
EVIDENCE

by

Carol Campaigne, J.D.; Joanne Constantino, J.D.; Glenn A. Guarino, J.D.; Kathy E. Hinck, J.D.; Kristin McCarthy, J.D.; Caralyn A. Miller, J.D.; Irwin J. Schiffres, J.D.; Melissa K. Stull, J.D.; Tim A. Thomas, J.D.; Mitchell J. Waldman, J.D.

TOPIC SCOPE

Scope of Topic:

This article discusses the law of evidence in civil and criminal cases, covering definitions and basic principles pertinent to the law of evidence, the various sources of the law of evidence, judicial notice of adjudicative facts, law and governmental affairs, litigation documents, and other particular matters, burdens of proof and persuasion in both the criminal and civil cases, as well as order of proof, presumptions and inferences. General principles of admissibility are also discussed, including limitations, and relevance, admissibility of illegally obtained evidence, and restrictions and limitations upon the use of such evidence. Furthermore, the article discusses best and secondary evidence, hearsay evidence, including exceptions to the hearsay rule such as with regard to

spontaneous statements, confessions, admissions and declarations, the use of evidence from prior proceedings, real or demonstrative evidence, documentary evidence, parol or extrinsic evidence affecting writings, and the weight and sufficiency of evidence.

Federal Aspects:

This article discusses the Federal Rules of Evidence, as well as pertinent portions of the Federal Rules of Criminal Procedure. Also covered are federal statutes governing the use of particular types of evidence in various types of litigation in federal court. (See "Federal Legislation," *infra*, for USCS citations). Federal constitutional issues are considered with respect to confessions and the use of illegally obtained evidence. For a full discussion of Rules 701-706 of the Federal Rules of Evidence, dealing with expert and opinion evidence, see 32B Am Jur 2d, Federal Rules of Evidence §§ 429 et seq. For a discussion of the federal aspects of subpoena, calling, and competency of witnesses, witness protection, and federal law sources of the various privileges against the disclosure of communications, see 81 Am Jur 2d, Witnesses.

Treated Elsewhere:

Access of accused to evidence, generally, **see** 21A Am Jur 2d, Criminal Law §§ 770 et seq., 998 et seq.

Administrative bodies, evidence in proceedings before, **see** 2Am Jur 2d, Administrative Law §§ 338 et seq.

Affidavits, use and admissibility, generally, **see** 3 Am Jur 2d, Affidavits §§ 29 et seq.

Bailed property in action on bailment, evidence concerning value of, **see** 8 Am Jur 2d, Bailments § 321

Conflicts of law pertaining to questions of evidence, presumptions, and burdens of proof, **see** 16 Am Jur 2d, Conflict of Laws §§ 131-135

Corporate existence, admissibility of evidence to prove, in actions by or against corporations, **see** 19 Am Jur 2d, Corporations §§ 2231 et seq.

Demonstrative aids not put in evidence, use by counsel of, **see** 75A Am Jur 2d, Trial §§ 505 et seq.

Depositions and discovery, generally, **see** 23 Am Jur 2d, Depositions and Discovery

Discovery requirements, exclusion of evidence for failure to comply with, **see** 23 Am Jur 2d, Depositions and Discovery § 427 .5 (Supp)

Driving motor vehicle while intoxicated, admissibility of evidence in prosecutions for, **see** 7A Am Jur 2d, Automobiles and Highway Traffic § 375

Evidence as to particular matters, see specific topics, such as 10 Am Jur 2d, Bastards §§ 104 et seq.; 21 Am Jur 2d, Creditors' Bills §§ 82 et seq.; 31 Am Jur 2d, Executors and Administrators §§ 1233, 1234, 1241, 1269, 1351 et seq.; 31 Am Jur 2d, Exemptions §§ 366 et seq.; 57A, 57B Am Jur 2d, Negligence; 60 Am Jur 2d, Patents; 60A Am Jur 2d, Perjury §§ 93 et seq.; 75 Am Jur 2d, Trespass §§ 214 et seq.; 76 Am Jur 2d, Trusts §§ 687 et seq.; 79 Am Jur 2d, Wills §§ 102 et seq.; 82 Am Jur 2d, Workers' Compensation § 564

Expert and opinion evidence: generally, **see** 31A Am Jur 2d, Expert and Opinion Evidence ; with respect to the value of realproperty, **see** 31A Am Jur 2d, Expert and Opinion Evidence §§ 329-338

Federal courts, practice and procedure in, generally, **see** 32,32A, 32B Am Jur 2d, Federal Practice and Procedure

Federal Rules of Evidence governing witnesses, as well as expert and opinion evidence, **see** 32B Am Jur 2d, Federal Rules of Evidence §§ 162-194 , 322 et seq.

Insanity or incompetency: admissibility of evidence in civil proceedings, generally, **see** 41 Am Jur 2d, Incompetent Persons §§ 132-141 ; admissibility of evidence on issue of

insanity in criminal trial, **see** 21 Am Jur 2d, Criminal Law §§ 78 , 79

Judicial notice by appellate court, **see** 5 Am Jur 2d, Appeal and Error §§ 739-742

Negligence, evidence of violation of statute, ordinance, or administrative order as evidence of, **see** 57A Am Jur 2d, Negligence §§ 736 , 737

Personal injury: admissibility of fact, nature, and extent of, generally, **see** 22 Am Jur 2d, Damages § 926 ; admissibility of evidence of plaintiff's domestic relations in personal injury action, **see** 22 Am Jur 2d, Damages § 936

Presentation and reception of evidence at trial, generally, **see** 75 Am Jur 2d, Trial §§ 321 et seq.

Property valuation: admissibility of evidence as to value of property in assessment of damages, generally, **see** 22 Am Jur 2d, Damages §§ 955-964 ; evidence concerning valuation in action for conversion, **see** 18 Am Jur 2d, Conversion §§ 173-177 ; evidence concerning valuation of property in eminent domain proceeding, **see** 27 Am Jur 2d, Eminent Domain §§ 427-442 ; expert and opinion evidence with respect to the value of real property, **see** 31A Am Jur 2d, Expert and Opinion Evidence §§ 329-338

Self-incriminatory evidence, use in criminal proceeding against accused, generally, **see** 21A Am Jur 2d, Criminal Law §§ 944 et seq.

Stipulations in judicial proceedings as to evidence or other matters pertaining to trial, **see** 73 Am Jur 2d, Stipulations

Subpoenas, generally, **see** 81 Am Jur 2d, Witnesses §§ 7 et seq.

Testator, admissibility of evidence concerning mental condition of, **see** 79 Am Jur 2d, Wills §§ 114-150

Unreasonable searches and seizures, prohibitions against, **see** 68 Am Jur 2d, Searches and Seizures

Variance between pleadings and proof, **see** 61A Am Jur 2d, Pleading §§ 368 et seq.

Witnesses, calling and examination of, generally, **see** 81 Am Jur 2d, Witnesses

RESEARCH REFERENCES

Text References:

9 Federal Procedure, L Ed, Criminal Procedure; 12, 12A Federal Procedure, L Ed, Evidence

Cook, Constitutional Rights of the Accused 2d

Fishman, Wiretapping and Eavesdropping

Gard, Jones on Evidence (6th ed.) (1972)

Hall, Search and Seizure

Hunter, Federal Trial Handbook 2d

Louisell and Mueller, Federal Evidence

Torcia, Wharton's Criminal Evidence (14th Ed)

Annotation References:

ALR Digests: Criminal Law; Evidence; Witnesses

ALR Index: Absence or Presence; Best and Secondary Evidence; Blackboard; Character and Reputation; Clothing; Confessions and Admissions; Confrontation of Witnesses; Declarations or Statements; Diagrams, Charts, and Tables; Demonstrative and Real Evidence; Description and Identification; Diligence; Documentary Evidence; Dying Declaration; Eavesdropping and Wiretapping; Entrapment; Evidence; Evidence Rules; Exhibits; Exclusion and Suppression of Evidence; Experiments or Tests; Expert and Opinion Evidence; Fingerprints; Fruit of the Poisonous Tree Doctrine; Hypothetical Questions; Impeachment of Witnesses; Interception of Communications; Judicial Notice;

Lineups; Miranda Warnings; Models; Mug Shot; Offer of Proof; Pictures and Photographs; Rebuttal; Prior Testimony or Statement; Rogue's Gallery Photograph; Same or Similar Acts or Matters; Search and Seizure; Theaters and Motion Pictures; Unavailable Witnesses; Videotapes; Voice; Witnesses; X-rays

Practice References:

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 241 et seq.; 9A Am Jur Pl & Pr Forms (Rev), Evidence ; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure ; 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure ; 22 Am Jur Pl & Pr Forms (Rev), Seals ; 23A Am Jur Pl & Pr Forms (Rev), Trial
1 Am Jur Legal Forms 2d, Acknowledgments §§ 7:11-7:464; 4A Am Jur Legal Forms 2d, Clerks of Court §§ 58:14, 58:15

1 Federal Procedural Forms, L Ed, Actions in District Court; 7 Federal Procedural Forms, L Ed, Criminal Procedure; 14 Federal Procedural Forms, L Ed, References, Referees, and Masters

1 Am Jur Proof of Facts 161, Admissions; 1 Am Jur Proof of Facts 475, Authentication of Almanac; 1 Am Jur Proof of Facts 500, Alteration of Instruments; 2 Am Jur Proof of Facts 467, Best and Secondary Evidence; 3 Am Jur Proof of Facts 379, Conversations, Proof 2; 3 Am Jur Proof of Facts 745, Mutual Mistake—Physical Condition of Realty; 4 Am Jur Proof of Facts 627, Electrocardiograms; 4 Am Jur Proof of Facts 641, Electroencephalograms; 5 Am Jur Proof of Facts 113, Firearms Identification; 5 Am Jur Proof of Facts 411, Glass; 6 Am Jur Proof of Facts 465, Intoxication; 7 Am Jur Proof of Facts 215, Life Expectancy; 7 Am Jur Proof of Facts 601, Maps, Diagrams, and Models; 9 Am Jur Proof of Facts 147, Photographs as Evidence; 10 Am Jur Proof of Facts 49, Rain and Other Weather Phenomena; 10 Am Jur Proof of Facts 251, Refreshing Recollection; 10 Am Jur Proof of Facts 281, Remarriage; 10 Am Jur Proof of Facts 295, Repairs; 12 Am Jur Proof of Facts 281, Acknowledgments; 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession; 15 Am Jur Proof of Facts 115, Identification of Substances by Neutron Activation Analysis; 16 Am Jur Proof of Facts 273, Computer Print-Outs as Evidence; 16 Am Jur Proof of Facts 665, Charred Documents; 17 Am Jur Proof of Facts 1, Tape Recordings as Evidence; 19 Am Jur Proof of Facts 423, Spectrogram Voice Identification; 20 Am Jur Proof of Facts 265, Questioned Typewriting; 21 Am Jur Proof of Facts 764, Sidewalk Defects; 21 Am Jur Proof of Facts 783, Sending and Receipt of Telegrams; 22 Am Jur Proof of Facts 385, Identification of Substances by Instrumental Analysis; 29 Am Jur Proof of Facts 65, Firearms Identification; 29 Am Jur Proof of Facts 461, Identification of Substances by Thin-Layer Chromatography and Paper Chromatography; 2 Am Jur POF2d 545, Reliability of Scientific Devices—Telephone Calling Line Identification; 10 Am Jur Proof of Facts 2d 365, Nondestructive Testing of Material—X-ray, Gamma Ray, and Neutron Radiography; 12 Am Jur POF2d 237, Entrapment to Commit Narcotics Offense; 14 Am Jur POF2d 1, Reliability of Polygraph Examination; 14 Am Jur POF2d 234, Admissibility of Computerized Business Records; 15 Am Jur POF2d 167, Alleged Victim's Commission of Prior Acts of and Reputation for Violence; 18 Am Jur POF2d 305, Admissibility of Opinion Survey; 19 Am Jur POF2d 435, Lineups and Showups: Admissibility and Effect of Pretrial Identification; 21 Am Jur POF2d 1, Law of Foreign Jurisdiction; 22 Am Jur POF2d 539, Involuntary Confession: Psychological Coercion; 23 Am Jur POF2d 713, Custodial Interrogation under *Miranda v Arizona*; 26 Am Jur POF2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade; 26 Am Jur POF2d 465, Consent to Search Given under Coercive Circumstances; 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence; 31 Am Jur POF2d 443, Contradiction of Expert Witness Through Use of Authoritative

Treatise; 32 Am Jur POF2d 253, Admission by Conduct or Silence; 34 Am Jur POF2d 509, Foundation for Offering Business Records in Evidence; 35 Am Jur Proof of Facts 2d 147, Foundation for Admission of Secondary Evidence; 36 Am Jur POF2d 605, Foundation for Telephone Conversation; 36 Am Jur POF2d 747, Impeachment of Witness by Prior Criminal Conviction; 38 Am Jur POF2d 145, Foundation for Admissibility of Hospital Records and X-rays; 39 Am Jur POF2d 1, Cause of Death as Determined from Autopsy; 42 Am Jur POF2d 617, Invalidity of Suspect's Waiver of Miranda Rights; 44 Am Jur POF2d 707, Foundation for Admission of Map, Diagram, or Chart; 45 Am Jur POF2d 631, Age of Person; 46 Am Jur POF2d 275, Foundation for Admission of Thermogram; 46 Am Jur POF2d 695, Intent of Parties to Ambiguous Deed; 49 Am Jur POF2d 649, General Reputation of Person in Community; 50 Am Jur POF2d 321, Ancient Documents; 5 Am Jur POF3d 191, Meteorological Conditions at a Particular Time or Place; 7 Am Jur POF3d 523, Habit of Person; 8 Am Jur POF3d 145, Use of Cat Scans in Litigation; 8 Am Jur POF3d 749, Foundation for DNA Fingerprint Evidence; 15 Am Jur POF3d 595, Questioned Document Examination—Identification of Handwriting on Document; 16 Am Jur POF3d 493, Foundation for Contemporaneous Videotape Evidence

1 Am Jur Trials 602, Locating and Preserving Evidence in Criminal Cases; 2 Am Jur Trials 1, Investigating Particular Civil Actions; 2 Am Jur Trials 409, Locating Public Records; 2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases; 3 Am Jur Trials 377, Preparing and Using Models; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence; 3 Am Jur Trials 507, Preparing and Using Diagrams; 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 5 Am Jur Trials 505, Mapping the Trial—Order of Proof; 5 Am Jur Trials 553, Introducing and Marking Exhibits; 5 Am Jur Trials 695, Courtroom Semantics; 5 Am Jur Trials 921, Showing Pain and Suffering; 7 Am Jur Trials 377, Elevator Accident Cases; 11 Am Jur Trials 265, Stairway Fall Suits; 13 Am Jur Trials 465, Defending Minor Felony Cases; 15 Am Jur Trials 373, Discovery and Evaluation of Medical Records; 18 Am Jur Trials 443, Unwitnessed Automobile Accident Cases; 18 Am Jur Trials 341, Handling the Defense in a Rape Prosecution; 25 Am Jur Trials 69, Plea Bargaining Techniques; 26 Am Jur Trials 327, Representation of an Alien in Exclusion, Rescission and Deportation Hearings; 27 Am Jur Trials 1, Representing the Mentally Disabled Criminal Defendant; 30 Am Jur Trials 711, Trial Court Restrictions on Evidence of Defendant's Wealth; 39 Am Jur Trials 261, Planning and Producing a "Day-in-the-Life" Videotape in a Personal Injury Lawsuit; 40 Am Jur Trials 249, Using or Challenging a "Day-in-the-Life" Documentary in a Personal Injury Lawsuit; 40 Am Jur Trials 501, Forensic Pathology in Homicide Cases; 44 Am Jur Trials 317, Forensic Document Examination in Medical Malpractice Trials; 45 Am Jur Trials 1, Determining Preliminary Facts Under Federal Rule 104; 48 Am Jur Trials 1, Audio Recordings: Evidence, Experts and Technology

Federal Legislation:

US Const Amends 4-6

1 USCS §§ 112, 113 (federal statutes and treaties as evidence)

18 USCS §§ 2510 et seq. (wire and electronic communications interception and interception of oral communications)

18 USCS § 3500 (Jencks Act)

18 USCS § 3501 (admissibility of confessions)

18 USCS § 3505 (foreign records of regularly conducted activity)

18 USCS Appx § 8 (introduction in evidence of classified information)

28 USCS §§ 1731-1746 (documentary evidence)
44 USCS § 3312 (photographs and microphotographs of records considered as originals;
certified reproductions admissible in evidence)
47 USCS § 605(a) (unauthorized use of wire or radio communications)
FR Civ P, Rules 8, 36, 44
FR Crim P, Rules 11, 12, 16, 26.2, 41
FRE 101 et seq.

I. GENERAL MATTERS [1-23]

A. Introduction [1-8]

Research References

ALR Digests: Evidence

ALR Index: Evidence; Evidence Rules

§ 1 Nature and definition of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence is matter that makes clear the truth of fact, persuades a court of the existence of fact, or produces a just conviction of truth. 1 It is further defined as any species of proof legally presented at trial through the medium of witnesses, records, documents, exhibits, and concrete objects for the purpose of inducing belief in the minds of the court or jury. 2 The word "evidence" thus includes all the means by which any fact in dispute at a judicial trial is established or disproved. Any circumstance which affords an inference as to whether the matter alleged is true or false is therefore evidence, and is commonly understood to be within the meaning of that term. 3

The object of all evidence is to inform the trial tribunal of the material facts which are relevant as bearing upon the issue, in order that the truth may be elicited and that a fair determination of the controversy may be reached. 4 Thus, the fundamental basis upon which all rules which govern the admission or exclusion of evidence must rest, if they are to rest upon reason, is their adaptation to the development of the truth of such facts. 5

Footnotes

Footnote 1. Re M. (2nd Dist) 55 Cal App 3d 650, 127 Cal Rptr 851.

Footnote 2. People v Foss (2d Dist) 201 Ill App 3d 91, 147 Ill Dec 254, 559 NE2d 254;
Ustica Enterprises, Inc. v Costello (La App 5th Cir) 434 So 2d 137.

Footnote 3. Application of Everts, 175 Neb 310, 121 NW2d 487.

Footnote 4. Cresson Consol. Gold Mining & Milling Co. v Whitten, 139 Colo 273, 338 P2d 278; Lynch v Rosenberger, 121 Kan 601, 249 P 682, 60 ALR 376; Evans v Commonwealth, 230 Ky 411, 19 SW2d 1091, 66 ALR 360; Clark v Brooklyn H. R. Co., 177 NY 359, 69 NE 647.

Evidence is considered relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. People v Tellez (1st Dist) 235 Ill App 3d 542, 176 Ill Dec 586, 601 NE2d 1284.

Footnote 5. Funk v United States, 290 US 371, 78 L Ed 369, 54 S Ct 212, 93 ALR 1136; Public Utilities Com. v Donahue, 138 Colo 492, 335 P2d 285.

§ 2 "Proof" distinguished from evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The word "proof" is frequently used as the synonym of "evidence," but it is more accurate to confine the term "proof" to the effect of evidence or to the establishment of a fact by evidence. 6 Proof results as the probative effect of evidence and is the conviction or persuasion of the mind resulting from a consideration of the evidence. It is merely that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact. 7

Footnotes

Footnote 6. State v Crutcher, 231 Iowa 418, 1 NW2d 195; State v Sogge, 36 ND 262, 161 NW 1022.

Footnote 7. Dege v Produce Exchange Bank, 212 Minn 44, 2 NW2d 423.

§ 3 Requirement that matter be received in court

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts are to decide a case only on the evidence in that particular case. 8 Matter which was not introduced or presented as evidence at trial does not come within the commonly accepted definition of "evidence." 9 In this regard, neither testimony nor physical objects are evidence unless they are produced, introduced, and received in a trial. 10

Because evidence is matter which has actually been presented at trial, facts obtained through the use of discovery devices, such as written interrogatories, are not of themselves evidence. They may, however, become evidence by introduction as such at the trial of the matter. 11

§ 3 ----Requirement that matter be received in court [SUPPLEMENT]

Case authorities:

Although formal proffer is not essential, proponent of evidence must show substance of proposed testimony in some fashion. *Stockstill v Shell Oil Co.* (1993, CA5 La) 3 F3d 868, 8 BNA IER Cas 1529, 62 CCH EPD ¶ 42562, reh den, motion gr (CA5 La) 1993 US App LEXIS 29041.

Plaintiff waived his right to challenge the granting of defendant's motion in limine to exclude all evidence relating to the details of plaintiff's child's death because plaintiff failed to proffer any evidence allegedly excluded by the trial court. *Garrett v City of Sandusky*, 68 OS3d 139, 624 NE2d 704.

Footnotes

Footnote 8. *People v McClerren* (5th Dist) 197 Ill App 3d 441, 143 Ill Dec 841, 554 NE2d 776.

Footnote 9. *Commonwealth ex rel. Hendrickson v Myers*, 393 Pa 224, 144 A2d 367.

Footnote 10. *People v McClerren* (5th Dist) 197 Ill App 3d 441, 143 Ill Dec 841, 554 NE2d 776.

A document or item which is not marked as an exhibit and is not offered or received by the court is not, in technical terms, evidence. *Cannon v Venture Stores, Inc.* (Mo App) 743 SW2d 473.

Footnote 11. *Realty Mart, Inc. v Louisiana Bd. of Tax Appeals* (La App 1st Cir) 336 So 2d 52.

§ 4 Classes of evidence

<p style="text-align: center;">View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The word "evidence" is comprehensive, 12 and encompasses both testimony and physical evidence. 13 Legal evidence is thus not limited to the oral testimony of witnesses personally cognizant of the facts, given in open court. 14 Proof may be produced in the form of documentary evidence, such as public records, private writings,

books of account, and other documents, 15 or by the introduction of objects and exhibits.
16

Evidence is classified according to whether it is "circumstantial" or "direct." Circumstantial evidence is evidence of a series of facts other than the fact in issue, which leads to a permissible inference concerning the existence of the fact in issue. 17 Direct evidence is evidence which, if believed, proves the existence of the fact in issue without inference or presumption; 18 it is evidence which comes from one who speaks directly of his or her own knowledge on the main or ultimate fact to be proved, or who saw or heard the factual matters which are the subject of the testimony. 19 However, it is not necessary that this direct knowledge be gained through the senses of sight and hearing alone, but it may be obtained from any of the senses through which outside knowledge is acquired, including the senses of touch or pain. 20

The term "prima facie evidence" denotes evidence which, if unexplained or uncontradicted, is sufficient in a jury case to carry the case to the jury and to sustain a verdict in favor of the issue which it supports, but which may be contradicted by other evidence. 21 Stated otherwise, prima facie evidence means evidence which is sufficient to establish the fact, unless rebutted; evidence which, standing alone and unexplained, would maintain the proposition for which it is introduced. 22 The term "prima facie evidence" is not synonymous with the term "presumption." 23 A prima facie evidence rule is nothing more or less than a rule of evidence, and it is not a rule of substantive law; it has reference and applies only to the mode or manner by and through which facts essential to a judgment or conviction might be established. 24

§ 4 ----Classes of evidence [SUPPLEMENT]

Cross References: The reference in footnote 15 is to §§ 1023 et seq., and the reference in footnote 16 is to §§ 934 et seq.

Case authorities:

Name of any given joined party to lawsuit is not evidence and therefore rules of evidence should not be used to analyze potential effect of advising jury of existence of specific party to lawsuit. *Stopplesworth v Refuse Hideaway* (1996) 200 Wis 2d 512, 546 NW2d 870.

Footnotes

Footnote 12. *State v Ricci*, 107 RI 582, 268 A2d 692.

Footnote 13. *People v Csabon* (2d Dept) 79 App Div 2d 609, 433 NYS2d 487; *Lautek Corp. v Unemployment Compensation Bd. of Review*, 138 Pa Cmwlth 547, 588 A2d 1007.

Footnote 14. § 5.

Footnote 15. For a discussion of documentary evidence, generally, see Subdivision G under Roman Numeral Division VI, which covers particular types of evidence.

Footnote 16. For a discussion of real or demonstrative evidence, generally, see Subdivision G under Roman Numeral Division VII, which covers particular types of evidence.

Footnote 17. § 313.

Footnote 18. State v Famber, 358 Mo 288, 214 SW2d 40; Bland v Fox, 172 Neb 662, 111 NW2d 537.

Footnote 19. State v Famber, 358 Mo 288, 214 SW2d 40.

Footnote 20. State v Famber, 358 Mo 288, 214 SW2d 40.

Footnote 21. McKenzie v Standard Acci. Ins. Co., 198 SC 109, 16 SE2d 529.

Footnote 22. Rowland v State, 166 Tex Crim 118, 311 SW2d 831, cert den and app dismd 355 US 606, 2 L Ed 2d 524, 78 S Ct 540.

Footnote 23. Hill v Cabral, 62 RI 11, 2 A2d 482, 121 ALR 1072.

As to the definition of the term "presumption," see § 181.

Footnote 24. State v Trimming, 89 Idaho 440, 406 P2d 118; Rowland v State, 166 Tex Crim 118, 311 SW2d 831, cert den and app dismd 355 US 606, 2 L Ed 2d 524, 78 S Ct 540.

§ 5 --Testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although the words "testimony" and "evidence" are used synonymously and interchangeably in common parlance, ²⁵ "testimony" is in fact a particular kind or species of evidence, namely, that which comes to the tribunal through living witnesses speaking under oath or affirmation in the presence of the tribunal, judicial or quasi-judicial. ²⁶

Testimony means a statement made by a witness for the purpose of establishing proof of a fact to a court or tribunal. It is distinguished from statements made under different circumstances, and from evidence derived from writings and other sources. ²⁷

The word "testimony" implies the preliminary of taking an oath. It is defined as evidence given by a competent witness under oath or affirmation. ²⁸ Records of statements prepared during the course of an administrative investigation, prior to the initiation of administrative hearings, do not constitute testimony. ²⁹

Because testimony is by nature communicative, the taking of finger prints does not fall within the categories of either communication or testimony. 30 Similarly, a handwriting sample has been ruled physical rather than testimonial evidence. 31

It has, nevertheless, been held that the use of the word "testimony," instead of "evidence," in an instruction, where both oral evidence and physical facts and circumstances are defensively interposed, does not constitute reversible error where it is clear and obvious from all the court's instructions that it was intended that such physical facts and circumstances should also be considered by the jury. 32

§ 5 --Testimony [SUPPLEMENT]

Case authorities:

District court was well within its discretion in admitting testimony concerning inaccuracies in age discrimination plaintiff's work, even though no physical copies of those records were produced. *Manzer v Diamond Shamrock Chems. Co.* (1994, CA6 Ky) 29 F3d 1078, 65 BNA FEP Cas 585, 1994 FED App 255P, 65 CCH EPD ¶ 43215, reh, en banc, den (1994, CA6 Ky) 1994 US App LEXIS 26621.

Generally courts should not prohibit defendant from presenting theory of defense to jury, but some relevant factual basis for defense should exist under federal evidence rules before evidence or testimony is offered. *United States v Thompson* (1994, CA11 Ga) 25 F3d 1558, 8 FLW Fed C 401.

Footnotes

Footnote 25. *Roberts v Carlson*, 142 Neb 851, 8 NW2d 175; *Ex parte Jackson* (Tex Crim) 470 SW2d 679.

Footnote 26. *State v Ricci*, 107 RI 582, 268 A2d 692.

"Testimony" is generally described in both statutory and decisional law as oral statements made by a person under oath in a court proceeding, and is extended to cover the prior inconsistent statements of a witness, admissible under the prior-inconsistent-statement exception to the hearsay rule. *People v Pic'l* (2nd Dist) 114 Cal App 3d 824, 171 Cal Rptr 106.

Footnote 27. *Phinpathya v Immigration & Naturalization Service* (CA9) 673 F2d 1013, revd on other grounds 464 US 183, 78 L Ed 2d 401, 104 S Ct 584 (superseded by statute on other grounds as stated in *INS v Hector*, 479 US 85, 93 L Ed 2d 326, 107 S Ct 379) and (superseded by statute on other grounds as stated in *Adeleke v McNary* (SD NY) 1993 US Dist LEXIS 477).

Footnote 28. *United States v Mathern* (ED Pa) 329 F Supp 536.

Footnote 29. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797, later proceeding (ED Pa) 505 F Supp 1313, 7 Fed Rules Evid Serv 305, summary judgment gr (ED Pa) 513 F Supp 1100,

1981-1 CCH Trade Cases ¶ 64155, 8 Fed Rules Evid Serv 289, supp op on other grounds (ED Pa) 513 F Supp 1334, 1981-1 CCH Trade Cases ¶ 64155, 31 FR Serv 2d 833 and affd in part and revd in part on other grounds (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized by Pfeiffer v Marion Center Area School Dist., Bd. of School Directors etc. (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 30. Pearson v United States (CA5 Fla) 389 F2d 684.

Footnote 31. Gilbert v California, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951 (not followed by Barone v State (Nev) 1993 Nev LEXIS 183).

Footnote 32. Roberts v Carlson, 142 Neb 851, 8 NW2d 175.

§ 6 Legislative power to prescribe rules of evidence; validity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The legislature of a state has the power to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements or deprive any person of his or her constitutional rights. 33 A state rule of evidence, which is designed to ensure trustworthy evidence, may be invalidated on constitutional grounds if it interferes with the ability of a defendant to offer testimony. Thus, a state may not apply an arbitrary rule of competency to exclude a material defense witness from taking the stand, nor may a state apply a rule of evidence that permits a witness to take the stand and then arbitrarily excludes material portions of that witness' testimony. 34

It is beyond the pale of the United States Supreme Court's proper function in the federal system to interfere with the constitutional power of states to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the Federal Constitution. 35

In general, the legislature may not delegate to another body its authority to declare by legislation what may be considered evidence. 36

Congress is not authorized to prescribe rules governing the admissibility of evidence in state courts. 37 However, subject to constitutional requirements, Congress has power to prescribe what evidence is to be received in the courts of the United States. 38

Footnotes

Footnote 33. Burgett v Texas, 389 US 109, 19 L Ed 2d 319, 88 S Ct 258, conformed to (Tex Crim) 422 SW2d 728.

As to the creation of presumptions, see § 7.

As to whether legislation retrospectively changing rules of evidence, such as by authorizing conviction upon less proof in amount or degree than was required when a crime was committed, or by making previously inadmissible evidence admissible, violates the constitutional prohibition against ex post facto laws, see 16A Am Jur 2d, Constitutional Law § 651.

Footnote 34. *Rock v Arkansas*, 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704, 22 Fed Rules Evid Serv 1128, holding that evidentiary rule prohibiting the admission of hypnotically refreshed testimony violates defendant's constitutional right to testify on his or her own behalf.

Footnote 35. *Spencer v Texas*, 385 US 554, 17 L Ed 2d 606, 87 S Ct 648, 40 Ohio Ops 2d 438, reh den 386 US 969, 18 L Ed 2d 125, 87 S Ct 1015.

Footnote 36. *Huiet v Schwob Mfg. Co.*, 196 Ga 855, 27 SE2d 743, conformed to 70 Ga App 226, 28 SE2d 184.

As to constitutional inhibitions against the delegation of legislative powers, see 16 Am Jur 2d, Constitutional Law §§ 240 et seq.

Footnote 37. *Sulpho-Saline Bath Co. v Allen*, 66 Neb 295, 92 NW 354.

Footnote 38. *Tot v United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241.

§ 7 --Creation of presumptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A legislative body generally may provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts. 39 This power is not confined to civil cases, but applies to criminal prosecutions as well. 40 In the exercise of its right to prescribe evidentiary rules in civil and criminal cases, the legislature may provide that when certain facts have been proved, they shall be prima facie or presumptive evidence of other facts, with the following limitations:

- (1) there must be a natural and rational relation between the fact proved and that presumed; 41
- (2) the fact inferred from the fact actually proved cannot be purely arbitrary or wholly unreasonable; and
- (3) the accused in all events must be given the right to have the triers of fact determine guilt or innocence after giving such weight to the presumption as they shall deem proper. 42

The power of the legislature to create presumptions is not a means of escape from constitutional restrictions. 43

Footnotes

Footnote 39. *St. Louis S. F. R. Co. v Mangum*, 199 Ark 767, 136 SW2d 158; *Bishop v Salida Hospital Dist.*, 158 Colo 315, 406 P2d 329; *Loftin v Crowley's, Inc.*, 150 Fla 836, 8 So 2d 909, 142 ALR 626; *Ward's Estate v State Dept. of Social Welfare*, 176 Kan 614, 272 P2d 737; *State v Stump*, 16 Wash 2d 140, 132 P2d 727.

Law Reviews: Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*. 77 J Crim L 308 (Summer, 1986).

Annotation: Validity, under Federal Constitution, of criminal statute or ordinance making one fact presumptive or prima facie evidence of another—Federal cases, 23 L Ed 2d 812.

Footnote 40. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213; *Garcia v People*, 121 Colo 130, 213 P2d 387; *Traylor v State (Del Sup)* 458 A2d 1170; *Commonwealth v Kroger*, 276 Ky 20, 122 SW2d 1006; *People v Campbell*, 115 Mich App 369, 320 NW2d 381.

Footnote 41. *Leary v United States*, 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532, 69-2 USTC ¶ 15900, 23 AFTR 2d 69-2006, on remand (CA5 Tex) 544 F2d 1266, reh den (CA5 Tex) 548 F2d 355; *State v Childress*, 78 Ariz 1, 274 P2d 333, 46 ALR2d 1169; *Bishop v Salida Hospital Dist.*, 158 Colo 315, 406 P2d 329; *Garcia v People*, 121 Colo 130, 213 P2d 387; *Kellogg v Murphy*, 349 Mo 1165, 164 SW2d 285; *People v Hildebrandt*, 308 NY 397, 126 NE2d 377, 49 ALR2d 449; *State ex rel. North Carolina Milk Com. v National Food Stores, Inc.*, 270 NC 323, 154 SE2d 548.

Footnote 42. *State v Tutalo*, 99 RI 14, 205 A2d 137, 17 ALR3d 482.

Footnote 43. *New York Times Co. v Sullivan*, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 1 Media L R 1527, 95 ALR2d 1412.

§ 8 Contractual stipulations affecting rules of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Contracts which attempt to divest or oust the courts of their jurisdiction are void as against public policy. 44 There is, however, a difference of opinion upon the question of the validity of contractual stipulations by which parties attempt to alter or waive rules of evidence established by law, or to fix the mode, method, or quantum of proof to be applied in subsequent litigation between them. According to one line of authorities,

parties cannot by contract control or modify the law of evidence, and any attempts in that direction are invalid and not binding upon the parties or the court. 45 Parties cannot by contract alter the rules of evidence so as to preclude the court from receiving evidence admissible under the general rules of evidence. 46 Moreover, parties to a contract may not by the terms of their contract change the burden of going forward with the evidence from that imposed by the rules of evidence, 47 although there is also authority that parties to a contract may provide that certain facts shall constitute prima facie evidence. 48

Footnotes

Footnote 44. 20 Am Jur 2d, Courts § 140.

Footnote 45. Kimbro v Metropolitan Life Ins. Co. (Fla App D3) 112 So 2d 274, cert dismd (Fla) 116 So 2d 240.

Footnote 46. Shultz v American Nat. Ins. Co. (Tex Civ App) 142 SW2d 275, writ dismd w o j.

Footnote 47. Kimbro v Metropolitan Life Ins. Co. (Fla App D3) 112 So 2d 274, cert dismd (Fla) 116 So 2d 240.

Footnote 48. Shultz v American Nat. Ins. Co. (Tex Civ App) 142 SW2d 275, writ dismd w o j.

B. Federal Rules of Evidence [9-23]

Research References

FRE 101-106, 1101-1103

28 USCS §§ 2071, 2072, 2076; 29 USCS § 160(b)

29 CFR §§ 101.10(a), 102.39

ALR Digests: Evidence

ALR Index: Evidence: Evidence Rules; Exclusion and Suppression of Evidence

1 Federal Procedural Forms, L Ed, Actions in District Court §§ 1:1521, 1:1964 to

1:1966; 14 Federal Procedural Forms, L Ed, References, Referees, and Masters § 57:74

Hunter, Federal Trial Handbook 2d § 1.6

Louisell & Mueller, Federal Evidence §§ 1, 3, 4, 619-623

1. Scope and Applicability of Rules [9-19]

§ 9 Proceedings governed by Federal Rules

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence 49 govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrates, 50 to the extent and with the exceptions stated in the Rules. 51 Moreover, Congress' authority to prescribe such rules, characterized as housekeeping rules, has long been recognized. 52

The District Court's construction of the Federal Rules of Evidence is a question of law subject to de novo review. 53 Furthermore, federal rules purporting to govern procedural matters, which are duly passed by Congress, will be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure. 54

The Federal Rules of Evidence are not a complete code of evidence for use in federal courts. For example, the rules direct courts to construe the Rules so as to promote their growth and development; 55 the rules grant authority to the judiciary to develop the laws of evidence in the hearsay area; 56 and, according to the Advisory Committee on the Federal Rules of Evidence, the rule which furnishes examples of allowable methods of authentication and identification 57 is meant to leave room for growth and development in this area of the law. 58

◆ Practice guide: To determine whether the Federal Rules of Evidence are applicable in a particular situation, three questions must be answered, namely:

1. Is the particular court or magistrate covered by the Rules?
2. Is the particular proceeding covered by the Rules?
3. Is the particular situation covered by the Constitution, by an act of Congress, or by other rules prescribed by the Supreme Court pursuant to statutory authority?

If the answer is "Yes" to the first two questions and "No" to the third question, then the Federal Rules of Evidence are applicable.

The Rules Enabling Act empowers Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the U.S. District Courts, including proceedings before magistrates, and in the Courts of Appeals. 59 Rules of evidence prescribed by Supreme Court shall not abridge, enlarge, or modify any substantive rights. 60

§ 9 ----Proceedings governed by Federal Rules [SUPPLEMENT]

Case authorities:

Although Rules of Evidence do not apply to sentencing where hearsay is staple, sentencing judges must ensure that hearsay they use is reliable. *United States v Atkin* (1994, CA7 Ind) 29 F3d 267.

Federal Rules of Evidence do not apply in supervised release revocation proceedings. *United States v Frazier* (1994, CA11 Ga) 26 F3d 110, 8 FLW Fed C 387.

Footnotes

Footnote 49. FRE 1103 (stating that the rules may be known and cited as the Federal Rules of Evidence).

Footnote 50. FRE 101.

Practice References Hunter, Federal Trial Handbook 2d § 1.6.

Louisell & Mueller, Federal Evidence § 1.

Footnote 51. FRE 1101.

Footnote 52. *Hanna v Plumer*, 380 US 460, 14 L Ed 2d 8, 85 S Ct 1136, 9 FR Serv 2d 1.3, Case 1.

Annotation: Federal Rules of Evidence or state evidentiary rules as applicable in diversity cases, 84 ALR Fed 283.

Footnote 53. *United States v McClintock* (CA9 Ariz) 748 F2d 1278, 17 Fed Rules Evid Serv 262, cert den 474 US 822, 88 L Ed 2d 61, 106 S Ct 75.

Footnote 54. *Hanna v Plumer*, 380 US 460, 14 L Ed 2d 8, 85 S Ct 1136, 9 FR Serv 2d 1.3, Case 1.

Footnote 55. FRE 102.

Footnote 56. FRE 803(24) and 804(b)(5).

As to hearsay, generally, see §§ 658 et seq.

Footnote 57. FRE 901(b).

Footnote 58. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

Footnote 59. 28 USCS § 2072(a).

Footnote 60. 28 USCS § 2072(b).

§ 10 Adoption by states of Federal Rules of Evidence

<p>View Entire Section Go to Parallel Reference Table</p>

In 1974, the National Conference of Commissioners on Uniform State Laws adopted the new Uniform Rules of Evidence, designed to be identical to the Federal Rules of

Evidence as promulgated by the United States Supreme Court. 61 Cases interpreting the Federal Rules of Evidence are helpful in analysis of state rules which are based on the Federal Rules of Evidence. 62 In fact, a state rule of evidence patterned after a Federal Rule of Evidence should be construed in accordance with federal court decisions interpreting the Federal Rules of Evidence. 63 Thus, state courts will look at the Federal Rule's history and purposes in interpreting the provisions of an identical state rule of evidence. 64 However, one state court has held that because rules of evidence, to the extent that they do not impinge upon United States constitutional guarantees, are a matter of state law, federal authorities are not of controlling precedential significance. 65

Footnotes

Footnote 61. Uniform Rules of Evidence, 13A Uniform Laws Annotated, Prefatory Note.

Footnote 62. *Smithey v State*, 269 Ark 538, 602 SW2d 676.

Footnote 63. *Moore v State* (Fla) 452 So 2d 559, appeal after remand (Fla App D4) 473 So 2d 686, 9 FLW 2591, approved, ctfed ques ans (Fla) 485 So 2d 1279, 11 FLW 157.

Footnote 64. *State v Smith*, 97 Wash 2d 856, 651 P2d 207.

Footnote 65. *State v Outlaw*, 108 Wis 2d 112, 321 NW2d 145 (state court was interpreting a rule of evidence relating to an informer's privilege, and federal law defers to state law in the specific area of privileges).

§ 11 Law governing in diversity cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal Rules of Evidence apply in federal diversity cases when they cover the points in dispute. 66 The Federal Rules of Evidence thus govern the admissibility of evidence, 67 including documentary evidence, 68 in federal diversity cases. In reaching the conclusion that the Federal Rules of Evidence control the evidentiary question in issue, courts rely on the fact that Congress amended the proposed Rules which the Supreme Court promulgated, 69 and has deferred to state law in certain specific areas, such as presumptions 70 and privileges. 71 Further, in a diversity case state evidentiary rules may be so bound up with state substantive law that federal courts sitting in that state should accord them the same treatment as state courts in order to give full effect to the state's substantive policy. 72 For example, state law has been found to govern over the Federal Rules of Evidence as to the admissibility of evidence of a plaintiff's remarriage in a wrongful death action. 73

Federal law will govern—

—when the Federal Rules of Evidence address the specific question at issue in the case. 74

—if the evidentiary question at issue has procedural aspects, even if the issue also has substantive ramifications. 75

—where there is no conflict between federal and state law on the question at issue. 76

§ 11 ----Law governing in diversity cases [SUPPLEMENT]

Practice Aids: Federalism and Federal Rule of Evidence 501: Privilege and vertical choice of law, 82 Geo LJ 1781 (1994).

Footnotes

Footnote 66. *Gibbs v State Farm Mut. Ins. Co.* (CA9 Cal) 544 F2d 423, 1 Fed Rules Evid Serv 566.

Annotation: Federal Rules of Evidence or state evidentiary rules as applicable in diversity cases, 84 ALR Fed 283.

Practice References Louisell and Mueller, Federal Evidence § 620.

Footnote 67. *McInnis v A.M.F., Inc.* (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943; *Rioux v Daniel International Corp.* (DC Me) 582 F Supp 620, 16 Fed Rules Evid Serv 245; *Scott v Sears, Roebuck & Co.* (CA4 Va) 789 F2d 1052, 20 Fed Rules Evid Serv 322; *Campus Sweater & Sportswear Co. v M. B. Kahn Constr. Co.* (DC SC) 515 F Supp 64, 33 UCCRS 547, affd without op (CA4 SC) 644 F2d 877; *Grenada Steel Industries, Inc. v Alabama Oxygen Co.* (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163; *Conway v Chemical Leaman Tank Lines, Inc.* (CA5 Tex) 525 F2d 927, 1 Fed Rules Evid Serv 193, on reh (CA5 Tex) 540 F2d 837, appeal after remand (CA5 Tex) 610 F2d 360, reh den (CA5 Tex) 614 F2d 1298 and on remand (ED Tex) 487 F Supp 647, motion gr (ED Tex) 87 FRD 712, 30 FR Serv 2d 856, affd (CA5 Tex) 644 F2d 1059, reh den (CA5 Tex) 650 F2d 282 and appeal after remand (CA5 Tex) 687 F2d 108, 11 Fed Rules Evid Serv 1895, 34 FR Serv 2d 1485, reh den (CA5 Tex) 693 F2d 133.

As to admissibility, generally, see §§ 301 et seq.

Footnote 68. *Pollard v Metropolitan Life Ins. Co.* (CA3 Pa) 598 F2d 1284, 4 Fed Rules Evid Serv 942, cert den 444 US 917, 62 L Ed 2d 171, 100 S Ct 232, reh den 444 US 985, 62 L Ed 2d 414, 100 S Ct 493.

For a discussion of documentary evidence, generally, see Subdivision G under Roman Numeral Division VI, which covers particular types of evidence.

Footnote 69. *McInnis v A.M.F., Inc.* (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943; *Rioux v Daniel International Corp.* (DC Me) 582 F Supp 620, 16 Fed Rules Evid Serv 245; *Scott v Sears, Roebuck & Co.* (CA4 Va) 789 F2d 1052, 20 Fed Rules Evid Serv 322; *Sprynczynatyk v General*

Motors Corp. (CA8 ND) 771 F2d 1112, 18 Fed Rules Evid Serv 952, cert den 475 US 1046, 89 L Ed 2d 572, 106 S Ct 1263; Warner v Transamerica Ins. Co. (CA8 Mo) 739 F2d 1347, 16 Fed Rules Evid Serv 1338.

Footnote 70. FRE 302, discussed in § 187.

Footnote 71. FRE 501, discussed in § 14.

Footnote 72. Conway v Chemical Leaman Tank Lines, Inc. (CA5 Tex) 540 F2d 837, appeal after remand (CA5 Tex) 610 F2d 360, reh den (CA5 Tex) 614 F2d 1298 and on remand (ED Tex) 487 F Supp 647, motion gr (ED Tex) 87 FRD 712, 30 FR Serv 2d 856, affd (CA5 Tex) 644 F2d 1059, reh den (CA5 Tex) 650 F2d 282 and appeal after remand (CA5 Tex) 687 F2d 108, 11 Fed Rules Evid Serv 1895, 34 FR Serv 2d 1485, reh den (CA5 Tex) 693 F2d 133.

Footnote 73. Stonehocker v General Motors Corp. (CA4 SC) 587 F2d 151, 3 Fed Rules Evid Serv 1334; Caldarera v Eastern Airlines, Inc. (CA5 La) 705 F2d 778, 12 Fed Rules Evid Serv 1996; Conway v Chemical Leaman Tank Lines, Inc. (CA5 Tex) 540 F2d 837, appeal after remand (CA5 Tex) 610 F2d 360, reh den (CA5 Tex) 614 F2d 1298 and on remand (ED Tex) 487 F Supp 647, motion gr (ED Tex) 87 FRD 712, 30 FR Serv 2d 856, affd (CA5 Tex) 644 F2d 1059, reh den (CA5 Tex) 650 F2d 282 and appeal after remand (CA5 Tex) 687 F2d 108, 11 Fed Rules Evid Serv 1895, 34 FR Serv 2d 1485, reh den (CA5 Tex) 693 F2d 133 (declarations of Texas statute providing that evidence of actual ceremonial remarriage of surviving spouse in action for wrongful death was admissible, and of state Supreme Court interpreting statute as mandatory were embedded in state substantive law and policy which was adopted and applied by federal court).

Footnote 74. Scott v Sears, Roebuck & Co. (CA4 Va) 789 F2d 1052, 20 Fed Rules Evid Serv 322 (court held that FRE 702, establishing standards for admitting expert testimony, generally, governed admissibility of human factors expert testimony); Dawsey v Olin Corp. (CA5 La) 782 F2d 1254 (court held that admissibility of expert testimony fell within province of FRE 702); Reed v General Motors Corp. (CA5 La) 773 F2d 660, 19 Fed Rules Evid Serv 826 (court observed that FRE 411 governed admission of evidence of insurance in federal forum).

Footnote 75. Re Air Crash Disaster near Chicago (CA7 Ill) 701 F2d 1189, 12 Fed Rules Evid Serv 914, cert den 464 US 866, 78 L Ed 2d 178, 104 S Ct 204 (court held that Federal Rules of Evidence applied because admissibility rule could be considered procedural despite its substantive aspects).

Footnote 76. Stonehocker v General Motors Corp. (CA4 SC) 587 F2d 151, 3 Fed Rules Evid Serv 1334 (court concluded that state had no policy either favoring or disfavoring admissibility of evidence at issue and therefore applied Federal Rules of Evidence); Re Air Crash Disaster near Chicago (CA7 Ill) 701 F2d 1189, 12 Fed Rules Evid Serv 914, cert den 464 US 866, 78 L Ed 2d 178, 104 S Ct 204 (state law was same as federal law).

§ 12 Adjudicative bodies to which Rules are applicable

The Federal Rules of Evidence apply to—

- the United States District Courts.
- the District Court of Guam.
- the District Court of the Virgin Islands.
- the District Court for the Northern Mariana Islands.
- the United States Courts of Appeals.
- the United States Claims Court.
- the United States Bankruptcy judges and United States magistrates. 77

The District of Columbia 78 and Puerto Rico are included in the United States District Courts to which the Federal Rules of Evidence are applicable. 79

The Federal Rules of Evidence apply to United States magistrates, and the terms "judge" and "court" in the Rules include United States magistrates and bankruptcy judges. 80

Although the pertinent rule 81 does not say whether the Federal Rules of Evidence apply to the United States Supreme Court, that court has applied the Federal Rules of Evidence in certain instances. 82

The Federal Rules of Evidence do not apply to state courts, 83 although some state courts have cited the Federal Rules of Evidence. 84

However, the Federal Rules of Evidence may be applicable by statute to courts not specifically listed under the provision governing applicability of the Rules. 85

As to the application of the Federal Rules of Evidence to courts-martial, by Executive order military rules of evidence for courts-martial substantially follow the format of the Federal Rules of Evidence. 86

The Federal Rules of Evidence, by their own terms, do not apply to administrative agencies, 87 or in Black Lung Benefits Act 88 hearings. 89 Although the general rule is that administrative tribunals are not bound by the strict rules of evidence governing jury trials or other court proceedings, 90 statutes or regulations may expressly provide for the application of rules of evidence in certain administrative proceedings. 91

Footnotes

Footnote 77. FRE 1101(a).

Practice References Louisell and Mueller, Federal Evidence § 619.

Footnote 78. Estate of Temple v Commissioner, 65 TC 776, 1 Fed Rules Evid Serv 1095.

Footnote 79. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101, which state that any doubt as to the inclusion of the District Courts for the District of Columbia and the District of Puerto Rico in the phrase "District Courts of the United States" as used in FRE 1101(a) is laid at rest by the provisions of the Judicial Code establishing judicial districts (28 USCS §§ 81 et seq.), creating District Courts in judicial districts (28 USCS § 132), and specifically providing that the District of Columbia (28 USCS § 88) and Puerto Rico (28 USCS § 119) each constitutes one judicial district.

Footnote 80. FRE 1101(a).

Footnote 81. FRE 1101(a).

Footnote 82. Massachusetts v Westcott, 431 US 322, 52 L Ed 2d 349, 97 S Ct 1755, 1 Fed Rules Evid Serv 1025 (applying FRE 201).

Footnote 83. Peaches v Evansville, 180 Ind App 465, 389 NE2d 322, reh den 180 Ind App 472, 391 NE2d 828 and cert den 444 US 1033, 62 L Ed 2d 669, 100 S Ct 704 (Federal Rules of Evidence not applicable in state court even though plaintiff is attempting to establish federal claim under federal civil rights statute, since state courts are not among those "federal" courts for whom Federal Rules of Evidence are deemed applicable under FRE 101 and FRE 1101).

Footnote 84. State v Howard (Iowa) 284 NW2d 201 (applying FRE 201(c)).

Footnote 85. FRE 1101(a).

Footnote 86. Executive Order No. 12473, 49 Fed Reg 17152.

Footnote 87. Wearly v Federal Trade Com. (DC NJ) 462 F Supp 589, 1978-2 CCH Trade Cases ¶ 62358, 3 Fed Rules Evid Serv 1438, 27 FR Serv 2d 64, vacated on other grounds (CA3 NJ) 616 F2d 662, 1980-1 CCH Trade Cases ¶ 63175, cert den 449 US 822, 66 L Ed 2d 25, 101 S Ct 81.

Footnote 88. 30 USCS §§ 931 et seq.

Footnote 89. Republic Steel Corp. v Leonard (CA3) 635 F2d 206; U. S. Pipe & Foundry Co. v Webb (CA5) 595 F2d 264; Consolidation Coal Co. v Chubb (CA7) 741 F2d 968, 16 Fed Rules Evid Serv 881; American Coal Co. v Benefits Review Bd., United States Dept. of Labor (CA10) 738 F2d 387, 16 Fed Rules Evid Serv 54.

Footnote 90. 2 Am Jur 2d, Administrative Law § 345.

Footnote 91. 29 CFR §§ 101.10(a), 102.39.

The National Labor Relations Act provides that any unfair labor practice proceeding must so far as practicable, be conducted in accordance with the rules of evidence

applicable in the District Courts of the United States under the rules of civil procedure for the District Courts of the United States, adopted by the Supreme Court of the United States. 29 USCS § 160(b).

The National Labor Relations Board is required by regulation to conduct its proceedings so far as practicable in accord with the Federal Rules of Evidence. *NLRB v Houston Distribution Services, Inc.* (CA5) 573 F2d 260, 98 BNA LRRM 2538, 83 CCH LC ¶ 10613, cert den 439 US 1047, 58 L Ed 2d 705, 99 S Ct 722, 99 BNA LRRM 3450, 85 CCH LC ¶ 10963.

Annotation: Rules of evidence in NLRB proceedings as affected by evidence provision of § 10(b) of National Labor Relations Act (29 USCS § 160(b)), 32 ALR Fed 838.

§ 13 Proceedings to which Rules are applicable

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence apply generally to—

- civil actions and proceedings, including admiralty and maritime cases. 92
- criminal cases and proceedings. 93
- contempt proceedings, except those in which the court may act summarily. 94
- proceedings in cases under Title 11, United States Code (bankruptcy cases). 95

The provision governing applicability of the Rules to proceedings, generally, 96 is subject to the qualifications expressed in (1) the provision dealing with rules of privilege; 97 (2) the provision dealing with situations in which the Federal Rules of Evidence are inapplicable; 98 and (3) the provision dealing with proceedings in which the Rules are applicable in part. 99

Footnotes

Footnote 92. FRE 1101(b).

Footnote 93. FRE 1101(b).

Thus, FRE 408 governs the admission of related civil settlement negotiations in a criminal trial by reason of FRE 1101(b).

Footnote 94. FRE 1101(b).

Footnote 95. 11 USCS §§ 101 et seq; FRE 1101(b).

Footnote 96. FRE 1101(b).

Footnote 97. FRE 1101(c).

Footnote 98. FRE 1101(d).

Footnote 99. FRE 1101(e), cited in Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

§ 14 --Rules of privilege

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The rule with respect to privileges applies at all stages of all actions, cases, and proceedings. 1 The rule with respect to privileges referred to in Federal Rules of Evidence 1101(c) is Federal Rules of Evidence 501, which provides that the privilege of a witness is governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. 2

In accordance with Federal Rules of Evidence 1101(c), it has been held that the rule with respect to privileges applies during grand jury proceedings, 3 and discovery. 4

§ 14 --Rules of privilege [SUPPLEMENT]

Case authorities:

Defendant convicted of sending threatening communications through mail is denied new trial, even though reverend who had significant personal contact with him testified that defendant "knows difference between right and wrong," because such testimony was admissible under FRE 701(a) and (b) and was not subject to clergy-communicant privilege recognized under FRE 501 since reverend testified to no utterances or conduct defendant intended to convey confidential message to reverend. *United States v Mohanlal* (1994, SD NY) 867 F Supp 199.

Case-by-case balancing approach of Second Circuit in adopting highly qualified version of psychotherapist-patient privilege was persuasive, and in applying it, court should consider privacy interest of individual opposing disclosure, policy of encouraging forthright exchange of information between psychotherapist and patient, policy of Federal Rules of Civil Procedure favoring narrow construction of privileges in order to encourage full access to information, methods of limiting disclosure, and relevancy of requested information. *Mines v City of Philadelphia* (1994, ED Pa) 158 FRD 337.

Court would recognize existence of psychotherapist/patient privilege under Rule 501; appropriate scope is determined by balancing interests protected by shielding evidence

sought with those advanced by disclosure. *Jaffee v Redmond* (1995, CA7 Ill) 51 F3d 1346, 41 Fed Rules Evid Serv 612, reh, en banc, den (1995, CA7 Ill) 1995 US App LEXIS 10909.

In diversity action, Rule 501 required application of Alaska Evidence Rule 512 prohibiting drawing of any negative inferences from invocation of attorney-client privilege, since it is part and parcel of Alaska's law of privileges even though it does not explicitly address how privileges are to be determined. *Home Indem. Co. v Lane Powell Moss & Miller* (1995, CA9 Alaska) 43 F3d 1322, 95 CDOS 175, 30 FR Serv 3d 449.

Self-critical analysis privilege protected documents of plaintiff who was suing former site owners to recover its current and anticipated response costs under CERCLA and various Florida statutes; even though Florida did not recognize such privilege, federal privilege applied in federal question case with pendent state law claims. *Reichhold Chems. v Textron, Inc.* (1994, ND Fla) 157 FRD 522, 39 Env't Rep Cas 1328.

Footnotes

Footnote 1. FRE 1101(c).

According to the Advisory Committee Notes to the Federal Rules of Evidence, FRE 1101(c) is made necessary by the limited applicability of the other Federal Rules of Evidence.

For further discussion of the situations to which the Federal Rules of Evidence do not apply, see § 15.

Practice References *Louisell and Mueller*, Federal Evidence § 621.

Footnote 2. *Re Grand Jury Investigation* (ED Pa) 412 F Supp 943, 1 Fed Rules Evid Serv 1139.

For a discussion of privileged relations and communications, generally, see 81 Am Jur 2d, Witnesses §§ 285 et seq.

Footnote 3. *Re Grand Jury Subpoena* (CA2 NY) 599 F2d 504, CCH Fed Secur L Rep ¶ 96917, 79-1 USTC ¶ 9405, 43 AFTR 2d 79-1221; *United States v Mackey* (ED NY) 405 F Supp 854, 2 Fed Rules Evid Serv 1060; *United States v Estes* (DC Vt) 609 F Supp 564, rev'd on other grounds (CA2 Vt) 793 F2d 465, 20 Fed Rules Evid Serv 1089.

The existence and extent of privilege in a federal grand jury proceeding is a matter of federal common law, and thus state documents must be produced pursuant to a subpoena by a federal grand jury even though state law prohibits disclosure of the document where the asserted privilege does not exist as a matter of federal law. *United States v Blasi* (MD Ala) 462 F Supp 373, 3 Fed Rules Evid Serv 1004.

Footnote 4. *Biliske v American Live Stock Ins. Co.* (WD Okla) 73 FRD 124, 24 FR Serv 2d 691; *Oliver v Committee for Re-Election of President* (DC Dist Col) 66 FRD 553, 19 FR Serv 2d 1517.

§ 15 Proceedings or situations to which Rules of Evidence are inapplicable

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal Rules of Evidence, other than with respect to privileges, do not apply in—

—the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court. 5

—proceedings before a grand jury.

—proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. 6

◆ Caution: It should be noted that Federal Rules of Evidence 1101(d) is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. 7

§ 15 ----Proceedings or situations to which Rules of Evidence are inapplicable [SUPPLEMENT]

Case authorities:

Hearing on revocation of supervised release is not part of criminal prosecution and full panoply of rights due defendant under Federal Rules of Evidence do not apply, thus hearsay testimony is admissible so long as it is reliable. *United States v Pratt* (1995, CA7 Wis) 52 F3d 671.

Footnotes

Footnote 5. FRE 104.

For a discussion of FRE 104, see § 16.

Footnote 6. FRE 1101(d).

Practice References *Louisell and Mueller, Federal Evidence* §§ 622, 623.

Footnote 7. *United States v Fatico* (1978, CA2 NY) 579 F2d 707, 3 Fed Rules Evid Serv 506, on remand (ED NY) 458 F Supp 388, 3 Fed Rules Evid Serv 391, affd (CA2 NY) 603 F2d 1053, cert den 444 US 1073, 62 L Ed 2d 755, 100 S Ct 1018 and (disapproved

on other grounds by *United States v Urrego-Linares* (CA4 NC) 879 F2d 1234, cert den 493 US 943, 107 L Ed 2d 334, 110 S Ct 346).

§ 16 --Determination of preliminary questions of fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence, other than those with respect to privileges, do not apply to the determination of questions of facts preliminary to the admissibility of evidence when the issue is to be determined by the court under Federal Rules of Evidence 104. 8 Federal Rules of Evidence 1101(d)(1) confirms the general view of various authorities on evidence that the rules of evidence governing criminal jury trials do not govern hearings before a judge to determine evidentiary questions. 9

In accordance with Federal Rules of Evidence 1101(d)(1), the Federal Rules of Evidence are not applicable to suppression hearings, 10 and therefore the admission of hearsay evidence 11 and evidence without formal authentication is permissible at such hearings, although the court remains obligated to weigh the evidence and discount that which is less reliable. 12 However, the Rule governing rulings on evidence 13 has been held applicable to a separate hearing to determine the voluntariness of a confession, and thus a claim on appeal that the court improperly excluded evidence in such a hearing, which error is not properly preserved by an offer of proof as required by the Rule, is not permitted. 14

◆ Observation: The Advisory Committee Notes to the Federal Rules of Evidence say that Federal Rules of Evidence 1101(d)(1) restates for convenience the provisions of the second sentence of Federal Rules of Evidence 104(a). 15 However, one court has said that the Advisory Committee Notes to the Federal Rules of Evidence are in error in this regard since the second sentence of Federal Rules of Evidence 104(a) provides that in making its determination the court is not bound by the rules of evidence except those with respect to privileges, and the words "not bound" have an entirely different and much narrower purport than the flat statement that the rules "do not apply." According to this court, the words "not bound" simply mean that the court may generally apply the rules unless for some reason they should not be applied, whereas the term "not applicable" means what it says, that the rules do not apply. 16

Footnotes

Footnote 8. FRE 1101(d)(1).

Footnote 9. *United States v Matlock*, 415 US 164, 39 L Ed 2d 242, 94 S Ct 988 (referring to proposed FRE 1101(d)(1) which is substantially identical to the Rule as enacted).

Footnote 10. *United States v Matlock*, 415 US 164, 39 L Ed 2d 242, 94 S Ct 988

(referring to FRE 1101(d)(1) which is substantially identical to the Rule as enacted); *United States v Ochs* (SD NY) 461 F Supp 1, 3 Fed Rules Evid Serv 1307, affd without op (CA2 NY) 636 F2d 1205, cert den 451 US 1016, 69 L Ed 2d 388, 101 S Ct 3005, reh den 453 US 923, 69 L Ed 2d 1006, 101 S Ct 3161.

Footnote 11. *United States v Marchand* (CA2 Vt) 564 F2d 983, 2 Fed Rules Evid Serv 1130, cert den 434 US 1015, 54 L Ed 2d 760, 98 S Ct 732; *United States v Ochs* (SD NY) 461 F Supp 1, 3 Fed Rules Evid Serv 1307, affd without op (CA2 NY) 636 F2d 1205, cert den 451 US 1016, 69 L Ed 2d 388, 101 S Ct 3005, reh den 453 US 923, 69 L Ed 2d 1006, 101 S Ct 3161; *United States v Tussell* (MD Pa) 441 F Supp 1092.

Footnote 12. *United States v Tussell* (MD Pa) 441 F Supp 1092.

One court has concluded that since the Federal Rules of Evidence do not apply to suppression hearings by reason of FRE 1101(d)(1), the common law of evidence interpreted in the light of reason and experience applies to such hearings. *United States v Salsedo* (ED Cal) 477 F Supp 1235, vacated on other grounds (CA9 Cal) 622 F2d 465, on remand (ED Cal) 504 F Supp 864, affd (CA9 Cal) 659 F2d 1012, cert den 455 US 926, 71 L Ed 2d 469, 102 S Ct 1289.

Footnote 13. FRE 103.

Footnote 14. *United States v Gresham* (CA5 Tex) 585 F2d 103.

Footnote 15. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 16. *United States v Salsedo* (ED Cal) 477 F Supp 1235, vacated on other grounds (CA9 Cal) 622 F2d 465, on remand (ED Cal) 504 F Supp 864, affd (CA9 Cal) 659 F2d 1012, cert den 455 US 926, 71 L Ed 2d 469, 102 S Ct 1289.

§ 17 --Grand jury proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence, other than with respect to privileges, do not apply in proceedings before grand juries. 17 The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by technical, procedural and evidentiary rules governing the conduct of criminal trials. 18 Thus, the Rule dealing with compromise and offers to compromise 19 does not apply in the first instance in grand jury proceedings, and does not apply by analogy in such proceedings since the grand jury cannot be hamstrung in its essential function to uncover matters which may relate to potential criminal acts. 20 However, although rules of evidence, constitutional or otherwise, are generally inapplicable to grand jury proceedings, evidentiary rules may illuminate the factors mitigating prejudice, and consequently, when prejudicial matters cannot be excised, when probative value exceeds prejudicial effects, or when less prejudicial evidence is unavailable, the prejudice may be ignored. 21

Although Federal Rules of Evidence 1101(d) provides that the rules of evidence do not apply to proceedings before grand juries, this Rule specifically excepts the Federal Rules of Evidence governing privileges, and thus the attorney-client privilege does apply to grand jury proceedings. 22 A grand jury witness may thus resist questioning or a subpoena on grounds that it calls for the production of attorney work product. 23

Federal Rules of Evidence 1101(d)(2) does not deal with the evidence required to support an indictment. 24

Footnotes

Footnote 17. FRE 1101(d)(2).

◆ Comment: This subdivision of FRE 1101 accords with the Supreme Court decision of *Costello v United States*, 350 US 359, 100 L Ed 397, 76 S Ct 406, 56-1 USTC ¶ 9321, 48 AFTR 689, reh den 351 US 904, 100 L Ed 1440, 76 S Ct 692, in which the court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

As to the nature and functions of grand juries, generally, see 38 Am Jur 2d, Grand Jury.

Footnote 18. *United States v Calandra*, 414 US 338, 38 L Ed 2d 561, 94 S Ct 613, 66 Ohio Ops 2d 320.

Footnote 19. FRE 408.

For a discussion of FRE 408, see §§ 507 et seq.

Footnote 20. *Re Special November 1975 Grand Jury etc.* (ND Ill) 433 F Supp 1094, 2 Fed Rules Evid Serv 120.

Footnote 21. *United States v Samango* (DC Hawaii) 450 F Supp 1097, *affd* (CA9 Hawaii) 607 F2d 877.

Footnote 22. *United States v Mackey* (ED NY) 405 F Supp 854, 2 Fed Rules Evid Serv 1060.

For a discussion of the protection against discovery of attorney work product, see 23 Am Jur 2d, Depositions and Discovery §§ 50-67.

Footnote 23. *Re Grand Jury Investigation* (ED Pa) 412 F Supp 943, 1 Fed Rules Evid Serv 1139.

Footnote 24. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

§ 18 --Other proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal Rules of Evidence, other than those with respect to privileges, do not apply to various miscellaneous proceedings including—

- proceedings for extradition or rendition.
- preliminary examinations in criminal cases.
- the sentencing, granting, or revoking of probation.
- issuance of warrants for arrest, criminal summonses, and search warrants.
- proceedings with respect to release on bail or otherwise. 25

Extradition and rendition proceedings are governed in detail by statute, 26 and are essentially administrative in character, and traditionally rules of evidence have not been applied in such proceedings. 27

In preliminary examinations in criminal cases, hearsay testimony is customarily received and, according to the Advisory Committee, it is believed that the extent of the applicability of the rules of evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings. 28

Rules of evidence have not been regarded as applicable to sentencing 29 or probation proceedings, where great reliance is placed on the presentence investigation and report. 30

As regards sentencing, Federal Rules of Evidence 1101(d)(3) largely parallels the federal criminal statute governing use of information at sentencing, 31 wherein Congress declared that no limitation could be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. 32 Thus, any exclusion of evidence at a sentencing proceeding must be based not merely upon the hearsay nature of the evidence for example, but on the due process or confrontation clause implications of the evidence. 33 Similarly, a probation revocation hearing is not a formal trial and Federal Rules of Evidence 1101(d)(3), provides that the Federal Rules of Evidence, other than those with respect to privileges, do not apply in proceedings for revoking probation. 34

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause, 35 and the nature of the proceedings makes application of the formal Rules of Evidence inappropriate and impracticable. 36

Proceedings with respect to release on bail or otherwise do not call for application of the Federal Rules of Evidence, since the governing statute specifically provides that the rules pertaining to the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at a detention hearing. 37 The reference to the weight of the evidence against the accused in the statute, 38 as a factor to be considered in determining the conditions of the pre-trial release of a person charged with an offense, clearly does not have in view evidence introduced at a hearing under the Federal Rules of Evidence. 39

In addition to the proceedings specified in Federal Rules of Evidence 1101(d)(3), the Federal Rules of Evidence are inapplicable to—

—a contempt proceeding in which the court may act summarily. 40

—a hearing on such preliminary matters as class certification when a full-scale evidentiary hearing may not be absolutely necessary. 41

—a proceeding conducted upon a motion to transfer a juvenile delinquency proceeding to adult court under the Federal Juvenile Delinquency Act. 42

—parole board proceedings. 43

—a rescission of status proceeding conducted by an immigration judge. 44

§ 18 --Other proceedings [SUPPLEMENT]

Case authorities:

Rules of evidence do not apply to probation revocation proceedings, so hearsay is unobjectionable; district judge must use reliable evidence, but written reports of medical tests are generally reliable. *United States v Pierre* (1995, CA7 Ill) 47 F3d 241.

Footnotes

Footnote 25. FRE 1101(d)(3).

Footnote 26. 18 USCS §§ 3181-3195.

Footnote 27. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 28. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 29. *United States v Charmer Industries, Inc.* (CA2 NY) 711 F2d 1164, 1983-2 CCH Trade Cases ¶ 65581, appeal after remand (CA2 NY) 722 F2d 1073, 1983-2 CCH Trade Cases ¶ 65755.

Evidence rules regarding hearsay are not applicable to sentencing proceedings. *United States v Manthei* (CA5 Tex) 913 F2d 1130.

Footnote 30. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

See FR Crim P, Rule 32(c) requiring a presentence investigation and report in every case unless the court otherwise directs.

Footnote 31. 18 USCS § 3661.

Footnote 32. *United States v Fatico* (CA2 NY) 579 F2d 707, 3 Fed Rules Evid Serv 506, on remand (ED NY) 458 F Supp 388, 3 Fed Rules Evid Serv 391, *affd* (CA2 NY) 603 F2d 1053, *cert den* 444 US 1073, 62 L Ed 2d 755, 100 S Ct 1018 and (disapproved on other grounds by *United States v Urrego-Linares* (CA4 NC) 879 F2d 1234); *United States v Whelan* (DC NJ) 456 F Supp 744, *affd without op* (CA3 NJ) 601 F2d 578 and *affd without op* (CA3 NJ) 601 F2d 578.

Footnote 33. *United States v Fatico* (CA2 NY) 579 F2d 707, 3 Fed Rules Evid Serv 506, on remand (ED NY) 458 F Supp 388, 3 Fed Rules Evid Serv 391, *affd* (CA2 NY) 603 F2d 1053, *cert den* 444 US 1073, 62 L Ed 2d 755, 100 S Ct 1018 and (disapproved on other grounds by *United States v Urrego-Linares* (CA4 NC) 879 F2d 1234).

Footnote 34. *United States v Francischine* (CA5 Fla) 512 F2d 827, *reh den* (CA5 Fla) 515 F2d 1184 and *cert den* 423 US 931, 46 L Ed 2d 261, 96 S Ct 284.

Footnote 35. In this connection, see FR Crim P, Rules 4(a) and 41(c).

Footnote 36. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 37. 18 USCS § 3142(f).

Footnote 38. 18 USCS § 3142(g)(2).

Footnote 39. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 40. FRE 1101(b).

Criminal contempts are punishable summarily under FR Crim P, Rule 42(a) if the judge certifies seeing or hearing the contempt in the presence of the court.

Footnote 41. *Thompson v Board of Education* (WD Mich) 71 FRD 398, 12 BNA FEP Cas 1700, 13 CCH EPD ¶ 11487, 1 Fed Rules Evid Serv 557, *motion den* (WD Mich) 519 F Supp 1373, 32 BNA FEP Cas 404, *revd on other grounds* (CA6 Mich) 709 F2d 1200, 32 BNA FEP Cas 527, 32 CCH EPD ¶ 33694, 36 FR Serv 2d 1118 (such view of Federal Rules of Evidence is consistent with FRE 102's mandate to construe Rules in manner so as to avoid unjustifiable expense and delay without negatively affecting just determination of merits of case).

The United States Supreme Court has stated that a class action hearing of necessity is not accompanied by the traditional rules and procedures applicable to civil trials. *Eisen v Carlisle & Jacquelin*, 417 US 156, 40 L Ed 2d 732, 94 S Ct 2140, 9 BNA FEP Cas 1302, 7 CCH EPD ¶ 9374a, CCH Fed Secur L Rep ¶ 94570, 1974-1 CCH Trade Cases ¶ 75082, 18 FR Serv 2d 877, 4 ELR 20513 (not followed by *In re Seagate Technology II* Sec. Litig. (ND Cal) 1994 US Dist LEXIS 1478).

Footnote 42. 18 USCS §§ 5031-5042.

The evidence received in a juvenile delinquency hearing need not be measured by the standards of admissibility in a criminal trial; however, the evidence must measure up to the essentials of due process and fair treatment, since the hearing is a critically important action determining vitally important statutory rights of the juvenile. *United States v K.* (DC Or) 471 F Supp 924, 4 Fed Rules Evid Serv 926.

Footnote 43. *McArthur v United States Bd. of Parole* (SD Ind) 434 F Supp 163, 1 Fed Rules Evid Serv 1234, *affd* without op (CA7 Ind) 559 F2d 1226 (parole board hearing is not adversary proceeding and its purpose is not to determine whether prisoner has committed crime, but in light of facts and circumstances of case, to determine whether prisoner should be released from custody, and virtually all evidence considered in such proceedings must of necessity be hearsay).

Footnote 44. *Re De Vera* (BIA) 16 I & N Dec 266.

§ 19 Proceedings to which Rules are applicable in part

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In certain enumerated proceedings, the Federal Rules of Evidence apply to the extent that matters of evidence are not provided for in the statutes which govern procedure in such proceedings or in other rules prescribed by the Supreme Court pursuant to statutory authority. 45 In a substantial number of special proceedings, ad hoc evaluation has resulted in the promulgation of particularized evidentiary provisions by acts of Congress or by rules adopted by the Supreme Court. 46 These provisions, which are well-adapted to the particular proceedings, though not so adapted for inclusion in a set of general rules, are left undisturbed under Federal Rules of Evidence 1101(e). 47 Otherwise, the Rules are applicable to the proceedings enumerated in the subdivision. 48

Federal evidentiary rules generally govern in habeas corpus proceedings by reason of Federal Rules of Evidence 1101(e), and there is nothing in the statutory provisions pertaining to habeas corpus 49 or the Supreme Court Rules governing such cases which would preclude the applicability of the Rule governing the competency of a juror to testify as a witness, 50 which provides in part that a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying may not be received for the purposes of an inquiry into the validity of a verdict or indictment. 51

A proceeding for challenging collaterally the validity of a federal conviction 52 is a formal procedure with all the usual accoutrements of a civil trial, and the legal issues are determined under the established requirements of the Constitution, the statutes, and judicial precedence, while issues of fact are resolved under the Federal Rules of Evidence, in view of Federal Rules of Evidence 1101(e). 53

Footnotes

Footnote 45. FRE 1101(e).

Footnote 46. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 47. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 48. Advisory Committee Notes to Federal Rules of Evidence, FRE 1101.

Footnote 49. 28 USCS § 2254.

Footnote 50. FRE 606(b).

Footnote 51. *Smith v Brewer* (SD Iowa) 444 F Supp 482, *affd* (CA8 Iowa) 577 F2d 466, *cert den* 439 US 967, 58 L Ed 2d 426, 99 S Ct 457.

Footnote 52. 28 USCS § 2255.

Footnote 53. *United States v Francischine* (CA5 Fla) 512 F2d 827, *reh den* (CA5 Fla) 515 F2d 1184 and *cert den* 423 US 931, 46 L Ed 2d 261, 96 S Ct 284.

2. Purpose and Construction of Rules [20-23]

§ 20 Introduction

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal Rules of Evidence must be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. 54

The ultimate purposes of the Federal Rules of Evidence are the ascertainment of the truth and the just determination of the proceedings. These purposes are reflected in—

—Rule 401, relating to the definition of relevant evidence. 55

—Rule 402, relating to relevant evidence as generally admissible and irrelevant evidence as inadmissible. 56

—Rule 403, relating to the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. 57

—Rule 501, relating to privileges. 58

–Rule 608(b), relating to attaching or supporting credibility through extrinsic evidence of specific instances of conduct of a witness. 59

–Rule 609(c), relating to impeachment by evidence of a conviction of a crime where there has been a pardon, annulment, or certificate of rehabilitation. 60

–Rule 803(24), relating to exceptions to the hearsay rule. 61

In accordance with these purposes, it has been held that the provision prohibiting extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Federal Rules of Evidence 609, 62 should not be read in isolation, when to do so would destroy the purpose of ascertaining the truth, especially when a witness directly contradicts the relevant evidence which Federal Rules of Evidence 608(b) seeks to exclude. 63 It has also been held that under the Rule providing in part that evidence of a conviction is not admissible if the conviction has been the subject of a certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, 64 a trial judge may conclude that a witness has been rehabilitated, even though such rehabilitation is not evidenced by a certificate of any nature, since the Rule permits an exercise of discretion by the trial court in implementing the purpose of the Rule to the end that truth may be ascertained and proceedings justly determined in accordance with Federal Rules of Evidence 102. 65 Moreover, the trial judge is free to fashion an evidentiary procedure that will secure fairness in administration to the end that the truth will be ascertained and the proceedings justly determined under Federal Rules of Evidence 102 where the Federal Rules of Evidence do not provide a procedure, such as where impeachment of a witness is sought by subsequent inconsistent statements. 66

◆ Observation: The Advisory Committee's commentary is particularly relevant in determining the meaning of a Federal Rule of Evidence as enacted by Congress, where Congress has not amended the Advisory Committee's draft of the rule in any way that touches upon the issue in question. 67

§ 20 ----Introduction [SUPPLEMENT]

Case authorities:

Decedent's statements concerning his accident in reclining chair, made before he died of unrelated causes, are inadmissible in diversity case, even though state law governs substantive questions and plaintiff argues that Massachusetts statute making declarations of deceased persons more readily admissible is substantive, because rule allowing declarations "made in good faith and upon personal knowledge of declarant" is mere rule of admissibility, and FRE 601 was never intended to "give life" to it in federal courts. *Donovan v Sears Roebuck & Co.* (1994, DC Mass) 849 F Supp 86.

Footnotes

Footnote 54. FRE 102.

Practice References Louisell & Mueller, Federal Evidence §§ 3, 4.

Footnote 55. United States ex rel. Edney v Smith (ED NY) 425 F Supp 1038, affd without op (CA2 NY) 556 F2d 556, cert den 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683; United States v King (ED NY) 73 FRD 103, 1 Fed Rules Evid Serv 521.

Footnote 56. United States ex rel. Edney v Smith (ED NY) 425 F Supp 1038, affd without op (CA2 NY) 556 F2d 556, cert den 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683; United States v King (ED NY) 73 FRD 103, 1 Fed Rules Evid Serv 521.

Footnote 57. United States ex rel. Edney v Smith (ED NY) 425 F Supp 1038, affd without op (CA2 NY) 556 F2d 556, cert den 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683.

Footnote 58. United States ex rel. Edney v Smith (ED NY) 425 F Supp 1038, affd without op (CA2 NY) 556 F2d 556, cert den 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683.

Footnote 59. United States v Opager (CA5 Fla) 589 F2d 799, 3 Fed Rules Evid Serv 1013.

Footnote 60. FRE 609(c), cited in United States v Thorne (CA8 Ark) 547 F2d 56, 1 Fed Rules Evid Serv 517.

Footnote 61. United States ex rel. Edney v Smith (ED NY) 425 F Supp 1038, affd without op (CA2 NY) 556 F2d 556, cert den 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683.

Footnote 62. FRE 608(b).

Footnote 63. United States v Opager (CA5 Fla) 589 F2d 799, 3 Fed Rules Evid Serv 1013.

Footnote 64. FRE 609(c).

Footnote 65. United States v Thorne (CA8 Ark) 547 F2d 56, 1 Fed Rules Evid Serv 517.

Footnote 66. United States v Bibbs (CA5 Fla) 564 F2d 1165, 2 Fed Rules Evid Serv 855, cert den 435 US 1007, 56 L Ed 2d 388, 98 S Ct 1877.

Footnote 67. Beech Aircraft Corp. v Rainey, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

§ 21 Securing fairness in administration

[View Entire Section](#)

The Federal Rules of Evidence shall be construed to secure fairness in administration to the end that the truth may be ascertained and proceedings justly determined. 68 Thus, a trial court may properly exercise its discretion by reason of Federal Rules of Evidence 102 in not rigidly applying in isolation a particular rule which would obstruct and defeat the central purpose of the Rules as a whole, and the court may apply a balancing test of the peculiarities and relevant factors of the individual case. 69

Footnotes

Footnote 68. FRE 102.

Practice References Louisell & Mueller, Federal Evidence §§ 3, 4.

Footnote 69. United States v Opager (CA5 Fla) 589 F2d 799, 3 Fed Rules Evid Serv 1013.

§ 22 Eliminating unjustifiable expense and delay

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence are to be construed to secure elimination of unjustifiable expense and delay. 70 The Rule dealing with the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, 71 when read in light of Federal Rules of Evidence 102 contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting parties from unfair prejudice. 72 Similarly, Federal Rules of Evidence 102, together with Federal Rules of Evidence 403 and certain Rules of the Federal Rules of Civil Procedure, 73 when read with the congressional mandate requiring prompt action on complaints of federal employment discrimination, provides adequate authority for a District Court to make a decision summarily upon an administrative record in a federal employment discrimination case, though the District Court, on a showing of need, should exercise its discretion to reopen the record and hear additional evidence or permit the plaintiff to proceed to develop additional relevant evidence through discovery procedures. 74 Further, the view that a class action hearing is not accompanied by the traditional rules and procedures applicable to civil trials, even though Federal Rules of Evidence 1101(b) provides that the Rules apply generally to civil actions and proceedings, has been held consistent with Federal Rules of Evidence 102's mandate to construe the Rules in a manner so as to avoid unjustifiable expense and delay without negatively affecting the just determination of the merits of the case. 75

Footnotes

Footnote 70. FRE 102.

Practice References Louisell & Mueller, Federal Evidence §§ 3, 4.

Footnote 71. FRE 403.

Footnote 72. *United States v Jackson* (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56 (stating that exclusion of proof of arrest of a defendant conditioned upon the entry of a stipulation by the defendant that he was in a certain place at a certain time and used a false name is justified by FRE 102).

Footnote 73. FR Civ P, Rules 16, 26, and 56(c).

Footnote 74. *Haire v Calloway* (CA8 Mo) 526 F2d 246, 11 BNA FEP Cas 769, 10 CCH EPD ¶ 10505, vacated on other grounds (CA8 Mo) 537 F2d 318, 13 BNA FEP Cas 1182, 12 CCH EPD ¶ 11263, on remand (ED Mo) 434 F Supp 1140, 15 BNA FEP Cas 589, affd (CA8 Mo) 572 F2d 632, 17 BNA FEP Cas 252, 16 CCH EPD ¶ 8187.

Footnote 75. *Thompson v Board of Education* (WD Mich) 71 FRD 398, 12 BNA FEP Cas 1700, 13 CCH EPD ¶ 11487, 1 Fed Rules Evid Serv 557, motion den (WD Mich) 519 F Supp 1373, 32 BNA FEP Cas 404, revd on other grounds (CA6 Mich) 709 F2d 1200, 32 BNA FEP Cas 527, 32 CCH EPD ¶ 33694, 36 FR Serv 2d 1118 and (disapproved on other grounds by *Shimkus v Gersten Cos.* (CA9 Cal) 816 F2d 1318, 7 FR Serv 3d 767).

§ 23 Promotion of growth and development of law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence are to be construed to secure promotion of the growth and development of the law of evidence. 76 The Federal Rules of Evidence were not designed to render the law of evidence intransmutable; 77 rather, Federal Rules of Evidence 102 was designed to allow expansion of the Federal Rules of Evidence by analogy to cover new or unanticipated situations. 78 Federal Rules of Evidence 102 authorizes the court to interpret the Federal Rules of Evidence creatively so as to promote growth and development in the law of evidence in the interest of justice and reliable factfinding. 79 As a result, a court found support in the Rule for its conditioning of an advance ruling on the use of a state felony conviction for assault in impeaching a defendant on barring defense counsel from presenting evidence, through cross-examination or otherwise, of any assault convictions of any of the government's witnesses without specific advance authorization from the court, even though such condition is not specifically authorized by the Rule governing impeachment by evidence of a prior criminal conviction 80 which is designed to protect defendants from unfair prejudice. 81 However, this application of Federal Rules of Evidence 102 has been criticized by another court as legislative action. 82 Moreover, because the Federal Rules of Evidence do not provide a procedure for impeachment by subsequent inconsistent statements, the trial judge is free to fashion an evidentiary procedure that will promote

growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined under Federal Rules of Evidence 102. 83

Footnotes

Footnote 76. FRE 102.

Practice References Louisell & Mueller, Federal Evidence §§ 3, 4.

Footnote 77. United States v Robinson (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901.

Footnote 78. United States v Bibbs (CA5 Fla) 564 F2d 1165, 2 Fed Rules Evid Serv 855, cert den 435 US 1007, 56 L Ed 2d 388, 98 S Ct 1877.

Footnote 79. United States v Jackson (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56.

Footnote 80. FRE 609(a).

Footnote 81. United States v Jackson (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56.

Footnote 82. United States v Brown (WD NY) 409 F Supp 890, 1 Fed Rules Evid Serv 1128.

Footnote 83. United States v Bibbs (CA5 Fla) 564 F2d 1165, 2 Fed Rules Evid Serv 855, cert den 435 US 1007, 56 L Ed 2d 388, 98 S Ct 1877.

II. JUDICIAL NOTICE [24-154]

A. Introduction [24-46]

Research References

FRE 201

Uniform Rule of Evidence 201

ALR Digests: Evidence §§ 2-91

ALR Index: Judicial Notice

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 1-7

2 Am Jur Trials 1, Investigating Particular Civil Actions § 53; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence § 70; 18 Am Jur Trials 443, Unwitnessed Automobile Accident Cases

Am Jur Proof of Facts Fact Book §§ I:176-I:178

21 Am Jur POF2d 1, Law of Foreign Jurisdiction §§ 4-7, 16; 26 Am Jur POF2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade § 9

1. In General [24-26]

§ 24 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Judicial notice is a substitute for formal proof of a matter by evidence. 84 The phrase judicial notice refers to the method by which a court informs itself of a particular fact during the course of litigation without the use of formal evidentiary proof, 85 when there is no real necessity for it 86 because the facts noticed are indisputable as a matter of notorious common knowledge 87 or as being easily capable of immediate verification. 88 Judicial notice is used cautiously and only when the facts judicially noted cannot reasonably be disputed. 89

When the rule is invoked for general evidentiary purposes, the trial court has the power to dispense with proof of judicially cognizable adjudicative facts. 90 Judicial notice cannot, however, be used by a party to fill in the gaps in the party's evidence and it is a better practice to bring into evidence those facts that a party desires a court to judicially notice. In fact, some courts require that the documents or exhibits a party wants the court to judicially notice must be offered and brought to the attention of the trier. Similarly, a party who depends upon the taking of judicial notice by an appellate court of local conditions within the judicial knowledge of the trial court should make sure that this knowledge is brought into the record. 91 Furthermore, judicial notice must not be used to deprive an adverse party of the opportunity to prove a disputed fact. 92

The principles of judicial notice will only apply to cases where three prerequisites are met: first, the matter must be one of common knowledge, although it does not have to be universally known; second, the matter must be settled beyond a doubt—if there is any uncertainty about the matter then evidence must be taken; third, the knowledge must exist within the jurisdiction of the court. 93

§ 24 ----Generally [SUPPLEMENT]

Case authorities:

In inmate's suit challenging disciplinary proceedings conducted under defendant's direction, court would take judicial notice, as requested by plaintiff's counsel, of transcripts of prior testimony in other cases involving defendant since defendant did not object or contest accuracy of his statements in those cases. *Young v Selsky* (1994, CA2 NY) 41 F3d 47.

Court would not take judicial notice of fact that nearly all currency contains detectable traces of illegal narcotics since such fact is neither commonly known or readily determinable through unquestionably reliable source. *United States v Carr* (1994, CA3 Pa) 25 F3d 1194.

District court's use of sex discrimination suit by another woman arising out of same promotion of male coworker as basis of instant suit to find that plaintiff was without remedy under Title VII was not instance of judicial notice since fact found in other suit, that other female was most qualified for promotion, was not universal truth but fact to be established through presentation of evidence. *Meredith v Beech Aircraft Corp.* (1994, CA10 Kan) 18 F3d 890, 64 BNA FEP Cas 473, 64 CCH EPD ¶ 43003, 39 Fed Rules Evid Serv 41.

In suit by government against physician for reimbursement of National Health Service Corps Scholarship funds, court improperly took judicial notice of findings by another district court in another lawsuit involving physician, since findings in other suit did not indisputably establish that physician refused to work for health center to which he had been assigned. *United States v Jones* (1994, CA11 Ga) 29 F3d 1549, 8 FLW Fed C 541.

Footnotes

Footnote 84. *People v Rowland*, 4 Cal 4th 238, 14 Cal Rptr 2d 377, 841 P2d 897, 92 CDOS 10128, 92 Daily Journal DAR 17038, reh den, stay den (Cal) 1993 Cal LEXIS 587 and stay gr (Cal) 1993 Cal LEXIS 1812 and cert den (US) 126 L Ed 2d 101, 114 S Ct 138.

Footnote 85. *Poulnot v District of Columbia* (App DC) 608 A2d 134; *Royatex, Ltd. v Daughan* (Me) 551 A2d 454.

Judicial notice means that the court will bring to its aid, without proof or evidence of the facts, its knowledge of the existence or nonexistence of facts. *Hammond v Doody* (Ind App) 553 NE2d 196.

Forms: Notice—Request that judicial notice be taken. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 1.

Notice—Motion for order appointing expert witness to allow court to take judicial notice. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 2.

Motion—For judicial notice of statute of sister state. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 3.

Motion—For judicial notice of statute of sister state—Another form. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 4.

Affidavit or declaration—In support of motion for order appointing expert witness to allow court to take judicial notice. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 5.

Order—Appointing expert witness to allow court to take judicial notice. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 6.

Instruction to jury—Evidence established by judicial notice—Distance along highway. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 7.

Footnote 86. Poulnot v District of Columbia (App DC) 608 A2d 134.

Judicial notice is intended to avoid the necessity of formally introducing evidence in those limited circumstances where the fact sought to be proven is so well known that evidence in support of the fact is unnecessary. Hebden v Workmen's Compensation Appeal Bd. (Bethenergy Mines, Inc.), 142 Pa Cmwlth 176, 597 A2d 182, app gr 529 Pa 659, 604 A2d 251 and revd on other grounds (Pa) 632 A2d 1302.

Footnote 87. § 33.

Footnote 88. § 34.

Footnote 89. § 31.

Footnote 90. Reeves v Agee (Okla) 769 P2d 745.

Footnote 91. Hammond v Doody (Ind App) 553 NE2d 196.

Footnote 92. Hebden v Workmen's Compensation Appeal Bd. (Bethenergy Mines, Inc.), 142 Pa Cmwlth 176, 597 A2d 182, app gr 529 Pa 659, 604 A2d 251 and revd on other grounds (Pa) 632 A2d 1302.

Footnote 93. Berget v State (Okla Crim) 824 P2d 364, reh den (Okla Crim) 1992 Okla Crim App LEXIS 10 and cert den (US) 121 L Ed 2d 79, 113 S Ct 124 (petitioner's testimony in another proceeding concerning the events constituting the crimes for which he is on trial does not fit the above quoted criteria).

§ 25 Relevancy of information required

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In order to be admissible, evidence must be relevant to the issues in the case. 94 Therefore, judicial notice may only be taken of relevant matters. 95 Consequently, while a state Supreme Court may take judicial notice of the records of any court of its state, the party desiring that judicial notice be taken of a record must show the relevance of the subject record. 96 Similarly, a court will not take judicial notice of a transcript of oral argument before the United States Supreme Court where nothing in the transcript of the oral argument is relevant to the proper resolution of the case before the court. 97

Footnotes

Footnote 94. § 310.

Footnote 95. People v Rowland, 4 Cal 4th 238, 14 Cal Rptr 2d 377, 841 P2d 897, 92 CDOS 10128, 92 Daily Journal DAR 17038, reh den, stay den (Cal) 1993 Cal LEXIS 587 and stay gr (Cal) 1993 Cal LEXIS 1812 and cert den (US) 126 L Ed 2d 101, 114 S

Ct 138.

Footnote 96. § 139.

Footnote 97. § 139.

§ 26 Use of encyclopedias, textbooks, and dictionaries

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Since judicial notice is not limited by the actual knowledge of the individual judge, 98 judges may refresh their memories upon matters properly subject to judicial notice from encyclopedias, textbooks, dictionaries, or other publications of established authenticity. 99 For example, the Physician's Desk Reference is a reference book universally recognized as having reasonably indisputable accuracy, and consequently judicial notice may be taken of the book for some purposes. A court will decline, however, to take judicial notice of warnings contained in the Physician's Desk Reference where they are referred to in a prescribing physician's deposition, but not identified by the doctor and not properly made a part of the deposition, if the court cannot be certain that subsequently filed copies of warnings contained in the reference book are of the same date as those to which the physician referred. 1 In addition, reference may be had to standard dictionaries for the purpose of determining the common meaning of words, 2 The mere appearance of facts within such publications does not, however, in most jurisdictions, entitle them to judicial notice unless they are such as to be a part of common knowledge. 3 In some jurisdictions, dictionaries, encyclopedias and similar general reference works may be consulted to determine whether a particular fact is widely enough known to fall within this category of common knowledge. 4 The rule regarding taking judicial notice of facts appearing in texts is different in jurisdictions which adhere to the rule that judicial notice may be taken of facts not of general common knowledge, provided they can be verified to a certainty by reference to competent authoritative sources. 5

Footnotes

Footnote 98. § 35.

Footnote 99. *Werk v Parker*, 249 US 130, 63 L Ed 514, 39 S Ct 197; *Utah Const. Co. v Berg*, 68 Ariz 285, 205 P2d 367; *State v Ladd*, 252 Iowa 487, 106 NW2d 100; *International Free & Accepted Modern Masons v Most Worshipful Prince Hall Grandll Grand Lod (Ky)* 318 SW2d 46, 119 USPQ 393, 76 ALR2d 1386; *Kennedy v Parrott*, 243 NC 355, 90 SE2d 754, 56 ALR2d 686 (medical textbooks); *Hopkins v Comer*, 240 NC 143, 81 SE2d 368; *Re Siemens' Estate*, 346 Pa 610, 31 A2d 280, 153 ALR 483, cert den 320 US 758, 88 L Ed 452, 64 S Ct 66.

Regarding a witness' refreshing her memory, see 81 Am Jur 2d, Witnesses §§ 769-799.

Annotation: Judicial notice of diseases or similar conditions adversely affecting

human beings, 72 ALR2d 554 § 5.

Footnote 1. *West v Searle & Co.*, 305 Ark 33, 806 SW2d 608, CCH Prod Liab Rep ¶ 12783.

Footnote 2. *Gooch v Maryland Mechanical Systems, Inc.*, 81 Md App 376, 567 A2d 954, 17 Media L R 1329, cert den 319 Md 484, 573 A2d 807; *Bend Millwork Co. v Department of Revenue*, 285 Or 577, 592 P2d 986; *Simpson v State Mut. Life Assur. Co.*, 135 Vt 554, 382 A2d 198; *Re All-Star Ins. Corp.* (App) 112 Wis 2d 329, 332 NW2d 828 (meaning of terms used in a contract).

Footnote 3. *Standard Life Ins. Co. v Strong*, 19 Tenn App 404, 89 SW2d 367; *Lassen v Lassen*, 8 Va App 502, 383 SE2d 471.

For a discussion of taking judicial notice of matters of common knowledge, see § 33.

Footnote 4. *B.V.D. Licensing Corp. v Body Action Design, Inc.* (CA FC) 846 F2d 727, 6 USPQ2d 1719, 25 Fed Rules Evid Serv 954 (citing dictionary entries for BVD in taking judicial notice that BVD trademark is widely known in United States).

Footnote 5. § 34.

2. Types of Facts or Data [27-46]

a. In General [27-30]

§ 27 Generally; legislative facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

◆ Definition: Legislative facts are those facts which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. 6

When a court, as a basis for making law, assumes or reaches a conclusion as to a broad proposition of fact, the court is said to have taken judicial notice of legislative facts. Quite often, in reaching, and in justifying, its conclusions, a court will take notice of scientific, sociological and other data which itself may be disputed. For example, the United States Supreme Court has taken judicial notice of the primary purpose of a statute, 7 and that custodial interrogation is inherently so psychologically coercive that any statements elicited during such interrogation are per se coerced, in violation of the Fifth Amendment privilege against self-incrimination, unless detailed procedural safeguards, including what are now known as Miranda warnings, are followed. 8

Footnotes

Footnote 6. Advisory Committee Note to FRE 201.

Footnote 7. *M. v Superior Court of Sonoma County*, 450 US 464, 67 L Ed 2d 437, 101 S Ct 1200 (the Court took notice that prevention of illegitimate pregnancy among teenage girls was a primary purpose of the challenged legislation, then cited considerable sociological data showing the frequency of teenage pregnancies, the usually negative impact such a pregnancy has on the female involved, and the overall societal impact of the problem).

Concerning judicial notice of legislative intent, see §§ 123-125.

Footnote 8. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140 (the Court cited extensively to police training manuals and similar publications in reaching its conclusion).

§ 28 Elementary factual data; evaluative data

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In addition to adjudicative 9 and legislative 10 facts, two other aspects of the fact-finding process are also sometimes discussed in terms of judicial notice. The first is what might be called "elementary factual data." As the Advisory Committee that drafted the Federal Rules of Evidence has commented, every case involves the use of hundreds or thousands of nonevidence facts. For example, when a witness in an automobile accident case says the word "car," everyone, judge and jury included, furnishes, from nonevidence sources within herself, the supplementing information that the car is an automobile. The judicial process cannot construct every case from scratch; these items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. 11

The other aspect of the fact-finding process sometimes discussed in terms of judicial notice is referred to as "evaluative data," which has been described as nonevidence facts to appraise or assess the adjudicative facts of the case. 12

Footnotes

Footnote 9. § 31.

Footnote 10. § 27.

Footnote 11. Advisory Committee Note to FRE 201.

§ 29 Distinguishing between judicial notice of adjudicative fact and other types of judicial notice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The precise line of demarcation between adjudicative and legislative facts is not always easily identified. 13 Adjudicative facts are usually those facts that are in issue in a particular case; 14 such facts relate to the parties and to their activities, properties, and/or businesses. 15 When a court finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court is performing an adjudicative function, and the facts are conveniently called adjudicative facts. Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury trial. 16 Thus, judicial notice of adjudicative facts dispenses with the need to present other evidence or for the factfinder to make findings as to those particular facts. 17

Legislative facts, on the other hand, do not relate specifically to the activities or characteristics of the litigants, 18 but are general facts which help the tribunal decide questions of law, policy, and discretion. 19 They can be described as established truths, facts, or pronouncements that do not change from case to case but apply universally. 20 Legislative facts are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. 21 A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties. In the great mass of cases decided by courts, the legislative element is either absent or unimportant or interstitial, because in most cases the applicable law and policy have been previously established. But whenever a tribunal engages in the creation of law or policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record. 22 Though a court, with its adversary procedure, is not necessarily precluded from resolving issues of legislative fact, it is generally thought that their determination is particularly appropriate to the administrative process, in which staffs of specialists and great storehouses of information are available. 23

◆ Comment: Counsel should be aware that judicial access to legislative facts is not subject to a limitation as in Federal Rules of Evidence 201(b) in the form of indisputability, or to any other formal requirements of notice other than those already inherent in affording opportunity to hear and be heard in exchanging briefs and in any requirement of formal findings at any level, and that judicial access to legislative facts should leave open the possibility of introducing evidence through regular channels in appropriate situations. 24

The Federal Rules of Evidence closely regulate judicial notice of adjudicative facts, as do the evidence codes of the states that have adopted the Federal Rules, and those of several other states as well. 25 Several states also have enacted statutes regulating judicial

At least two factors complicate determining whether a fact is adjudicative or not. First, the same fact may fit into several categories; the propriety of taking judicial notice, and applicability of procedural rules, will depend on the procedural setting at the time and upon how the court or jury uses the fact. 27

The second complicating factor is that although common sense directs that a jury should be instructed that it must accept as conclusive any judicially noticed adjudicative fact, 28 the Federal Rules of Evidence require a judge in a criminal case to instruct the jury that it is not required to accept such a fact as conclusive. 29 Perhaps as a result, some courts have declined to classify facts as adjudicative that probably should be so classified. 30

Footnotes

Footnote 13. *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Annotation: What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence, concerning judicial notice of adjudicative facts, 35 ALR Fed 440.

Footnote 14. *Korematsu v United States* (ND Cal) 584 F Supp 1406, 16 Fed Rules Evid Serv 1231.

As to adjudicative facts generally, see §§ 31 et seq.

Footnote 15. *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 16. *Usery v Tamiami Trail Tours, Inc.* (CA5 Fla) 531 F2d 224, 12 BNA FEP Cas 1233, 11 CCH EPD ¶ 10916; *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 17. *Korematsu v United States* (ND Cal) 584 F Supp 1406, 16 Fed Rules Evid Serv 1231.

Footnote 18. *Usery v Tamiami Trail Tours, Inc.* (CA5 Fla) 531 F2d 224, 12 BNA FEP Cas 1233, 11 CCH EPD ¶ 10916; *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 19. *Usery v Tamiami Trail Tours, Inc.* (CA5 Fla) 531 F2d 224, 12 BNA FEP Cas 1233, 11 CCH EPD ¶ 10916; *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 20. *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429; *Korematsu v United States* (ND Cal) 584 F Supp 1406, 16 Fed Rules Evid Serv 1231.

Footnote 21. Advisory Committee Notes to Federal Rules of Evidence, FRE 201.

Footnote 22. *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 23. *Usery v Tamiami Trail Tours, Inc.* (CA5 Fla) 531 F2d 224, 12 BNA FEP Cas 1233, 11 CCH EPD ¶ 10916.

Footnote 24. Advisory Committee Notes to Federal Rules of Evidence, FRE 201.

Footnote 25. § 32.

Footnote 26. § 32.

Footnote 27. *Marshall v Bramer* (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017; *Hughes v Vestal*, 264 NC 500, 142 SE2d 361 (state Supreme Court's use of chart of average automobile stopping distances at various speeds did not authorize trial judge in another collision case to take judicial notice of the information in the chart and to so instruct the jury); *Chartrand v Coos Bay Tavern, Inc.*, 298 Or 689, 696 P2d 513.

Judicial notice in the pretrial context is discussed in §§ 39-40.

Judicial notice postverdict and on appeal is discussed in §§ 44-46.

Footnote 28. § 42.

Footnote 29. § 43.

Footnote 30. § 43.

§ 30 --Particular facts as adjudicative or nonadjudicative

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Economic events, such as the governmental intervention into the oil industry, as well as the shortage of fuel oil in late 1973 following the Arab oil embargo, are adjudicative facts within the meaning of the Federal Rules of Evidence. 31

The following facts, however, have been held or recognized as nonadjudicative: (1) a drug's classification as a controlled substance under a federal statute, 32 since it does not relate to who did what, where, when, how, and with what motive or intent, nor is it a fact which would traditionally go to the jury; 33 (2) a note and an order from the trial court in an earlier case in the same circuit as the Court of Appeals; 34 and (3) state statutes or state regulations promulgated under a state statute. 35

◆ Comment: Counsel should be aware that judicial access to legislative facts is not subject to a limitation as in Federal Rules of Evidence 201(b) in the form of

indisputability, or to any other formal requirements of notice other than those already inherent in affording opportunity to hear and be heard in exchanging briefs and in any requirement of formal findings at any level, and that judicial access to legislative facts should leave open the possibility of introducing evidence through regular channels in appropriate situations. 36

Footnotes

Footnote 31. *Mainline Invest. Corp. v Gaines* (ND Tex) 407 F Supp 423, 1 Fed Rules Evid Serv 1107.

Annotation: What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence, concerning judicial notice of adjudicative facts, 35 ALR Fed 440.

Footnote 32. 21 USCS § 812, discussed generally in 25 Am Jur 2d, Drugs, Narcotics, and Poisons §§ 35-37.

Footnote 33. *United States v Gould* (CA8 Iowa) 536 F2d 216, 1 Fed Rules Evid Serv 233, 35 ALR Fed 429.

Footnote 34. *United States v Gorham*, 175 US App DC 383, 536 F2d 410.

Footnote 35. *United States v Atwell* (DC Del) 71 FRD 357, 1 Fed Rules Evid Serv 556.

Regarding judicial notice of state law generally, see §§ 120 et seq.

Footnote 36. § 29.

b. Judicial Notice of Adjudicative Facts [31-46]

(1). In General [31-35]

§ 31 Generally; indisputability

[View Entire Section](#)
[Go to Parallel Reference Table](#)

◆ Definition: Adjudicative facts are simply the facts of the particular case. 37

The Federal Rules of Evidence 38 authorize judicial notice of an adjudicative fact only if the fact is not subject to reasonable dispute. Such may be the case only if either of two conditions is satisfied: the fact (1) must be generally known within the territorial jurisdiction of the trial court, or (2) must be capable of accurate and ready determination

by resort to sources whose accuracy cannot reasonably be questioned. As such, the rule is consistent with the traditional view that traditional methods of proof should be dispensed with only in clear cases. 39 Consequently, federal courts take a cautious attitude with respect to judicial notice of adjudicative facts, requiring that the matter be beyond reasonable controversy. 40 If a particular fact is indisputably and incontrovertibly true, however, a court will judicially notice that fact and inform the jury that it must accept that fact as proven, 41 although in criminal cases the jury instruction is somewhat different. 42

In state courts, adjudicative facts may be judicially noticed if they are generally known 43—that is, well established and authoritatively settled— 44 by persons of average 45 or reasonable 46 intelligence in the jurisdiction in which the court sits, 47 and indisputable 48 or not subject to reasonable dispute. 49 Some facts may be judicially noticed because they are notorious and indisputable, 50 while others may be judicially noticed because they are well known and easily ascertainable. 51

The prior revocation of a driver's license is an adjudicative fact and judicial notice of the adjudicative fact may be taken in a civil license revocation proceeding. Judicial notice may not be taken, however, of adjudicative facts where a substantial liberty interest is involved in a criminal proceeding or where attempts are made to bring in facts not generated within the particular adjudicative body involved. 52

Disputed facts are not in the same category as matters of common knowledge of which judicial notice may be taken. 53 In fact, a court is not entitled to take judicial notice of facts which are disputed. 54 For example, a court may not take judicial notice of the adjudicative fact that asbestos and lung cancer in the same person are necessarily causally related, as this matter is subject to reasonable dispute. 55 In addition, whether or not there is a conspiracy of silence in the medical community regarding malpractice is a subject of considerable debate and a court may not take judicial notice that a conspiracy of silence exists. 56 Disputed facts are also not in the same vein as the laws of nature, geographic and historical facts, time, laws and other matters of common knowledge. 57

It is clear that uncertainty, 58 or widespread difference in belief with respect to the fact in question, 59 will operate to preclude judicial notice thereof in both federal and state courts. 60

That a fact is judicially noticeable does not necessarily mean that a court should also take judicial notice of the inferences a party hopes will be drawn from that fact. 61

Footnotes

Footnote 37. Advisory Committee Note to FRE 201.

Footnote 38. FRE 201.

Footnote 39. Advisory Committee Note to FRE 201.

Footnote 40. *Cardio-Medical Assoc., Ltd. v Crozer-Chester Medical Center* (CA3 Pa) 721 F2d 68, 1983-2 CCH Trade Cases ¶ 65716, 14 Fed Rules Evid Serv 1231 (trial judge could not properly take judicial notice that defendant's denial of staff privileges to

plaintiffs could have no discernible impact on interstate travel of patients to receive treatment); *Brown & Williamson Tobacco Corp. v Jacobson* (CA7 Ill) 827 F2d 1119, 14 Media L R 1497, appeal after remand (CA7 Ill) 14 Media L R 1861, 9 FR Serv 3d 630 and cert den 485 US 993, 99 L Ed 2d 512, 108 S Ct 1302 (it was improper for the trial judge, in reducing jury's compensatory damage award, to take judicial notice that media coverage of the result of the suit was fair); *United States v Pabian* (CA11 Fla) 704 F2d 1533, 13 Fed Rules Evid Serv 46 (it is not indisputable that veteran grand juries are less captive to the prosecutor than newly impanelled grand juries).

Footnote 41. § 42.

Footnote 42. § 43.

Footnote 43. *Prestige Homes, Inc. v Legouffe* (Colo) 658 P2d 850, appeal after remand (Colo App) 689 P2d 697; *Neal v Fisher*, 312 Md 685, 541 A2d 1314.

Footnote 44. *Miller v Poli's New England Theatres, Inc.*, 125 Conn 610, 7 A2d 845; *Rives v Atlanta Newspapers, Inc.*, 110 Ga App 184, 138 SE2d 100, revd on other grounds 220 Ga 485, 139 SE2d 395, conformed to 111 Ga App 6, 140 SE2d 304; *Rozelle v Barnard*, 72 NM 182, 382 P2d 180.

Footnote 45. *Rives v Atlanta Newspapers, Inc.*, 110 Ga App 184, 138 SE2d 100, revd on other grounds 220 Ga 485, 139 SE2d 395, conformed to 111 Ga App 6, 140 SE2d 304.

Footnote 46. *Neal v Fisher*, 312 Md 685, 541 A2d 1314.

Footnote 47. *Neal v Fisher*, 312 Md 685, 541 A2d 1314.

Footnote 48. *Rives v Atlanta Newspapers, Inc.*, 110 Ga App 184, 138 SE2d 100, revd on other grounds 220 Ga 485, 139 SE2d 395, conformed to 111 Ga App 6, 140 SE2d 304.

A high degree of indisputability is the essential prerequisite of judicial notice. *Re Estate of Friedli* (App) 164 Wis 2d 178, 473 NW2d 604.

Footnote 49. *Prestige Homes, Inc. v Legouffe* (Colo) 658 P2d 850, appeal after remand (Colo App) 689 P2d 697; *Neal v Fisher*, 312 Md 685, 541 A2d 1314.

Footnote 50. *Levit v Adams* (Tex App Houston (1st Dist)) 841 SW2d 478, revd on other grounds, remanded (Tex) 850 SW2d 469, reh'g of cause overr (May 5, 1993).

Footnote 51. *Levit v Adams* (Tex App Houston (1st Dist)) 841 SW2d 478, revd on other grounds, remanded (Tex) 850 SW2d 469, reh'g of cause overr (May 5, 1993).

Footnote 52. *Re Breedlove*, 186 W Va 279, 412 SE2d 473 (the court stating in particular that its holding could not be extended to recidivist proceedings).

Footnote 53. As to judicial notice of facts of common knowledge, generally, see § 33.

Footnote 54. *Wallace v Kaiser Aluminum & Chemical Corp.* (La) 586 So 2d 149; *Hae Woo Youn v Maritime Overseas Corp.* (La App 5th Cir) 605 So 2d 187, cert gr (La) 609 So 2d 239, cert den (US) 1994 US LEXIS 1475 and cert den (La) 609 So 2d 240 and cert den (US) 124 L Ed 2d 252, 113 S Ct 2342, reh den (US) 125 L Ed 2d 711, 113 S Ct

3022 and set aside, in part on other grounds (La) 623 So 2d 1257, petition for certiorari filed (Dec 13, 1993) and (disapproved on other grounds by Grubbs v Gulf Int'l Marine (La) 625 So 2d 495, 1994 AMC 244); Re Interest of N.M., 240 Neb 690, 484 NW2d 77; Gronneberg v Hoffart (ND) 466 NW2d 809; Tomlinson v Midamerica Mut. Life Ins. Co. (App) 168 Wis 2d 92, 483 NW2d 234.

It is improper to resolve disputed issues of material fact by judicial notice. Livingston Parish Police Jury v Acadiana Shipyards, Inc. (La App 1st Cir) 598 So 2d 1177, cert den (La) 605 So 2d 1122 and cert den (La) 605 So 2d 1122.

Footnote 55. § 62.

Footnote 56. Clark v Norris, 226 Mont 43, 734 P2d 182.

Footnote 57. Elliott v United States Fidelity & Guaranty Co. (La App 2d Cir) 568 So 2d 155.

Footnote 58. Peyroux v Howard, 32 US 324, 7 Pet 324, 8 L Ed 700; Taylor v Pine Bluff, 226 Ark 749, 294 SW2d 341.

Footnote 59. Dominion Hotel, Inc. v Arizona, 249 US 265, 63 L Ed 597, 39 S Ct 273; Gillum v Johnson, 7 Cal 2d 744, 62 P2d 1037, 108 ALR 595, reh den 7 Cal 2d 765, 63 P2d 810, 108 ALR 612.

Footnote 60. United States v Griffin (CA1 Mass) 525 F2d 710, cert den 424 US 945, 47 L Ed 2d 351, 96 S Ct 1414; Wooden v Missouri P. R. Co. (CA5 La) 862 F2d 560, 27 Fed Rules Evid Serv 299; Hardy v Johns-Manville Sales Corp. (CA5 Tex) 681 F2d 334, CCH Prod Liab Rep ¶ 9343, 11 Fed Rules Evid Serv 99; Clark v South Cent. Bell Tel. Co. (WD La) 419 F Supp 697, 18 BNA FEP Cas 630; United States v Baker (CA9 Wash) 641 F2d 1311, 8 Fed Rules Evid Serv 382; Rogers v R.J. Reynolds Tobacco Co. (Ind App) 557 NE2d 1045, CCH Prod Liab Rep ¶ 12572; Re Marriage of Tresnak (Iowa) 297 NW2d 109; State v Rush (Me) 324 A2d 748; Pepper Pike v Felder (Cuyahoga Co) 51 Ohio App 3d 143, 555 NE2d 333; Williams v Ft. Worth (Tex App Fort Worth) 782 SW2d 290, writ granted (Tex) 33 Tex Sup Ct Jour 622, op withdrawn (Oct 10, 1990) and writ den, in part, writ dism, in part (Oct 10, 1990); Richmond v Braxton, 230 Va 161, 335 SE2d 259, 52 ALR4th 725; Re Marriage of Campbell, 37 Wash App 840, 683 P2d 604.

Footnote 61. Cruz v County of Los Angeles (2nd Dist) 173 Cal App 3d 1131, 219 Cal Rptr 661. See also Marshall v Bramer (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017.

§ 32 Effect of rules and statutes specifying matters of judicial notice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 201 of the Federal Rules of Evidence is the only federal rule which applies to

judicial notice. It applies only to taking notice of adjudicative facts, 62 specifies when a court may 63 and must 64 notice such facts, guarantees all parties a right to be heard, upon timely request, before a fact is judicially noticed, 65 and spells out how a judge is to instruct a jury as to the fact that has been judicially noticed. 66 In addition, some states have enacted laws authorizing or requiring courts to take judicial notice of various specified matters. 67 For example, a state statute may require courts of general jurisdiction to take judicial notice of municipal ordinances 68 or of the laws of another state. 69 A statute enumerating matters of which the courts must take judicial notice does not necessarily preclude a court from taking judicial notice of other facts which are commonly known and accepted. 70

Footnotes

Footnote 62. FRE 201(a).

Footnote 63. § 36.

Footnote 64. § 37.

Footnote 65. § 38.

Footnote 66. §§ 42, 43.

Footnote 67. State v Lawrence, 120 Utah 323, 234 P2d 600.

Footnote 68. § 126.

Footnote 69. § 110.

Footnote 70. State v Lawrence, 120 Utah 323, 234 P2d 600.

§ 33 Facts of common knowledge

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law has long afforded judicial notice to a fact if it was a matter of common and general knowledge or notoriety, 71 and it has been said that the courts are never justified in taking judicial notice of matters which are not. 72 A fact might qualify for judicial notice because it is common knowledge everywhere. 73 The basic appearance of a snowman, for example, is common knowledge. It would be pointless, therefore, in a patent infringement action, to require a toy manufacturer to offer evidence of the traditional characteristics of all snowmen, and unjust to permit a jury to find that the company had infringed upon another's patent simply because the former, like the latter, distributed a toy that had those traditional characteristics. Thus, a trial judge could properly take judicial notice of those common features in ruling on a motion for summary judgment. 74 In addition, the fact that it rains in Louisiana is a proper subject for

judicial notice. 75 Dictionaries, encyclopedias and similar general reference works may be consulted to determine whether a particular fact is widely enough known to fall within this category of common knowledge. 76 Alternatively, a fact might qualify for judicial notice within a particular jurisdiction because it relates to conditions within that jurisdiction, for example, facts concerning particular locations and neighborhoods within the jurisdiction of the court. 77

It is not enough that the proffered proposition of fact is widely believed; certainty is required. 78 Judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities. 79

A court's taking of judicial notice that a fact is generally known is not conclusive proof that a particular individual was aware of that fact. 80

If the matter relates to specialized knowledge, 81 judicial notice is appropriate if the fact in question is well known and generally accepted in specialized areas among those members of the public who deal with such matters. 82 This is particularly true in the scientific field, so that common knowledge is not necessary if scientists agree that the essential element of certainty exists. 83

Care must be taken, in applying the common knowledge aspect of judicial notice, to distinguish between decisions taking notice of adjudicative versus legislative facts, because the degree of certainty sufficient for the legislative facts is not sufficient for adjudicative facts. A court should be particularly wary of taking judicial notice of sociological facts as adjudicative facts—such self-evident truths 84 often become hotly disputed political issues and are often ultimately rejected and supplanted by newer truths. 85

Finding that these matters are not matters of common knowledge, courts have refused to taking judicial notice of an attorney's overhead or expenses in determining the amount of fees to award counsel; 86 whether a particular school is an elementary, vocational, or secondary school; 87 a redevelopment project's proximity to leased premises; 88 the side effects of regroton (a blood pressure medicine) and the causes and effects of relaxation of the arteries; 89 facts contained in expert testimony and prior similar child custody cases before a court; 90 In addition, judicial notice may not be taken of a custom or usage, local in nature, without the proof of its existence and application. Consequently, the possibility of selecting an impartial jury in a particular county is not a proper matter for judicial notice. 91 Furthermore, while a court may take judicial notice that Aspen, Colorado is located in the Colorado Rocky Mountains, it cannot take judicial notice that on a flight from Nashville, Tennessee to Aspen a plane would have to climb from 6,500 to 17,500 feet as this is not a fact a court may act upon without proof. 92

Footnotes

Footnote 71. *United Steelworkers of America, etc. v Weber*, 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721, 20 BNA FEP Cas 1, 20 CCH EPD ¶ 30026, reh den 444 US 889, 62 L Ed 2d 125, 100 S Ct 193, 20 CCH EPD ¶ 30266 and reh den 444 US 889, 62 L Ed 2d 125, 100 S Ct 193, 20 CCH EPD ¶ 30266 and reh den 444 US 889, 62 L Ed 2d 126, 100 S Ct 194; *Waters-Pierce Oil Co. v Deselms*, 212 US 159, 53 L Ed 453, 29 S Ct 270; *Eden Toys, Inc. v Marshall Field & Co.* (CA2 NY) 675 F2d 498, 216 USPQ 560, 10

Fed Rules Evid Serv 1030; *Sinatra v Heckler* (ED NY) 566 F Supp 1354, 13 Fed Rules Evid Serv 1368; *Murty v Aga Khan* (ED NY) 92 FRD 478, 9 Fed Rules Evid Serv 1533; *Knox v Butler* (CA5 La) 884 F2d 849, 28 Fed Rules Evid Serv 1182, amd on other grounds, reh den (CA5) 1989 US App LEXIS 19292 and cert den 494 US 1088, 108 L Ed 2d 957, 110 S Ct 1828; *Mainline Invest. Corp. v Gaines* (ND Tex) 407 F Supp 423, 1 Fed Rules Evid Serv 1107; *Marshall v Bramer* (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017; *Chambers v Koehler* (WD Mich) 635 F Supp 884; *Dunn v White* (CA10 Okla) 880 F2d 1188, cert den 493 US 1059, 107 L Ed 2d 954, 110 S Ct 871; *United States v Esle* (CA11 Fla) 743 F2d 1465, 16 Fed Rules Evid Serv 782, reh den, en banc (CA11 Fla) 755 F2d 176; *B.V.D. Licensing Corp. v Body Action Design, Inc.* (CA FC) 846 F2d 727, 6 USPQ2d 1719, 25 Fed Rules Evid Serv 954; *Bettencourt v State*, 123 Cal App 2d 60, 266 P2d 201, 43 ALR2d 545; *Graham Hydraulic Power, Inc. v Stewart & Stevenson Power, Inc.* (Colo App) 797 P2d 835, 12 UCCRS2d 658; *Braithwaite v Lee*, 125 Conn 10, 2 A2d 380; *State ex rel. Libtz v Coleman*, 149 Fla 28, 5 So 2d 60; *Knepper v Monticello State Bank* (Iowa) 450 NW2d 833; *Zink v Basham*, 164 Kan 456, 190 P2d 203; *Public Utilities Com. v Cole's Express*, 153 Me 487, 138 A2d 466; *Kansas City Bridge Co. v Kansas City Structural Steel Co.* (Mo) 317 SW2d 370, 85 ALR2d 1252; *Elder v Delcour*, 364 Mo 835, 269 SW2d 17, 47 ALR2d 370; *State v Eary*, 235 Neb 254, 454 NW2d 685; *Rozelle v Barnard*, 72 NM 182, 382 P2d 180; *People v Epton*, 19 NY2d 1017, 281 NYS2d 1015, 228 NE2d 908; *State v Scott* (Trumbull Co) 3 Ohio App 2d 239, 32 Ohio Ops 2d 360, 210 NE2d 289; *Pemberton v American Distilled Spirits Co.* (Tenn) 664 SW2d 690, CCH Prod Liab Rep ¶ 9968, 42 ALR4th 245; *Eagle Trucking Co. v Texas Bitulithic Co.* (Tex) 612 SW2d 503, reformed on other grounds (Tex) 24 Tex Sup Ct Jour 256, on remand (Tex Civ App Tyler) 619 SW2d 598, writ dism w o j (Jul 21, 1982) and writ ref n r e (Tex) 640 SW2d 873, reh of writ of error overr (Nov 24, 1982) and reh of cause overr (Mar 25, 1981); *Bechtel Civil & Minerals, Inc. v South Columbia Basin Irrig. Dist.*, 51 Wash App 143, 752 P2d 395.

Footnote 72. *Zink v Basham*, 164 Kan 456, 190 P2d 203.

Footnote 73. *S.J. Lemoine, Inc. v St. Landry Parish School Bd.* (La App 3d Cir) 527 So 2d 1150.

Footnote 74. *Eden Toys, Inc. v Marshall Field & Co.* (CA2 NY) 675 F2d 498, 216 USPQ 560, 10 Fed Rules Evid Serv 1030.

Footnote 75. § 152.

Footnote 76. § 26.

Footnote 77. § 77.

Footnote 78. § 31.

Footnote 79. *Hardy v Johns-Manville Sales Corp.* (CA5 Tex) 681 F2d 334, CCH Prod Liab Rep ¶ 9343, 11 Fed Rules Evid Serv 99 (holding that the proposition that asbestos causes cancer cannot be judicially noticed because it is inextricably linked to a host of disputed issues).

Footnote 80. *United States v Baker* (CA9 Wash) 641 F2d 1311, 8 Fed Rules Evid Serv 382 (holding it improper, in proceeding charging alleged contemnors with violating an

injunction banning salmon fishing, for judge to take judicial notice of defendants' knowledge of the injunction based on unproven widespread publicity); *United States v Griffin* (CA1 Mass) 525 F2d 710, cert den 424 US 945, 47 L Ed 2d 351, 96 S Ct 1414 (declining to take judicial notice of a person's knowledge of a federal busing order, where government failed to introduce evidence of broad neighborhood knowledge of publicity from which knowledge could be inferred).

Footnote 81. *Werk v Parker*, 249 US 130, 63 L Ed 514, 39 S Ct 197.

Footnote 82. *Neal v United States* (DC NJ) 402 F Supp 678, 75-2 USTC ¶ 9805, 36 AFTR 2d 75-6218; *Re Olson*, 280 US App DC 205, 884 F2d 1415, later proceeding 282 US App DC 139, 892 F2d 1073.

Footnote 83. *Nicketta v National Tea Co.*, 338 Ill App 159, 87 NE2d 30 (trial judge properly took judicial notice that the parasite that produces trichinosis is destroyed when pork is properly cooked, and dismissed plaintiffs' cause of action alleging they became infected with trichinosis after purchasing fresh pork from defendant and properly cooking it); *Don Clark, Inc. v United States Fidelity & Guaranty Co.*, 145 Misc 2d 218, 545 NYS2d 968 (judicial notice can be taken of the common knowledge that oil can seep through the ground); *State v Schriber*, 185 Or 615, 205 P2d 149.

Regarding judicial notice of scientific facts generally, see §§ 92, 93.

Footnote 84. *Hardy v Johns-Manville Sales Corp.* (CA5 Tex) 681 F2d 334, CCH Prod Liab Rep ¶ 9343, 11 Fed Rules Evid Serv 99.

Footnote 85. See, for example, *Scott v Sandford*, 60 US 393, 19 How 393, 15 L Ed 691.

Law Reviews: Davis, *Judicial Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 Minn LR 1 (1986)

Davis, *There is a Book Out . . . : An Analysis of Judicial Absorption of Legislative Facts*, 100 Harv LR 1539 (1987).

Footnote 86. *Re Interest of M.L.K.*, 13 Kan App 2d 251, 768 P2d 316.

Footnote 87. *Commonwealth v Gonzales*, 33 Mass App 728, 604 NE2d 1317, review den 414 Mass 1102, 609 NE2d 88.

Footnote 88. *Mendel Kern, Inc. v Workshop, Inc.*, 400 Mass 277, 508 NE2d 853.

Footnote 89. *Commonwealth, Dept. of Transp., Bureau of Traffic Safety v Cassidy*, 103 Pa Cmwlth 582, 521 A2d 59.

Footnote 90. *Sutherland v Sutherland* (Tenn App) 831 SW2d 283.

Footnote 91. *Bechtel Civil & Minerals, Inc. v South Columbia Basin Irrig. Dist.*, 51 Wash App 143, 752 P2d 395.

Footnote 92. *Omni Aviation v Perry* (Tenn App) 807 SW2d 276.

§ 34 Facts capable of accurate and ready determination

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence authorize, and in appropriate circumstances require, ⁹³ a court to take judicial notice of an adjudicative fact that is not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ⁹⁴ In contrast with judicial notice of matters of common knowledge, ⁹⁵ notice of ascertainable facts is a comparatively new development in the law. ⁹⁶

Numerous cases can be found in which courts judicially notice historical, ⁹⁷ scientific, ⁹⁸ geographical and topographical ⁹⁹ facts, phenomena of nature, seasons and plants, ¹ time, ² customs and usages of businesses and professions, ³ and actions of government bodies and agencies. ⁴

Judicial notice is improper however, if a legitimate question exists either as to the information itself ⁵ or its underlying source. ⁶

Matters not of common knowledge may be judicially noticed if they may be readily determined by an examination of a source whose accuracy cannot be reasonably questioned, such as geographical and historic data and scientific facts which are generally accepted as irrefutable by living scientists. ⁷ In other words, taking judicial knowledge of any fact is subject to the test of verifiable certainty. For example, a court may take judicial notice of the location of cities, counties, boundaries, dimensions, and distances because geographic facts such as these are easily ascertainable and capable of verifiable certainty. ⁸

Footnotes

Footnote 93. § 37.

Footnote 94. FRE 201(b)(2).

Footnote 95. § 33.

Footnote 96. *Rosche v Hollywood (Fla)* 55 So 2d 909.

Footnote 97. § 71.

Footnote 98. § 93.

Footnote 99. §§ 75-80.

Footnote 1. § 152.

Footnote 2. § 154.

Footnote 3. § 47.

Footnote 4. §§ 145-150.

Footnote 5. § 31.

Footnote 6. *Oneida Indian Nation v New York* (CA2 NY) 691 F2d 1070, 11 Fed Rules Evid Serv 1002, 65 ALR Fed 606; *Hinton v Department of Justice* (CA3 Pa) 844 F2d 126, 25 Fed Rules Evid Serv 830.

Footnote 7. *Neal v Fisher*, 312 Md 685, 541 A2d 1314.

Footnote 8. *Butts Retail, Inc. v Diversifoods, Inc.* (Tex App Beaumont) 840 SW2d 770, 1992-2 CCH Trade Cases ¶ 70061, writ den, motion overr (Apr 21, 1993).

Regarding judicial notice of geographic facts generally, see §§ 75-80.

§ 35 Judicial, as distinguished from actual, knowledge

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the federal courts, a judge must take judicial notice of a fact although it is not within her knowledge if the fact in question is one which is the proper subject of judicial cognizance and the party seeking to have the fact noticed has provided the necessary proof, because the Federal Rules of Evidence require the judge to take notice under these conditions. 9 Therefore, it is inappropriate for a judge to rely solely on personal knowledge in ruling on a pretrial motion, 10 a suppression hearing, 11 or on the merits, 12 although a different rule may be applied in social security cases. In social security cases, if proper notice and opportunity for rebuttal are given, an administrative law judge may take judicial notice of adjudicative facts within her personal knowledge. 13

In state courts, even though facts are known to the judge personally, they must be proved by evidence unless they are matters of which judicial notice may properly be taken. 14 Thus, it is said that judicial notice in any particular case is not determined or limited by the actual knowledge of the individual judge or court. 15 In other words, the individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. 16 Therefore, judicial knowledge upon which a decision may be based is not the personal knowledge of the judge, 17 but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which the judge plays a neutral role. 18 Consequently, a judge may not take judicial notice of a person's sense of humor which is not a part of the evidence nor a fact generally known within the territorial jurisdiction of the trial court and which is not capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. A fact must be fairly well known and obvious before judicial notice of it can be taken. A high degree of

indisputability is the essential prerequisite of judicial notice. 19

Although no judge is at liberty to take into account personal knowledge which the judge possesses when deciding upon an issue submitted by the parties, judicial notice may be taken of adjudicative facts, under limited circumstances, provided those facts are not subject to reasonable dispute. 20 Furthermore, facts within the personal recollective knowledge of the judge may be judicially noticed if those facts are generally known in the jurisdiction. 21 In addition, in some jurisdictions, a trial judge may take judicial notice of a collateral fact of which she has personal knowledge. 22 The proper test is whether the fact to be judicially noticed is verifiably certain. 23 Under this test, a judge may personally know a fact of which she may not properly take judicial notice. 24

A judge may use authoritative sources to refresh her memory upon matters properly subject to judicial notice. 25 But the mere appearance of facts within publications such as encyclopedias, text books, and dictionaries, does not, in most jurisdictions mean that such facts can be judicially noticed unless they are part of common knowledge. 26

Footnotes

Footnote 9. FRE 201(d).

Footnote 10. *United States v Pabian* (CA11 Fla) 704 F2d 1533, 13 Fed Rules Evid Serv 46.

Footnote 11. A trial judge's personal knowledge of an informant's reliability is not a fact he can judicially notice to cure an otherwise defective search warrant affidavit. *United States v Sorrells* (CA11 Fla) 714 F2d 1522, 14 Fed Rules Evid Serv 306; *United States v Lewis* (CA9 Cal) 833 F2d 1380, 24 Fed Rules Evid Serv 432.

Footnote 12. *Re Marriage of Tresnak* (Iowa) 297 NW2d 109.

Footnote 13. *Banks v Schweiker* (CA9 Or) 654 F2d 637, 8 Fed Rules Evid Serv 1323.

Footnote 14. *Van Donselaar v Van Donselaar*, 249 Iowa 504, 87 NW2d 311 (criticized on other grounds by *Re Property Seized on or about November 14-15, 1989* (Iowa) 501 NW2d 482); *Smith v Henson*, 298 Ky 182, 182 SW2d 666; *Holtz v Babcock*, 143 Mont 371, 390 P2d 801; *Marcinko v D'Antuono*, 104 RI 172, 243 A2d 104, 37 ALR3d 874; *State v Martel*, 122 Vt 491, 177 A2d 236; *Darnell v Barker*, 179 Va 86, 18 SE2d 271.

Footnote 15. *Public Utilities Com. v Cole's Express*, 153 Me 487, 138 A2d 466; *Holtz v Babcock*, 143 Mont 371, 390 P2d 801; *Hopkins v Comer*, 240 NC 143, 81 SE2d 368.

Footnote 16. *Van Donselaar v Van Donselaar*, 249 Iowa 504, 87 NW2d 311 (criticized on other grounds by *Re Property Seized on or about November 14-15, 1989* (Iowa) 501 NW2d 482); *Smith v Henson*, 298 Ky 182, 182 SW2d 666; *Public Utilities Com. v Cole's Express*, 153 Me 487, 138 A2d 466; *Holtz v Babcock*, 143 Mont 371, 390 P2d 801; *Holtz v Babcock*, 143 Mont 371, 390 P2d 801; *Darnell v Barker*, 179 Va 86, 18 SE2d 271; *Lassen v Lassen*, 8 Va App 502, 383 SE2d 471.

Footnote 17. *Lynn v Lynn* (Dist Col App) 617 A2d 963; *Neal v Fisher*, 312 Md 685, 541

A2d 1314; Levit v Adams (Tex App Houston (1st Dist)) 841 SW2d 478, revd on other grounds, remanded (Tex) 850 SW2d 469, reh'g of cause overr (May 5, 1993); Re Estate of Friedli (App) 164 Wis 2d 178, 473 NW2d 604.

A judge may not use from the bench, under the guise of judicial knowledge, that which the judge knows only as an individual observer outside of the judicial proceedings. Vaughn v Shelby Williams of Tennessee, Inc. (Tenn) 813 SW2d 132.

Footnote 18. Vaughn v Shelby Williams of Tennessee, Inc. (Tenn) 813 SW2d 132 (it does not matter what is known to the judge personally if it is not known to the judge in her official capacity).

Footnote 19. Re Estate of Friedli (App) 164 Wis 2d 178, 473 NW2d 604.

Regarding the requirement of indisputability, see § 31.

Footnote 20. Vaughn v Shelby Williams of Tennessee, Inc. (Tenn) 813 SW2d 132.

Footnote 21. Matthews v State, 122 Idaho 801, 839 P2d 1215.

Footnote 22. Gamble v Price (App) 289 SC 538, 347 SE2d 131 (trial court took judicial notice of expert witness' infirmity for purpose of admitting expert's deposition).

Footnote 23. § 34.

Footnote 24. Levit v Adams (Tex App Houston (1st Dist)) 841 SW2d 478, revd on other grounds, remanded (Tex) 850 SW2d 469, reh'g of cause overr (May 5, 1993).

Footnote 25. Lassen v Lassen, 8 Va App 502, 383 SE2d 471.

Footnote 26. § 26.

(2). Procedural Issues [36-46]

§ 36 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At any stage of the proceedings, 27 under both federal 28 and state 29 law, a court may take judicial notice of an adjudicative fact which is a proper subject of such notice, 30 whether requested by a party or not. Courts may also take judicial notice of matters of common knowledge although not pleaded. 31

The burden of persuasion, where a court acts sua sponte to take judicial notice, rests upon the party who bears the burden of persuasion on the factual proposition which the noticed fact tends to establish. 32

Ordinarily, a party seeking to take advantage of judicial notice in the course of presenting evidence in the case should bring the matter it wants judicially noticed to the attention of the court so that if there is a ground upon which it may be contradicted or explained, the adverse party will be afforded an opportunity to do so. 33

Footnotes

Footnote 27. *Gibbes v Rose Hill Plantation Dev. Co.* (DC SC) 794 F Supp 1327; *David M.*, 29 Conn App 499, 615 A2d 1082; *Premier Bank v Daigle* (La App 3d Cir) 599 So 2d 503; *Thomas v Thomas*, 176 Mich App 90, 439 NW2d 270; *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363; *Granados v State* (Tex App Corpus Christi) 843 SW2d 736; *Eppenauer v Eppenauer* (Tex App El Paso) 831 SW2d 30; *Fine Foods, Inc. v Dahlin*, 147 Vt 599, 523 A2d 1228.

Footnote 28. FRE 201(c).

Footnote 29. *Premier Bank v Daigle* (La App 3d Cir) 599 So 2d 503; *Thomas v Thomas*, 176 Mich App 90, 439 NW2d 270; *Holtz v Babcock*, 143 Mont 341, 389 P2d 869, reh den 143 Mont 371, 390 P2d 801; *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363; *Granados v State* (Tex App Corpus Christi) 843 SW2d 736; *Eppenauer v Eppenauer* (Tex App El Paso) 831 SW2d 30.

Footnote 30. As to what adjudicative facts may be judicially noticed, see §§ 29 et seq.

Footnote 31. § 39.

Footnote 32. *Gibbes v Rose Hill Plantation Dev. Co.* (DC SC) 794 F Supp 1327.

Footnote 33. *David M.*, 29 Conn App 499, 615 A2d 1082.

Judicial notice is not judicial knowledge, and one having the burden of establishing a fact of which a court may take judicial notice is not, in consequence, relieved of the necessity of bringing the fact to the knowledge of the court. *Shapleigh v Mier*, 299 US 468, 81 L Ed 355, 57 S Ct 261, 113 ALR 253.

§ 37 Discretion of court

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts may not shut their minds to truths that all others can see and understand, 34 and are not at liberty to entirely disregard facts of general knowledge of which the courts are cognizant. 35 Moreover, in some jurisdictions statutes expressly require courts to take judicial notice of specified matters. 36 In the absence of a statute specifying matters of which judicial notice must be taken, it is discretionary with the trial court whether it will take judicial notice of well-established matters of fact. The court's rulings

usually depending upon the nature of the subject, the issue involved, the apparent justice, and the circumstances of the particular case. 37 In exercising this discretionary power, courts should proceed with great caution, 38 and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. 39 For example, to take judicial notice of a criminal investigation file which typically contains hearsay, rumors, conclusions and documents or photographs that may have an insufficient foundation to be admitted into evidence would probably be an abuse of discretion. 40 A court must take judicial notice of a fact where a party so requests and the court is supplied with the proper information, under both federal 41 and state 42 rules. A court may decline to take judicial notice of facts, even if the information is readily verifiable, when it is not supplied with the necessary information. 43

◆ Observation: In order to justify a reversal in a criminal action on the grounds that the court refused to take judicial notice of a particular fact, an accused must show: (1) the trial court abused its discretion by failing to take judicial notice of the fact; (2) he was prohibited by the trial court from establishing the fact by other competent evidence; and (3) because of its relevance to a material issue, the exclusion of the fact resulted in harm to the accused. 44

Footnotes

Footnote 34. *United States v Butler*, 297 US 1, 80 L Ed 477, 56 S Ct 312, 4 Ohio Ops 401, 36-1 USTC ¶ 9039, 16 AFTR 1289, 102 ALR 914; *State v Duranleau*, 99 NH 30, 104 A2d 519, 45 ALR2d 1166.

Footnote 35. *Jackie Cab Co. v Chicago Park Dist.*, 366 Ill 474, 9 NE2d 213, 112 ALR 1410.

Footnote 36. § 32.

Footnote 37. *Waters-Pierce Oil Co. v Deselms*, 212 US 159, 53 L Ed 453, 29 S Ct 270; *Henry v Butts* (Ala) 591 So 2d 849; *Settlers Village Community Improvement Assn. v Settlers Village 5.6, Ltd.* (Tex App Houston (14th Dist)) 828 SW2d 182; *Brough v Ute Stampede Ass'n*, 105 Utah 446, 142 P2d 670; *Randall v Commonwealth*, 183 Va 182, 31 SE2d 571.

Footnote 38. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *Wood v Astleford* (Minn App) 412 NW2d 753; *Gordon v Gordon* (Mo App) 739 SW2d 728, cert den 485 US 1034, 99 L Ed 2d 909, 108 S Ct 1594.

Footnote 39. *Wood v Astleford* (Minn App) 412 NW2d 753; *Gordon v Gordon* (Mo App) 739 SW2d 728, cert den 485 US 1034, 99 L Ed 2d 909, 108 S Ct 1594.

Footnote 40. *Wood v Astleford* (Minn App) 412 NW2d 753.

Footnote 41. FRE 201(d).

Footnote 42. *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363; *Eppenauer v Eppenauer* (Tex App El Paso) 831 SW2d 30.

Footnote 43. *Association against Discrimination in Employment, Inc. v City of Bridgeport* (CA2 Conn) 647 F2d 256, 25 BNA FEP Cas 1013, 25 CCH EPD ¶ 31714, cert den 455 US 988, 71 L Ed 2d 847, 102 S Ct 1611, 28 BNA FEP Cas 120, 28 CCH EPD ¶ 32465 and appeal after remand (CA2 Conn) 710 F2d 69, 32 BNA FEP Cas 20, 32 CCH EPD ¶ 33686, later proceeding (DC Conn) 572 F Supp 494, 38 BNA FEP Cas 1777, 32 CCH EPD ¶ 33939; *Clark v South Cent. Bell Tel. Co.* (WD La) 419 F Supp 697, 18 BNA FEP Cas 630; *Durbin v Bonanza Corp.* (Colo App) 716 P2d 1124; *Freson v Combs* (Ind App) 433 NE2d 55; *Holtz v Babcock*, 143 Mont 341, 389 P2d 869, reh den 143 Mont 371, 390 P2d 801; *Ringwood v Foreign Auto Works, Inc.* (Utah App) 786 P2d 1350, 125 Utah Adv Rep 45, review pending (Utah) 129 Utah Adv Rep 58 and cert den (Utah) 135 Utah Adv Rep 78 and cert den (Utah) 795 P2d 1138; *Bear River Mut. Ins. Co. v Wright* (Utah App) 770 P2d 1019, 104 Utah Adv Rep 41.

Footnote 44. *James v State* (Tex Crim) 546 SW2d 306.

§ 38 Opportunity to be heard

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Procedural protection is provided for a party who would be adversely affected by judicial notice of an adjudicative fact. If a timely request is made, a party must be given an opportunity to challenge the propriety of taking judicial notice and the tenor of the matter noticed under both the Federal Rules of Evidence 45 and corresponding state statutes. 46 To afford this opportunity, the court should, on the record, in advance of taking notice, identify the fact it contemplates noticing, and its justification for doing so. 47 Normally such opportunity would come before a court decides to take judicial notice, but in the absence of prior notification, the request may be made after judicial notice has been taken. 48 The latter situation is likely to arise only when a court takes judicial notice sua sponte. 49 A state court may also require that a party affected by a court's taking judicial notice of a fact be entitled to an opportunity to be heard, 50 and that when a court finds it appropriate to take judicial notice of a matter, fundamental fairness dictates that it should provide the parties with advance notice of its intentions. 51

◆ **Caution:** The failure to specifically object to a court taking judicial notice may constitute a waiver of the objection. 52 Some state courts go further, providing that a trial court must conduct a hearing on the propriety of taking judicial notice and the scope of the matter to be noticed when a party seeking to have a fact judicially noticed faces a challenge from the opposing party. 53 Furthermore, a court should not take judicial notice at a hearing at which parties are not represented by counsel. Normally, the taking of judicial notice under these circumstances violates the due process rights of the parties. 54

Since a court may take judicial notice at any stage of the proceedings, 55 a court may take judicial notice of a fact after the close of evidence and this does not preclude a party's opportunity to be heard on the matter because once the party receives the trial court's order, the party can make a timely request for an opportunity to be heard on the matter. 56

Footnotes

Footnote 45. FRE 201(e).

Footnote 46. *Bonifay v Garner* (Fla App D1) 503 So 2d 389, 12 FLW 567 (each holding it improper for judge to judicially notice facts without affording parties notice and opportunity to be heard); *Rodriguez v Philip* (Fla App D3) 413 So 2d 441.

Footnote 47. *United States v Mentz* (CA6 Ohio) 840 F2d 315, 24 Fed Rules Evid Serv 1154.

Footnote 48. FRE 201(e).

Footnote 49. *Siderius, Inc. v M.V. "Amilla"* (CA2 NY) 880 F2d 662, 1989 AMC 2533, 28 Fed Rules Evid Serv 339.

Although when a court acts sua sponte to take judicial notice the burden of persuasion rests upon the party who bears the burden of persuasion on the factual proposition which the noticed fact tends to establish, procedural fairness demands an opportunity to be heard on a propriety of taking judicial notice. *Gibbes v Rose Hill Plantation Dev. Co.* (DC SC) 794 F Supp 1327.

Footnote 50. *Enroth v Memorial Hosp. at Gulfport* (Miss) 566 So 2d 202.

Footnote 51. *Chasalow v Board of Assessors* (2d Dept) 176 App Div 2d 800, 575 NYS2d 129.

Footnote 52. *Rice v James* (Mo App) 844 SW2d 64.

Footnote 53. *Browning v State* (Okla App) 812 P2d 1372 (no matter put in issue by the pleadings can be considered undisputed for purposes of judicial notice; because the trial court did not require evidence of the disputed rules and regulation it had not basis for determining exactly what it was judicially noticing).

Footnote 54. *Re D.S.*, 253 Mont 484, 833 P2d 1090.

Footnote 55. § 36.

Footnote 56. *Fine Foods, Inc. v Dahlin*, 147 Vt 599, 523 A2d 1228.

§ 39 Effect of pleadings

<p>View Entire Section Go to Parallel Reference Table</p>

The courts are in disagreement over whether a party must present, in her pleadings,

matters she seeks to have judicially noticed. Some courts state that matters of which judicial notice may be taken need not be stated in the pleadings; the court will consider such matters although not pleaded. 57 In federal courts, a party is not required to plead matters which he wishes to have judicially noticed. 58 These jurisdictions also provide that judicial notice will be taken of well-established matters of common knowledge even though the pleadings contain allegations to the contrary, 59 and that pleadings, both civil and criminal, must be read in the light of facts of which the court takes judicial notice. 60 When facts alleged are out of harmony or inconsistent with, or contrary to, facts of which courts take judicial notice, the facts alleged will be disregarded. 61

Other courts apply a different rule, stating that the doctrine of judicial notice does not obviate the necessity for the proper framing of issues, whether of fact or of law, and facts cannot be proven by evidence or established by judicial notice until and unless they are properly pleaded. 62 Consequently, a trial court properly refuses to take judicial notice of federal regulations presented by a party in support of its contract claims when all the party alleges is that the guidelines were violated but does not argue how this violation violated any of the terms of the contract at issue. 63

A third approach is that a trial court is not precluded from judicially noticing a statute or regulation of another jurisdiction on the basis that it has not been pleaded, although a party seeking to recover on the ground of negligence per se must plead a statutory violation. 64

The use of judicial notice at the pleading stage should be severely limited. 65 Furthermore, no matter put in issue by the pleadings can be considered undisputed for purposes of judicial notice. 66 A court may, however, properly take notice of the rules of the United States Supreme Court at the pleading stage. 67

Footnotes

Footnote 57. *Dillard v McKnight*, 34 Cal 2d 209, 209 P2d 387, 11 ALR2d 835; *State v Heston*, 137 W Va 375, 71 SE2d 481.

As to the necessity of pleading or notice under the Uniform Judicial Notice of Foreign Law Act, see § 109.

Footnote 58. § 36.

Footnote 59. *Gordon's Transports, Inc. v Bailey*, 41 Tenn App 365, 294 SW2d 313.

Footnote 60. *United States v Lamont* (CA2 NY) 236 F2d 312.

Footnote 61. *Young v Boy Scouts of America*, 9 Cal App 2d 760, 51 P2d 191; *Morrow v Cleveland* (Cuyahoga Co) 73 Ohio App 460, 29 Ohio Ops 136, 40 Ohio L Abs 622, 56 NE2d 333; *State v Heston*, 137 W Va 375, 71 SE2d 481.

Footnote 62. *Atlantic Richfield Co. v Canaan Oil Co.*, 202 Conn 234, 520 A2d 1008.

Footnote 63. *Atlantic Richfield Co. v Canaan Oil Co.*, 202 Conn 234, 520 A2d 1008.

Footnote 64. Daugherty v Southern Pacific Transp. Co. (Tex) 772 SW2d 81, 14 BNA OSHC 1089.

Footnote 65. Johnston v Lehman, 148 Pa Cmwlt 98, 609 A2d 880.

Footnote 66. Browning v State (Okla App) 812 P2d 1372.

Footnote 67. Johnston v Lehman, 148 Pa Cmwlt 98, 609 A2d 880.

§ 40 Discovery motions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a movant challenges a party's right to discover particular information, the issue, in jurisdictions with liberal rules, is whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 68 A judge may judicially notice information in making this assessment that could not properly be noticed as adjudicative fact at trial. 69 For example, while a court may take judicial notice of the physical record in a prior suit before the same court, when determining if an action before the court complies with the applicable renewal statute, the court is precluded from according judicial notice to admissions made in the prior case. 70

Footnotes

Footnote 68. FR Civ P, Rule 26(b)(1), discussed generally in 23 Am Jur 2d, Depositions and Discovery §§ 21-24.

Footnote 69. Marshall v Bramer (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017.

Footnote 70. Mumford v Davis, 206 Ga App 148, 424 SE2d 306, 92 Fulton County D R 2461, cert den (Ga) 1993 Ga LEXIS 157.

§ 41 Summary judgment and similar motions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In deciding a motion for summary judgment, a federal district court may, sua sponte, take judicial notice of adjudicative facts 71 pursuant to the Federal Rules of Evidence. 72 If, however, a party disputes the fact in question, it is generally improper for the court to

notice it; 73 judicial notice is proper only if the fact is not subject to reasonable dispute 74 For example, a court may not take judicial notice, in considering a motion for summary judgment, of events occurring at a prior hearing where the parties do not agree what happened and the hearing was not recorded. 75 In addition, the adversely affected party must have an opportunity to oppose judicial notice of the fact. 76

In both state and federal courts, even when an adjudicative fact is judicially noticeable, it may be improper to accept as conclusive a second fact that is inferred from the noticed fact. 77

Where the issue before the court is primarily one of policy rather than fact, however, judicial notice is more likely to involve legislative rather than adjudicative facts, and the restrictions that govern the latter do not apply. 78

The same dichotomy—adjudicative versus nonadjudicative fact 79 —governs the propriety of judicial notice in determining whether the court has jurisdiction to hear the suit. Adjudicative facts may be noted only if Rule 201 or comparable standards are satisfied, whether the issue focuses on geographic jurisdiction 80 or subject-matter jurisdiction. 81 Where the question is one of policy mixed with fact, however, a court may exercise its much broader discretion to notice legislative facts. 82

Footnotes

Footnote 71. *Gonzales v Lake County* (ND Ind) 800 F Supp 676, revd on other grounds, remanded (CA7 Ind) 4 F3d 1412.

Footnote 72. FRE 201.

Footnote 73. *Oneida Indian Nation v New York* (CA2 NY) 691 F2d 1070, 11 Fed Rules Evid Serv 1002, 65 ALR Fed 606; *Cardio-Medical Assoc., Ltd. v Crozer-Chester Medical Center* (CA3 Pa) 721 F2d 68, 1983-2 CCH Trade Cases ¶ 65716, 14 Fed Rules Evid Serv 1231; *Aberbach v Wekiva Assoc., Ltd.* (SD Fla) 735 F Supp 1032, CCH Fed Secur L Rep ¶ 95373.

Footnote 74. § 31.

Footnote 75. *Levit v Adams* (Tex App Houston (1st Dist)) 841 SW2d 478, revd on other grounds, remanded (Tex) 850 SW2d 469, reh'g of cause overr (May 5, 1993).

Footnote 76. § 38.

Footnote 77. *Marshall v Bramer* (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017 (the judicially noticed fact of the Klan's policy of violence against African Americans, without more, would not suffice to permit an inference that the defendant was involved in firebombing the plaintiff's home); *Cruz v County of Los Angeles* (2nd Dist) 173 Cal App 3d 1131, 219 Cal Rptr 661 (the court took judicial notice of the defendant county's practices in mailing rejection notices, but refused to judicially notice the inference, urged by the county, that that practice was actually followed in the instant case).

Footnote 78. *City of Oceanside v McKenna* (4th Dist) 215 Cal App 3d 1420, 264 Cal Rptr 275, review den.

Footnote 79. §§ 29, 30.

Footnote 80. Concerning judicial notice of jurisdiction and venue, see § 80.

Regarding geography and venue generally, see §§ 75-82.

Footnote 81. *Cardio-Medical Assoc., Ltd. v Crozer-Chester Medical Center* (CA3 Pa) 721 F2d 68, 1983-2 CCH Trade Cases ¶ 65716, 14 Fed Rules Evid Serv 1231.

Footnote 82. *Bulova Watch Co. v K. Hattori & Co.* (ED NY) 508 F Supp 1322, 8 Fed Rules Evid Serv 384 (nature of Japanese-based multinational corporation and its relationship to its American subsidiaries).

§ 42 Jury instructions; conclusory effect of judicially noticed matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence provide that in a civil action or proceeding, the court must instruct the jury to accept as conclusive any fact judicially noticed. 83 A state's rules of evidence may provide that a court must instruct the jury to accept as conclusive any fact judicially noticed, 84 that once judicially noticed, an undisputed fact becomes a matter of law. 85

The vast majority of American jurisdictions have rejected the approach that judicial notice ought to operate as a powerful but rebuttable presumption, but it still prevails in a few states that have not adopted the Federal Rules of Evidence. 86 The reasoning behind this opposing view is that judicial notice meets the objective of establishing facts to which the offered evidence would normally be directed, and that consequently, judicial notice relieves a party only of having to offer proof on the matter, it does not constitute conclusive proof of the matter nor is the opposing party prevented from offering evidence disputing the matter established by judicial notice. 87

Footnotes

Footnote 83. FRE 201(g).

Footnote 84. *Gronneberg v Hoffart* (ND) 466 NW2d 809.

Footnote 85. *Langdale v Villamil* (Tex App Houston (14th Dist)) 813 SW2d 187.

Footnote 86. *Re Mark C.*, 28 Conn App 247, 610 A2d 181, app den 223 Conn 922, 614 A2d 823; *In Interest of Johnson* (4th Dist) 134 Ill App 3d 365, 89 Ill Dec 335, 480 NE2d

520; Kunc v Breen (Mo App) 671 SW2d 23 (the rule is consistently followed in Missouri that judicial notice is never conclusive and that notice is taken subject to refutation).

Annotation: Reception of evidence to contradict or rebut matters judicially noticed, 45 ALR2d 1169.

Footnote 87. Re Mark C., 28 Conn App 247, 610 A2d 181, app den 223 Conn 922, 614 A2d 823.

§ 43 --Criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is a division of opinion as to whether a judge should instruct a criminal jury that it must accept a judicially noticed fact as conclusive, or whether a criminal jury should be told that it can reject the noticed fact. The Federal Rules of Evidence provide that in a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. 88 In contrast, the Uniform Rules of Evidence provide that a court must instruct the jury to accept any fact judicially noticed as conclusive. 89 Some states follow the Uniform Rules instruction regarding the conclusiveness of judicial notice in a criminal case, 90 while other states follow the federal lead in requiring a permissive, rather than a conclusive, jury instruction. 91

Footnotes

Footnote 88. FRE 201(g).

Annotation: Reception of evidence to contradict or rebut matters judicially noticed, 45 ALR2d 1169.

Effect of Rule 201(g) of the Federal Rules of Evidence, providing for instruction in criminal case that jury need not accept as conclusive fact judicially noticed, on propriety of taking judicial notice on appeal under Rule 201(f), 49 ALR Fed 911.

What constitutes "adjudicative facts" within meaning of Rule 201 of Federal Rules of Evidence, concerning judicial notice of adjudicative facts, 35 ALR Fed 440.

Footnote 89. Uniform Rules of Evidence, Rule 201(g).

Footnote 90. First Nat. Bank v Jarnigan (Tex App Amarillo) 794 SW2d 54, writ den (Dec 12, 1990) and reh of writ of error overr (Feb 6, 1991).

Footnote 91. State v Vejvoda (1989) 231 Neb 668, 438 nw2d 461.

§ 44 Notice taken postverdict or on appeal

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judicially noticeable fact 92 may be noticed for the first time postverdict or by an appellate court, 93 and the Federal Rules of Evidence provide that judicial notice may be taken at any stage of the proceedings. 94 Some state courts also allow a party to request judicial notice at any stage of a proceeding. 95

There are no inherent restrictions on an appellate court's authority to take original judicial notice of a noticeable adjudicative fact, 96 so long as all parties are afforded an opportunity to be heard on the propriety of judicial notice. 97 Judicial notice cannot be used, however, to bring new issues into the case on appeal. 98 An appellate court's decision whether to take judicial notice of the record in a prior proceeding is entirely a matter of discretion. A rule providing that a court must take judicial notice if requested by a party and supplied with the necessary information is limited to the trial courts. 99

Appellate courts notice, and rely upon, adjudicative facts to establish appellate jurisdiction to hear an appeal, 1 to affirm 2 or to reverse 3 a ruling below, and even to initiate, sua sponte, a new proceeding. 4

A court is not obliged, on the other hand, to judicially notice information which a party should have but neglected to include in the record below. 5 Therefore, although an appellate court may take judicial notice for the first time on appeal of facts which the trial court would have been authorized to notice, an appellate court is reluctant to take judicial notice when the trial court was not requested to do so and was not given the opportunity to examine the source material. 6 This rule prevents the unfairness that would flow from permitting one side to press an issue or theory on appeal that was not raised below. 7 An appellate court may, however, take judicial notice of factual matters not previously presented to the trial court when the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy. 8 In addition, a reviewing court may take judicial notice of events or facts which, while not appearing in the record, disclose that an issue has been mooted. 9 It is, however, inappropriate to supply an essential element of proof by taking judicial notice of the fact of the appellate level even though a trial judge could have taken judicial notice of the fact at trial. 10

In other jurisdictions, an appellate court, in reviewing the proceedings in a trial court, is limited to the record that it is before it on appeal and may take judicial notice only of facts that could have been properly judicially noticed by the trial judge, facts that are necessary to determine whether the appellate court has jurisdiction of the appeal, and whether the appellant has taken a proper step to have the record timely and properly filed. 11

Other courts will not take judicial notice of any matters not considered by the trial court. 12

A court may take judicial notice that a party's appeal has been timely filed when the court

obtained the standard file copy of the notice of appeal from the appropriate clerk's office which indicates that the appeal was timely filed. 13

Footnotes

Footnote 92. *Hinton v Department of Justice* (CA3 Pa) 844 F2d 126, 25 Fed Rules Evid Serv 830 (refusing to take judicial notice of FBI agent's affidavit predicting the time and expense involved in complying with lower court's Freedom of Information Act order, since the affidavit satisfied neither prong of Rule 201(b)); *United States v Judge* (CA5 Tex) 846 F2d 274, 25 Fed Rules Evid Serv 911, appeal after remand (CA5 Tex) 864 F2d 1144, reh den, en banc (CA5 Tex) 868 F2d 1271 and cert den 495 US 918, 109 L Ed 2d 309, 110 S Ct 1946 (refusing to judicially notice Drug Enforcement Administration regulations because, among other reasons, it would be unfair procedurally to do so); *Prestige Homes, Inc. v Legouffe* (Colo) 658 P2d 850, appeal after remand (Colo App) 689 P2d 697 (all supporting the proposition that an appellate court should take original judicial notice of an adjudicative fact only if the fact is properly noticeable)..

As to what adjudicative facts may be judicially noticed, see §§ 31 et seq.

Footnote 93. *Premier Bank v Daigle* (La App 3d Cir) 599 So 2d 503.

Footnote 94. § 36.

Footnote 95. § 36.

Footnote 96. *Langdale v Villamil* (Tex App Houston (14th Dist)) 813 SW2d 187 (an appellate court may unquestionably take notice of facts not noticed by a trial court, and an appellate court may take judicial notice of whether an attorney holds a license to practice law in the state).

Judicial notice may be taken at the appellate level as well as at the trial level. *West v Searle & Co.*, 305 Ark 33, 806 SW2d 608, CCH Prod Liab Rep ¶ 12783.

Footnote 97. § 38.

Footnote 98. *Mutual Life Ins. Co. v McGrew*, 188 US 291, 47 L Ed 480, 23 S Ct 375; *Mountain View Mining & Milling Co. v McFadden*, 180 US 533, 45 L Ed 656, 21 S Ct 488; *State ex rel. Libtz v Coleman*, 149 Fla 28, 5 So 2d 60; *Knight v Pang*, 32 Wash 2d 217, 201 P2d 198.

Footnote 99. *Mel Trimble Real Estate v Monte Vista Ranch, Inc.* (Utah App) 758 P2d 451, 86 Utah Adv Rep 29, cert den (Utah) 769 P2d 819, 98 Utah Adv Rep 3 (where the issue of judicial notice is raised for the first time on appeal, the appellate court is faced with a conflict between the policy that decisions ought not to run contrary to indisputable facts and the procedural policy that prohibits a party from raising issues on appeal that were not raised below).

Footnote 1. *Fields v A & B Electronics* (Okla) 788 P2d 940 (superseded by statute on other grounds as stated in *Re Estate of Dalzell* (Okla App) 813 P2d 537) (taking judicial notice that on what would have been appellant's last day to file an appeal, its clerk's

office had closed before 4 p.m. due to heavy snow, thereby extending time for perfecting appeal).

Footnote 2. *Coney v Smith* (CA11 Fla) 738 F2d 1199; *Fontana v Fontana* (La App 2d Cir) 426 So 2d 351, cert den (La) 433 So 2d 150; *Cedars Corp. v Sun Valley Dev. Co.*, 213 Neb 622, 330 NW2d 900 (taking judicial notice of the record in a prior action as the basis for a res judicata dismissal).

Footnote 3. *Colonial Penn Ins. Co. v Coil* (CA4 SC) 887 F2d 1236, 29 Fed Rules Evid Serv 521, 15 FR Serv 3d 336; *Miceli v Industrial Com. of Arizona* (1983) 135 Ariz 71, 659 P2d 30; *Fields v A & B Electronics* (Okla) 788 P2d 940 (superseded by statute on other grounds as stated in *Re Estate of Dalzell* (Okla App) 813 P2d 537).

Footnote 4. *Green v Warden, U.S. Penitentiary* (CA7 Ind) 699 F2d 364, 12 Fed Rules Evid Serv 1078, cert den 461 US 960, 77 L Ed 2d 1321, 103 S Ct 2436.

Footnote 5. *Kennedy v Edgar* (4th Dist) 199 Ill App 3d 138, 145 Ill Dec 212, 556 NE2d 830.

Footnote 6. *People v Hardy*, 2 Cal 4th 86, 5 Cal Rptr 2d 796, 825 P2d 781, 92 CDOS 2166, 92 Daily Journal DAR 3841, mod on other grounds 2 Cal 4th 758a, 92 CDOS 4144, 92 Daily Journal DAR 6554, cert den (US) 121 L Ed 2d 435, 113 S Ct 498 and reh den (May 14, 1992) and cert den (US) 122 L Ed 2d 139, 113 S Ct 987; *Hollingsworth v King* (Tex App Amarillo) 810 SW2d 772, reh overr (Tex App Amarillo) 1991 Tex App LEXIS 1591 and writ den (Tex) 816 SW2d 340 and reh of writ of error overr (Oct 30, 1991).

Footnote 7. *People v Hardy*, 2 Cal 4th 86, 5 Cal Rptr 2d 796, 825 P2d 781, 92 CDOS 2166, 92 Daily Journal DAR 3841, mod on other grounds 2 Cal 4th 758a, 92 CDOS 4144, 92 Daily Journal DAR 6554, cert den (US) 121 L Ed 2d 435, 113 S Ct 498 and reh den (May 14, 1992) and cert den (US) 122 L Ed 2d 139, 113 S Ct 987.

Footnote 8. *Wehde v Regional Transp. Authority* (2d Dist) 237 Ill App 3d 664, 178 Ill Dec 190, 604 NE2d 446, app den 149 Ill 2d 662, 183 Ill Dec 873, 612 NE2d 525.

Footnote 9. *Dixon v Chicago & North Western Transp. Co.*, 151 Ill 2d 108, 176 Ill Dec 6, 601 NE2d 704, CCH Prod Liab Rep ¶ 13318; *Gray v Jackson* (Mo App) 773 SW2d 202.

Footnote 10. *Commonwealth v Whelan*, 408 Mass 29, 556 NE2d 389.

Footnote 11. *Centex Corp. v Dalton* (Tex App San Antonio) 810 SW2d 812, writ granted (Tex) 34 Tex Sup Ct Jour 824 and revd on other grounds 840 SW2d 952, reh of cause overr (Dec 16, 1992).

An appellate court may take judicial notice of its own records in litigation interconnected with an appeal before it. The court cannot, however, notice material which, though available for notice by the trial court, has not been incorporated into the record on appeal. *Reeves v Agee* (Okla) 769 P2d 745.

Footnote 12. *In re George Trust*, 253 Mont 341, 834 P2d 1378; *Commonwealth v Kittelberger*, 420 Pa Super 104, 616 A2d 1.

An appellate court may take judicial notice of a fact to the same extent as a trial court. An appellate court may not, however, take judicial notice of a fact that was not offered into evidence at the factfinding level. *Patrick Media Group, Inc. v Pennsylvania DOT*, 142 Pa Cmwlth 359, 597 A2d 274, app gr 529 Pa 652, 602 A2d 862 and revd on other grounds 533 Pa 188, 620 A2d 1125.

Footnote 13. *Helms v Young-Woodard*, 104 NC App 746, 411 SE2d 184, app dismd, review den 331 NC 117, 414 SE2d 756 and cert den (US) 121 L Ed 2d 53, 113 S Ct 91.

§ 45 --Criminal appeals

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In criminal cases, the Federal Rules of Evidence and corresponding state statutes direct that the jury be told that it need not accept a judicially noticed fact as conclusive. 14 This raises the question of whether an appellate court is precluded from taking judicial notice of an adjudicative fact in considering an appeal of a criminal conviction where no request to take such notice was made during the jury trial. The federal rule providing that, in a criminal case, the court must instruct the jury that it may, but is not required to accept the judicially noticed fact as conclusive 15 has been interpreted as precluding an appellate court from judicially noticing an adjudicative fact that the jury had not been given the opportunity to reject. 16 Where sufficient evidence has been adduced at trial, an appellate court can take judicial notice of adjudicative facts to reassure itself that the verdict below was factually correct. 17 Moreover, it in no way violates the policies underlying the federal rule for an appellate court to take judicial notice of adjudicative facts on procedural trial issues 18 or post-trial litigation unconnected to guilt or innocence. 19 In addition, an appellate court should be free to take judicial notice of an adjudicative fact that benefits a defendant who is appealing a conviction. 20

Footnotes

Footnote 14. § 43.

Footnote 15. § 42.

Footnote 16. *United States v Jones* (CA6 Tenn) 580 F2d 219, 3 Fed Rules Evid Serv 386, 49 ALR Fed 904.

Footnote 17. *United States v Rivero* (CA5 Fla) 532 F2d 450, appeal after remand (CA5 Fla) 554 F2d 213.

Regarding appellate judicial notice of adjudicative facts, generally, see §§ 44 et seq.

Footnote 18. *United States v Hawkins* (CA5 Miss) 566 F2d 1006, 2 Fed Rules Evid Serv 948, reh den (CA5 Miss) 569 F2d 1155 and cert den 439 US 848, 58 L Ed 2d 151, 99 S Ct 150 (judicially noticing random jury selection plan adopted by the Southern District of

Mississippi in assessing defendant's attack on the venire from which his jury had been selected).

Footnote 19. *McRae v Hogan* (CA5 Ga) 576 F2d 615 (prisoner's challenge to administrative order transferring him to another facility).

Footnote 20. *Massachusetts v Westcott*, 431 US 322, 52 L Ed 2d 349, 97 S Ct 1755, 1 Fed Rules Evid Serv 1025 (in considering the defendant's claim that federal legislation and regulations preempted the state's right to prosecute, the Court took judicial notice of records of the Merchant Vessel Documentation Division of the United States Coast Guard).

§ 46 --Postverdict events

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An appellate court may judicially notice an event that occurred after judgment was entered below if the facts noticed provide a basis to dismiss the case, 21 but this is appropriate only if the noticed fact unequivocally justifies such a result. 22

Subsequent events that are not properly a part of the record on appeal should not be noticed, however, to expand the scope of review of matters which were disputed at the trial, 23 except in extraordinary circumstances. 24

Footnotes

Footnote 21. *Melvin v Nickolopoulos* (CA3 NJ) 864 F2d 301 (recognizing rule but declining to apply it where factual basis for judicial notice was lacking); *Bluthardt v Breslin*, 74 Ill 2d 246, 24 Ill Dec 151, 384 NE2d 1309; *Re Marriage of Holder* (5th Dist) 137 Ill App 3d 596, 91 Ill Dec 926, 484 NE2d 485 (recognizing rule but refusing to apply it); *South Stickney Park Dist. v Bedford Park* (1st Dist) 131 Ill App 3d 205, 86 Ill Dec 402, 475 NE2d 616 (appellate court took judicial notice of ordinances, passed four months after the trial court's action, which rendered appellate issues moot).

Footnote 22. *Melvin v Nickolopoulos* (CA3 NJ) 864 F2d 301.

Footnote 23. *Re Marriage of Holder* (5th Dist) 137 Ill App 3d 596, 91 Ill Dec 926, 484 NE2d 485.

To permit a party to appeal a decision on a basis completely different from that presented below would render the lower court decision superfluous; appellate notice of facts unavailable at the time of trial would be inconsistent with the appellate function of the court. *State v McCarthy*, 197 Conn 247, 496 A2d 513, habeas corpus proceeding (DC Conn) 683 F Supp 880.

Footnote 24. *Colonial Penn Ins. Co. v Coil* (CA4 SC) 887 F2d 1236, 29 Fed Rules Evid

B. Specific Matters Judicially Noticed [47-154]

Research References

ALR Digests: Evidence §§ 21-90

ALR Index: Judicial Notice

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 1-7

2 Am Jur Trials 1, Investigating Particular Civil Actions § 53; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence § 70; 18 Am Jur Trials 443, Unwitnessed Automobile Accident Cases

Am Jur Proof of Facts Fact Book §§ I:176-I:178

21 Am Jur POF2d 1, Law of Foreign Jurisdiction §§ 4-7, 16; 26 Am Jur POF2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade § 9

1. Occupational and Business Facts [47-53]

§ 47 Business and professional customs and practices, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, the courts take judicial notice of commercial usages and customs which are well established and commonly known, 25 and to the manner and methods in which business is conducted. 26 For example, the ownership, operation, and status of a facility such as a hospital are matters, the factual components of which may be judicially noticed. 27

Courts have also taken, or refused to take, judicial notice of facts, customs and usages relating to a wide variety of other businesses, trades, occupations and professions, including agriculture; 28 brokers; 29 cemeteries; 30 charities; 31 drug stores; 32 education; 33 entertainment; 34 the garment industry; 35 the health care industry; 36 labor unions 37 and labor practices; 38 marketing and sales in general; 39 night clubs, restaurants and the like; 40 the sale and transfer of real estate and real estate in general, 41 and transportation. 42

So commonplace has become the consumer practice of buying merchandise on credit and paying for it later on the installment plan, that judicial notice may be taken of the practice. 43 Furthermore, a court may take judicial notice of the belief and usage among merchants that the party entitled to sign and deliver money order issued by a bank is authorized to bind the bank's credit to the limit expressed in the money order and, within that limit and relying on it, merchants deliver goods and render services. 44

§ 47 ----Business and professional customs and practices, generally

[SUPPLEMENT]

Case authorities:

Fact of bank's FDIC insured status was not subject to reasonable dispute; therefore, district court did not err by taking judicial notice of it. *United States v Chapel* (1994, CA9 Cal) 41 F3d 1338, 94 CDOS 9414, 94 Daily Journal DAR 17412.

Footnotes

Footnote 25. *Galveston Electric Co. v Galveston*, 258 US 388, 66 L Ed 678, 42 S Ct 351, 3 AFTR 3138; *United States v Ferger*, 250 US 199, 63 L Ed 936, 39 S Ct 445; *Lawson v Ridgeway*, 72 Ariz 253, 233 P2d 459, 29 ALR2d 518; *Marquardt v Cernocky* (2d Dist) 18 Ill App 2d 135, 151 NE2d 109, 67 ALR2d 956; *Elizabethtown Lincoln Mercury, Inc. v Jones*, 313 Ky 321, 231 SW2d 42.

Footnote 26. *McDonald v Chemical Nat. Bank*, 174 US 610, 43 L Ed 1106, 19 S Ct 787; *Nicol v Ames*, 173 US 509, 43 L Ed 786, 19 S Ct 522, 3 AFTR 2661; *Smith v Bear* (CA2 NY) 237 F2d 79, 60 ALR2d 1119; *Ocean Acci. & Guaranty Corp. v Rubin* (CA9 Cal) 73 F2d 157, 96 ALR 412; *Meyerson v Hurlbut*, 68 App DC 360, 98 F2d 232, 118 ALR 313, cert den 305 US 610, 83 L Ed 388, 59 S Ct 69; *Stockton Dry Goods Co. v Girsh*, 36 Cal 2d 677, 227 P2d 1, 22 ALR2d 1460.

Practice References 35 Am Jur POF2d 589, Routine Business Practice.

Footnote 27. *Enroth v Memorial Hosp. at Gulfport* (Miss) 566 So 2d 202.

Footnote 28. *Weber v Madison* (Iowa) 251 NW2d 523 (judicial notice taken that poultry production now dominated by big business).

The trial judge erred in taking judicial notice that maintaining a race horse and regular participation in commercial racing is a part of "farming" in Vermont. *Martin v Shepard*, 134 Vt 491, 365 A2d 971, 93 ALR3d 466

Regarding judicial notice of economic matters relating to agriculture, see § 69.

Footnote 29. *Lawrence v Commodity Futures Trading Com.* (CA9) 759 F2d 767 (commodity broker's associate's claim that a three-month suspension would cause him to lose customers and income is not an appropriate matter for judicial notice).

The New York Stock Exchange and National Association of Securities Dealers have essentially identical arbitration codes. *Parr v Superior Court* (1st Dist) 139 Cal App 3d 440, 188 Cal Rptr 801 (taking judicial notice of substantial similarity).

Footnote 30. *Jones v Trawick* (Fla) 75 So 2d 785, 50 ALR2d 1319 (a lot adjoining a cemetery is not as saleable as one not adjoining a cemetery).

Footnote 31. *Memorial Hospital Asso. v Pacific Grape Products Co.*, 45 Cal 2d 634, 290 P2d 481, 50 ALR2d 442.

Efforts by a nonprofit housing corporation to provide low rental housing for elderly persons on fixed incomes is a charitable activity intended to address a compelling social problem. *Waterbury First Church Housing, Inc. v Brown*, 170 Conn 556, 367 A2d 1386.

Footnote 32. *Winter Park Appliance Center, Inc. v Walling Crate Co.* (Fla App D2) 196 So 2d 198 (both concluding that it is common knowledge that most drugstores are engaged in a wide field of merchandising having no connection with drugs); *Loblaw, Inc. v New York State Board of Pharmacy*, 11 NY2d 102, 226 NYS2d 681, 181 NE2d 621, 98 ALR2d 1055.

Footnote 33. *Caulfield v Board of Education* (ED NY) 486 F Supp 862, 24 BNA FEP Cas 1418, 21 CCH EPD ¶ 30389, *affd* (CA2 NY) 632 F2d 999, 26 BNA FEP Cas 553, 24 CCH EPD ¶ 31270, *cert den* 450 US 1030, 68 L Ed 2d 225, 101 S Ct 1739, 28 BNA FEP Cas 117, 25 CCH EPD ¶ 31623 (court took judicial notice that historically, a large percentage of public school teachers in New York City, particularly in the lower grades, have been women); *Alex v Allen* (WD Pa) 409 F Supp 379, 21 FR Serv 2d 739 (court took judicial notice of the magnitude of disciplinary problems in public schools); *Crawley v Board of Education* (CA6 Ky) 658 F2d 450 (high school principal is part of the teaching profession even if or she does not teach a class, hence, under state law, the principal is entitled to a hearing before being transferred to a nonteaching position); *Trustees of Columbia University v Orangetown*, 93 Misc 2d 261, 402 NYS2d 899, *affd* (2d Dept) 60 App Div 2d 582, 399 NYS2d 708; *Greenhill v Carpenter* (Tenn App) 718 SW2d 268 (athletic programs have become an integral part of the educational process in colleges and universities throughout this country).

Footnote 34. *Gee v CBS, Inc.* (ED Pa) 471 F Supp 600, 202 USPQ 486, *affd without op* (CA3 Pa) 612 F2d 572 (taking judicial notice that information, contained in the Schwann Record Catalog, that a particular record is available for sale is authoritative); *Twentieth Century-Fox Film Corp. v Lardner* (CA9 Cal) 216 F2d 844, 51 ALR2d 728, *cert den* 348 US 944, 99 L Ed 739, 75 S Ct 365, *reh den* 348 US 965, 99 L Ed 753, 75 S Ct 522 (court refused to take judicial notice of manager's supposed authority to waive "good conduct" clause in contract).

Footnote 35. *D. A. Schulte, Inc. v Gangi*, 328 US 108, 90 L Ed 1114, 66 S Ct 925, 11 CCH LC ¶ 51230, 167 ALR 208 (New York City produces more garments for interstate shipment than any other city).

Footnote 36. *Matchett v Superior Court of Yuba County* (3rd Dist) 40 Cal App 3d 623, 115 Cal Rptr 317 (court took judicial notice of nationwide, generally accepted standards describing the organization and functions of medical staffs and medical staff committees in accredited hospitals); *Re Will of Cromartie*, 64 NC App 115, 306 SE2d 853 (because of the demands of other responsibilities, doctors often delay making entries onto patients' records that require dictation and transcription); *Shaker Medical Center Hospital v Phillips*, 54 Ohio Misc 21, 8 Ohio Ops 3d 338, 376 NE2d 983.

Footnote 37. *First Nat. Maintenance Corp. v NLRB*, 452 US 666, 69 L Ed 2d 318, 101 S Ct 2573, 107 BNA LRRM 2705, 91 CCH LC ¶ 12805; *McNamara Constr. of Manitoba, Ltd. v United States*, 206 Ct Cl 1, 509 F2d 1166, 20 CCF ¶ 83644; *Norwalk Teachers' Ass'n v Board of Education*, 138 Conn 269, 83 A2d 482, 28 BNA LRRM 2408, 20 CCH LC ¶ 66543, 31 ALR2d 1133; *Jacobs v Board of Education* (2d Dept) 64 App Div 2d 148, 409 NYS2d 234, 100 BNA LRRM 2463; *Hagerman v Dayton*, 147 Ohio St 313, 34 Ohio Ops 238, 71 NE2d 246, 170 ALR 199 (superseded by statute on other

grounds as stated in *State ex rel. Ohio Civil Service Employees Asso. v Stackhouse* (Cuyahoga Co) 1 Ohio App 3d 121, 1 Ohio BR 428, 439 NE2d 936).

Footnote 38. *Ladeau v Department of Employment Secur.*, 134 Vt 387, 359 A2d 648 (common usage in the labor market is that, in the absence of a contractual or statutory provision, severance pay is given, if at all, as an incident of firing without cause, and not as an incident to voluntary quitting).

Footnote 39. *Stockton Dry Goods Co. v Girsh*, 36 Cal 2d 677, 227 P2d 1, 22 ALR2d 1460; *Winter Park Appliance Center, Inc. v Walling Crate Co.* (Fla App D2) 196 So 2d 198; *Miami Beach v Austin Burke, Inc.* (Fla App D3) 185 So 2d 720; *Tobacco Growers Co-op. Ass'n. v Jones*, 185 NC 265, 117 SE 174, 33 ALR 231.

Footnote 40. *King v Griner* (Fla) 60 So 2d 177; *Massell v Daley*, 404 Ill 479, 89 NE2d 361, 13 ALR2d 1356 (it is common knowledge that business is often "going strong" in beer joints at midnight, and that their customers are on the move at that hour); *Bryer v Rath Packing Co.*, 221 Md 105, 156 A2d 442, 77 ALR2d 1; *Brechman v Adamar of New Jersey, Inc.*, 182 NJ Super 259, 440 A2d 480.

Most retailers, including establishments that prepare and sell meals, collect sales tax from their customers. *Kollasch v Adamany* (App) 99 Wis 2d 533, 299 NW2d 891, revd on other grounds 104 Wis 2d 552, 313 NW2d 47.

Footnote 41. § 69.

Footnote 42. *Atlantic C. L. R. Co. v Riverside Mills*, 219 US 186, 55 L Ed 167, 31 S Ct 164; *Mid-Continent Grain Co. v St. Louis S. F. R. Co.*, 166 Kan 641, 203 P2d 141; *Dellwo v Pearson*, 259 Minn 452, 107 NW2d 859, 97 ALR2d 866; *Skelka v Metropolitan Transit Authority* (2d Dept) 76 App Div 2d 492, 430 NYS2d 840; *State ex rel. Southern Pacific Co. v Duncan*, 230 Or 179, 368 P2d 733, 98 ALR2d 617; *Chattanooga v Fanburg*, 196 Tenn 226, 265 SW2d 15, 42 ALR2d 1200.

For a discussion of judicial notice of facts relating to transportation generally, see §§ 83-87.

Footnote 43. *Kansas Com. on Civil Rights v Sears, Roebuck & Co.*, 216 Kan 306, 532 P2d 1263.

Footnote 44. *Mirabile v Udoh*, 92 Misc 2d 168, 399 NYS2d 869, 23 UCCRS 101.

§ 48 Labor and employment, generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The courts frequently have taken judicial notice of matters of common knowledge relating to labor and employment and to labor conditions generally, 45 such as the fact

that a person beyond a certain age cannot well compete in the labor market. 46 The courts have also taken judicial notice of matters generally known in connection with labor unions and union activities. 47 Judicial notice has been taken of the facts that refusal of employers to confer and negotiate with representatives of their employees has been a prolific source of labor disturbances, 48 that union employees will not ordinarily cross a picket line, 49

The courts have taken judicial notice of the prevalence of unemployment throughout the entire nation during certain periods, 50

The courts will judicially notice the scope of such employments, and the duties incumbent upon those employed therein. 51 For example, the courts have judicially noticed the ordinary duties of the several classes of employees of railroads, such as roadmaster, section boss, conductor, fireman, station agent, superintendent, and general manager. 52

§ 48 ----Labor and employment, generally [SUPPLEMENT]

Case authorities:

Discharged Postal Service employee's interim CSRS benefits were not subject to judicial notice since facts surrounding them (i.e., amount received, how amount was derived, its significance in relation to likely size of employee's disability retirement annuity, and relevance to front pay award for discrimination) never achieved requisite degree of popular familiarity, nor was information derived from generally available government documents. *Lussier v Runyon* (1995, CA1 Me) 50 F3d 1103, 4 AD Cas 265.

In action by former school superintendent against school employees' retirement board challenging calculation of average final salary, board did not err by sua sponte utilizing financial statistics and public policy considerations not considered before hearing examiner, where board—not hearing examiner—was final factfinder in case and board could take official notice of facts which were obvious and notorious to expert in agency's field and those facts contained in agency's files. *Christiana v Public Sch. Employees' Retirement Bd.* (1994, Pa Cmwlt) 646 A2d 645.

Footnotes

Footnote 45. *Dixie Glass Co. v Pollak* (Tex Civ App Houston (1st Dist)) 341 SW2d 530, 91 ALR2d 662, writ ref n r e 162 Tex 440, 347 SW2d 596, 91 ALR2d 681, reh'g of writ of error overr (Jul 19, 1961).

Judicial notice may be taken of the fact that coffee breaks or short rest periods are rapidly becoming an accepted part of employment generally. *Mitchell v Greinetz* (CA10 Colo) 235 F2d 621, 30 CCH LC ¶ 70140, 61 ALR2d 956.

Footnote 46. *Dixie Glass Co. v Pollak* (Tex Civ App Houston (1st Dist)) 341 SW2d 530, 91 ALR2d 662, writ ref n r e 162 Tex 440, 347 SW2d 596, 91 ALR2d 681, reh'g of writ of error overr (Jul 19, 1961).

Footnote 47. *Johnston v Chrysler Corp.* (Sup) 54 Del 279, 178 A2d 459 (judicial notice has been taken of the fact that work contracts entered into between employers and an industrywide union customarily fix working conditions, rates of pay, hours of work, seniority among employees, and other matters as between employer and employee).

It is a matter of common knowledge that most school systems large enough to support a teachers' association pursue the practice of negotiating with the association with regard to employment, salaries, grievance procedure, and working conditions. *Norwalk Teachers' Ass'n v Board of Education*, 138 Conn 269, 83 A2d 482, 28 BNA LRRM 2408, 20 CCH LC ¶ 66543, 31 ALR2d 1133.

Footnote 48. *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 81 L Ed 893, 57 S Ct 615, 1 BNA LRRM 703, 1 CCH EPD ¶ 9601, 1 CCH LC ¶ 17017, 108 ALR 1352.

Footnote 49. *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, *affd* 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, *reh den* 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379.

Footnote 50. *Jennings v St. Louis*, 332 Mo 173, 58 SW2d 979, 87 ALR 365; *Andrews v McMahan*, 43 NM 87, 85 P2d 743, 120 ALR 697; *W. H. H. Chamberlin, Inc. v Andrews*, 271 NY 1, 2 NE2d 22, 5 Ohio Ops 306, 106 ALR 1519, *affd* 299 US 515, 81 L Ed 380, 57 S Ct 122, *reh den* 301 US 714, 81 L Ed 1365, 57 S Ct 926.

Footnote 51. *State ex rel. Ferrocarriles Nacionales v Rutledge*, 331 Mo 1015, 56 SW2d 28, 85 ALR 1378, *cert den* 289 US 746, 77 L Ed 1492, 53 S Ct 689; *State ex rel. Kern v Arnold*, 100 Mont 346, 49 P2d 976, 100 ALR 1071; *Deodati v Kern*, 280 NY 366, 21 NE2d 355, 122 ALR 1446.

Footnote 52. *New England R. Co. v Conroy*, 175 US 323, 44 L Ed 181, 20 S Ct 85; *Condran v Chicago, M. & St. P. R. Co.* (CA8 Iowa) 67 F 522; *Louisville, E. & S. L. R. Co. v McVay*, 98 Ind 391; *Gannon v Chicago, R. I. & P. R. Co.*, 141 Iowa 37, 117 NW 966; *Dailey v Preferred Masonic Mut. Acc. Ass'n.*, 102 Mich 289, 57 NW 184, *different results reached on reh* 102 Mich 299, 60 NW 694; *Elliott v Payne*, 293 Mo 581, 239 SW 851, 23 ALR 706; *Sacalaris v Eureka & P. R. Co.*, 18 Nev 155, 1 P 835; *Mason v Richmond & D. R. Co.*, 111 NC 482, 16 SE 698.

§ 49 Value of services

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, the courts will not take judicial notice of the value of personal services, 53 even though such services are not professional or expert in nature. 54 For example, it has been held that judicial notice will not be taken of local charges for repairing an automobile, 55 or of the price per day of farm labor. 56

§ 49 ----Value of services [SUPPLEMENT]

Practice Aids: Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities. 23 ALR5th 241.

Footnotes

Footnote 53. *Rozelle v Barnard*, 72 NM 182, 382 P2d 180; *Gange v Gange*, 79 ND 372, 56 NW2d 688; *Schlegel v Hough*, 182 Or 441, 186 P2d 516, reh den 182 Or 449, 188 P2d 158; *Re Gudde's Will*, 260 Wis 79, 49 NW2d 906.

Footnote 54. *Re Gudde's Will*, 260 Wis 79, 49 NW2d 906.

Footnote 55. *Rozelle v Barnard*, 72 NM 182, 382 P2d 180.

Footnote 56. *Branch v Branch*, 144 Va 244, 132 SE 303.

§ 50 Automotive industry

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have taken judicial notice of facts relating to automobile advertising; 57 how cars are purchased 58 and paid for; 59 periodic maintenance contracts; 60 comparisons of price and quality; 61 the uses to which various vehicles are put; 62 automobile leasing 63 and insurance; 64 and parking lots and garages. 65 Some courts have refused to take judicial notice of matters relating to the automotive industry, such as a manufacturer's intended primary use for pickup trucks, 66 the characteristics of either a "trail bike" or a particular brand of motorcycle, in resolving whether a trail bike was either an "automobile" or "midget automobile" within insurance policy's exclusion clause. 67 and the standard of care for garage owners in a city. 68

Footnotes

Footnote 57. *Henningsen v Bloomfield Motors, Inc.*, 32 NJ 358, 161 A2d 69, 75 ALR2d 1.

Footnote 58. *Robertson v King*, 225 Ark 276, 280 SW2d 402, 52 ALR2d 1108; *Cannady's Used Cars v Dowling*, 221 Miss 293, 72 So 2d 696, 44 ALR2d 1053; *Adams v Mid-West Chevrolet Corp.*, 198 Okla 461, 179 P2d 147, 175 ALR 554.

Footnote 59. *Robertson v King*, 225 Ark 276, 280 SW2d 402, 52 ALR2d 1108.

Footnote 60. *Thomas v Hughes*, 177 Kan 347, 279 P2d 286, 65 ALR2d 306.

Footnote 61. *Althof v Benson*, 259 Iowa 1254, 147 NW2d 875.

Footnote 62. *Berdeaux v Gamble Alden Life Ins. Co.* (Ala) 338 So 2d 403 (it is judicially noticeable that pickup trucks are adopted for and commonly used to both carry passengers and loads of various sorts).

Footnote 63. *Grant v Emmco Ins. Co.*, 295 NC 39, 243 SE2d 894.

A court may take judicial notice of a common practice in the automobile leasing industry of inserting a by-out provision in a lease agreement. *Gemini Equipment Co. v Pennsy Supply, Inc.*, 407 Pa Super 404, 595 A2d 1211.

Footnote 64. *Government Employees Ins. Co. v Sweet* (Fla App D4) 186 So 2d 95, 21 ALR3d 895; *Grant v Emmco Ins. Co.*, 295 NC 39, 243 SE2d 894.

Footnote 65. *Marquardt v Cernocky* (2d Dist) 18 Ill App 2d 135, 151 NE2d 109, 67 ALR2d 956 (many operators of parking lots, particularly those located upon sloping ground, will place fences, logs, or railroad ties, cement barriers, and the like to keep parked autos in a safe position); *General Acci. Group v Frintzilas*, 111 Misc 2d 306, 443 NYS2d 989 (operation of a parking lot involves use of adjacent streets as well as curb cuts and driveways).

Footnote 66. *Berdeaux v Gamble Alden Life Ins. Co.* (Ala) 338 So 2d 403 (not common knowledge, and therefore not judicially noticeable).

Footnote 67. *Central Nat. Ins. Co. v Virginia Farm Bureau Mut. Ins. Co.*, 222 Va 353, 282 SE2d 4).

Footnote 68. *Flynn v Libkie*, 101 Mich App 331, 300 NW2d 560, remanded 411 Mich 942, 308 NW2d 98 (an adjudicative fact which could not be judicially noticed where the requirements of Rule 201(b) were not satisfied).

§ 51 Building and construction industry

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have judicially noticed kinds of equipment frequently used in construction; 69 the purpose of a subcontractor surety bond; 70 the frequency of labor unrest in construction projects; 71 and the expected efficient life of a properly installed septic tank. 72 The length of time necessary to complete construction of a home, however, is not judicially noticeable. 73

Footnotes

Footnote 69. *Kingsport Utilities, Inc. v Brown*, 201 Tenn 393, 299 SW2d 656, 69 ALR2d 87.

Footnote 70. The purpose of a surety bond for a construction subcontractor is to provide for performance of the subcontractor's construction obligation if the subcontractor defaulted. *Balboa Ins. Co. v K & D & Associates* (Tex Civ App Dallas) 589 SW2d 752, writ ref n r e (May 7, 1980) and reh'g of writ of error overr (Jun 18, 1980).

Footnote 71. *McNamara Constr. of Manitoba, Ltd. v United States*, 206 Ct Cl 1, 509 F2d 1166, 20 CCF ¶ 83644.

Regarding judicial notice of labor matters generally, see § 48.

Footnote 72. *Wagner Constr. Co. v Noonan* (Ind App) 403 NE2d 1144.

Footnote 73. *Stefanowicz Corp. v Harris*, 36 Md App 136, 373 A2d 54.

§ 52 Insurance

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Judicial notice may be taken of numerous facts, customs and usages of the insurance industry. For example, judicial notice may be taken that insurance is a regulated industry; 74 that premiums are collected in advance of the period covered; 75 that the general custom of life insurance companies is to require formal written applications for life insurance; 76 that the practice of life insurers is to reckon the age of an insured from his nearest birthday, 77 that the vast majority of people who carry insurance never read their policies; 78 that a substantial percentage of liability insurance claims are settled without litigation; 79 and that disputes as to liability are often settled by arbitration. 80 Courts have also judicially noticed information relating to credit life insurance; 81 fire insurance; 82 and supersedeas bonds. 83

In addition, a court may take judicial notice of a regulatory impact statement filed by a superintendent of insurance which explains how the same factors used by actuaries in setting primary rates are also used in setting excess rates, and consequently supplies an adequate rational basis for the excess rates. 84 A court will not, however, take judicial notice that the mere fact of pregnancy influences premium rates or otherwise increases the risk under a policy that by its terms excludes coverage for normal pregnancies. 85

Footnotes

Footnote 74. *Kimmey v Farmers Bank* (Del Sup) 373 A2d 569 (insurance companies are subject to mortgage loan regulation).

Footnote 75. *Jost v Equitable Life Assur. Soc.*, 271 SC 492, 248 SE2d 778.

Footnote 76. *Taylor v Grand Lodge, A. O. U. W.*, 101 Minn 72, 111 NW 919.

Footnote 77. *Prange v International Life Ins. Co.*, 329 Mo 651, 46 SW2d 523, 80 ALR 950.

Footnote 78. *Magnolia-Broadway Corp. v Fire Asso. of Philadelphia (City Ct)* 137 NYS2d 918; *Brewer v Vanguard Ins. Co. (Tenn App)* 614 SW2d 360.

Footnote 79. *Comunale v Traders & General Ins. Co.*, 50 Cal 2d 654, 328 P2d 198, 68 ALR2d 883.

Footnote 80. *Hardware Dealers Mut. Fire Ins. Co. v Glidden Co.*, 284 US 151, 76 L Ed 214, 52 S Ct 69.

Footnote 81. *Winkle v Grand Nat. Bank*, 267 Ark 123, 601 SW2d 559, cert den 449 US 880, 66 L Ed 2d 104, 101 S Ct 230.

Footnote 82. *Codd v Westchester Fire Ins. Co.*, 14 Wash 2d 600, 128 P2d 968, 151 ALR 316.

Footnote 83. *Melvin v West (Fla App D2)* 120 So 2d 233, 90 ALR2d 443.

As to judicial notice of information concerning automobile insurance, see § 50.

Footnote 84. *Medical Malpractice Ins. Asso. v Superintendent of Ins.*, 72 NY2d 753, 537 NYS2d 1, 533 NE2d 1030, cert den 490 US 1080, 104 L Ed 2d 661, 109 S Ct 2100.

Footnote 85. *Tomlinson v Midamerica Mut. Life Ins. Co. (App)* 168 Wis 2d 92, 483 NW2d 234.

§ 53 Attorneys

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have judicially noticed facts relating to: the kinds of work that attorneys do 86 and don't do; 87 how law firms seek to attract clients; 88 and how they attempt to protect client confidences. 89 In addition, a court may take judicial notice that appointed counsel is an able, effective, and experienced trial attorney in considering an indigent criminal defendant's claim of a denial of effective assistance of counsel. 90 A court may not, however, take judicial notice that a firm is a well regarded law firm in a particular city. 91

Federal courts are often called upon to set attorneys fees, for example in many civil rights and class actions. In doing so, they often take judicial notice of the prevailing fee structure for attorneys of comparable skill and ability. 92 Some courts also take judicial notice of usual and customary attorney's fees 93 and of the contents of a case file without receiving further evidence and proceeding before the court. 94 For example, a court may take judicial notice from the volume of the record before it and the absolvency

of a debtor in the case that the work of counsel has been expensive and that the chances of collecting a debt from a defunct corporation are so slim that a generous contingent fee is necessary to motivate the efforts of counsel. 95 Other state courts do not allow the taking of judicial notice of the reasonableness of attorney's fees awarded to a party, stating that the reasonableness of the attorney's fees must be established by competent evidence, 96 or restrict when notice may be taken to certain situations. 97

Decisions have also judicially noted the timing of payment 98 and what lawyers generally do not include as chargeable time. 99

Courts have taken judicial notice of prevailing hourly rates for purposes of fixing attorneys' fees. 1

Footnotes

Footnote 86. *Lindy Bros. Builders, Inc. v American Radiator & Standard Sanitary Corp.* (ED Pa) 382 F Supp 999, 1974-2 CCH Trade Cases ¶ 75361, *affd* in part and vacated in part on other grounds (CA3 Pa) 540 F2d 102, 1976-2 CCH Trade Cases ¶ 61039 (disapproved on other grounds by *Blum v Stenson*, 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541, 34 BNA FEP Cas 417, 33 CCH EPD ¶ 34226) as stated in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088, 24 Env't Rep Cas 1577, 16 ELR 20801; *Bennett v Bennett* (Ala) 454 So 2d 535.

Footnote 87. *Bursten v United States* (CA5 Fla) 395 F2d 976, 68-1 USTC ¶ 9400, 21 AFTR 2d 1403, 3 ALR Fed 644, appeal after remand (CA5 Fla) 453 F2d 605, 72-1 USTC ¶ 9152, 29 AFTR 2d 72-442, cert den 409 US 843, 34 L Ed 2d 83, 93 S Ct 44 (most lawyers have only scant knowledge of tax laws).

Footnote 88. *Walls v Mississippi State Bar* (Miss) 437 So 2d 30 (taking judicial notice that many law firms held open houses in the past in violation of an antiquated ethics opinion and no one saw fit to complain, the court concluded that appellants' open house did not constitute impermissible soliciting).

Footnote 89. *SEC v Musella* (SD NY) 578 F Supp 425, CCH Fed Secur L Rep ¶ 99637, 14 Fed Rules Evid Serv 1844, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 91416, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 91647, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 91800, later proceeding (SD NY) 678 F Supp 1060, CCH Fed Secur L Rep ¶ 93590, later proceeding (SD NY) 748 F Supp 1028, CCH Fed Secur L Rep ¶ 94536, *affd* (CA2 NY) 898 F2d 138, cert den 498 US 816, 112 L Ed 2d 32, 111 S Ct 57, later proceeding (SD NY) CCH Fed Secur L Rep ¶ 97205, adopted (SD NY) 818 F Supp 600, CCH Fed Secur L Rep ¶ 97416.

Footnote 90. *State ex rel. Stephan v Smith*, 242 Kan 336, 747 P2d 816.

Footnote 91. *Harris Trust & Sav. Bank v American Nat'l Bank & Trust Co.* (1st Dist) 230 Ill App 3d 591, 171 Ill Dec 788, 594 NE2d 1308, app den 146 Ill 2d 627, 176 Ill Dec 798, 602 NE2d 452.

Footnote 92. *Ursic v Bethlehem Mines* (CA3 Pa) 719 F2d 670, 4 EBC 2297, 14 Fed Rules Evid Serv 395 (pretextual discharge from employment case; \$100 per hour is a

reasonable fee charged by able and experienced counsel); SEC v Kelly, Andrews & Bradley, Inc. (SD NY) 423 F Supp 645 (calculating fee due to law firm appointed by SEC to administer or liquidate brokerage); Cook v Block (DC Dist Col) 609 F Supp 1036, 41 BNA FEP Cas 1322, 38 CCH EPD ¶ 35672.

Footnote 93. Harrison v Perea, 168 US 311, 42 L Ed 478, 18 S Ct 129; Austin Area Teachers Federal Credit Union v First City Bank-Northwest Hills, N.A. (Tex App Austin) 825 SW2d 795, writ den (Jun 24, 1992); Re Gudde's Will, 260 Wis 79, 49 NW2d 906.

Footnote 94. Austin Area Teachers Federal Credit Union v First City Bank-Northwest Hills, N.A. (Tex App Austin) 825 SW2d 795, writ den (Jun 24, 1992).

Footnote 95. Schlater v Haynie (Tenn App) 833 SW2d 919, reh den (Tenn App) 1992 Tenn App LEXIS 21.

Footnote 96. Hoelscher v GFH Financial Services, Inc. (Tex App Dallas) 814 SW2d 842, 130D motion filed (Sep 24, 1991); Palmer v Liles (Tex App Houston (1st Dist)) 677 SW2d 661, 82 OGR 376, writ ref n r e (Nov 7, 1984) (a court does not have authority to adjudicate the reasonableness of fees without supporting, competent evidence).

Footnote 97. Re Marriage of Murray (Ind App) 460 NE2d 1023; Zebrowski & Associates, Inc. v Indianapolis (Ind App) 457 NE2d 259 (notice should be limited to routine cases involving relatively small amounts).

Footnote 98. State ex rel. Moore v Scroggie (App) 109 Idaho 32, 704 P2d 364 (it is common practice for defense attorneys to obtain a substantial "up front" fee payment before undertaking the defense of a serious crime such as murder).

Footnote 99. Cook v Block (DC Dist Col) 609 F Supp 1036, 41 BNA FEP Cas 1322, 38 CCH EPD ¶ 35672 (in disallowing an item on a bill submitted by the attorney for a successful employment discrimination class action, the court took judicial notice that many private law firms do not bill clients for the time expended in keeping daily log sheets of billable hours).

Footnote 1. Ursic v Bethlehem Mines (CA3 Pa) 719 F2d 670, 4 EBC 2297, 14 Fed Rules Evid Serv 395 (fact that, in particular region of state, able and experienced trial counsel charge \$100 per hour).

2. Characteristics of People; Incidents of Human Life [54-63]

§ 54 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Judicial knowledge comprehends information and beliefs relating to human activities, habits, traits, diseases, 2 and propensities. 3 Courts have taken judicial notice of the behavior, characteristics, and needs of children, 4 teenagers, 5 college students, 6 parents, 7 and senior citizens. 8

Courts judicially may notice facts concerning life 9 and life expectancy, 10 and death, 11 food 12 and drink, 13 and clothing. 14

Judicial notice has been taken that racism still plagues many aspects of life in the United States, 15 and a court may take judicial notice of the distinction between a party's cultural ethnicity, for example Puerto Rican, and their race. 16 Courts may also notice that sometimes people are motivated by economic concerns, 17 and sometimes by altruistic interests. 18 They have taken judicial notice of what people read 19 and what they do not read. 20 In addition, courts may take notice that sports can be hazardous to the participant 21 and the spectator or innocent bystander alike; 22 that productivity decreases and the volume of mail increases before and shortly after Christmas; 23 and that political parties compete for the farm vote. 24

A court may not, however, take judicial notice that the phrase "going with" means that the parties involved are engaged in sexual relations, as the meaning of this phrase is subject to reasonable dispute. 25

§ 54 ----Generally [SUPPLEMENT]

Case authorities:

On motion to dismiss for lack of subject matter jurisdiction plaintiff's complaint alleging, inter alia, that Drug Enforcement Agency stalked and harassed plaintiff, court would take judicial notice of fact that there are psychiatric conditions which cause individuals to exaggerate life situations, including ordinary conversations, slight and encounters, and interpret them in highly self-referential fashion. *O'Connor v United States* (1994, DC Md) 159 FRD 22.

Footnotes

Footnote 2. Regarding judicial notice of diseases, see §§ 60-62.

Footnote 3. *Gaymon v Quinn Menhaden Fisheries, Inc.* (Fla App D1) 118 So 2d 42, 81 ALR2d 1165; *State ex rel. Ronish v School Dist.*, 136 Mont 453, 348 P2d 797, 78 ALR2d 1012.

Footnote 4. *Eden Toys, Inc. v Marshall Field & Co.* (CA2 NY) 675 F2d 498, 216 USPQ 560, 10 Fed Rules Evid Serv 1030; *Atlantic C. L. R. Co. v Ward* (Fla) 81 So 2d 476; *Bilams v Metropolitan Transit Authority* (Fla App D3) 371 So 2d 693; *Whaley v Whaley* (Lawrence Co) 61 Ohio App 2d 111, 15 Ohio Ops 3d 136, 399 NE2d 1270.

Footnote 5. *Stanford v State* (Fla) 110 So 2d 1.

Footnote 6. *Long Beach v California Lambda Chapter of Sigma Alpha Epsilon Fraternity*

(2nd Dist) 255 Cal App 2d 789, 63 Cal Rptr 419, 25 ALR3d 912.

Footnote 7. *United States v Hayashi* (CA9 Hawaii) 282 F2d 599, 84 ALR2d 754; *Nissen v Redelack*, 246 Minn 83, 74 NW2d 300, 55 ALR2d 1428 (ovrld on other grounds by *Spanel v Mounds View School Dist.*, 264 Minn 279, 118 NW2d 795).

Footnote 8. *Seminole Tribe of Florida v Butterworth* (SD Fla) 491 F Supp 1015, affd (CA5 Fla) 658 F2d 310, cert den 455 US 1020, 72 L Ed 2d 138, 102 S Ct 1717; *Waterbury First Church Housing, Inc. v Brown*, 170 Conn 556, 367 A2d 1386.

Footnote 9. *Prink v Rockefeller Center, Inc.*, 48 NY2d 309, 422 NYS2d 911, 398 NE2d 517.

Footnote 10. § 55.

Footnote 11. *Berry v Springdale*, 238 Ark 328, 381 SW2d 745, 8 ALR3d 925 (it is common knowledge that many people who fall asleep in their cars with the engine running and windows up have been asphyxiated when the car exhaust system or heater is defective); *Prink v Rockefeller Center, Inc.*, 48 NY2d 309, 422 NYS2d 911, 398 NE2d 517 (many apparently accidental deaths are actually suicide).

Footnote 12. *Nicketta v National Tea Co.*, 338 Ill App 159, 87 NE2d 30 (because it is common knowledge that properly cooking pork kills trichinosis, trial judge properly dismissed plaintiffs' cause of action alleging they became infected with trichinosis after purchasing fresh pork from defendant and properly cooking it); *Department of Revenue v To Your Door Pizza, Inc.* (Ky App) 670 SW2d 482.

Footnote 13. *Pemberton v American Distilled Spirits Co.* (Tenn) 664 SW2d 690, CCH Prod Liab Rep ¶ 9968, 42 ALR4th 245 (high proof alcohol not "unsafe" without a warning label).

Annotation: Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name, 49 ALR2d 764.

Footnote 14. *B.V.D. Licensing Corp. v Body Action Design, Inc.* (CA FC) 846 F2d 727, 6 USPQ2d 1719, 25 Fed Rules Evid Serv 954 (the "BVD" trademark is widely known in United States; BVD is widely known as makers of clothing, particularly men's underwear).

A person normally keeps his wearing apparel at his home. *Dixie Fire Ins. Co. v McAdams* (Tex Civ App) 235 SW2d 207, 41 ALR2d 714, writ dism w o j.

Footnote 15. *United Steelworkers of America, etc. v Weber*, 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721, 20 BNA FEP Cas 1, 20 CCH EPD ¶ 30026, reh den 444 US 889, 62 L Ed 2d 125, 100 S Ct 193, 20 CCH EPD ¶ 30266 and reh den 444 US 889, 62 L Ed 2d 125, 100 S Ct 193, 20 CCH EPD ¶ 30266 and reh den 444 US 889, 62 L Ed 2d 126, 100 S Ct 194 (the Court, citing to numerous court decisions, took judicial notice of the history of excluding members of racial minorities from crafts); *Snell v Suffolk County* (CA2 NY) 782 F2d 1094, 39 BNA FEP Cas 1590, 39 CCH EPD ¶ 35836 (race discrimination in employment action brought by African American and Hispanic corrections officers); *Meredith v Fair* (CA5 Miss) 298 F2d 696 (racism in state colleges

and universities); *Marshall v Bramer* (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017 (nature of the Ku Klux Klan and its history of advocating violence against African-Americans).

Footnote 16. *Bermudez Zenon v Restaurant Compostela, Inc.* (DC Puerto Rico) 790 F Supp 41.

Footnote 17. *Urevich v Woodard* (Colo) 667 P2d 760 (holding that a statute proscribing direct or indirect payment as an inducement to circulate petitions to place an initiative on the ballot impermissibly interfered with the right of initiative).

Footnote 18. *State Farm Fire & Casualty Co. v Sentry Indem Co.* (La App 3d Cir) 346 So 2d 1331.

Footnote 19. *Millikan v Guilford Mills, Inc.*, 70 NC App 705, 320 SE2d 909, cert den 312 NC 798, 325 SE2d 631 (it is common knowledge that nearly every machine, device or piece of equipment sold in the United States is accompanied by an instruction manual, sheet or label, that these instruction manuals are usually reliable and that people usually read the instruction manuals and follow the information contained therein).

Footnote 20. *Davis v M.L.G. Corp.* (Colo) 712 P2d 985 (it is common knowledge that consumers seldom read the detailed provisions of standardized contracts).

The vast majority of people never read their insurance policies. *Magnolia-Broadway Corp. v Fire Asso. of Philadelphia* (City Ct) 137 NYS2d 918.

Footnote 21. *Neeld v National Hockey League* (CA9 Cal) 594 F2d 1297, 1979-1 CCH Trade Cases ¶ 62570 (ice hockey); *Larson v Santa Clara Valley Water Conservation Dist.* (1st Dist) 218 Cal App 2d 515, 32 Cal Rptr 875, 8 ALR3d 665 (water skiing).

Footnote 22. *Patton v Westwood Country Club Co.* (Cuyahoga Co) 18 Ohio App 2d 137, 47 Ohio Ops 2d 247, 247 NE2d 761, 42 ALR3d 337 (it is generally known that the average golfer does not always hit the ball straight).

Footnote 23. *Sinatra v Heckler* (ED NY) 566 F Supp 1354, 13 Fed Rules Evid Serv 1368.

Footnote 24. *Awtry v United States*, 231 Ct Cl 271, 684 F2d 896, 11 Fed Rules Evid Serv 748.

Footnote 25. *Thornton v Shows* (Miss) 537 So 2d 1363.

§ 55 Span of life

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts take judicial notice of matters of common knowledge with respect to the span

of life of human beings. For example, a court may find that it is a matter of common knowledge that a person 35 years of age with no constitutional diseases or abnormalities might be expected to live for a substantial number of years, in the absence of unexpected calamity. 26 Generally, the courts also take judicial notice of the existence of standard mortality, or life expectancy, tables which seek to approximate the lifespan of human beings, 27 particularly if the tables are set out in the state code. 28

Footnotes

Footnote 26. *Bone v General Motors Corp.* (Mo) 322 SW2d 916, 71 ALR2d 361.

Footnote 27. § 55.

Footnote 28. § 120.

§ 56 Conception, gestation, and birth

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts take judicial notice that only women, not men, can become pregnant; 29 that one act of intercourse is enough to conceive a child; 30 that the male has equal biological responsibility for the conception of a child; 31 that a young boy cannot father a child; 32 and that the ordinary human gestation period is roughly 9 months, 33 but that this period is sometimes days or weeks longer or shorter. 34

Footnotes

Footnote 29. *M. v Superior Court of Sonoma County*, 450 US 464, 67 L Ed 2d 437, 101 S Ct 1200.

Footnote 30. *Panza v Panza* (Dom Rel Ct) 112 NYS2d 262.

Footnote 31. *M. v Superior Court of Sonoma County*, 450 US 464, 67 L Ed 2d 437, 101 S Ct 1200.

Footnote 32. *State v Daniels*, 169 Ohio St 87, 8 Ohio Ops 2d 56, 157 NE2d 736, 76 ALR2d 468 (it is reasonably, if not absolutely, certain that an 8-year-old boy cannot become a father).

Footnote 33. *Melanson v Rogers*, 38 Conn Supp 484, 451 A2d 825 (9 months); *Doe IV v Roe IV*, 5 Hawaii App 558, 705 P2d 535, reconsideration den (Hawaii App) 753 P2d 253, later proceeding 5 Hawaii App 610, 704 P2d 940, later proceeding 6 Hawaii App 629, 736 P2d 448; *Moody v Christiansen* (Iowa) 306 NW2d 775; *Ugbaja v Sumpter* (Mo App) 821 SW2d 557 (280 days); *Re Niles' Will* (Sur) 99 NYS2d 238 (280 days).

§ 57 Family relationships

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts continue to judicially notice facts about the relationships within the traditional family. 35 Courts also, however, judicially notice contemporary realities concerning nontraditional parenting conditions and arrangements, 36 family viability and dissolution, 37 and various implications of divorce. 38

Footnotes

Footnote 35. *Boren v Department of Employment Development* (3rd Dist) 59 Cal App 3d 250, 130 Cal Rptr 683 (state unemployment insurance provision disqualified anyone who left his or her job because of marital or domestic duties and who was not the family's primary source of financial support; taking judicial notice that women are more likely than men to follow their spouses to a new job location, and are more likely to quit work to care for young children or an ill family member, the court held that although the provision was neutrally worded, it was intended to, and did, have a disparate impact on women).

Footnote 36. *C.C. v A.B.*, 406 Mass 679, 550 NE2d 365 (court abolished the presumption of legitimacy of a child born to a married couple; *Doe v Doe*, 222 Va 736, 284 SE2d 799 (in an adoption proceeding, the state supreme court refused to take judicial notice that the mother's admitted lesbian relationship would have a negative effect on her son's welfare)..

Footnote 37. *Trammel v United States*, 445 US 40, 63 L Ed 2d 186, 100 S Ct 906, 5 Fed Rules Evid Serv 737 (spousal testimonial incapacity privilege should be limited to the witness spouse, not the defendant); *Wyman v Wallace*, 94 Wash 2d 99, 615 P2d 452 (the court abolished the common-law action for alienation of affections); *State v Kelly*, 97 NJ 178, 478 A2d 364 (holding that expert testimony on the battered woman syndrome was relevant and that the trial judge erred in excluding it).

Footnote 38. *Tan v Tan* (1st Dist) 3 Ill App 3d 671, 279 NE2d 486 (court took judicial notice of the "recent liberation of women," in denying alimony to former wife; *Welcker v Welcker* (La App 4th Cir) 342 So 2d 251, cert den (La) 343 So 2d 1077 (judicially noticing that divorced women customarily are known by a combination of their first name, family surname, and former husband's surname).

§ 58 Societal attitudes about sexuality

Court opinions reflect changing attitudes in a variety of contexts. For example, courts have judicially recognized that patdowns of male penitentiary inmates by female officers is offensive. 39 In addition, while a court may judicially notice that female breasts are intimately associated in people's minds with human reproduction, while male breasts are not, 40 a court may refuse to take judicial notice that the breasts of topless female dancers are commonly associated with sexual arousal, but that the uncovered chests of male dancers are not. 41 A court may take judicial notice that the public is generally aware of the type of material being sold in an establishment named "Adult World." 42

It is not, however, judicially noticeable that someone who leaves Playboy magazines open on a table in his office is more inclined to commit a sexual assault than anyone else. 43 In addition, a court may not take judicial notice of the effects upon a beholder of an unseemly display of affection as these are not so well known as to be a subject for judicial notice. 44

Footnotes

Footnote 39. *Sterling v Cupp*, 290 Or 611, 625 P2d 123, 31 BNA FEP Cas 427, 32 CCH EPD ¶ 33822.

Footnote 40. *Seattle v Buchanan*, 90 Wash 2d 584, 584 P2d 918.

Footnote 41. *Williams v Ft. Worth* (Tex App Fort Worth) 782 SW2d 290, writ granted (Tex) 33 Tex Sup Ct Jour 622, op withdrawn (Oct 10, 1990) and writ den, in part, writ dism, in part (Oct 10, 1990) (such a viewpoint might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer).

Footnote 42. *Egg Harbor City v Colasuonno*, 182 NJ Super 110, 440 A2d 69.

Footnote 43. *Richmond v Braxton*, 230 Va 161, 335 SE2d 259, 52 ALR4th 725.

Footnote 44. *Highfill v Baptist Hosp., Inc.* (Tenn App) 819 SW2d 436 (if such results are within the knowledge of health care professionals, this information is a necessary part of a plaintiff's evidence).

§ 59 Matters of public and social welfare

In general, the courts take judicial notice of all matters affecting the health 45 and social 46 welfare of the public which are in accord with general or scientific knowledge. For

example, a court may take judicial notice that olives are food within the meaning of the statute permitting the seizure of adulterated food. 47 A court may also take judicial notice of the fact that there is a finite capacity for the storage of hazardous waste at facilities within the state and that that capacity is rapidly being reached. 48 In addition, a court may take judicial notice, based upon the availability of statistics well publicized in newspapers and periodicals, that the use of illegal drugs constitutes a serious societal problem and that no segment of society is immune from this problem. 49 Judicial notice may also be taken of the fact that shoplifting has reached serious, if not unrestrained, proportions. 50

Footnotes

Footnote 45. § 60.

Footnote 46. *Jacobson v Massachusetts*, 197 US 11, 49 L Ed 643, 25 S Ct 358.

Footnote 47. *United States v 71/55 Gallon Drums* (ND Ill) 790 F Supp 1379.

Footnote 48. *Hunt v Chemical Waste Management, Inc.* (Ala) 584 So 2d 1367, 33 Env't Rep Cas 1433, 22 ELR 20171, later proceeding (US) 116 L Ed 2d 435, 112 S Ct 413, 92 Daily Journal DAR 1241 and motion gr, cert gr, in part (US) 117 L Ed 2d 130, 112 S Ct 964, 92 CDOS 1119 and motion gr (US) 118 L Ed 2d 204, 112 S Ct 1554 and rev'd on other grounds (US) 119 L Ed 2d 121, 112 S Ct 2009, 92 CDOS 4577, 92 Daily Journal DAR 7279, 34 Env't Rep Cas 1721, 22 ELR 20909, 6 FLW Fed S 293.

Footnote 49. *Doe v City & County of Honolulu*, 8 Hawaii App 571, 816 P2d 306, 6 BNA IER Cas 1406.

Footnote 50. *Bruce v Meijers Supermarkets, Inc.*, 34 Mich App 352, 191 NW2d 132.

§ 60 Health, diseases, and personal injuries

<p>View Entire Section Go to Parallel Reference Table</p>

The courts take judicial notice of matters of common knowledge relating to the health and diseases of people. 51 Courts also judicially may notice that the public health is deeply implicated in the reclamation of swamp and overflowed lands; 52 and that there is great social need for adequate medical benefits at a cost which the average wage earner can afford to pay. 53

In addition, courts may take judicial notice of specific facts regarding diseases or similar conditions where the particular matter is one of common knowledge, but refuse to do so where the matter is not one of common knowledge. 54 Somewhat in keeping with this rule, some courts hold that judicial notice may not be taken of the effects of a particular type of medical treatment or therapy. 55 While the courts will not, however, take judicial notice of particular matters relating to medical or surgical procedures, which

usually are deemed to be matters to be proved by expert testimony, some medical matters of technical cognizance are been recognized as also being matters of common knowledge, so that judicial notice may be taken of them, thus supplying proof of such matters without the necessity of taking expert testimony. 56

It is recognized that judicial notice may not be appropriate when the matter to be noticed is a question of fact at issue in the case. 57 For example, a court may not take judicial notice of the adjudicative fact that asbestos and lung cancer in the same person are necessarily causally related, as this matter is subject to reasonable dispute. 58 Moreover, courts may be reluctant to take judicial notice of medical matters contrary to the effect of the testimony given by expert witnesses, 59 although in some instances a court will take judicial notice of facts concerning disease or the like, despite the testimony of expert witnesses to the contrary. 60

The right of a court to fully advise itself concerning matters properly subject to judicial notice by consulting standard factual works of reference 61 is recognized in cases dealing with disease and the like. 62 In addition, a court may take judicial notice that physicians constantly rely on medical records in making treatment decisions regarding their patients. 63 Although judicial notice may generally be taken of textbooks, and judicial notice may be taken of the Physician's Desk Reference for some purposes, 64 there are cases which indicate that under some circumstances it is improper for courts to rely on medical textbooks or other reference works in applying the judicial notice principle to matters of disease. 65

Footnotes

Footnote 51. *Jacobson v Massachusetts*, 197 US 11, 49 L Ed 643, 25 S Ct 358.

Annotation: Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554.

Footnote 52. *Leovy v United States*, 177 US 621, 44 L Ed 914, 20 S Ct 797.

Footnote 53. *California Physicians' Service v Garrison*, 28 Cal 2d 790, 172 P2d 4, 167 ALR 306.

Footnote 54. *Burr v Policy Holders Life Ins. Asso.*, 128 Cal App 563, 17 P2d 1014.

Footnote 55. *Roberts v Wofford Beach Hotel (Fla)* 67 So 2d 670.

Annotation: Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554 § 3[b].

Footnote 56. *Thomsen v Burgeson*, 26 Cal App 2d 235, 79 P2d 136; *Asselborn v State Farm Life Ins. Co.* (2d Dist) 1 Ill App 2d 104, 116 NE2d 902.

Footnote 57. *Smith v Harbison-Walker Refractories Co.*, 340 Mo 389, 100 SW2d 909; *Perez v Columbia Granite Co.*, 74 RI 503, 62 A2d 658.

Footnote 58. *Wallace v Kaiser Aluminum & Chemical Corp.* (La) 586 So 2d 149.

Footnote 59. Russell v Liberman, 71 RI 448, 46 A2d 858.

Footnote 60. Mutual Life Ins. Co. v Dause, 256 Ky 448, 76 SW2d 233.

Footnote 61. § 26.

Footnote 62. Green v Mutual Ben. Health & Acci. Ass'n, 267 Ala 56, 99 So 2d 694, 72 ALR2d 549; Kennedy v Parrott, 243 NC 355, 90 SE2d 754, 56 ALR2d 686.

Footnote 63. Donavant v Hudspeth, 318 NC 1, 347 SE2d 797.

Footnote 64. § 26.

Footnote 65. Standard Life Ins. Co. v Strong, 19 Tenn App 404, 89 SW2d 367; Morrill v Komasinski, 256 Wis 417, 41 NW2d 620.

§ 61 --Extent, effect, and incidents of disease or personal injury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Many aspects of disease and personal injuries, and resulting disability, are judicially noticed by the courts, such as the fact that injuries may prove more or less serious than was originally anticipated; 66 that the condition from injuries or sickness may improve or deteriorate; 67 that total disability resulting from injury or disease may lessen in time, and even disappear; 68 that persons seriously injured may not realize it until some time after the event; 69 that persons injured accidentally are frequently unable to correctly describe the event; 70 that severe injuries cause pain; 71 that afflicted members of the body are less productive and more susceptible to injury than whole members; 72 and that there is difficulty in diagnosing some types of ailments. 73

The courts may also take judicial notice of the tendency of some people to delude themselves concerning their health, 74 that seriously ill persons may continue to live for a normal lifetime, 75 that many people suffer pain without being disabled thereby, 76 and that people continue to work although ill. 77

Footnotes

Footnote 66. Missouri Pacific Transp. Co. v Sharp, 194 Ark 405, 108 SW2d 579.

Footnote 67. Aetna Casualty & Surety Co. v Bailes (Tex Civ App Waco) 285 SW2d 886, writ ref n r e.

Footnote 68. Vass' Case, 319 Mass 297, 65 NE2d 549.

Footnote 69. Gibson v Bodley, 156 Kan 338, 133 P2d 112.

Footnote 70. *Crew v Nelson*, 188 Va 108, 49 SE2d 326.

Footnote 71. *Pierstorff v Gray's Auto Shop*, 58 Idaho 438, 74 P2d 171; *Goldberg v Gintoff*, 112 Vt 43, 20 A2d 114.

Footnote 72. *Kinzie v General Tire & Rubber Co.*, 235 Ind 592, 134 NE2d 212.

Footnote 73. *Reyer v Pearl River Tung Co.*, 219 Miss 211, 68 So 2d 442.

Footnote 74. *Lowman v Amphitheatre School Dist.*, 56 Ariz 516, 109 P2d 617.

Footnote 75. *American State Bank v National Life Ins. Co.*, 297 Ill App 137, 17 NE2d 256.

Regarding judicial notice of matters relating to mortality or life expectancy tables, see § 55.

Footnote 76. *Yeager v Pacific Mut. Life Ins. Co.*, 166 Ohio St 71, 1 Ohio Ops 2d 204, 139 NE2d 48.

Footnote 77. *Earley v Philadelphia & Reading Coal & Iron Co.*, 144 Pa Super 301, 19 A2d 615.

§ 62 --Particular diseases, injuries, operations, and medical facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts have in a number of cases considered the application of judicial notice to proof of facts concerning particular diseases, including inflammatory diseases and arthritis, 78 internal parasitic diseases, 79 skin diseases, 80 respiratory system diseases, 81 genitourinary 82 and venereal 83 disease, cardiovascular diseases, 84 blood and lymph diseases and infections, 85 diabetes and metabolism diseases, 86 and animal-borne diseases. 87 The courts have also considered the application of judicial notice to proof of facts concerning paralysis and nerve injuries and diseases; 88 allergies, asthma, and hay fever; 89 alcoholism; 90 cancer and tumors; 91 blindness, and eye diseases and injuries; 92 deafness, and ear diseases and injuries; 93 tooth and oral diseases and injuries; 94 AIDS; 95 and tuberculosis. 96

The courts have considered the application of judicial notice to facts concerning surgery generally; 97 amputations; 98 tonsillectomies; 99 fractures, sprains, and similar injuries; 1 abortion or childbirth; 2 and hernia. 3

The courts have also considered facts relating to the following, as subjects or possible subjects of judicial notice: wounds, generally; 4 head injuries; 5 heatstroke, sunstroke, and exposure; 6 vaccinations and immunizations; 7 poisoning, and foreign matter in food or drink; 8 and the effect of an overdose of sleeping pills. 9

A court may, however, refuse to take judicial notice of the medical effects of a migraine headache in determining whether a defendant's migraine headache rendered her incapable of making a voluntary choice as to whether to accept treatment in the form of a Demerol shot in considering the party's appeal of the suspension of her driving privileges. 10

Footnotes

Footnote 78. *Julian v Folsom* (DC NY) 160 F Supp 747 (it is common knowledge among those experienced in the disability field that arthritis does not immediately arise as a result of injury, but develops progressively and over a period of time); *Norton v United States* (DC Fla) 110 F Supp 94 (court took judicial notice that arthritis rapidly becoming so prevalent that it is common knowledge that it is a painful ailment and that no accident or injury is necessary to bring it on).

Annotation: Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554.

Footnote 79. *Silverman v Swift & Co.*, 141 Conn 450, 107 A2d 277, (proper cooking of pork kills live trichinae); *Nicketta v National Tea Co.*, 338 Ill App 159, 87 NE2d 30; *Adams v Scheib*, 408 Pa 452, 184 A2d 700.

Footnote 80. *State ex rel. Inter-State Oil Co. v Bland*, 354 Mo 622, 190 SW2d 227 (court refused to take judicial notice that dermatitis is an occupational disease).

Footnote 81. *Stevenson v Lee Moor Contracting Co.*, 45 NM 354, 115 P2d 342 (the court took judicial notice that the breathing of fumes and gases by truckdrivers does not ordinarily cause pneumonia); *Moffett v Harbison-Walker Refractories Co.*, 339 Pa 112, 14 A2d 111 (judicial notice was taken that in its early stages silicosis is difficult to detect); *De Mascola v Lancaster*, 200 Pa Super 365, 189 A2d 333 (it is common knowledge that existing lung disease may be aggravated by extreme overexertion and by certain types of dangers, such as inhalation of flame and fumes, and exposure to extreme heat, to which firefighter are exposed).

Footnote 82. *Ex parte Reserve Life Ins. Co.*, 38 Ala App 32, 77 So 2d 388, cert dismd 262 Ala 95, 77 So 2d 392.

Footnote 83. *United States v Seattle Title Trust Co.* (CA9 Wash) 53 F2d 435 (holding it to be a matter of common knowledge, of which the court would take judicial notice, that syphilis, even when it results in general paralysis, does not necessarily result in permanent and total disability from the time of infection); *Re Gifford*, 192 Wash 562, 74 P2d 475, 114 ALR 348 (the court took judicial notice as a scientific fact that syphilis may be inherited or be acquired innocently by infection).

Footnote 84. *Olson v Olson*, 242 Iowa 192, 46 NW2d 1, 40 ALR2d 1 (the court stated that it is common knowledge, that the fact that one has hardening of the arteries does not mean that he is a senile dement, or mentally incompetent); *Fry v Continental Southern Lines, Inc.* (La App 4th Cir) 139 So 2d 31 (it is matter of common knowledge that heart attacks can prove fatal to sufferers therefrom who are not active, and that such attacks do occur while a person is peacefully in sedentary position or even asleep); *Monumental*

Life Ins. Co. v Taylor, 212 Md 202, 129 A2d 103 (the court took judicial notice that knowledge on the part of the insurer that the applicant was suffering from angina pectoris would have reasonably affected the determination of the acceptability of the risk of insuring him); Prawatchke v Sheffield Farms Co., 134 NJL 92, 46 A2d 68 (judicial notice was taken that climbing stairs causes a strain on the heart of one suffering from a cardiac condition); Owen v Rochester-Penfield Bus Co., 304 NY 457, 108 NE2d 606, 33 ALR2d 1354 (judicial notice was taken that many people are subject to low blood pressure and poor circulation).

Footnote 85. Mandles v Guardian Life Ins. Co. (DC Colo) 32 F Supp 619, affd (CA10 Colo) 115 F2d 994 (it is a matter of common knowledge that blood poisoning frequently follows cuts); New York Life Ins. Co. v Zivitz, 243 Ala 379, 10 So 2d 276, 143 ALR 321 (the court included Hodgkin's disease along with tuberculosis and cancer as fatal maladies of which the court would take judicial knowledge, but refused to take judicial notice that a blood infection known as streptococcic hemolytic infection was a disease materially increasing the risk of loss to the insurer).

Footnote 86. New York Life Ins. Co. v Simons (CA1 Mass) 60 F2d 30, cert den 287 US 648, 77 L Ed 560, 53 S Ct 93 (the court took judicial notice that insurance companies deem the appearance of sugar in an applicant's urine as material to the risk).

Footnote 87. Carmen v Eli Lilly & Co., 109 Ind App 76, 32 NE2d 729 (common knowledge that for past centuries rabies (hydrophobia) has been one of the most dreaded diseases of humanity).

Footnote 88. Dobbins v United States (CA10 NM) 91 F2d 78 (court took judicial notice that multiple sclerosis is not a totally disabling disease in its first stages); Bauer v Otis (1st Dist) 133 Cal App 2d 439, 284 P2d 133 (that nerve injury does not ordinarily follow the giving and receiving of injections was stated to be a matter of common knowledge); Cacic v Slovenska Narodna Podporna Jednota, 102 Mont 438, 59 P2d 910 (judicial notice was taken that paralysis of a limb may affect only the sensory nerve or only the motor nerve, but sometimes affects both nerves).

Footnote 89. Franke's, Inc. v Bennett, 201 Ark 649, 146 SW2d 163; Moran v Board of Medical Examiners, 32 Cal 2d 301, 196 P2d 20; Barrett v S. S. Kresge Co., 144 Pa Super 516, 19 A2d 502 (judicial notice was taken that many people are allergic to particular foods).

Footnote 90. Meares v Meares, 256 Ala 596, 56 So 2d 661.

Footnote 91. Baldor v Rogers (Fla) 81 So 2d 658, 55 ALR2d 453 (wherein judicial notice was taken of a concerted medical campaign to conquer cancer); Bandeen v Howard (Ky) 299 SW2d 249, cert den 355 US 813, 2 L Ed 2d 31, 78 S Ct 13 and (ovrld on other grounds by Pearl v Marshall (Ky) 491 SW2d 837) (court took judicial notice that medical science has as yet discovered no drug that will cure cancer in its advanced stage); Ferrara v Galluchio, 5 NY2d 16, 176 NYS2d 996, 152 NE2d 249, 71 ALR2d 331, reh den 5 NY2d 793 (judicial notice was taken that wounds which do not heal over long periods of time frequently become cancerous).

Footnote 92. Bowling v Industrial Com., 145 Ohio St 23, 30 Ohio Ops 245, 60 NE2d 479 (court took judicial notice that any liquid heated to 880 degrees Fahrenheit and coming into contact with any part of the human anatomy probably would cause injury, and that

this is especially true when such liquid comes in contact with the delicate membrane of the eye).

Footnote 93. *Equitable Life Assur. Soc. v Burns*, 254 Ky 487, 71 SW2d 1009 (judicial notice was taken that an infected ear canal coupled with pyorrhea would not cause total and permanent disability within the meaning of a group insurance policy); *Katona v Federal Shipbuilding & Dry Dock Co.*, 136 NJL 474, 56 A2d 609 (court stated that it could not assume in the absence of proof that deafness in the left ear will render the hearing in the right ear more acute, as this is not a matter of general knowledge of which it might take judicial notice).

Footnote 94. *Ambrosi v Monks* (Mun Ct App Dist Col) 85 A2d 188 (judicial notice was taken that the extraction of a tooth, done in a reasonable manner, will not ordinarily result in the fracture of an adjacent tooth); *Thrasher v Board of Governors* (Okla) 359 P2d 717 (the court judicially noted that malformation or poor adjustment of false teeth may result in poor digestion and cause physical discomfort, nervousness, mental anguish, mouth lesions leading to infection, and serious illness).

Footnote 95. *Dunn v White* (CA10 Okla) 880 F2d 1188, cert den 493 US 1059, 107 L Ed 2d 954, 110 S Ct 871 (seriousness of the AIDS epidemic and the potential for its transmission among prisoners).

Annotation: Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554.

Footnote 96. *Pattison v State*, 149 Misc 198, 267 NYS 525, affd 242 App Div 673, 273 NYS 445 (judicial notice was taken that an environment of peace and contentment is desirable for any substantial aid in the recovery of tubercular patients); *White v State*, 70 Tex Crim 285, 157 SW 152 (judicial notice was taken that tuberculosis and constipation are physical diseases).

Footnote 97. *Rodgers v Lawson*, 83 US App DC 281, 170 F2d 157 (court took judicial notice that even "minor surgery" is fraught with danger and that good professional judgment at times requires leaving the patient to the restorative process of nature, aided medicinally rather than by surgery); *Seneris v Haas*, 45 Cal 2d 811, 291 P2d 915, 53 ALR2d 124 (court stated that surgery and the necessity therefor, and the effect thereof, are in most instances not a matter of common knowledge); *Wood v Edenfield Electric Co.*, 211 Tenn 295, 364 SW2d 908 (it is common knowledge that surgical operations of any kind leave scar tissue and quite often there remain permanent tenderness and discomfort in the area of operation); *Fredrickson v Maw*, 119 Utah 385, 227 P2d 772 (ovrld on other grounds by *Swan v Lamb* (Utah) 584 P2d 814) (judicial notice taken that due care by a surgeon is lacking if surgical instruments, sponges, or medical supplies are not removed before an incision is closed or the wound heals).

Footnote 98. *United Secur. Life Ins. Co. v St. Clair*, 41 Ala App 243, 130 So 2d 213, cert den 272 Ala 711, 130 So 2d 219 (noticing the jury's common knowledge that the amputee suffered pain); *Williams v Consolidated Underwriters* (La App 2d Cir) 50 So 2d 55 (court took judicial notice that persons who have lost an index finger have little difficulty in securing gainful employment and experience very little inconvenience in satisfactorily discharging the duties of such employment); *Casey v Frank Jones Brewing Co.*, 79 NH 42, 104 A 454 (it is a matter of common knowledge that old scars are often sensitive, and

that amputation is frequently followed by suffering and discomfort for a long period of time).

Footnote 99. *Carroll v Missouri Power & Light Co.*, 231 Mo App 265, 96 SW2d 1074.

Footnote 1. *Ostertag v Bethlehem Shipbuilding Corp.*, 65 Cal App 2d 795, 151 P2d 647 (stating that it is a matter of common knowledge that a distortion in the bony structure of the body, once union and healing are complete, will not ordinarily correct itself); *Weinberg v Massachusetts Bay Transp. Authority*, 348 Mass 669, 205 NE2d 5 (whether a fracture of the ankle could give rise to varicose veins and shortness of breath cannot be said to be a matter of common knowledge).

Footnote 2. *Clark v State*, 257 Ala 95, 57 So 2d 384 (refusing to take judicial notice that an abortion can be commenced and carried to a fatal termination within a short period of time); *State v Hall*, 251 NC 211, 110 SE2d 868 (court stated that it is a fact of common and general knowledge that pregnant women sometimes miscarry, and sometimes have stillbirths, and that sometimes children born alive die very shortly after birth); *State v Daniels*, 169 Ohio St 87, 8 Ohio Ops 2d 56, 157 NE2d 736, 76 ALR2d 468 (court took judicial notice that it is reasonably, if not absolutely, certain that an 8-year-old boy cannot become a father); *Re Buck's License*, 192 Or 66, 232 P2d 791 (judicial notice was taken of the impossibility of performing two fatal abortions on the same subject within the span of a few days); *Gravley v Gravley* (Tex Civ App Dallas) 353 SW2d 333, writ dismissed (Mar 28, 1962) (it is common knowledge that babies are sometimes born prematurely).

Footnote 3. *Matthews v Hardaway Contracting Co.*, 179 Tenn 98, 163 SW2d 59.

Footnote 4. *National City Bank v Bledsoe*, 125 Ind App 430, 126 NE2d 490 (court took judicial notice that persons who have been fatally shot sometimes linger for several days before death); *Ferrara v Galluchio*, 5 NY2d 16, 176 NYS2d 996, 152 NE2d 249, 71 ALR2d 331, reh den 5 NY2d 793 (it is common knowledge among laypersons that wounds which do not heal over long periods of time frequently become cancerous)..

Footnote 5. *Goldberg v Gintoff*, 112 Vt 43, 20 A2d 114.

Footnote 6. *Milstead v Kaylor*, 186 Tenn 642, 212 SW2d 610 (judicial notice was taken of the effects of sunstroke as revealed in dictionaries and encyclopedias, one of them being that the condition may result in death); *Byrd v Stonega Coke & Coal Co.*, 182 Va 212, 28 SE2d 725 (court judicially noticed that frequently persons, apparently normal, collapse from exposure to extreme heat or cold).

Footnote 7. *Wolfsmith v Marsh*, 51 Cal 2d 832, 337 P2d 70, 82 ALR2d 1257 (held to be a matter of common knowledge among laypersons that injections in the arm, as well as other portions of the body, do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum); *Sadlock v Board of Education*, 137 NJL 85, 58 A2d 218 (court took judicial notice that vaccination is commonly believed to be a safe and valuable means of preventing the spread of certain diseases, particularly smallpox, and that this belief is supported by high medical authority).

Footnote 8. *Cleaver v Central States Life Ins. Co.*, 346 Mo 548, 142 SW2d 474, 129 ALR 1094 (refusing to take judicial notice that carbon monoxide gas is a poison, and of the manner in which it operates); *Boll v Condie-Bray Glass & Paint Co.*, 321 Mo 92, 11

SW2d 48 (judicial notice was taken that inhaling fumes, dust, and gases generated in the manufacture of paint produces "painters' colic," or lead poisoning, a disease accompanied by great pain and often resulting in permanent injury); McGurren v Fargo (ND) 66 NW2d 207 (court took judicial notice that poisons, when taken in sufficient quantities, cause serious injury); Greener v E. I. Du Pont De Nemours & Co., 188 Tenn 303, 219 SW2d 185 (court took judicial notice that lead poisoning is latent and progressive, and further noted as a matter of common knowledge that some symptoms of a given disease, particularly in its early stage, may likewise be symptoms of any one of several other diseases).

Footnote 9. Prudential Ins. Co. v Gutowski (Sup) 49 Del 233, 113 A2d 579, 52 ALR2d 1073.

Footnote 10. Commonwealth, DOT, Bureau of Driver Licensing v Moss, 146 Pa Cmwlth 330, 605 A2d 1279, reh den (Pa Cmwlth) 1992 Pa Commw LEXIS 342 and app den 532 Pa 648, 614 A2d 1144.

§ 63 Reputation of particular persons

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts will not take judicial notice of the reputation of particular individuals, 11 since this is a matter about which there might be a difference of opinion. 12 Similarly, a court may refuse to take judicial notice of the general public political reputation of particular persons. 13

Footnotes

Footnote 11. State v McDaniel, 249 Kan 341, 819 P2d 1165; Lorenz v Towntalk Pub. Co. (Mo) 261 SW2d 952.

Footnote 12. Lorenz v Towntalk Pub. Co. (Mo) 261 SW2d 952.

Footnote 13. Lorenz v Towntalk Pub. Co. (Mo) 261 SW2d 952.

3. Economic and Financial Facts [64-70]

§ 64 Generally

[View Entire Section](#)

The courts take judicial notice of generally known financial and business conditions at given times. 14 The courts may also take judicial notice of the existence and effect of general domestic, economic, or financial panics 15 or depressions, 16 such as the general business collapse following the stock market crash in 1929 17 and the concomitant unparalleled demands for relief. 18

The generally depressed condition of a major national industry is a proper subject of judicial notice, 19 although the courts may not take judicial notice of the exact extent or percentage of loss of business in any one particular industry or business enterprise. 20 In addition, a court may take judicial notice that the employment opportunities in one area are greater than those in another area. 21 Depreciation of property values 22 during periods of economic stress, and the fact that during a period of severe economic depression mortgagees were urged to be lenient and to refrain from foreclosing mortgages, 23 are matters which may be judicially noticed. Similarly, courts may judicially notice the fact that economic depressions have proved a motivating factor in the enactment of legislation designed to alleviate conditions resulting therefrom. 24

Business and price trends are also the subject of judicial notice, 25 and may impel the court in a proper case to fix the amount of return upon the investment of a corporation. 26 In establishing utility rates, courts have taken judicial notice of conditions incident to an economic depression, such as changes in value, consumption of commodities, and reasonable return on invested capital. 27

Footnotes

Footnote 14. *Dayton Power & Light Co. v Public Utilities Com.*, 292 US 290, 78 L Ed 1267, 54 S Ct 647; *McCardle v Indianapolis Water Co.*, 272 US 400, 71 L Ed 316, 47 S Ct 144; *Chadwick v Stokes* (CA3 Pa) 162 F2d 132, 172 ALR 405; *Florida Accountants Asso. v Dandelake* (Fla) 98 So 2d 323, 70 ALR2d 425, appeal after remand (Fla) 108 So 2d 46; *Aron v Gillman*, 309 NY 157, 128 NE2d 284, 51 ALR2d 598, motion den 309 NY 797, 130 NE2d 598; *Paullus v Yarbrough*, 219 Or 611, 347 P2d 620, 79 ALR2d 1222; *Young v Phillips*, 170 Tenn 169, 93 SW2d 634, 104 ALR 975.

Footnote 15. *Third Nat. Bank v Impac, Ltd.*, 432 US 312, 53 L Ed 2d 368, 97 S Ct 2307.

Footnote 16. *West Coast Hotel Co. v Parrish*, 300 US 379, 81 L Ed 703, 57 S Ct 578, 8 Ohio Ops 89, 1 BNA LRRM 754, 1 CCH LC ¶ 17021, 108 ALR 1330; *Atchison, T. & S. F. R. Co. v United States*, 284 US 248, 76 L Ed 273, 52 S Ct 146; *Camerer v California Sav. & Commercial Bank*, 4 Cal 2d 159, 48 P2d 39, 100 ALR 667; *Bell v District Court of Holyoke*, 314 Mass 622, 51 NE2d 328, 150 ALR 126; *Young v Phillips*, 170 Tenn 169, 93 SW2d 634, 104 ALR 975.

Footnote 17. § 65.

Footnote 18. *West Coast Hotel Co. v Parrish*, 300 US 379, 81 L Ed 703, 57 S Ct 578, 8 Ohio Ops 89, 1 BNA LRRM 754, 1 CCH LC ¶ 17021, 108 ALR 1330.

Footnote 19. *Great N. R. Co. v Weeks*, 297 US 135, 80 L Ed 532, 56 S Ct 426;
Atchison, T. & S. F. R. Co. v United States, 284 US 248, 76 L Ed 273, 52 S Ct 146.

Footnote 20. *Ohio Bell Tel. Co. v Public Utilities Com.*, 301 US 292, 81 L Ed 1093, 57 S Ct 724.

Footnote 21. *Grace v Collier County School Bd.* (Fla App D1) 552 So 2d 961, 14 FLW 2597.

Footnote 22. Regarding judicial notice of depreciations in property values, see § 69.

Footnote 23. *Marsh v Arthur C. Marsh Co.*, 153 Or 134, 55 P2d 1111, 104 ALR 981.

Footnote 24. *West Coast Hotel Co. v Parrish*, 300 US 379, 81 L Ed 703, 57 S Ct 578, 8 Ohio Ops 89, 1 BNA LRRM 754, 1 CCH LC ¶ 17021, 108 ALR 1330; *Gillum v Johnson*, 7 Cal 2d 744, 62 P2d 1037, 108 ALR 595, reh den 7 Cal 2d 765, 63 P2d 810, 108 ALR 612.

Footnote 25. *Dayton Power & Light Co. v Public Utilities Com.*, 292 US 290, 78 L Ed 1267, 54 S Ct 647; *Central Kentucky Natural Gas Co. v Railroad Com. of Kentucky*, 290 US 264, 78 L Ed 307, 54 S Ct 154; *Galveston Electric Co. v Galveston*, 258 US 388, 66 L Ed 678, 42 S Ct 351, 3 AFTR 3138.

Footnote 26. *Smith v Illinois Bell Tel. Co.*, 282 US 133, 75 L Ed 255, 51 S Ct 65.

Footnote 27. *Dayton Power & Light Co. v Public Utilities Com.*, 292 US 290, 78 L Ed 1267, 54 S Ct 647; *Central Kentucky Natural Gas Co. v Railroad Com. of Kentucky*, 290 US 264, 78 L Ed 307, 54 S Ct 154.

§ 65 World or national economic events

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts took judicial cognizance of the Great Depression of the late 1920's and 1930's, 28 including the stock market collapse, 29 the general economic and financial collapse which followed it, 30 and the ensuing adverse business and financial conditions and distress 31 and widespread unemployment. 32 More recently, courts have taken judicial notice of major financial events such as the Arab Oil Embargo of 1973, the Emergency Petroleum Allocation Act, 33 and their impact on the petroleum industry; 34 the dramatic decline in oil prices and profitability of drilling for oil and gas in the continental United States after 1981; 35 and the unusually poor state of the nation's economy during 1974-1982. 36

Footnotes

Footnote 28. *Downs v Baltimore & O. R. Co.*, 345 Ill App 118, 102 NE2d 537, 30 ALR2d 503; *Bolivar Tp. Bd. of Finance v Hawkins*, 207 Ind 171, 191 NE 158, 96 ALR 271.

Footnote 29. *Great N. R. Co. v Weeks*, 297 US 135, 80 L Ed 532, 56 S Ct 426; *Camerer v California Sav. & Commercial Bank*, 4 Cal 2d 159, 48 P2d 39, 100 ALR 667.

Footnote 30. *Atchison, T. & S. F. R. Co. v United States*, 284 US 248, 76 L Ed 273, 52 S Ct 146; *Jacobs v First Nat. Bank (CA5 La)* 48 F2d 17, cert den 284 US 634, 76 L Ed 540, 52 S Ct 18; *Camerer v California Sav. & Commercial Bank*, 4 Cal 2d 159, 48 P2d 39, 100 ALR 667; *Gannon v Gannon*, 130 Conn 449, 35 A2d 204, 150 ALR 986; *Mahood v Bessemer Properties, Inc.*, 154 Fla 710, 18 So 2d 775, 153 ALR 1199; *Vanderbilt v Brunton Piano Co.*, 111 NJL 596, 169 A 177, 89 ALR 1080.

Footnote 31. *Young v Phillips*, 170 Tenn 169, 93 SW2d 634, 104 ALR 975.

Footnote 32. *Jennings v St. Louis*, 332 Mo 173, 58 SW2d 979, 87 ALR 365.

Footnote 33. 15 USCS §§ 751-756.

Footnote 34. *Mainline Invest. Corp. v Gaines (ND Tex)* 407 F Supp 423, 1 Fed Rules Evid Serv 1107 (the embargo and the Act are adjudicative facts, judicially noticeable in an action seeking damages for breach of contract to pay commissions for locating a purchaser for crude oil).

Footnote 35. *Bastian v Petren Resources Corp. (CA7 Ill)* 892 F2d 680, CCH Fed Secur L Rep ¶ 94908, cert den 496 US 906, 110 L Ed 2d 270, 110 S Ct 2590.

Footnote 36. *Trevino v United States (CA9 Wash)* 804 F2d 1512, 21 Fed Rules Evid Serv 1402, cert den 484 US 816, 98 L Ed 2d 34, 108 S Ct 70 (noting that 1974-1982 were aberrational years, marked by recessions, double-digit inflation, and extreme oil prices; thus this period should not be used as the standard by which a court should adjust an award of damages to anticipate the effects of inflation).

§ 66 Banking; financial transactions, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts may take judicial notice that it is not normal business practice for a corporate payee of checks to endorse them in blank and deliver them to third persons, 37 and that for a bank to accept such checks for deposit in a third person's account violates reasonable standards of banking practice. 38 Similarly, courts may judicially notice that banks customarily do not accept instruments which lack the endorsement of a payee. 39 A court may also take judicial notice of customs and practices with regard to checking, 40 lending, 41 and various other matters, 42

In a securities fraud action, judicial notice of publicly filed disclosure documents is

Footnotes

Footnote 37. *Pargas, Inc. v Estate of Taylor* (La App 3d Cir) 416 So 2d 1358, 34 UCCRS 1238; *Belmar Trucking Corp. v American Trust Co.*, 65 Misc 2d 31, 316 NYS2d 247.

Footnote 38. *Belmar Trucking Corp. v American Trust Co.*, 65 Misc 2d 31, 316 NYS2d 247.

Annotation: Bank's "reasonable commercial standards" defense under UCC § 3-419(3), 49 ALR4th 888.

Footnote 39. *Federal Deposit Ins. Corp. v Marine Nat. Bank* (CA5 Fla) 431 F2d 341, 7 UCCRS 1327.

Footnote 40. *Arterburn v Walkfield*, 309 Ky 212, 217 SW2d 203, 6 ALR2d 982

Footnote 41. *Kimmey v Farmers Bank* (Del Sup) 373 A2d 569 (banking institutions are subject to mortgage loan regulation); *Champa v Consolidated Finance Corp.*, 231 Ind 580, 110 NE2d 289, 36 ALR2d 185 (finance companies generally retain car title certificates in connection with chattel mortgages); *Re Ruepp*, 71 NC App 146, 321 SE2d 517 (institutional lenders customarily dictate the form and language of the documents used in a loan agreement); *Austin v Seattle*, 176 Wash 654, 30 P2d 646, 93 ALR 203 (distinctive character of the chattel loan business).

Footnote 42. *Re Marriage of Tammen* (1st Dist) 63 Cal App 3d 927, 134 Cal Rptr 161 (it is common knowledge that deeds of trust are bought and sold in the ordinary course of business); *Lichtenfels v North Carolina Nat. Bank*, 260 NC 146, 132 SE2d 360, 1 ALR3d 897 (state and national banks seek the privilege of acting as fiduciaries administering the estates of decedents and incompetent persons).

Footnote 43. *Walsh v Chittenden Corp.* (DC Vt) 798 F Supp 1043, CCH Fed Secur L Rep ¶ 97364, later proceeding (DC Vt) 799 F Supp 405.

§ 67 Money; changes in cost of living

<p>View Entire Section Go to Parallel Reference Table</p>

In general, the courts take judicial notice of the character of money and popular language in reference thereto, as well as the value of the various forms of money, in the past as well as in the present. 44 The value of the money of a leading foreign nation in terms of our own will likewise be judicially noticed by the courts. 45

The courts will take judicial notice of the change in value of the dollar during a period of years, 46 and the steady and material decline in the purchasing value of the dollar. 47

For example, change in the cost of living is so much a matter of common knowledge that the jury, or the court when fixing damages, or the court reviewing an award of damages for personal injuries or death, may take judicial notice of such change. 48

Footnotes

Footnote 44. *Gay's Gold*, 80 US 358, 13 Wall 358, 20 L Ed 606.

Footnote 45. *Parker v Pan American World Airways, Inc.* (Tex Civ App Dallas) 447 SW2d 731, writ dismissed by agreement (Jan 21, 1970).

Footnote 46. *Arnold v Arnold*, 332 Ill App 586, 76 NE2d 335, 18 ALR2d 1.

Annotation: Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death, 12 ALR2d 611.

Effect of anticipated inflation on damages for future losses—modern cases, 21 ALR4th 21.

Footnote 47. *Banton v Belt Line R. Corp.*, 268 US 413, 69 L Ed 1020, 45 S Ct 534; *Citizens of Florida v Florida Public Service Com.* (Fla App D1) 440 So 2d 371, review denied (Fla) 461 So 2d 1357, 10 FLW 49; *Lahman v Gould* (1st Dist) 82 Ill App 2d 220, 226 NE2d 443, cert denied and application dismissed 390 US 458, 20 L Ed 2d 29, 88 S Ct 1197; *Downs v Baltimore & O. R. Co.*, 345 Ill App 118, 102 NE2d 537, 30 ALR2d 503; *Curotto v Hammack*, 362 Mo 457, 241 SW2d 897, 26 ALR2d 1302; *Curotto v Hammack*, 362 Mo 457, 241 SW2d 897, 26 ALR2d 1302; *Woods Dev. Co. v Meurer Abstract & Title Co.* (Okla) 712 P2d 30.

Footnote 48. *Kircher v Atchison, T. & S. F. R. Co.*, 32 Cal 2d 176, 195 P2d 427.

§ 68 Current financial data; interest, discount, and exchange rates

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts regularly take notice of commonly known and easily verifiable information such as current interest rates, 49 although a jurisdiction which has not adopted the Federal Rules of Evidence has found that because the prime rate fluctuates, it is not a proper subject for judicial notice. 50 Courts may also take judicial notice of the discount rate on 90-day notes 51 and various other published economic statistics. 52 Similarly, the effect that inflation has already had on the value of money over a specific period of time is judicially noticeable. 53 In addition, a foreign currency rate of exchange is a proper subject of judicial notice. A rate of exchange is not subject to reasonable dispute because its accuracy can be determined readily by resort to an authoritative source such as a published rate of exchange. For example numerous publications, including major newspapers publish exchange rates. 54 A court may also take judicial notice that most credit cards do not charge interest on sums paid within 30 days. 55 A court may not,

however, take judicial notice of the American Jurisprudence 2d Desk Book compound interest and annuity tables for the purpose of determining values of a party's pension fund, as the Desk Book is not an authoritative publication, nor are its value tables a matter of common general knowledge. 56

Footnotes

Footnote 49. *Transorient Navigators Co., S.A. v M/S Southwind* (CA5 La) 788 F2d 288; *Havens Steel Co. v Randolph Engineering Co.* (CA8 Mo) 813 F2d 186, 22 Fed Rules Evid Serv 1206 (appellate court took judicial notice of the prevailing prime interest rate in 1980); *Gray Line Bus Co. v Greater Bridgeport Transit Dist.*, 188 Conn 417, 449 A2d 1036, 35 ALR4th 1252; *Fortman v Manthey* (ND) 248 NW2d 821; *Tyler Pipe Industries, Inc. v State, Dept. of Revenue*, 96 Wash 2d 785, 638 P2d 1213, later proceeding 105 Wash 2d 318, 715 P2d 123, *jur noted* 479 US 810, 93 L Ed 2d 17, 107 S Ct 57, *motion gr* 479 US 1015, 93 L Ed 2d 717, 107 S Ct 664 and *vacated on other grounds* 483 US 232, 97 L Ed 2d 199, 107 S Ct 2810, *on remand, en banc* 109 Wash 2d 878, 749 P2d 1286, *cert den and app dismd* 486 US 1040, 100 L Ed 2d 615, 108 S Ct 2030.

Footnote 50. *Read v Benedict*, 200 Ga App 4, 406 SE2d 488, 102-101 Fulton County D R 13b.

Footnote 51. *Wagner & Brown v E.W. Moran Drilling Co.* (Tex App Fort Worth) 702 SW2d 760, 90 OGR 571 (the current rate, 19 percent, was capable of accurate determination and therefore noticeable under Rule 201(b)(2)).

Footnote 52. *Feldman v Allegheny Airlines, Inc.* (DC Conn) 382 F Supp 1271, *affd in part and revd in part on other grounds* (CA2 Conn) 524 F2d 384, (1974 Economic Report of the President); *Deweese v United States* (CA10 Colo) 576 F2d 802, 47 ALR Fed 723 (Bureau of Labor Statistics Report); *Thomas v Thomas*, 176 Mich App 90, 439 NW2d 270 (court may take judicial notice that the consumer price index has risen a certain percentage in a given period of years); *City of Hope, Inc. v Fisk Bldg. Associates* (1st Dept) 63 App Div 2d 946, 406 NYS2d 472 (judicially noticing the Consumer Price Index, which served as the basis for an escalation clause in a lease).

Footnote 53. § 67.

Footnote 54. *Royatex, Ltd. v Daughan* (Me) 551 A2d 454.

Footnote 55. *Loigman v Keim*, 250 NJ Super 434, 594 A2d 1364.

Footnote 56. *Lassen v Lassen*, 8 Va App 502, 383 SE2d 471.

§ 69 Facts relating to real estate and agriculture

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court may take judicial notice of the effects of major economic events on real estate, for example, that foreclosure sales of mortgaged real property and the rights of parties to mortgages are affected by economic depression, 57 or that land values are deflated following a real estate boom or during a period of depression; 58 and that the rapid rise of real-estate prices has a severe impact on the availability of affordable housing for the poor and elderly. 59

Likewise, courts frequently take judicial notice of a variety of factors which have a bearing on the value of real property, such as the relation of sale price to market value of real estate; 60 that a smaller tract of land might be expected to sell for a larger amount per unit of area than a larger tract; 61 that construction of apartment buildings in a neighborhood previously zoned for one-family residences and buildings for educational, religious, and similar purposes will adversely affect the surrounding residential dwellings; 62 that small businesses have difficulty in obtaining tracts of timber within their purchasing power; 63 and that building costs have increased over the years. 64 But courts are often reluctant to take judicial notice of how such factors have effected the specific value of particular pieces of property, 65 or of the actual financial value of a given parcel of land. 66

Similarly, courts may take judicial notice of increases 67 and decreases 68 in farm land prices, the depressed state of agriculture generally, 69 and fluctuations in commodity prices. 70

Other matters regarding real estate of which a court may take judicial notice include the facts that payments on real property purchase contracts are often delayed by 2 or 3 weeks, and this does not upset most creditors; 71 a home which is in need of substantial repairs at the time of sale is worth considerably less than one which does not need such repairs; 72 title searchers and conveyancers customarily search title for only 60 years and until a warranty deed is found in the chain of title; 73 mortgages frequently run for many years; 74 the transfer of title to real estate requires anywhere from a few weeks to a period of months; 75 it is common practice for a wife to join in her husband's conveyance of his separately owned property, to assure that she will not later make a claim of homestead rights; 76 and that 1/2-acre tracts in a particular locality are ordinarily not profitable for agricultural use. 77

The cost of fixing up houses and rental values in a particular county do not, however, fall within any of the categories for proper judicial notice. 78 In addition, a sworn declaration from an appraiser stating that in the appraiser's opinion the creation of an assessment district will not result in an increase in market values is not a proper matter for judicial notice. 79

§ 69 ----Facts relating to real estate and agriculture [SUPPLEMENT]

Case authorities:

Evidence on depreciable life is outside field of general knowledge. *Three & One Co. v Geilfuss* (1993, App) 178 Wis 2d 400, 504 NW2d 393.

Footnotes

Footnote 57. *Marsh v Arthur C. Marsh Co.*, 153 Or 134, 55 P2d 1111, 104 ALR 981.

Footnote 58. *Mahood v Bessemer Properties, Inc.*, 154 Fla 710, 18 So 2d 775, 153 ALR 1199.

Footnote 59. *City of Oceanside v McKenna* (4th Dist) 215 Cal App 3d 1420, 264 Cal Rptr 275, review den; *Waterbury First Church Housing, Inc. v Brown*, 170 Conn 556, 367 A2d 1386.

Footnote 60. *Beverly Beach Properties, Inc. v Nelson* (Fla) 68 So 2d 604, 41 ALR2d 1071, cert den 348 US 816, 99 L Ed 643, 75 S Ct 27.

Footnote 61. *Georgia Power Co. v Walker*, 101 Ga App 454, 114 SE2d 159, 80 ALR2d 1264.

Footnote 62. *Filister v Minneapolis*, 270 Minn 53, 133 NW2d 500, 17 ALR3d 733, cert den and app dismd 382 US 14, 15 L Ed 2d 10, 86 S Ct 47; *Hayes v Gibbs*, 110 Utah 54, 169 P2d 781, 168 ALR 513.

Footnote 63. *Paullus v Yarbrough*, 219 Or 611, 347 P2d 620, 79 ALR2d 1222.

Footnote 64. *Coumas v Transcontinental Garage, Inc.*, 68 Wyo 99, 230 P2d 748, 41 ALR2d 539.

Footnote 65. *Aberbach v Wekiva Assoc., Ltd.* (SD Fla) 735 F Supp 1032, CCH Fed Secur L Rep ¶ 95373; *Re Marriage of Anderson*, 54 Or App 959, 637 P2d 615 (refusing to judicially notice the economic impact of inflation on a particular parcel of real estate, in family dissolution action).

Footnote 66. *Cummins v Dixon* (Mo) 265 SW2d 386, 47 ALR2d 441 (although an appellate court can judicially notice that land values have increased during the previous 10 years, it cannot take judicial notice whether a particular parcel of land is worth more than the amount that had been specified in an option clause in a contract entered 10 years earlier, because there is no evidence as to whether the price in that contract was unrealistically high or low when it was signed).

A court cannot take judicial notice of the market value and liquidity of tracts of real property. *Taylor v Taylor*, 46 NC App 438, 265 SE2d 626.

Footnote 67. *Fortman v Manthey* (ND) 248 NW2d 821.

Footnote 68. *Re Request for Advisory Opinion Concerning Constr. of H.B. 1388 etc.* (SD) 387 NW2d 239.

Footnote 69. *Lucy v Lucy* (ND) 456 NW2d 539; *Re Request for Advisory Opinion Concerning Constr. of H.B. 1388 etc.* (SD) 387 NW2d 239.

Footnote 70. *Re Request for Advisory Opinion Concerning Constr. of H.B. 1388 etc.*

(SD) 387 NW2d 239; Pugh v Turner, 145 Tex 292, 197 SW2d 822, 172 ALR 707.

Footnote 71. Miller v Uhrick (App) 146 Ariz 413, 706 P2d 739, approved 146 Ariz 511, 707 P2d 309.

Footnote 72. Grass v Homann (4th Dist) 130 Ill App 3d 874, 85 Ill Dec 751, 474 NE2d 711 (criticized on other grounds by Warren v Le May (5th Dist) 142 Ill App 3d 550, 96 Ill Dec 418, 491 NE2d 464).

Footnote 73. Palamarg Realty Co. v Rehac, 80 NJ 446, 404 A2d 21.

Footnote 74. Rosenbaum Realty Co. v American Sav. Bank, 152 NJ Super 81, 377 A2d 781.

Footnote 75. Sowell v Trotter, 69 Ohio Misc 7, 23 Ohio Ops 3d 75, 430 NE2d 480.

Footnote 76. Gregory v Sanders (Wyo) 635 P2d 795, appeal after remand (Wyo) 652 P2d 25.

Footnote 77. Bookout v White, 123 Mont 459, 214 P2d 861, 17 ALR2d 562.

Footnote 78. Neal v Fisher, 312 Md 685, 541 A2d 1314.

Footnote 79. Knox v Orland, 4 Cal 4th 132, 14 Cal Rptr 2d 159, 841 P2d 144, 92 CDOS 9914, 92 Daily Journal DAR 16569, later proceeding (Cal) 1992 Cal LEXIS 6113.

§ 70 Value of personal property; stocks, bonds, and investment capital

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts will not, as a general rule, take judicial notice of the value of articles of personal property, since innumerable factors affect their value. 80 Courts may, however, take judicial notice of certain matters or facts of general knowledge which affect the value of personal property. For example, the courts have taken judicial notice of the fact that stock in closed or closely held corporation has no recognized standard market value. 81

Courts have taken judicial notice of the earning power of investment capital, 82 the availability of high-yield investments, 83 and facts relating to the purchase, sale, acquisition and value of stocks. 84 In addition, a court may take judicial notice of what was or is the fair value or earning power of money safely invested at a given period of time 85 and of the reasonable return on invested capital. 86

A court may, but is not required, to take judicial notice that stock market reports of certain newspapers and trade journals are trustworthy and reliable, 87 although where a party fails to introduce evidence of the price at which a stock was traded on a particular date, it is improper for the trial judge to take judicial notice of that fact. 88

Footnotes

Footnote 80. *Marsh v Brown-Crummer Inv. Co.*, 138 Kan 123, 23 P2d 465, 88 ALR 835; *Loth v Loth*, 227 Minn 387, 35 NW2d 542, 6 ALR2d 176.

◆ Comment: A court may, however, take judicial notice that an expensive vehicle such as a Porsche is especially vulnerable to theft in New York City. *United States v Mundy* (ED NY) 806 F Supp 373, 37 Fed Rules Evid Serv 123.

Footnote 81. *Kay v Key West Development Co. (Fla)* 72 So 2d 786, 47 ALR2d 361.

Footnote 82. *In re Marriage of Zeman* (2d Dist) 198 Ill App 3d 722, 145 Ill Dec 149, 556 NE2d 767; *Re Kees' Estate*, 239 Iowa 287, 31 NW2d 380; *State ex rel. Home Planners Depository v Hughes*, 299 Mo 529, 253 SW 229, 28 ALR 1305 (judicially noticing that an interest rate of 3 percent is less than that paid by savings bank and much less than the usual rate on loans on real-estate security, and is therefore less than the value of the money's worth); *Fortman v Manthey* (ND) 248 NW2d 821.

Footnote 83. *Svetenko v Svetenko* (ND) 306 NW2d 607.

Footnote 84. *Willcuts v Bunn*, 282 US 216, 75 L Ed 304, 51 S Ct 125, 2 USTC ¶ 640, 9 AFTR 584, 71 ALR 1260 (most state and municipal bonds are purchased as investments); *Publicker v Commissioner* (CA3) 206 F2d 250, 53-2 USTC ¶ 10912, 44 AFTR 270, 60 ALR2d 1295, cert den 346 US 924, 98 L Ed 418, 74 S Ct 312 (prices commonly quoted for stock exchange transactions do not include the taxes incurred in the actual transfer of shares); *Foglesong v Thurston Nat. Life Ins. Co. (Okla)* 555 P2d 606 (acquisition of stock to acquire control of a corporation is frequently made at premium prices).

Footnote 85. *Simpson v United States*, 252 US 547, 64 L Ed 709, 40 S Ct 367, 4 AFTR 4735; *Re Kees' Estate*, 239 Iowa 287, 31 NW2d 380.

Footnote 86. *Central Kentucky Natural Gas Co. v Railroad Com. of Kentucky*, 290 US 264, 78 L Ed 307, 54 S Ct 154.

Footnote 87. *Gravenstine v Gravenstine*, 58 Md App 158, 472 A2d 1001.

Footnote 88. *Re Marriage of Moody* (1st Dist) 119 Ill App 3d 1043, 75 Ill Dec 581, 457 NE2d 1023.

4. Historical Facts [71-74]

§ 71 Generally

[View Entire Section](#)

Courts regularly take cognizance of matters of general history and historical events. An adjudicative fact does not qualify for judicial notice, however, merely because it is of ancient vintage; 89 as with any adjudicative fact, it must be common knowledge or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. 90

Footnotes

Footnote 89. *Oneida Indian Nation v New York* (CA2 NY) 691 F2d 1070, 11 Fed Rules Evid Serv 1002, 65 ALR Fed 606 (trial judge, interpreting treaties and the Articles of Confederation, erred in judicially noticing records, notes, correspondence, histories, articles, and other data, without at least giving both sides the opportunity to contest the propriety of noticing such materials); *Jordan v Worthen* (1st Dist) 68 Cal App 3d 310, 137 Cal Rptr 282 (admission of hearsay evidence was improper to prove that the historic use of a private road was a matter of common knowledge).

Regarding hearsay generally, see §§ 658 et seq.

Footnote 90. §§ 31, 33.

§ 72 Facts of national or international concern

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Judicial notice has been taken of the international situation which existed prior to entry of the United States into the First World War and the consequent development of our national resources. 91 Judicial notice also has been taken of the Civil War, of the acts which led to it, and of the general social, economic, and financial results which followed it. 92 In addition, judicial notice has been taken of the historical facts and events leading up to the adoption of a particular amendment to the Constitution of the United States, 93 and of the cooperation of federal and state authorities in a matter of joint concern. 94

Dates of historical events have also been judicially noticed by the courts where they are a matter of general or readily verifiable knowledge. 95

Footnotes

Footnote 91. *Ashwander v Tennessee Valley Authority*, 297 US 288, 80 L Ed 688, 56 S Ct 466, reh den 297 US 728, 80 L Ed 1011, 56 S Ct 588 and (criticized on other grounds by *Pennhurst State School & Hospital v Halderman*, 465 US 89, 79 L Ed 2d 67, 104 S Ct 900) as stated in *Cuesnongle v Ramos* (CA1 Puerto Rico) 835 F2d 1486.

Footnote 92. *Burke v Miltenberger*, 86 US 519, 19 Wall 519, 22 L Ed 158.

Footnote 93. *Burnet v Niagara Falls Brewing Co.*, 282 US 648, 75 L Ed 594, 51 S Ct 262, 2 USTC ¶ 674, 9 AFTR 978; *Re Trusteeship of Kenan*, 261 NC 1, 134 SE2d 85, 99 ALR2d 934, appeal after remand 262 NC 627, 138 SE2d 547.

Footnote 94. *Hamilton v Regents of University of California*, 293 US 245, 79 L Ed 343, 55 S Ct 197, reh den 293 US 633, 79 L Ed 717, 55 S Ct 345 (military instruction in land grant colleges).

Footnote 95. *Neely v Henkel*, 180 US 109, 45 L Ed 448, 21 S Ct 302.

§ 73 State and local facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

State courts in particular take notice of historic facts peculiarly connected with or affecting the state, 96 including the historical facts and conditions which precede and lead to the enactment of legislation on a given subject, 97 and even salient facts of local history which are known generally in a particular community in the state. 98

Footnotes

Footnote 96. *Unity Co. v Gulf Oil Corp.*, 141 Me 148, 40 A2d 4, 156 ALR 297, petition dismd 141 Me 438, 41 A2d 704.

Footnote 97. *Leo Sheep Co. v United States*, 440 US 668, 59 L Ed 2d 677, 99 S Ct 1403; *Oliphant v Suquamish Indian Tribe*, 435 US 191, 55 L Ed 2d 209, 98 S Ct 1011, on remand (CA9) 573 F2d 1137; *Mattz v Arnett*, 412 US 481, 37 L Ed 2d 92, 93 S Ct 2245; *International Soc. for Krishna Consciousness, Inc. v New Jersey Sports & Exposition Authority (DC NJ)* 532 F Supp 1088, 10 Fed Rules Evid Serv 472, affd (CA3 NJ) 691 F2d 155.

Footnote 98. *United States v Griffin (CA1 Mass)* 525 F2d 710, cert den 424 US 945, 47 L Ed 2d 351, 96 S Ct 1414; *Arthur v Nyquist (WD NY)* 415 F Supp 904, motion den (CA2 NY) 547 F2d 7 and motion den (WD NY) 426 F Supp 191 and supp op (WD NY) 426 F Supp 194 and adhered to (WD NY) 429 F Supp 206, affd in part and revd in part on other grounds (CA2 NY) 573 F2d 134, cert den 439 US 860, 58 L Ed 2d 169, 99 S Ct 179; *Amana Soc. v Colony Inn, Inc. (Iowa)* 315 NW2d 101; *Southwestern Greyhound Lines, Inc. v Railroad Com. of Texas*, 128 Tex 560, 99 SW2d 263, 109 ALR 1235.

§ 74 Other particular matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Notice may be taken of historic facts relating to religious history and practice, 99 politics, 1 international and foreign history, 2 and a variety of other subjects. 3

Footnotes

Footnote 99. *United States v Dykema* (CA7 Wis) 666 F2d 1096, 81-2 USTC ¶ 9814, 49 AFTR 2d 82-407, cert den 456 US 983, 72 L Ed 2d 861, 102 S Ct 2257, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17 and (criticized on other grounds by *United States v Church of World Peace* (CA10 Colo) 775 F2d 265, 85-2 USTC ¶ 9749, 56 AFTR 2d 85-6191).

Footnote 1. *Awtry v United States*, 231 Ct Cl 271, 684 F2d 896, 11 Fed Rules Evid Serv 748; *Adams v Bolin*, 74 Ariz 269, 247 P2d 617, 33 ALR2d 1102.

Footnote 2. *Re Application of Schlittner*, 146 Ariz 198, 704 P2d 1343; *Re De Sautels*, 1 Mass App 787, 307 NE2d 576.

Footnote 3. *Brown v Board of Educ.*, 347 US 483, 98 L Ed 873, 74 S Ct 686, 53 Ohio Ops 326, 38 ALR2d 1180 (history of development of segregated schools in the south); *Jones v Illinois Dept. of Rehabilitation Services* (CA7 Ill) 689 F2d 724, 11 Fed Rules Evid Serv 1471, 34 FR Serv 2d 1631; *Hunter v Wade* (CA10 Kan) 169 F2d 973, 8 ALR2d 277, affd 336 US 684, 93 L Ed 974, 69 S Ct 834, reh den 337 US 921, 93 L Ed 1730, 69 S Ct 1152; *Seay v Latham*, 143 Tex 1, 182 SW2d 251, 155 ALR 180.

5. Geography; Political Subdivisions [75-82]

§ 75 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts take judicial notice of the prominent geographical and natural features of the country, 4 such as the large lakes and rivers; 5 the division of the country into states; 6 the existence, location, and population of political subdivisions; 7 and distances between well-known points; 8 Courts also judicially notice the territorial limits of the United States, 9

The question whether a specific geographical fact is entitled to judicial notice is considerably simplified if the fact is the creature of statute, for in such cases the court will take notice of the statute and incidentally the geographical fact, regardless of the notoriety of the latter. 10

Footnotes

Footnote 4. *Pearcy v Stranahan*, 205 US 257, 51 L Ed 793, 27 S Ct 545; *Arkansas v Kansas & Texas Coal Co.*, 183 US 185, 46 L Ed 144, 22 S Ct 47; *McNitt v Turner*, 83 US 352, 16 Wall 352, 21 L Ed 341; *Nesko Corp. v Fontaine*, 19 Conn Supp 160, 110 A2d 631; *Wachendorf v Kearns (CP)* 33 Ohio Ops 458, 69 NE2d 640.

Footnote 5. § 82.

Footnote 6. § 76.

Footnote 7. §§ 76, 77.

Footnote 8. § 78.

Footnote 9. *Carroll v United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (criticized on other grounds by *Terry v Ohio*, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383) as stated in *Pimental v Department of Transp. (RI)* 561 A2d 1348; *Lowrance v Pflueger (CA7 Wis)* 878 F2d 1014; *United States v Perez (CA9 Guam)* 776 F2d 797; *United States v Garcia (CA11 Fla)* 672 F2d 1349, 10 Fed Rules Evid Serv 359.

Footnote 10. *United States v Jackson*, 104 US 41, 14 Otto 41, 26 L Ed 651; *McNitt v Turner*, 83 US 352, 16 Wall 352, 21 L Ed 341; *State v Scott (Trumbull Co)* 3 Ohio App 2d 239, 32 Ohio Ops 2d 360, 210 NE2d 289.

§ 76 States and political subdivisions; lots and blocks

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Both federal and state courts take judicial notice of the location and boundaries of states, 11 the division of states into counties, cities, towns, and villages, 12 and the locations of these subdivisions within various counties, judicial districts, and other political subdivisions. 13 A court may take judicial notice of the location of cities, counties, boundaries, dimensions, and distances because geographic facts such as these are easily ascertainable and capable of verifiable certainty. 14

◆ Comment: In determining the sufficiency of the evidence of venue, appellate courts may take judicial notice of the official highway map of their state. 15 Courts regularly take judicial notice of geographical features of the country generally and of the locality in which they sit. 16 Judicial notice will also be taken of the fact that a particular industry is not in the state. 17

The courts of a state take judicial notice of the political and territorial separation of the

state into counties and the population of a county, 18 the number of counties in the state having a population over a certain number, 19 the area of a county, 20 and the county seat. 21 In addition, a court may take judicial notice that a city is centrally located in a certain county and that a location that is just outside that city's limits is therefore located in the same county. 22

The courts take judicial notice of the charters of municipalities or of acts incorporating them. 23

Courts will take judicial notice of the location of cities, towns, and villages within the limits of their jurisdiction, at least where they are of significant size or importance. 24 For example, the courts of a state will take judicial notice of the county in which a municipality is located. 25 Courts will take judicial notice of the population of municipalities within their jurisdiction. 26

The courts will judicially notice that municipalities are divided into lots and blocks. 27

Footnotes

Footnote 11. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *Weaver v United States* (CA5 Ala) 298 F2d 496; *Alaska Public Easement Defense Fund v Andrus* (DC Alaska) 435 F Supp 664, 8 ELR 20019.

Footnote 12. Division of states into counties: *Fitch v Lawrenceburg*, 104 Ind App 704, 12 NE2d 391 (location of county seats); *Griffing v Gibb*, 67 US 519, 2 Black 519, 17 L Ed 353 (division into cities, towns, and villages).

Footnote 13. *United States v Raineri* (WD Wis) 521 F Supp 30 (judicial notice taken that federal statute divides Wisconsin into western and eastern districts, and does not divide the western district into divisions); *Nuuanu Neighborhood Asso. v Department of Land Utilization*, 63 Hawaii 444, 630 P2d 107; *People v Austin* (2d Dist) 116 Ill App 3d 95, 71 Ill Dec 625, 451 NE2d 593 (appellate court took judicial notice of Circuit judge's position on bench within bounds of the Second Judicial District, and also the judge's former civil office as public defender and his status as member of bar and officer of court); *State v Neil*, 203 Kan 473, 454 P2d 136 (district and appellate courts both took judicial notice that a town referred to in a criminal information is located in a certain county, thus establishing venue); *Odam v Arthur Murray, Inc.*, 5 Kan App 2d 612, 621 P2d 453 (location of Kansas City, Missouri and Kansas City, Kansas; *Burlington v Dunn*, 318 Mass 216, 61 NE2d 243, 168 ALR 1181, cert den 326 US 739, 90 L Ed 441, 66 S Ct 51; *Jackson v State* (Miss) 556 So 2d 335 (judge can take judicial notice that a city is located within a specified county for purpose of establishing venue within county for a crime committed in the city); *Opponents to Petition for Formation of Community Care Nursing Home Dist. v Petitioners for Formation of Community Care Nursing Home Dist.* (Mo App) 564 SW2d 552 (location of certain townships within certain counties); *Kramer v State*, 60 Nev 262, 108 P2d 304; *Crayne v Crayne*, 54 Nev 205, 13 P2d 222, 84 ALR 716; *Pearce v Langfit*, 101 Pa 507; *State v Harris* (Tenn Crim) 678 SW2d 473 (for purposes of determining jurisdiction, Court of Criminal Appeals judicially noticed that area of Gibson County in which crime took place was not within any of the civil districts comprising jurisdiction of the Humboldt Law Court).

Footnote 14. Butts Retail, Inc. v Diversifoods, Inc. (Tex App Beaumont) 840 SW2d 770, 1992-2 CCH Trade Cases ¶ 70061, writ den, motion overr (Apr 21, 1993).

Regarding judicial notice of matters capable of verifiable certainty, see § 34.

Footnote 15. State v Seaton (Mo App) 817 SW2d 535.

Footnote 16. Hoyt v Russell, 117 US 401, 29 L Ed 914, 6 S Ct 881; Farmland Preservation Asso. v Goldschmidt (CA8 Iowa) 611 F2d 233, 14 Env't Rep Cas 1791, 10 ELR 20052; Dowling v W. R. Hodges & Son, 131 Fla 672, 179 So 702; Turpin v Watts (Mo App) 607 SW2d 895; Hyland v Kirkman, 157 NJ Super 565, 385 A2d 284, later proceeding 204 NJ Super 345, 498 A2d 1278; Prijatel v Sifco Industries, Inc., 47 Ohio Misc 31, 1 Ohio Ops 3d 322, 353 NE2d 923, aff'd by ct of app; Brown v Knox County, 187 Tenn 8, 212 SW2d 673, 5 ALR2d 1264.

Footnote 17. Geo. B Wallace, Inc. v Pfost, 57 Idaho 279, 65 P2d 725, 110 ALR 613.

Footnote 18. Armstrong v Board of Suprs., 153 Neb 858, 46 NW2d 602.

Footnote 19. Harrell v Sullivan, 220 Ind 108, 40 NE2d 115, 140 ALR 455, reh den 220 Ind 125, 41 NE2d 354, 140 ALR 470 (ovrld on other grounds by State ex rel. Buttz v Marion Circuit Court, 225 Ind 7, 72 NE2d 225, 170 ALR 187).

Footnote 20. Beit v Beit, 135 Conn 195, 63 A2d 161, 10 ALR2d 734, reh den 135 Conn 413, 65 A2d 171, 10 ALR2d 734.

Footnote 21. Brown v Knox County, 187 Tenn 8, 212 SW2d 673, 5 ALR2d 1264; Brown Express Co. v Dieckman (Tex Civ App Austin) 344 SW2d 501.

Footnote 22. Brown v State, 205 Ga App 31, 421 SE2d 340, 92 Fulton County D R 1661; Brown Express Co. v Dieckman (Tex Civ App Austin) 344 SW2d 501.

Footnote 23. § 127.

Footnote 24. Peyroux v Howard, 32 US 324, 7 Pet 324, 8 L Ed 700; Burlington v Dunn, 318 Mass 216, 61 NE2d 243, 168 ALR 1181, cert den 326 US 739, 90 L Ed 441, 66 S Ct 51; Kramer v State, 60 Nev 262, 108 P2d 304.

Footnote 25. State v Ragland, 173 Kan 265, 246 P2d 276; Iozzi v State, 224 Md 42, 166 A2d 257; Crayne v Crayne, 54 Nev 205, 13 P2d 222, 84 ALR 716; Harper v Killion, 162 Tex 481, 348 SW2d 521.

Footnote 26. Lawson v Ridgeway, 72 Ariz 253, 233 P2d 459, 29 ALR2d 518.

Footnote 27. Hemsley v Sage, 194 Okla 669, 154 P2d 577.

§ 77 --Particular location within political subdivision

[View Entire Section](#)

Most courts that have considered the question have concluded that the location of a street address as within a particular political subdivision is judicially noticeable. 28 The same is true as to a particular intersection. 29 Judicial notice may be justified because the location of a particular street address is likely to be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 30 Some courts, however, refuse to take judicial notice, because the location of a street address within a particular political subdivision is not common knowledge. 31 In addition, a court may take judicial notice that a recognizable location is within a particular parish, even though the parish is never specifically mentioned by name. 32 Furthermore, that two particular cities are situated in a particular county is a proper subject for judicial notice and whether a highway links two cities is a fact of such notoriety that there is no necessity of accompanying a request for judicial notice with additional background information, in order for the facts to be mandatorily judicially noticed. 33 A court will not, however, take judicial notice that the building in question, in a case in which a defendant is charged with violating municipal ordinances in connection with the maintenance of the building, is within city limits. 34

Footnotes

Footnote 28. *United States v Spagnuolo* (CA2 NY) 168 F2d 768, cert den 335 US 824, 93 L Ed 378, 69 S Ct 48; *People v Hosney* (2nd Dist) 204 Cal App 2d 584, 22 Cal Rptr 397; *People v De Soto*, 33 Cal App 2d 478, 92 P2d 466; *National Optical Co. v United States Fidelity & Guaranty Co.*, 77 Colo 130, 235 P 343 (civil); *People v Pride*, 16 Ill 2d 82, 156 NE2d 551 (ovrld on other grounds by *People v Housby*, 84 Ill 2d 415, 50 Ill Dec 834, 420 NE2d 151); *Shreve v Taylor County Public Library Board* (Ky) 419 SW2d 779, appeal after remand (Ky) 431 SW2d 861 (civil); *State v Scramuzza* (La) 408 So 2d 1316; *State v Nelson* (La App 4th Cir) 543 So 2d 1058, cert den (La) 548 So 2d 1229; *State v Thomas* (La App 4th Cir) 543 So 2d 540, cert den (La) 548 So 2d 1229; *State v Spain* (Mo App) 759 SW2d 871 (superseded by statute on other grounds as stated in *State v Trumble* (Mo App) 844 SW2d 22); *State v Jackson*, 180 Mont 195, 589 P2d 1009; *Dooley v State*, 82 Okla Crim 243, 168 P2d 651 (criminal); *Commonwealth v Bigelow*, 250 Pa Super 330, 378 A2d 961, affd 484 Pa 476, 399 A2d 392; *Clements v State*, 141 Tex Crim 108, 147 SW2d 483 (criminal); *Evans Associated Industries, Inc. v Evans* (Tex Civ App Houston (1st Dist)) 493 SW2d 547, 86 ALR3d 481, writ dism w o j (Jul 11, 1973) and reh'g of writ of error overr (Oct 10, 1973) (civil); *Randall v Commonwealth*, 183 Va 182, 31 SE2d 571 (a criminal prosecution, in which the court, although not referring to a street address, held that judicial notice could be taken that defendant's residence was in a certain county).

Annotation: Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484.

Propriety of taking judicial notice of geographic facts for purposes of proof of venue in federal criminal prosecution, 15 ALR Fed 715.

Judicial notice of matters relating to public thoroughfares and parks, 48 ALR2d 1102.

Footnote 29. *United States v Hughes* (CA5 Ala) 542 F2d 246 (prosecution for driving while intoxicated prosecution per the Assimilative Crimes Act, 18 USCS § 13); *Times-Mirror Co. v Superior Court of Los Angeles County*, 3 Cal 2d 309, 44 P2d 547; *State v Trezona*, 286 Minn 531, 176 NW2d 95; *State v Anderson*, 156 Mont 122, 476 P2d 780; *Commonwealth v Lawrence*, 282 Pa 128, 127 A 465; *La Sorsa v Burr* (Tex Civ App Houston (14th Dist)) 516 SW2d 265.

Footnote 30. § 31.

Footnote 31. *Harmon v Harmon*, 209 Ga 474, 74 SE2d 75 (civil); *Smith v State*, 138 Ga App 692, 227 SE2d 468 (criminal).

Regarding judicial notice of matters of common knowledge, see § 33.

Annotation: Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484).

Footnote 32. *State v Powell* (La App 2d Cir) 598 So 2d 454, cert den (La) 605 So 2d 1089.

Footnote 33. *Apostolic Church v American Honda Motor Co.* (Tex App Tyler) 833 SW2d 553, writ den (Dec 2, 1992) and reh of writ of error overr (Dec 31, 1992).

Footnote 34. § 106.

§ 78 Distances between locations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts often take judicial cognizance of the distances between two or more locations and the customary routes and usual time required for travel between them. 35

A court is within its discretion in taking judicial notice of the distance between two points, 36 for example the distance between two cities, 37 as this is a fact which the court can accurately determine from unquestionable sources. 38 Although a court is free to take notice of the distance of an alternative maritime route, it is inappropriate for a federal court to notice judicially that parties would never contract for shipment over that geological distance, 39 as the Federal Rules of Evidence 40 forbid the taking of judicial notice of facts subject to reasonable dispute or of facts not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. 41

Footnotes

Footnote 35. *Carroll v United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (criticized on other grounds by *Terry v Ohio*, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383) as stated in *Pimental v Department of Transp.* (RI) 561 A2d

1348; Scott v Abilene Independent School Dist. (ND Tex) 438 F Supp 594; Tahoe Forest Inn v Superior Court of El Dorado County (3rd Dist) 99 Cal App 3d 509, 160 Cal Rptr 314; Beit v Beit, 135 Conn 195, 63 A2d 161, 10 ALR2d 734, reh den 135 Conn 413, 65 A2d 171, 10 ALR2d 734; M. I. G. Invest., Inc. v Marsala (2d Dist) 92 Ill App 3d 400, 47 Ill Dec 265, 414 NE2d 1381; Re Estate of Connors (1st Dist) 23 Ill App 2d 240, 161 NE2d 871; Lombardo v De Shance, 167 Ohio St 431, 5 Ohio Ops 2d 114, 149 NE2d 914, 66 ALR2d 1313.

Annotation: Judicial notice of matters relating to public thoroughfares and parks, 48 ALR2d 1102.

Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484.

Footnote 36. Fine Foods, Inc. v Dahlin, 147 Vt 599, 523 A2d 1228.

Footnote 37. State ex rel. Leonard Trucking Co. v Division of Transp. (Mo App) 825 SW2d 19. Walsh v Table Rock Asphalt Constr. Co. (Mo App) 522 SW2d 116.

Footnote 38. Fine Foods, Inc. v Dahlin, 147 Vt 599, 523 A2d 1228.

Footnote 39. Berkshire Fashions, Inc. v The M.V. Hakusan II (CA3 NJ) 954 F2d 874, 1992 AMC 1171, 22 FR Serv 3d 1180.

Footnote 40. FRE 201(b).

Footnote 41. § 31.

§ 79 Topographical surveys

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts will take judicial notice of the system of surveys in a state, including the United States Government surveys. 42 For example, a court may take judicial notice of a map bearing the seal of a professional surveyor, in a defendant's prosecution for selling drugs within 1,000 feet of school property where the map is used at trial only to aid an officer testifying to the jury as to the actual site where he made his measurements. 43

Footnotes

Footnote 42. Gies v Boehm, 78 Wyo 449, 329 P2d 807.

Footnote 43. Graves v State (Fla App D3) 587 So 2d 633, 16 FLW D 2682.

§ 80 Territorial extent of jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government, the laws of which they administer, 44 and of the extent and boundaries of the territory under which they themselves can exercise jurisdiction. 45

Footnotes

Footnote 44. *Pearcy v Stranahan*, 205 US 257, 51 L Ed 793, 27 S Ct 545; *Lincoln v United States*, 197 US 419, 49 L Ed 816, 25 S Ct 455, adhered to 202 US 484, 50 L Ed 1117, 26 S Ct 728; *Graham v State*, 196 Miss 382, 17 So 2d 210.

Footnote 45. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *Graham v State*, 196 Miss 382, 17 So 2d 210.

§ 81 Public thoroughfares and parks

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Highway nomenclature and designations within the trial court's jurisdiction are matters of common knowledge and proper subjects for judicial notice. In matters involving geographical knowledge, it is not necessary that a formal request for judicial notice be made by a party and therefor it does not require that the court formally announce that it is taking judicial notice of the fact. 46 Therefore, courts will take judicial notice of the existence and general aspects of the street and highway system. 47 For example, judicial notice may be taken that roads which are open to the public as of right constitute highways within the meaning of a state statute. 48

A court may take notice of facts relating to a road's physical 49 and geographical 50 characteristics, and the area through which a road passes. 51 There is, however, authority for the proposition that courts may not take judicial notice of whether streets are within boundaries of cities, 52 or within the boundaries of a business or residential district. 53

A court may also take judicial notice of traffic conditions, 54 the frequency with which a road is used, 55 a road's importance to the community, 56 the types of vehicles which frequent a given road, 57 and the visibility of lights along a roadway to drivers. 58 In addition, courts may take judicial notice of the existence, location, and purpose of stop

signs, 59 traffic lights, 60 and various types of road signs which communicate traffic regulations to drivers. 61 Courts have also judicially noticed the function and purpose of toll stations 62 and the existence of sidewalk defects. 63

Judicial notice may be taken of the characteristic functions and purposes of parks, or the major activities to which they are devoted. 64 Judicial notice has also been taken respecting the authority under which particular parks and roads were constructed or regulated. 65

§ 81 ----Public thoroughfares and parks [SUPPLEMENT]

Case authorities:

Although court may take judicial notice of location of cities within county, it may not do so as to location of streets within city. *Clark v State* (1994) 213 Ga App 313, 444 SE2d 806, 94 Fulton County D R 1577.

Footnotes

Footnote 46. *Apostolic Church v American Honda Motor Co.* (Tex App Tyler) 833 SW2d 553, writ den (Dec 2, 1992) and reh of writ of error overr (Dec 31, 1992).

Footnote 47. 8 Am Jur 2d, *Automobiles and Highway Traffic* § 980.

Footnote 48. *Stewart v Davis* (Miss) 571 So 2d 926.

Footnote 49. *Central P. R. Co. v Alameda County*, 284 US 463, 76 L Ed 402, 52 S Ct 225; *Haley v United States* (WD NC) 654 F Supp 481, affd without op (CA4 NC) 829 F2d 1120; *Murdock v Ledbetter-Johnson Co.*, 105 Ga App 551, 125 SE2d 99; *Howard v Missman*, 81 Idaho 82, 337 P2d 592; *Kinsch v Di Vito Constr. Co.* (1st Dist) 54 Ill App 2d 149, 203 NE2d 621; *Prell v Wood* (Iowa) 386 NW2d 89; *Earnest v Kansas State Highway Com.*, 182 Kan 357, 320 P2d 847 (noting that black-top construction tends to feather off and crumble at edges under heavy traffic in severe weather conditions); *Commonwealth, Dept. of Highways v General & Excess Ins. Co.* (Ky) 355 SW2d 695; *Burroughs v Milligan*, 199 Md 78, 85 A2d 775, 28 ALR2d 243; *Muszynski v Buffalo*, 49 Misc 2d 957, 268 NYS2d 753, revd on other grounds (4th Dept) 33 App Div 2d 648, 305 NYS2d 163, affd 29 NY2d 810, 327 NYS2d 368, 277 NE2d 414; *Edwards v State*, 202 Tenn 393, 304 SW2d 500 (judicial notice that highway was paved).

Footnote 50. *Wander v Brady*, 252 Iowa 183, 105 NW2d 86; *State v Hubschman*, 81 NJ Super 452, 195 A2d 913 (Garden State Parkway is 173 miles long with about 120 entrances along its sides); *Bogert v Washington*, 45 NJ Super 13, 131 A2d 535, affd 25 NJ 57, 135 A2d 1 (taking judicial notice that a particular parkway ran parallel to another street, and of the distance between them); *Jumper v Goodwin*, 239 SC 508, 123 SE2d 857; *State v Gignac*, 119 Vt 471, 129 A2d 499; *People v Torres* (1st Dist) 57 Ill App 2d (abstract) 127, 207 NE2d 14.

Footnote 51. *Essex County Preservation Asso. v Campbell* (DC Mass) 399 F Supp 208, 7 Env't Rep Cas 2136, 5 ELR 20568, affd (CA1 Mass) 536 F2d 956, 8 Env't Rep Cas 2156,

6 ELR 20577 (court took judicial notice of fact that any increase in size of highway was bound to have some deleterious effect on environment); *Jasper v Commonwealth* (Ky) 375 SW2d 709; *Colonial Dodge, Inc. v Miller*, 116 Mich App 78, 322 NW2d 549, 34 UCCRS 123; *Selbee v Multnomah County*, 247 Or 390, 430 P2d 561 (it is a matter of common knowledge that conversion of two-lane highway in a residential district into four-lane highway will be a detriment to adjacent property and may lower its market value).

Footnote 52. *Kieffer v Berkeley* (Mo App) 508 SW2d 295.

Footnote 53. *Eagle Trucking Co. v Texas Bitulithic Co.* (Tex) 612 SW2d 503, reformed (Tex) 24 Tex Sup Ct Jour 256, on remand (Tex Civ App Tyler) 619 SW2d 598, writ dismissed (Jul 21, 1982) and writ reversed (Tex) 640 SW2d 873, rehearing of writ of error overruled (Nov 24, 1982) and rehearing of cause overruled (Mar 25, 1981).

Footnote 54. *State ex rel. Washington State Highway Com. v O'Brien*, 83 Wash 2d 878, 523 P2d 190.

Footnote 55. *Hom v Clark* (1st Dist) 221 Cal App 2d 622, 35 Cal Rptr 11; *Eggink v Robertson* (3rd Dist) 191 Cal App 2d 496, 13 Cal Rptr 76.

Footnote 56. *State Road Dept. v Lewis* (Fla) 170 So 2d 817 (taking judicial notice of the importance of a particular state road in the system of state roads).

Footnote 57. *Stevens v White Motor Corp.*, 77 Wis 2d 64, 252 NW2d 88.

Footnote 58. *May v Boston & M. Railroad*, 340 Mass 609, 165 NE2d 910.

Footnote 59. *Bakity v County of Riverside* (4th Dist) 12 Cal App 3d 24, 90 Cal Rptr 541.

Footnote 60. *Wilson v Morris* (La App 4th Cir) 139 So 2d 93.

Footnote 61. *State v Hubschman*, 81 NJ Super 452, 195 A2d 913 (judicial notice that intermittent signs are placed along roadside of Garden State Parkway to inform motorists of individual regulations); *Farmers Oil Co. v Miller*, 264 NC 101, 141 SE2d 41; *Derheim v N. Fiorito Co.*, 80 Wash 2d 161, 492 P2d 1030 (judicial notice that "no U-turn" signs were posted along divided portions of an interstate highway, prohibiting vehicles from reversing direction by crossing grass divider from one roadway to other).

Footnote 62. *State v Richards*, 106 NJ Super 55, 254 A2d 137.

Footnote 63. *Pappadakis v New Orleans* (La App 4th Cir) 182 So 2d 843.

Footnote 64. *New Castle v Lawrence County*, 353 Pa 175, 44 A2d 589.

Annotation: Judicial notice of matters relating to public thoroughfares and parks, 48 ALR2d 1102.

Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484.

§ 82 Waters and watercourses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts take judicial notice of the location, source, size, and course of major rivers and other bodies of water within the nation or jurisdiction, 66 and of their navigability. 67

The courts will also judicially notice at what distance from the mouth of a river the tide ebbs and flows, 68 although judicial notice will not be taken of the size of tidal lands or mud flats. 69 Judicial notice may also be taken of the fact that a certain stream is 70 or is not 71 a navigable stream. Furthermore, while judicial notice may be taken of the navigability of more important rivers and streams, less significant waterways must be established in the same manner as any other question of fact. 72 In addition, judicial notice will not be taken of the particular point between the mouth and source of a river where its navigability ceases, since that is a matter requiring proof. 73

Footnotes

Footnote 66. *Wear v Kansas*, 245 US 154, 62 L Ed 214, 38 S Ct 55; *People ex rel. Barrett v Anderson*, 398 Ill 480, 76 NE2d 773.

Footnote 67. *Arizona v California*, 283 US 423, 75 L Ed 1154, 51 S Ct 522; *United States v Utah*, 283 US 64, 75 L Ed 844, 51 S Ct 438; *Otto v Alper* (DC Del) 489 F Supp 953, 6 Fed Rules Evid Serv 511; *Smith v Hustler, Inc.* (WD La) 514 F Supp 1265, 8 Fed Rules Evid Serv 1001; *Elder v Delcour*, 364 Mo 835, 269 SW2d 17, 47 ALR2d 370.

Footnote 68. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *Peyroux v Howard*, 32 US 324, 7 Pet 324, 8 L Ed 700.

Footnote 69. *Baer v Moran Bros. Co.*, 153 US 287, 38 L Ed 718, 14 S Ct 823.

Footnote 70. *Wear v Kansas*, 245 US 154, 62 L Ed 214, 38 S Ct 55.

Footnote 71. *Elder v Delcour*, 364 Mo 835, 269 SW2d 17, 47 ALR2d 370.

Footnote 72. *E.D. Mitchell Living Trust v Murray* (Mo App) 818 SW2d 326.

Footnote 73. *United States v Rio Grande Dam & Irrig. Co.*, 174 US 690, 43 L Ed 1136, 19 S Ct 770.

6. Transportation [83-87]

§ 83 Motor vehicles and their operation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have judicially noticed matters as basic as the definition of an automobile, 74 and as specific as the effect of a stone thrown at a passing car. 75 Numerous decisions have judicially noticed the function of car parts, including signal devices, 76 headlights, 77 and tires. 78 Courts have judicially noticed the effect intoxication has on the driver, 79 the annual number of alcohol-related traffic accidents, 80 and the carnage caused by such accidents, 81 as well as highway fatality statistics, generally. 82

Courts may take judicial notice include the normal purposes for which a vehicle is used, 83 although a court cannot take judicial notice of the characteristics of either a trail bike or a particular brand of motorcycle, in resolving whether a trail bike is either an automobile or midget automobile within insurance policy's exclusion clause. 84 In addition, courts may take judicial notice of the proper positioning of a towed vehicle, 85 and the fact that motorcycles generally emit considerable noise through their exhaust systems. 86 Courts may also judicially notice types of driver conduct which are usually indicative of negligence, 87 of the inherent dangers of certain types of driving maneuvers, such as making a left turn, 88 and of the fact that passengers rely on the driver for control and management of the car and to exercise the required degree of care. 89 Furthermore, it is generally agreed that the reliability of radar to measure the speed of motor vehicles is a proper subject for judicial notice. 90

Footnotes

Footnote 74. *Home Indem. Co. v Hunter* (1st Dist) 7 Ill App 3d 786, 288 NE2d 879; *Midwest Mut. Ins. Co. v Fireman's Fund Ins. Co.*, 258 SC 533, 189 SE2d 823.

Footnote 75. *Kingery v Chapple* (Alaska) 504 P2d 831.

Footnote 76. *Kantor v Ash*, 215 Md 285, 137 A2d 661, 69 ALR2d 585.

Footnote 77. *Midwest Mut. Ins. Co. v Fireman's Fund Ins. Co.*, 258 SC 533, 189 SE2d 823.

Footnote 78. *Searcy v Neal* (Mo App) 509 SW2d 755, appeal after remand (Mo App) 549 SW2d 602.

Footnote 79. *Ex parte Ross* (Tex Crim) 522 SW2d 214, cert den 423 US 1018, 46 L Ed 2d 390, 96 S Ct 454 and (superseded by statute on other grounds as stated in *Price v State* (Tex Crim) 866 SW2d 606).

Regarding judicial notice of the nature an intoxicating quality of alcoholic beverages generally, see §§ 98, 99.

Footnote 80. *Simpson v Anchorage* (Alaska App) 635 P2d 1197.

Footnote 81. *Kobilansky v Liffrig* (ND) 358 NW2d 781 (superseded by statute on other grounds as stated in *Madison v North Dakota DOT* (ND) 503 NW2d 243).

Footnote 82. *Popp v Motor Vehicle Dept.*, 211 Kan 763, 508 P2d 991.

Footnote 83. *Berdeaux v Gamble Alden Life Ins. Co.* (Ala) 338 So 2d 403; *Hartford Acci. & Indem. Corp. v Lowery* (Tex Civ App Beaumont) 490 SW2d 935, writ ref n r e (May 23, 1973).

Footnote 84. *Central Nat. Ins. Co. v Virginia Farm Bureau Mut. Ins. Co.*, 222 Va 353, 282 SE2d 4.

Footnote 85. *Brown v Rudy Smith Service, Inc.* (La App 4th Cir) 441 So 2d 409.

Footnote 86. *Wallace v Andersonville Docks, Inc.* (Tenn App) 489 SW2d 532.

Footnote 87. *Hahn v Russ* (Alaska) 611 P2d 66 (one who rear-ends another vehicle under normal circumstances is generally negligent); *Bone v General Motors Corp.* (Mo) 322 SW2d 916, 71 ALR2d 361.

Footnote 88. *Green v Boney*, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370.

Footnote 89. *Worley v Tucker Nevils, Inc.* (Mo) 503 SW2d 417.

Footnote 90. *State v Kane* (App) 122 Idaho 623, 836 P2d 569.

§ 84 Driver reaction times

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is not possible to act instantaneously upon perceiving danger; some time elapses between the perception of danger and the physical reaction to it. In litigation arising from traffic collisions, courts readily acknowledge and accept this fact. 91 Courts are divided, however, as to the propriety of taking judicial notice of the length of time it takes the average driver to react. Several courts have taken judicial notice, usually based on state publications of various sorts, that the average driver reaction time is anywhere from half a second to a full second; 92 other courts have refused to take judicial notice of an average reaction time. 93 Even where courts will take judicial notice of driver reaction times, a court may require that the information be verified. For example, a trial court does not abuse its discretion in refusing to take judicial notice of reaction times, braking distances, and stopping distances when a party's exhibits do not identify their sources and therefore the information they contain cannot be verified. 94

Footnotes

Footnote 91. Ryans v Blevins (DC Del) 159 F Supp 234, affd (CA3 Del) 258 F2d 945; Albaugh v Pennsylvania R. Co. (DC Dist Col) 120 F Supp 70, affd 95 US App DC 82, 219 F2d 764; Berton v Cochran, 81 Cal App 2d 776, 185 P2d 349; Bechtold v Bishop & Co. (Cal App) 98 P2d 575, superseded on other grounds 16 Cal 2d 285, 105 P2d 984; Coonley v Lowden, 234 Iowa 731, 12 NW2d 870; State use of Stehley v Belle Isle Cab Co., 194 Md 550, 71 A2d 435; Dister v Ludwig, 362 Mo 162, 240 SW2d 694; Yeaman v Storms, 358 Mo 774, 217 SW2d 495; McMinn v Thompson, 61 NM 387, 301 P2d 326; De Marco v Rose, 392 Pa 1, 139 A2d 634; Teston v Miller (Tex Civ App Beaumont) 349 SW2d 296, writ ref n r e (Jan 3, 1962) and reh'g of writ of error overr (Jan 31, 1962); Stimeling v Goodman, 202 Va 111, 115 SE2d 923; Murray v Banning, 17 Wash 2d 1, 134 P2d 715; Kaan v Kuhn, 64 Wyo 158, 187 P2d 138.

Footnote 92. Ryans v Blevins (DC Del) 159 F Supp 234, affd (CA3 Del) 258 F2d 945 (three-quarters to four-fifths of a second); Standard Oil Co. v Crawl (CA8 Mo) 198 F2d 580 (same; McDonough v St. Louis Public Service Co. (Mo) 350 SW2d 739 (same); Vietmeier v Voss (Mo) 246 SW2d 785 (three-quarters of a second, unless a longer time affirmatively appears in the proof); McCreary v Conroy (Mo App) 611 SW2d 234; De Marco v Rose, 392 Pa 1, 139 A2d 634 (three-quarters of a second); Samford v Duff (Tex Civ App Corpus Christi) 483 SW2d 517, writ ref n r e (Oct 11, 1972) and reh'g of writ of error overr (Nov 22, 1972) (same); Thornton v Campise (Tex Civ App Houston (14th Dist)) 459 SW2d 455, writ ref n r e (Feb 17, 1971) (three-quarters of a second); Kaan v Kuhn, 64 Wyo 158, 187 P2d 138 (at least one-half of a second is required after danger appears for the average motorist to transfer his foot from accelerator throttle to brake).

Annotation: Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds, 84 ALR2d 979 § 1.

Footnote 93. Conway v Chemical Leaman Tank Lines, Inc. (CA5 Tex) 610 F2d 360, reh'g den (CA5 Tex) 614 F2d 1298; Hansen v Dillon, 156 Colo 396, 400 P2d 201; Mathews v Carlson (Fla App D3) 130 So 2d 625; Kinchen v Rigamer (La App 4th Cir) 411 So 2d 482.

Footnote 94. Gronneberg v Hoffart (ND) 466 NW2d 809.

§ 85 Boats; ships and shipping

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have taken judicial notice of matters relating to travel by boat, air, and rail. 95 For example, courts have judicially noticed the nature of a boat's speed in knots, 96 the function and effectiveness of boats' radars, 97 and the consequence of a boat's severance from its berth. 98

The courts will take judicial notice of matters of common knowledge relative to ships and shipping. It is common knowledge that a ship is a wanderer to many ports of call and thus more often than not is far from the direct control and supervision of its owner. 99

It is also common knowledge that the master of a ship is charged with full enforcement of discipline of members of the crew. 1

Footnotes

Footnote 95. *Michigan C. R. Co. v Powers*, 201 US 245, 50 L Ed 744, 26 S Ct 459.

Footnote 96. *Valentine Waterways Corp. v Tug Choptank* (ED Va) 260 F Supp 210, affd (CA4 Va) 380 F2d 381.

Footnote 97. *Granholt v TFL Express* (SD NY) 576 F Supp 435, 1984 AMC 943, 14 Fed Rules Evid Serv 1518.

Footnote 98. *Trade Banner Line, Inc. v Caribbean S.S. Co., S. A.* (CA5 Tex) 521 F2d 229.

Footnote 99. *State ex rel. Southern Pacific Co. v Duncan*, 230 Or 179, 368 P2d 733, 98 ALR2d 617.

Footnote 1. *State ex rel. Southern Pacific Co. v Duncan*, 230 Or 179, 368 P2d 733, 98 ALR2d 617.

§ 86 Airlines and airports

<p>View Entire Section Go to Parallel Reference Table</p>

Judicial notice has been given to information relating to the types of airlines that service particular airports; 2 the impact of an airport upon surrounding communities; 3 and the psychological and emotional effect that an airplane crash has on the nearby population. 4 But in the absence of qualifying evidence, a court should not take judicial notice of information concerning events revolving around an airport in another state. 5

Footnotes

Footnote 2. *Indianapolis Airport Auth. v American Airlines* (CA7 Ind) 733 F2d 1262, 15 Fed Rules Evid Serv 1340 (criticized on other grounds by *Northwest Airlines v County of Kent* (US) 127 L Ed 2d 183, 94 CDOS 475, 94 Daily Journal DAR 822, 7 FLW S 741, 73 AFTR 2d 94-461, 94 TNT 16-2).

Footnote 3. *Hawn v County of Ventura* (2nd Dist) 73 Cal App 3d 1009, 141 Cal Rptr 111, cert den 436 US 917, 56 L Ed 2d 757, 98 S Ct 2262.

Footnote 4. *Re Air Crash Disaster near Chicago* (CA7 Ill) 644 F2d 594, cert den 454 US 878, 70 L Ed 2d 187, 102 S Ct 358.

§ 87 Railroads

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have repeatedly affirmed the fact that the railroad industry is a business which is constantly open to public observation. 6 The manner in which railroad companies conduct their business has been followed for so long a period, with such uniformity, that the court is bound to take judicial notice of its general features. 7 It is also a matter of judicial knowledge that the demands of commerce require in the transportation of freight that the cars of one company be hauled over the road of another. 8

The courts will take judicial notice that a particular railroad company is a common carrier engaged in the transportation of persons, 9 and in interstate commerce. 10

Since judicial notice is taken of the location of the principal cities of the United States and their distance apart, 11 a simple computation will ordinarily demonstrate with approximate certainty the time of travel between such cities and the courts will take judicial notice of the result of this computation. 12 It is clear, however, that judicial notice cannot be taken of the usual time of the arrival and departure of trains at a particular place. 13

The courts have judicially noticed that railroad grade crossings are places of danger, and that notwithstanding precautions taken by railroads to prevent grade crossing accidents, a substantial number of motorists are negligent in approaching them. 14 It has also been judicially noticed that it is dangerous to stand close to a moving train, both because of overhang and suction. 15

Footnotes

Footnote 6. Detroit U. Railway v Detroit, 229 US 39, 57 L Ed 1056, 33 S Ct 697.

Footnote 7. Northern Ohio Traction & Light Co. v Ohio, 245 US 574, 62 L Ed 481, 38 S Ct 196; Pennsylvania R. Co. v Towers, 245 US 6, 62 L Ed 117, 38 S Ct 2; Chicago, M. & St. P. R. Co. v Wisconsin, 238 US 491, 59 L Ed 1423, 35 S Ct 869; Minnesota Rate Cases, 230 US 352, 57 L Ed 1511, 33 S Ct 729; Atlantic C. L. R. Co. v Riverside Mills, 219 US 186, 55 L Ed 167, 31 S Ct 164; State ex rel. Southern Pacific Co. v Duncan, 230 Or 179, 368 P2d 733, 98 ALR2d 617.

Footnote 8. Pennsylvania R. Co. v Sonman Shaft Coal Co., 242 US 120, 61 L Ed 188, 37 S Ct 46.

Footnote 9. Horn v Illinois C. R. Co., 327 Ill App 498, 64 NE2d 574.

Footnote 10. *Furney v Thompson*, 164 Kan 294, 188 P2d 955.

Footnote 11. §§ 76, 78.

Footnote 12. *Illinois ex rel. McNichols v Pease*, 207 US 100, 52 L Ed 121, 28 S Ct 58; *United States v Thornton*, 160 US 654, 40 L Ed 570, 16 S Ct 415.

Footnote 13. *Wiggins v Burkham*, 77 US 129, 10 Wall 129, 19 L Ed 884.

Footnote 14. *Tanzi v New York C. R. Co.*, 155 Ohio St 149, 44 Ohio Ops 140, 98 NE2d 39, 24 ALR2d 1151.

Footnote 15. *Gibson v Southern Pacific Co.* (1st Dist) 137 Cal App 2d 337, 290 P2d 347, 63 ALR2d 1205.

7. Language and Communications [88-91]

§ 88 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a rule, the courts take judicial notice of matters of common knowledge in the field of communications¹⁶ and with regard to the use of language. For example, the courts will take judicial notice of the meaning of common English words, phrases, and abbreviations.¹⁷

Newspaper articles and television stories have been judicially noticed by federal courts,¹⁸ although at least one federal court has refused to take judicial notice of the truth of a newspaper article, stating that a statement of fact appearing in daily newspaper does not of itself establish that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.¹⁹ Judicial notice has also been taken of the fact that tabloid newspapers are published in many places and are ordinarily read generally, if sufficiently established for a length of time, so as to gain a general circulation.²⁰

Footnotes

Footnote 16. *State v Traffic Tel. Workers' Federation*, 2 NJ 335, 66 A2d 616, 24 BNA LRRM 2071, 16 CCH LC ¶ 65162, 9 ALR2d 854.

Footnote 17. §§ 89, 90.

Footnote 18. *Show-World Center, Inc. v Walsh* (SD NY) 438 F Supp 642; *Shell Oil Co. v Kleppe* (DC Colo) 426 F Supp 894.

Footnote 19. *Cofield v Ala. Public Service Com.* (CA11 Ala) 936 F2d 512.

For a further discussion of the purpose for which judicial notice may be taken, see § 134.

Footnote 20. *Pirie v Kamps*, 68 Wyo 83, 229 P2d 927, 26 ALR2d 647.

§ 89 Meanings of words and phrases; signs and symbols

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, the courts take judicial notice of the meaning of English words and phrases. 21 In this respect, it is not necessary that the meaning of a word or phrase be universal; to be judicially noticed no more is required than that the meaning be general and notorious in a local sense, within the particular jurisdiction of the court. 22 Courts regularly take judicial notice of the meaning of words, phrases, abbreviations and symbols, and even idioms and colloquialisms, either because they are generally understood in the community and therefore need not be proven, or because their meaning is readily verifiable. Thus, reference may be had to standard dictionaries for the purpose of determining the common meaning of words, 23 but courts also judicially notice the popular understanding of terms and expressions whether these are in a dictionary or conform to the dictionary definition. 24 If, however, a usage is special or limited to a too-restricted locality or business or class of people, the general rule may be deemed inapplicable. 25 For example, the courts will not take judicial notice of the commercial designation of an article where such designation is not commonly employed and is known only to a relatively few persons. 26 Courts have recognized that certain words are defamatory per se. 27

Footnotes

Footnote 21. *Sonn v Magone*, 159 US 417, 40 L Ed 203, 16 S Ct 67; *Saltonstall v Wiebusch*, 156 US 601, 39 L Ed 549, 15 S Ct 476; *Re Bordeaux' Estate*, 37 Wash 2d 561, 225 P2d 433, 26 ALR2d 249.

Footnote 22. *Toplitz v Hedden*, 146 US 252, 36 L Ed 961, 13 S Ct 70.

Footnote 23. § 26.

Footnote 24. *Thompson v Soles*, 299 NC 484, 263 SE2d 599.

Footnote 25. *Seeberger v Schlesinger*, 152 US 581, 38 L Ed 560, 14 S Ct 729; *Toplitz v Hedden*, 146 US 252, 36 L Ed 961, 13 S Ct 70.

Footnote 26. *Seeberger v Schlesinger*, 152 US 581, 38 L Ed 560, 14 S Ct 729.

Footnote 27. *Campbell v Jacksonville Kennel Club, Inc.* (Fla) 66 So 2d 495; *Gobin v Globe Pub. Co.*, 232 Kan 1, 649 P2d 1239, 8 Media L R 2191, 36 ALR4th 797; *James v*

§ 90 Abbreviations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Abbreviations are recognized as part of the English language, and the courts will take judicial notice of all well-known, widely recognized and commonly used abbreviations.

28 Thus, the courts take judicial notice of the usual abbreviations or corruptions of Christian names in common use. 29

Footnotes

Footnote 28. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *Re Siemens' Estate*, 346 Pa 610, 31 A2d 280, 153 ALR 483, cert den 320 US 758, 88 L Ed 452, 64 S Ct 66.

Footnote 29. 57 Am Jur 2d, Name § 7.

§ 91 Telecommunications

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court will take judicial notice of the telephone and of its nature, operation, and use. 30 The courts also take judicial notice of matters of common knowledge relating to radio and television. 31 For example, they have taken judicial notice of the custom of householders to use outside antennae or aerials for radio reception; 32 of the number of television sets in use; 33 and of the range limitations of television reception. 34

Footnotes

Footnote 30. *State v Traffic Tel. Workers' Federation*, 2 NJ 335, 66 A2d 616, 24 BNA LRRM 2071, 16 CCH LC ¶ 65162, 9 ALR2d 854.

Footnote 31. *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517 (judicial notice may be taken of the fact that more and more films made prior to commercial television are being telecast); *St. Louis Park v Casey*, 218 Minn 394, 16 NW2d 459, 155 ALR 1128 (that radio receiving and sending stations operated by amateurs are in connection with residences is too well known a fact to be ignored).

Footnote 32. *St. Louis Park v Casey*, 218 Minn 394, 16 NW2d 459, 155 ALR 1128.

Footnote 33. *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517.

Footnote 34. *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517.

8. Scientific and Mechanical Facts [92-101]

§ 92 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Judicial notice is taken of commonly known facts relating to scientific, 35 mechanical, 36 and electrical, 37 matters or devices and to explosions and explosives. 38

A court may take judicial notice that liquid milk weighs about the same as liquid water or approximately 8 1/3 pounds per gallon. 39 In addition, a court may take judicial notice that a lake is polluted and may take notice of what is polluting it. 40 For example, a court may take judicial notice of the fact that Lake Erie is polluted and that the pollution consists of a great quantity of different substances that have been deposited into it over a period of decades. 41

Footnotes

Footnote 35. §§ 93 et seq.

Footnote 36. §§ 100, 101.

Footnote 37. 26 Am Jur 2d, *Electricity, Gas, and Steam* § 173.

Footnote 38. 31A Am Jur 2d, *Explosions and Explosives* § 183.

Footnote 39. *Allen v Industrial Com.* (Utah) 729 P2d 15, 46 Utah Adv Rep 3.

Footnote 40. *State ex rel. Brown v BASF Wyandotte Corp.* (CP) 67 Ohio Ops 2d 239.

Footnote 41. *State ex rel. Brown v BASF Wyandotte Corp.* (CP) 67 Ohio Ops 2d 239.

§ 93 Scientific facts

In addition to noticing the validity of scientific principles and methods, courts also judicially notice an almost infinite variety of scientific facts. Such facts include laws of physics, 42 the composition and qualities of chemical substances, 43 and the effect that foods and chemicals have on human beings. 44 For example, it is judicially noticeable that someone addicted to heroin likely will fear the verifiably brutal physical and psychological symptoms connected with withdrawal. The effects of withdrawal from cocaine and methadone, by contrast, are not judicially noticeable; as to these, expert testimony is required. 45 In addition, a court may take judicial notice of any scientific fact that may be ascertained by reference to a standard dictionary 46 or is of such general knowledge as would be known by any judicial officer. 47 Courts have also taken judicial notice of the flammability or explosiveness of various substances, 48 the dangers of radiation from nuclear detonation, 49 and the characteristics and dangers of man-made objects and substances. 50

Even if a scientific fact is judicially noticeable, a court should not arbitrarily apply it to the evidence in the case, unless the conclusion reached is so irrefutable that the conclusion, like the scientific fact itself, is one on which reasonable minds could not differ. 51

Footnotes

Footnote 42. *Elwood v New York* (SD NY) 450 F Supp 846, revd on other grounds (CA2 NY) 606 F2d 358, 13 Env't Rep Cas 1833, cert den 447 US 906, 64 L Ed 2d 855, 100 S Ct 2989, 14 Env't Rep Cas 1575; *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517; *Larson v Santa Clara Valley Water Conservation Dist.* (1st Dist) 218 Cal App 2d 515, 32 Cal Rptr 875, 8 ALR3d 665; *Transcontinental Gas Pipeline Corp. v State Oil & Gas Bd.* (Miss) 457 So 2d 1298, 83 OGR 295, revd on other grounds 474 US 409, 88 L Ed 2d 732, 106 S Ct 709, 87 OGR 550, reh den 475 US 1091, 89 L Ed 2d 738, 106 S Ct 1485.

Footnote 43. *United States v Whitley* (CA6 Ky) 734 F2d 1129, 15 Fed Rules Evid Serv 531 (disapproved on other grounds by *Mathews v United States*, 485 US 58, 99 L Ed 2d 54, 108 S Ct 883) and (criticized on other grounds by *United States v Graham* (CA6 Ohio) 856 F2d 756, 26 Fed Rules Evid Serv 1154) (cocaine); *Miller Brewing Co. v G. Heileman Brewing Co.* (CA7 Wis) 561 F2d 75, 195 USPQ 281, cert den 434 US 1025, 54 L Ed 2d 772, 98 S Ct 751, 196 USPQ 592 (alcoholic and caloric content); *United States v Pisano* (CA7 Ill) 193 F2d 355, 41 AFTR 476, 31 ALR2d 409 (heroin); *Mast v Standard Oil Co.*, 140 Ariz 1, 680 P2d 137 (petroleum).

Annotation: Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name, 49 ALR2d 764.

Footnote 44. *Miller Brewing Co. v G. Heileman Brewing Co.* (WD Wis) 427 F Supp 1204; *State ex rel. Brown v BASF Wyandotte Corp.* (CP) 67 Ohio Ops 2d 239 (court

took judicial notice of the toxic properties of mercury, its conversion by natural processes into methyl mercury, and the deleterious effects of such substances on humans and on fish and other wildlife).

As to judicial notice of matters relating to health and disease generally, see §§ 60-62.

Footnote 45. *United States v Gregorio* (CA4 Md) 497 F2d 1253, cert den 419 US 1024, 42 L Ed 2d 298, 95 S Ct 501.

Footnote 46. Regarding judicial notice of information contained in dictionaries, see § 26.

Footnote 47. *State v Brock* (Hamilton Co) 34 Ohio App 2d 175, 63 Ohio Ops 2d 288, 296 NE2d 837.

Footnote 48. *Standard Oil Co. v Marysville*, 279 US 582, 73 L Ed 856, 49 S Ct 430; *Gulf, C. & S. F. R. Co. v Downs* (Tex Civ App) 70 SW2d 318, writ ref.

As to judicial notice in explosion cases, see 31A Am Jur 2d, Explosions and Explosives § 183.

Footnote 49. *Jaffee v United States* (CA3 NJ) 592 F2d 712, on remand (DC NJ) 468 F Supp 632, affd (CA3 NJ) 663 F2d 1226, cert den 456 US 972, 72 L Ed 2d 845, 102 S Ct 2234 and cert den 441 US 961, 60 L Ed 2d 1066, 99 S Ct 2406.

Footnote 50. *Browning-Ferris Industries of South Jersey, Inc. v Muszynski* (CA2 NY) 899 F2d 151, 31 Env't Rep Cas 1081, 20 ELR 20587; *Stark v Photo Researchers, Inc.* (SD NY) 77 FRD 18, 25 FR Serv 2d 419; *Bankers Fire & Marine Ins. Co. v Bukacek*, 271 Ala 182, 123 So 2d 157, 84 ALR2d 672 (use of dynamite as an explosive is intrinsically dangerous); *Gibson v Southern Pacific Co.* (1st Dist) 137 Cal App 2d 337, 290 P2d 347, 63 ALR2d 1205 (it is dangerous to stand close to a moving train, both because of overhang and suction); *Prudential Ins. Co. v Gutowski* (Sup) 49 Del 233, 113 A2d 579, 52 ALR2d 1073 (death may result from an overdose of sleeping pills); *Knox v Granite Falls*, 245 Minn 11, 72 NW2d 67, 53 ALR2d 1091 (kerosene flares are not the safest or most effective means of lighting and warning of street excavations); *Nance v Parks*, 266 NC 206, 146 SE2d 24, 15 ALR3d 1377 (an automobile equipped with automatic transmission when left in drive with the motor running, may move forward under its own power in response to a jolt or vibrations and an automobile can be driven an appreciable distance with the parking brake set before the driver notices that he has not released it); *Virginia Transit Co. v Hodges*, 201 Va 232, 110 SE2d 231, 84 ALR2d 115 (the volume of sound increases when a car sounding a siren is approaching).

Footnote 51. *Prestige Homes, Inc. v Legouffe* (Colo) 658 P2d 850, appeal after remand (Colo App) 689 P2d 697."

§ 94 Validity of scientific theories and techniques

[View Entire Section](#)

Scientific theories that are so firmly established as to have attained the status of scientific law are properly subject to judicial notice under the Federal Rules of Evidence. 52 In state courts, where the admission of testimony on a scientific technique presents an issue of first impression, the technique's reliability is not a proper subject of judicial notice. 53 If the underlying principles and information win sufficient acceptance in the scientific community, however, courts will take judicial notice of its scientific acceptability. 54 Therefore, once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature. For example, a court is entitled to take judicial notice that the procedure used to identify a substance as cocaine has been established with verifiable certainty or that it rests on the laws of nature where an expert witness testifies that the scientific tests used to identify the substance found in a defendant's pockets are the same tests recognized in some 5,000 other criminal cases in the state. 55

Courts may take judicial notice that the theory underlying DNA Profiling is generally accepted in the relevant scientific community. 56 Therefore, trial courts may take judicial notice of the reliability of DNA identification testing, although before a court admits the test results into evidence, the prosecutor must establish in each particular case that the generally accepted laboratory procedures were followed. 57

Even if a scientific theory or technique is judicially noticeable, a court should not arbitrarily apply it to the evidence in the case, unless the conclusion reached is so irrefutable that the conclusion, like the scientific fact itself, is one on which reasonable minds could not differ. 58

Footnotes

Footnote 52. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632.

Footnote 53. *People v Eyler*, 133 Ill 2d 173, 139 Ill Dec 756, 549 NE2d 268, cert den 498 US 881, 112 L Ed 2d 174, 111 S Ct 215, reh den 498 US 993, 112 L Ed 2d 550, 111 S Ct 541.

Footnote 54. *People v Smith* (1st Dist) 215 Cal App 3d 19, 263 Cal Rptr 678, reh den (Cal App 1st Dist) 1989 Cal App LEXIS 1302 and review den (Cal) 1990 Cal LEXIS 55.

Footnote 55. *Mitchell v State*, 200 Ga App 146, 407 SE2d 115, 102-134 Fulton County D R 17B.

Footnote 56. *United States v Jakobetz* (CA2 Vt) 955 F2d 786, 34 Fed Rules Evid Serv 876, cert den (US) 121 L Ed 2d 63, 113 S Ct 104 and (criticized on other grounds by *United States v Vea-Gonzales* (CA9 Or) 986 F2d 321, 93 CDOS 1187) and (criticized on other grounds by *United States v Isaacs* (CA1 Mass) 37 Fed Rules Evid Serv 1164); *State v Vandebogart*, 136 NH 365, 616 A2d 483.

Footnote 57. *People v Adams*, 195 Mich App 267, 489 NW2d 192, app den, mod on other grounds, remanded 441 Mich 915, 497 NW2d 182.

Regarding the admissibility of evidence, see §§ 313 et seq.

Footnote 58. *Prestige Homes, Inc. v Legouffe* (Colo) 658 P2d 850, appeal after remand (Colo App) 689 P2d 697."

§ 95 --Identification by fingerprints and footprints

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

So general is the use, and so accurate are the results, of fingerprint identification, that in many cases it has been expressly declared that the courts will take judicial notice of that means of identification. 59 A court may also properly take judicial notice of the scientific principle of capacity for identification by comparison of two sets of palm prints. 60 In addition, it is a matter of common knowledge in the fields of crime detection and medical jurisprudence that the permanence of the friction ridges on the sole of the foot makes a naked footprint a means of identification. 61

§ 95 --Identification by fingerprints and footprints [SUPPLEMENT]

Case authorities:

There was no error in a prosecution for first-degree murder, burglary, robbery, and attempted rape in the admission of testimony that an expert had compared a fingerprint from the crime scene with a fingerprint card from defendant on file before his arrest. Defendant's use of the fingerprint expert's report opened the door and created confusion which the State could clear up by introducing evidence that the report was based on a ten-print card that was on file prior to defendant's arrest for this crime. *State v Montgomery* (1995) 341 NC 553, 461 SE2d 732.

Footnotes

Footnote 59. *Murphy v State*, 184 Md 70, 40 A2d 239; *State v Dantonio*, 18 NJ 570, 115 A2d 35, 49 ALR2d 460.

Annotation: Fingerprints, palm prints, or bare footprints as evidence, 28 ALR2d 1115.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Footnote 60. *State v Inman* (Me) 350 A2d 582.

Footnote 61. State v Rogers, 233 NC 390, 64 SE2d 572, 28 ALR2d 1104 (ovrld on other grounds by State v Silver, 286 NC 709, 213 SE2d 247).

Practice References 43 Am Jur POF2d 217, Footprint Identification.

§ 96 --Blood tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The unanimity of medical and legal authorities on the question of the reliability of blood-grouping tests as an indicator of the truth justifies the taking of judicial notice of the general recognition of the accuracy and value of the tests when properly performed.

62 Consequently, a trial court may take judicial notice that electrophoresis is generally accepted by forensic scientists as a reliable method of detecting genetic markers in dried blood. 63

§ 96 --Blood tests [SUPPLEMENT]

Case authorities:

The Commonwealth established that a chemical blood test was performed by a clinical laboratory licensed and approved by the Department of Health, as required by 75 Pa CS § 1547(c)(2), where the approval of the laboratory was listed in the Pennsylvania Bulletin by the Department of Health and the court took judicial notice of such listing. Commonwealth v Brown (1993, Super Ct) 631 A2d 1014.

Footnotes

Footnote 62. Haines v Shanholtz, 57 Md App 92, 468 A2d 1365, cert den 300 Md 90, 475 A2d 1201; Groulx v Groulx, 98 NH 481, 103 A2d 188, 46 ALR2d 994; State v Dantonio, 18 NJ 570, 115 A2d 35, 49 ALR2d 460; Cortese v Cortese, 10 NJ Super 152, 76 A2d 717; Callison v Callison (Okla) 687 P2d 106.

Annotation: Blood grouping tests, 46 ALR2d 1000.

Admissibility and weight of blood-grouping tests in disputed paternity cases, 43 ALR4th 579.

Footnote 63. People v Lopez (1st Dist) 228 Ill App 3d 1061, 170 Ill Dec 758, 593 NE2d 647; State v Thomas, 187 W Va 686, 421 SE2d 227.

§ 97 --X-rays

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The process of X-ray photography is now as well established as a recognized method of securing a reliable representation of the bones of the human body, although they are hidden from direct view by surrounding flesh, and of metallic or other solid substances that may be embedded in the flesh, as was photography as a means of securing a representation of things that might be directly observed by the unaided eye at the time when photography was first given judicial sanction as a means of disclosing facts of observation. 64 In addition, the use of X-ray apparatus by competent dentists and what its use ordinarily reveals are so well known as to be within common knowledge and frequent experience of laymen. 65 It has become a matter of common knowledge that X-ray pictures only reflect shadows of solid or hard substances. 66

§ 97 --X- rays [SUPPLEMENT]

Practice Aids: X-rays and the best evidence rule, 213 New York LJ 28:3 (1995).

Footnotes

Footnote 64. *Wires v Litle*, 27 Cal App 2d 240, 80 P2d 1010, heard by sup ct as reported in 27 Cal App 2d 244, 82 P2d 388; *State v Matheson*, 130 Iowa 440, 103 NW 137.

Annotation: Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554 § 39.

Footnote 65. *Butts v Watts* (Ky) 290 SW2d 777.

Footnote 66. *Texas Employers' Ins. Ass'n v Crow*, 148 Tex 113, 221 SW2d 235, 10 ALR2d 913.

§ 98 Nature and intoxicating quality of alcoholic beverages

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judge may take judicial notice of well known and undisputed facts about the effect of alcohol on the human body. 67 For example, the courts will take judicial notice that alcohol 68 or whiskey, 69 including contraband or other homemade whisky, known as

moonshine, 70 are intoxicating liquors. 71 In addition, the name "gin" is sufficient to give judicial notice of the intoxicating quality of the liquid so named. 72 It is, however, improper for a judge to move beyond matters of common knowledge or facts readily determinable from unimpeachable sources and to attempt to make precise calculations based upon specific absorption of alcohol rates without the aid of expert testimony. 73

Footnotes

Footnote 67. *Poulnot v District of Columbia* (App DC) 608 A2d 134.

Court properly took judicial notice that Southern Comfort is an intoxicating liquor and that excessive consumption can cause death, where such facts are generally known. *State ex rel. Cholka v Johnson*, 96 Wis 2d 704, 292 NW2d 835.

Footnote 68. *Fuller v Jackson*, 97 Miss 237, 52 So 873; *Skaggs v State* (Okla Crim) 276 P2d 267, 49 ALR2d 760.

Annotation: Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name, 49 ALR2d 764 § 3.

Footnote 69. *Hughes v State*, 264 Ark 723, 574 SW2d 888; *Everhart v State*, 194 Tenn 272, 250 SW2d 368.

Footnote 70. *State v Hawkins*, 81 Utah 16, 16 P2d 713.

Footnote 71. For a listing and definition of various intoxicating liquors, see 45 Am Jur 2d, Intoxicating Liquors §§ 4-21.

Footnote 72. *Skaggs v State* (Okla Crim) 276 P2d 267, 49 ALR2d 760.

Footnote 73. *Poulnot v District of Columbia* (App DC) 608 A2d 134.

§ 99 --Malt liquors beer

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is divergence of opinion whether judicial notice should be taken of the intoxicating quality of beer from its name, this lack of accord being due in part to the difference in the alcoholic content of beer at different periods, causing the rule to change in some jurisdictions. In some cases, the courts have judicially noticed that the term beer, without any qualifying word, refers to an intoxicating beverage, 74 but there is other authority to the effect that judicial notice should not be taken that beer, without qualification of the word, is an intoxicating liquor. 75

Footnotes

Footnote 74. *Osborn v Leuffgen*, 381 Ill 295, 45 NE2d 622; *State v Winter*, 129 Mont 207, 285 P2d 149 (statutory definition of intoxicating liquor included beer).

Annotation: Judicial notice of intoxicating quality, and the like, of liquor or particular liquid, from its name, 49 ALR2d 764 § 8.

Footnote 75. *Louisville & N. R. Co. v Falls City Ice & Beverage Co.*, 249 Ky 807, 61 SW2d 639, 91 ALR 509; *Skaggs v State* (Okla Crim) 276 P2d 267, 49 ALR2d 760.

§ 100 Mechanical facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts take judicial notice of the general rules governing mechanical operations and powers. 76 The courts also take judicial notice of mechanical devices in general use, 77 the nature of the use of a specific device, 78 and the nature and method of its construction. 79 In any case, however, in order for judicial notice to be taken of mechanical matters and devices, they must be matters or devices of which there is common knowledge or general notoriety. 80

Footnotes

Footnote 76. *Black Diamond Coal Mining Co. v Excelsior Coal Co.*, 156 US 611, 39 L Ed 553, 15 S Ct 482; *Potts v Creager*, 155 US 597, 39 L Ed 275, 15 S Ct 194; *Springdale v Freeman* (CP) 25 Ohio Ops 2d 462, 93 Ohio L Abs 379, 196 NE2d 471; *Gordon's Transports, Inc. v Bailey*, 41 Tenn App 365, 294 SW2d 313.

Footnote 77. *Richards v Chase Elevator Co.*, 158 US 299, 39 L Ed 991, 15 S Ct 831, reh den 159 US 477, 40 L Ed 225, 16 S Ct 53; *Potts v Creager*, 155 US 597, 39 L Ed 275, 15 S Ct 194; *Springdale v Freeman* (CP) 25 Ohio Ops 2d 462, 93 Ohio L Abs 379, 196 NE2d 471; *Guarina v Bogart*, 407 Pa 307, 180 A2d 557, 93 ALR2d 1165.

Footnote 78. *Richards v Chase Elevator Co.*, 158 US 299, 39 L Ed 991, 15 S Ct 831, reh den 159 US 477, 40 L Ed 225, 16 S Ct 53; *Potts v Creager*, 155 US 597, 39 L Ed 275, 15 S Ct 194; *State v Shelt* (Lucas Co) 46 Ohio App 2d 115, 75 Ohio Ops 2d 103, 346 NE2d 345; *Kingsport Utilities, Inc. v Brown*, 201 Tenn 393, 299 SW2d 656, 69 ALR2d 87.

Footnote 79. *Springdale v Freeman* (CP) 25 Ohio Ops 2d 462, 93 Ohio L Abs 379, 196 NE2d 471.

Footnote 80. *Office Specialty Mfg. Co. v Fenton Metallic Mfg. Co.*, 174 US 492, 43 L Ed 1058, 19 S Ct 641; *Richards v Chase Elevator Co.*, 158 US 299, 39 L Ed 991, 15 S Ct 831, reh den 159 US 477, 40 L Ed 225, 16 S Ct 53; *Black Diamond Coal Mining Co. v Excelsior Coal Co.*, 156 US 611, 39 L Ed 553, 15 S Ct 482; *Potts v Creager*, 155 US

§ 101 --Patentability

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts will take judicial notice of the patentability of an invention when the question involved is a matter of common knowledge. 81 Thus, judicial knowledge will be taken of the fact that a mechanical device covered by a patent, secured or applied for, has been in general use for a period of time preceding the application for the patent, 82 but this is true only where such use is notorious and a matter of common knowledge. 83

Footnotes

Footnote 81. *Werk v Parker*, 249 US 130, 63 L Ed 514, 39 S Ct 197.

Footnote 82. *Office Specialty Mfg. Co. v Fenton Metallic Mfg. Co.*, 174 US 492, 43 L Ed 1058, 19 S Ct 641; *Richards v Chase Elevator Co.*, 158 US 299, 39 L Ed 991, 15 S Ct 831, reh den 159 US 477, 40 L Ed 225, 16 S Ct 53; *Black Diamond Coal Mining Co. v Excelsior Coal Co.*, 156 US 611, 39 L Ed 553, 15 S Ct 482; *Potts v Creager*, 155 US 597, 39 L Ed 275, 15 S Ct 194.

Footnote 83. *New York Belting & Packing Co. v New Jersey Car Spring & Rubber Co.*, 137 US 445, 34 L Ed 741, 11 S Ct 193.

As to judicial in patent validity and infringement litigation generally, see 60 Am Jur 2d, Patents § 1054.

9. Statistical and Mathematical Facts [102, 103]

§ 102 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The courts take judicial notice of statistical facts of general and common knowledge. 84 For example, the courts take judicial notice of statistical facts derived from an official census. 85 A court may also take judicial notice that the statistics and underlying sampling theory of DNA paradigms are not controversial or novel, and the court may therefore take judicial notice of the paradigm. 86

◆ Caution: Statistics may not be used as a substitute for facts. 87 In addition, federal records and statistics are recognized as public records of which courts may take judicial notice, and therefore, a court may take judicial notice of the statistics presented in a party's brief which were compiled by divisions of the United States Department of Transportation. 88 The courts also take judicial notice of the rules of arithmetic, 89 and of weights and measures other than those that are odd or unusual. 90

A court may take judicial notice, based upon the availability of statistics well publicized in newspapers and periodicals, that the use of illegal drugs constitutes a serious societal problem and that no segment of society is immune from this problem. 91

Courts refuse to take judicial notice of parole eligibility statistics as these are not a proper subject for judicial notice because statistical information of this type does not bound the scope of reasonable dispute or susceptible to immediate and an accurate determination by resort to readily accessible and indisputable sources. 92

§ 102 ----Generally [SUPPLEMENT]

Practice Aids: A lawyer's guide to probability and statistics, 20 Am J Crim L 401 (1993).

Footnotes

Footnote 84. *Parker v Brown*, 317 US 341, 87 L Ed 315, 63 S Ct 307; *Ney v Yellow Cab Co.*, 2 Ill 2d 74, 117 NE2d 74, 51 ALR2d 624.

Footnote 85. 14 Am Jur 2d, *Census* § 12.

Footnote 86. *State v Montalbo*, 73 Hawaii 130, 828 P2d 1274.

For a discussion of judicial notice of scientific theories or principals, see § 93.

Footnote 87. *Tenants' Union of West Side, Inc. v Beame*, 40 NY2d 133, 386 NYS2d 83, 351 NE2d 731.

Footnote 88. *Wehde v Regional Transp. Authority* (2d Dist) 237 Ill App 3d 664, 178 Ill Dec 190, 604 NE2d 446, app den 149 Ill 2d 662, 183 Ill Dec 873, 612 NE2d 525.

Footnote 89. *Gordon's Transports, Inc. v Bailey*, 41 Tenn App 365, 294 SW2d 313.

Trial court erred in refusing to take judicial notice of the number of feet traveled in a second by a car traveling at a given rate per hour, where plaintiff sought judicial notice of the indisputable results of a simple mathematical computation and supplied the court with the necessary information. *Drake v Holstead* (Tex App Beaumont) 757 SW2d 909.

Footnote 90. *Markendorf v Friedman*, 280 Ky 484, 133 SW2d 516, 127 ALR 416, app dismd 309 US 626, 84 L Ed 987, 60 S Ct 610.

Footnote 91. § 59.

Footnote 92. § 106.

§ 103 Mortality, or life expectancy, tables

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts take judicial notice of the existence of standard mortality, or life expectancy, tables which seek to approximate the lifespan of men and women from past experience. 93 Before the courts will take judicial notice of the accuracy or authenticity of a table of mortality figures, however, they must be satisfied by their own experience or the general use and reputation of the mortality tables that they are accurate and generally acceptable as authority. 94

In a divorce action, a court may take judicial notice of the mortality table put out by the United States Department of Health, Education and Welfare in calculating the present value of a spouse's retirement benefits so as to enable the court to determine whether the property division is just and fair. 95

Footnotes

Footnote 93. *Lincoln v Power*, 151 US 436, 38 L Ed 224, 14 S Ct 387; *Knoche v Meyer Sanitary Milk Co.*, 177 Kan 423, 280 P2d 605; *Morris v Morris (Ky)* 293 SW2d 243; *Geier v Tjaden (ND)* 74 NW2d 361; *Jones v Eppler (Okla)* 266 P2d 451, 48 ALR2d 333.

A court may, within its discretion, take judicial notice of actuarial tables and consequently rely upon them as accurate for a person of a given age and health. *Re Marriage of Bowman*, 226 Mont 99, 734 P2d 197.

As to judicial notice of the span of life, see § 55.

For various mortality (life expectancy) tables, see *Am Jur 2d Desk Book, Documents* 92-97.

Footnote 94. *Geier v Tjaden (ND)* 74 NW2d 361.

Footnote 95. *McKibben v McKibben (Tex Civ App San Antonio)* 567 SW2d 538.

Regarding property distribution in divorce actions generally, see 24 *Am Jur 2d, Divorce and Separation* §§ 817-962.

10. Law and Government Affairs [104-151]

a. Law, In General [104-128]

(1). Introduction [104-108]

§ 104 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

◆ Observation: The Federal Rule of Evidence which applies to judicial notice governs only judicial notice of adjudicative facts. 96

A court must judicially notice the law of its jurisdiction. 97

§ 104 ----Generally [SUPPLEMENT]

Case authorities:

The trial court properly took notice of and instructed upon federal law in a resentencing hearing for first- degree murder where the only aggravating circumstance submitted was pecuniary gain, the district attorney asked the court during trial to take judicial notice of two United States Code provisions dealing with servicemen's group life insurance and a death gratuity payment, and the court instructed the jury that the provisions of the United States Code are to be accepted as true by the jury. Although defendant contended that the court should have instructed the jury in accordance with G.S. § 8C-1, Rule 201(g) that it could, but was not required to, accept as conclusive any fact judicially noticed, the United States Code Sections are not adjudicative facts and the trial court properly took notice of and instructed upon federal law. *State v Bacon* (1994) 337 NC 66, 446 SE2d 542.

Footnotes

Footnote 96. FRE 201(a).

Law Reviews: Suffling, *Judicial Notice*, 48 Miss LJ 919, 930 (1977).

Footnote 97. *Newcomb v Brennan* (CA7 Wis) 558 F2d 825, 44 ALR Fed 297, cert den 434 US 968, 54 L Ed 2d 455, 98 S Ct 513 (state statutes, city charters and city ordinances were within the category of "common knowledge" and were proper subjects for judicial notice); *Glendale v Coquat*, 46 Ariz 478, 52 P2d 1178, 102 ALR 837; *Johnson v State*, 6 Ark App 78, 638 SW2d 686; *State ex rel. McGonigle v Madison Circuit Court*, 244 Ind 403, 193 NE2d 242 (state constitution and case law); *Cassibo v Bodwin*, 149 Mich App 474, 386 NW2d 559 (courts are required to take judicial notice of

all statutes of the state); *Sperry Corp. v State Tax Com.* (Mo) 695 SW2d 464; *State v Thayer*, 235 Neb 70, 453 NW2d 474 (all public laws and general statutes enacted by the legislature); *State v Pleva*, 203 NJ Super 178, 496 A2d 375, cert den 102 NJ 323, 508 A2d 203, later proceeding 106 NJ 637, 525 A2d 1104 (federal and state laws); *Kish v Van Note* (Tex) 692 SW2d 463, reh overr (Jul 17, 1985) (Texas courts are required to take judicial notice of the public statutes of the state).

§ 105 Federal-state issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a fundamental principle of American law that state ⁹⁸ as well as federal courts must take judicial notice of the Constitution of the United States, acts of Congress, ⁹⁹ and treaties entered into by the United States. ¹ Some modern state evidence codes codify this obligation. ²

Similarly, federal courts are bound to take notice of the laws of every state. ³ Thus, in exercising original jurisdiction, the Supreme Court of the United States takes judicial notice of the laws of the state in question, ⁴ and in the exercise of its general appellate jurisdiction, the Supreme Court takes notice of the laws of every state. ⁵ Furthermore, in reviewing judgments of the state courts, the Supreme Court of the United States takes judicial notice of subsequently enacted legislation of the state from which the case came. ⁶ On certiorari, however, the Supreme Court will not judicially notice a statute of a sister state that was neither noticed by nor proved in the court of the forum state. ⁷ In addition, in reviewing decisions of the highest court of a state, the Supreme Court takes judicial notice of the laws of that state only, ⁸ to the extent that such laws are judicially noticeable by the courts of that state. ⁹

◆ Observation: Federal courts in diversity suits must apply state substantive law and federal procedural law. ¹⁰ The federal circuits are divided as to whether, in an action based on diversity jurisdiction, a federal court is to apply state law ¹¹ governing judicial notice, or federal law. ¹²

Footnotes

Footnote 98. *State v Pleva*, 203 NJ Super 178, 496 A2d 375, cert den 102 NJ 323, 508 A2d 203, later proceeding 106 NJ 637, 525 A2d 1104 (federal and state laws); *State v Reese* (Hamilton Co) 56 Ohio App 2d 278, 10 Ohio Ops 3d 285, 382 NE2d 1193 (trial court may take judicial notice that a particular drug is on federal government's list of prescription drugs); *Peters v Double Cola Bottling Co.*, 224 SC 437, 79 SE2d 710.

Footnote 99. *Spokane Falls & N. R. Co. v Ziegler*, 167 US 65, 42 L Ed 79, 17 S Ct 728.

Footnote 1. § 117.

Footnote 2. See, for example, Cal Evid Code § 451(a); Fla Stat 90.201(1), (2); NY CPLR 4511(a).

Footnote 3. *Bowen v Johnston*, 306 US 19, 83 L Ed 455, 59 S Ct 442; *Straton v New*, 283 US 318, 75 L Ed 1060, 51 S Ct 465; *Kucel v Walter E. Heller & Co.* (CA5 Tex) 813 F2d 67, 3 UCCRS2d 1416 (because federal courts are required to take judicial notice of the content of the laws of every state in the union, a party is not required to prove the content of state law or show that it is different from the law of another state); *United States v Schmitt* (CA5 La) 748 F2d 249, 17 Fed Rules Evid Serv 697, cert den 471 US 1104, 85 L Ed 2d 850, 105 S Ct 2333 (federal courts are bound to take judicial notice of the law of any state, whether statutory or judicial in origin); *Reeves v Schulmeier* (CA5 Tex) 303 F2d 802, 97 ALR2d 718 (federal courts sitting in Texas will take judicial notice of Oklahoma law); *Jaeger v Raymark Industries, Inc.* (ED Wis) 610 F Supp 784 (federal courts are required to take judicial notice of state law).

Footnote 4. *Lloyd v Mathews*, 155 US 222, 39 L Ed 128, 15 S Ct 70; *Chicago & A. Railroad v Wiggins Ferry Co.*, 119 US 615, 30 L Ed 519, 7 S Ct 398; *Hanley v Donoghue*, 116 US 1, 29 L Ed 535, 6 S Ct 242.

Footnote 5. *Pure Oil Co. v Minnesota*, 248 US 158, 63 L Ed 180, 39 S Ct 35.

Footnote 6. *Abie State Bank v Bryan*, 282 US 765, 75 L Ed 690, 51 S Ct 252.

Footnote 7. *Bothwell v Buckbee, Mears Co.*, 275 US 274, 72 L Ed 277, 48 S Ct 124.

Footnote 8. *Missouri, K. & T. R. Co. v Wulf*, 226 US 570, 57 L Ed 355, 33 S Ct 135; *Lloyd v Mathews*, 155 US 222, 39 L Ed 128, 15 S Ct 70; *Renaud v Abbott*, 116 US 277, 29 L Ed 629, 6 S Ct 1194; *Mitchell v Overman*, 103 US 62, 13 Otto 62, 26 L Ed 369.

Footnote 9. *Junction R. Co. v Bank of Ashland*, 79 US 226, 12 Wall 226, 20 L Ed 385.

Footnote 10. 20 Am Jur 2d, Courts § 209.

Footnote 11. *Gates v P. F. Collier, Inc.* (CA9 Hawaii) 378 F2d 888, cert den 389 US 1038, 19 L Ed 2d 827, 88 S Ct 774, reh den 390 US 975, 19 L Ed 2d 1193, 88 S Ct 1024; *Weber v Mutual of Omaha Ins. Co.* (DC Or) 215 F Supp 105.

Footnote 12. *Hardy-Latham v Wellons* (CA4 NC) 415 F2d 674; *J. M. Blythe Motor Lines Corp. v Blalock* (CA5 Fla) 310 F2d 77, 6 FR Serv 2d 114; *Schultz v Tecumseh Products* (CA6 Mich) 310 F2d 426; *Fullington v Iowa Sheet Metal Contractors, Inc.* (DC Neb) 319 F Supp 243.

Annotation: Federal or state law as governing federal court's authority, in diversity action after *Erie R. Co. v Tompkins*, to take judicial notice of law of sister state or foreign country, 7 ALR Fed 921.

§ 106 Matters of criminal law and procedure

Courts may take judicial notice of a variety of matters relating to criminal law. For example, a trial court may take judicial notice of whether a substance is designated as a controlled substance and can so instruct the jury. 13 Courts sometimes take notice of a substance's designation as a matter of adjudicative fact 14 and sometimes as a matter of law. 15 Other matters of which a court may take judicial notice include that capital punishment is being imposed throughout the state for the crime of murder committed during a robbery in the first-degree; 16 that in the greater Miami area drug ripoffs are commonplace and usually involve violence with a firearm resulting in death or injury; 17 and that the county of prosecution is adjacent to and located in the same judicial district as the county where an offense occurred, for purposes of determining a defendant's allegation that the state did not prove venue. 18 A court may also take judicial notice of its own records 19 to determine whether a defendant has satisfactorily completed one-third or more of the probationary period. 20 Furthermore, a judge may take judicial notice of the state's rules and regulations that require licensed child care centers to keep records concerning the care and control of children at the center and such judicial notice may give a magistrate probable cause to believe that such records would be located at a defendant's residence which is also a licensed child care center, and consequently give the magistrate authority to issue a search warrant seeking such records from the premises. 21

Courts also refuse to take judicial notice of a number of matters of criminal law and procedure. For example, parole eligibility statistics are not a proper subject for judicial notice because statistical information of this type does not bound the scope of reasonable dispute or susceptible to immediate and an accurate determination by resort to readily accessible and indisputable sources. 22 A court also will not take judicial notice that the building in question, in a case in which a defendant is charged with violating municipal ordinances in connection with the maintenance of the building, is within city limits. 23

Courts in criminal proceedings have also declined to take judicial notice of—

—a police officer's written report containing admissions by a defendant favorable to a codefendant. 24

—the reliability of an informant for purpose of rehabilitating a defective search warrant. 25

—the general pattern of grand jury voting in which grand juries are said to vote unanimously in the first months of their term while not voting unanimously toward the end of their term. 26

—the indictment and conviction of a coconspirator as predicate to the introduction of the coconspirator's statements. 27

Footnotes

Footnote 13. *Burks v State* (Ala App) 611 So 2d 487, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1768, cert den (Ala) 1993 Ala LEXIS 257 and (disapproved on other grounds by *Ex Parte Mutrie* (Ala) 1993 Ala LEXIS 897).

Footnote 14. *Commonwealth v Whelan*, 408 Mass 29, 556 NE2d 389 (trial judge may take judicial notice that codeine is a derivative of opium; judicial notice of this fact may not be taken as a matter of common knowledge, rather it is a subject of generalized knowledge readily ascertainable from authoritative sources and consequently appropriate for judicial notice).

Footnote 15. § 120.

Footnote 16. *McMillian v State* (Ala App) 594 So 2d 1253, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2691 and remanded on other grounds (Ala) 1992 Ala LEXIS 1770, reported in full (Ala) 594 So 2d 1288, remanded on other grounds (Ala App) 594 So 2d 1289, remanded on other grounds (Ala App) 616 So 2d 933.

Footnote 17. *Reyes v State* (Fla App D3) 581 So 2d 932, 16 FLW D 1543, review den (Fla) 589 So 2d 292.

Footnote 18. *Granados v State* (Tex App Corpus Christi) 843 SW2d 736.

Footnote 19. § 138.

Footnote 20. *State v Cuellar* (Tex App Austin) 815 SW2d 295.

Footnote 21. § 122.

Footnote 22. *Abbott v Commonwealth* (Ky) 822 SW2d 417.

Regarding judicial notice of statistics generally, see § 102.

Footnote 23. *Cool Valley v LeBeau* (Mo App) 824 SW2d 512.

Regarding judicial notice of particular locations within a political subdivision, see § 76.

Footnote 24. *Pina v Henderson* (CA2 NY) 752 F2d 47, 17 Fed Rules Evid Serv 94 (existence and content of report were not "matters beyond dispute").

Footnote 25. *United States v Sorrells* (CA11 Fla) 714 F2d 1522, 14 Fed Rules Evid Serv 306.

Footnote 26. *United States v Pabian* (CA11 Fla) 704 F2d 1533, 13 Fed Rules Evid Serv 46.

Footnote 27. *United States v Griffin* (CA11 Fla) 778 F2d 707, 19 Fed Rules Evid Serv 1426.

§ 107 Foreign governmental matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judge is required to take notice facts regarding whether a foreign power has been recognized by this government. 28 In addition to legal status, courts also take judicial notice of factual realities concerning foreign governments, for example, that a court's judicial system was fundamentally fair and can be expected to protect American rights 29 while another country's judicial system could not be. 30

The existence of a state of war between foreign powers has been judicially noticed, as has also the existence of civil war in a foreign country. 31

Footnotes

Footnote 28. *Re De Sautels*, 1 Mass App 787, 307 NE2d 576.

Footnote 29. *Murty v Aga Khan* (ED NY) 92 FRD 478, 9 Fed Rules Evid Serv 1533.

Footnote 30. *Itek Corp. v First Nat. Bank* (DC Mass) 511 F Supp 1341, vacated on other grounds (CA1 Mass) 704 F2d 1, on remand (DC Mass) 566 F Supp 1210, affd (CA1 Mass) 730 F2d 19, 39 UCCRS 625.

Footnote 31. *United States v Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 US 466, 60 L Ed 387, 36 S Ct 212; *Orantes-Hernandez v Smith* (CD Cal) 541 F Supp 351, 11 Fed Rules Evid Serv 98 (in action against U.S. Immigration and Nationalization Service, court took judicial notice of civil war in El Salvador and substantial danger to civilians of death, torture, political persecution and other civil rights violations—citing FRE 201(b)).

§ 108 Judicial notice on appeal

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Appellate courts may take original judicial notice of law whether the effect is to affirm the decision of the lower court or agency 32 or to affirm it. 33 A court will decline to notice a government regulation, however, if the record lacks sufficient information to support the conclusion the court is being asked to draw from the regulation. 34

Footnotes

Footnote 32. *Dietz v Property Tax Appeal Bd.* (4th Dist) 191 Ill App 3d 468, 138 Ill Dec 746, 547 NE2d 1367, app den 131 Ill 2d 558, 142 Ill Dec 880, 553 NE2d 394.

Footnote 33. Wessel v Erickson Landscaping Co. (Utah) 711 P2d 250.

Footnote 34. United States v Judge (CA5 Tex) 846 F2d 274, 25 Fed Rules Evid Serv 911, appeal after remand (CA5 Tex) 864 F2d 1144, reh den, en banc (CA5 Tex) 868 F2d 1271 and cert den 495 US 918, 109 L Ed 2d 309, 110 S Ct 1946.

(2). Laws of Foreign Jurisdictions [109-115]

§ 109 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, and in the absence of statutory requirement to the contrary, the courts of the forum will not take judicial notice of the law prevailing in another country, 35 state or territory, 36 or municipality. 37 In a number of states, however, statutes have been enacted which provide for judicial notice of the law of sister states. 38 In particular, some states adopted the Uniform Judicial Notice of Foreign Law Act which provided for judicial notice of the common law and statutes of other states and territories of the United States. 39

◆ Comment: The Uniform Judicial Notice of Foreign Law Act has been withdrawn. States that had adopted the act, however, may continue to cite their version of the statute in their rulings on the propriety of taking judicial notice of a sister state's laws. The purpose of the act was to simplify the method of properly bringing to the consideration of the court applicable principles of foreign law and to leave its determination to the court instead of the jury. 40 The act did not change the common-law rule that the law of foreign countries will not be judicially noticed, but it did change the common-law rule that foreign law would be determined by the jury. 41

§ 109 ----Generally [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 35. § 112.

Footnote 36. § 110.

Footnote 37. § 111.

Footnote 38. § 110.

Footnote 39. *Re Estate of Warner* (App) 161 Wis 2d 644, 468 NW2d 736 (a court must take judicial notice of the common-law and statutes of its sister states).

Forms: Motion—For judicial notice of statute of sister state. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 3.

Motion—For judicial notice of statute of sister state—Another form. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 4.

Footnote 40. *Strout v Burgess*, 144 Me 263, 68 A2d 241, 12 ALR2d 939.

Annotation: Uniform Judicial Notice of Foreign Law Act, 23 ALR2d 1437.

Practice References 21 Am Jur POF2d 1, Law of Foreign Jurisdiction.

Footnote 41. *Franzen v Equitable Life Assur. Soc.*, 130 NJL 457, 33 A2d 599; *Kennedy v Lenzine*, 76 RI 231, 69 A2d 231.

§ 110 Sister states

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A court may take judicial notice of other states' statutes. Consequently, a court may take judicial notice of the similarity between its state's statutes and another state's statutes. 42 A court may take judicial notice of the laws of other states on its own motion, 43 although it ordinarily does not do so. 44 A trial court is not precluded from judicially noticing a statute or regulation of another jurisdiction on the basis that it has not been pleaded, although a party seeking to recover on the ground of negligence per se must plead a statutory violation. 45 Before a court may be asked to take judicial notice of another state's laws, pursuant to the states statute requiring a court to take judicial notice of the statutory and case law of other states, however, reasonable notice must be given to any adverse parties. A failure to give reasonable notice to adverse parties precludes the applications of another state's law. 46 In a wrongful death action, a petition which alleges fatal injuries occurring in a foreign state is sufficient to invoke a judicial notice of the foreign state's laws and state a cause of action under the foreign state's wrongful death statute. 47

A trial court's judicial notice of the laws of a sister state is subject to review as a ruling on a question of law. 48

§ 110 ----Sister states [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and

Footnotes

Footnote 42. Sykes v Hiatt, 98 NC App 688, 391 SE2d 834, review den 327 NC 437, 395 SE2d 697.

Annotation: Federal or state law as governing federal court's authority, in diversity action after Erie R. Co. v Tompkins, to take judicial notice of law of sister state or foreign country, 7 ALR Fed 921.

Forms: Motion—For judicial notice of statute of sister state. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 3.

Motion—For judicial notice of statute of sister state—Another form. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 4.

Footnote 43. Gaffney v State (Tex App Texarkana) 812 SW2d 439, petition for discretionary review ref (Sep 25, 1991); Schlusser v American Family Mut. Ins. Co. (App) 157 Wis 2d 516, 460 NW2d 756 (court taking notice of Minnesota statute).

Footnote 44. Gaffney v State (Tex App Texarkana) 812 SW2d 439, petition for discretionary review ref (Sep 25, 1991).

Footnote 45. § 39.

Footnote 46. Miller v A.N. Webber, Inc. (Minn App) 484 NW2d 420.

Footnote 47. Snead v Cordes (Mo App) 811 SW2d 391.

Footnote 48. Texas Employers' Ins. Assn. v Borum (Tex App San Antonio) 834 SW2d 395, writ den (Dec 2, 1992).

§ 111 Other municipalities

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While municipal courts will take judicial notice of their own local ordinances, 49 they will not as a rule take judicial notice of the ordinances of another municipality. 50

§ 111 ----Other municipalities [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 49. § 126.

Footnote 50. *Sisk v Shenandoah*, 200 Va 277, 105 SE2d 169.

§ 112 Other nations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Determination of foreign law in federal courts is regulated in civil cases by the Federal Rules of Civil Procedure, 51 and in criminal cases by the Federal Rules of Criminal Procedure. 52 Each provision requires a party to give notice of the intent to raise an issue involving the law of a foreign country, and permits the judge, in determining foreign law, to consider any relevant material or source, whether offered by a party or not. 53 The practical effect is that a federal judge may judicially notice relevant foreign law when satisfied that it is appropriate to do so. 54

Some states have enacted similar legislation. 55 However, some states, 56 and at least one federal court, 57 persist in regarding foreign law as a factual issue, to be pleaded and proved to the jury.

§ 112 ----Other nations [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 51. FR Civ P, Rule 44.1.

Footnote 52. FR Crim P, Rule 26.1.

Footnote 53. FR Civ P 44.1; FR Crim P, Rule 26.1.

Footnote 54. *Re Fotochrome, Inc.* (ED NY) 377 F Supp 26, *affd* (CA2 NY) 517 F2d 512 (taking judicial notice of provisions of the Japanese Code of Civil Procedure requiring deposits of arbitration awards in Japanese courts); *Henry v Richardson-Merrell, Inc.* (DC NJ) 366 F Supp 1192, *revd on other grounds* (CA3 NJ) 508 F2d 28 (judicially noticing the statute of limitations in personal injury claims in the Civil Code of Quebec).

Annotation: Raising and determining issue of foreign law under Rule 44.1 of Federal

Rules of Civil Procedure, 62 ALR Fed 521.

Footnote 55. Volkswagenwerk Aktiengesellschaft v Superior Court of Alameda County (1st Dist) 123 Cal App 3d 840, 176 Cal Rptr 874 (appellate court took judicial notice of West German law and of existing agreements between West Germany and the United States); Vergnani v Guidetti, 308 Mass 450, 32 NE2d 272; Re Duysburgh (Sur) 154 Misc 2d 82, 584 NYS2d 516 (court is not mandated to take judicial notice of foreign law and may require testimony at a hearing pursuant to state law); Panama Processes, S.A. v Cities Service Co. (Okla) 796 P2d 276.

Footnote 56. Doan Thi Hoang Anh v Nelson (Iowa) 245 NW2d 511, citing Rule 94, 58 (ICA Rules of Civil Procedure exclude a foreign statute from judicial notice in the absence of pleading and proof).

Footnote 57. Weiss v Glemp (SD NY) 792 F Supp 215.

§ 113 --Law of mother country

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The general rule that courts will not take judicial notice of the law of a foreign country 58 does not apply to the laws of a country from which the state of the forum was formed. In such a situation the laws of the mother country that were in existence at the time of the separation will be judicially noticed. 59 For example, in California the Mexican civil law and the acts of the Mexican Government are judicially noticed by the courts. 60

§ 113 --Law of mother country [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 58. § 112.

Footnote 59. South Shore Land Co. v Petersen (1st Dist) 226 Cal App 2d 725, 38 Cal Rptr 392; Cartwright v Public Service Co., 66 NM 64, 343 P2d 654.

Footnote 60. Los Angeles v San Fernando, 14 Cal 3d 199, 123 Cal Rptr 1, 537 P2d 1250 (Spanish and Mexican law governing property rights in California before the annexation remained in effect after the change of sovereignty unless duly repealed or altered, and the Supreme Court is required to take judicial notice of such laws as a part of the law of the state; historical facts concerning the Spanish and Mexican settlement of California are also proper subjects of its judicial notice).

§ 114 International law; maritime laws

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

State and federal courts must judicially notice all treaties of the United States. 61 Even in the absence of a treaty, the determination of international law has always been seen as a question of law for the court, and one that may properly be judicially noticed. 62 Similarly, maritime laws are universally recognized insofar as they are part of the law of nations. 63

§ 114 ----International law; maritime laws [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 61. § 117.

Footnote 62. *Ponce v Roman Catholic Apostolic Church*, 210 US 296, 52 L Ed 1068, 28 S Ct 737; *The Paquete Habana*, 175 US 677, 44 L Ed 320, 20 S Ct 290; *United States v Chaves*, 159 US 452, 40 L Ed 215, 16 S Ct 57.

Footnote 63. *The New York*, 175 US 187, 44 L Ed 126, 20 S Ct 67.

§ 115 Procedure for taking judicial notice of foreign law

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Even in jurisdictions that permit judicial notice of the law of other states or nations, a judge is not obliged to notice such matters unless a party provides the court with the necessary materials and information. In the absence of such proof, the court may simply apply the law of the forum. 64 In some jurisdictions, absent proof to the contrary, the laws of another state are presumed to be the same as the laws of jurisdiction hearing the matter, 65 but once a party proves what the law of a sister state was, it is proper for the trial judge to judicially notice the law of that state. 66

§ 115 ----Procedure for taking judicial notice of foreign law [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments. 56 Am Jur Trials 529.

Footnotes

Footnote 64. Clarkson v Shaheen (CA2 NY) 660 F2d 506, cert den 455 US 990, 71 L Ed 2d 850, 102 S Ct 1614 and appeal after remand (CA2 NY) 716 F2d 126 and (superseded by statute on other grounds as stated in Purves v ICM Artists, Ltd. (SD NY) 119 BR 407) (upholding application of forum law where neither party gave notice of intent to assert foreign law pursuant to FR Civ Proc 44.1); Aetna Casualty & Surety Co. v Ciarrochi (Fla App D3) 573 So 2d 990, 16 FLW D 315; Doan Thi Hoang Anh v Nelson (Iowa) 245 NW2d 511; Barnhill v Barnhill (La App 3d Cir) 488 So 2d 299; Benham v Keller (Okla) 673 P2d 152.

Footnote 65. Crane v State (Tex Crim) 786 SW2d 338, reh den (Mar 28, 1990).

Footnote 66. Osborn v Kinnington (Tex App El Paso) 787 SW2d 417, writ den (Sep 12, 1990) and reh of writ of error overr (Oct 17, 1990).

Annotation: Comment Note.—Pleading and proof of law of foreign country, 75 ALR3d 177.

Comment Note.—Presumption as to law of foreign countries, 75 ALR2d 529.

(3). Federal Law and Treaties [116-119]

§ 116 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

All courts, federal and state alike, take judicial notice of the provisions of the United States Constitution, 67 and the ratification of amendments 68 thereto. Moreover, all courts, federal and state alike, take judicial notice of the public and general acts of Congress. 69 While as a general rule, judicial notice may be taken of a public acts and orders of a federal governmental department, agency, or commission, private orders may not be judicially noticed. 70

Footnotes

Footnote 67. § 105.

Footnote 68. *Dillon v Gloss*, 256 US 368, 65 L Ed 994, 41 S Ct 510.

Footnote 69. *St. Louis, I. M. & S. R. Co. v Starbird*, 243 US 592, 61 L Ed 917, 37 S Ct 462; *Missouri, K. & T. R. Co. v Wulf*, 226 US 570, 57 L Ed 355, 33 S Ct 135; *Atlantic Richfield Co. v Canaan Oil Co.*, 202 Conn 234, 520 A2d 1008; *Florida Accountants Asso. v Dandelake (Fla)* 98 So 2d 323, 70 ALR2d 425, appeal after remand (Fla) 108 So 2d 46; *Cook v Donner*, 145 Kan 674, 66 P2d 587, 110 ALR 244; *Twiehaus v Rosner*, 362 Mo 949, 245 SW2d 107, 28 ALR2d 1192; *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363.

Footnote 70. *Centex Corp. v Dalton* (Tex App San Antonio) 810 SW2d 812, writ granted (Tex) 34 Tex Sup Ct Jour 824 and revd on other grounds (Tex) 840 SW2d 952, reh'g of cause overr (Dec 16, 1992) (the rule provides for judicial notice of federal resolutions or orders of boards, departments and commissions promulgated under federal statutes, but is limited to judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state or territory, or jurisdiction of the United States).

§ 117 Treaties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Both state and federal courts take judicial notice of treaties between the United States and other countries ⁷¹ and such treaties may predominate over any state statutory provision or private guidelines. ⁷² For example, a court may take judicial notice of the Warsaw Convention and inform itself of the Convention's provisions in such a manner as is deemed proper when a party has raised the Convention as a defense in its answer, thereby giving reasonable written notice of its intent to rely on United States law. ⁷³ The courts, when considering a treaty, must take judicial notice of all facts connected therewith which may be necessary for its interpretation or enforcement, ⁷⁴ such as the historical data leading up to the making of the treaty. ⁷⁵

Footnotes

Footnote 71. *Pronovost v United States*, 232 US 487, 58 L Ed 696, 34 S Ct 391; *United States v Chaves*, 159 US 452, 40 L Ed 215, 16 S Ct 57; *Volkswagenwerk Aktiengesellschaft v Superior Court of Alameda County* (1st Dist) 123 Cal App 3d 840, 176 Cal Rptr 874 (appellate court took judicial notice of West German law and of existing agreements between West Germany and the United States); *Schofield v Hertz Corp.*, 201 Ga App 830, 412 SE2d 853, 102-221 Fulton County D R 13B, reconsideration den (Ga App) 102-235 Fulton County D R 19 and cert den (Ga) 1992 Ga LEXIS 39; *Camp v Sellers & Co.*, 158 Ga App 646, 281 SE2d 621 (multinational agreement took precedence over Georgia statutes as to adequacy of service of judicial process); *People v Jackson* (3d Dept) 89 App Div 2d 697, 453 NYS2d 875 (judicial notice taken of the treaty on extradition between the United States and Canada as a public law of the United States); *Advance Footwear Co. v Air Jamaica, Ltd.*, 124 Misc 2d 6, 476 NYS2d 438

(New York courts are required to notice the Warsaw Convention relating to international air transport).

Annotation: Raising and determining issue of foreign law under Rule 44.1 of Federal Rules of Civil Procedure, 62 ALR Fed 521.

Footnote 72. 74 Am Jur 2d, Treaties § 19.

Footnote 73. Hibbard v Transworld Airlines, Inc. (Butler Co) 70 Ohio App 3d 829, 592 NE2d 889, motion overr 60 Ohio St 3d 704, 573 NE2d 121.

Footnote 74. United States v Lynde, 78 US 632, 11 Wall 632, 20 L Ed 230; United States v Reynes, 50 US 127, 9 How 127, 13 L Ed 74.

Footnote 75. United States v Reynes, 50 US 127, 9 How 127, 13 L Ed 74.

§ 118 Law of territories

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The federal courts will take judicial notice of the laws of the territories of the United States. 76 The federal courts will also take judicial notice of the laws in force in a territory prior to the time it became a part of the United States. 77

◆ Observation: Such laws are not considered foreign laws, but the laws of an antecedent government. 78

Footnotes

Footnote 76. Garzot v De Rubio, 209 US 283, 52 L Ed 794, 28 S Ct 548.

Footnote 77. United States v Fullard-Leo, 331 US 256, 91 L Ed 1474, 67 S Ct 1287; Ponce v Roman Catholic Apostolic Church, 210 US 296, 52 L Ed 1068, 28 S Ct 737; Crespín v United States, 168 US 208, 42 L Ed 438, 18 S Ct 53.

Footnote 78. United States v Perot, 98 US 428, 8 Otto 428, 25 L Ed 251.

§ 119 Regulations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Register Act requires that courts take judicial notice of the contents of the Federal Register. 79 This codifies a long-established principle that federal courts take notice of rules and regulations promulgated by the chief executive departments and bureaus of the federal government. 80 State courts, likewise, are required to take judicial notice of regulations of properly promulgated and published federal regulations. 81 In addition, a court may decline to take notice of agency regulations, if to do so might do an injustice to one of the parties. 82

Footnotes

Footnote 79. 44 USCS § 1507.

Footnote 80. *Thornton v United States*, 271 US 414, 70 L Ed 1013, 46 S Ct 585; *Paul v Petroleum Equipment Tools Co.* (CA5 La) 708 F2d 168, 26 BNA WH Cas 390, 98 CCH LC ¶ 34399, 77 ALR Fed 667, reh den (CA5 La) 714 F2d 137; *Florida Power & Light Co. v Costle* (CA5) 650 F2d 579, 16 Env't Rep Cas 1640, 11 ELR 20836, later proceeding (CA5) 683 F2d 941, 17 Env't Rep Cas 2055, 12 ELR 21071, 68 ALR Fed 965; *United States ex rel. Tennessee Valley Authority v Easement & Right-of-Way, etc.* (WD Ky) 246 F Supp 263, aff'd (CA6 Ky) 375 F2d 120; *Crimm v Missouri P. R. Co.* (CA8 Mo) 750 F2d 703, 36 BNA FEP Cas 883, 35 CCH EPD ¶ 34824, 17 Fed Rules Evid Serv 495, 40 FR Serv 2d 1059; *Missouri P. R. Co. v United Transp. Union, General Committee of Adjustment* (ED Mo) 580 F Supp 1490, aff'd (CA8 Mo) 782 F2d 107, 121 BNA LRRM 2445, 104 CCH LC ¶ 11762, cert den 482 US 927, 96 L Ed 2d 696, 107 S Ct 3209, 125 BNA LRRM 2616; *Willcox v Federal Power Com.*, 185 US App DC 287, 567 F2d 394, 7 ELR 20555, cert den 434 US 1012, 54 L Ed 2d 755, 98 S Ct 724 and (criticized on other grounds by *Consolidated Edison Co. v Federal Energy Regulatory Com.*, 219 US App DC 165, 676 F2d 763).

Footnote 81. *Lilly v Grand T. W. R. Co.*, 317 US 481, 87 L Ed 411, 63 S Ct 347; *Northern Heel Corp. v Compo Industries, Inc.* (CA1 NH) 851 F2d 456, 26 Fed Rules Evid Serv 480 (OSHA regulations subject to judicial notice); *Philip Chang & Sons Associates v La Casa Novato* (5th Dist) 177 Cal App 3d 159, 222 Cal Rptr 800 (Court of Appeals required to take judicial notice of relevant provisions of the Code of Federal Regulations); *Re Marriage of Brown*, 247 Kan 152, 795 P2d 375, appeal after remand (Kan) 832 P2d 1205; *Dahlbeck v DICO Co.* (Minn App) 355 NW2d 157, CCH Prod Liab Rep ¶ 10185 (disapproved on other grounds by *Kallio v Ford Motor Co.* (Minn) 407 NW2d 92, CCH Prod Liab Rep ¶ 11374); *Insurance Co. of Pennsylvania v West Plains Air, Inc.* (Mo App) 637 SW2d 444 (Federal Aviation Administration regulations).

Footnote 82. *United States v Judge* (CA5 Tex) 846 F2d 274, 25 Fed Rules Evid Serv 911, appeal after remand (CA5 Tex) 864 F2d 1144, reh den, en banc (CA5 Tex) 868 F2d 1271 and cert den 495 US 918, 109 L Ed 2d 309, 110 S Ct 1946.

(4). State Law [120-125]

§ 120 Generally

Courts may take judicial notice of their state's statutes 83 and constitutional provisions. 84 For example, a court must take judicial notice of its state's administrative procedure act and any rule promulgated pursuant to it. 85 A trial court has a duty to take judicial notice of a state statute listing cocaine as a controlled substance. The state is not required to introduce evidence of the existence of the statute or to request the trial court to take judicial notice of it, although the state should inform the jury of judicial notice taken by the court of cocaine as a controlled substance. 86 In addition, a court may take judicial notice of the life expectancy of a person based on tables set out in the state code, 87 and may take judicial notice of a county's status as a home rule unit of local government. 88 Generally speaking, however, a strictly private act is not judicially noticed, in the absence of a statutory requirement. 89

The failure of counsel to call the attention of the court to pertinent statutes will not prevent the court from taking judicial notice thereof. 90 Furthermore, a reviewing court may take judicial notice of statutes and constitutional provisions even though they were not raised before a lower tribunal and any argument based upon the statutes and constitutional provisions was consequently waived. 91 A court may also take judicial notice of the laws of other states on its own motion, although it ordinarily does not do so. 92

Footnotes

Footnote 83. *Spokane Falls & N. R. Co. v Ziegler*, 167 US 65, 42 L Ed 79, 17 S Ct 728; *Gardner v Collector*, 73 US 499, 6 Wall 499, 18 L Ed 890; *Perry v New Orleans, M. & C. R. Co.*, 55 Ala 413; *Glendale v Coquat*, 46 Ariz 478, 52 P2d 1178, 102 ALR 837; *Florida Accountants Asso. v Dandelake (Fla)* 98 So 2d 323, 70 ALR2d 425, appeal after remand (Fla) 108 So 2d 46; *American Federation of State, County & Municipal Employees, Council 31 v County of Cook*, 145 Ill 2d 475, 164 Ill Dec 904, 584 NE2d 116; *Cook v Donner*, 145 Kan 674, 66 P2d 587, 110 ALR 244; *Nase v Christensen (SD)* 409 NW2d 131; *State ex rel. O'Connell v Yelle*, 51 Wash 2d 594, 320 P2d 1079.

Footnote 84. *American Federation of State, County & Municipal Employees, Council 31 v County of Cook*, 145 Ill 2d 475, 164 Ill Dec 904, 584 NE2d 116.

Footnote 85. *Lone Star Helicopters, Inc. v State (Okla)* 800 P2d 235.

Footnote 86. *State v Rios (Mo App)* 840 SW2d 284.

A trial court is not only permitted, but in fact, is required to take judicial notice of domestic law, including state administrative regulations, in determining whether a particular substance is a narcotic drug. *State v Metivier*, 157 Vt 644, 596 A2d 352.

Footnote 87. *Medi-Stat, Inc. v Kusturin*, 303 Ark 45, 792 SW2d 869, reh den (Ark) 798 SW2d 438 and supp op, reh den (Ark) 1990 Ark LEXIS 629.

Footnote 88. *American Federation of State, County & Municipal Employees, Council 31*

v County of Cook, 145 Ill 2d 475, 164 Ill Dec 904, 584 NE2d 116.

Footnote 89. § 121.

Footnote 90. *New York Indians v United States*, 170 US 1, 42 L Ed 927, 18 S Ct 531, and 170 US 614, 42 L Ed 1165, 18 S Ct 735; *Jenkins v Collard*, 145 US 546, 36 L Ed 812, 12 S Ct 868.

Footnote 91. *American Federation of State, County & Municipal Employees, Council 31 v County of Cook*, 145 Ill 2d 475, 164 Ill Dec 904, 584 NE2d 116.

Footnote 92. § 110.

§ 121 Special or private acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While courts take judicial notice of the public laws of their own state, 93 they do not, as a general rule, and in the absence of a statute to the contrary, take judicial notice of special or private acts of the legislature; they are matters of fact, and parties to an action who rely upon them, or rights derived from them, must plead or prove them in the same manner as other factual issues. 94 Some jurisdictions will, however, take judicial notice of private state acts which deal with city or county matters. 95 Thus, for purposes of judicial notice, it may be useful to keep in mind the distinction between public and private or special acts of the legislature, 96 although in some states the distinction between public and private acts of the legislature is unimportant in view of constitutional prohibitions against special legislation. 97

Footnotes

Footnote 93. § 120.

Footnote 94. *Unity v Burrage*, 103 US 447, 13 Otto 447, 26 L Ed 405; *Re Estate of Cramer*, 183 Kan 816, 332 P2d 560, cert den 360 US 912, 3 L Ed 2d 1261, 79 S Ct 1296.

Footnote 95. *Memphis v International Brotherhood of Electrical Workers Union (Tenn)* 545 SW2d 98.

Footnote 96. For a discussion of the distinction between public and private statutes, see 73 Am Jur 2d, Statutes §§ 4-10.

Footnote 97. 73 Am Jur 2d, Statutes §§ 38-40.

§ 122 Regulations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Regulations issued by state agencies are judicially noticed by state courts 98 and federal courts 99 alike. A trial court may take judicial notice of a rule or regulation without proof of the contents of the state code of regulations. When a court judicially notices a regulation, it admits the relevant regulation and effect on the date in question and the effect of regulation need not be in evidence. 1 Furthermore, a judge may take judicial notice of the state's rules and regulations that require licensed child care centers to keep records concerning the care and control of children at the center and such judicial notice may give a magistrate probable cause to believe that such records would be located at a defendant's residence which is also a licensed child care center, and consequently give the magistrate authority to issue a search warrant seeking such records from the premises. 2

Some courts, however, refuse to take judicial notice of administrative rules or regulations because establishing the existence and contents of a particular administrative rule or regulation at any time is often a difficult and uncertain process. Consequently, these courts hold that it is the burden of a party relying on an administrative rule or regulation to prove both its existence and its language. 3

§ 122 ----Regulations [SUPPLEMENT]

Case authorities:

In prosecution for serving malt or brewed beverages to minors, trial court properly took judicial notice that specific brand of beers which minors testified they had been given were listed in official state bulletin as being registered with liquor control board as containing greater than 0.5 percent alcohol by volume. *Commonwealth v Harvey* (1995, Pa Super) 666 A2d 1108, app den (Pa) 1996 Pa LEXIS 1101.

Footnotes

Footnote 98. *Clopton v State* (Ala App) 601 So 2d 1087, affd, in part, revd, in part on other grounds (Ala) 601 So 2d 1091, on remand (Ala App) 601 So 2d 1094; *McKinley v Arkansas Dept. of Human Services, Div. of Family Services*, 311 Ark 382, 844 SW2d 366; *Nuuanu Neighborhood Asso. v Department of Land Utilization*, 63 Hawaii 444, 630 P2d 107 (official state tax map); *State v Howell* (App) 122 Idaho 209, 832 P2d 1144; *Felt v Board of Trustees*, 107 Ill 2d 158, 89 Ill Dec 855, 481 NE2d 698 (reports of examinations of state agencies into funding of Illinois public retirement system); *Dietz v Property Tax Appeal Bd.* (4th Dist) 191 Ill App 3d 468, 138 Ill Dec 746, 547 NE2d 1367, app den 131 Ill 2d 558, 142 Ill Dec 880, 553 NE2d 394 (judicially noticing State Department of Revenue's Real Property Appraisal Manual even though neither party relied on it in proceedings below); *Kraetsch v Stull*, 238 Iowa 944, 29 NW2d 341;

County Fire Ins. Co. v Harper, 207 Okla 359, 249 P2d 705; Mullinax, Wells, Baab & Cloutman, P.C. v Sage (Tex App Dallas) 692 SW2d 533, writ ref n r e (Sep 11, 1985) (contents of State Register generally); McGraw v Hansbarger, 171 W Va 758, 301 SE2d 848 (regulations promulgated by Board of Health governing licensing of community mental health centers); Associated Hospital Service v Milwaukee, 13 Wis 2d 447, 109 NW2d 271, 88 ALR2d 1395 (judicial notice taken of a special report of a state insurance department, an article in a legal journal referred to in such a report, and a transcript of testimony given before the state legislature's insurance and banking committee); Pine Bluffs v State Bd. of Control (Wyo) 647 P2d 1365.

Footnote 99. Roemer v Board of Public Works, 426 US 736, 49 L Ed 2d 179, 96 S Ct 2337 (in a suit challenging the constitutionality of a Maryland statute judicial notice would be taken of state regulations pertaining to the administration of the relevant statute); Association against Discrimination in Employment, Inc. v City of Bridgeport (CA2 Conn) 647 F2d 256, 25 BNA FEP Cas 1013, 25 CCH EPD ¶ 31714, cert den 455 US 988, 71 L Ed 2d 847, 102 S Ct 1611, 28 BNA FEP Cas 120, 28 CCH EPD ¶ 32465 (judicial notice of city budget would be appropriate under Rule 201(b)(2) as a fact capable of ready determination and not reasonably questionable); KVUE, Inc. v Moore (CA5 Tex) 709 F2d 922, 9 Media L R 2334, affd 465 US 1092, 80 L Ed 2d 114, 104 S Ct 1580 (judicial notice of state attorney general's formal opinion clarifying a statute); National Agricultural Chemicals Asso. v Rominger (ED Cal) 500 F Supp 465, 15 Env't Rep Cas 1039, 7 Fed Rules Evid Serv 836 (judicial notice taken of California regulations, relying on FR Civ P 201).

Footnote 1. Birdnow v Director of Revenue (Mo App) 767 SW2d 384.

Footnote 2. Holden v State, 202 Ga App 558, 414 SE2d 910, 103-23 Fulton County D R 15B.

Footnote 3. Dairyland Power Coop. v State Bd. of Equalization & Assessment, 238 Neb 696, 472 NW2d 363.

§ 123 Matters judicially noticeable in determining validity of statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is well established that judicial notice may constitute the fact predicate for a judicial decision or action as to the validity of legislation, 4 and a court may take judicial notice of legislative facts in reviewing the constitutionality of legislative schemes. 5 The courts are not in accord, however, as to the extent to which they may resort to judicial notice, including notice of the legislative history and record of a given statute, in determining whether the statute was legally enacted. Such differences of opinion are due in part to varying state constitutional provisions. If the constitution provides for the keeping of legislative journals, such journals constitute official records; and the acts recorded and published by authority may be presumed, as a matter of course, to be correct. 6 Other decisions hold that the court cannot go behind the enrollment which is authenticated by the proper officers of state. 7 A third approach is that the court will, if

it becomes necessary, take cognizance of legislative journals for the purpose of resolving a question as to whether a statute has been enacted in the mode prescribed by the constitution. 8 According to this view the due authentication and enrollment of the statute affords only prima facie evidence of its passage, and the showing thus made may be overcome by examination of the legislative journals. 9

Footnotes

Footnote 4. *O'Gorman & Young, Inc. v Hartford Fire Ins. Co.*, 282 US 251, 75 L Ed 324, 51 S Ct 130, 72 ALR 1163.

Footnote 5. *State v Patzer* (ND) 382 NW2d 631, cert den 479 US 825, 93 L Ed 2d 50, 107 S Ct 99; *Re Marriage of Campbell*, 37 Wash App 840, 683 P2d 604.

Footnote 6. *Staplin v Canal Authority* (Fla App D1) 208 So 2d 853.

Footnote 7. *Harwood v Wentworth*, 162 US 547, 40 L Ed 1069, 16 S Ct 890.

Footnote 8. § 125.

Footnote 9. *Blake v National Banks*, 90 US 307, 23 Wall 307, 23 L Ed 119, 2 AFTR 2339; *Wiseman v Madison Cadillac Co.*, 191 Ark 1021, 88 SW2d 1007, 103 ALR 1208.

§ 124 Matters judicially noticeable in interpreting statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts may look to, and take judicial notice of, legislative history and other historical materials to resolve ambiguities in and to discern the legislature's intent in enacting the statute, 10 although a court may require that the history of a statute be a matter of public record in the office of the legislative reference service for the court to take judicial notice of it. 11 Judicial notice may also be taken of reports made to legislative bodies. 12 A court will not, however, take judicial notice of an analysis provided by a sponsoring entity or a letter to the Governor from the sponsoring entity when interpreting a statute. 13 A court may also rely on background history and historical evidence (private books, notes, correspondence, periodical articles, etc.) in interpreting a statute. When there is no dispute as to their authenticity and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is clearly appropriate. 14 Expressions of fact or opinions in such sources that are disputed, however, should not be judicially noticed, at least until an opposing party is given an opportunity to present evidence challenging the accuracy of the information or the propriety of judicially noticing it. 15

Official inaction is occasionally relevant in determining legislative intent. Courts have occasionally taken notice that a bill that was intended to effectuate a particular change of public policy failed to pass in the legislature. 16

Judicial notice has been taken of a legislative appropriation, and of the fact that a certain amount of money remained unspent from the fund appropriated. 17

A court may take judicial notice of statements made on the floor of the legislature, which are strong indications of legislative intent, even though these statements are not controlling in statutory interpretation. 18

Local legislative proceedings, however, have never been subject to the same rule. With the adoption of the evidence code, judicial notice of local enactments has become available. Nothing in the evidence code, however, allows judicial notice to be taken of local legislative history. 19

◆ Comment: There are strong reasons why local legislative history should not be judicially noticed. Unlike state legislative history, the history of local legislation is not maintained in any particular way or in any particular place, and the manner of its retention—or nonretention—may well have as many variables as there are local governments. 20

A court may take judicial notice of an explanatory note, submitted by a public agency, accompanying a house bill later enacted into law in the absence of a more substantial record of the legislative history. 21 A court may also take judicial notice of a governor's proclamation convening in extraordinary session of the state legislature and may take judicial notice that the primary purpose of a governor's call for the special session was to enable the legislature to consider legislation authorizing incentives to encourage an airline to construct and operate a new maintenance facility in the state. 22

Footnotes

Footnote 10. § 125.

Footnote 11. *Re Interrogatory Propounded by Romer etc.* (Colo) 814 P2d 875.

Footnote 12. *Carolene Products Co. v United States*, 323 US 18, 89 L Ed 15, 65 S Ct 1, 155 ALR 1371 (taking judicial notice of reports of congressional committees showing the reason for the passage of federal legislation); *Re State ex rel. O.* (App) 110 Wis 2d 447, 329 NW2d 275 (materials such as analysis of proposed legislation by a legislative reference bureau are properly subject to judicial notice).

Footnote 13. *In re Marriage of Siller* (3rd Dist) 187 Cal App 3d 36, 231 Cal Rptr 757.

Footnote 14. *Oneida Indian Nation v New York* (CA2 NY) 691 F2d 1070, 11 Fed Rules Evid Serv 1002, 65 ALR Fed 606.

Footnote 15. §§ 31, 38.

Footnote 16. *Duran v Lamm* (Colo App) 701 P2d 609 (trial court's taking judicial notice that the Colorado General Assembly had failed to pass an appropriation bill to pay a judgment against the state for attorney's fees upheld); *American Federation of State, etc., Council No. 95 v Olson* (ND) 338 NW2d 97, 114 BNA LRRM 3275 (taking judicial

notice that on several occasions the legislature had refused to enact into law bills that were introduced to provide for collective bargaining by public employees).

Footnote 17. *People ex rel. Conn v Randolph*, 35 Ill 2d 24, 219 NE2d 337, 18 ALR3d 1065.

Footnote 18. *Winchester Woods Assoc. v Planning & Zoning Com.*, 219 Conn 303, 592 A2d 953.

Footnote 19. *Byrnes v Hillsboro*, 104 Or App 95, 798 P2d 1119.

Footnote 20. *Byrnes v Hillsboro*, 104 Or App 95, 798 P2d 1119.

Footnote 21. *Knack v Department of Retirement Systems*, 54 Wash App 654, 776 P2d 687, review den 113 Wash 2d 1021, 781 P2d 1322.

Footnote 22. *Re Interrogatory Propounded by Romer etc. (Colo)* 814 P2d 875.

§ 125 --Legislative records and journals

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts may take judicial notice of legislative proceedings as recorded therein to the same extent that they take judicial notice of statutes of the legislative body. 23 In addition, a court may take judicial notice of the contents of legislative journals, 24 and the official minutes of meetings of a legislative body. 25 A court may properly take judicial notice of the journals of the legislature to determine whether a statute was regularly enacted according to the forms prescribed by the state constitution. 26 Courts may also look to, and take judicial notice of, legislative history and other historical materials to resolve ambiguities in and to discern the legislature's intent in enacting the statute, 27

In some cases it has been held that although the courts may take judicial notice of legislative journals, they will not do so to the extent of searching them at the suggestion or request of counsel in order to ascertain whether a statute was in fact enacted. 28

Footnotes

Footnote 23. *Bird v Plunkett*, 139 Conn 491, 95 A2d 71, 36 ALR2d 951; *Socony Vacuum Oil Co. v State (Iowa)* 170 NW2d 378; *State v Heston*, 137 W Va 375, 71 SE2d 481.

Footnote 24. *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363.

Footnote 25. *Thorning v Hollister School Dist. (6th Dist)* 11 Cal App 4th 1598, 15 Cal

Rptr 2d 91, 93 CDOS 29, 93 Daily Journal DAR 41, review den (Cal) 1993 Cal LEXIS 1557.

Footnote 26. *Blake v National Banks*, 90 US 307, 23 Wall 307, 23 L Ed 119, 2 AFTR 2339; *Giragi v Moore*, 48 Ariz 33, 58 P2d 1249, 110 ALR 314, adhered to 49 Ariz 74, 64 P2d 819, 110 ALR 320, app dismd 301 US 670, 81 L Ed 1334, 57 S Ct 946; *Wiseman v Madison Cadillac Co.*, 191 Ark 1021, 88 SW2d 1007, 103 ALR 1208.

Footnote 27. *County of Milwaukee v State, Labor & Industry Review Com.* (App) 113 Wis 2d 199, 335 NW2d 412 (legislative journals are proper subject of judicial notice and the governor's message published therein may be used by a court searching the legislative history to establish legislative intent).

Footnote 28. *Graves v Alsap*, 1 Ariz 274, 25 P 836, wherein it was held that the legislative journals could not be resorted to in order to ascertain whether a law was enacted and was still in force, where no enrolled bill was found in the proper archives, since the absence of an enrolled bill therefrom was conclusive evidence that such an act never existed.

(5). Municipal and County Ordinances; Charters and Acts Affecting Municipalities [126, 127]

§ 126 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of statutory requirement, state courts of general jurisdiction, whether civil or criminal, will not take judicial notice of the bylaws and ordinances of municipal corporations; such bylaws and ordinances must be pleaded and proved. 29

◆ **Observation:** Ordinances are distinguished from state statutes for purposes of the taking of judicial notice because while state statutes are compiled, published, and distributed by recognized professional entities who must vouch for the integrity of their product and thus are likely accurate, readily ascertainable and available, such is often not the case with ordinances. 30 Municipal courts, however, generally take judicial notice of the ordinances or other local laws of the municipality within which their jurisdictions lie. 31 In contrast, municipal courts will generally not take judicial notice of the ordinances or local laws of other municipalities. 32

Not all courts follow the general rule; in some states, a trial court may properly take judicial notice of a county ordinance. 33 Furthermore, a state statute may require a court to take judicial notice of municipal ordinances. 34 Even where this is the case, however, a court is not required to take judicial notice of ordinances that are not before it and to which it does not have access; the party seeking the court to take judicial notice is obligated to supply the court with the full text of the rules the party desires to have notice. 35 For example, a court may decline to take judicial notice of municipal

ordinances where a party provides copies not authenticated by affidavit or certification of an official custodian and fails to provide any independent source from which to verify the ordinances. 36 Counsel should take the initiative in requesting that a trial court take judicial notice of an ordinance even in a state where a statute requires a court to take judicial notice of local ordinances. 37

◆ Comment: The intent of a statute requiring a court to take judicial notice of a local ordinance is to remove any discretion a court might have in determining whether it will take notice of an ordinance. Such a statute does not direct the court to act on its own in obtaining evidence for the record and a party must make the ordinance available to the trial court for it to take notice. 38

A state appellate court generally will not take judicial notice of a city ordinance that does not appear in the record, 39 although it may take judicial notice of city ordinances, even though the trial court did not take notice of the ordinances, when both parties are afforded a reasonable opportunity by brief to present information relevant to the propriety of taking notice and the tenor of the matter to be noticed. 40

Footnotes

Footnote 29. *Yates v Milwaukee*, 77 US 497, 10 Wall 497, 19 L Ed 984; *Bolstad v Pergeson*, 305 Ark 163, 806 SW2d 377; *Atlanta v Lambright*, 205 Ga App 558, 423 SE2d 265; *Greenberg v Rothberg*, 72 Ga App 882, 35 SE2d 485; *Marcher v Butler*, 113 Idaho 867, 749 P2d 486 (ovrld on other grounds by *Harrison v Taylor*, 115 Idaho 588, 768 P2d 1321); *State ex rel. Rose v Hoffman*, 227 Ind 256, 85 NE2d 486; *Hammond v Doody* (Ind App) 553 NE2d 196; *Maish v Schererville* (Ind App) 486 NE2d 1; *Walker v D'Alesandro*, 212 Md 163, 129 A2d 148, 64 ALR2d 231; *Commonwealth v Kimball*, 299 Mass 353, 13 NE2d 18, 2 BNA LRRM 847, 114 ALR 1440; *Rice v James* (Mo App) 844 SW2d 64; *Kansas City v Baker* (Mo App) 793 SW2d 646; *Forste v Benton* (Mo App) 792 SW2d 910 (the court stated that, while it could take judicial notice of the city charter, it could not take judicial notice of the existence or contents of city ordinances); *Jones v Fireman's Fund Ins. Co.* (Mo App) 792 SW2d 404; *Browning-Ferris Industries of Kansas City, Inc. v Dance* (Mo App) 671 SW2d 801; *State v Cottingham*, 226 Neb 270, 410 NW2d 498; *State v Duranleau*, 99 NH 30, 104 A2d 519, 45 ALR2d 1166; *Keyes v Amundson* (ND) 391 NW2d 602; *Morrow v Cleveland* (Cuyahoga Co) 73 Ohio App 460, 29 Ohio Ops 136, 40 Ohio L Abs 622, 56 NE2d 333; *Nase v Christensen* (SD) 409 NW2d 131; *State ex rel. Schmittou v Nashville*, 208 Tenn 290, 345 SW2d 874; *Adams v Dean Roofing Co.* (Tenn App) 715 SW2d 341; *Sisk v Shenandoah*, 200 Va 277, 105 SE2d 169; *Nesbitt v Flaccus*, 149 W Va 65, 138 SE2d 859; *Brannon v Perkey*, 127 W Va 103, 31 SE2d 898, 158 ALR 631.

Footnote 30. *Keyes v Amundson* (ND) 391 NW2d 602.

Footnote 31. *State v Duranleau*, 99 NH 30, 104 A2d 519, 45 ALR2d 1166; *Orose v Hodge Drive-It-Yourself Co.*, 132 Ohio St 607, 9 Ohio Ops 10, 9 NE2d 671, 111 ALR 954; *Johnson v Tulsa*, 97 Okla Crim 85, 258 P2d 695; *Nase v Christensen* (SD) 409 NW2d 131.

Footnote 32. § 111.

Footnote 33. *State v Holmes* (Fla App D2) 256 So 2d 32, cert dismd (Fla) 273 So 2d 753 and (criticized on other grounds by *State v Kehoe* (Fla App D4) 498 So 2d 560, 11 FLW 2488); *Bouldin v Commonwealth*, 4 Va App 166, 355 SE2d 352.

Footnote 34. *Faustrum v Board of Fire & Police Comm'rs* (2d Dist) 240 Ill App 3d 947, 181 Ill Dec 567, 608 NE2d 640, app den 151 Ill 2d 563, 186 Ill Dec 380, 616 NE2d 333; *Chanler v Manocherian* (1st Dept) 151 App Div 2d 432, 543 NYS2d 671; *Mandan v Mertz* (ND) 399 NW2d 298; *Dream Mile Club, Inc. v Tobyhanna Township Bd. of Supervisors*, 150 Pa Cmwlt 309, 615 A2d 931.

Footnote 35. *Faustrum v Board of Fire & Police Comm'rs* (2d Dist) 240 Ill App 3d 947, 181 Ill Dec 567, 608 NE2d 640, app den 151 Ill 2d 563, 186 Ill Dec 380, 616 NE2d 333.

Footnote 36. *Hollingsworth v King* (Tex App Amarillo) 810 SW2d 772, reh overr (Tex App Amarillo) 1991 Tex App LEXIS 1591 and writ den (Tex) 816 SW2d 340 and reh of writ of error overr (Oct 30, 1991).

Footnote 37. *Dream Mile Club, Inc. v Tobyhanna Township Bd. of Supervisors*, 150 Pa Cmwlt 309, 615 A2d 931.

Footnote 38. *Dream Mile Club, Inc. v Tobyhanna Township Bd. of Supervisors*, 150 Pa Cmwlt 309, 615 A2d 931.

Footnote 39. 5 Am Jur 2d, Appeal and Error § 741.

Footnote 40. *Goodwin v Kansas City*, 244 Kan 28, 766 P2d 177.

§ 127 Municipal charters and acts affecting municipalities

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some states have enacted statutes obliging a court to take judicial notice of municipal charters and other state legislation affecting municipalities. 41 Even in the absence of such legislation, acts incorporating cities, towns and other municipal corporations may be regarded as inherently public or, if local in their general character, as containing certain provisions that may affect the general public. Thus, courts have generally taken judicial notice of such acts without regard to whether the particular act was or was not declared to be public. 42 Hence, the corporate existence or powers of such bodies need not be alleged or proved. 43 That a particular area within the court's jurisdiction is an incorporated city is judicially noticeable as a fact of common knowledge. 44

A federal court may judicially notice a city budget if the required information is provided to it. 45

Footnotes

Footnote 41. *Olson v County of Sacramento* (3rd Dist) 38 Cal App 3d 958, 113 Cal Rptr 664.

Footnote 42. *Unity v Burrage*, 103 US 447, 13 Otto 447, 26 L Ed 405; *Duluth v State* (Minn) 390 NW2d 757, later proceeding (Minn App) 431 NW2d 135; *Andal v Salem*, 53 Or App 159, 630 P2d 1344; *State ex rel. Schmittou v Nashville*, 208 Tenn 290, 345 SW2d 874; *Young v Seattle*, 30 Wash 2d 357, 191 P2d 273, 3 ALR2d 704.

Footnote 43. *Aberdeen v Bank of Amory*, 191 Miss 318, 2 So 2d 153.

Footnote 44. *People v Vega* (2nd Dist) 18 Cal App 3d 954, 96 Cal Rptr 391; *Embry v Caneyville* (Ky) 397 SW2d 141; *State v Turner*, 8 NC App 73, 173 SE2d 642 (legislation establishing a municipal corporation was a "public act," noticeable as such); *Scott v Scott*, 141 W Va 533, 91 SE2d 621.

Regarding judicial notice of facts of common knowledge generally, see § 33.

Footnote 45. *Association against Discrimination in Employment, Inc. v City of Bridgeport* (CA2 Conn) 647 F2d 256, 25 BNA FEP Cas 1013, 25 CCH EPD ¶ 31714, cert den 455 US 988, 71 L Ed 2d 847, 102 S Ct 1611, 28 BNA FEP Cas 120, 28 CCH EPD ¶ 32465; *Melton v Oklahoma City* (CA10 Okla) 879 F2d 706, reh gr, en banc, in part (CA10) 888 F2d 724 and on reh, en banc (CA10 Okla) 928 F2d 920, cert den (US) 116 L Ed 2d 241, 112 S Ct 296, 112 S Ct 297.

(6). Court Rules [128]

§ 128 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court also judicially notices its own rules of procedure without requiring that those rules be formally offered into evidence. 46 It is generally held, however, that an appellate court will not take judicial notice of the rules of the trial court unless statutorily required to do so. 47 A number of states, however, have recently decided that because this information is not subject to serious question and can be confirmed by consulting sources likewise invulnerable to challenge, the information should be judicially noticeable even in the absence of a judicial notice of law statute. 48 In a jurisdiction following the latter view, a court may still require a showing that local court rules have been filed with the state supreme court in order to take judicial notice of them. 49 In addition, an appellate court generally will not take judicial notice of a local rule that is not made part of the record, 50 although some appellate courts hold that matters of public record, such as local rules governing representation by counsel, their withdrawal on proper notice to clients, are proper subjects for judicial notice. 51

Footnotes

Footnote 46. Wallace v Martin (La App) 166 So 874; Raykovich v Youngstown (App, Mahoning Co) 50 Ohio L Abs 363, 79 NE2d 242.

Footnote 47. 4 Am Jur 2d, Appeal and Error § 506.

Footnote 48. Parkway Bank & Trust Co. v Le Vine (1st Dist) 45 Ill App 3d 497, 4 Ill Dec 49, 359 NE2d 882; Lupo v Lupo (La App 1st Cir) 366 So 2d 932; Faribault-Martin-Watonwan Human Services ex rel. Jacobson v Jacobson (Minn App) 363 NW2d 342; State v Erlewine, 234 Neb 855, 452 NW2d 764; Spingola v Spingola, 91 NM 737, 580 P2d 958, appeal after remand 93 NM 598, 603 P2d 708; Woodard v Hopperstad Builders, Inc. (Tex Civ App Corpus Christi) 554 SW2d 726, writ ref n r e (Nov 2, 1977); Canavan v Truss-Tex Component Co. (Tex Civ App Houston (1st Dist)) 511 SW2d 318, writ ref n r e (Nov 13, 1974) and reh of writ of error overr (Dec 30, 1974).

Footnote 49. State ex rel. Ward v Pape, 237 Neb 283, 465 NW2d 760; Petitt v Laware (Tex App Houston (1st Dist)) 715 SW2d 688, writ ref n r e (Dec 17, 1986) and reh of writ of error overr (Jul 9, 1986).

Footnote 50. Hoskins v Hoskins (Mo App) 833 SW2d 20.

Footnote 51. Langdale v Villamil (Tex App Houston (14th Dist)) 813 SW2d 187.

b. Other Judicial Matters [129-144]

(1). In General [129-132]

§ 129 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court may judicially notice the dates of its current and previous terms, 52 holidays 53 and closings due to inclement weather. 54 Courts also take judicial notice of the limits of their jurisdiction, the extent of the territory therein included, and whether an event took place beyond the limits thereof. 55 In addition, a court must take judicial notice of its location in the hierarchy of courts in the state or federal system. 56

The United States Supreme Court may take judicial notice of the fact that writs of habeas corpus are granted only in some cases, and the guilty verdicts are returned after only some trials; it is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in her case. 57 Furthermore, a reviewing court may take judicial notice of the official roster of the state's Secretary of State to determine that at the time of sentencing a particular judge was the sole presiding judge of the county court when the record does not make any showing of disability or inability to perform

and is otherwise silent as to how a different judge came to handle sentencing. 58 A court will also take judicial notice of the fact that there is no legislatively established statutory probate court, county court at law, or other statutory court exercising jurisdiction of a probate court in a county in determining whether a district court has jurisdiction of a probate action to remove an independent executor. 59

A federal district court may take judicial notice of the content and format of its juror questionnaires. 60

Footnotes

Footnote 52. *Thompson v Cheatham*, 244 Ga 116, 259 SE2d 62; *Robinson v Robinson*, 70 Idaho 122, 212 P2d 1031; *State ex rel. Harp v Vanderburgh Circuit Court*, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108; *A. & M. College v Guinn* (Tex Civ App Austin) 280 SW2d 373, writ ref n r e; *State Road Com. v Hereford*, 151 W Va 526, 153 SE2d 501.

Footnote 53. *Powell v New York C. R. Corp.* (App, Stark Co) 14 Ohio Ops 2d 393, 86 Ohio L Abs 286, 174 NE2d 556, motion overr.

Footnote 54. *Fields v A & B Electronics* (Okla) 788 P2d 940 (superseded by statute on other grounds as stated in *Re Estate of Dalzell* (Okla App) 813 P2d 537).

Footnote 55. § 130.

Footnote 56. *Ken Carver & Sons, Inc. v Lenahan* (Franklin Co) 8 Ohio App 2d 13, 37 Ohio Ops 2d 7, 220 NE2d 373.

Footnote 57. *Whitmore v Arkansas*, 495 US 149, 109 L Ed 2d 135, 110 S Ct 1717.

Footnote 58. *State v Pecina* (Ottawa Co) 76 Ohio App 3d 775, 603 NE2d 363.

Footnote 59. *Eppenauer v Eppenauer* (Tex App El Paso) 831 SW2d 30.

Footnote 60. *United States v Osorio* (DC Conn) 801 F Supp 966.

§ 130 Judicial notice of court's own jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court must judicially notice the extent 61 and limits of its own subject matter jurisdiction, and is obliged to bring a lack of subject matter jurisdiction to the attention of the parties if they have failed to raise the issue. 62 A court may take judicial notice, sua sponte, of facts necessary to determine its jurisdiction, particularly when the fact is capable of ready and accurate determination. 63

Proper exercise of jurisdiction requires appellate courts to judicially notice the jurisdiction of inferior courts over which the appellate court is permitted or required to exercise its power of review. 64

Footnotes

Footnote 61. *State v Scott* (Trumbull Co) 3 Ohio App 2d 239, 32 Ohio Ops 2d 360, 210 NE2d 289.

Footnote 62. *Crowe v Crowe*, 137 Ind App 225, 207 NE2d 220, transf to 247 Ind 51, 211 NE2d 164 (intermediate appellate court took judicial notice that it lacked jurisdiction in an appeal from an order requiring increased payments of support of minor child, noting that exclusive jurisdiction of appeal rested in the state Supreme Court by virtue of statute); *Langley v Rieth* (La App, Orleans) 64 So 2d 803 (taking judicial notice of its jurisdiction on appeal, notwithstanding that the question of jurisdiction had not been raised by the parties).

For a discussion of jurisdiction generally, see 20 Am Jur 2d, Courts §§ 87 et seq.

Footnote 63. *Fields v A & B Electronics* (Okla) 788 P2d 940 (superseded by statute on other grounds as stated in *Re Estate of Dalzell* (Okla App) 813 P2d 537).

Footnote 64. *State v Ballard*, 209 Ark 397, 190 SW2d 522; *Scott v Rosenthal* (Fla App D3) 132 So 2d 347, quashed (Fla) 150 So 2d 433, different results reached on reh (Fla) 150 So 2d 436 and (not followed by *Kimbrell v Paige* (Fla App D4) 422 So 2d 902); *Finkenbiner v Dowd*, 231 Ind 416, 108 NE2d 261 (judicially noticing that the Wabash Circuit Court and the Lapate Circuit Court are courts of concurrent jurisdiction; *State v Gibson*, 15 NJ 384, 105 A2d 1, 42 ALR2d 1461 (judicial notice that neither the circuit court nor the claims court, under the state's Constitution of 1844, was invested with criminal jurisdiction); *Grieve v Webb*, 22 Wash 2d 902, 158 P2d 73 (judicial notice that the superior court of the state of Washington for Yakima County is a court of general jurisdiction).

§ 131 Judicial officers, rules and administration; miscellaneous records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although not unequivocally a matter of common knowledge, judges take notice of the identity of the officers of their courts, including judges, 65 sheriffs, 66 clerks, 67 and attorneys. 68 In addition, a court may take judicial notice of the number of county recorder's courts in the state. 69

Footnotes

Footnote 65. *Re J & A Concrete Contractors, Inc.* (BC WD Tex) 58 BR 51 (bankruptcy

judge took judicial notice that he was only one in a series of visiting judges assigned by designation to reduce crowded docket resulting from permanent sitting judge's illness and eventual retirement); *Stephens v Reid*, 189 Ga 372, 6 SE2d 728; *Alexander v Gladden*, 205 Or 375, 288 P2d 219 (state supreme court judicially noticed the organization of its own court and those lower courts it supervises).

A court may take judicial notice of the assignments of trial judges to hold court, of the counties that made up a certain district and of the resident district of a superior court judge. *Turner v Hatchett*, 104 NC App 487, 409 SE2d 747.

Footnote 66. *Sowers-Taylor Co. v Collins* (Mo App) 14 SW2d 692 (judicial notice of names of officers authorized to serve process).

Footnote 67. *Favre v Louisville & N. R. Co.*, 180 Miss 843, 178 So 327.

Footnote 68. *State ex rel. Stephan v Williams*, 246 Kan 681, 793 P2d 234 (judicial notice could be taken that the party bringing a quo warranto action was, in fact, the duly elected Attorney General, and that attorneys from the Attorney General's office were licensed to practice law in the state); *Squire v Bates*, 132 Ohio St 161, 7 Ohio Ops 248, 5 NE2d 690 (persons who have been admitted and dates of their admission).

Footnote 69. *Wojcik v State*, 260 Ga 260, 392 SE2d 525.

§ 132 Inferior or superior courts; personnel

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Appellate courts take judicial notice of the status of inferior courts in the judicial hierarchy, 70 their geographic location, 71 the numbers of judges on the inferior court bench, for particular courts and in general, 72 and when lower courts are and are not in session. 73

Similarly, appellate courts may judicially notice inferior court judges, 74 their signatures and seals, 75 where they reside, 76 how they came into office, 77 their emoluments, 78 their authority, 79 a particular inferior court judge's health 80 and whether the judge had died 81 or retired. 82

Appellate courts will also generally judicially notice clerks and other officers of an inferior court, 83 although the identity of a trial judge's law clerk might not be subject to judicial notice on appeal in determining whether the trial judge's recusal is required because of the clerk's relationship with the plaintiff's attorney. 84

Little case law exists concerning an inferior court judicially noticing a superior court's jurisdiction, officials, rules and administration. Logically, a lower court's obligation, or at least discretion, to notice such matters, assuming the fact in question is common knowledge or capable of ready and accurate determination, follows directly from the court's place in the judicial hierarchy. 85

Footnotes

Footnote 70. McAfee v State, 258 Ind 677, 284 NE2d 778.

Footnote 71. Nashlund v Sabade (1st Dist) 39 Ill App 3d 139, 350 NE2d 90.

Footnote 72. Valley Bank & Trust Co. v Marrewa, 354 Mass 403, 237 NE2d 677 (judicial notice that the number of judges and referees was relatively small in comparison with the number of bankruptcy proceedings); Re Henry, 369 Mich 347, 119 NW2d 671 (in ordering that a contempt proceeding against an attorney be heard by a judge other than the one who initiated the citation, the Michigan Supreme Court took judicial notice that the court in question was a multi-judge court).

Footnote 73. Cichy v Kostyk, 143 Conn 688, 125 A2d 483; Boston Sea Party, Inc. v Bryant Lithographing Co., 146 Ga App 294, 246 SE2d 350; McNeal v Able, 135 Ga App 702, 218 SE2d 460; Sink v Easter, 288 NC 183, 217 SE2d 532; Grady v Parker, 228 NC 54, 44 SE2d 449.

Footnote 74. Ex parte Bush, 270 Ala 62, 116 So 2d 382 (Alabama Supreme Court took judicial notice of change in the presiding judge of a Circuit Court); Riggs v Brock, 208 Ark 1050, 189 SW2d 367; State ex rel. Harp v Vanderburgh Circuit Court, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108.

For further discussion of the tendency of an appellate court to take judicial notice of who are the judges of the various courts of record of the state, of the terms of office, and of the organization and jurisdiction of such courts, see 5 Am Jur 2d, Appeal and Error § 740.

Footnote 75. § 150.

Footnote 76. Robinson Co. v Beck, 261 Ala 531, 74 So 2d 915 (judicially noticing that the trial judge did not reside in the county where the trial was had, thereby rendering judgment subject to being vacated within a specified period).

Footnote 77. Adams v Hale, 213 Ark 589, 212 SW2d 330.

Footnote 78. Gipson v Maner, 225 Ark 976, 287 SW2d 467.

Footnote 79. Miller v Miller, 142 Ind App 90, 231 NE2d 828; Harlor v Harlor (Franklin Co) 79 Ohio App 504, 35 Ohio Ops 310, 65 NE2d 512.

Footnote 80. Jett v Jones, 87 Ga App 531, 74 SE2d 483.

Footnote 81. Harfert v Silvola, 144 Colo 285, 356 P2d 133.

Footnote 82. Ex parte Globe Life Ins. Co., 41 Ala App 82, 123 So 2d 603.

Footnote 83. American Life Ins. Co. v Anderson, 246 Ala 588, 21 So 2d 791.

Footnote 84. Hammond v Doody (Ind App) 553 NE2d 196.

Footnote 85. *Cole v Brunswick Leather Goods Corp.*, 1 NJ Super 190, 63 A2d 569 (intermediate appellate court judicially noticed the availability of justices of the former supreme court for an extended period for purpose of application for writ of certiorari).

(2). Litigation Documents; Judicial Records [133-144]

§ 133 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, a judge may take judicial notice of the contents of court records, although courts will not judicially notice records and facts in one proceeding in deciding another proceeding. 86 There are exceptions, however, to this general rule, and in appropriate cases, a judge may take judicial notice of the contents of court records in a related prior proceeding. 87 For example, a judge may take judicial notice in a parental rights termination proceeding of the file in a prior neglect proceeding. 88 Some jurisdictions provide that judicial notice may be taken of all judicial records, 89 while others limit judicial notice to a court's own records. 90 Generally, the accuracy or reliability of the contents of documents must be demonstrated in order for a court to take judicial notice of the documents. 91

◆ **Comment:** If a court takes judicial notice of a litigation document from another case, it must actually examine that document, and make it clear on the record what documents it examined, the facts that were judicially noticed, and the manner in which those facts were used by the court. 92 Some courts, however, permit the taking of judicial notice of the existence of another case, of litigation documents that are a part of another case, and of the allegations made therein, whenever the mere existence of such things is relevant to the instant case. 93

Footnotes

Footnote 86. §§ 138-143.

Footnote 87. § 141.

Footnote 88. *S.S. v D.M.* (Dist Col App) 597 A2d 870.

Footnote 89. *Allstate Ins. Co. v Greyhound Rent-A-Car, Inc.* (Fla App D4) 586 So 2d 482, 16 FLW D 2518, review den (Fla) 598 So 2d 75.

Footnote 90. *Lee v State Constr. Industry Licensing Bd.*, 205 Ga App 497, 423 SE2d 26.

Footnote 91. *In re Jackson*, 3 Cal 4th 578, 11 Cal Rptr 2d 531, 835 P2d 371, 92 CDOS

7581, 92 Daily Journal DAR 12344, mod on other grounds 3 Cal 4th 902a, 92 CDOS 8928, 92 Daily Journal DAR 14634 and reh den (Oct 28, 1992) and cert den (US) 124 L Ed 2d 641, 113 S Ct 2419.

Footnote 92. Soley v Star & Herald Co. (CA5 Canal Zone) 390 F2d 364, 11 FR Serv 2d 97; National Union Fire Ins. Co. v Underwood (Fla App D4) 502 So 2d 1325, 12 FLW 639; In Interest of Adkins (Iowa) 298 NW2d 273; Chapman v Chapman, 96 Nev 290, 607 P2d 1141; Willard v Kelley (Okla) 803 P2d 1124; Parrish v Layton City Corp. (Utah) 542 P2d 1086; Ringwood v Foreign Auto Works, Inc. (Utah App) 786 P2d 1350, 125 Utah Adv Rep 45, review pending (Utah) 129 Utah Adv Rep 58 and cert den (Utah) 135 Utah Adv Rep 78 and cert den (Utah) 795 P2d 1138.

Footnote 93. Re Ronwin, 139 Ariz 576, 680 P2d 107; In re Pipinos, 33 Cal 3d 189, 187 Cal Rptr 730, 654 P2d 1257, 28 ALR4th 205 (Supreme Court of California took judicial notice of the transcript of a sentencing hearing for purposes of determining whether the trial court abused its discretion in denying bail); Jones v Bordman, 243 Kan 444, 759 P2d 953 (a court is not permitted to take judicial notice of contested fact findings reached by another court in another case as to expert witness' credibility).

For a discussion of hearsay evidence, see §§ 658 et seq.

For a discussion the Federal Rules of Evidence pertaining to hearsay evidence, see 32B Am Jur 2d §§ 195 et seq.

§ 134 Effect of purpose for taking judicial notice; hearsay issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court may judicially notice the truth or falsity of allegations made in another lawsuit, only in very unusual circumstances. 94

Judicial notice of the existence of a document and of statements made therein is not in itself hearsay. 95 A court may take judicial notice of submitted documents noting that its notice only concludes that the articles exist 96 and not whether the text of the articles is factually or scientifically accurate. 97 The hearsay problem arises only if a court accepts the allegations contained in the document as true. 98 In other words, a court may not take judicial notice of the truth of an evidentiary record in another action tried in the same court where there is no conclusive affect to the judgment noticed. It is permissible to take notice that a judgment has been rendered, that a record exists, and the nature of its contents. It is not permissible to bind a party to the evidence in that record except where the party was joined in or privy to the action. 99 Furthermore, although a court may take judicial notice of a prior proceeding, a court cannot take judicial notice of the testimony given at that prior proceeding, as such testimony is hearsay. 1

Footnotes

Footnote 94. *Barton v Peterson* (ND Ga) 733 F Supp 1482 (court may not take judicial notice of a jury verdict in one case when offered in a second case against one who was not a party in that earlier case); *Re Ronwin*, 139 Ariz 576, 680 P2d 107; *Gottsch v Bank of Stapleton*, 235 Neb 816, 458 NW2d 443 (in creditor's action to impose constructive trust on the debtors' overline credit lender, judicial notice could not be taken of debtors' fraud on creditor where collateral estoppel did not exist and fraud was not a previously adjudicated fact binding on the lender).

Footnote 95. *Re Calder* (CA10 Utah) 907 F2d 953, 23 CBC2d 677, CCH Bankr L Rptr ¶ 73507.

Use of a party's pleading in a prior, related litigation is not hearsay when offered only to prove when that party was aware of the facts alleged therein. *Magnolia Square Homeowners Assn. v Safeco Ins. Co.* (6th Dist) 221 Cal App 3d 1049, 271 Cal Rptr 1 (criticized on other grounds by *Sosinsky v Grant* (5th Dist) 6 Cal App 4th 1548, 8 Cal Rptr 2d 552, 92 CDOS 4274, 92 Daily Journal DAR 6727).

Footnote 96. *Liberty Mut. Ins. Co. v Rotches Pork Packers, Inc.* (CA2 NY) 969 F2d 1384, 36 Fed Rules Evid Serv 254, motion den, summary judgment gr, complaint dismd (SD NY) 1993 US Dist LEXIS 4805 (court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings).

Footnote 97. *People v Pizarro* (5th Dist) 10 Cal App 4th 57, 12 Cal Rptr 2d 436, 92 CDOS 8525, 92 Daily Journal DAR 14128, review den (Cal) 1993 Cal LEXIS 253.

Footnote 98. *Day v Sharp* (2nd Dist) 50 Cal App 3d 904, 123 Cal Rptr 918 (criticized on other grounds by *Sosinsky v Grant* (5th Dist) 6 Cal App 4th 1548, 8 Cal Rptr 2d 552, 92 CDOS 4274, 92 Daily Journal DAR 6727).

Footnote 99. *Scottsdale Memorial Health Systems, Inc. v Clark*, 157 Ariz 461, 759 P2d 607, 8 Ariz Adv Rep 5, appeal after remand (App) 164 Ariz 211, 791 P2d 1094, 60 Ariz Adv Rep 43.

Footnote 1. *Re Zemple* (Minn App) 489 NW2d 818.

§ 135 Litigation documents as adjudicative fact or evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under appropriate circumstances, a court may properly take judicial notice of a litigation document as adjudicative fact and use it as conclusive evidence that resolves a question of fact. ² Under other circumstances, a court may take notice of such a document as evidence to be considered, along with other evidence, in resolving an issue of fact. ³ In some circumstances, it is improper for a court to take judicial notice of a particular record for either of these purposes. ⁴

Footnotes

Footnote 2. *Anderson v Cramlet* (CA10 Colo) 789 F2d 840, 12 Media L R 2121.

Footnote 3. *Meyerson v Werner* (CA2 NY) 683 F2d 723, 11 Fed Rules Evid Serv 671 (upholding a contempt citation for the contemnor's failure to withdraw his latest bankruptcy petition, the Second Circuit held that a court may take judicial notice of a litigant's long record of willful, contemptuous, and contumacious behavior and of his use of his other shell corporations to defraud creditors by petitioning in bankruptcy); *United States v Montemayor* (CA5 Tex) 666 F2d 235, 9 Fed Rules Evid Serv 1141.

Footnote 4. *Melvin v Nickolopoulos* (CA3 NJ) 864 F2d 301.

§ 136 --Litigation documents as source of law; legislative, evaluative, or basic fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court takes judicial notice of a litigation document as a source of law when it follows a decision of superior court, cites a court decision as precedent, or relies upon it as persuasive authority. A court may find and follow such decisions even if the attorneys in the case have failed to cite them; indeed, in some situations a court is required to do so. Sometimes this process is referred to as judicial notice, 5 Similarly, a court may judicially notice almost anything without serious restriction if it is using the matter noticed as legislative fact or evaluative or basic data. 6

Footnotes

Footnote 5. *People v Smith* (1st Dist) 215 Cal App 3d 19, 263 Cal Rptr 678, reh den (Cal App 1st Dist) 1989 Cal App LEXIS 1302 and review den (Cal) 1990 Cal LEXIS 55.

Footnote 6. §§ 27, 28.

§ 137 Documents in case being litigated

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court has broad discretions to take judicial notice and to consider prior decisions in resolving the case currently before the court. 7 Generally, a court is free to take judicial notice of any litigation document that is part of the record of the case being litigated. This freedom applies to equally to trial 8 and appellate courts, 9 including discovery taken

in the case and documents submitted by the party for the court's in camera inspection. 10 A court may take judicial notice of the documents in the proceeding immediately before it 11 and all prior proceedings in the same case, 12 although a court may require that the documents be introduced into evidence, 13 and judicial notice cannot be taken of prior reported but not transcribed testimony because conclusions drawn from that source are incapable of being reviewed by an appellate court. 14 A court may take judicial notice of the existence of court records and certain judicial action reflected in a court's records because these facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. 15 The general rule permitting judicial notice of documents in the case applies even if new parties have been added subsequent to the filing of the document in question. 16

That a court may take judicial notice of the existence of such a document without further authentication does not necessarily mean it may rely upon it; it is still necessary to consider the nature of the document, the use to which the document or its contents is being put, and other rules of evidence or procedure. 17

A court may also take judicial notice of the contents in a court's file in order to determine the reasonableness and necessities of attorney's fees. 18 In addition, a trial court may take judicial notice of an appellate court's imposition of frivolous appeal damages in a party's previous appeal in the same case when determining and whether to order the party's removal as personal representative of an estate. 19

Generally, however, the trial judge may not judicially notice testimony taken out of the prior hearing in the same case with respect to temporary orders. Consequently, a trial court cannot take judicial notice of formerly admitted evidence on a hearing on temporary conservatorship in a later child custody hearing. 20

Footnotes

Footnote 7. Chasalow v Board of Assessors (2d Dept) 176 App Div 2d 800, 575 NYS2d 129.

Footnote 8. Hatch v Wagner, 41 Colo App 35, 590 P2d 973; Perry v Schaumann (App) 110 Idaho 596, 716 P2d 1368; In Interest of A.S., 12 Kan App 2d 594, 752 P2d 705; Fontana v Fontana (La App 2d Cir) 426 So 2d 351, cert den (La) 433 So 2d 150; Farm Credit Bank v Huether (ND) 454 NW2d 710; Farm Credit Bank v Huether (ND) 454 NW2d 710; Reeves v Agee (Okla) 769 P2d 745; Riche v Riche (Utah App) 784 P2d 465, 123 Utah Adv Rep 31 (records in prior proceedings in same case; State v Blow, 157 Vt 513, 602 A2d 552.

Footnote 9. Shuttlesworth v Birmingham, 394 US 147, 22 L Ed 2d 162, 89 S Ct 935, on remand 45 Ala App 723, 222 So 2d 377 (examining the record in a prior case before the Supreme Court between the same parties arising out of the same events); Stradley v Cortez (CA3 Pa) 518 F2d 488, 20 FR Serv 2d 515 (judicial notice of matters asserted in plaintiff's motion for new trial made in the course of proceedings before the District Court); Federal Deposit Ins. Corp. v Equitable Life Assur. Soc., 289 Ala 192, 266 So 2d 752 (state Supreme Court has judicial knowledge of contents of its records with reference to its previous consideration of litigation presently before it); State ex rel. Corbin v Tocco (App) 173 Ariz 587, 845 P2d 513, 123 Ariz Adv Rep 20; Holguin v Aetna Casualty &

Surety Ins. Co. (App) 156 Ariz 9, 749 P2d 918 (records and other appellate proceedings in same case); Krawiec v Kraft, 163 Conn 445, 311 A2d 82 (judicial notice of all papers forming part of a file in a case may be used for any proper purpose); Airvac, Inc. v Ranger Ins. Co. (Fla) 330 So 2d 467 (upon second appeal, court must take judicial notice of the opinion and judgment rendered in the first appeal, as well as facts in the transcript of record in the original case); Reeves v Agee (Okla) 769 P2d 745 (judicial notice appellate court's own records in litigation that is interconnected with case on review, including its opinion in a prior appeal of the same case, to determine the extent of res judicata; however, such notice is an exception to the general rule that appellate court is strictly limited to record before it); Chandler v Denton (Okla) 741 P2d 855, later proceeding (Okla) 747 P2d 938 (the record on prior appeal of the same action is not part of the subsequent appeal record, but an appellate court may take judicial cognizance of its former opinions to ascertain the binding effect that is due past decisions and may also judicially notice former opinions of lower courts in the same case).

Footnote 10. Gulf City Fisheries, Inc. v Bobby Kitchens, Inc. (Miss) 518 So 2d 661.

Footnote 11. Perry v Schaumann (App) 110 Idaho 596, 716 P2d 1368; In Interest of A.S., 12 Kan App 2d 594, 752 P2d 705.

Footnote 12. Thompson v Maxwell L. G. & R. Co., 168 US 451, 42 L Ed 539, 18 S Ct 121 (evidence and verdict of a prior trial); Federal Deposit Ins. Corp. v Equitable Life Assur. Soc., 289 Ala 192, 266 So 2d 752 (appellate court has judicial knowledge of contents of its records with reference to its previous consideration of litigation presently before it); Airvac, Inc. v Ranger Ins. Co. (Fla) 330 So 2d 467 (appellate court); Chandler v Denton (Okla) 741 P2d 855, later proceeding (Okla) 747 P2d 938 (the state Supreme Court may take judicial cognizance of its former opinions in the same action to ascertain their binding effect, and may also judicially notice former opinions of the intermediate appellate court); Riche v Riche (Utah App) 784 P2d 465, 123 Utah Adv Rep 31 (courts may take judicial notice of records in prior proceedings in same case).

Footnote 13. Bull v Jacksonville Federal Sav. & Loan Assn. (Fla App D1) 576 So 2d 755, 16 FLW D 558 (in a mortgage foreclosure action, refusing to allow a trial court to take judicial notice of an officially recorded mortgage, where the mortgagee included the mortgage in its pleadings but did not formally introduce them into evidence).

Footnote 14. Matthews v State, 122 Idaho 801, 839 P2d 1215.

Footnote 15. Dairyland Power Coop. v State Bd. of Equalization & Assessment, 238 Neb 696, 472 NW2d 363.

Footnote 16. Carmack v Fidelity-Bankers Trust Co., 180 Tenn 571, 177 SW2d 351.

Footnote 17. Trans Western Leasing Corp. v Corrao Constr. Co., 98 Nev 445, 652 P2d 1181.

A court may not take judicial notice of a previously entered consent decree, the purpose of which had been merely to preserve the status quo of the parties rather than to settle facts and issues that were the focus of the subsequent trial. American Aluminum Products, Inc. v Pollard, 97 NC App 541, 389 SE2d 589.

Concerning the use to which the document is to be put, see § 134.

Footnote 18. *Atascosa County Appraisal Dist. v Tymrak* (Tex App San Antonio) 815 SW2d 364, writ granted (Tex) 35 Tex Sup Ct Jour 597 and affd (Tex) 858 SW2d 335, reh'g of cause overr (Sep 10, 1993).

Footnote 19. *Re Estate of Voegele* (Mo App) 838 SW2d 444.

Footnote 20. *May v May* (Tex App Corpus Christi) 829 SW2d 373, writ den (Jul 1, 1992).

§ 138 Proceedings and record in other causes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

State courts may not be authorized to take judicial notice of the records in a different case pending or disposed of in the same court that are outside the record of the case before it.

21 In some jurisdictions, a court may not consider or take judicial notice of its record in a different proceeding without an agreement of the parties. 22 In other jurisdictions, the rule is that judicial notice may not be taken of the record in a separate case. 23 Some courts go even further, stating that a court may not judicially notice its own record in another case previously before the court even on a related subject and with related parties. This rule applies in criminal proceedings, including hearings on petitions to revoke probation. 24

State courts will generally not take judicial notice of records and facts in one action while deciding another because a party is entitled to have her case decided upon evidence introduced at trial and a reviewing court should not decide a case upon evidence that the party has had no opportunity to refute or explain. 25 For example, a court will not judicially notice a defendant's testimony in another proceeding concerning the events constituting the crimes for which he is on trial. 26 In order to prove some matter contained in the record of a case other than the one being litigated, a party in a state court may be required to offer the other court file or certified copies of portions of the court file into evidence in the case then being litigated. 27 Since the fact judicially noticed may be established without supporting evidence, that fact must have independent reliability and trustworthiness. Requiring independent proof of the other court file insures the existence and genuineness of that court file as well as providing the opposing party an opportunity to attack the propriety of taking such judicial notice, and the independent proof may be made by the court taking judicial notice of its own file, provided that the file is physically before the court. Requiring the introduction of the other file into evidence insures an intelligible record for review, for the appellate court cannot take a corresponding judicial notice. In addition, the introduction of the other court file into evidence may be accomplished by the court taking judicial notice of a file if a file is physically before it. 28 A stipulation alone does not provide the evidentiary basis for judicial notice of evidence not otherwise properly before a court. 29

There are, however, exceptions to the general rule that examine considerations of expediency and of what it is the court is asked to take notice. For example, a court may

take judicial notice of the files in other proceedings involving a party when in the prior adjudications the party was represented by counsel and had every opportunity to refute, impeach, or explain the evidence against her because none of the evils associated with letting a court take judicial notice is present in such circumstances. 30 Furthermore, in some jurisdictions, a trial judge may take judicial notice of any record in the court on which the judge sits, as called upon to do so. 31

It should be noted that the rule which precludes a court from taking judicial notice of its own records in other actions does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principle under the theory of stare decisis in the second action. 32

Footnotes

Footnote 21. Carson v Gibson (Fla App D2) 595 So 2d 175, 17 FLW D 536.

Footnote 22. Leuchtenmacher v Farm Bureau Mut. Ins. Co. (Iowa) 460 NW2d 858.

Footnote 23. Smith v State, 307 Ark 223, 818 SW2d 945.

Footnote 24. Bane v State (Ind App) 579 NE2d 1339, transfer den (Mar 19, 1992).

Regarding notice of matters of criminal procedure generally, see § 106.

As to related proceedings, see § 141.

Footnote 25. In Interest of C.M.W. (Mo App) 813 SW2d 331.

Footnote 26. Berget v State (Okla Crim) 824 P2d 364, reh den (Okla Crim) 1992 Okla Crim App LEXIS 10 and cert den (US) 121 L Ed 2d 79, 113 S Ct 124.

Footnote 27. Carson v Gibson (Fla App D2) 595 So 2d 175, 17 FLW D 536; State v Weber (Mo App) 814 SW2d 298.

Footnote 28. State v Weber (Mo App) 814 SW2d 298.

Footnote 29. Carson v Gibson (Fla App D2) 595 So 2d 175, 17 FLW D 536.

Footnote 30. In Interest of C.M.W. (Mo App) 813 SW2d 331.

Footnote 31. Willard v Kelley (Okla) 803 P2d 1124.

Footnote 32. Wasinger v Miller, 154 Colo 61, 388 P2d 250; Board of Educational Lands & Funds v Gillett, 158 Neb 558, 64 NW2d 105; American Nat. Bank v Bradford, 28 Tenn App 239, 188 SW2d 971; Pickens v Coal River Boom & Timber Co., 66 W Va 10, 65 SE 865.

§ 139 --Records from other courts

Federal courts generally may take judicial notice of proceedings in other courts³³ if those proceedings have relevance to the matters in hand.³⁴ Courts have applied this principle to take judicial notice of criminal convictions and it is proper for a court to do so particularly when the judge in the case is familiar with the defendant's criminal case.³⁵

In state courts, the general rule is that a court cannot judicially notice the records of another court.³⁶ For example, it is improper to take judicial notice of the findings of a jury in an obscenity case in a different county involving the same defendant because the parties in the proceeding are not the same.³⁷ Furthermore, a court errs in taking judicial notice of a bankruptcy court's proceedings, particularly when the bankruptcy court's findings are not made part of the record in the case before the court as the bankruptcy court did not resolve the bankruptcy case until after the instant case ended.³⁸

Some state courts, however, will take judicial notice of the records in other cases, under certain circumstances.³⁹ Courts will sometimes take judicial notice of the determination made in other cases which are made by a court of competent jurisdiction that the parties appeared before. Consequently, it has been said that a court may properly take judicial notice of a prior determination of illegality of the use in question in a prior proceeding in construing the applicability of a nonconforming youth statute without denying a party due process.⁴⁰ In addition, a trial court properly takes judicial notice of the facts stated in a published opinion of the state's Supreme Court.⁴¹ Furthermore, it is permissible for a family court justice to take judicial notice of factual findings and legal rulings made by another family court justice in a separate proceeding that required the same burden of proof. In fact, a trial justice may have an obligation to take judicial notice of similar indications of dependency and neglect within the same family where the justice has at her disposal extensive records concerning the children, and the judge is aware of the mother's history of dysfunctional relationships, her propensity to engage in relationships with abusive men, of allegations of substance abuse, and of allegations of physical and mental abuse of the children involved.⁴²

In general, a state appellate court also will not take judicial notice of a record in another court unless it is incorporated in the proceedings before it.⁴³ This rule of law prohibits an appellate court from going to the record of another case for the purpose of ascertaining a fact not shown in the record of the case before it.⁴⁴

A state Supreme Court may take judicial notice of the records of any court of its state, but the party desiring that judicial notice be taken of a record must show the relevance of the subject record.⁴⁵ Similarly, a court will not take judicial notice of a transcript of oral argument before the United States Supreme Court where nothing in the transcript of the oral argument is relevant to the proper resolution of the case before the court.⁴⁶ It has been held that the adoption of rules of criminal evidence did not abrogate, in criminal cases, the common law rule that an appellate court cannot take judicial notice of the records of another court.⁴⁷ A court may, however, judicially notice a common law action filed by the same plaintiff currently before the court alleging that a trial judge's denial of a declaratory judgment was an abuse of her discretion when the court feels that

the common law actions are relevant to the question before it. 48

Footnotes

Footnote 33. *Bolivar v Pocklington* (DC Puerto Rico) 137 FRD 202, *affd*, remanded (CA1 Puerto Rico) 975 F2d 28, 23 FR Serv 3d 723.

Footnote 34. *Kowalski v Gagne* (CA1 Mass) 914 F2d 299, 31 Fed Rules Evid Serv 434.

Footnote 35. *Kowalski v Gagne* (CA1 Mass) 914 F2d 299, 31 Fed Rules Evid Serv 434.

Footnote 36. *Jones v Murphy*, 49 Ala App 66, 268 So 2d 848 (Court of Criminal Appeals does not take judicial notice of another court's records); *Hillsborough County Bd. of County Comrs. v Public Employees Relations Com.* (Fla App D1) 424 So 2d 132, later proceeding (Fla App D1) 447 So 2d 1371 (impermissible for a District Court of Appeal to take judicial notice of records of a sister District Court of Appeal); *Department of Revenue v Young American Builders* (Fla App D1) 358 So 2d 1096, *affd* (Fla) 376 So 2d 849 (same); *Sternberg v Smith* (La App 1st Cir) 385 So 2d 469 (Louisiana law does not provide for judicial notice of proceedings in other courts. L.S.A.-C.C.P. arts. 1391-1397); *Jenks v Gulla* (La App 1st Cir) 383 So 2d 1052 (Court of Appeal cannot take judicial notice of suit records of other courts); *Temoney v State*, 290 Md 251, 429 A2d 1018 (impermissible to judicially notice properly authenticated transcripts of defendant's prior out-of-state convictions, offered at a sentence-enhancement hearing to prove that those convictions qualified as "violent" felonies); *Re Estate of Brockerman*, 332 Pa Super 88, 480 A2d 1199 (where plaintiffs failed at the trial level to offer records of a related suit, the appellate court refused to judicially notice the records on appeal); *Southwestern Electric Power Co. v Martin* (Tex App Texarkana) 844 SW2d 229, writ den (Mar 31, 1993); *Re Estate of Leno*, 139 Vt 554, 433 A2d 260 (although judicial notice of files, records and judgment in a case other than that on trial is improper, where there was no objection in the court below was made to such judicial notice and the issue was not raised on appeal, any error was waived).

Footnote 37. *People v Page Books, Inc.* (2d Dist) 235 Ill App 3d 765, 175 Ill Dec 876, 601 NE2d 273, *app gr* 148 Ill 2d 650, 183 Ill Dec 28, 610 NE2d 1272.

Footnote 38. *Rumbaugh v Beck*, 411 Pa Super 220, 601 A2d 319.

Footnote 39. *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363; *Kirshner v Shinaberry* (Lucas Co) 64 Ohio App 3d 536, 582 NE2d 22.

Footnote 40. *Matthews v Pernell* (Montgomery Co) 64 Ohio App 3d 707, 582 NE2d 1075, *motion den* 49 Ohio St 3d 711, 551 NE2d 1303 and *motion overr* 52 Ohio St 3d 703, 556 NE2d 528.

Footnote 41. *Chicago v American Nat. Bank & Trust Co.* (1st Dist) 233 Ill App 3d 1031, 175 Ill Dec 112, 599 NE2d 1126.

Footnote 42. *Re McKayla C.* (RI) 618 A2d 1264.

Footnote 43. *Marlow v American Suzuki Motor Corp.* (1st Dist) 222 Ill App 3d 722, 165 Ill Dec 166, 584 NE2d 345.

Footnote 44. *Southwestern Electric Power Co. v Martin* (Tex App Texarkana) 844 SW2d 229, writ den (Mar 31, 1993).

Footnote 45. *People v Rowland*, 4 Cal 4th 238, 14 Cal Rptr 2d 377, 841 P2d 897, 92 CDOS 10128, 92 Daily Journal DAR 17038, reh den, stay den (Cal) 1993 Cal LEXIS 587 and stay gr (Cal) 1993 Cal LEXIS 1812 and cert den (US) 126 L Ed 2d 101, 114 S Ct 138.

Footnote 46. *People v Payton*, 3 Cal 4th 1050, 13 Cal Rptr 2d 526, 839 P2d 1035, 92 CDOS 9415, 92 Daily Journal DAR 15669, reh den (Cal) 1993 Cal LEXIS 585 and stay gr (Cal) 1993 Cal LEXIS 2187 and cert den (US) 126 L Ed 2d 649, 114 S Ct 682.

Footnote 47. *Penix v State* (Tex App Fort Worth) 748 SW2d 629.

As to judicial notice by appellate courts of the proceedings and record in other causes, see 5 Am Jur 2d, Appeal and Error § 742.

Footnote 48. *Marlow v American Suzuki Motor Corp.* (1st Dist) 222 Ill App 3d 722, 165 Ill Dec 166, 584 NE2d 345.

§ 140 --Special circumstances justifying judicial notice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The normal rule that an appellate court considers only the factual record before the district court is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by a lower court. 49 Those developments must, however, be a matter of record. 50 Consequently, an appellate court may take judicial notice of a person's guilty plea in affirming the district court's finding that the person was embezzling from her employer. 51 An appellate court may also take judicial notice of matters that were not before the trial court when both parties request that judicial notice be taken, as in such circumstances there should be no unfairness to either side. In addition, court may take judicial notice of information not presented to the trial court when the facts are not reasonably open to dispute and both parties' motion for judicial notice append photocopies of certified copies of the pertinent court files. 52

A court may take judicial notice of newspaper articles and the amount of publicity generated on the reversal of a defendant's earlier conviction and the filing of new charges against that defendant to ensure that defendant effective assistance of appellate counsel. 53 In addition, a court may take judicial notice, in an attorney discipline case, of the fact that the attorney has previously been reprimanded for misconduct. 54

These cases are not necessarily in conflict with the general rules, 55 but usually recognize these rules, holding, however, that for reasons apparent in each case the court

is justified in noticing judicially the proceedings in other causes. 56 For example, where the parties to two proceedings are substantially the same and the result of one cause is determinative of the other, the courts may take judicial notice of the proceedings and judgment in the former cause 57 instead of compelling the parties to resort to other proceedings to produce the same effect. 58

While a court may under some circumstances take judicial notice of a judgment appearing in the record of another case in the same court, this does not mean that it can give weight to the conclusions embodied in that judgment in deciding the issues in another action involving different parties. 59

Footnotes

Footnote 49. *Melvin v Nickolopoulos* (CA3 NJ) 864 F2d 301; *Landy v Federal Deposit Ins. Corp.* (CA3 NJ) 486 F2d 139, CCH Fed Secur L Rep ¶ 94094, 17 FR Serv 2d 769, cert den 416 US 960, 40 L Ed 2d 312, 94 S Ct 1979; *Colonial Penn Ins. Co. v Coil* (CA4 SC) 887 F2d 1236, 29 Fed Rules Evid Serv 521, 15 FR Serv 3d 336; *Rothenberg v Security Management Co.* (CA11 Ga) 667 F2d 958, CCH Fed Secur L Rep ¶ 98450, 33 FR Serv 2d 1040, later proceeding (ND Ga) CCH Fed Secur L Rep ¶ 99038; *Matthews v Matthews* (Fla App D2) 133 So 2d 91, appeal after remand (Fla App D2) 222 So 2d 282 (a court may take judicial notice of its own records, but in passing on motion for summary judgment, the same court could not consider testimony in the transcript in an earlier case which was between the same parties but which was not made part of record in the present case).

Footnote 50. *Matter of Re Marriage of Morten*, 67 Or App 235, 677 P2d 735, review den 297 Or 83, 679 P2d 1368 (in awarding custody of children to their father based on evidence that the former wife's new husband had a history of alcohol abuse and assaultive crimes, the court declined to take judicial notice that the former wife's marriage to the new husband was dissolved after oral argument on appeal; if the former wife felt that events subsequent to the hearing on appeal were relevant to the children's custody status, she should bring those events to the trial court's attention in an appropriate fashion).

Footnote 51. *Re American Biomaterials Corp.* (CA3 NJ) 954 F2d 919, 92-1 USTC ¶ 50194, 69 AFTR 2d 92-611.

Footnote 52. *People v Hardy*, 2 Cal 4th 86, 5 Cal Rptr 2d 796, 825 P2d 781, 92 CDOS 2166, 92 Daily Journal DAR 3841, mod on other grounds 2 Cal 4th 758a, 92 CDOS 4144, 92 Daily Journal DAR 6554, cert den (US) 121 L Ed 2d 435, 113 S Ct 498 and reh den (May 14, 1992) and cert den (US) 122 L Ed 2d 139, 113 S Ct 987 (California Evidence Code provides special rules for situations in which a party seeks judicial notice of information not received in open court or not included in the record of the action).

Footnote 53. *Harvey v State* (Wyo) 835 P2d 1074, reh den (Wyo) 1992 Wyo LEXIS 85 and cert den (US) 121 L Ed 2d 586, 113 S Ct 661.

Footnote 54. *Re McCausland* (Ind) 605 NE2d 185.

Footnote 55. § 138.

Footnote 56. *Wells v United States*, 318 US 257, 87 L Ed 746, 63 S Ct 582; *Funk v Commissioner (CA3)* 163 F2d 796, 47-2 USTC ¶ 9370, 36 AFTR 188; *Knorp v Thompson*, 352 Mo 44, 175 SW2d 889.

Footnote 57. § 144.

Footnote 58. *Butler v Eaton*, 141 US 240, 35 L Ed 713, 11 S Ct 985.

Footnote 59. *Fox v Schaeffer*, 131 Conn 439, 41 A2d 46, 157 ALR 132.

§ 141 Related proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court may take judicial notice of closely related proceedings. 60 For example, judicial notice of other proceedings may be proper where the same parties are involved and the allegations from those proceedings have been proved. 61 Other courts hold that judicial notice may be taken of a prior case between two parties if it can be determined that the cases are essentially the same. 62 For example, a court may take notice of a default judgment entered in a related proceeding. 63 A court may also take judicial notice that an interpleader action filed in federal court, related to taxpayers' suit against schoolboard members alleging illegal expenditure of public funds has been brought to a conclusion by final judgment entered in favor of the intervenor. 64 It is proper for a court to take notice of an underlying divorce action in a suit by a husband against the wife's divorce attorney alleging intentional interference with parental custody rights and intentional infliction of emotional distress. 65 A court may also take judicial notice of an adjudicated outcome of a prior domestic abuse proceeding. 66 Furthermore, in an attorney discipline proceeding, a court may consider an affidavit regarding the attorney's failure to pay state bar enrollment fees and the attorney's resulting automatic suspension where the evidence is not offered or considered for the purpose of and is not relevant to determining the attorney's guilt or innocence of the particular charges in the proceeding before the court, but rather is offered and considered for the purpose of and is relevant to determining the appropriate sanction if guilt is determined. 67

Many courts judicially notice litigation documents in related cases in motions for summary judgment, 68 although some courts will not. 69

Some jurisdictions have established requirements for judicial notice to be taken of prior court proceedings in order to ensure a proper record for appellate review. For example, first, written notice must be given to the trial court so that it is clear what matters the trial court had the opportunity to consider. Secondly, judicially noticed documents must be physically included as part of the record filed on appeal, or must be on file at the Supreme Court as the result of a different proceeding. The determination whether judicially noticed court records are adjudicative or legislative and must exclude it, is not without question. It is said sometimes it may be adjudicative, others legislative, and in even some cases both adjudicative and legislative. 70

In a subsequent action between the same parties, a court cannot take judicial notice of the findings of fact and conclusions of law contained in a prior judgment which has been rendered void. 71 Although a trial court has the power to take judicial notice of court files of other actions between the same parties, this does not mean that it might use every statement found in the papers constituting the file with the same effect as though the facts were in evidence before it. It would, for example, be improper for a trial court to base its decision terminating a respondent's parental rights solely on findings from an earlier proceeding removing children from the respondent's care and custody that was judicially noticed by the court. 72

Footnotes

Footnote 60. *Cash Inn of Dade, Inc. v Metropolitan Dade County* (CA11 Fla) 938 F2d 1239, 20 FR Serv 3d 906; *Re Marriage of DeBow* (5th Dist) 236 Ill App 3d 1038, 177 Ill Dec 89, 602 NE2d 984, app den 148 Ill 2d 640, 183 Ill Dec 17, 610 NE2d 1261; *Finn v Lipman* (Me) 526 A2d 1380; *Re Murphy* (Mo) 732 SW2d 895; *Re Interest of N.M.*, 240 Neb 690, 484 NW2d 77; *State ex rel. Pederson v Howell*, 239 Neb 51, 474 NW2d 22; *Patten v Green* (ND) 397 NW2d 458; *Re C.A.D. (Okla)* 839 P2d 165, amd, on reh (Okla) 1992 Okla LEXIS 197; *Lien v Lien* (SD) 420 NW2d 26.

Footnote 61. *Re Marriage of DeBow* (5th Dist) 236 Ill App 3d 1038, 177 Ill Dec 89, 602 NE2d 984, app den 148 Ill 2d 640, 183 Ill Dec 17, 610 NE2d 1261.

Footnote 62. *People in interest of O.J.S. (Colo App)* 844 P2d 1230, cert gr (Colo) 1993 Colo LEXIS 98 and affd (Colo) 863 P2d 291, dissenting op modified, reh den (Colo) 1993 Colo LEXIS 997; *Osei-Kuffnor v Argana* (Dist Col App) 618 A2d 712; *In Interest of C.M.W. (Mo App)* 813 SW2d 331; *Re Interest of N.M.*, 240 Neb 690, 484 NW2d 77; *Marble Slab Creamery, Inc. v Wesic, Inc. (Tex App Houston (14th Dist))* 823 SW2d 436; *Hanley v Hanley* (Tex App Dallas) 813 SW2d 511.

Footnote 63. *Philips Medical Sys. Int'l, B.V. v Bruetman* (CA7 Ill) 982 F2d 211, RICO Bus Disp Guide (CCH) ¶ 8190, 24 FR Serv 3d 466 (not followed by *Select Creations v Paliafito Am. (ED Wis)* 830 F Supp 1223) and later proceeding (CA7 Ill) 8 F3d 600, RICO Bus Disp Guide (CCH) ¶ 8419, reh den (CA7 Ill) 1994 US App LEXIS 379.

Footnote 64. *Smith v Dorsey* (Miss) 599 So 2d 529.

Footnote 65. *Finn v Lipman* (Me) 526 A2d 1380.

Footnote 66. *Re Zemple* (Minn App) 489 NW2d 818.

Footnote 67. *Re Murphy* (Mo) 732 SW2d 895.

Footnote 68. *United States v Kates* (ED Pa) 419 F Supp 846; *Aloe Creme Laboratories, Inc. v Francine Co. (CA5 Fla)* 425 F2d 1295; *United States v Sterkowicz* (ND Ill) 266 F Supp 703, 67-1 USTC ¶ 9474, 19 AFTR 2d 1451; *Anderson v Cramlet* (CA10 Colo) 789 F2d 840, 12 Media L R 2121; *Magnolia Square Homeowners Assn. v Safeco Ins. Co. (6th Dist)* 221 Cal App 3d 1049, 271 Cal Rptr 1 (criticized on other grounds by *Sosinsky v Grant* (5th Dist) 6 Cal App 4th 1548, 8 Cal Rptr 2d 552, 92 CDOS 4274, 92 Daily Journal DAR 6727); *Southern California Funding, Inc. v Hutto* (Fla App D1) 438 So 2d

426, review den (Fla) 449 So 2d 265; Fleming v Anderson, 187 Va 788, 48 SE2d 269.

Footnote 69. Chorba v Davlisa Enterprises, Inc., 303 Pa Super 497, 450 A2d 36.

Footnote 70. Cockreham v Wyoming Production Credit Asso. (Wyo) 743 P2d 869.

Footnote 71. Valley Vista Dev. Corp. v Broken Arrow (Okla) 766 P2d 344 (citing 62 O.S. (1981) §§ 362, 363).

Footnote 72. Re Mark C., 28 Conn App 247, 610 A2d 181, app den 223 Conn 922, 614 A2d 823.

§ 142 Unrelated cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is sometimes appropriate for a court to judicially notice information from cases unrelated to the one at bar, so long as the facts are not noticed in a way that are unfairly binding upon the parties. ⁷³ Some states, however, do not allow judicial notice of testimony in prior unrelated cases ⁷⁴ and other state courts hold that where the facts offered for judicial notice are derived from pleadings in a case not involving the same parties and are not proved, judicial notice is improper. ⁷⁵

Footnotes

Footnote 73. United States v Montemayor (CA5 Tex) 666 F2d 235, 9 Fed Rules Evid Serv 1141; Marshall v Bramer (CA6 Ky) 828 F2d 355, 23 Fed Rules Evid Serv 371, 8 FR Serv 3d 873, companion case (CA6 Ky) 828 F2d 361, 14 Media L R 1561, 8 FR Serv 3d 1017; Willard v Kelley (Okla) 803 P2d 1124.

Footnote 74. Sutherland v Sutherland (Tenn App) 831 SW2d 283.

Footnote 75. Vulcan Materials Co. v Bee Constr., 96 Ill 2d 159, 70 Ill Dec 465, 449 NE2d 812.

§ 143 Collateral proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, in proceedings that are collateral to a prior lawsuit, courts will take judicial notice of the proceedings in the principal suit. For instance, in a suit to execute a

previous judgment for civil damages, courts may judicially notice the principal suit for the sake of judicial convenience. 76 In contempt proceedings, where the petition is to punish the violation of an injunction that was issued by the same court, the court will take judicial notice of the decree violated. 77 The same liberality is found in habeas corpus proceedings. 78

A court may take judicial notice of litigation records (or the absence thereof) to ascertain whether a specific party has instituted proceedings of a particular nature 79 or whether an appeal is pending. 80 Courts have also taken judicial notice of records in other proceedings and courts which indicate a proclivity for litigation suggesting that the claim before the court may be fraudulent, spurious or frivolous. 81 Uncontested, basic information, readily gleaned from the face of documents, may be judicially noticed. 82

Even courts with a grudging attitude tend to be willing to take such notice of the records and decisions in other actions or proceedings involving family law, 83 particularly where children are involved. 84 For example, in an action to enforce a property settlement agreement entered into by the parties as part of a divorce decree, a court will take judicial notice of the underlying divorce decree. 85

Footnotes

Footnote 76. *Decker v Kolleda* (Marion Co) 57 Ohio App 442, 11 Ohio Ops 124, 26 Ohio L Abs 313, 14 NE2d 417.

Footnote 77. *Fontana v Fontana* (La App 2d Cir) 426 So 2d 351, cert den (La) 433 So 2d 150; *Young v Commonwealth*, 194 Va 780, 75 SE2d 479.

Regarding violations of court orders as contempt, see 17 Am Jur 2d, Contempt §§ 130-164.

Footnote 78. *Moore v Estelle* (CA5 Tex) 526 F2d 690, cert den 426 US 953, 49 L Ed 2d 1192, 96 S Ct 3180 (in considering habeas corpus appeal of state prisoner, Court of Appeals judicially noticed prior habeas corpus proceedings brought by the same petitioner in connection with the same conviction, including state petitions, even where prior state case had not been included in the records; *Murray v Louisiana* (CA5 La) 347 F2d 825 (on appeal from denial of federal habeas corpus relief, Appellate Court could take judicial notice of prior state petition filed by petitioner); *Alexander v Solem* (SD) 383 NW2d 486 (habeas court correctly judicially noticed petitioner's underlying file which was necessary and relevant for habeas corpus petition).

Footnote 79. *Alvis v Bank of America Nat. Trust & Sav. Asso.*, 95 Cal App 2d 118, 212 P2d 608, 36 ALR2d 1209.

Footnote 80. *Dawson v Campbell*, 270 Ala 586, 120 So 2d 727 (absence of judgment or decree supporting an appeal); *Bramlett v Alabama State Tenure Com.* (Ala App) 341 So 2d 727 (judicial notice that an appeal to a state administrative agency was not timely taken); *Re Estate of Lindsay* (Fla App D4) 207 So 2d 736.

Footnote 81. *Meyerson v Werner* (CA2 NY) 683 F2d 723, 11 Fed Rules Evid Serv 671 (upholding a contempt citation for failing to withdraw yet another bankruptcy petition);

Colonial Penn Ins. Co. v Coil (CA4 SC) 887 F2d 1236, 29 Fed Rules Evid Serv 521, 15 FR Serv 3d 336 (holding that the circumstances entitled the company to revoke its offer of judgment, despite FR Civ P, Rule 68, which directs that such offers are irrevocable); Holmes v United States (ND Ga) 231 F Supp 971, affd (CA5 Ga) 353 F2d 785; Green v Warden, U.S. Penitentiary (CA7 Ind) 699 F2d 364, 12 Fed Rules Evid Serv 1078, cert den 461 US 960, 77 L Ed 2d 1321, 103 S Ct 2436; Conway v Dunbar (CA9 Cal) 448 F2d 765; Schweitzer v Scott (CD Cal) 469 F Supp 1017, 4 Fed Rules Evid Serv 964; Filrep, S. A. v Barry (3d Dist) 88 Ill App 3d 935, 44 Ill Dec 45, 410 NE2d 1137.

Footnote 82. Re Welfare of Ward, 22 Wash App 774, 592 P2d 661.

Footnote 83. Occhiuto v Occhiuto, 97 Nev 143, 625 P2d 568; Buncher v Buncher, 207 Pa Super 322, 217 A2d 861.

Footnote 84. Witcher v Motley (Ala App) 417 So 2d 208; Re Appeal in Pima County, etc. (App) 135 Ariz 181, 659 P2d 1326 (in proceeding for termination of parental rights, judicial notice of another superior court file was proper); In Interest of Adkins (Iowa) 298 NW2d 273; Re Welfare of Clausen (Minn) 289 NW2d 153 (in parental termination proceeding, trial court properly took judicial notice of files and records from juvenile and criminal divisions of its own jurisdiction); Re Otto, 181 Neb 96, 147 NW2d 164 (in a proceeding to declare children neglected and determine the fitness of a parent, the court took judicial notice of a prior divorce case that was interwoven and interdependent and involved custody of same children); Gross v Gross (SD) 355 NW2d 4 (in proceedings to modify child support provisions of a divorce decree, trial court may take judicial notice of probate pending in its files under which the father will inherit a large amount of money and the means by which the father will inherit); Re S.S. (SD) 334 NW2d 59 (trial court properly took judicial notice of evidence of dependence and neglect from prior proceedings in terminating parental rights); State in interest of C. (Wyo) 638 P2d 165 (the court in child neglect proceedings could take judicial notice of its own records in the case before it as well as the records of a case closely related to it).

Footnote 85. Brooks v Minn, 73 Hawaii 566, 836 P2d 1081.

§ 144 Issue preclusion; res judicata

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts may take judicial notice of their own records in prior proceedings which are between the same parties and are concerned with the same basic facts involving in the same general claims for relief. 86 A court may take judicial notice of other civil cases before it involving the same parties in order to establish an identity of issues and apply the doctrine of collateral estoppel. 87 Courts may take judicial notice under such circumstances in both to criminal convictions 88 and judgments in civil cases, 89 although a court may refuse to take notice of a prior decision which the parties fail to raise. 90 Similarly, courts have taken judicial notice of litigation documents of related cases to ascertain whether an action is barred by a statute of limitations. 91

A court may take judicial notice of court files in another suit between the same parties especially when the relevance of that litigation was expressly made an issue in the current trial. Consequently a court may take judicial notice of the file in a prior suit to hold that an issue in a party's prior appeal is barred by the doctrine of res judicata. 92

Furthermore, although a court may take judicial notice of the existence of its records as well as the records of another court, judicial notice of facts in a court's records is subject to the doctrine of collateral estoppel and res judicata. 93 In addition, the use to which such records may be put is circumscribed by the doctrines of res judicata and collateral estoppel. 94

Footnotes

Footnote 86. § 141.

Footnote 87. *Wilson v Norfolk Southern Corp.*, 200 Ga App 523, 409 SE2d 84, 102-159 Fulton County D R 10B.

Footnote 88. *Kowalski v Gagne* (CA1 Mass) 914 F2d 299, 31 Fed Rules Evid Serv 434; *Government of Virgin Islands v Testamark* (CA3 VI) 528 F2d 742, 1 Fed Rules Evid Serv 1105; *Colonial Penn Ins. Co. v Coil* (CA4 SC) 887 F2d 1236, 29 Fed Rules Evid Serv 521, 15 FR Serv 3d 336 (judicial notice that homeowners who sued insurance company after a fire destroyed their home subsequently pleaded guilty to setting the fire); *Commodity Futures Trading Com. v Co Petro Marketing Group, Inc.* (CA9 Cal) 680 F2d 573, 10 Fed Rules Evid Serv 1494, appeal after remand (CA9 Cal) 700 F2d 1279, 10 BCD 414, CCH Bankr L Rptr ¶ 69108; *Coney v Smith* (CA11 Fla) 738 F2d 1199.

Footnote 89. *St. Louis Baptist Temple, Inc. v Federal Deposit Ins. Corp.* (CA10 Colo) 605 F2d 1169, 5 Fed Rules Evid Serv 23; *Lazzarone v Bank of America* (3rd Dist) 181 Cal App 3d 581, 226 Cal Rptr 855 (citing Evid. Code §§ 452(d), 453); *Cologna v Farmers & Merchants Ins. Co.* (Mo App) 785 SW2d 691; *Terre Du Lac Asso. v Terre Du Lac, Inc.* (Mo App) 737 SW2d 206, 74 ALR4th 141; *Cedars Corp. v Sun Valley Dev. Co.*, 213 Neb 622, 330 NW2d 900 (collateral estoppel); *Ringwood v Foreign Auto Works, Inc.* (Utah App) 786 P2d 1350, 125 Utah Adv Rep 45, review pending (Utah) 129 Utah Adv Rep 58 and cert den (Utah) 135 Utah Adv Rep 78 and cert den (Utah) 795 P2d 1138 (res judicata); *Texas West Oil & Gas Corp. v First Interstate Bank* (Wyo) 743 P2d 857, reaffirmed (Wyo) 749 P2d 278 (upon a defendant's motion to dismiss based upon either res judicata or collateral estoppel, a trial court may judicially notice previous determinations of other courts in actions in which plaintiff had been a party).

Footnote 90. *Melvin v Nickolopoulos* (CA3 NJ) 864 F2d 301 (appellees' failure in federal district court to assert res judicata as to one state court ruling precluded consideration of that ruling on appeal).

Footnote 91. *Ellis v Cauhaupé*, 71 Wyo 475, 260 P2d 309.

Footnote 92. *Legassey v Shulansky*, 28 Conn App 653, 611 A2d 930.

Footnote 93. *Dairyland Power Coop. v State Bd. of Equalization & Assessment*, 238 Neb 696, 472 NW2d 363.

Footnote 94. Texas Real Estate Com. v Nagle (Tex) 767 SW2d 691, reh'g of cause overruled (Apr 12, 1989).

c. Other Executive, Administrative, and Regulatory Matters [145-151]

§ 145 Domestic governmental matters, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts take cognizance of the various departments of government and of their respective powers and duties; 95 of public officials and their responsibilities and authority; 96 and of official acts, regulations, 97 reports, and public records of public officers and agencies. 98 Similarly, courts take judicial notice of information relating to various public institutions and facilities, such as courthouses, 99 schools and colleges, 1 penal and correctional facilities, 2 government projects, 3 and the like. 4

Judicial notice is also often taken of information relating to elections, 5 and politics. 6

Footnotes

Footnote 95. Re Alessi (BC ND Ill) 12 BR 96, 7 BCD 1037, 4 CBC2d 1003, CCH Bankr L Rptr ¶ 68240 (regulation of betting, and particularly of betting on horse races, is generally considered an exercise of police power properly reserved to the states); Jablonski v Caputo (Fla App D2) 297 So 2d 310 (the State Bureau of Vital Statistics is the custodian of records that reflect the granting of divorces in every county in Florida); Department of Public Works & Bldgs. v Dust, 19 Ill 2d 217, 166 NE2d 36 (judicial notice that Department of Public Works and Buildings had power of eminent domain); Irvington Policemen's Benev. Asso. v Irvington, 170 NJ Super 539, 407 A2d 377, 103 BNA LRRM 2358, cert den 82 NJ 296, 412 A2d 801 (the police play an extremely important role in every community's social well-being); Seaborn v Hartsville Rescue Squad, 269 SC 386, 237 SE2d 496 (the state Highway Patrol is responsible for enforcing traffic laws on the public highway); Ex parte Parrott (Tex App Fort Worth) 723 SW2d 342 (court would take judicial notice that the Tarrant County Child Support Office was a section of the Tarrant County Domestic Relations Office formerly known as the Tarrant County Juvenile Department).

Footnote 96. § 146.

Footnote 97. § 122.

Footnote 98. § 149.

Footnote 99. Rhode Island Defense Attorneys Asso. v Dodd (RI) 463 A2d 1370.

Footnote 1. *United States v Griffin* (CA1 Mass) 525 F2d 710, cert den 424 US 945, 47 L Ed 2d 351, 96 S Ct 1414; *Meredith v Fair* (CA5 Miss) 298 F2d 696; *Cline v Knight*, 111 Colo 8, 137 P2d 680, 146 ALR 1281; *Coughlon v Iowa High School Athletic Asso.*, 260 Iowa 702, 150 NW2d 660; *Greenhill v Carpenter* (Tenn App) 718 SW2d 268.

Footnote 2. *Falzerano v Collier* (DC NJ) 535 F Supp 800; *Chambers v Koehler* (WD Mich) 635 F Supp 884 (that prison riots occurred on a certain weekend at certain prisons in Michigan, there having been major and serious conflagrations in which prisoners went on a rampage and which were widely reported in the press); *Dunn v White* (CA10 Okla) 880 F2d 1188, cert den 493 US 1059, 107 L Ed 2d 954, 110 S Ct 871 (trial court properly took judicial notice, in prisoner's action against prison officials who disciplined him for refusing to submit to AIDS blood test, of the seriousness of the AIDS epidemic and the potential for its transmission among prisoners); *Re Shaieb* (4th Dist) 250 Cal App 2d 553, 58 Cal Rptr 631 (disapproved on other grounds by *In Re Jerald C.*, 33 Cal 3d 1, 187 Cal Rptr 562, 654 P2d 745) (judicial notice that a particular institution was one of the facilities of the Youth Authority); *People v White*, 51 Mich App 1, 214 NW2d 326 (judicial notice of available rehabilitative facilities for juvenile); *New York Moratorium on Prison Constr. v New York State Dept. of Correctional Services*, 91 Misc 2d 674, 398 NYS2d 525 (notice taken of the fact that prison construction projects were urgent and necessary).

Footnote 3. *United States v California* (ED Cal) 509 F Supp 867, affd in part and revd in part on other grounds, remanded (CA9 Cal) 694 F2d 1171, 13 ELR 20429; *Tilghman v Commonwealth*, 27 Pa Cmwlth 484, 366 A2d 966, affd 473 Pa 319, 374 A2d 535.

Footnote 4. *International Soc. for Krishna Consciousness, Inc. v New Jersey Sports & Exposition Authority* (DC NJ) 532 F Supp 1088, 10 Fed Rules Evid Serv 472, affd (CA3 NJ) 691 F2d 155 (the general history preceding the enactment of legislation creating New Jersey's Meadowland complex is well known and a proper subject for judicial notice); *Washington Metropolitan Area Transit Authority v One Parcel of Land* (CA4 Md) 706 F2d 1312, cert den 464 US 893, 78 L Ed 2d 229, 104 S Ct 238 (the Washington Metropolitan Area Transit Authority owns substantial amounts of real property); *Wessells v State, Dept. of Highways* (Alaska) 562 P2d 1042 (the state government appropriates substantial sums of money each year to its state highway program); *Moncur v Los Angeles* (2nd Dist) 68 Cal App 3d 118, 137 Cal Rptr 239 (vast size of an international airport in Los Angeles, and the large number of crank calls and bomb threats there); *State ex rel. Kern v Arnold*, 100 Mont 346, 49 P2d 976, 100 ALR 1071 (greater portion of the time of members of a paid fire department when on duty is devoted to holding themselves in readiness to answer calls).

Footnote 5. *Joseph v United States Civil Service Com.*, 180 US App DC 281, 554 F2d 1140 (judicial notice taken of the number of independent candidates for office in local elections prior to the instant litigation); *Coast Indian Community v United States*, 213 Ct Cl 129, 550 F2d 639, motion gr 217 Ct Cl 703 (roster of voters was published for three successive weeks in a local newspaper of general circulation, in compliance with a federal regulation governing elections on California reservations and rancheria); *Helm v State Election Board* (Okla) 589 P2d 224 (votes are cast and counted in Oklahoma County in a way that is unique in Oklahoma); *Garland by Mayor & City Council v Louton* (Tex App Dallas) 683 SW2d 725, revd on other grounds (Tex) 691 SW2d 603 (a particular city in Texas held a municipal election on January 21, 1984); *Bellevue Fire Fighters Local 1604, etc. v Bellevue*, 100 Wash 2d 748, 675 P2d 592, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017 (some political subdivisions conduct partisan

political campaigns; *Bellevue Fire Fighters Local 1604, etc. v Bellevue*, 100 Wash 2d 748, 675 P2d 592, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017 (some political subdivisions conduct partisan political campaigns).

Footnote 6. *United States v Dallas County Com.* (CA11 Ala) 739 F2d 1529, 16 Fed Rules Evid Serv 116 (court may not judicially notice that voter apathy existed or was a basic reason for the discriminatory results of the election system in Alabama); *Awtry v United States*, 231 Ct Cl 271, 684 F2d 896, 11 Fed Rules Evid Serv 748 (stating that courts take judicial notice how each party competes every four years to persuade the farmer that it will do more for them than the other party will); *Montana Auto. Assn. v Greely*, 193 Mont 378, 632 P2d 300 (judicial notice taken of the compelling need for disclosure laws designed to deter actual corruption and the avoidance of the appearance of corruption).

§ 146 Public officials and their functions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts regularly take judicial notice of who holds various public offices, from the President on down, the time of their accession to office, their terms of service, their public duties and in some cases their public acts. 7 Included in this category are members of the Cabinet, 8 United States senators, 9 state governors, 10 state legislators, 11 and other elected and appointed officers, 12 This issue often arises in litigation against a government entity when it is necessary to substitute a new office holder for his or her predecessor who was initially named in the suit. 13

Courts likewise take notice of the official character, duties, powers, jurisdiction, existence, times of election and terms of office of county and other government subdivisions. 14 Similarly courts judicially notice other matters relating to public officers or employees that are common knowledge within the jurisdiction of the court. 15 For example, a court may take judicial notice pursuant to Federal Rules of Evidence 201 that a state's board of medical examiners will provide, in response to a telephone call or letter from anyone, current information on the status of all physicians licensed in that state. 16 In addition, a court may judicially recognize that a state department of environmental protection, as a state agency, acts pursuant to its *parens patriae* authority to abate damage to third parties and property owned or controlled by the state. 17

§ 146 ----Public officials and their functions [SUPPLEMENT]

Case authorities:

District court in sex discrimination suit against fire company erred in taking judicial notice of status of fire companies in Maryland to reach its conclusion that defendant was not engaged in exclusive public function, since it concerned disputed adjudicative facts and was unsupported by any record evidence. *Haavistola v Community Fire Co.* (1993, CA4 Md) 6 F3d 211, 63 BNA FEP Cas 207, 62 CCH EPD ¶ 42570, on remand, count

dismd (DC Md) 63 BNA FEP Cas 929, costs/fees proceeding (DC Md) 1994 US Dist LEXIS 729.

Footnotes

Footnote 7. *Richardson v McChesney*, 218 US 487, 54 L Ed 1121, 31 S Ct 43; *Re Watson*, 71 Nev 227, 286 P2d 254, 53 ALR2d 301 (Judicial notice that judge was returned to office by voters with knowledge of previous misconduct); *Board of County Comrs. v Snellgrove* (Okla) 428 P2d 272.

Footnote 8. *Mellon v Brewer*, 57 App DC 126, 18 F2d 168, 53 ALR 1519, cert den 275 US 530, 72 L Ed 409, 48 S Ct 28 (as to who was Secretary of the Treasury at a given date).

Footnote 9. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200.

Footnote 10. *Radant v Vargason*, 220 Neb 116, 368 NW2d 483.

Footnote 11. *Bluthardt v Breslin*, 74 Ill 2d 246, 24 Ill Dec 151, 384 NE2d 1309 (taking judicial notice that, subsequent to plaintiffs' challenge to defendant's right to sit and serve as a member of state House of Representative, defendant was re-elected); *Tilghman v Commonwealth*, 27 Pa Cmwlth 484, 366 A2d 966, affd 473 Pa 319, 374 A2d 535 (judicial notice that plaintiff had been a state senator since 1969 and was a member of the Senate Appropriations Committee).

Footnote 12. *Alberto v Nicolas*, 279 US 139, 73 L Ed 642, 49 S Ct 317; *Collins v Loisel*, 259 US 309, 66 L Ed 956, 42 S Ct 469, habeas corpus proceeding 262 US 426, 67 L Ed 1062, 43 S Ct 618.

Footnote 13. *Leadership Roundtable v Little Rock* (ED Ark) 499 F Supp 579, affd (CA8 Ark) 661 F2d 701 (city manager); *Klassy v Weaver* (ND Ga) 575 F Supp 801 (administrator of Small Business Administration); *State ex rel. Essex v Riley*, 51 Ohio St 2d 44, 5 Ohio Ops 3d 24, 364 NE2d 1139 (relator was no longer state superintendent of public instruction).

Footnote 14. *State ex rel. McLeod v Snipes*, 266 SC 415, 223 SE2d 853.

Footnote 15. *State ex rel. Kern v Arnold*, 100 Mont 346, 49 P2d 976, 100 ALR 1071.

Footnote 16. *Kadan v Commercial Ins. Co.* (ED La) 800 F Supp 1392, later proceeding (ED La) 1992 US Dist LEXIS 14443.

Footnote 17. *Reliance Ins. Co. v Armstrong World Indus., Inc.*, 259 NJ Super 538, 614 A2d 642, mod, summary judgment gr (Law Div) 265 NJ Super 148, 625 A2d 601.

§ 147 --Legislative bodies

[View Entire Section](#)

The courts take judicial notice of matters relating to the composition and proceedings of legislative bodies, 18 and courts have taken judicial notice of the time of the commencement and close of a session of the legislature, 19 and the duration of the terms of the legislators. 20 The courts also take judicial notice of proceedings of legislative bodies, particularly those proceedings set forth in legislative journals. 21

Footnotes

Footnote 18. *Wallace v United States*, 258 US 296, 66 L Ed 626, 42 S Ct 318.

Footnote 19. *Richardson v McChesney*, 218 US 487, 54 L Ed 1121, 31 S Ct 43.

Footnote 20. *Richardson v McChesney*, 218 US 487, 54 L Ed 1121, 31 S Ct 43.

Footnote 21. § 125.

§ 148 --Construction of statutes by government officials

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Judicial notice may be taken of the uniform and continued practice of the head of an executive department of the state government in construing and administering a law which it is his duty to execute. 22 Therefore, courts will take judicial notice of the construction of a statute by the attorney general of a state. 23

Footnotes

Footnote 22. *Short v W. T. Carter & Bro.*, 133 Tex 202, 126 SW2d 953, app dismd 308 US 513, 84 L Ed 438, 60 S Ct 140; *Associated Hospital Service v Milwaukee*, 13 Wis 2d 447, 109 NW2d 271, 88 ALR2d 1395.

Footnote 23. *State v Garland*, 250 Iowa 428, 94 NW2d 122.

§ 149 Acts, reports, and records of administrative agencies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The official decisions, acts, orders, reports and records of federal agencies and officers in specific cases are often judicially noticed by federal courts 24 and state courts, 25 although a court should not judicially notice a government record if it has not been properly authenticated, 26 and a court has broad discretion to take judicial notice of matters of public record. 27 Some courts will not take judicial notice of federal agency records and regulations, stating that they are not proper subjects for judicial notice. 28

The decisions, acts and records of state agencies are also often judicially noticed by state courts 29 and federal courts. 30

In unusual circumstances, however, courts occasionally refuse to judicially notice such items, 31 and some courts will not take judicial notice of administrative rules or regulations as a general rule. 32 Courts have, however, accorded judicial notice to a decision of the Director of Selective Service relating to exemption from induction into the armed forces. 33

Footnotes

Footnote 24. *Arizona v California*, 283 US 423, 75 L Ed 1154, 51 S Ct 522 (reports of congressional committees); *Gustafson v Cornelius Co.* (CA8 Minn) 724 F2d 75, 115 BNA LRRM 2284, 99 CCH LC ¶ 10664 (criticized on other grounds by *Minnesota Federation of Teachers v Randall* (CA8 Minn) 891 F2d 1354) (taking judicial notice of the date a former employee filed a grievance with the NLRB); *Missouri P. R. Co. v United Transp. Union, General Committee of Adjustment* (ED Mo) 580 F Supp 1490, *affd* (CA8 Mo) 782 F2d 107, 121 BNA LRRM 2445, 104 CCH LC ¶ 11762, *cert den* 482 US 927, 96 L Ed 2d 696, 107 S Ct 3209, 125 BNA LRRM 2616; *United States v Coffman* (CA10 Colo) 638 F2d 192, 7 Fed Rules Evid Serv 839, *cert den* 451 US 917, 68 L Ed 2d 309, 101 S Ct 1995; *Willcox v Federal Power Com.*, 185 US App DC 287, 567 F2d 394, 7 ELR 20555, *cert den* 434 US 1012, 54 L Ed 2d 755, 98 S Ct 724 and (criticized on other grounds by *Consolidated Edison Co. v Federal Energy Regulatory Com.*, 219 US App DC 165, 676 F2d 763) (judicially noticing the Commission's order denying stay and granting rehearing); *American Indians Residing on Maricopa-Ak Chin Reservation v United States*, 229 Ct Cl 167, 667 F2d 980, 9 Fed Rules Evid Serv 1532, *cert den* 456 US 989, 73 L Ed 2d 1284, 102 S Ct 2269 (Department of the Interior records, stored in National Archives, concerning right-of-way acquired by railroads in the public domain).

Footnote 25. *Heston v Farmers Ins. Group* (2nd Dist) 160 Cal App 3d 402, 206 Cal Rptr 585 (brief filed by insurance company's counsel before National Labor Relations Board in 1973); *People v Pollution Control Bd.*, 103 Ill 2d 441, 83 Ill Dec 168, 469 NE2d 1102 (Federal Register notice calling for comment on new microbiological water quality criteria); *Smitty's Super Markets, Inc. v Retail Store Employees Local 322* (Mo App) 637 SW2d 148, 116 BNA LRRM 3393, 97 CCH LC ¶ 10205, on remand (Mo Cir Ct) 116 BNA LRRM 3455 (judicial notice of decision by administrative law judge in related matter before NLRB); *Scafetta v Arlington County*, 13 Va App 646, 414 SE2d 438, *stay gr, reh gr* (Va App) 1992 Va App LEXIS 111 and *stay vac, on reh* 14 Va App 834, 419 SE2d 384, 425 SE2d 807.

Footnote 26. *Powers v Dole* (CA7 Ill) 782 F2d 689, 39 BNA FEP Cas 1774, 39 CCH EPD ¶ 35912.

A court is free to take judicial notice of certain facts that are of public record if they are provided to the court by the party seeking to have them considered. Securities and Exchange Commission (SEC) filings fall within this category of public records that may be judicially noticed. *Re Delmarva Secur. Litigation* (DC Del) 794 F Supp 1293, CCH Fed Secur L Rep ¶ 96905.

A court may take judicial notice of the population of a given city indicated in a state official manual. *Sulls v Director of Revenue* (Mo App) 819 SW2d 782.

Footnote 27. *Chasalow v Board of Assessors* (2d Dept) 176 App Div 2d 800, 575 NYS2d 129.

Footnote 28. *Steckler v United Van Lines* (La App 5th Cir) 503 So 2d 133.

Footnote 29. *Marina Tenants Assn. v Deauville Marina Development Co.* (2nd Dist) 181 Cal App 3d 122, 226 Cal Rptr 321 (master lease between county and lessees); *Scannell v County of Riverside* (4th Dist) 152 Cal App 3d 596, 199 Cal Rptr 644 (county sheriff's booking sheet in a criminal case); *Re Final Grand Jury Report Concerning Torrington Police Dept.*, 197 Conn 698, 501 A2d 377 (public portion of special report investigating alleged criminal activities by members of police department); *Felt v Board of Trustees*, 107 Ill 2d 158, 89 Ill Dec 855, 481 NE2d 698 (records relating to funding of judges retirement system); *School City of Gary v State*, 253 Ind 697, 256 NE2d 909, 42 ALR3d 1432 (the assessed valuation figures of the city's taxable property); *Re Objection to Real Property Taxes (Minn)* 353 NW2d 525 (tax court, after notifying parties of its intent to do so, properly took judicial notice of sales ratio studies prepared by Department of Revenue); *Re Handy*, 144 Vt 610, 481 A2d 1051 (Liquor Control Board could properly take judicial notice of its own records of petitioner's infractions).

Annotation: Judicial notice as to assessed valuations, 42 ALR3d 1439.

Footnote 30. *Sinaloa Lake Owners Asso. v Simi Valley* (CA9 Cal) 882 F2d 1398, cert den 494 US 1016, 108 L Ed 2d 493, 110 S Ct 1317, later proceeding (CD Cal) 805 F Supp 824, 92 Daily Journal DAR 13912, later proceeding (CA9 Cal) 1993 US App LEXIS 11958.

Footnote 31. *People v Thacker* (5th Dist) 175 Cal App 3d 594, 221 Cal Rptr 37; *Dykes v Quincy Tel. Co.* (Fla App D1) 539 So 2d 503, 49 BNA FEP Cas 425, 14 FLW 465 (court refused to take notice of recommended orders filed before one agency, as the orders were only recommended, not final and declined to notice orders filed by a second agency that was not a public agency for purposes of the judicial notice provision of the state evidence code); *Country Club Hills Homeowners Asso. v Jefferson Metropolitan Housing Authority* (Jefferson Co) 5 Ohio App 3d 77, 5 Ohio BR 189, 449 NE2d 460, motion overr (plaintiffs' standing to sue was based on their status as property owners, but instead of testifying to that fact, they requested the judge to take judicial notice of records of the county recorder's office and the court refused to take notice of the records, which were apparently not reproduced); *Rousse v Isle La Motte*, 144 Vt 416, 479 A2d 132 (court held that it could not judicially notice evidence in other appeals before State Board of Appraisers, as those cases are not on appeal to the court).

Footnote 32. *Donahoo v Nebraska Liquor Control Com.*, 229 Neb 197, 426 NW2d 250.

Footnote 33. *Bowles v United States*, 319 US 33, 87 L Ed 1194, 63 S Ct 912, reh den 319 US 785, 87 L Ed 1728, 63 S Ct 1323.

§ 150 Officials' signatures and seals

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The seals and signatures of the chief magistrate, heads of departments and principal officers of the government, state and national, are judicially noticeable, 34 as are those of officers of the court. 35 Notice may also be taken of the seals of local notaries, 36 and a court will take judicial notice of the seals of public notaries of foreign countries where mandated by statute. 37

Footnotes

Footnote 34. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200; *York & M. L. R. Co. v Winans*, 58 US 30, 17 How 30, 15 L Ed 27.

Footnote 35. *Cook v State*, 269 Ala 646, 115 So 2d 101 (signatures of clerks of the circuit will be judicially noticed); *State v Ward*, 118 NH 874, 395 A2d 511 (summarized in preceding footnote).

Footnote 36. *Re Haase (App)* 120 Wis 2d 40, 353 NW2d 821 (superseded by statute on other grounds as stated in *Re Recall Petition of Carlson (App)* 147 Wis 2d 630, 433 NW2d 635) (judicial notice taken of the fact that commissions of public notaries were valid and in effect at time of their notarization of recall petitions, regarding two school board members).

For a discussion of proof of the facts in a notary's certificate, see 58 Am Jur 2d, *Notaries Public* § 45.

Footnote 37. *People v Hollander* (1st Dist) 163 Cal App 2d 379, 329 P2d 740.

§ 151 Procedural issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As is the case with judicial notice generally, 38 a court may notice an agency regulation, act, report, or record even though not included in the parties' pleadings or in the record on appeal. 39 although there is authority to the contrary. 40

It is important, in assessing the propriety of taking judicial notice of a particular agency regulation, record or action, to consider why the item to be noticed is relevant. If it is relevant for some nonhearsay purpose, it is difficult to imagine a substantive reason to refuse judicial notice. Such is the case, for example, when an agency action is relevant as an operative legal fact. 41 or when the mere fact that an agency has acted is relevant, without regard to the correctness of its action. 42 Similarly, courts should be free to notice agency actions, records, and reports as legislative facts. 43 Even statements made by private individuals as part of an agency record properly may be noticed if relevant for a nonhearsay purpose. 44

Information contained in public records offered as adjudicative fact for hearsay purposes may also be judicially noticeable, but only if the record or information satisfies an exception to the hearsay rule. 45 and only if the adversely effected party is given an opportunity to contest the accuracy of the information. 46 In determining whether an action is timely within a statute of limitations, for example, it is common for a court to judicially notice a public record as to the date the triggering event occurred. 47

Footnotes

Footnote 38. § 36.

Footnote 39. *KVUE, Inc. v Moore* (CA5 Tex) 709 F2d 922, 9 Media L R 2334, affd 465 US 1092, 80 L Ed 2d 114, 104 S Ct 1580 (judicial notice of state attorney general's formal opinion clarifying a statute at issue, without remanding case to district court); *Port Arthur v United States* (DC Dist Col) 517 F Supp 987, affd 459 US 159, 74 L Ed 2d 334, 103 S Ct 530 (taking judicial notice of 1980 census information in Voting Rights Act case, although census had not been published until after trial); *McNeil v McDonough* (DC NJ) 515 F Supp 113, 25 BNA FEP Cas 1135, affd (CA3 NJ) 648 F2d 178, 25 BNA FEP Cas 1161, 25 CCH EPD ¶ 31764 (noticing decision by state attorney general); *Felt v Board of Trustees*, 107 Ill 2d 158, 89 Ill Dec 855, 481 NE2d 698 (reports by state agencies as to fiscal soundness of state public retirement system); *Dietz v Property Tax Appeal Bd.* (4th Dist) 191 Ill App 3d 468, 138 Ill Dec 746, 547 NE2d 1367, app den 131 Ill 2d 558, 142 Ill Dec 880, 553 NE2d 394 (judicially noticing State Department of Revenue's Real Property Appraisal Manual even though neither party relied on it in proceedings below); *Jannett v King* (Mo App) 687 SW2d 252 (judicial notice of Division of Health regulations pertaining to breathalyzer testing permitted without introduction or regulations into evidence, since state statute requires judicial notice of code of state regulations without proof); *Lang v County of Delaware*, 88 Pa Cmwlth 452, 490 A2d 20, later proceeding 138 Pa Cmwlth 276, 587 A2d 889, app den 529 Pa 665, 604 A2d 1031 (even though parties had made no mention in their briefs regarding Department of General Services regulations, the court could not ignore them inasmuch as the court had dealt previously with them in an unrelated matter).

Regarding a court's authority to take judicial notice of matters regardless of whether they've been pleaded, see § 39.

Footnote 40. *United States v Judge* (CA5 Tex) 846 F2d 274, 25 Fed Rules Evid Serv 911, appeal after remand (CA5 Tex) 864 F2d 1144, reh den, en banc (CA5 Tex) 868 F2d 1271 and cert den 495 US 918, 109 L Ed 2d 309, 110 S Ct 1946; *Duderstadt Surveyors*

Supply, Inc. v Alamo Express, Inc. (Tex App San Antonio) 686 SW2d 351, writ ref n r e (May 22, 1985) (expressing reluctance to notice on appeal State Railroad Commission actions that the trial court had not had an opportunity to examine and consider); Minnesota Federation of Teachers v Randall (CA8 Minn) 891 F2d 1354.

Footnote 41. American Indians Residing on Maricopa-Ak Chin Reservation v United States, 229 Ct Cl 167, 667 F2d 980, 9 Fed Rules Evid Serv 1532, cert den 456 US 989, 73 L Ed 2d 1284, 102 S Ct 2269 (in resolving whether the Department of the Interior had granted a right-of-way to railroads over certain land, the court can consult Department records, stored in National Archives); Marina Tenants Assn. v Deauville Marina Development Co. (2nd Dist) 181 Cal App 3d 122, 226 Cal Rptr 321 (where the controversy before the court depended in part upon the terms of a master lease between a county and lessees, the court may judicially notice the lease).

Footnote 42. People v Pollution Control Bd., 103 Ill 2d 441, 83 Ill Dec 168, 469 NE2d 1102 (Federal Register notice calling for comment on new microbiological water quality criteria was relevant in justifying concern for adequacy of existing state criteria).

Footnote 43. Re Final Grand Jury Report Concerning Torrington Police Dept., 197 Conn 698, 501 A2d 377 (in considering news media application to release grand jury testimony and sealed portions of a special investigative report, the court took judicial notice of the portions that had been released publicly).

Footnote 44. Heston v Farmers Ins. Group (2nd Dist) 160 Cal App 3d 402, 206 Cal Rptr 585. The parties disagreed as to how a particular clause in a contract should be construed; the court took judicial notice that, in a brief filed by insurance company's counsel before National Labor Relations Board in 1973 concerning interpretation of an identical clause, the company took the same position that plaintiff maintained in the current suit.

Footnote 45. For a discussion of the rule against hearsay and exceptions to the hearsay rule, see §§ 658-660.

Footnote 46. § 38.

Footnote 47. Gustafson v Cornelius Co. (CA8 Minn) 724 F2d 75, 115 BNA LRRM 2284, 99 CCH LC ¶ 10664 (criticized on other grounds by Minnesota Federation of Teachers v Randall (CA8 Minn) 891 F2d 1354) (taking judicial notice of the date a former employee filed a grievance with the NLRB); Scannell v County of Riverside (4th Dist) 152 Cal App 3d 596, 199 Cal Rptr 644 (sustaining a demurrer to a false imprisonment action based on a statute of limitations, the court took judicial notice of the county sheriff's booking sheet as to the date of arrest).

11. Other Matters [152-154]

§ 152 Phenomena of nature; seasons; plants

[View Entire Section](#)

Courts will ordinarily take judicial notice of the operation and effect of natural laws and of nature's powers and forces, 48 with the qualification that notice is limited to those natural laws which are of uniform occurrence. 49 The rule prevails, as a corollary of the courts' recognition of such facts, that it is not necessary to prove things which must have happened according to the ordinary course of nature. 50 The usual amount of rainfall in certain localities at certain seasons of the year, 51 is subject to judicial notice. For example, the fact that it rains in Louisiana is a proper subject for judicial notice. 52 In addition, that certain years were years of unusual rainfall, 53 common facts relating to floods, 54 the prevalence of certain weather conditions in a given locality, 55 the action of the elements; 56 the fact that sounds in a dense fog are very deceptive, 57 the natural tendency of wood to decay when exposed to the weather and badly in need of paint, 58 the laws of gravity 59 and the peculiar qualities of gas and oil, 60 are proper subjects for judicial notice. Taking judicial notice of weather conditions existing approximately two months prior to trial may, however, be improper. 61

Courts accept without proof the common phenomena of vegetable life, including, but not limited to: the general course of agriculture and husbandry; the general times or seasons for planting crops which are commonly grown in the community; the maturity and harvesting of crops, and general facts relating to their tillage and care. 62 For example, a court may take judicial notice of fragility of the ecology of sand dunes and grasses of a barrier beach. 63

Footnotes

Footnote 48. *Lie v San Francisco & Portland S.S. Co.*, 243 US 291, 61 L Ed 726, 37 S Ct 270.

Footnote 49. *Brown v Spilman*, 155 US 665, 39 L Ed 304, 15 S Ct 245.

Footnote 50. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200.

Footnote 51. *Brown v Gessler*, 191 Or 503, 230 P2d 541, 23 ALR2d 815.

Footnote 52. *S.J. Lemoine, Inc. v St. Landry Parish School Bd.* (La App 3d Cir) 527 So 2d 1150.

Footnote 53. *McKeon v Brammer*, 238 Iowa 1113, 29 NW2d 518, 174 ALR 1229.

Footnote 54. *Howell v Hutchinson*, 177 Kan 722, 282 P2d 373, 63 ALR2d 882.

Footnote 55. *Fair Ocean Co. v Cargo of Permina Samudra XII* (DC Guam) 423 F Supp 1037; *Tug "Sea Hawk" v Sococo, Ltd.* (SD Fla) 707 F Supp 1306, affd without op (CA11 Fla) 894 F2d 411; *Rubin v Appel* (Fla App D3) 194 So 2d 318; *Brown v Gessler*, 191 Or 503, 230 P2d 541, 23 ALR2d 815.

Practice Aids: Rain and other weather phenomena. 10 Am Jur Proof of Facts 49.

Footnote 56. *Mefer S.A.R.L. of Paris v Naviagro Maritime Corp.* (SD NY) 533 F Supp 337, 10 Fed Rules Evid Serv 476; *Howell v Hutchinson*, 177 Kan 722, 282 P2d 373, 63 ALR2d 882; *Hammack v Missouri Clean Water Com.* (Mo App) 659 SW2d 595 (rejecting restaurant owner's challenge to order directing him to construct an adequate waste water treatment facility).

Footnote 57. *Lie v San Francisco & Portland S.S. Co.*, 243 US 291, 61 L Ed 726, 37 S Ct 270 (judicial notice taken that such fact "is a matter of common knowledge").

Footnote 58. *Stupka v Scheidel*, 244 Iowa 442, 56 NW2d 874, later proceeding 249 Iowa 953, 90 NW2d 10.

Footnote 59. *Concrete Appliances Co. v Gomery*, 269 US 177, 70 L Ed 222, 46 S Ct 42.

Footnote 60. 38 Am Jur 2d, Gas and Oil § 326.

Footnote 61. *Cook County Dept. of Environmental Control v Tomar Industries, Div. of Polk Bros.* (1st Dist) 29 Ill App 3d 751, 331 NE2d 196 (variable weather conditions, not strikingly unusual, cannot be held to constitute matters of common or general knowledge within the community).

Footnote 62. *Western Union Tel. Co. v Bush*, 191 Ark 1085, 89 SW2d 723, 103 ALR 367; *Scarborough v Calypso Veneer Co.*, 244 NC 1, 92 SE2d 435, 57 ALR2d 818; *Miller v Miller*, 101 Or App 371, 790 P2d 1184.

Footnote 63. *Lemp v Town Bd. of Islip*, 90 Misc 2d 360, 394 NYS2d 517, 7 ELR 20613.

§ 153 Habits, traits, and diseases of animals

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have taken judicial notice of the habits and characteristics of dogs, 64 pigs, 65 that deer browse on and near farms, 66 and that fish sometimes quit biting for no apparent reason. 67 Judicial notice may also be taken that horses 68 and other livestock are easily frightened. 69 Judicial notice has also been taken of the common diseases of animals 70 and that ordinary corn will not kill cattle. 71

There is, however, no authority for the proposition that judicial notice may be taken as to the ferocity of any particular type of domestic animal. Therefore, a court may not take judicial notice that german shepherd dogs are, as a breed, vicious. 72 Neither may a court take judicial notice of the allegedly normal propensities of horses to fight and bite each other, so as to establish notice of viciousness in the owner. 73

Footnotes

Footnote 64. *Lloyd v Alton R. Co.*, 348 Mo 122, 159 SW2d 267.

Footnote 65. *Pendoley v Ferreira*, 345 Mass 309, 187 NE2d 142, 2 ALR3d 924 (it is common knowledge that the offensive odors of a piggery with a large number of pigs cannot be confined to a small area, such as 25 acres); *Jarvis v Koss*, 139 Vt 254, 427 A2d 364 (it is common knowledge that pigs are rooting animals).

Annotation: Keeping pigs as nuisance, 2 ALR3d 931.

Footnote 66. *Smith v Costello*, 77 Idaho 205, 290 P2d 742, 56 ALR2d 1020.

Footnote 67. *Harris v Brooks*, 225 Ark 436, 283 SW2d 129, 54 ALR2d 1440.

Footnote 68. *Bracken v Bruce*, 190 NJ Super 146, 462 A2d 201.

Footnote 69. *Long v United States* (DC SC) 241 F Supp 286 (livestock in general and mules in particular are easily frightened by sudden loud noises and by objects which are propelled directly at and over their heads).

Footnote 70. *Kimmish v Ball*, 129 US 217, 32 L Ed 695, 9 S Ct 277.

Footnote 71. *Doane v Farmers Cooperative Co.*, 250 Iowa 390, 94 NW2d 115, 81 ALR2d 128.

Footnote 72. *De Vault v Carvigo, Inc.* (2d Dept) 138 App Div 2d 669, 526 NYS2d 483, app dismd without op 72 NY2d 914, 532 NYS2d 848, 529 NE2d 178 and app den 72 NY2d 806, 532 NYS2d 847, 529 NE2d 177.

Footnote 73. *Vigue v Noyes*, 113 Ariz 237, 550 P2d 234 (action against the owner of a horse which kicked a small child in the head).

§ 154 Time and related matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts take judicial notice of systems of time which have been in universal use. 74 Courts may also take judicial notice of the day of the week upon which any day of the month falls. 75 In addition, the time of the rising or setting of the sun or moon upon a particular day is a proper matter for the judicial cognizance of the court, 76 as is the duration of day or night, allowing a court to determine whether on a specific day at a specific time, it was daylight. 77 A court may also take judicial notice that at 2:15 a.m. most people are tired and probably not as alert as earlier in the evening. 78 Judicial notice has also been taken of the observance of daylight savings time and when it has gone into effect. 79

Footnotes

Footnote 74. *McFarlane v Whitney*, 134 Tex 394, 134 SW2d 1047; *Anderson v Cook*, 102 Utah 265, 130 P2d 278, 143 ALR 987.

Footnote 75. *Brown v Piper*, 91 US 37, 1 Otto 37, 23 L Ed 200.

Footnote 76. *La Com v Pacific Gas & Electric Co.* (1st Dist) 132 Cal App 2d 114, 281 P2d 894, 48 ALR2d 1455; *Brooks v Stewart* (Mo) 335 SW2d 104, 81 ALR2d 508; *State v Powell* (Mo) 306 SW2d 531, 66 ALR2d 1141; *State v Dancy*, 297 NC 40, 252 SE2d 514.

Footnote 77. *Toole v Salter*, 249 SC 354, 154 SE2d 434.

Footnote 78. *Moore v Board of Educ. of Fulton Public School No. 58* (Mo) 836 SW2d 943, cert den (US) 122 L Ed 2d 666, 113 S Ct 1270.

Footnote 79. *Playboy Club, Inc. v Myers* (Mo) 431 SW2d 228.

III. BURDEN OF PROOF [155-180]

A. Generally; In Civil Cases [155-167]

Research References

ALR Digests: Evidence §§ 92.5, 93

ALR Index: Presumptions and Burden of Proof

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 71 et seq.

Jones on Evidence (7th Ed) §§ 3:1 et seq.

1. Introduction [155-157]

§ 155 Burdens of proof, persuasion and production

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The term burden of proof has been used to describe two related but distinct concepts: the burden of production and the burden of persuasion. 80

To satisfy the burden of production is also sometimes referred to as making out a prima facie case; 81 and the term is sometimes used in legislation for this purpose. 82 Thus, proof of the underlying fact is enough to survive a motion for a directed verdict. 83

Whether a party has satisfied its burden of production is not an issue of fact for the jury;

it is an issue of law. It arises when, after a party rests, an opposing counsel brings a motion for a directed verdict or the like. 84

The burden of persuasion aspect of the burden of proof describes the obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true. 85

The burden of persuasion has two components; first, the facts a party must plead and prove in order to prevail on a particular issue, and second, how persuasively it must prove those facts. 86

§ 155 ----Burdens of proof, persuasion and production [SUPPLEMENT]

Case authorities:

The assignment of the burden of proof is a rule of substantive law. *Director, Office of Workers' Compensation Programs, Dep't of Labor v Greenwich Collieries (US)* 129 L Ed 2d 221, 114 S Ct 2251.

Rules that have evolved concerning burden of production serve many important functions, including ascertaining truth and justice. *Beacon Bowl v Wisconsin Elec. Power Co.* (1993) 176 Wis 2d 740, 501 NW2d 788.

Footnotes

Footnote 80. *Abilene Sheet Metal, Inc. v NLRB* (CA5) 619 F2d 332, 104 BNA LRRM 3077, 89 CCH LC ¶ 12152; *Board of Trade v Dow Jones & Co.* (1st Dist) 108 Ill App 3d 681, 64 Ill Dec 275, 439 NE2d 526, 218 USPQ 636, affd 98 Ill 2d 109, 74 Ill Dec 582, 456 NE2d 84; *Office of Consumer Advocate v Iowa Utilities Bd.* (Iowa) 454 NW2d 883; *Holy Spirit Asso. for Unification of World Christianity v Department of Treasury*, 131 Mich App 743, 347 NW2d 707; *Trustees of Carpenters for Southern Nevada Health & Welfare Trust v Better Bldg. Co.*, 101 Nev 742, 710 P2d 1379; *Sunderland v North Dakota Workmen's Compensation Bureau* (ND) 370 NW2d 549.

Forms: Instructions to jury—Definition of burden of proof. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 71, 72.

Footnote 81. *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898 and (not followed on other grounds by *Burton v Ohio, Adult Parole Authority* (CA6 Ohio) 798 F2d 164, 41 BNA FEP Cas 1799, 41 CCH EPD ¶ 36544) and (criticized on other grounds by *Saint Mary's Honor Ctr. v Hicks* (US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 37 Fed Rules Evid Serv 581, 7 FLW Fed S 553).

Law Reviews: Morgan, Choice of Law Governing Proof, 58 Harv LR 153.

Forms: Instruction to jury—Prima facie evidence defined. 9A Am Jur Pl & Pr Forms

(Rev), Evidence, Form 103.

Footnote 82. For instance, 15 USCS § 1127 provides that a trademark is deemed abandoned when its use is discontinued without intent to resume its use, and that proof of nonuse for two years constitutes prima facie evidence of abandonment.

Footnote 83. *Poncy v Johnson & Johnson* (DC NJ) 460 F Supp 795, 202 USPQ 199, 3 Fed Rules Evid Serv 1313.

Footnote 84. See § 164 for a discussion of the burden of proof requirements of a motion for a directed verdict.

Footnote 85. *People v Superior Court of San Francisco* (1st Dist) 119 Cal App 3d 162, 173 Cal Rptr 788, 22 ALR4th 1140; *Harman v Northwestern Mut. Life Ins. Co.*, 91 Idaho 719, 429 P2d 849.

Law Reviews: *McNaughton, Burden of Proof and Presumptions in Massachusetts*, 35 Bos U LR 481.

Footnote 86. See § 157 for a discussion of these two components of the burden of persuasion.

§ 156 Burdens and presumptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Burden of proof and presumption embody distinct legal concepts. 87 They are related in that a presumption may shift the burden of production as to a particular fact from one party to another and may aid the party with the ultimate burden of persuasion to satisfy that burden. 88 As a rule, a presumption does not shift the burden of persuasion. 89

Footnotes

Footnote 87. *Kadala v Amoco Oil Co.* (CA4 Md) 820 F2d 1355; *Lisbon Contractors, Inc. v United States* (CA FC) 828 F2d 759, 34 CCF ¶ 75358; *Palenkas v Beaumont Hospital*, 432 Mich 527, 443 NW2d 354; *Dehner v St. Louis* (Mo App) 688 SW2d 15.

Law Reviews: *Hoffman & Schroeder, Burdens of Proof*, 38 Ala LR 31 (1986).

Footnote 88. *Byrd v Giffen Industries, Inc.* (Fla App D2) 133 So 2d 482; *Sanders v Davila* (Tex Civ App Amarillo) 593 SW2d 127, writ ref n r e (Apr 30, 1980).

Footnote 89. *Simpson v Home Petroleum Corp.* (CA5 Tex) 770 F2d 499; *Lehew v Larsen* (Fla App D1) 124 So 2d 872, 85 ALR2d 821; *Dehner v St. Louis* (Mo App) 688 SW2d 15.

§ 157 Degree of proof: preponderance of evidence and clear and convincing evidence tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally the party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence; that generally occurs when the factfinder is satisfied that the fact is more likely true than not true. 90 Jury instructions defining preponderance of the evidence usually include language directing the jury to find against the party with the burden if it is unable to decide whether a preponderance has been shown. 91

Occasionally constitutional or policy considerations impose a greater burden of persuasion; in such instances a party will be required to prove its case by clear and convincing evidence. 92 Clear and convincing evidence is defined in a variety of ways; for example, to establish a fact or an element by clear and convincing evidence a party must persuade the jury that the proposition is highly probable, 93 or must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true. 94

§ 157 ----Degree of proof: preponderance of evidence and clear and convincing evidence tests [SUPPLEMENT]

Case authorities:

While the difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue, such difficulty does not justify the additional onus of an especially high standard of proof. *Cooper v Oklahoma* (1996, US) 134 L Ed 2d 498, 96 CDOS 2645, 96 Daily Journal DAR 4383, 9 FLW Fed S 529.

Wisconsin cases have long applied middle burden of proof, evidence that is clear, satisfactory and convincing, in civil actions involving such matters as punitive damages, conduct that could be prosecuted as crime, and allegations of fraud, and undue influence because these matters are more serious than factual issues in ordinary civil case and fall within certain classes of acts for which stigma attaches and therefore, greater degree of certitude is required. *Carlson & Erickson Builders v Lampert Yards* (1995) 190 Wis 2d 651, 529 NW2d 905, 1995-1 CCH Trade Cases ¶ 70937.

Footnotes

Footnote 90. *Masaki v General Motors Corp.*, 71 Hawaii 1, 780 P2d 566, reconsideration den 71 Hawaii 664, 833 P2d 899; *Crowell v Alexandria (La)* 558 So 2d 216.

The party asserting negligence must prove negligence by a preponderance of the

evidence. *Hensley v United States* (SD Fla) 728 F Supp 716; *Toomer v United Resin Adhesives, Inc.* (ND Ill) 652 F Supp 219; *May v V.F.W.* Post No. 2539 (Miss) 577 So 2d 372; *Perotti v Ohio Dept. of Rehab. & Corr.*, 61 Ohio App 3d 86, 572 NE2d 172; *Harvilla v Delcamp*, 521 Pa 21, 555 A2d 763.

Plaintiff must show by a preponderance of the evidence that the defendant's negligent act or omission violated a duty owed to plaintiff and that there is a reasonable connection between the act or omission and plaintiff's injury. *Culver v Bennett* (Del Sup) 588 A2d 1094.

As to the elements of actionable negligence, generally, see 57A Am Jur 2d, Negligence §§ 78 et seq.

Footnote 91. *Torem v 564 Cent. Ave. Rest., Inc.* (1st Dept) 133 App Div 2d 25, 518 NYS2d 620, resettled (1st Dept) 134 App Div 2d 158, 520 NYS2d 526.

Forms: Instruction to jury—Duty where evidence equally balanced. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 76.

Definitions regarding preponderance of evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 131 et seq.

Footnote 92. *Lopinto v Haines*, 185 Conn 527, 441 A2d 151; *Masaki v General Motors Corp.*, 71 Hawaii 1, 780 P2d 566, reconsideration den 71 Hawaii 664, 833 P2d 899; *In Interest of G. M.* (Tex) 596 SW2d 846, reh'g of cause overr (Apr 23, 1980); *Kruse v Horlamus Industries, Inc.*, 130 Wis 2d 357, 387 NW2d 64.

Footnote 93. *Lopinto v Haines*, 185 Conn 527, 441 A2d 151; *Masaki v General Motors Corp.*, 71 Hawaii 1, 780 P2d 566, reconsideration den 71 Hawaii 664, 833 P2d 899; *Riley Hill General Contractor, Inc. v Tandy Corp.*, 303 Or 390, 737 P2d 595.

Footnote 94. *First Nat. Bank v Rush*, 30 Ark App 272, 785 SW2d 474; *Masaki v General Motors Corp.*, 71 Hawaii 1, 780 P2d 566, reconsideration den 71 Hawaii 664, 833 P2d 899; *Bud Wolf Chevrolet, Inc. v Robertson* (Ind) 519 NE2d 135; *Re Interest of C.P.*, 235 Neb 276, 455 NW2d 138; *In Interest of G. M.* (Tex) 596 SW2d 846, reh'g of cause overr (Apr 23, 1980).

Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the factfinder to come to a clear conviction, without hesitation, of the truth of the facts related. *First Nat. Bank v Rush*, 30 Ark App 272, 785 SW2d 474.

To make out a case of common-law deceit, plaintiff's evidence must be clear and convincing, that is, free from confusion, fully intelligible, distinct and establish to the jury that the defendant intended to deceive the plaintiff or did so with a reckless disregard for the truth. *Riley Hill General Contractor, Inc. v Tandy Corp.*, 303 Or 390, 737 P2d 595.

Forms: Instructions to jury—Clear and convincing evidence defined. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 138, 139.

2. Allocation [158-161]

§ 158 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his cause of action. 95 The plaintiff is obliged to prove only those facts that are necessary elements of its claim; it need not prove facts it unnecessarily pleaded that are not elements of its cause of action. 96

Courts often remark that the burdens of production and persuasion on an issue rest with the party that pleads the affirmative on the issue. 97 This is another way of saying that a party has the burden of proving the legal elements of its case. 98

When the law underlying a law suit is legislative in origin, courts generally attempt to resolve burden allocation questions by deferring, when possible, to legislative intent. 99 However, legislatures often do not adequately address burden issues. 1 When this occurs, the court could, for example, make the issue part of the underlying cause of action which plaintiff must plead and prove, or could give the defendant the burden of pleading but impose upon the plaintiff the burdens of production and persuasion. 2

As a rule, a party is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised by another party. 3 Nor is the party with the burden of persuasion obligated to offer evidence on matters that are not made issues in the case by the pleadings. 4 Moreover, a party may be relieved of its burden of production if the necessary proof is introduced by his adversary, and if such proof is sufficiently convincing and uncontroverted, the burden of persuasion as well. 5

It is often said that the burdens of production and persuasion lie upon the party who, absent meeting his burden, is not entitled to relief, 6 or upon the party that would be unsuccessful if no evidence were introduced on either side. 7 Similarly, courts often observe that the burdens of production and persuasion generally fall upon the party seeking a change in the status quo, 8 or upon the party that asserts the claim. 9

Footnotes

Footnote 95. Preferred Acci. Ins. Co. v Grasso (CA2 Conn) 186 F2d 987, 23 ALR2d 1234; Moudry v Parkos, 217 Neb 521, 349 NW2d 387; Vance v My Apartment Steak House, Inc. (Tex) 677 SW2d 480.

Annotation: Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support, 53 ALR2d 591.

Burden of proof in actions under general declaratory judgment acts, 23 ALR2d 1243.

Forms: Instruction to jury—Party on whom burden rests. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 73.

Footnote 96. *Empire State Bldg. Co. v Bryde*, 211 Neb 184, 318 NW2d 65.

Footnote 97. *Black, Robertshaw, Frederick, Copple & Wright, P. C. v United States* (App) 130 Ariz 110, 634 P2d 398, 32 UCCRS 539; *Atlantic & Pacific Ins. Co. v Barnes* (Colo App) 666 P2d 163; *Chemlease Worldwide, Inc. v Brace, Inc.* (Minn) 338 NW2d 428, 37 UCCRS 647; *Pack v Royal-Globe Ins. Cos.*, 224 Tenn 452, 457 SW2d 19; *Big Fork Mining Co. v Tennessee Water Quality Control Bd.* (Tenn App) 620 SW2d 515, 12 ELR 20127; *Osborn v Manning* (Wyo) 685 P2d 1121, later proceeding (Wyo) 798 P2d 1208, reh den (Wyo) 812 P2d 549.

Footnote 98. *Keeler Brass Co. v Continental Brass Co.* (CA4 NC) 862 F2d 1063, 9 USPQ2d 1331, 27 Fed Rules Evid Serv 278 (in a copyright infringement action, defendant's assertion of independent creation did not impose upon it the burden of persuasion on that issue, as plaintiff at all times has the burden of proving that defendant copied plaintiff's designs); *Roe Roofing, Inc. v Lumber Products, Inc.*, 70 Or App 93, 688 P2d 425, 39 UCCRS 854, review den 298 Or 427, 693 P2d 48.

Footnote 99. *Steadman v SEC*, 450 US 91, 67 L Ed 2d 69, 101 S Ct 999, CCH Fed Secur L Rep ¶ 97878, reh den 451 US 933, 68 L Ed 2d 318, 101 S Ct 2008; *Vance v Terrazas*, 444 US 252, 62 L Ed 2d 461, 100 S Ct 540, reh den 445 US 920, 63 L Ed 2d 606, 100 S Ct 1285 and on remand (ND Ill) 494 F Supp 1017, affd (CA7 Ill) 653 F2d 285.

Footnote 1. *Wards Cove Packing Co. v Atonio*, 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115, 49 BNA FEP Cas 1519, 50 CCH EPD ¶ 39021, motion den 493 US 802, 107 L Ed 2d 9, 110 S Ct 38 and on remand (WD Wash) 54 BNA FEP Cas 1623, later proceeding (WD Wash) 1991 US Dist LEXIS 5531 and affd in part and revd in part on other grounds, remanded (CA9 Wash) 10 F3d 1485, 93 CDOS 8953, 93 Daily Journal DAR 15404, 63 BNA FEP Cas 738, 63 CCH EPD ¶ 42715; *Price Waterhouse v Hopkins*, 490 US 228, 104 L Ed 2d 268, 109 S Ct 1775, 49 BNA FEP Cas 954, 49 CCH EPD ¶ 38936, on remand (DC Dist Col) 737 F Supp 1202, 52 BNA FEP Cas 1275, 53 CCH EPD ¶ 39922, later proceeding (DC Dist Col) 53 BNA FEP Cas 1499 and affd 287 US App DC 173, 920 F2d 967, 54 BNA FEP Cas 750, 55 CCH EPD ¶ 40413.

Footnote 2. *Dairyland County Mut. Ins. Co. v Roman* (Tex) 498 SW2d 154 (when plaintiff avers generally that it has performed all conditions precedent to a contract, defendant has the burden of specifying in its pleadings the conditions it claims were not performed; *Trevino v Allstate Ins. Co.* (Tex App Dallas) 651 SW2d 8, writ ref n r e (Sep 14, 1983) and reh of writ of error overr (Nov 2, 1983) (failure of plaintiff to make general averment regarding conditions precedent requires plaintiff to prove performance of each condition ab initio, and releases defendant of burden of pleading the conditions it claims were not performed).

As to pleading performance of conditions precedent, generally see 61A Am Jur 2d, Pleading §§ 83 et seq.

Footnote 3. *Weiss v Chrysler Motors Corp.* (CA2 NY) 515 F2d 449, 20 FR Serv 2d 208; *Rodriguez v Olin Corp.* (CA5 La) 780 F2d 491, 20 Fed Rules Evid Serv 115; *Martin v Weaver* (CA6 Ohio) 666 F2d 1013, 9 Fed Rules Evid Serv 952, cert den 456 US 962, 72 L Ed 2d 485, 102 S Ct 2038; *Underwood v Lowery*, 133 Ga App 629, 212 SE2d 5.

Footnote 4. *Empire State Bldg. Co. v Bryde*, 211 Neb 184, 318 NW2d 65; *Hubbard v Gatz* (2d Dept) 130 App Div 2d 622, 515 NYS2d 552, app den 70 NY2d 606, 519 NYS2d 1029, 513 NE2d 1309.

Footnote 5. *Kilian v Stackpole Sons, Inc.* (DC Pa) 98 F Supp 500.

Footnote 6. *Benson v Barnes & Barnes Trucking*, 217 Neb 865, 354 NW2d 127.

Footnote 7. *Atlantic & Pacific Ins. Co. v Barnes* (Colo App) 666 P2d 163; *Nikitiuk v Pishtey*, 153 Conn 545, 219 A2d 225; *Compensation of Harris v SAIF Corp.*, 292 Or 683, 642 P2d 1147, on remand 57 Or App 566, 645 P2d 597.

Footnote 8. *State, Alcoholic Beverage Control Bd. v Decker* (Alaska) 700 P2d 483; *Atlantic & Pacific Ins. Co. v Barnes* (Colo App) 666 P2d 163.

Footnote 9. *Teng v Diplomat Nat. Bank* (Ala) 431 So 2d 1202; *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 367 NW2d 1, app dismd 474 US 805, 88 L Ed 2d 33, 106 S Ct 40.

§ 159 Negative assertions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Whoever asserts a claim or defense that is negative in form or depends upon a negative proposition has the burden of establishing the truth of the assertion. 10 Thus, for example, the party who asserts invalidity of a statute as the basis of his or her claim or defense has the burden of establishing it. 11 A party seeking to take advantage of an exception to a contract is charged with the burden of proving facts necessary to come within the exception. 12 And the invalidity of an ordinance or resolution must be established by the party asserting it. 13 Similarly, the burden rests upon the party who assails the validity of a marriage which is prima facie regular, 14 or a foreign divorce decree which is regular on its face. 15

There is some authority that when an exception or exemption is contained in the enacting clause of a statute, the party relying on the statute must prove that his case does not come within the exception, 16 but otherwise the burden of proof is on the opposite party. 17 Where the facts whether the case at hand fall within a statutory exception are particularly within the knowledge of one of the parties, it is the burden of that party to prove such facts. 18

Footnotes

Footnote 10. Oberly v Howard Hughes Medical Inst. (Del Ch) 472 A2d 366; Board of Trade v Dow Jones & Co., 98 Ill 2d 109, 74 Ill Dec 582, 456 NE2d 84; Frank Stinson Chevrolet, Inc. v Connelly (SD) 356 NW2d 480.

Footnote 11. Metropolitan Casualty Ins. Co. v Brownell, 294 US 580, 79 L Ed 1070, 55 S Ct 538, reh den 295 US 767, 79 L Ed 1708, 55 S Ct 647.

Footnote 12. Reece Constr. Co. v State Highway Com., 6 Kan App 2d 188, 627 P2d 361.

Footnote 13. Milwaukie Co. of Jehovah's Witnesses v Mullen, 214 Or 281, 330 P2d 5, 74 ALR2d 347, cert den and app dismd 359 US 436, 3 L Ed 2d 932, 79 S Ct 940.

Footnote 14. Brown v Parks, 173 Ga 228, 160 SE 238; Osmak v American Car & Foundry Co., 328 Mo 159, 40 SW2d 714, 77 ALR 722.

Footnote 15. Coe v Coe, 334 US 378, 92 L Ed 1451, 68 S Ct 1094, 1 ALR2d 1376.

Footnote 16. Sullivan v Ward, 304 Mass 614, 24 NE2d 672, 130 ALR 437; Fennell v Ferreira, 133 NJ Super 63, 335 A2d 84.

Footnote 17. Schlemmer v Buffalo R. & P. R. Co., 205 US 1, 51 L Ed 681, 27 S Ct 407; Greyhound Corp. v Leadman (DC Ky) 112 F Supp 237; Ansell v Boston, 254 Mass 208, 150 NE 167; Fennell v Ferreira, 133 NJ Super 63, 335 A2d 84.

Footnote 18. New York C. & H. R. R. Co. v United States (CA1 Mass) 165 F 833.

As to the application of this rule with regard to criminal statutes, see § 176.

§ 160 Defenses and counterclaims

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The defendant has the burden of proof with regard to counterclaims and most affirmative defenses. ¹⁹ Defenses can be divided into three general categories: denial, burden-divided defenses, and affirmative defenses. A denial is a defense in which the defendant simply denies the truth of plaintiff's allegations; it does not oblige defendant to prove anything affirmatively; the burden of persuasion as to each element of plaintiff's case continues to rest on the plaintiff throughout the trial. ²⁰

Occasionally the law divides the burdens in connection with certain defenses and assigns the burdens of pleading and production to the defendant, while imposing upon the plaintiff the burden of persuasion. ²¹

Footnotes

Footnote 19. *United States v Poland*, 251 US 221, 64 L Ed 236, 40 S Ct 127; *Southeast Secur. Co. v Christensen*, 66 Idaho 233, 158 P2d 315; *Gaston v Finch*, 246 Iowa 1360, 72 NW2d 507; *Hines v Continental Baking Co.* (Mo App) 334 SW2d 140, 84 ALR2d 1027; *Citizens Nat. Bank v Rawley*, 131 Neb 10, 267 NW 151; *Crayne v Crayne*, 54 Nev 205, 13 P2d 222, 84 ALR 716; *McWithy v Heart River School Dist.*, 75 ND 744, 32 NW2d 886; *Rees v Archibald*, 6 Utah 2d 264, 311 P2d 788; *Lambert v Metropolitan Life Ins. Co.*, 123 W Va 547, 17 SE2d 628.

Forms: Instruction to jury regarding burden of proof as to affirmative defense, setoff, counterclaim, or cross complaint. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 78.

Footnote 20. *Austin v Memphis* (Tenn App) 684 SW2d 624, *affd in part and revd in part* on other grounds (Tenn) 796 SW2d 449, *adhered to*, *reh den* (Tenn) 1990 Tenn LEXIS 320, *later proceeding*, *remanded* (Tenn App) 831 SW2d 789.

Footnote 21. *Keeler Brass Co. v Continental Brass Co.* (CA4 NC) 862 F2d 1063, 9 USPQ2d 1331, 27 Fed Rules Evid Serv 278 (defense of independent creation in copyright infringement actions); *Palenkas v Beaumont Hospital*, 432 Mich 527, 443 NW2d 354 (defendant must satisfy the burden of production when raising the statute of limitations as a defense).

§ 161 Comparative availability of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where information necessary to prove an issue is peculiarly or exclusively within the possession of one party, courts sometimes reason that convenience and fairness justify placing the burdens of pleading and proving those facts upon that party. 22

A specialized application of assigning burdens in accord with peculiar knowledge may be seen in cases involving concurrent negligence with but a single unidentified cause. 23 Some courts have taken a similar approach in products liability litigation involving asbestos, Agent Orange, and other toxic substances, holding an industry as a whole liable for injuries sustained by a class of plaintiffs, and apportioning damages according to each defendant's share of the market unless a given defendant can show that it could not have made the product which caused a particular plaintiff's injury. 24

Where proof is offered that one of several parties made an admission but the identity of which one cannot be definitively established, because plaintiff was unable to specify which defendant was the declarant, the burden of proof shifted to each defendant to deny having made the statement. 25

Courts have sometimes eased the burden on a party that faces unusual difficulties in obtaining evidence even if the adversary does not necessarily have greater access to such evidence, such as a plaintiff who is not available to testify, 26 or who, because of amnesia, cannot remember the events in question and is therefore handicapped in

rebutting an allegation of contributory negligence. 27

◆ **Recommendation:** To safeguard against phony claims of amnesia, a jury should be instructed that before the lesser burden of persuasion is applied, because of the danger of shamming, they must be satisfied that the evidence of amnesia is clear and convincing, supported by the objective nature and extent of any other physical injuries sustained, and that the amnesia was clearly a result of the accident. 28

A party cannot avoid the normal allocation of burdens merely because needed information is possessed by a nonparty who refuses to cooperate and is privileged from testifying. 29

Footnotes

Footnote 22. *United States v New York, N. H. & H. R. Co.*, 355 US 253, 2 L Ed 2d 247, 78 S Ct 212; *Bank of Crete, S.A. v Koskotas* (SD NY) 733 F Supp 648; *United States v Continental Ins. Co.* (CA11 Fla) 776 F2d 962, 33 CCF ¶ 74094; *Browzin v Catholic University of America*, 174 US App DC 60, 527 F2d 843; *Lindahl v Office of Personnel Management* (CA FC) 776 F2d 276; *Albert Mendel & Son, Inc. v Krogh*, 4 Conn App 117, 492 A2d 536; *Thomas v Allegheny & Eastern Coal Co.*, 309 Pa Super 333, 455 A2d 637; *Jackson v Green* (Tex App Corpus Christi) 700 SW2d 620, writ ref n r e (Jan 22, 1986) and reh'g of writ of error overr (Feb 26, 1986).

Annotation: Burden of proof in actions under general declaratory judgment acts, 23 ALR2d 1243.

Footnote 23. *Summers v Tice*, 33 Cal 2d 80, 199 P2d 1, 5 ALR2d 91 (ovrld on other grounds by *Sindell v Abbott Laboratories*, 26 Cal 3d 588, 163 Cal Rptr 132, 607 P2d 924, CCH Prod Liab Rep ¶ 8648, 2 ALR4th 1061) as stated in *Jolly v Eli Lilly & Co.*, 44 Cal 3d 1103, 245 Cal Rptr 658, 751 P2d 923, CCH Prod Liab Rep ¶ 11745 (when two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm).

Forms: Instruction to jury—Burden of proof where there are several defendants. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 77.

Footnote 24. *Hall v E. I. Du Pont de Nemours & Co.* (ED NY) 345 F Supp 353, 17 FR Serv 2d 835; *Hardy v Johns-Manville Sales Corp.* (ED Tex) 509 F Supp 1353, CCH Prod Liab Rep ¶ 9014, rev'd, in part on other grounds (CA5 Tex) 681 F2d 334, CCH Prod Liab Rep ¶ 9343, 11 Fed Rules Evid Serv 99; *Sindell v Abbott Laboratories*, 26 Cal 3d 588, 163 Cal Rptr 132, 607 P2d 924, CCH Prod Liab Rep ¶ 8648, 2 ALR4th 1061, cert den 449 US 912, 66 L Ed 2d 140, 101 S Ct 285.

Law Reviews: Gold, Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence, 96 Yale LJ 376 (1986).

Footnote 25. *O'Neal v Morgan* (CA2 NY) 637 F2d 846, 7 Fed Rules Evid Serv 1069, cert

den 451 US 972, 68 L Ed 2d 351, 101 S Ct 2050.

Footnote 26. *Johnson v White*, 154 Mich App 425, 397 NW2d 555, app gr 428 Mich 857, 399 NW2d 396, reh gr, in part 428 Mich 871, 401 NW2d 615 and revd on other grounds 430 Mich 47, 420 NW2d 87.

Footnote 27. *Murakami v County of Maui*, 69 Hawaii 43, 731 P2d 787; *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812.

Footnote 28. *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812.

Footnote 29. *Bank of Crete, S.A. v Koskotas* (SD NY) 733 F Supp 648.

3. Constitutional Considerations [162, 163]

§ 162 Due process

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The burden of proof in civil cases is normally not an issue of federal constitutional moment. 30 Occasionally, however, constitutional considerations do affect who may be required to prove what and the degree of persuasion the burdened party is required to satisfy. The burden of proof the government or state must satisfy in a proceeding against an individual is an important component of due process for two reasons: first, the standard of proof reflects the importance of a particular adjudication; 31 second, the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. 32

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. 33 Due process requires only a mere preponderance of the evidence to justify the state depriving an individual of a financial right. 34 When the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money, however, the state must justify its action by clear and convincing evidence, rather than by the traditional civil standard of a mere preponderance. 35 The clear and convincing evidence standard has been required in deportation proceedings, 36 in denaturalization proceedings, 37 in civil commitment proceedings, 38 and in proceedings to finally and irrevocably terminate parents' rights to custody of their children. 39

A state may permissibly impose the clear and convincing standard to protect a state interest—preservation of human life—in litigation brought on behalf of an individual against the state. 40

Footnotes

Footnote 30. *Lavine v Milne*, 424 US 577, 47 L Ed 2d 249, 96 S Ct 1010.

Footnote 31. *Santosky v Kramer*, 455 US 745, 71 L Ed 2d 599, 102 S Ct 1388, on remand (3d Dept) 89 App Div 2d 738, 453 NYS2d 942, later proceeding (3d Dept) 161 App Div 2d 908, 557 NYS2d 473, app dismd, motion dismd 76 NY2d 981, 563 NYS2d 766, 565 NE2d 515; *Addington v Texas*, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804, on remand (Tex) 588 SW2d 569, reh'g of cause overr (Nov 7, 1979).

Footnote 32. *Cruzan v Director, Missouri Dept. of Health*, 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841.

Footnote 33. *Addington v Texas*, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804, on remand (Tex) 588 SW2d 569, reh'g of cause overr (Nov 7, 1979); *Re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323, conformed to 27 NY2d 728, 314 NYS2d 536, 262 NE2d 675 and (criticized on other grounds by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319) as stated in *State v Krantz*, 241 Mont 501, 788 P2d 298, cert den 498 US 938, 112 L Ed 2d 306, 111 S Ct 341.

Footnote 34. In *Lavine v Milne*, 424 US 577, 47 L Ed 2d 249, 96 S Ct 1010.

Footnote 35. *Santosky v Kramer*, 455 US 745, 71 L Ed 2d 599, 102 S Ct 1388, on remand (3d Dept) 89 App Div 2d 738, 453 NYS2d 942, later proceeding (3d Dept) 161 App Div 2d 908, 557 NYS2d 473, app dismd, motion dismd 76 NY2d 981, 563 NYS2d 766, 565 NE2d 515; *Mathews v Eldridge*, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893, 41 Cal Comp Cas 920 (holding that assessing the nature of the process due to the individual in such a proceeding requires a balancing of three factors: the private interests affected by the state's chosen procedure.

Footnote 36. *Woodby v Immigration & Naturalization Service*, 385 US 276, 17 L Ed 2d 362, 87 S Ct 483.

Footnote 37. *Schneiderman v United States*, 320 US 118, 87 L Ed 1796, 63 S Ct 1333, reh den 320 US 807, 88 L Ed 488, 64 S Ct 24.

Footnote 38. *Addington v Texas*, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804, on remand (Tex) 588 SW2d 569, reh'g of cause overr (Nov 7, 1979).

Footnote 39. *Addington v Texas*, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804, on remand (Tex) 588 SW2d 569, reh'g of cause overr (Nov 7, 1979).

Footnote 40. *Cruzan v Harmon (Mo)* 760 SW2d 408, cert gr 492 US 917, 106 L Ed 2d 587, 109 S Ct 3240, motion gr 492 US 942, 106 L Ed 2d 644, 110 S Ct 35 and motion den 493 US 930, 107 L Ed 2d 308, 110 S Ct 318 and motion gr 493 US 951, 107 L Ed 2d 347, 110 S Ct 360 and motion den 493 US 973, 107 L Ed 2d 499, 110 S Ct 495 and affd 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841.

§ 163 Free exercise

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Burdens of proof have a role in reconciling conflicts between an individual's right to the free exercise of religious beliefs and practices and legitimate government interests. 41 To validate an action that substantially burdens a religious practice, the government must establish that its action is justified by a compelling state interest. 42 But this rule applies only where a government agency engages in individualized assessments of the reasons for the individual's conduct; absent such circumstances, the agency need not show a compelling state interest; it need merely show that it was enforcing a generally applicable, religion-neutral law. 43

Footnotes

Footnote 41. *Sherbert v Verner*, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790, 9 BNA FEP Cas 1152.

Footnote 42. *Hobbie v Unemployment Appeals Com.*, 480 US 136, 94 L Ed 2d 190, 107 S Ct 1046, 43 BNA FEP Cas 21, 42 CCH EPD ¶ 36753; *Thomas v Review Bd. of Indiana Employment Secur. Div.*, 450 US 707, 67 L Ed 2d 624, 101 S Ct 1425, 25 BNA FEP Cas 629, 25 CCH EPD ¶ 31662, on remand (Ind) 421 NE2d 642, 26 CCH EPD ¶ 31972; *Sherbert v Verner*, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790, 9 BNA FEP Cas 1152 (invalidating state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion).

Footnote 43. *Employment Div., Dept. of Human Resources v Smith*, 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595, 52 BNA FEP Cas 855, 53 CCH EPD ¶ 39826, CCH Unemployment Ins Rep ¶ 21933, reh den 496 US 913, 110 L Ed 2d 285, 110 S Ct 2605 and on remand 310 Or 376, 799 P2d 148, 53 BNA FEP Cas 1743.

4. Procedural Issues [164-167]

§ 164 Satisfying proponent's burden of production; opponent's motion for directed verdict

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The proponent's burden of production means that he must produce sufficient evidence so that a rational jury or other factfinder could find that each of the elements of his claim has been proven by a preponderance of the evidence. 44 The adequacy of the proponent's evidence is tested when, after he rests, the opponent moves for a directed

verdict; if the proponent has failed to satisfy the burden of production, the opponent's motion will be granted. 45

In ruling on a motion for a directed verdict a judge must also apply the rule that witness credibility is for the jury, not the court, to decide. 46 A party cannot, however, sustain its burden of production by calling adverse or hostile witnesses, eliciting testimony that negates its cause of action, and then arguing that the jury could find for that party simply by disbelieving these witnesses. 47

Footnotes

Footnote 44. *Maine v United States Dept. of Labor* (CA1) 669 F2d 827; *Boeing Co. v Shipman* (CA5 Ala) 411 F2d 365; *Hoekstra v Farm Bureau Mut. Ins. Co.* (Iowa) 382 NW2d 100; *Bowman v Doherty*, 235 Kan 870, 686 P2d 112, ALR4th 1362; *Theriot v St. Martin Parish School Bd.* (La App 3d Cir) 434 So 2d 668; *Seiders v Testa* (Me) 464 A2d 933; *Mech v Hearst Corp.*, 64 Md App 422, 496 A2d 1099, cert den 305 Md 175, 501 A2d 1323; *Smith v Bell Tel. Co.*, 397 Pa 134, 153 A2d 477.

See § 157 for a definition of "preponderance of the evidence."

Footnote 45. *Anderson v Liberty Lobby, Inc.* (1986) 477 US 242, 91 L Ed 2d 202, 106 S Ct 2505, 12 Media L R 2297, 4 FR Serv 3d 1041, motion den 480 US 903, 94 L Ed 2d 515, 107 S Ct 1343; *De Marines v KLM Royal Dutch Airlines* (1978, CA3 Pa) 580 F2d 1193, 3 Fed Rules Evid Serv 575, 26 FR Serv 2d 226; *Alabama Power Co. v Williams* (1990, Ala) 570 So 2d 589, 591, reh den, without op (Ala) 1990 Ala LEXIS 1010; *Fisher v City of Berkeley* (1984) 37 Cal 3d 644, 209 Cal Rptr 682, 693 P2d 261, 1985-1 CCH Trade Cases P 66473, affd 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045, 1986-1 CCH Trade Cases P 66965, reh den 475 US 1150, 90 L Ed 2d 350, 106 S Ct 1806 (burden of producing evidence refers to a party's obligation to produce sufficient evidence to produce a prima facie case, i.e. sufficient to avoid a nonsuit); *Bongiovi v Jamison* (1986) 110 Idaho 734, 718 P2d 1172; *General Electric Co. v Board of Assessors* (1984) 393 Mass 591, 472 NE2d 1329; *Francioni v Gibsonia Truck Corp.* (1977) 472 Pa 362, 372 A2d 736; *Morena v South Hills Health System* (1983) 501 Pa 634, 462 A2d 680 (a judgment of nonsuit is properly entered if the plaintiff has not introduced evidence sufficient to establish the necessary elements to maintain an action); *Morena v South Hills Health System* (1983) 501 Pa 634, 462 A2d 680; *Osborn v Manning* (1984, Wyo) 685 P2d 1121, 1124, later proceeding (Wyo) 798 P2d 1208, reh den (Wyo) 812 P2d 549.

The party with the burden of production must introduce sufficient proof to submit the case to the factfinder. *Bituminous Casualty Corp. v Deyle* (1990) 234 Neb 537, 451 NW2d 910, 916.

Motions for directed verdicts are generally discussed in 75A Am Jur 2d, Trial §§ 857 et seq., 907 et seq.

Forms: Motion for directed verdict at close of plaintiff's evidence. 23A Am Jur Pl & Pr Forms (Rev), Trial § 269.

Motions by defendant for directed verdict—Insufficiency of plaintiff's evidence. 23A Am Jur Pl & Pr Forms (Rev), Trial §§ 274 et seq.

Footnote 46. 75A Am Jur 2d, Trial § 846.

Footnote 47. *Dyer v MacDougall* (CA2 NY) 201 F2d 265; *Eckenrode v Pennsylvania R. Co.* (CA3 Pa) 164 F2d 996, *affd* 335 US 329, 93 L Ed 41, 69 S Ct 91.

§ 165 --Drawing inferences

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In deciding a motion for a directed verdict, the judge must give the nonmovant the benefit of all reasonable inferences that may be drawn from all of the evidence that has been admitted. 48 Although a court must allow the jury to draw reasonable inferences, a party cannot satisfy its burden of production with evidence that supports only an abstract or theoretical probability, or evidence that would require the jury to engage in speculation or conjecture. 49

When direct evidence as to an element of a claim or defense is lacking and the circumstantial evidence arguably supports conflicting inferences, one favoring plaintiff, the other favoring the defendant, courts occasionally hold that the party who does not have the burden of persuasion is entitled to a directed verdict because to submit the question to the jury is to permit the jury to indulge in speculation and conjecture. 50 Another view holds that it is the jury, not the court, which weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. 51

§ 165 --Drawing inferences [SUPPLEMENT]

Case authorities:

In determining an accused's guilt under a criminal statute, a jury may find the requisite knowledge of the law on the accused's part by drawing reasonable inferences from the evidence of the accused's conduct. *Ratzlaf v United States* (US) 126 L Ed 2d 615, 114 S Ct 655.

In case involving accident at railroad grade crossing, trial court did not abuse its discretion in limiting testimony as to prior accident where main issue was whether vegetation (line of trees) obstructed view at crossing and, by way of countering possible inference that prior accident had also involved vegetation, railroad sought to show that prior accident did not involve vegetation; whether such inference was created at all was questionable and, in any event, trial court simply foreclosed what could have been substantial detour into collateral issue. *Barlett v Kansas City S. Ry. Co.* (1993, Mo) 854 SW2d 396.

In prosecution for robbery of three fast food restaurants, in which defendant offered alibi,

adverse inference from defendant's failure to call his mother as witness was permissible, where mother had been present when defendant apologized to owner of restaurants. *State v Neil* (1994, Mo) 869 SW2d 734.

Footnotes

Footnote 48. 75A Am Jur 2d, Trial §§ 958, 970.

Footnote 49. *Guenther v Armstrong Rubber Co.* (1969, CA3 Pa) 406 F2d 1315 (to satisfy the burden of producing evidence that the defendant manufactured the particular tire that caused plaintiff's injuries, more is required than a showing that defendant manufactured 75 to 80 percent of the tires that were sold at the store where plaintiff had purchased the tire in question).

Footnote 50. *Cawthon v Waco Fire & Casualty Ins. Co.*, 190 Ga App 797, 380 SE2d 327, revd on other grounds 259 Ga 632, 386 SE2d 32, on remand 194 Ga App 227, 391 SE2d 142 (in which the court charged the jury that facts which are consistent with either of two opposing theories prove nothing); *Presbrey v Gillette Co.* (2d Dist) 105 Ill App 3d 1082, 61 Ill Dec 816, 435 NE2d 513, CCH Prod Liab Rep ¶ 9314 (a party fails to meet its burden of production when the evidence equally supports the parties' opposing theories); *Burens v Industrial Com.*, 162 Ohio St 549, 55 Ohio Ops 436, 124 NE2d 724; *Litton Industrial Products, Inc. v Gammage* (Tex) 668 SW2d 319; *Ragland v Rutledge*, 234 Va 216, 361 SE2d 133.

Footnote 51. *Lavender v Kurn*, 327 US 645, 90 L Ed 916, 66 S Ct 740; *Tennant v Peoria & P. U. R. Co.*, 321 US 29, 88 L Ed 520, 64 S Ct 409, reh den 321 US 802, 88 L Ed 1089, 64 S Ct 610.

§ 166 Shifting burdens

[View Entire Section](#)
[Go to Parallel Reference Table](#)

That a party has satisfied his burden of production generally does not affect, change or shift the burden of persuasion on the elements of the cause of action, defense, or counterclaim, as the case may be; the party who begins with the burden of persuasion on any issue retains that burden on that issue throughout the trial. 52

If the opponent's motion for a directed verdict is denied, he faces what is sometimes called the risk of nonproduction: if he produces no evidence, he runs the risk that the jury will find that the proponent has met his burden of persuasion. This does not, however, shift the burden of production; the proponent continues to have the burden of establishing each element of his cause of action by a preponderance of the evidence, and the jury must still decide whether he has satisfied that burden. 53

Footnotes

Footnote 52. *Commercial Molasses Corp. v New York Tank Barge Corp.*, 314 US 104, 86 L Ed 89, 62 S Ct 156; *Lavett v Lavett* (Ala) 414 So 2d 907 (ovrld on other grounds by *McBride v McBride* (Ala) 548 So 2d 155); *State v Childress*, 78 Ariz 1, 274 P2d 333, 46 ALR2d 1169; *Insurance Co. of Pennsylvania v Estate of Guzman* (Fla App D4) 421 So 2d 597; *People v Ziltz*, 98 Ill 2d 38, 74 Ill Dec 40, 455 NE2d 70; *District Heights Apartments v Noland Co.*, 202 Md 43, 95 A2d 90, 39 ALR2d 387; *Smith v Bohlen*, 95 NC App 347, 382 SE2d 812, affd 328 NC 564, 402 SE2d 380; *Big Fork Mining Co. v Tennessee Water Quality Control Bd.* (Tenn App) 620 SW2d 515, 12 ELR 20127.

Annotation: Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony and child support, 53 ALR2d 591.

Footnote 53. *Ambrose v Wheatley* (DC Del) 321 F Supp 1220; *Simpson v Home Petroleum Corp.* (CA5 Tex) 770 F2d 499; *Palenkas v Beaumont Hospital*, 432 Mich 527, 443 NW2d 354; *Bituminous Casualty Corp. v Deyle*, 234 Neb 537, 451 NW2d 910.

Annotation: Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support, 53 ALR2d 591.

§ 167 Substance or procedure; in diversity cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The burden of persuasion is generally considered an issue of substantive law, rather than procedure in the sense that if a judge misinstructs the jury as to who has the burden or what that burden is, this is likely to be reversible error. 54

In federal courts in diversity cases, the prevailing view appears to be that the burden of production is a procedural question to which federal law applies. 55 But the allocation of the burden of proof as to the elements of a claim or defense is considered substantive; so whenever a federal court must apply substantive state law, it must look to state law to determine which party bears which burdens on which issues. 56 State law as to the sufficiency of evidence governs, 57 and the burden of persuasion is a substantive issue, to which state law applies. 58

Footnotes

Footnote 54. *Cities Service Oil Co. v Dunlap*, 308 US 208, 84 L Ed 196, 60 S Ct 201; *Kabo v Summa Corp.* (ED Pa) 523 F Supp 1326; *Blue Diamond Coal Co. v United Mine Workers* (CA6 Ky) 436 F2d 551, 76 BNA LRRM 2003, 64 CCH LC ¶ 11360, cert den 402 US 930, 28 L Ed 2d 863, 91 S Ct 1525, 77 BNA LRRM 2023, 65 CCH LC ¶ 11677; *Amoco Production Co. v Douglas Energy Co.* (DC Kan) 613 F Supp 730, 85 OGR 466; *Atlantic & Pacific Ins. Co. v Barnes* (Colo App) 666 P2d 163; *Fitzsimons v Frey*, 153 Neb 124, 43 NW2d 531.

Footnote 55. *Jones v Meat Packers Equipment Co.* (CA4 Va) 723 F2d 370, CCH Prod Liab Rep ¶ 9949; *Martin v American Petrofina, Inc.* (CA5 La) 779 F2d 250, CCH Prod Liab Rep ¶ 10950, 19 Fed Rules Evid Serv 1454, mod, vacated, reh den, in part on other grounds (CA5 La) 785 F2d 543; *Gideon v Johns-Manville Sales Corp.* (CA5 Tex) 761 F2d 1129, CCH Prod Liab Rep ¶ 10820, 18 Fed Rules Evid Serv 296; *Peterson v Hager* (CA10 Okla) 724 F2d 851.

Footnote 56. *Dick v New York Life Ins. Co.*, 359 US 437, 3 L Ed 2d 935, 79 S Ct 921; *Palmer v Hoffman*, 318 US 109, 87 L Ed 645, 63 S Ct 477, 144 ALR 719, reh den 318 US 800, 87 L Ed 1163, 63 S Ct 757; *Cities Service Oil Co. v Dunlap*, 308 US 208, 84 L Ed 196, 60 S Ct 201.

Footnote 57. *Gootee v Colt Industries, Inc.* (CA6 Mich) 712 F2d 1057, CCH Prod Liab Rep ¶ 9698, 36 UCCRS 1157; *R.W. Murray, Co. v Shatterproof Glass Corp.* (CA8 Mo) 758 F2d 266, 17 Fed Rules Evid Serv 999, 40 UCCRS 1283 (criticized on other grounds by *Kaplan v RCA Corp.* (CA4 NC) 783 F2d 463, 42 UCCRS 1312).

Footnote 58. *Amoco Production Co. v Douglas Energy Co.* (DC Kan) 613 F Supp 730, 85 OGR 466.

B. In Criminal Cases [168-180]

Research References

ALR Digests: Evidence § 92.5

ALR Index: Criminal Law; Degree and Standard of Proof; Presumptions and Burden of Proof

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 351 et seq.

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:932 et seq.

Jones on Evidence (7th ed) §§ 5:1 et seq.

Wharton's Criminal Evidence (14th ed, Torcia) §§ 10 et seq.

1. Beyond Reasonable Doubt Standard, Generally [168-172]

§ 168 Overview

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a matter of due process the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. 59

Thus a state may not specify a lesser burden of proof for an element of a crime. 60 Nor may a state specify a fact as an element of a crime and then impose upon the defendant the burden of disproving it. 61

The burden to prove the elements of the crime beyond a reasonable doubt never shifts; it

§ 168 ----Overview [SUPPLEMENT]

Case authorities:

On appeal to Court of Appeals, proper standard of review in case where evidence against accused is wholly circumstantial is whether evidence before jury was legally sufficient to support finding of guilt beyond reasonable doubt, even though People are obliged to prove accused's guilt "to a moral certainty" and defendant is entitled to jury instruction, in words or substance, to that effect; phrase "proof to a moral certainty" is simply description of standard to be applied by fact finder in cases of purely circumstantial evidence. *People v Wong* (1993) 81 NY2d 600, 601 NYS2d 440, 619 NE2d 377.

Footnotes

Footnote 59. *Re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323, conformed to 27 NY2d 728, 314 NYS2d 536, 262 NE2d 675 and (criticized on other grounds by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319) as stated in *State v Krantz*, 241 Mont 501, 788 P2d 298, cert den 498 US 938, 112 L Ed 2d 306, 111 S Ct 341.

The prosecution must prove all the elements of a criminal offense beyond a reasonable doubt. The prosecution's burden is not relieved by a defendant's tactical decision not to contest an essential element of an offense. *Estelle v McGuire* (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305, on remand (CA9) 956 F2d 923, 92 CDOS 1314, 92 Daily Journal DAR 2100.

Forms: Instruction—Burden of proof on prosecution. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 357; 7 Federal Procedural Forms, L Ed § 20:932.

Instruction—Burden of proof may be met by circumstantial evidence. 7 Federal Procedural Forms, L Ed § 20:935.

Footnote 60. *State v Rupert*, 247 Kan 512, 802 P2d 511 (a statute making nonsupport of one's child a crime, and requiring the state to prove nonsupport beyond a reasonable doubt, but to prove that the defendant is the child's parent by only a preponderance of the evidence, violates the Due Process Clause of the Fourteenth Amendment); *State v Clay*, 160 W Va 651, 236 SE2d 230.

Footnote 61. *Mullaney v Wilbur*, 421 US 684, 44 L Ed 2d 508, 95 S Ct 1881 (criticized on other grounds by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319) (statute providing that if the prosecutor proved beyond a reasonable doubt that the defendant committed an unlawful, intentional killing, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation held unconstitutional).

As to the validity of presumptions in a criminal case, see § 191.

Footnote 62. State v Stump, 254 Iowa 1181, 119 NW2d 210, cert den 375 US 853, 11 L Ed 2d 80, 84 S Ct 113; State v Chiarello, 69 NJ Super 479, 174 A2d 506, certif den 36 NJ 301, 177 A2d 343; Commonwealth v Smihal, 182 Pa Super 232, 126 A2d 523; State v Brown, 97 RI 95, 196 A2d 138; Allison v Commonwealth, 207 Va 810, 153 SE2d 201.

§ 169 Defined as important life decision

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The important life decision definition of beyond a reasonable doubt, defining beyond a reasonable doubt as the kind of doubt which folks in the more serious and important affairs of their own lives might be willing to act upon, is one approved definition. 63 Several courts have approved of this explanation of beyond a reasonable doubt, substituting "hesitate to act" or variations of it for the "willing to act" phraseology. 64

Attempts to clarify the definition further by citing various examples of major life decisions have not generally been successful. 65

§ 169 ----Defined as important life decision [SUPPLEMENT]

Practice Aids: Supreme Court's views as to proper definition of reasonable doubt, for purposes of requirement, under due process clauses of Federal Constitution's Fifth and Fourteenth Amendments, to prove criminal defendant's guilt beyond reasonable doubt. 127 L ED 2nd 731.

Footnotes

Footnote 63. Holland v United States, 348 US 121, 99 L Ed 150, 75 S Ct 127, 54-2 USTC ¶ 9714, 46 AFTR 943, reh den 348 US 932, 99 L Ed 731, 75 S Ct 334, 46 AFTR 1361; Commonwealth v Robinson, 408 Mass 245, 557 NE2d 752, habeas corpus proceeding (CA1 Mass) 933 F2d 101, cert den (US) 117 L Ed 2d 522, 112 S Ct 1301; Lord v State, 107 Nev 28, 806 P2d 548.

Footnote 64. Rogers v Carver (CA1 Mass) 833 F2d 379, cert den 485 US 937, 99 L Ed 2d 276, 108 S Ct 1116 (compared with the standard one would apply in making important decisions in daily life); United States v Leaphart (CA10 Kan) 513 F2d 747 (hesitate to act language is acceptable, willing to act language is not).

Definition of beyond a reasonable doubt stated that the term described proof of such a convincing character that you would be willing to rely upon it without hesitation in your most important affairs of your own. United States v Moss (CA4 Va) 756 F2d 329 (criticized on other grounds by Re Grand Jury Subpoena Duces Tecum (CA2 NY) 767 F2d 26).

Another definition requires that the proof be so convincing that an ordinary person would be willing to make the most important decisions in his or her own life. *United States v Jaramillo-Suarez* (CA9 Cal) 950 F2d 1378, 91 Daily Journal DAR 15420, 34 Fed Rules Evid Serv 1093.

Footnote 65. *Commonwealth v Ferreira*, 373 Mass 116, 364 NE2d 1264, stating that an instruction using, as examples of major life decisions, whether to continue getting an education or to leave school to get a job; whether to get married or to stay single; or whether to buy a house or to continue to rent, tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt.

§ 170 Moral certainty test

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the past, courts often defined beyond a reasonable doubt by equating it to a moral certainty. 66 Recently, however, the reference to moral certainty, rather than evidentiary certainty, has been disapproved as creating too great a risk that a reasonable juror might interpret the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. 67

§ 170 ----Moral certainty test [SUPPLEMENT]

Practice Aids: Supreme Court's views as to proper definition of reasonable doubt, for purposes of requirement, under due process clauses of Federal Constitution's Fifth and Fourteenth Amendments, to prove criminal defendant's guilt beyond reasonable doubt. 127 L ED 2nd 731.

Case authorities:

There was no error in a noncapital first-degree murder prosecution where the court gave a "moral certainty" reasonable doubt instruction during jury selection which defendant contended reduced the State's burden of proof below the standard required by the due process clause. The reasonable doubt instruction given during jury selection, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury; moreover, even if there was error in the preliminary instruction, the trial court's use of the pattern jury instruction in its charge to the jury before it retired for deliberation cured any possible defect in the earlier instruction. *State v White* (1995) 340 NC 264, 457 SE2d 841.

Footnotes

Footnote 66. *United States v Indorato* (CA1 Mass) 628 F2d 711, cert den 449 US 1016, 66 L Ed 2d 476, 101 S Ct 578; *Monk v Zelez* (CA10 Kan) 901 F2d 885.

Footnote 67. *Estelle v McGuire* (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305, on remand (CA9) 956 F2d 923, 92 CDOS 1314, 92 Daily Journal DAR 2100; *Cage v Louisiana*, 498 US 39, 112 L Ed 2d 339, 111 S Ct 328, on remand (La) 583 So 2d 1125, stay gr (La) 580 So 2d 662 and review den sub nom *Cage v Louisiana* (US) 116 L Ed 2d 170, 112 S Ct 211, transf sub nom *State v Cage* (La) 1994 La LEXIS 281 (ovrld on other grounds by *Estelle v McGuire* (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305); *Boyde v California*, 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1961; *Skelton v Whitley* (CA5 La) 950 F2d 1037, cert den (US) 121 L Ed 2d 61, 113 S Ct 102.

§ 171 Jury instructions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Any definition of the term "beyond a reasonable doubt" must not detract from the heavy burden suggested by the use of the term reasonable doubt standing alone. 68 However, in deciding whether an instruction defining "beyond a reasonable doubt" creates reversible error, the courts must consider how reasonable jurors could have understood the charge as a whole. 69 Even if the judge has improperly defined beyond a reasonable doubt, a conviction may nonetheless be affirmed if, taken as a whole, the instructions correctly convey the concept of reasonable doubt to the jury, properly emphasize the gravity of the decision the jury must make, and not detract from the jury's understanding of the extent of the burden. 70

Attempts to explain the term reasonable doubt do not usually result in making it any clearer to the minds of the jury. 71 As a result, no definition of "beyond a reasonable doubt" is constitutionally required. 72

Some courts discourage judges from defining reasonable doubt, although merely because judges define beyond a reasonable doubt to the jury does not require automatic reversal. 73 Other courts explicitly require that the judge explain beyond a reasonable doubt to the jury. 74

§ 171 ----Jury instructions [SUPPLEMENT]

Practice Aids: Supreme Court's views as to proper definition of reasonable doubt, for purposes of requirement, under due process clauses of Federal Constitution's Fifth and Fourteenth Amendments, to prove criminal defendant's guilt beyond reasonable doubt. 127 L ED 2nd 731.

Footnotes

Footnote 68. *United States v Nolasco* (CA9 Ariz) 926 F2d 869, 91 CDOS 1182, 91 Daily

Journal DAR 1969, cert den (US) 116 L Ed 2d 80, 112 S Ct 111.

Forms: Instruction–Definition of reasonable doubt. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 358; 7 Federal Procedural Forms, L Ed § 20:933.

Footnote 69. *Cage v Louisiana*, 498 US 39, 112 L Ed 2d 339, 111 S Ct 328, on remand (La) 583 So 2d 1125, stay gr (La) 580 So 2d 662 and review den sub nom *Cage v Louisiana* (US) 116 L Ed 2d 170, 112 S Ct 211, transf sub nom *State v Cage* (La) 1994 La LEXIS 281 and (ovrld on other grounds by *Estelle v McGuire* (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305).

Footnote 70. *Holland v United States*, 348 US 121, 99 L Ed 150, 75 S Ct 127, 54-2 USTC ¶ 9714, 46 AFTR 943, reh den 348 US 932, 99 L Ed 731, 75 S Ct 334, 46 AFTR 1361.

Footnote 71. *Holland v United States*, 348 US 121, 99 L Ed 150, 75 S Ct 127, 54-2 USTC ¶ 9714, 46 AFTR 943, reh den 348 US 932, 99 L Ed 731, 75 S Ct 334, 46 AFTR 1361.

Footnote 72. *United States v Campbell* (CA1 Me) 874 F2d 838; *United States v Ricks* (CA4 Md) 882 F2d 885, 28 Fed Rules Evid Serv 763, cert den 493 US 1047, 107 L Ed 2d 841, 110 S Ct 846; *Thompson v Lynaugh* (CA5 Tex) 821 F2d 1054, habeas corpus proceeding (CA5 Tex) 821 F2d 1080, cert den 483 US 1035, 97 L Ed 2d 794, 108 S Ct 5 and cert den 483 US 1035, 97 L Ed 2d 794, 108 S Ct 5; *Whiteside v Parke* (CA6 Ky) 705 F2d 869, cert den 464 US 843, 78 L Ed 2d 133, 104 S Ct 141; *United States v Hall* (CA7 Ill) 854 F2d 1036, 26 Fed Rules Evid Serv 894; *United States v Nolasco* (CA9 Ariz) 926 F2d 869, 91 CDOS 1182, 91 Daily Journal DAR 1969, cert den (US) 116 L Ed 2d 80, 112 S Ct 111; *State v Dunn*, 249 Kan 488, 820 P2d 412; *McGinty v State* (Tex Crim) 723 SW2d 719.

Footnote 73. *United States v Adkins* (CA4 NC) 937 F2d 947; *United States v Ricks* (CA4 Md) 882 F2d 885, 28 Fed Rules Evid Serv 763, cert den 493 US 1047, 107 L Ed 2d 841, 110 S Ct 846; *United States v Moss* (CA4 Va) 756 F2d 329 (criticized on other grounds by *Re Grand Jury Subpoena Duces Tecum* (CA2 NY) 767 F2d 26); *People v Evans* (4th Dist) 199 Ill App 3d 330, 145 Ill Dec 286, 556 NE2d 904, app den 133 Ill 2d 563, 149 Ill Dec 328, 561 NE2d 698; *Summers v State* (Okla Crim) 704 P2d 91.

Footnote 74. *United States v Delibac* (CA2 Vt) 925 F2d 610; *Friedman v United States* (CA8 Mo) 381 F2d 155; *United States v Pepe* (CA10 Kan) 501 F2d 1142; *Commonwealth v Stellberger*, 25 Mass App 148, 515 NE2d 1207; *State v Desrosiers* (RI) 559 A2d 641.

One definition of "beyond a reasonable doubt" accepts an instruction that defines "reasonable doubt" as "a doubt based on reason and common sense." *United States v Jaramillo-Suarez* (CA9 Cal) 950 F2d 1378, 91 Daily Journal DAR 15420, 34 Fed Rules Evid Serv 1093.

§ 172 Application of rule on posttrial motion or appeal

The standard for appellate review of a post-conviction motion for judgement of acquittal notwithstanding the verdict is identical to that employed to measure the sufficiency of the evidence supporting a guilty verdict. 75 The evidence is sufficient to withstand defendant's motion or appeal so long as a rational juror could be satisfied that the government has proven each element of the crime beyond a reasonable doubt. 76 In making this assessment, the court is required to view the evidence in the light most favorable to the prosecutor, giving the prosecutor the benefit of all reasonable inferences that can be drawn from the evidence. 77

Footnotes

Footnote 75. *United States v Martinez* (CA1 RI) 922 F2d 914.

Footnote 76. *Jackson v Virginia*, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781, reh den 444 US 890, 62 L Ed 2d 126, 100 S Ct 195 and (not followed by *State v Williams* (La) 383 So 2d 369) as stated in *State v Gatson* (La App 3d Cir) 434 So 2d 1315; *United States v Taylor* (CA2 NY) 464 F2d 240; *People v Campbell*, 146 Ill 2d 363, 166 Ill Dec 932, 586 NE2d 1261; *People v Hampton*, 407 Mich 354, 285 NW2d 284, cert den 449 US 885, 66 L Ed 2d 110, 101 S Ct 239; *People v Stroud* (2d Dept) 121 App Div 2d 484, 503 NYS2d 816, app den 68 NY2d 817; *State v Green*, 94 Wash 2d 216, 616 P2d 628.

Footnote 77. *Jackson v Virginia*, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781, reh den 444 US 890, 62 L Ed 2d 126, 100 S Ct 195 and (not followed on other grounds by *State v Williams* (La) 383 So 2d 369) as stated in *State v Gatson* (La App 3d Cir) 434 So 2d 1315 (on appeal, the court must look at the evidence in a light most favorable to the prosecution, drawing all legitimate inferences and resolving all credibility conflicts in its favor; *United States v Sabatino* (CA1 Me) 943 F2d 94; *United States v Rieger* (CA3 Pa) 942 F2d 230; *United States v Christian* (CA6 Tenn) 942 F2d 363, cert den (US) 116 L Ed 2d 806, 112 S Ct 905; *United States v Monroe* (CA9 Cal) 943 F2d 1007, 91 CDOS 6699, 91 Daily Journal DAR 10251, 33 Fed Rules Evid Serv 1431, cert den (US) 118 L Ed 2d 304, 112 S Ct 1585 and (criticized on other grounds by *United States v Jones* (App DC) 297 US App DC 356, 973 F2d 928) and (among conflicting authorities on other grounds noted in *United States v Smiley* (CA8 Mo) 997 F2d 475); *United States v Brown* (CA10 Colo) 943 F2d 1246, 33 Fed Rules Evid Serv 1286, related proceeding (Colo) 841 P2d 1066; *Wells v State*, 261 Ga 282, 404 SE2d 106, 102-99 Fulton County D R 16B; *State v Bright*, 238 Neb 348, 470 NW2d 181; *State v Badami*, 235 Neb 118, 453 NW2d 746.

2. Burden as to Particular Allegations or Elements [173-180]

§ 173 Place of commission of crime; venue

Since the criminality of an act depends not only on its perpetration, but that it be in violation of the penal laws of the state where committed, the place of the act may be an ingredient of the crime which must be proven by the prosecution. 78 However, the view that venue is not an element of a crime and therefore need not be proven beyond a reasonable doubt appears to be followed by federal courts 79 and numerous state courts. 80 A number of state courts, however, have held that the prosecution must, indeed, prove venue beyond a reasonable doubt. 81

§ 173 ----Place of commission of crime; venue [SUPPLEMENT]

Case authorities:

When jurisdiction in a criminal prosecution is challenged, the State is required to proved beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

The evidence in a second-degree murder prosecution made a prima facie showing of jurisdiction sufficient to carry the case to the jury and permit the jury to infer that the murder took place in this state, although the victim's body was found in a stream in South Carolina, where it tended to show that shortly after leaving work at 11:00 p.m., the victim went to her home in Mount Holly, two doors from where defendant lived, and changed from her work clothes into a dress; a few hours later, defendant was seen in the vicinity alone driving the victim's car; a breaking and entering occurred at the victim's home; acts of violence took place in the home as reflected by broken glass, dishes on the floor and the bedroom in disarray; a cement block and a rock used by the killer to sink the victim's body in the stream some fourteen miles away were taken from the victim's yard; on the morning following the killing, defendant left on his former sister-in-law's car a Bible in which he had written that he was going to kill himself; that afternoon defendant told a friend that he had done something for which the police were going to kill him; and when defendant was arrested, he told the police that the warrant would be worthless if he could prove he "killed that woman in South Carolina." *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

When jurisdiction is challenged and the trial court makes a preliminary determination that sufficient evidence exists upon which the jury could conclude beyond a reasonable doubt that the murder occurred in North Carolina, the trial court must instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the murder occurred in North Carolina, it should return a verdict of not guilty and a special verdict indicating a lack of jurisdiction. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

In this murder prosecution in which defendant challenged the facts of jurisdiction, the trial court erred by failing to instruct the jury that the State bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

Footnotes

Footnote 78. *Tate v People*, 125 Colo 527, 247 P2d 665; *People v Mowry*, 6 Ill 2d 132, 126 NE2d 683.

Footnote 79. *United States v Hall* (CA1 Mass) 691 F2d 48; *United States v Potamitis* (CA2 NY) 739 F2d 784, 15 Fed Rules Evid Serv 1747, cert den 469 US 918, 83 L Ed 2d 232, 105 S Ct 297, post-conviction proceeding (SD NY) 666 F Supp 43, on reconsideration (SD NY) 1988 US Dist LEXIS 5357, later proceeding (SD NY) 1988 US Dist LEXIS 5332, affd (CA2 NY) 862 F2d 423 and cert den 469 US 934, 83 L Ed 2d 269, 105 S Ct 332, later proceeding (SD NY) 611 F Supp 1033, later proceeding (SD NY) 611 F Supp 1046, later proceeding (SD NY) 606 F Supp 1390, later proceeding (SD NY) 609 F Supp 881 and affd without op (CA2 NY) 779 F2d 40, post-conviction proceeding (SD NY) 1992 US Dist LEXIS 21246, adopted (SD NY) 1993 US Dist LEXIS 3900 and (disapproved on other grounds by *Zafiro v United States* (US) 122 L Ed 2d 317, 113 S Ct 933, 93 CDOS 535, 93 Daily Journal DAR 1049, 6 FLW Fed S 861) as stated in *United States v Haynes* (CA2 NY) 1994 US App LEXIS 1906; *United States v Davis* (CA5 Ga) 666 F2d 195; *United States v Charlton* (CA6 Tenn) 372 F2d 663, cert den 387 US 936, 18 L Ed 2d 999, 87 S Ct 2062; *United States v Rodgers* (CA7 Ill) 755 F2d 533, 17 Fed Rules Evid Serv 579, cert den 473 US 907, 87 L Ed 2d 656, 105 S Ct 3532; *United States v Moeckly* (CA8 Minn) 769 F2d 453, 18 Fed Rules Evid Serv 1264, cert den 475 US 1015, 89 L Ed 2d 311, 106 S Ct 1196 and cert den 476 US 1104, 90 L Ed 2d 357, 106 S Ct 1947, post-conviction proceeding (CA8 Ark) 1992 US App LEXIS 19602; *United States v Durades* (CA9 Cal) 607 F2d 818; *Wilkett v United States* (CA10 Okla) 655 F2d 1007, cert den 454 US 1142, 71 L Ed 2d 294, 102 S Ct 1001; *United States v Males* (1983, CA11 Fla) 715 F2d 568, 14 Fed Rules Evid Serv 21.

While the burden of proving that the crime occurred in the district is on the prosecution, the prosecution is not required to meet the reasonable doubt standard applicable to the substantive elements of the offense; rather the prosecution need only show by a preponderance of the evidence that the trial is in the same district as the offense. *United States v White* (CA5 Fla) 611 F2d 531, 5 Fed Rules Evid Serv 896 and cert den 446 US 992, 64 L Ed 2d 849, 100 S Ct 2978.

Footnote 80. *State v Mohr* (App) 150 Ariz 564, 724 P2d 1233, ALR4th 2285; *Henley v State*, 210 Ark 759, 197 SW2d 468; *People v Arline* (5th Dist) 13 Cal App 3d 200, 91 Cal Rptr 520 (disapproved on other grounds by *People v Hall*, 41 Cal 3d 826, 226 Cal Rptr 112, 718 P2d 99); *Pennick v State* (Fla App D3) 453 So 2d 542, 9 FLW 1756; *Hatton v State* (Ind) 439 NE2d 565; *Morris v State*, 274 Ind 161, 409 NE2d 608, later proceeding (Ind) 466 NE2d 13; *State v Allen* (Iowa) 293 NW2d 16; *State v True* (Me) 330 A2d 787; *State v Valentine* (Mo) 506 SW2d 406; *State v Bauers* (Mo App) 702 SW2d 896; *Dixon v State*, 83 Nev 120, 424 P2d 100; *State v Glasscock*, 76 NM 367, 415 P2d 56 (ovrld on other grounds by *State v Lopez*, 84 NM 805, 508 P2d 1292); *State v Wise* (App) 90 NM 659, 567 P2d 970, cert den 91 NM 4, 569 P2d 414; *Steingut v Gold*, 42 NY2d 311, 397 NYS2d 765, 366 NE2d 854; *People v Burgess* (2d Dept) 107 App Div 2d 703, 484 NYS2d 58; *State v Batdorf*, 293 NC 486, 238 SE2d 497; *Baker v State* (Okla Crim) 448 P2d 282; *State v Brown*, 97 RI 95, 196 A2d 138; *State v Graycek* (SD) 335 NW2d 572; *State v Greene*, 86 SD 177, 192 NW2d 712, cert den 406 US 929, 32 L Ed 2d 131, 92 S

Ct 1805; *Harvey v State*, 213 Tenn 608, 376 SW2d 497; *State v Johnson* (Tenn Crim) 673 SW2d 877; *Moore v State* (Tex Crim) 694 SW2d 528; *State v Cauble* (Utah) 563 P2d 775; *State v Marino*, 100 Wash 2d 719, 674 P2d 171; *State v Manns*, 174 W Va 793, 329 SE2d 865.

Footnote 81. *Houston v Peyton* (WD Va) 297 F Supp 717; *Stokes v State* (Ala App) 373 So 2d 1211, cert den (Ala) 373 So 2d 1218; *Tate v People*, 125 Colo 527, 247 P2d 665; *People v Mowry*, 6 Ill 2d 132, 126 NE2d 683; *People v Hanson* (5th Dist) 138 Ill App 3d 530, 92 Ill Dec 901, 485 NE2d 1144; *State v Wardenburg*, 261 Iowa 1395, 158 NW2d 147; *State v Johnson*, 222 Kan 465, 565 P2d 993; *Willis v Commonwealth* (Ky) 339 SW2d 174; *State v Skipper* (La) 387 So 2d 592; *State v Miles* (La App 1st Cir) 450 So 2d 1067; *People v Belanger*, 120 Mich App 752, 327 NW2d 554; *State v Fabian* (Miss) 263 So 2d 773, appeal after remand (Miss) 284 So 2d 55; *State v Bretz*, 185 Mont 253, 605 P2d 974, cert den 444 US 994, 62 L Ed 2d 425, 100 S Ct 529, reh den 444 US 1104, 62 L Ed 2d 791, 100 S Ct 1073; *State v Headley*, 6 Ohio St 3d 475, 6 Ohio BR 526, 453 NE2d 716; *State v Gribble*, 24 Ohio St 2d 85, 53 Ohio Ops 2d 222, 263 NE2d 904; *State v Cooksey*, 242 Or 250, 409 P2d 335; *State v Ledder*, 31 Or App 487, 570 P2d 994; *State v Farley* (SD) 290 NW2d 491; *State v Brown*, 29 Wash App 11, 627 P2d 132; *Pickens v State*, 96 Wis 2d 549, 292 NW2d 601 (ovrld on other grounds by *State v Dean*, 103 Wis 2d 228, 307 NW2d 628) and (disapproved on other grounds by *Godinez v Moran* (US) 125 L Ed 2d 321, 113 S Ct 2680, 93 CDOS 4675, 93 Daily Journal DAR 7933, 7 FLW Fed S 499).

§ 174 Corpus delicti

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The corpus delicti must be established by the prosecution, meaning that the prosecution must establish the actual commission, by someone, of the particular offense. 82

◆ Observation: Proof that the defendant committed the crime is also necessary for a conviction, but it is not an element of the corpus delicti. 83

Footnotes

Footnote 82. *People v McLaughlin* (2nd Dist) 156 Cal App 2d 291, 319 P2d 365; *State v Brown*, 250 NC 209, 108 SE2d 233; *Hilyard v State*, 90 Okla Crim 435, 214 P2d 953, 28 ALR2d 961; *State v Teal*, 225 SC 472, 82 SE2d 787.

Footnote 83. Wharton's Criminal Evidence (14th ed, Torcia) § 17.

§ 175 Mental state

Where mental state is an element of the crime, the prosecutor must prove it beyond a reasonable doubt. 84 But if intent is not a necessary element of a crime, it is not essential for the prosecution to affirmatively prove the purpose for which an alleged criminal act was performed. 85

Although a state may require a defendant to prove an affirmative defense, such as self-defense, some of whose facts tend to negate the mens rea element of the crime, 86 the state may not place upon the defendant the burden of disproving the mental state specified in the definition of the crime. 87 If intent is a crucial element of the crime, the state must prove it beyond a reasonable doubt, and any instruction which effectively shifts the burden of proof to the defendant is impermissible. 88 Thus, for example, in homicide cases, a state is constitutionally required to disprove the defense of accident, because accident is no more than the negative of intent or malice. 89

Footnotes

Footnote 84. See § 168 for a discussion of the necessity to prove each element of a crime beyond a reasonable doubt. As to presumptions regarding intent, see § 271.

Mental state as an element of crime is generally discussed in 21 Am Jur 2d, Criminal Law §§ 129 et seq.

Footnote 85. *People v Wells*, 68 Cal App 2d 476, 156 P2d 979, motion den (3rd Dist) 261 Cal App 2d 468, 68 Cal Rptr 400.

Footnote 86. *Martin v Ohio*, 480 US 228, 94 L Ed 2d 267, 107 S Ct 1098, reh den 481 US 1024, 95 L Ed 2d 519, 107 S Ct 1913.

See § 178 for a discussion of the burden of proof with regard to affirmative defenses.

Footnote 87. *Mullaney v Wilbur*, 421 US 684, 44 L Ed 2d 508, 95 S Ct 1881.

Footnote 88. *State v Amado* (RI) 433 A2d 233.

In a heroin prosecution, an instruction cannot shift to the defendant the burden of proving that the defendant had no knowledge that the substance involved was heroin. *State v Pimentel*, 61 Hawaii 308, 603 P2d 141.

Footnote 89. *Fornash v Marshall* (CA6 Ohio) 686 F2d 1179, cert den 460 US 1042, 75 L Ed 2d 796, 103 S Ct 1439, reh den 461 US 940, 77 L Ed 2d 316, 103 S Ct 2113; *McArthur v State* (Fla) 351 So 2d 972 (not followed by *Dunn v State* (Fla App D5) 454 So 2d 641); *Commonwealth v Hutchinson*, 395 Mass 568, 481 NE2d 188; *King v State*, 254 Miss 162, 181 So 2d 158; *State v Gardner*, 51 NJ 444, 242 A2d 1; *People v Wright* (1st Dept) 17 App Div 2d 151, 232 NYS2d 767; *State v Phillips*, 264 NC 508, 142 SE2d 337; *State v Poole*, 33 Ohio St 2d 18, 62 Ohio Ops 2d 340, 294 NE2d 888, 63 ALR3d 932; *Commonwealth v Cooney*, 431 Pa 153, 244 A2d 651 (not followed by

Commonwealth v Bradley, 332 Pa Super 99, 480 A2d 1205); Pogue v State (Tex Crim) 474 SW2d 492; State v Oakes, 129 Vt 241, 276 A2d 18, cert den 404 US 965, 30 L Ed 2d 285, 92 S Ct 340; State v Fondren, 41 Wash App 17, 701 P2d 810, review den 104 Wash 2d 1015; Goodman v State (Wyo) 573 P2d 400, appeal after remand (Wyo) 601 P2d 178.

Under the rule that the prosecution's burden is not relieved by a defendant's tactical decision not to contest an essential element of an offense, evidence of a child's injuries, used to establish battered child syndrome, was relevant to show intent, and the state was not required to refrain from introducing such evidence even though the defendant did not raise the defense of accidental death. Estelle v McGuire (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305, on remand (CA9) 956 F2d 923, 92 CDOS 1314, 92 Daily Journal DAR 2100.

Annotation: Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

§ 176 Negative allegations; exceptions, and the like

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When a negative averment is an essential element of a crime, the burden is still generally on the prosecution to prove the elements of the crime. 90 However, the burden may be placed on a defendant where the negative of the issue is not susceptible of direct proof, of the facts are more immediately within the accused's knowledge, such as where the circumstances could be readily disproved by the production of documents or other evidence within the defendant's possession or control. 91 For instance, while there are cases holding that in a prosecution for carrying a weapon without a license, lack of a license is an essential element of the crime that must be proved by the prosecution, 92 the general rule followed elsewhere is that the burden of proof as to whether the defendant was licensed is on the defendant. 93 Similarly, where the language of such a statute is construed as creating an exception for those who have permits, rather than an element of the crime, the prosecution does not have the burden of proving a lack of a permit. 94 However, in such a case, it is error to require that the defendant prove that the exception applies "by a fair preponderance" of the evidence; instead the defendant may be required to go forward with sufficient evidence to establish a prima facie case of the issuance of a permit, and the prosecution would then have to disprove that evidence beyond a reasonable doubt. 95

§ 176 ----Negative allegations; exceptions, and the like [SUPPLEMENT]

Case authorities:

The trial court's admission of an SBI agent's testimony in response to a question by the prosecutor that neither defendant nor his attorney had given the shoes worn by defendant

on the night of the crime to law officers for comparison with shoeprints at the crime scene did not improperly allow the State to shift the burden of proof to defendant in violation of his right to due process but merely allowed the witness to inform the jury of defendant's failure to support his theory of the case. *State v Jaynes* (1995) 342 NC 249, 464 SE2d 448.

Footnotes

Footnote 90. *Colt v United States* (CA5 Fla) 158 F2d 641; *Sheppard v State* (Okla Crim) 306 P2d 346.

Footnote 91. *Rossi v United States*, 289 US 89, 77 L Ed 1051, 53 S Ct 532; *Colt v United States* (CA5 Fla) 158 F2d 641; *State v Gerlack*, 87 Or App 184, 741 P2d 926.

Footnote 92. *Sellers v State* (Ala App) 507 So 2d 540, revd on other grounds (Ala) 507 So 2d 544, on remand (Ala App) 507 So 2d 545; *State v Beauton*, 170 Conn 234, 365 A2d 1105; *State v Baych* (Iowa) 169 NW2d 578 (ovrld on other grounds by *State v Erickson* (Iowa) 362 NW2d 528) (proof that no valid permit had been issued put defendant under burden to rebut this element of the case); *Commonwealth v McNeil*, 461 Pa 709, 337 A2d 840, 69 ALR3d 1049, post-conviction proceeding 479 Pa 382, 388 A2d 707, post-conviction proceeding 497 Pa 187, 439 A2d 664, habeas corpus granted (ED Pa) 576 F Supp 1343, later proceeding (CA3 Pa) 782 F2d 443, cert den 479 US 1010, 93 L Ed 2d 709, 107 S Ct 654, petition den (ED Pa) 1994 US Dist LEXIS 734.

Footnote 93. *People v Williams* (4th Dist) 184 Cal App 2d 673, 7 Cal Rptr 604; *Williams v United States* (Dist Col App) 237 A2d 539; *Johnson v State*, 230 Ga 196, 196 SE2d 385 (criticized on other grounds by *Head v State*, 235 Ga 677, 221 SE2d 435) as stated in *Moore v State*, 176 Ga App 490, 336 SE2d 365; *Taylor v State* (Ind) 578 NE2d 664; *Commonwealth v Jones*, 372 Mass 403, 361 NE2d 1308.

Annotation: Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Footnote 94. *State v Paige* (Minn) 256 NW2d 298.

Footnote 95. *State v Paige* (Minn) 256 NW2d 298.

§ 177 Statutes of limitations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Since statutes of limitations create a bar to prosecution, 96 the prosecution must affirmatively prove the commission of the offense within the period limited by the statute. 97 If the prosecution relies on an exception, it has the burden to show its right to prosecute. 98

Footnotes

Footnote 96. 21 Am Jur 2d, Criminal Law § 223.

Footnote 97. Bustamante v District Court of Third Judicial Dist., 138 Colo 97, 329 P2d 1013 (ovrld on other grounds by County Court of County of El Paso v Ruth, 194 Colo 352, 575 P2d 1); State v Steensland, 33 Idaho 529, 195 P 1080, 13 ALR 1442; People v Guariglia, 187 Misc 843, 65 NYS2d 96, affd 272 App Div 784, 69 NYS2d 759.

Footnote 98. State v Steensland, 33 Idaho 529, 195 P 1080, 13 ALR 1442.

§ 178 Affirmative defenses

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As to certain defenses, various jurisdictions assign one or more of the burdens to the defense; for example, the view is split whether the burden of proof on the issue of insanity is on the prosecution or defense. 99 Furthermore, there is no constitutional barrier to requiring a defendant to produce sufficient evidence of certain defenses before the prosecutor is obliged to rebut or overcome such defenses. 1

Constitutional questions arise, however, when the law imposes upon the defendant the burden of persuasion as to a defense. 2 A state may require a defendant to prove a defense by a preponderance of the evidence or by a greater burden 3 so long as the statute contains no presumptions and does not require the defendant to disprove any fact specified by the statute as an element of the crime. 4

There are constitutional limits in reassigning elements and burdens of persuasion beyond which the States may not go. 5 And it would violate the proportionality component of the prohibition of cruel and unusual punishment if a state sought, with regard to any felony, to eliminate the mental culpability element and make the absence of such culpability an affirmative defense. 6

§ 178 ----Affirmative defenses [SUPPLEMENT]

Case authorities:

The trial court in a first-degree murder sentencing hearing did not err when instructing the jury on defendant's burden of proof by defining preponderance of the evidence as evidence which "must satisfy you" rather than as "more likely than not." State v Alston (1995) 341 NC 198, 461 SE2d 687.

Footnotes

Footnote 99. 21 Am Jur 2d, Criminal Law §§ 76 et seq.

Footnote 1. *United States v Bailey*, 444 US 394, 62 L Ed 2d 575, 100 S Ct 624, on remand 219 US App DC 67, 675 F2d 1292, 10 Fed Rules Evid Serv 1163, cert den 459 US 853, 74 L Ed 2d 104, 103 S Ct 119 (it was constitutional to place the burden of production on the defendant as to the defenses of duress and necessity, and to direct that if the defendant fails to satisfy that burden, he is not entitled to a jury instruction on the defense).

The amount of proof required to put the prosecution to its proof as to the issue of sanity is discussed in 21 Am Jur 2d, Criminal Law § 76.

Forms: Instruction—Burden and degree of proof on affirmative defense—Self defense. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 359; 7 Federal Procedural Forms, L Ed § 20:935.

Footnote 2. *Re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323, conformed to 27 NY2d 728, 314 NYS2d 536, 262 NE2d 675 and (criticized on other grounds by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319) as stated in *State v Krantz*, 241 Mont 501, 788 P2d 298, cert den 498 US 938, 112 L Ed 2d 306, 111 S Ct 341.

Footnote 3. *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319, upholding homicide statute which defined murder as any intentional, unlawful killing, but providing, however, that murder could be mitigated to manslaughter if a defendant proved, by a preponderance of the evidence, the affirmative defense that the killing occurred while the defendant was under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse.

Footnote 4. *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319.

Assuming the prosecutor proved the elements of aggravated murder beyond a reasonable doubt, the defendant was entitled to be acquitted on the grounds of self-defense only if she proved by a preponderance of the evidence: (1) that she was not at fault in creating the situation giving rise to the argument; (2) that she acted in the honest belief that she was in imminent danger of death or other great bodily harm and that her only means of escape from such danger was the use of deadly force; and (3) that she violated no duty to retreat to avoid danger. *Martin v Ohio*, 480 US 228, 94 L Ed 2d 267, 107 S Ct 1098, reh den 481 US 1024, 95 L Ed 2d 519, 107 S Ct 1913.

Footnote 5. *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319.

Footnote 6. *Morissette v United States*, 342 US 246, 96 L Ed 288, 72 S Ct 240 (law making it a felony to unlawfully take the property of another unless the defendant proved by a preponderance of the evidence that he reasonably believed the property to be his own).

As to whether states may constitutionally place the burden of proving insanity on the defendant, see 21 Am Jur 2d, Criminal Law § 77.

§ 179 Alibi

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although an alibi is sometimes classified as an affirmative defense, it is simply a denial that the accused committed the crime, 7 thus, proof of an alibi is simply a means of controverting the state's effort to establish a criminal act. 8 The prosecution has the burden to establish that the accused was present at the place and time of the offense. 9 The jury is properly instructed that the defendant has no burden of proof with respect to his alibi, but that the state must disprove the alibi beyond a reasonable doubt. 10 Statutes or rules that require that the defendant give notice to the prosecution of the accused's intent to rely on an alibi 11 do not shift the burden of proof. 12

Some courts that classify alibi as an affirmative defense only place on the defendant the burden to go forward with evidence so as to raise a reasonable doubt as to his presence at the scene of the alleged crime, but then the prosecution must prove beyond a reasonable doubt the defendant's actual presence there. 13 A state cannot require a defendant to prove an alibi defense by a preponderance of the evidence, because to do so would relieve the state of the burden of proving beyond a reasonable doubt that the defendant committed the act which constitutes the crime. 14

Footnotes

Footnote 7. 21 Am Jur 2d, Criminal Law § 192.

Footnote 8. Robinson v State, 20 Md App 450, 316 A2d 268.

Practice References Burden and degree of proof. 27 Am Jur POF2d 431, Alibi Defense § 6.

Footnote 9. People v Pearson, 19 Ill 2d 609, 169 NE2d 252; Scherer v State, 187 Ind 15, 116 NE 52; State v Walston, 259 NC 385, 130 SE2d 636; Commonwealth v Bonomo, 396 Pa 222, 151 A2d 441; State v Mayfield, 235 SC 11, 109 SE2d 716, cert den 363 US 846, 4 L Ed 2d 1728, 80 S Ct 1616 and reh den 364 US 857, 5 L Ed 2d 81, 81 S Ct 36.

Footnote 10. People v Wintje, 68 NY2d 637, 505 NYS2d 62, 496 NE2d 221.

Footnote 11. 21 Am Jur 2d, Criminal Law §§ 193 et seq.

Footnote 12. State v Whitely, 100 Utah 14, 110 P2d 337.

Footnote 13. Brown, 131 Ill App 2d 669; State v Young, 134 W Va 771, 61 SE2d 734.

Footnote 14. Johnson v Bennett (CA8 Iowa) 414 F2d 50.

§ 180 Prior convictions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When a prior conviction is included in a charge for the purpose of enhancing the punishment, such as under a persistent felon statute, the prosecutor has the burden of proving beyond a reasonable doubt that there was a prior conviction ¹⁵ and that the present defendant was in fact the defendant in the prior proceeding. ¹⁶ A procedure under which the prosecutor must prove the fact of the prior conviction, a defendant who wishes to challenge the conviction must come forward with some evidence suggesting that the conviction was invalid, and then the burden is then placed on the prosecutor to prove that the prior conviction is valid, is not violative of the right to due process. ¹⁷

§ 180 ----Prior convictions [SUPPLEMENT]

Case authorities:

Evidence of counterfeiting defendant's prior counterfeiting conspiracy and conviction with codefendant was properly admitted as probative on issues of intent, knowledge, and plan. *United States v Wallace* (1994, CA5 La) 32 F3d 921.

District court did not err in not having issued limiting instruction sua sponte after defendant's prior convictions for robbery and possession with intent to distribute heroin were introduced into evidence since convictions were introduced by defendant as part of defense strategy. *United States v Brawner* (1994, App DC) 32 F3d 602.

Footnotes

Footnote 15. *People v Mason* (Colo) 643 P2d 745; *People v April* (3d Dist) 73 Ill App 3d 555, 29 Ill Dec 843, 392 NE2d 400; *Washington v State* (Ind) 441 NE2d 1355; *Poppe v State*, 155 Neb 527, 52 NW2d 422; *State v Harris*, 1 Utah 2d 182, 264 P2d 284; *State v Prater*, 30 Wash App 512, 635 P2d 1104, review den 97 Wash 2d 1007.

Footnote 16. *Robinson v State* (Ala App) 432 So 2d 518; *State v Hooper*, 145 Ariz 538, 703 P2d 482, cert den 474 US 1073, 88 L Ed 2d 805, 106 S Ct 834; *State v Bernal*, 137 Ariz 421, 671 P2d 399; *Montgomery v State*, 277 Ark 95, 640 SW2d 108; *People v Mascarenas* (Colo) 666 P2d 101, appeal after remand (Colo) 706 P2d 404; *People v Hall* (5th Dist) 145 Ill App 3d 873, 99 Ill Dec 644, 495 NE2d 1379; *People v April* (3d Dist) 73 Ill App 3d 555, 29 Ill Dec 843, 392 NE2d 400; *Seeglitz v State* (Ind) 500 NE2d 144; *State v Bennett* (La) 357 So 2d 1136; *State v Horton* (La App 4th Cir) 487 So 2d 602; *People v Johnson*, 96 Mich App 652, 293 NW2d 664; *Phillips v State* (Miss) 421 So 2d 476; *State v McMillan* (Mo App) 593 SW2d 629, later proceeding (Mo App) 676 SW2d 903; *State v Radi*, 176 Mont 451, 578 P2d 1169, appeal after remand 185 Mont 38, 604 P2d 318; *State v Cooper*, 158 Mont 102, 489 P2d 99, appeal after remand 161 Mont 85, 504 P2d 978; *State v Luna*, 211 Neb 630, 319 NW2d 737, habeas corpus proceeding

(CA8 Neb) 772 F2d 448, post-conviction proceeding 230 Neb 966, 434 NW2d 526; State v Adels, 186 Neb 849, 186 NW2d 908; State v Ward, 118 NH 874, 395 A2d 511; State v Padilla (App) 92 NM 19, 582 P2d 396, cert den 92 NM 180, 585 P2d 324; State v Morgan, 82 NC App 674, 347 SE2d 487; Lewis v State (Okla Crim) 681 P2d 772; Jennings v State (Okla Crim) 484 P2d 885; State v Anderson, 15 Or App 607, 517 P2d 339; State v Garritsen (SD) 302 NW2d 409; Beck v State (Tex Crim) 719 SW2d 205; Perkins v State (Tex Crim) 485 SW2d 792; State v Murdock, 91 Wash 2d 336, 588 P2d 1143; State v Vance, 164 W Va 216, 262 SE2d 423; Block v State, 41 Wis 2d 205, 163 NW2d 196.

Footnote 17. Parke v Raley (US) 121 L Ed 2d 391, 113 S Ct 517, 92 CDOS 9568, 92 Daily Journal DAR 16078, 92 Daily Journal DAR 16173, 6 FLW Fed S 757, on remand (CA6 Ky) 983 F2d 1068, reported in full (CA6 Ky) 1993 US App LEXIS 508 and reh den (US) 122 L Ed 2d 372, 113 S Ct 1068.

IV. PRESUMPTIONS [181-300]

A. Introduction [181-189]

Research References

FRE Rules 301, 302

Uniform Rules of Evidence, Rules 301-303

ALR Digests: Evidence §§ 92 et seq.

ALR Index: Presumptions and Burden of Proof

12 Federal Procedure, L Ed, Evidence §§ 33:91 et seq.

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 51 et seq., 61 et seq.

Jones on Evidence (7th ed) §§ 4:1 et seq.

§ 181 Generally; definitions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A presumption is neither evidence nor a substitute for evidence. 18 Properly used, the term "presumption" is a rule of law directing that if a party proves certain facts (the "basic facts") at a trial or hearing, the factfinder must also accept an additional fact (the "presumed fact") as proven unless sufficient evidence is introduced tending to rebut the presumed fact. 19 In a sense, therefore, a presumption is an inference which is mandatory unless rebutted. 20

The underlying purpose and impact of a presumption is to affect the burden of going forward. 21 Depending upon a variety of factors, a presumption may shift the burden of production as to the presumed fact, or may shift both the burden of production and the burden of persuasion. 22

A few states have codified some of the more common presumptions in their evidence codes. 23 Often a statute will provide that a fact or group of facts is prima facie evidence of another fact. 24 Courts frequently recognize this principle in the absence of an explicit legislative directive. 25

§ 181 ----Generally; definitions [SUPPLEMENT]

Case authorities:

CLS Family Ct Act § 413(1)(g)—which creates irrebuttable presumption imposing \$25 per month floor on all child support obligations up to accumulated debt of \$500—flatly contradicts enabling legislation (42 USCS § 667) that commands opportunity in all cases to rebut and drop support award floor to \$0 when impoverished circumstances so dictate; state law is thus preempted by federal statute. *Rose ex rel. Clancy v Moody* (1993) 83 NY2d 65, 607 NYS2d 906, 629 NE2d 378, cert den (US) 128 L Ed 2d 464.

Footnotes

Footnote 18. *Levasseur v Field* (Me) 332 A2d 765; *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded by statute on other grounds as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113); *Connizzo v General American Life Ins. Co.* (Mo App) 520 SW2d 661.

Footnote 19. Inferences and presumptions are a staple of our adversary system of factfinding, since it is often necessary for the trier of fact to determine the existence of an element of a crime—that is an ultimate or elemental fact—from the existence of one or more evidentiary or basic facts. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

Footnote 20. *Legille v Dann*, 178 US App DC 78, 544 F2d 1, 191 USPQ 529; *Murray v Montgomery Ward Life Ins. Co.*, 196 Colo 225, 584 P2d 78; *Re Estate of Borom* (Ind App) 562 NE2d 772; *Manchester v Dugan* (Me) 247 A2d 827; *Ferdinand v Agricultural Ins. Co.*, 22 NJ 482, 126 A2d 323, 62 ALR2d 1179; *Smith v Bohlen*, 95 NC App 347, 382 SE2d 812, affd 328 NC 564, 402 SE2d 380; *Larmay v Van Etten*, 129 Vt 368, 278 A2d 736; *Martin v Phillips*, 235 Va 523, 369 SE2d 397.

As to the validity of mandatory inferences, see § 192.

Forms: General instruction on presumptions. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 51.

Instruction to jury—Presumption based on basic fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 54.

Footnote 21. FRE Rule 301.

Footnote 22. § 198.

Footnote 23. California Evidence Code §§ 621 et seq.; Hawaii Rules of Evidence, Rules 303, 304; Oregon Evidence Code, Rule 311.

Footnote 24. California Evidence Code § 602; Alaska Rule of Evidence, Rule 301(b); Hawaii Rule of Evidence, Rule 305; Maine Rule of Evidence, Rule 301(b); Oregon Rule of Evidence, Rule 311(2); Vermont Rule of Evidence, Rule 301(b); Wisconsin Rule of Evidence, Rule 301.

Footnote 25. American Casualty Co. v Costello, 174 Mich App 1, 435 NW2d 760; Glover v Henry (Tex App Eastland) 749 SW2d 502.

§ 182 Inference distinguished

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An inference is a factual conclusion that can rationally be drawn from other facts. 26

Inferences are by their nature permissive, not mandatory: although the fact proved rationally supports the conclusion the offering party hopes will be inferred, the factfinder is free to accept or reject the inference. 27

In deciding whether an evidentiary device is permissive or mandatory, two factors are paramount: the scope of the inference or presumption and the precise presentation of the presumption to the jury. A presumption's scope includes the statute creating the presumption itself, cases interpreting the presumption, and an evaluation of the probability of the presumed or elemental fact existing upon proof of the basic fact. 28 The jury instructions will also generally be controlling in determining whether an inference will be classified as permissive or mandatory. 29

Footnotes

Footnote 26. Computer Identics Corp. v Southern Pacific Co. (CA1 Mass) 756 F2d 200, 1985-1 CCH Trade Cases ¶ 66466 (an inference is the result of a reasoning process by which a fact or proposition is deduced as a logical consequence from other facts that have already been proven); Reeves v General Foods Corp. (CA5 Tex) 682 F2d 515, 29 BNA FEP Cas 779, 29 CCH EPD ¶ 32967 (disapproved on other grounds by United States Postal Service Bd. of Governors v Aikens, 460 US 711, 75 L Ed 2d 403, 103 S Ct 1478, 31 BNA FEP Cas 609, 31 CCH EPD ¶ 33477, 13 Fed Rules Evid Serv 1368) as stated in Thornbrough v Columbus & G. R. Co. (CA5 Miss) 760 F2d 633, 37 BNA FEP Cas 1414, 37 CCH EPD ¶ 35274; Cummins v King & Sons (Alaska) 453 P2d 465 (an inference is a fact or proposition deduced by process of reasoning as a logical conclusion from other facts); Oana v Haskell, 7 Ariz App 493, 441 P2d 259; Lawton v Dracousis, 14 Mass App 164, 437 NE2d 543, app den 387 Mass 1103, 440 NE2d 1177; Rusk Farms, Inc. v Ralston Purina Co. (Mo App) 689 SW2d 671.

Footnote 27. Sweeney v Erving, 228 US 233, 57 L Ed 815, 33 S Ct 416.

Using the word permissive with the word inference is redundant, since there are no mandatory inferences. *State v Rainey*, 298 Or 459, 693 P2d 635.

Forms: Instruction to jury—Effect of failure to rebut inferences. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 61.

Instructions on inferences drawn from failure to produce evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 62 et seq.

Footnote 28. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

Footnote 29. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

A jury was specifically told that the statutory inference that presence at a still indicated criminal activity in connection with the still was not conclusive, but was merely one circumstance to be considered. *United States v Gainey*, 380 US 63, 13 L Ed 2d 658, 85 S Ct 754. On the other hand, an instruction that the defendant's presence at the still shall be deemed sufficient evidence to authorize a conviction impermissibly authorized a conviction even if the jury disbelieved all of the testimony except the proof of presence at the site. *United States v Romano*, 382 US 136, 15 L Ed 2d 210, 86 S Ct 279.

§ 183 --In criminal cases under Rule 303

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 303 of the Uniform Rules of Evidence, basic facts create at best only an inference from which a presumed fact may be determined at the jury's discretion, but the presumption cannot be compelled at the judge's direction in a criminal case. 30 Thus, such a rule has the effect of reducing presumptions in criminal cases to nothing more than permissible inferences when used against an accused. 31 Such an evidentiary device cannot relieve the state of proving all elements of a crime, 32 and a judge is not authorized to, in effect, direct a partial verdict against the accused on the issue. 33 According to Rule 303, a court is not directed to find a presumed fact against the accused in a criminal case. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror, on the evidence as a whole, including evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury, provided that the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror, on the evidence as a whole, could not find the existence of the presumed fact. 34 Whenever the existence of a presumed fact against the accused is submitted to the jury, the court is required to instruct that the jury may regard the basic facts as sufficient evidence of the presumed fact, but is not required to do so. In addition, if the presumed

fact establishes guilt, is an element of the offense, or negatives a defense, the court is required to instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt. 35

The rule described above applies, except as otherwise provided by statute, with regard to common law and statutory presumptions against the accused, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt. 36 Thus, even if it is a common law presumption in tort cases that one who is speeding is negligent, the rule has the effect that this presumption at best creates only an inference in a criminal case. 37 The rule's language that a statutory provision dealing with prima facie evidence establishes a presumption also indicates that the rule governs the effect of such statutes as those providing that the proof of unlawful possession of a controlled substance is prima facie evidence of knowledge of its character. 38

Footnotes

Footnote 30. State v Dyess, 124 Wis 2d 525, 370 NW2d 222.

Footnote 31. State v Rainey, 298 Or 459, 693 P2d 635.

Footnote 32. State v Rainey, 298 Or 459, 693 P2d 635.

Footnote 33. State v Dyess, 124 Wis 2d 525, 370 NW2d 222.

Footnote 34. Uniform Rules of Evidence, Rule 303(b).

Footnote 35. Uniform Rules of Evidence, Rule 303(c).

Footnote 36. Uniform Rules of Evidence, Rule 303(a).

Footnote 37. State v Dyess, 124 Wis 2d 525, 370 NW2d 222.

Footnote 38. State v Rainey, 298 Or 459, 693 P2d 635.

§ 184 Conclusive presumptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A conclusive or irrebuttable presumption is not a presumption at all; it is a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted. 39 Such presumptions rest upon grounds of expediency or public policy so compelling in character as to override the requirement of proof. 40

§ 184 ----Conclusive presumptions [SUPPLEMENT]

Case authorities:

The trial court did not err in a sentencing hearing for first-degree murder by submitting evidence of a prior attempted rape conviction, submitting the aggravating circumstance of a prior felony involving violence, or in its instructions where the State submitted evidence that defendant had been convicted by General Court Martial of attempted rape. Attempted rape is a felony under North Carolina law, as well as under military law, and, since the military courts have held all rapes to be crimes of violence under military law, and all attempts to commit rape therefore by definition involve the use or threat of force, there was no need to consider whether there is a non-violent crime of attempted rape under North Carolina law. The evidence presented concerning the prior felony was proper and sufficient to establish that the defendant had been convicted of a prior felony involving the use or threat of violence to the person and the court's instruction did not constitute an impermissible conclusive presumption as it permitted the jury to make the determination as to whether defendant had been convicted. G.S. § 15A- 2000(e)(3). *State v Green* (1994) 336 NC 142, 443 SE2d 14.

Footnotes

Footnote 39. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 49 L Ed 2d 752, 96 S Ct 2882, 1 Fed Rules Evid Serv 243 (superseded on other grounds by statute as stated in *Freeman United Coal Mining Co. v Office of Workers' Compensation Program* (CA7) 999 F2d 291); *Legille v Dann*, 178 US App DC 78, 544 F2d 1, 191 USPQ 529; *Jackson v Jackson*, 67 Cal 2d 245, 60 Cal Rptr 649, 430 P2d 289; *State ex rel. Juvenile Dept. of Deschutes County v Merritt*, 83 Or App 378, 732 P2d 46.

Footnote 40. *United States v Provident Trust Co.*, 291 US 272, 78 L Ed 793, 54 S Ct 389, 4 USTC ¶ 1229, 13 AFTR 861.

§ 185 Rationale

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Most presumptions are based at least in part on the high probability that if the basic facts exist, the presumed fact also exists; the presumed fact is so likely to follow from the basic fact that in the absence of rebutting evidence merely permitting the factfinder to infer the presumed fact does not adequately reflect the substantial likelihood that the presumed fact is true. 41

Presumptions are sometimes created to offset one party's advantage or disadvantage with regard to availability of proof; for instance, evidence that the shipper delivered the freight in good condition to the first of several carriers triggers a presumption that the damage was caused by the last carrier. 42 Similarly, in certain securities fraud actions, once plaintiffs prove omissions or misrepresentations by the defendants, a presumption exists that plaintiff relied on these omissions and misrepresentations to its detriment. 43

Presumptions sometimes serve the purpose of facilitating the resolution of factual disputes that otherwise might not be capable of decision; for instance, the presumption that someone who has not been seen nor heard of for seven years is dead. 44

Courts and legislatures also create presumptions to implement social policy by assisting one class of litigants against another. 45

Footnotes

Footnote 41. *Swain v Neeld*, 28 NJ 60, 145 A2d 320.

Footnote 42. *Chicago & N. R. Co. v C. C. Whitnack Produce Co.*, 258 US 369, 66 L Ed 665, 42 S Ct 328.

Footnote 43. *Lewis v McGraw* (CA2 NY) 619 F2d 192, CCH Fed Secur L Rep ¶ 97344, cert den 449 US 951, 66 L Ed 2d 214, 101 S Ct 354; *Sharp v Coopers & Lybrand* (CA3 Pa) 649 F2d 175, CCH Fed Secur L Rep ¶ 97971, 71 OGR 555, cert den 455 US 938, 71 L Ed 2d 648, 102 S Ct 1427 and (criticized on other grounds by *Re Atlantic Financial Management, Inc.* (CA1 Mass) 784 F2d 29, CCH Fed Secur L Rep ¶ 92482) and (criticized on other grounds by *Kersh v General Council of the Assemblies of God* (CA9 Cal) 804 F2d 546, CCH Fed Secur L Rep ¶ 93000) and (ovrld on other grounds by *Re Data Access Systems Secur. Litigation* (CA3 NJ) 843 F2d 1537, CCH Fed Secur L Rep ¶ 93703) as stated in *McCarter v Mitcham* (CA3 Pa) 883 F2d 196, CCH Fed Secur L Rep ¶ 94547.

Footnote 44. 22A Am Jur 2d, Death §§ 551 et seq.

Footnote 45. *Keyes v School Dist.*, 413 US 189, 37 L Ed 2d 548, 93 S Ct 2686, reh den 414 US 883, 38 L Ed 2d 131, 94 S Ct 27, on remand (DC Colo) 368 F Supp 207, later proceeding (DC Colo) 380 F Supp 673, affd in part and revd in part on other grounds (CA10 Colo) 521 F2d 465, cert den 423 US 1066, 46 L Ed 2d 657, 96 S Ct 806, later proceeding (DC Colo) 439 F Supp 393, later proceeding (DC Colo) 474 F Supp 1265, later proceeding (DC Colo) 540 F Supp 399, later proceeding (DC Colo) 576 F Supp 1503, later proceeding (DC Colo) 609 F Supp 1491, later proceeding (DC Colo) 653 F Supp 1536, later proceeding (DC Colo) 670 F Supp 1513, affd, in part, remanded (CA10 Colo) 895 F2d 659, cert den 498 US 1082, 112 L Ed 2d 1040, 111 S Ct 951 and (disapproved on other grounds by *Price v Austin Independent School Dist.* (CA5 Tex) 945 F2d 1307) and (disapproved on other grounds by *Daly v Hill* (CA4 NC) 790 F2d 1071) and (among conflicting authorities noted in *Lujan v Franklin County Bd. of Education* (CA6 Tenn) 766 F2d 917, 38 BNA FEP Cas 9, 37 CCH EPD ¶ 35337).

§ 186 Choice of law

<p>View Entire Section Go to Parallel Reference Table</p>

States have taken a variety of approaches to applying choice of law principles to burdens and presumptions. The traditional approach to choice of law issues applies the law of the forum state in all procedural matters while applying applicable foreign law as to substantive matters; because presumptions and burdens of proof are perceived as procedural rather than substantive, they are governed by the law of the forum. 46

When the law of a foreign state on burdens of proof or presumptions is inseparably connected to the substantive right in question, or is intended to affect the substantive rights of the parties, 47 and does not violate the public policy of the forum state, the law of the foreign state, rather than that of the forum, governs. 48

The contact approach applies the law of the state which is the most interested in the outcome of the particular question of law. 49

A third approach provides that the forum will apply its own local law in determining which party has the burden of persuading the trier of fact on a particular issue unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect the decision of the issue rather than to regulate the conduct of the trial. 50

Regardless of a state's approach to choice of law, courts as a rule recognize that conclusive presumptions affect the substantive rights of the parties; thus, where the substantive law is supplied by a foreign state, the forum state will apply the former's conclusive presumptions. 51

Footnotes

Footnote 46. *Sun Oil Co. v Wortman*, 486 US 717, 100 L Ed 2d 743, 108 S Ct 2117, 101 OGR 1; *Sylvania Electric Products, Inc. v Barker* (CA1 Mass) 228 F2d 842, cert den 350 US 988, 100 L Ed 854, 76 S Ct 475; *Re Medico Associates, Inc.* (BC DC Mass) 23 BR 307; *Computerized Radiological Services, Inc. v Syntex Corp.* (ED NY) 595 F Supp 1495, 40 UCCRS 49, affd in part and revd in part (CA2 NY) 786 F2d 72, 42 UCCRS 1656; *Jackson v Coggan* (SD NY) 330 F Supp 1060; *Maryland Casualty Co. v Williams* (CA5 Miss) 377 F2d 389, 35 ALR3d 275; *Estep v Norfolk & W. R. Co.* (CA6 Ky) 192 F2d 889; *Alexander v Inland Steel Co.* (CA8 Mo) 263 F2d 314; *State Mut. Life Assur. Co. v Wittenberg* (CA8 Ark) 239 F2d 87; *United Air Lines, Inc. v Wiener* (CA9 Cal) 335 F2d 379, 8 FR Serv 2d 49b.42, Case 1, cert dismd 379 US 951, 13 L Ed 2d 549, 85 S Ct 452; *Weber v Continental Casualty Co.* (CA10 Okla) 379 F2d 729; *Amerada Hess Pipeline Corp. v Alaska Public Utilities Com.* (Alaska) 711 P2d 1170; *Marquis v St. Louis S. F. R. Co.* (2nd Dist) 234 Cal App 2d 335, 44 Cal Rptr 367; *Chasse v Albert*, 147 Conn 680, 166 A2d 148; *Miller & Long Co. v Shaw* (Dist Col App) 204 A2d 697 (disapproved on other grounds by *Myers v Gaither* (Dist Col App) 232 A2d 577); *Holt Service Co. v Modlin*, 163 Ga App 283, 293 SE2d 741; *Mudd v Goldblatt Bros., Inc.* (1st Dist) 118 Ill App 3d 431, 73 Ill Dec 657, 454 NE2d 754; *Tietloff v Lift-A-Loft Corp.* (Ind App) 441 NE2d 986; *Vernon v Aubinoe*, 259 Md 159, 269 A2d 620; *Joffre v Canada Dry Ginger Ale, Inc.*, 222 Md 1, 158 A2d 631; *Finch v Hughes Aircraft Co.*, 57 Md App 190, 469 A2d 867, cert den 300 Md 88, 475 A2d 1200, reconsideration den 301 Md 41, 481 A2d 801 and cert den 469 US 1215, 84 L Ed 2d 336, 105 S Ct 1190, reh den 471 US 1049, 85 L Ed 2d 341, 105 S Ct 2043, later proceeding (CA FC) 926 F2d 1574, 17 USPQ2d 1914 and (criticized on other grounds by *Newell v Richards*, 83 Md App 371, 574 A2d 370) and (criticized on other grounds by *Newell v Richards* (Md App) 1990 Md

App LEXIS 133); *Leventhal v American Airlines, Inc.*, 347 Mass 766, 196 NE2d 924; *Stuart v State Farm Mut. Auto. Ins. Co.* (Mo App) 699 SW2d 450; *Arnold v Ray Charles Enterprises, Inc.*, 264 NC 92, 141 SE2d 14; *McDougall v Glenn Cartage Co.*, 169 Ohio St 522, 9 Ohio Ops 2d 12, 160 NE2d 266; *Sloniger v Enterline*, 400 Pa 457, 162 A2d 397; *Vicars v Atlantic Discount Co.*, 205 Va 934, 140 SE2d 667.

Footnote 47. *Kabo v Summa Corp.* (ED Pa) 523 F Supp 1326 (where the burden of proof has such a substantive impact as to affect the decision of the case, or is intertwined with the statutory remedy, the burden of proof is deemed substantive, and should be determined according to the otherwise applicable law).

Footnote 48. *Cardell v Morrison* (DC Mass) 138 F Supp 817; *New York C. R. Co. v Monroe* (SD NY) 188 F Supp 826, 15 Ohio Ops 2d 31; *Melville v American Home Assur. Co.* (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756; *Sanders v Glenshaw Glass Co.* (CA3 Pa) 204 F2d 436, cert den 346 US 916, 98 L Ed 411, 74 S Ct 278; *Lachman v Pennsylvania Greyhound Lines, Inc.* (CA4 Va) 160 F2d 496; *Maryland Casualty Co. v Williams* (CA5 Miss) 377 F2d 389, 35 ALR3d 275; *Pilot Life Ins. Co. v Boone* (CA5 Ala) 236 F2d 457; *Jupiter v United States* (ED La) 181 F Supp 294, affd (CA5 La) 287 F2d 388; *Thompson v Boswell* (CA6 Tenn) 166 F2d 106; *Maurer v United States* (ED Wis) 219 F Supp 253; *Keeshin Motor Express Co. v Park Davis Lines, Inc.* (DC Mo) 119 F Supp 561; *Knight v Handley Motor Co.* (Dist Col App) 198 A2d 747 (disapproved on other grounds by *Myers v Gaither* (Dist Col App) 232 A2d 577); *Valleroy v Southern R. Co.* (Mo) 403 SW2d 553; *Gordon's Transports, Inc. v Bailey*, 41 Tenn App 365, 294 SW2d 313; *De Santis v Wackenhut Corp.* (Tex App Houston (14th Dist)) 732 SW2d 29, writ granted (Tex) 31 Tex Sup Ct Jour 137 and affd in part and revd in part on other grounds (Tex) 31 Tex Sup Ct Jour 616, op withdrawn, substituted op, on reh (Tex) 793 SW2d 670, 5 BNA IER Cas 739, 1990-2 CCH Trade Cases ¶ 69147, reh overr (Sep 12, 1990) and cert den 498 US 1048, 112 L Ed 2d 775, 111 S Ct 755, 6 BNA IER Cas 128; *Buhler v Maddison*, 109 Utah 267, 176 P2d 118, 168 ALR 177; *Goldman v Beaudry*, 122 Vt 299, 170 A2d 636.

Footnote 49. *Melville v American Home Assur. Co.* (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756 (in a diversity action brought in Pennsylvania by insured against insurance company located in New York, the court applied Delaware law regarding the presumption with respect to suicide, because insured was a Delaware resident and had purchased the policy in Delaware, and the accident occurred in Delaware); *Headen v Pope & Talbot, Inc.* (CA3 Pa) 252 F2d 739 (law of the state where parties were married did not control as to presumptions concerning validity of marriage); *Patten v General Motors Corp., Chevrolet Motor Div.* (WD Okla) 699 F Supp 1500 (in a wrongful death and products liability action brought in Oklahoma against businesses located in Michigan, Ohio, and Florida concerning an accident in Colorado, Oklahoma's interest in compensating the survivors justified application of Oklahoma law on burden of persuasion, because the van was put into the stream of commerce in Oklahoma, plaintiffs and decedents were Oklahoma residents, and defendants did business in Oklahoma); *Sadberry v Griffiths* (4th Dist) 191 Cal App 2d 610, 12 Cal Rptr 773 (in holding that California law applied as to a presumption of motor vehicle ownership, the court gave some consideration to the fact that California was the state in which plaintiffs were injured as well as the state in which the forum was located); *Myers v Gaither* (Dist Col App) 232 A2d 577, remanded 131 US App DC 216, 404 F2d 216 (contacts with the District of Columbia were superior to those of any other jurisdiction such that District of Columbia law governed).

Footnote 50. *Computerized Radiological Services, Inc. v Syntex Corp.* (ED NY) 595 F Supp 1495, 40 UCCRS 49, affd in part and revd in part (CA2 NY) 786 F2d 72, 42 UCCRS 1656; *Melville v American Home Assur. Co.* (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756; *Amerada Hess Pipeline Corp. v Alaska Public Utilities Com.* (Alaska) 711 P2d 1170; *Holt Service Co. v Modlin*, 163 Ga App 283, 293 SE2d 741; *Babcock v Chesapeake & O. R. Co.* (1st Dist) 83 Ill App 3d 919, 38 Ill Dec 841, 404 NE2d 265; *Tietloff v Lift-A-Loft Corp.* (Ind App) 441 NE2d 986; *Finch v Hughes Aircraft Co.*, 57 Md App 190, 469 A2d 867, cert den 300 Md 88, 475 A2d 1200, reconsideration den 301 Md 41, 481 A2d 801 and cert den 469 US 1215, 84 L Ed 2d 336, 105 S Ct 1190, reh den 471 US 1049, 85 L Ed 2d 341, 105 S Ct 2043, later proceeding (CA FC) 926 F2d 1574, 17 USPQ2d 1914 and (criticized on other grounds by *Newell v Richards*, 83 Md App 371, 574 A2d 370) and (criticized on other grounds by *Newell v Richards* (Md App) 1990 Md App LEXIS 133).

Footnote 51. *Maryland Casualty Co. v Williams* (CA5 Miss) 377 F2d 389, 35 ALR3d 275; *Kowalski v Wojtkowski*, 19 NJ 247, 116 A2d 6, 53 ALR2d 556 (disapproved on other grounds by *B. v O.*, 50 NJ 93, 232 A2d 401); *Buhler v Maddison*, 109 Utah 267, 176 P2d 118, 168 ALR 177.

§ 187 --Federal or state law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 302 of the Federal Rules of Evidence provides that in civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with state law. 52 For choice of law purposes, a presumption which supplies a fact which is an element of a claim or defense, or which affects the decision of the issue, is substantive, and if state law provides the substantive rule of decision, the forum state's conflict of laws rules determine what substantive law applies and the presumptions that go with it. 53 Rule 302 does not, however, apply to mere inferences. 54

◆ Comment: State law usually applies in diversity cases, but this designation is not completely accurate, since the *Erie* doctrine applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. Hence, FRE 302 employs the phrase "as to which State law supplies the rule of decision." 55

Rule 302 applies to presumptions that involve a fact which is an element of a claim or defense, such as the presumptions that a decedent was exercising due care, 56 or against suicide. 57 On the other hand, it does not apply to a "tactical" presumption, where such is not an element of the plaintiff's case. 58

The Uniform Rules of Evidence conversely provide that in civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with the federal law. 59

Footnotes

Footnote 52. FRE 302.

Footnote 53. *Melville v American Home Assur. Co.* (ED Pa) 443 F Supp 1064, 3 Fed Rules Evid Serv 746, revd on other grounds (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756.

Annotation: Conflict of laws as to presumptions and burden of proof concerning facts of civil case, 35 ALR3d 289.

Footnote 54. *Herbert v Wal-Mart Stores, Inc.* (CA5 La) 911 F2d 1044, 31 Fed Rules Evid Serv 273, reh den, en banc (CA5 La) 917 F2d 559.

Footnote 55. Advisory Committee Notes to FRE 302.

As to when state law provides the rule of decision, see 32 Am Jur 2d, Federal Practice and Procedure §§ 267 et seq.

Footnote 56. *Monger v Cessna Aircraft Co.* (CA8 Mo) 812 F2d 402, 22 Fed Rules Evid Serv 835.

Footnote 57. *Melville v American Home Assur. Co.* (ED Pa) 443 F Supp 1064, 3 Fed Rules Evid Serv 746, revd on other grounds (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756.

Footnote 58. *Louisell and Mueller*, Federal Evidence § 75 (giving, as an example, a suit to collect on an account where receipt of the account by mail is not an element of the plaintiff's case).

Footnote 59. Uniform Rules of Evidence, Rule 302.

Many states' versions of the Uniform Rules omit this provision. See 13A ULA, Uniform Rules of Evidence, Rule 302, Variations from Official Text.

§ 188 Administrative presumptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Administrative presumptions must satisfy a test of logical probability. 60 This appears to be a somewhat more demanding test than the some rational connection test enunciated for legislative presumptions. 61

An administrative presumption's usefulness, and the degree to which it is needed to further the reasons underlying its creation, are relevant considerations. 62

Assessment of factual probability, usefulness, and necessity is sometimes implicit rather than explicit, but these remain significant considerations. 63

To be constitutional, a presumption must afford a party a fair opportunity to rebut it. 64

Footnotes

Footnote 60. *NLRB v Baptist Hospital, Inc.*, 442 US 773, 61 L Ed 2d 251, 99 S Ct 2598, 101 BNA LRRM 2556, 86 CCH LC ¶ 11351, on remand (CA6) 602 F2d 131, 102 BNA LRRM 2640, 87 CCH LC ¶ 11624, later proceeding 246 NLRB 149, 102 BNA LRRM 1418, 1979-80 CCH NLRB ¶ 16363 (presumptions promulgated by the NLRB must have a sound factual connection between the basic and the presumed facts); *NLRB v Los Angeles New Hospital (CA9)* 640 F2d 1017, 106 BNA LRRM 2855, 90 CCH LC ¶ 12637.

Footnote 61. See § 190 for a discussion of the constitutional issues present with legislatively created presumptions.

Footnote 62. *NLRB v Baptist Hospital, Inc.*, 442 US 773, 61 L Ed 2d 251, 99 S Ct 2598, 101 BNA LRRM 2556, 86 CCH LC ¶ 11351, on remand (CA6) 602 F2d 131, 102 BNA LRRM 2640, 87 CCH LC ¶ 11624, later proceeding 246 NLRB 149, 102 BNA LRRM 1418, 1979-80 CCH NLRB ¶ 16363; *Holland Livestock Ranch v United States (CA9 Nev)* 714 F2d 90 (a presumption could not be used to prove the act of trespass itself, because the presumption was not necessary to prove trespass); *Holland Livestock Ranch v United States (CA9 Nev)* 655 F2d 1002, later proceeding (DC Nev) 588 F Supp 943, 14 ELR 20852 (once some actual trespass had been proved, a presumption could be used in measuring damages caused by grazing, because demonstrating each individual trespass would be extremely difficult, if not impossible).

Footnote 63. *Jensen v United States (DC NJ)* 743 F Supp 1091, holding valid the National Oceanic and Atmospheric Administration's presumption that if three one-pound samples taken from a multi-hundred-pound catch of scallops failed to satisfy size and weight standards, the entire catch violated the standards, despite petitioners' claim that the presumption was irrational because the size of the sample is statistically insignificant.

Footnote 64. *Straughn v K & K Land Management, Inc. (Fla)* 326 So 2d 421; *B.R. v Department of Health & Rehabilitative Services (Fla App D2)* 558 So 2d 1027, 14 FLW 2837, review den (Fla) 567 So 2d 434.

§ 189 --Applicability of Rule 301

<p>View Entire Section Go to Parallel Reference Table</p>

There is a split of authority as to whether or not Rule 301 of the Federal Rules of Evidence, providing that a presumption does not shift the burden of proof, 65 applies to

regulatory and administrative hearings and trials; some courts holding the rule applicable to such proceedings, 66 while others hold that such proceedings are not civil actions and proceedings as meant by Rule 301 because they do not fall within Rule 1101, which defines the proceedings to which the Federal Rules of Evidence apply. 67 Where Congress explicitly directs that the Federal Rules of Evidence should apply to such proceedings, however, Rule 301 is applicable. 68

Assuming the rule applies to such proceedings, courts are divided as to whether presumptions created by regulatory agencies and used at agency proceedings are subject to Rule 301. 69

Footnotes

Footnote 65. FRE 301 is discussed in this regard in § 195.

Footnote 66. *Alabama By-Products Corp. v Killingsworth* (CA11) 733 F2d 1511, 15 Fed Rules Evid Serv 1062.

Footnote 67. *American Coal Co. v Benefits Review Bd., United States Dept. of Labor* (CA10) 738 F2d 387, 16 Fed Rules Evid Serv 54.

Footnote 68. *Beth Israel Hospital & Geriatric Center v NLRB* (CA10) 688 F2d 697, 111 BNA LRRM 2384, 95 CCH LC ¶ 13770, 11 Fed Rules Evid Serv 920, cert dismd 459 US 1025, 74 L Ed 2d 522, 103 S Ct 433, 96 CCH LC ¶ 14034, later proceeding 289 NLRB 249, 129 BNA LRRM 1263, 1987-88 CCH NLRB ¶ 19470.

Footnote 69. *Big Y Foods, Inc. v NLRB* (CA1) 651 F2d 40, 107 BNA LRRM 2971, 91 CCH LC ¶ 12815 (Rule 301 did not limit the effect of the so-called presumption of the propriety of a bargaining unit, because the presumption was a "substantive, not a procedural, presumption such as is set forth in Rule 301"); *Carozza v United States Steel Corp.* (CA3) 727 F2d 74; *Peabody Coal Co. v Director, Office of Workers' Compensation Programs, United States Dept. of Labor* (CA7) 778 F2d 358; *NLRB v Tahoe Nugget, Inc.* (CA9) 584 F2d 293, 99 BNA LRRM 2509, 84 CCH LC ¶ 10793, 3 Fed Rules Evid Serv 884, cert den 442 US 921, 61 L Ed 2d 290, 99 S Ct 2847, 101 BNA LRRM 2428, 86 CCH LC ¶ 11322, reh den 444 US 887, 62 L Ed 2d 122, 100 S Ct 187 (Rule 301 does not apply to an NLRB presumption that a union represents a majority of its members); *American Coal Co. v Benefits Review Bd., United States Dept. of Labor* (CA10) 738 F2d 387, 16 Fed Rules Evid Serv 54 (provisions in the Black Lung Benefits Act which specifically authorize an official or agency to create presumptions is a provision which "otherwise provides" within the meaning of Rule 301).

B. Constitutional Issues Affecting Validity of Presumptions [190-193]

Research References

ALR Digests: Evidence §§ 92 et seq.

ALR Index: Presumptions and Burden of Proof

Jones on Evidence (7th ed) §§ 4:55 et seq., 5:27 et seq.

Wharton's Criminal Evidence (14th ed, Torcia) § 34

§ 190 In civil litigation

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Because a presumption is a procedural rule that, at most, imposes the burden of persuasion, presumptions in civil litigation generally do not raise constitutional issues; accordingly, whenever a legislature may enact legislation directly imposing liability on proof of certain facts, it may instead provide that those facts create a presumption which shifts the burden of persuasion on the ultimate issue. 70

Where a presumption intrudes upon a significant liberty interest, however, it may violate due process of law. 71 Barring special circumstances, however, all that is required is that there be some rational connection between the basic fact and the presumed fact. 72

A court assessing a constitutional challenge to a conclusive presumption assesses the adequacy of the fit between the classification and the policy that the classification serves. Thus, its constitutionality is measured by the same standards as are substantive rules of law generally. 73

§ 190 ----In civil litigation [SUPPLEMENT]

Case authorities:

Rebuttable presumptions, which merely shift to challenging party burden of presenting credible evidence of nonreceipt of mailed notice, are constitutional. *Mullen v Braatz* (1993, App) 179 Wis 2d 749, 508 NW2d 446.

Footnotes

Footnote 70. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 49 L Ed 2d 752, 96 S Ct 2882, 1 Fed Rules Evid Serv 243 (superseded on other grounds by statute as stated in *Freeman United Coal Mining Co. v Office of Workers' Compensation Program* (CA7) 999 F2d 291); *Ferry v Ramsey*, 277 US 88, 72 L Ed 796, 48 S Ct 443.

Footnote 71. *Stanley v Illinois*, 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208, holding unconstitutional violation of the due process clause of the Fourteenth Amendment a statutory presumption that unmarried fathers are unsuitable and neglectful parents.

Footnote 72. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 49 L Ed 2d 752, 96 S Ct 2882, 1 Fed Rules Evid Serv 243 (superseded on other grounds by statute as stated in *Freeman United Coal Mining Co. v Office of Workers' Compensation Program* (CA7) 999 F2d 291); *Dick v New York Life Ins. Co.*, 359 US 437, 3 L Ed 2d 935, 79 S Ct 921; *Mobile, J. & K. C. R. Co. v Turnipseed*, 219 US 35, 55 L Ed 78, 31 S Ct 136; *Pizza v Wolf Creek Ski Dev. Corp.* (Colo) 711 P2d 671, 55 ALR4th 607 (criticized on

other grounds by *Tri-Aspen Constr. Co. v Johnson* (Colo) 714 P2d 484).

Footnote 73. *Michael H. v Gerald D.*, 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573.

§ 191 Rational connection test for presumptions and inferences in criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A criminal law presumption violates due process if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of the lack of connection between the two in common experience. 74

For example, the necessary rational connection has been found wanting where the presumptions directed that possession of marijuana or cocaine was sufficient evidence to permit conviction of the crime of transporting and concealing it with knowledge of its illegal importation, unless the defendant explained otherwise to the jury's satisfaction. 75 As to heroin, however, the presumption has been held not arbitrary and not a violation of due process. 76

The constitutionality of an instruction to the jury that possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which it may reasonably draw the inference that the person in possession knew the property had been stolen, has also been upheld. 77

Footnotes

Footnote 74. *Tot v United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241, holding a violation of due process the statutory presumption that the possession of a firearm shall be presumptive evidence that such firearm had been shipped in interstate commerce, because it ignored the substantial possibility that the defendants might have obtained the firearms from an intrastate source.

A presumption that someone present at an illegal still was in possession of it failed both the rational connection and the judicial instruction tests because, although presence tells us that the defendant very likely played a part in the illicit scheme, it provided no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. *United States v Romano*, 382 US 136, 15 L Ed 2d 210, 86 S Ct 279.

The clear connection between the basic fact, presence at an illegal still, and the presumed fact, in essence, any criminal involvement in its operation, passed the rational connection

test because presence at an illegal still strongly suggested that the defendant was a participant in its operation. *United States v Gainey*, 380 US 63, 13 L Ed 2d 658, 85 S Ct 754.

Footnote 75. *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850); *Leary v United States*, 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532, 69-2 USTC ¶ 15900, 23 AFTR 2d 69-2006, on remand (CA5 Tex) 544 F2d 1266, reh den (CA5 Tex) 548 F2d 355 (the probability that the drug had been imported was insufficient to sustain the presumption, and that to presume knowledge of importation from mere possession was so dubious as to be arbitrary).

Footnote 76. *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850).

Footnote 77. *Barnes v United States*, 412 US 837, 37 L Ed 2d 380, 93 S Ct 2357, holding that the nexus between the basic fact and the presumed fact was clearly sufficient to enable the jury to find beyond a reasonable doubt that those in the unexplained possession of recently stolen property know it to have been stolen.

§ 192 Tests for mandatory and permissive presumptions or inferences

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The degree of persuasiveness required to uphold a criminal law presumption depends upon whether the presumption is permissive or mandatory. 78 A permissive inference, that is, one from which the jury may, but need not, infer the presumed fact from the basic fact, satisfies due process so long as a rational factfinder could conclude that, once the basic facts are proven, the presumed fact is more probably than not also true. A mandatory presumption of the criminal law, that is, one from which the jury must find the presumed fact from the basic fact unless the defendant persuades it to the contrary, satisfies due process only if a rational factfinder, convinced that the basic facts are true and relying only on the basic facts, could find beyond a reasonable doubt that the presumed fact is also true. 79

Where the judge has told the jury it may ignore the presumption even in the absence of contradicting evidence, its validity is assessed, not in the abstract, but in light of all the evidence in the record. But to the extent that the trier of fact is forced to abide by a presumption, and not reject it based on an independent evaluation of the facts presented by the prosecution in the particular case, the analysis of the presumption's validity is logically divorced from those facts, and hence must be assessed on its face, without regard to any other evidence that has been introduced at trial. 80

◆ Observation: The ultimate test of either type of presumption is whether the inference or presumption undermines the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt. 81

Footnotes

Footnote 78. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213, stressing the distinction between two types of evidentiary device; a permissive inference or presumption, what is referred to in civil litigation as an inference, and a mandatory presumption, in essence, a presumption that requires the defendant at least to raise a reasonable doubt as to the presumed fact.

◆ Reminder: Under Uniform Rules of Evidence, Rule 303, presumptions are only permissive in criminal cases. § 183.

As to the distinction between inferences and presumptions, generally, see § 182.

Footnote 79. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

Footnote 80. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

Footnote 81. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

§ 193 --Probability

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The factual probability of the presumed fact must be much greater for a mandatory than for a permissive presumption. A permissive inference or presumption allows, but does not require, the factfinder to infer the presumed fact from proof of the basic fact, and places no burden of any kind on the defendant. 82 Therefore, the constitutionality of a permissive inference or presumption is assessed against a comparatively liberal standard; 83 that is, a permissive inference or presumption complies with due process so long as a rational factfinder could conclude that the presumed fact is more likely than not to flow from the basic fact. 84

A mandatory presumption, on the other hand, may affect not only the strength of the no reasonable doubt burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. 85 Thus, a mandatory presumption is constitutional only if a rational factfinder, who was convinced of the basic facts, could, without considering any other evidence, find the presumed fact beyond a reasonable doubt. 86 A mandatory presumption need not, however, be accurate in every imaginable case, so long as it passes the rational factfinder beyond a reasonable doubt standard. 87

Footnotes

Footnote 82. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213; *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850).

Footnote 83. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213; *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850) (permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the beyond a reasonable doubt standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference).

Footnote 84. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213; *Leary v United States*, 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532, 69-2 USTC ¶ 15900, 23 AFTR 2d 69-2006, on remand (CA5 Tex) 544 F2d 1266, reh den (CA5 Tex) 548 F2d 355; *Tot v United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241.

Footnote 85. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213; *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850); *Leary v United States*, 395 US 6, 23 L Ed 2d 57, 89 S Ct 1532, 69-2 USTC ¶ 15900, 23 AFTR 2d 69-2006, on remand (CA5 Tex) 544 F2d 1266, reh den (CA5 Tex) 548 F2d 355; *United States v Romano*, 382 US 136, 15 L Ed 2d 210, 86 S Ct 279; *Tot v United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241.

Footnote 86. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213.

Giving an instruction that there is a mandatory presumption of intent to steal from failure to return rented property within specified period could not be harmless error. *Yates v Evatt*, 500 US 391, 114 L Ed 2d 432, 111 S Ct 1884, 91 CDOS 3849, 91 Daily Journal DAR 6160 (ovrld on other grounds by *Estelle v McGuire (US)* 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305).

Instructing the jury that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted, and that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted, violated due process. *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965 (criticized on other grounds by *Estelle v McGuire (US)* 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305) as stated in *People v Clair*, 2 Cal 4th 629, 7 Cal Rptr 2d 564, 828 P2d 705, 92 CDOS 3966, 92 Daily Journal DAR 6358, reh den (Cal) 1992 Cal LEXIS 3179 and stay gr (Cal) 1992 Cal LEXIS 4259 and cert den (US) 122 L Ed 2d 155, 113 S Ct 1006.

Trial judge's instructions to the jury that the law presumes that a person intends the

ordinary consequences of his voluntary acts violated the constitution because it communicated to the jury that the state did not have to prove the element of intent, (Sandstrom v Montana, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450, on remand 184 Mont 391, 603 P2d 244), and even though an instruction of this type might provide that the presumption of intent could be overcome by other evidence, the deprivation of due process persists (Myrick v Maschner (CA10 Kan) 799 F2d 642).

Footnote 87. County Court of Ulster County v Allen, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213, criticizing the Second Circuit for invalidating a presumption because it might not be valid in implausible hypothetical situations.

C. Effect of Presumptions [194-196]

Research References

FRE Rule 301

ALR Digests: Evidence §§ 92 et seq.

ALR Index: Presumptions and Burden of Proof

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 51 et seq.

12 Federal Procedure, L Ed, Evidence §§ 33:91 et seq.

Jones on Evidence (7th ed) §§ 4:1 et seq.

§ 194 Generally

<p>View Entire Section Go to Parallel Reference Table</p>

The traditional theory treats a presumption as merely a procedural device whose purpose is merely to facilitate the trial process by shifting the burden of production as to a presumed fact from one party to another, but not the burden of persuasion. 88

The reformist theory objects that presumptions are created to deal with significant concerns of procedure and policy; by treating a presumption as little more than a permissive inference with a minor procedural appendage, which disappears once the adversely affected party verbalizes a denial of the presumed fact. 89 The probability theory similarly reasons that any presumption that is based upon logical probability, that is, one in which the basic facts have probative value of the existence of the presumed fact, ought to shift the burden of persuasion to the party adversely affected by the presumption. 90

The public policy theory reasons that if a presumption's primary purpose is merely to facilitate the trial process, it should shift only the burden of production. If a presumption was created to help implement a broader social policy, however, it should also shift the burden of persuasion. The practical difficulty with this approach is that most presumptions reflect a mixture of procedural and policy concerns. 91

Footnotes

Footnote 88. *Union P. R. Co. v United States*, 208 Ct Cl 1, 524 F2d 1343, 75-2 USTC ¶ 9800, 76-1 USTC ¶ 9308, 36 AFTR 2d 75-6251, 37 AFTR 2d 76-996, cert den 429 US 827, 50 L Ed 2d 89, 97 S Ct 83, later proceeding 9 Cl Ct 702, 86-1 USTC ¶ 9259, 57 AFTR 2d 86-933, affd (CA FC) 847 F2d 1567, 88-1 USTC ¶ 9357, 61 AFTR 2d 88-1200 and on remand (Ct Cl Tr Div) 76-2 USTC ¶ 9727, 38 AFTR 2d 76-6079, affd 213 Ct Cl 715, 77-1 USTC ¶ 9247, 39 AFTR 2d 77-895; *Nationwide Mut. Ins. Co. v Griffin* (Fla App D4) 222 So 2d 754; *Sumpter v State*, 261 Ind 471, 306 NE2d 95, app dismd 419 US 811, 42 L Ed 2d 38, 95 S Ct 25 and appeal after remand 264 Ind 117, 340 NE2d 764, cert den 425 US 952, 48 L Ed 2d 196, 96 S Ct 1727 and (ovrld by on other grounds *Taylor v State* (Ind) 420 NE2d 1231).

Annotation: Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Footnote 89. *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded on other grounds by statute as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113).

Footnote 90. *Union Cent. Life Ins. Co. v Sims*, 208 Ark 1069, 189 SW2d 193, applying the probability theory to the presumption of accidental death rather than death from suicide or violation of law.

Footnote 91. See § 185 for a discussion of social policy as a rationale for presumptions.

§ 195 Under Federal Rule 301 and similar state rules

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 301 of the Federal Rules of Evidence provides generally that in all civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. 92 Congress rewrote Rule 301, which as promulgated by the Supreme Court, shifted both the burden of going forward and the burden of persuasion. 93 While Rule 301 of the Uniform Rules of Evidence does not directly address this issue, some state variations of Rule 301 follow the federal text that presumptions do not shift the burden of proof. 94 Courts in these states generally follow federal interpretations when interpreting their own state provisions. 95 Several additional states have adopted the substance of Rule 301 by judicial decision. 96

According to Rule 301, once a party has introduced sufficient evidence rebutting the presumed fact, the presumption as such drops out of the case. 97

Rule 301 applies only in civil actions and proceedings, not in criminal trials. 98

The rule also acknowledges that some presumptions should receive different treatment, but only if otherwise provided for by Act of Congress or by the rules themselves. 99 A presumption is clearly regulated by Rule 301 if its legislative history so specifies. 1 But, if the language codifying a statutory presumption explicitly directs a shift in the burden of persuasion, it clearly falls outside the provisions of Rule 301. 2

Disagreement exists, however, as to statutory presumptions that do not explicitly otherwise provide, that is, which do not explicitly direct a shift in the burden of persuasion. A plain reading of Rule 301 suggests that a statutory presumption that lacks such language is regulated by the rule without consideration either of the intent with which Congress created the presumption or of pre-Rule 301 case law interpreting the presumption. 3 On the other hand, federal statutory presumptions that pre-date the Federal Rules of Evidence were enacted at a time when Congress could not have anticipated the importance of specifying in the statute itself (rather than its legislative history) the impact the presumption should have. Thus, an across-the-board application of Rule 301 to pre-Rule 301 presumptions could in some instances frustrate the intent with which Congress enacted the presumption in the first place. And even absent explicit legislative history, the policies underlying the creation of a statutory presumption may strongly suggest that Congress intended the presumption to shift the burden of persuasion—or, at least, that Congress would have so intended if it had thought the problem through. Arguably, therefore, courts should give a pre-Rule 301 statutory presumption a burden-of-persuasion-shifting effect, not only if Congress "so provided" explicitly in the statute, but also if its legislative history or underlying policy considerations suggest that this is what Congress intended. 4

§ 195 ----Under Federal Rule 301 and similar state rules [SUPPLEMENT]

Case authorities:

District court's rejection of employer's asserted reasons for discharging plaintiff did not mandate finding for employee alleging racial discrimination since, under FRE Rule 301, presumption does not shift burden of proof and Title VII plaintiff at all times bears ultimate burden of persuasion, holding that finding for employee was not mandated did not give special favor to employers whose evidence rebutting charges of racial discrimination was disbelieved, fact that employer's proffered reason was unpersuasive or obviously contrived did not necessarily establish that employee's proffered reason of race was correct, and courts should not treat discrimination differently from other ultimate questions of fact. *Saint Mary's Honor Ctr. v Hicks* (1993, US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 7 FLW Fed S 553.

Footnotes

Footnote 92. FRE 301.

Footnote 93. *Silver Chrysler Plymouth, Inc. v Chrysler Motors Corp.* (ED NY) 370 F Supp 581, affd (CA2) 518 F2d 751 (ovrld on other grounds by *Armstrong v McAlpin* (CA2 NY) 625 F2d 433, CCH Fed Secur L Rep ¶ 97542, 51 ALR Fed 646); *Psaty v*

United States (CA3 NJ) 442 F2d 1154, 71-1 USTC ¶ 9346, 27 AFTR 2d 71-1184.

Footnote 94. See 13A ULA, Uniform Rules of Evidence, Rule 301, Variations from Official Text.

Footnote 95. *Widmayer v Leonard*, 422 Mich 280, 373 NW2d 538.

Footnote 96. *Franciscan Sisters Health Care Corp. v Dean*, 95 Ill 2d 452, 69 Ill Dec 960, 448 NE2d 872; *Waters v New Amsterdam Casualty Co.*, 393 Pa 247, 144 A2d 354; *Lynn v Cepurneek*, 352 Pa Super 379, 508 A2d 308, later proceeding 373 Pa Super 479, 541 A2d 771; *Bixler v Hoverter*, 89 Pa Cmwlt 88, 491 A2d 958.

Footnote 97. *Keeler Brass Co. v Continental Brass Co.* (CA4 NC) 862 F2d 1063, 9 USPQ2d 1331, 27 Fed Rules Evid Serv 278.

Footnote 98. House Judiciary Committee Report, No. 93-650, p 5.

See § 191, for a discussion of presumptions in criminal trials.

Footnote 99. FRE 301.

Footnote 1. *Clay v Traders Bank of Kansas City* (CA8 Mo) 708 F2d 1347, 10 BCD 1317, CCH Bankr L Rptr ¶ 69296, appeal after remand (CA8 Mo) 737 F2d 765 (statutory presumption in 28 USCS § 547(f), that a debtor was insolvent on and during the 90 days immediately preceding the date a petition in bankruptcy was filed).

Footnote 2. *Wilson v Omaha Indian Tribe*, 442 US 653, 61 L Ed 2d 153, 99 S Ct 2529, on remand (CA8 Iowa) 614 F2d 1153, cert den 449 US 825, 66 L Ed 2d 28, 101 S Ct 87 and on remand (ND Iowa) 523 F Supp 874, revd on other grounds (CA8 Iowa) 707 F2d 304, on remand (ND Iowa) 578 F Supp 1191, affd in part and revd in part on other grounds (CA8 Iowa) 854 F2d 1089, 11 FR Serv 3d 1415, cert den 490 US 1090, 104 L Ed 2d 986, 109 S Ct 2429 and cert den 465 US 1025, 79 L Ed 2d 684, 104 S Ct 1281 and cert den 465 US 1101, 80 L Ed 2d 128, 104 S Ct 1596 (where the court considered the impact of 25 USCS § 194, which provides that in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership); *Tenneco Chemicals, Inc. v William T. Burnett & Co.* (CA4 Md) 691 F2d 658, 216 USPQ 846, 11 Fed Rules Evid Serv 1495 (35 USCS § 282 provides that in litigation over the validity of a patent, once a patentee introduces into evidence the letters of patent issued by the Patent and Trademark Office, a patent shall be presumed valid and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting invalidity); *United States Steel Corp. v Gray* (CA5) 588 F2d 1022 (considering 30 USCS § 921(4), the Federal Coal Mine and Safety Act of 1969, which provides that in an action for benefits, if a miner was employed for fifteen years or more in underground coal mines and evidence is introduced that demonstrates the existence of a totally disabling respiratory or pulmonary ailment, then there shall be a rebuttable presumption that the miner's disability or death was caused by pneumoconiosis); *Alabama By-Products Corp. v Killingsworth* (CA11) 733 F2d 1511, 15 Fed Rules Evid Serv 1062 (presumptions issued by a regulatory agency that require the adversely affected party to establish the nonexistence of the presumed fact come within the exception).

Footnote 3. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 49 L Ed 2d 752, 96 S Ct 2882, 1 Fed Rules Evid Serv 243 (superseded on other grounds by statute as stated in *Freeman United Coal Mining Co. v Office of Workers' Compensation Program* (CA7) 999 F2d 291), construing the provisions of the Federal Coal Mine and Safety Act of 1969 (30 USCS § 921(c)(1), (2)).

Footnote 4. *Pennsylvania, Dept. of Transp. v United States*, 226 Ct Cl 444, 643 F2d 758, 7 Fed Rules Evid Serv 1157, cert den 454 US 826, 70 L Ed 2d 101, 102 S Ct 117 (recognizing the congressional intent argument, but holding it inapplicable to the Federal Aid Highways Act of 1916, now codified as amended at 23 USCS §§ 101 et seq.).

§ 196 --Effect of pre-Rule case law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Prior to enactment of Rule 301, federal courts had traditionally held that some presumptions shifted the burden of production as well as the burden of persuasion. 5 Applying Rule 301 to such presumptions would effect a substantive change in the law that Congress presumably did not intend or contemplate when it enacted Rule 301. Some courts, therefore, have concluded that the burden-of-persuasion-shifting impact of such pre-301 decisions are grandfathered into the law and survive Rule 301. 6

Footnotes

Footnote 5. *Missouri P. R. Co. v Elmore & Stahl*, 377 US 134, 12 L Ed 2d 194, 84 S Ct 1142, reh den 377 US 984, 12 L Ed 2d 752, 84 S Ct 1880.

Footnote 6. *Psaty v United States* (CA3 NJ) 442 F2d 1154, 71-1 USTC ¶ 9346, 27 AFTR 2d 71-1184; *Plough, Inc. v Mason & Dixon Lines* (CA6 Tenn) 630 F2d 468, 7 Fed Rules Evid Serv 1152, holding that a presumption created to implement a provision of the Interstate Commerce Act (former 49 USCS § 20(11)), continues to shift the burden of persuasion despite the subsequent enactment of Rule 301; *American Hoist & Derrick Co. v Chicago, M., St. P. & P. R. Co.* (CA6 Ohio) 414 F2d 68; *Super Service Motor Freight Co. v United States* (CA6 Tenn) 350 F2d 541.

The law has long recognized a presumption that a vessel which drifts into collision was at fault and that proof of the basic facts imposes the burden of establishing that the drifting had a cause other than negligence upon those responsible for the vessel; this presumption is not governed by Rule 301 because the Rule would give it insufficient weight. *James v River Parishes Co.* (CA5 La) 686 F2d 1129, 11 Fed Rules Evid Serv 913.

Although the NLRB's reliance on the presumption of continued majority support of a union may be inconsistent with FRE 301 because it shifts to the employer the burden of persuasion regarding the appropriateness of the proposed bargaining unit (*Presbyterian/St. Luke's Medical Center v NLRB* (CA10) 653 F2d 450, 107 BNA LRRM 2953, 91 CCH LC ¶ 12860, 8 Fed Rules Evid Serv 1007), the presumption continues to

apply. *Beth Israel Hospital & Geriatric Center v NLRB* (CA10) 688 F2d 697, 111 BNA LRRM 2384, 95 CCH LC ¶ 13770, 11 Fed Rules Evid Serv 920, cert dismd 459 US 1025, 74 L Ed 2d 522, 103 S Ct 433, 96 CCH LC ¶ 14034, later proceeding 289 NLRB 249, 129 BNA LRRM 1263, 1987-88 CCH NLRB ¶ 19470.

D. Invoking and Rebutting Presumptions [197-201]

Research References

ALR Digests: Evidence §§ 92 et seq.

ALR Index: Presumptions and Burden of Proof

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 51 et seq.

Jones on Evidence (7th ed) §§ 4:38 et seq.

§ 197 Proving and rebutting basic facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The party seeking to invoke a presumption must satisfy the burden of production 7 as to the basic facts, that is, must introduce sufficient evidence of the basic facts to survive a motion for a directed verdict as to those facts. 8 Occasionally a party will seek to employ one presumption to assist it in establishing a second presumption. 9

When the presumed fact is an essential element of a cause of action, the burden of production as to the basic facts must be satisfied during the case-in-chief. 10 If, on the other hand, the presumed fact is merely helpful, rather than an essential element, or if it rebuts a defense, affirmative defense or counterclaim, the burden of production as to the basic facts may be satisfied at other stages in the trial. 11

Footnotes

Footnote 7. See § 164, concerning the burden of production generally.

Footnote 8. *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898 and (not followed on other grounds by *Burton v Ohio, Adult Parole Authority* (CA6 Ohio) 798 F2d 164, 41 BNA FEP Cas 1799, 41 CCH EPD P 36544) and (criticized on other grounds by *Saint Mary's Honor Ctr. v Hicks* (US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 37 Fed Rules Evid Serv 581, 7 FLW Fed S 553); *Re Estate of Wagner* (ND) 265 NW2d 459; *Coward v Gateway Nat. Bank* (Tex) 525 SW2d 857, reh'g of cause overr (Jul 30, 1975) and (superseded on other grounds by statute as stated in *Bethel v Butler Drilling Co.* (Tex App Houston (14th Dist)) 635 SW2d 834).

Footnote 9. See § 200 concerning the validity of piling presumption upon presumption.

Footnote 10. § 164.

Footnote 11. See § 160 for a discussion of when it is appropriate to produce evidence at later trial stages.

§ 198 Satisfying and shifting burden of production

[View Entire Section](#)
[Go to Parallel Reference Table](#)

By satisfying its burden of production as to the basic facts, a party triggers the presumption. This has a two-fold procedural impact: first, the presumption satisfies a party's burden of production as to the presumed fact and enables a party to survive a motion for a directed verdict; 12 secondly, the presumption also shifts the burden of production as to the presumed fact; a principle which is codified in many evidence codes, 13 and recognized in the case law of several states. 14

If the party relying on the presumption satisfies its burden of production as to the basic facts and the party adversely affected by the presumption fails to satisfy its burden of production to rebut the presumed fact, the latter party suffers a directed verdict as to the presumed fact. 15 In a nonjury trial, if the court finds that the basic fact is true, it must also find that the presumed fact is true. 16 In a jury trial, the jury is instructed that if they accept the basic facts as true, they must also accept the presumed fact as true. 17

Footnotes

Footnote 12. *Schenck v Minolta Office Sys., Inc.* (Colo App) 802 P2d 1131, cert den (Colo) 1990 Colo LEXIS 889, later proceeding (Colo App) 17 Brief Times Rep 1613, reh den (Nov 26, 1993) (proof of basic facts makes out prima facie case of presumed fact); *Mortgage Invest. Co. v Griego*, 108 NM 240, 771 P2d 173.

Footnote 13. § 195.

Footnote 14. *Ristaino v Flannery*, 76 Md App 662, 547 A2d 1115, cert gr 314 Md 508, 551 A2d 874 and vacated, en banc 317 Md 452, 564 A2d 790; *Greene v Oliver Realty, Inc.*, 363 Pa Super 534, 526 A2d 1192, 2 BNA IER Cas 1333, 107 CCH LC ¶ 55775, app den 517 Pa 607, 536 A2d 1331, 5 BNA IER Cas 1088; *Glover v Henry* (Tex App Eastland) 749 SW2d 502; *Martin v Phillips*, 235 Va 523, 369 SE2d 397.

Footnote 15. See § 199 for a discussion of the requirements to rebut a presumed fact.

Footnote 16. *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898 and (not followed on other grounds by *Burton v Ohio, Adult Parole Authority* (CA6 Ohio) 798 F2d 164, 41 BNA FEP Cas 1799, 41 CCH EPD ¶ 36544) and (criticized

on other grounds by *Saint Mary's Honor Ctr. v Hicks* (US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 37 Fed Rules Evid Serv 581, 7 FLW Fed S 553).

Footnote 17. *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898 and (not followed on other grounds by *Burton v Ohio, Adult Parole Authority* (CA6 Ohio) 798 F2d 164, 41 BNA FEP Cas 1799, 41 CCH EPD ¶ 36544) and (criticized on other grounds by *Saint Mary's Honor Ctr. v Hicks* (US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 37 Fed Rules Evid Serv 581, 7 FLW Fed S 553); *Keeler Brass Co. v Continental Brass Co.* (CA4 NC) 862 F2d 1063, 9 USPQ2d 1331, 27 Fed Rules Evid Serv 278; *Lovelace v Sherwin-Williams Co.* (CA4 NC) 681 F2d 230, 29 BNA FEP Cas 172, 29 CCH EPD ¶ 32833; *Reeves v General Foods Corp.* (CA5 Tex) 682 F2d 515, 29 BNA FEP Cas 779, 29 CCH EPD ¶ 32967 (disapproved on other grounds by *United States Postal Service Bd. of Governors v Aikens*, 460 US 711, 75 L Ed 2d 403, 103 S Ct 1478, 31 BNA FEP Cas 609, 31 CCH EPD ¶ 33477, 13 Fed Rules Evid Serv 1368) as stated in *Thornbrough v Columbus & G. R. Co.* (CA5 Miss) 760 F2d 633, 37 BNA FEP Cas 1414, 37 CCH EPD ¶ 35274; *Clay v Traders Bank of Kansas City* (CA8 Mo) 708 F2d 1347, 10 BCD 1317, CCH Bankr L Rptr ¶ 69296, appeal after remand (CA8 Mo) 737 F2d 765; *Smiddy v Varney* (1981, CA9 Cal) 665 F2d 261, cert den 459 US 829, 74 L Ed 2d 66, 103 S Ct 65; *Murray v Montgomery Ward Life Ins. Co.*, 196 Colo 225, 584 P2d 78 (effect of a presumption is to create a prima facie case on which judgment may be rendered in the absence of contrary evidence); *Re Estate of Borom* (Ind App) 562 NE2d 772 (a presumption is a deduction which in the absence of rebuttal evidence the law requires the factfinder to make if it finds the basic facts); *Grier v Rosenberg*, 213 Md 248, 131 A2d 737 (a presumption is a conclusion that is mandatory, if not rebutted); *Johnson v Austin*, 406 Mich 420, 280 NW2d 9 (if the factfinder finds the basic facts, it must find the presumed fact in the absence of evidence to the contrary); *Tri-State Land Co. v Shoreview* (Minn) 290 NW2d 775 (a presumption makes out a prima facie case which is dispositive in the absence of contrary evidence); *Henderson County v Osteen*, 297 NC 113, 254 SE2d 160; *Smith v Bohlen*, 95 NC App 347, 382 SE2d 812, affd 328 NC 564, 402 SE2d 380 (a presumption is binding on the jury unless sufficiently rebutted); *Greene v Oliver Realty, Inc.*, 363 Pa Super 534, 526 A2d 1192, 2 BNA IER Cas 1333, 107 CCH LC ¶ 55775, app den 517 Pa 607, 536 A2d 1331, 5 BNA IER Cas 1088; *Bixler v Hoverter*, 89 Pa Cmwlth 88, 491 A2d 958 (presumption is mandatory, unless rebutted).

One case adopted a position directing that the judge instruct the jury that if it finds the basic facts, it should find the presumed fact unless it believes that the nonexistence of the presumed fact is at least as probable as its existence. *Widmayer v Leonard*, 422 Mich 280, 373 NW2d 538.

Forms: Instruction to jury—Effect of uncontroverted disputable presumption. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 52.

Instruction to jury—Presumption based on basic fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 54.

§ 199 Rebutting presumed fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts have expressed the burden of proof that the adversely affected party must satisfy in order to avoid an instruction that if the jury finds the basic fact it must also find the presumed fact, in a variety of ways: the evidence rebutting a presumption must be substantial, 18 credible, 19 positive, 20 or must be sufficient to raise an issue of fact for the jury 21 or put the issue in equilibrium. 22 Other courts have held that any evidence having a tendency to support the nonexistence of the presumed fact will suffice. 23 With regard to a typical presumption, therefore, to avoid a directed verdict as to the presumed fact, the party adversely affected by the presumption must offer sufficient evidence to permit a rational factfinder to find the nonexistence of the presumed fact by a preponderance of the evidence. 24

Once the party adversely affected by the presumption offers sufficient evidence rebutting the presumption to avoid a directed verdict as to the presumed fact, the presumption drops out of the case and the burden of persuasion as to the presumed fact remains with the party who had that burden at the outset of the trial. 25

Footnotes

Footnote 18. *New York Life Ins. Co. v Gamer*, 303 US 161, 82 L Ed 726, 58 S Ct 500, 114 ALR 1218; *O'Brien v Equitable Life Assur. Soc.* (CA8 Mo) 212 F2d 383, cert den 348 US 835, 99 L Ed 658, 75 S Ct 57; *Harlem Taxicab Ass'n v Nemesh*, 89 US App DC 123, 191 F2d 459; *Union Cent. Life Ins. Co. v Sims*, 208 Ark 1069, 189 SW2d 193; *Carroll v Carroll* (Ky) 251 SW2d 989; *Anderson v Minneapolis*, 258 Minn 221, 103 NW2d 397; *Shell Oil Co. v Kapler*, 235 Minn 292, 50 NW2d 707; *Halloway v Halloway*, 189 Miss 723, 198 So 738; *Di Paoli v Prudential Ins. Co.* (Mo App) 384 SW2d 861; *Re Will of Blake*, 21 NJ 50, 120 A2d 745; *People v Richetti*, 302 NY 290, 97 NE2d 908; *Carson v Metropolitan Life Ins. Co.*, 165 Ohio St 238, 59 Ohio Ops 310, 135 NE2d 259; *Shepherd v Midland Mut. Life Ins. Co.*, 152 Ohio St 6, 39 Ohio Ops 352, 87 NE2d 156, 12 ALR2d 1250; *Mulroy v Co-operative Transit Co.*, 142 W Va 165, 95 SE2d 63.

Footnote 19. *Schenck v Minolta Office Sys., Inc.* (Colo App) 802 P2d 1131, cert den (Colo) 1990 Colo LEXIS 889, later proceeding (Colo App) 17 Brief Times Rep 1613, reh den (Nov 26, 1993); *Greene v Willey*, 147 Me 227, 86 A2d 82; *Johnson v White*, 154 Mich App 425, 397 NW2d 555, app gr 428 Mich 857, 399 NW2d 396, reh gr, in part 428 Mich 871, 401 NW2d 615 and revd on other grounds 430 Mich 47, 420 NW2d 87; *Carson v Metropolitan Life Ins. Co.*, 165 Ohio St 238, 59 Ohio Ops 310, 135 NE2d 259; *Waters v New Amsterdam Casualty Co.*, 393 Pa 247, 144 A2d 354; *Johnson v Atlantic C. L. R. Co.*, 217 SC 190, 60 SE2d 226; *Mulroy v Co-operative Transit Co.*, 142 W Va 165, 95 SE2d 63; *McNamer v American Ins. Co.*, 267 Wis 494, 66 NW2d 342 (ovrld on other grounds by *Wells v Dairyland Mut. Ins. Co.*, 274 Wis 505, 80 NW2d 380).

Footnote 20. *Johnson v White*, 154 Mich App 425, 397 NW2d 555, app gr 428 Mich 857, 399 NW2d 396, reh gr, in part 428 Mich 871, 401 NW2d 615 and revd on other grounds

430 Mich 47, 420 NW2d 87; *Empire Gas & Fuel Co. v Muegge*, 135 Tex 520, 143 SW2d 763.

Footnote 21. *Callahan v Van Galder*, 3 Wis 2d 654, 89 NW2d 210.

Footnote 22. *Employers' Liability Assur. Corp. v Maes* (CA10 NM) 235 F2d 918; *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded on other grounds by statute as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113) (adopting the formulation that a presumption persists until the contrary evidence persuades the factfinder that the balance of probability is in equilibrium or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist); *Re Guardianship of Breece*, 173 Ohio St 542, 20 Ohio Ops 2d 155, 184 NE2d 386 (the production of evidence disputing or contrary to the presumption causes the presumption to disappear where such evidence to the contrary either counterbalances the presumption or even when it is only sufficient to leave the case in equipoise); *Carson v Metropolitan Life Ins. Co.*, 156 Ohio St 104, 45 Ohio Ops 103, 100 NE2d 197, 28 ALR2d 344.

Annotation: Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Forms: Instruction to jury—Sufficiency of evidence to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 53.

Instruction to jury—Presumption where evidence is sufficient to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 55.

Footnote 23. *Re O'Connor's Estate*, 74 Ariz 248, 246 P2d 1063; *Jodoin v Baroody*, 95 NH 154, 59 A2d 343 (a presumption is not evidence and its sole function is to take the place of evidence, so that when the latter appears if only to the extent that an inference may be drawn from it, the presumption vanishes); *Schlichting v Schlichting*, 15 Wis 2d 147, 112 NW2d 149 (the presumption of decedent's due care disappears from the case when any evidence is introduced tending to establish negligence).

Footnote 24. *Henderick v Uptown Safe Deposit Co.* (1st Dist) 21 Ill App 2d 515, 159 NE2d 58; *Firkus v Murphy*, 311 Minn 85, 246 NW2d 864; *Re Estate of Swan*, 4 Utah 2d 277, 293 P2d 682; *Bates v Bowles White & Co.*, 56 Wash 2d 374, 353 P2d 663.

Footnote 25. *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089, 25 BNA FEP Cas 113, 25 CCH EPD ¶ 31544, 9 Fed Rules Evid Serv 1, on remand (CA5 Tex) 647 F2d 513, 25 BNA FEP Cas 1746, 26 CCH EPD ¶ 31898 and (not followed on other grounds by *Burton v Ohio, Adult Parole Authority* (CA6 Ohio) 798 F2d 164, 41 BNA FEP Cas 1799, 41 CCH EPD ¶ 36544) and (criticized on other grounds by *Saint Mary's Honor Ctr. v Hicks* (US) 125 L Ed 2d 407, 113 S Ct 2742, 93 CDOS 4747, 93 Daily Journal DAR 8057, 62 BNA FEP Cas 96, 61 CCH EPD ¶ 42322, 37 Fed Rules Evid Serv 581, 7 FLW Fed S 553); *Panduit Corp. v All States Plastic Mfg. Co.* (CA FC) 744 F2d 1564, 223 USPQ 465 (disapproved on other grounds by *Richardson-Merrell, Inc. v Koller*, 472 US 424, 86 L Ed 2d 340, 105 S Ct 2757); *Pennsylvania, Dept. of Transp. v United States*, 226 Ct Cl 444, 643 F2d 758, 7 Fed Rules Evid Serv 1157, cert den 454 US 826, 70 L Ed 2d 101, 102 S Ct 117; *Lynn v Cepurneek*, 352 Pa Super 379, 508 A2d 308, later proceeding 373 Pa Super 479, 541 A2d

§ 200 Pyramiding presumptions or inferences

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the basic facts of a presumption may be proved by circumstantial evidence, it is often said presumptions must be based on facts, and not upon inferences or upon other presumptions. 26 Similarly, it is often said that an inference may not be based upon another inference, 27 although this statement has been criticized as an inaccurate and confusing expression of the principle that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. 28 Other courts permit pyramiding inferences or presumptions. 29 Under this view, if the inferences and underlying evidence are strong enough to permit a rational factfinder to find guilt beyond a reasonable doubt, a criminal conviction may properly be based on pyramiding inferences. 30 If the inferences are too weak, or the conclusions the prosecutor seeks to have drawn from them are too speculative, a conviction based thereon must be set aside. 31

Courts which permit basing an inference on an inference often differ as to how persuasively the primary or basic inference must be proven before a second inference may be drawn from it; some insisting that a second inference may be drawn from a first inference only if the first inference is shown with sufficient strength to elevate it to the equivalence of established fact, or to the exclusion of other reasonable inferences. 32 Other courts take the view that the basic or primary inference is sufficiently established if it is more probable than its nonexistence. 33 A third view is that an inference may be based upon an inference so long as neither inference is too remote, speculative or conjectural. 34

The rule forbidding basing one inference on another is not violated by multiple inferences drawn from the same set of facts, so long as each inference has a factual foundation. 35 Also, the rule is not violated if the basic fact is inferred from circumstantial evidence. 36

Footnotes

Footnote 26. *State v Williams*, 229 Kan 646, 630 P2d 694; *Aultman v Delchamps, Inc.* (Miss) 202 So 2d 922; *East Texas Theatres, Inc. v Rutledge* (Tex) 453 SW2d 466, reh'g of cause overr (Apr 22, 1970).

Annotation: Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Footnote 27. *Crown Cork & Seal Co. v Morton Pharmaceuticals, Inc.* (CA6 Tenn) 417 F2d 921; *Admiral Theatre Corp. v Douglas Theatre Co.* (CA8 Neb) 585 F2d 877, 1978-2 CCH Trade Cases ¶ 62333, 26 FR Serv 2d 1129 (criticized on other grounds by Kreuzer

v American Academy of Periodontology, 237 US App DC 43, 735 F2d 1479, 1984-1 CCH Trade Cases ¶ 66029) and (criticized on other grounds by Mt. Pleasant v Associated Electric Cooperative, Inc. (CA8 Mo) 838 F2d 268, 1988-1 CCH Trade Cases ¶ 67871); Wear v Chenault Motor Co., 52 Ala App 382, 293 So 2d 298, 14 UCCRS 655, cert den 292 Ala 756, 293 So 2d 301; Green House, Inc. v Thiermann (Fla App D2) 288 So 2d 566, cert den (Fla) 295 So 2d 303; Martineau v Walker, 97 Idaho 246, 542 P2d 1165, 18 UCCRS 354; Haney v Meyer, 139 Ind App 663, 215 NE2d 886; State v Williams, 229 Kan 646, 630 P2d 694; Springfield Tent & Awning Co. v Rice, 202 Kan 234, 447 P2d 833; Briner v General Motors Corp. (Ky) 461 SW2d 99; Commonwealth v Mandile, 403 Mass 93, 525 NE2d 1322; People v Clay, 95 Mich App 152, 289 NW2d 888; George v Travelers Indem Co., 81 Mich App 106, 265 NW2d 59; State v Alexander (Mo App) 581 SW2d 389; R & S Corp. v Barnes, 182 Neb 431, 155 NW2d 379; Tapia v Panhandle Steel Erectors Co., 78 NM 86, 428 P2d 625; People v Volpe, 20 NY2d 9, 281 NYS2d 295, 228 NE2d 365; People v Rifenburgh (3d Dept) 29 App Div 2d 897, 288 NYS2d 331; Nunn v Smith, 270 NC 374, 154 SE2d 497; Central Carolina Farmers, Inc. v Hilliard, 54 NC App 418, 283 SE2d 558; Nationwide Mut. Ins. Co. v Security Bldg. Co., 42 NC App 21, 255 SE2d 590; Barger v Mizel (Okla) 424 P2d 41; Beatty v Dixon (Okla) 408 P2d 339; Conlin v Greyhound Lines, Inc., 120 RI 1, 384 A2d 1057; Schlumberger Well Surveying Corp. v Nortex Oil & Gas Corp. (Tex) 435 SW2d 854, 31 OGR 161, reh'g of cause overr (Jan 29, 1969); Roberts v U.S. Home Corp. (Tex App San Antonio) 694 SW2d 129; Nagy v First Nat. Gun Banque Corp. (Tex App Dallas) 684 SW2d 114, writ ref n r e (Jan 23, 1985); De Ford Lumber Co. v Roys (Tex Civ App Dallas) 615 SW2d 235; Regal Petroleum Corp. v McClung (Tex Civ App Dallas) 608 SW2d 276; New York Underwriters Ins. Co. v Trustees of First Baptist Church (Tex Civ App Eastland) 603 SW2d 378, writ ref n r e (Dec 3, 1980) and reh'g of writ of error overr (Feb 11, 1981); Lugo v Joy, 215 Va 39, 205 SE2d 658.

Stacking of inference upon inference was impermissible where an employee's widow sued for death benefits, alleging that her husband's death arose out of the course of his employment and the award of benefits was based on the inferences: (1) that an accident on the job had caused a subdural hematoma; (2) that the injury had led to physical and mental impairment; and (3) that this impairment had caused decedent to walk in front of truck three days later. Girdley Constr. Co. v Ohmstede (Fla App D1) 465 So 2d 594, 10 FLW 723.

A failure to sound horn and veer truck away from child did not amount to negligence, as the factfinder was not permitted to stack inferences: (1) that child was unaware of the truck and the danger occasioned by its passage; (2) that she would step into its side after the cab of the truck had passed her and after she was behind the driver's line of vision and that driver knew or should have known this; and (3) that if the driver had blown his horn or veered the truck, the accident would have been avoided. Byrd v Leach (Fla App D4) 226 So 2d 866.

Footnote 28. Sutton v State (1991, Ind App) 571 NE2d 1299.

Footnote 29. United States v Eustace (CA2 NY) 423 F2d 569; Cora Pub, Inc. v Continental Casualty Co. (CA5 Fla) 619 F2d 482, reh den (CA5 Fla) 629 F2d 1349 and reh den (CA5 Fla) 629 F2d 1350; Arms v State Farm Fire & Casualty Co. (CA6 Tenn) 731 F2d 1245; Daniels v Twin Oaks Nursing Home (CA11 Ala) 692 F2d 1321, reh den (CA11 Ala) 698 F2d 1238; Louis & Diederich, Inc. v Cambridge European Imports, Inc. (6th Dist) 189 Cal App 3d 1574, 234 Cal Rptr 889, 3 UCCRS2d 1186; People v Sigal (5th Dist) 249 Cal App 2d 299, 57 Cal Rptr 541 (ovrld on other grounds by People v

Sears (Cal) 74 Cal Rptr 872, 450 P2d 248); Schwedler v Galvan (1st Dist) 46 Ill App 3d 630, 4 Ill Dec 891, 360 NE2d 1324; People v Orsie, 83 Mich App 42, 268 NW2d 278; People v Helcher, 14 Mich App 386, 165 NW2d 669; Rob-Lee Corp. v Cushman (Mo App) 727 SW2d 455; Pollock v Rapid Industrial Plastics Co. (2d Dept) 113 App Div 2d 520, 497 NYS2d 45; State v Champagne (ND) 198 NW2d 218; McConnell v Oklahoma Gas & Electric Co. (Okla) 563 P2d 632; Red Eagle Oil Co. v ITT Eason Oil Co. (Okla App) 693 P2d 1280, 83 OGR 367; Stinson v Daniel, 220 Tenn 70, 414 SW2d 7.

Footnote 30. United States v Brown (CA10 Colo) 943 F2d 1246, 33 Fed Rules Evid Serv 1286, related proceeding (Colo) 841 P2d 1066, holding the inference of knowledge of illegal scheme supported the further inference that defendant's purpose, in failing to intervene at the deposition and in destroying the records, was to participate in the clients' scheme to defraud the United States and the clients' creditors.

The inference that defendant had handled a package in Mexico was proven with sufficient strength to permit the further inference that defendant knew its contents when he mailed it to the United States. United States v Shahane (CA8 ND) 517 F2d 1173, cert den 423 US 893, 46 L Ed 2d 124, 96 S Ct 191.

From proof that defendant possessed stolen car and car keys, and also a firearm which had been stolen from a locked apartment, it was permissible for the jury to infer that the defendant also possessed the stolen pass key. People v Sigal (5th Dist) 249 Cal App 2d 299, 57 Cal Rptr 541 (other aspects ovrl'd by People v Sears (Cal) 74 Cal Rptr 872, 450 P2d 248).

Store receipts and palmprints of defendant on those receipts permitted the jury to infer that the defendant had purchased materials a day before the bombing identical to those used in the bomb, which in turn permitted the jury to infer that defendant had built and detonated a bomb. Benson v State (Fla App D2) 526 So 2d 948, 13 FLW 1235, review den (Fla) 536 So 2d 243 and cert den 489 US 1069, 103 L Ed 2d 817, 109 S Ct 1349.

It was not an improper inference on an inference to find that defendant had shot the victim based on testimony of a witness who was in same apartment but not in same room, where only defendant and deceased were downstairs when shots were fired and someone matching the defendant's physical description was seen fleeing from the scene. People v Daniels, 163 Mich App 703, 415 NW2d 282, app den 430 Mich 854.

Footnote 31. People v Atley, 392 Mich 298, 220 NW2d 465 (presence of two people in a car with 127 pounds of marijuana, coupled with evidence that the defendant intended to sell the marijuana, does not support the inference that the two had reached an agreement to sell it, even though the men in the car had agreed to harvest the drugs and the other man was not paid for his efforts).

Where in a prosecution for unlawful possession of heroin, an officer testified that he saw the defendant make a "quick motion" and after defendant left the scene, the officers made a thorough search and found a small silver wrapper containing several white capsules of heroin, it was held that the government failed, as matter of law, to meet its burden of proof with respect to possession. Malloy v United States (Dist Col App) 246 A2d 781.

Footnote 32. Franklin v Dade County (Fla App D3) 230 So 2d 730, cert den (Fla) 237 So 2d 761; Mann v Safeway Stores, Inc., 95 Idaho 732, 518 P2d 1194 (evidence supporting the primary inference excluded all other reasonable inferences and therefore could be the

basis of a second inference); *Challis Irrig. Co. v State* (App) 107 Idaho 338, 689 P2d 230; *Carnevale v Smith*, 122 RI 218, 404 A2d 836.

Where the state presented only circumstantial evidence that required the jury to infer, first, that at least two persons committed an aggravated burglary and felony murder, and second, that defendant was the second person involved in the crimes, the evidence was an improper stacking of inferences, as the facts logically allowed for the possibility that only one man committed the crimes and there was no direct evidence connecting the defendant to the crime other than his association with the other man and a nonconclusive semen match which quite possibly could have been produced by a friend of the victim. *State v Williams*, 229 Kan 646, 630 P2d 694.

An adjudication of delinquency based on an alleged act of larceny was reversed where the primary inference that defendant was the person seen by a bookkeeper was not the only conclusion which naturally followed from testimony that defendant was in the hallway wearing a blue shirt, and where the primary inference that defendant was the person seen with "a rather large sum of money" was not the only conclusion naturally drawn from testimony that a young man wearing a blue shirt was seen with "a rather large sum of money;" because both primary inferences were susceptible to other reasonable interpretations, any stacking of further inferences upon them was not permissible. *Re Derek* (RI) 448 A2d 765.

Footnote 33. *Tillery v Standard Sand & Silica Co.* (Fla App D2) 226 So 2d 842.

A factfinder may not draw a second inference from another inference that is itself speculative, or merely of remote possibility, or which does not exclude drawing from the same facts on which it rests a different, equally reasonable and probable inference. *Ginn v Penobscot Co.* (Me) 334 A2d 874, mod on other grounds (Me) 342 A2d 270.

Footnote 34. *Louis & Diederich, Inc. v Cambridge European Imports, Inc.* (6th Dist) 189 Cal App 3d 1574, 234 Cal Rptr 889, 3 UCCRS2d 1186; *People v Sigal* (5th Dist) 249 Cal App 2d 299, 57 Cal Rptr 541 (ovrld on other grounds by *People v Sears* (Cal) 74 Cal Rptr 872, 450 P2d 248) (although an inference can be based on an inference, an inference cannot be based solely on an inference that is too remote or conjectural).

Where the only evidence that banana peel had been on the grocery floor long enough for the store to be negligent for failing to remove it was that the peel was black, summary judgment was properly entered against plaintiff as the inference of negligence was too speculative because it depended upon an initial, unproven inference that the peel was not already black when it reached the floor. *Bates v Winn-Dixie Supermarkets, Inc.* (Fla App D2) 182 So 2d 309, cert den (Fla) 188 So 2d 813.

Footnote 35. *Plains Transport of Kansas, Inc. v King*, 224 Kan 17, 578 P2d 1095.

In an action by a father for wrongful death of his child who was struck by an automobile, evidence was sufficient to establish that defendant was the driver of the automobile who waived for the child to cross the street, and that the child saw him wave and relied on his signal when stepping onto the street. Such evidence did not constitute an impermissible inference based solely on another inference, where the driver's own testimony established that he was the driver, and independent evidence supported the second inference that the child saw him waive and relied on that signal. *Bell v Giamarco* (Franklin Co) 50 Ohio App 3d 61, 553 NE2d 694.

Footnote 36. *Stinson v Daniel*, 220 Tenn 70, 414 SW2d 7.

§ 201 Conflicting presumptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One approach to resolving conflicting or inconsistent presumptions is a more-or-less mechanical rule: conflicting or inconsistent presumptions cancel each other, and the judge and jury should proceed without regard to either. 37 A second approach requires the judge to determine which presumption should prevail, based upon factors such as public policy. However, if the considerations of policy are of equal weight, neither presumption applies. 38

Footnotes

Footnote 37. *Legille v Dann*, 178 US App DC 78, 544 F2d 1, 191 USPQ 529 (holding that conflicting applications of the presumption that public officials, employees, and agencies perform their duties properly and efficiently cancel each other); *Lynn v Cepurneek*, 352 Pa Super 379, 508 A2d 308, later proceeding 373 Pa Super 479, 541 A2d 771.

Footnote 38. Uniform Rules of Evidence, Rule 301(b).

Inconsistent presumptions between Paternity Act, which provided that where a blood test shows a probability of paternity of 97 percent or greater the alleged father is presumed to be the father and that the presumption may be rebutted only by clear and convincing evidence, and rules of evidence, which provided that the legitimacy of a child conceived or born during marriage can be challenged only by proof beyond a reasonable doubt, were disregarded. *Atkinson v Hall (Me)* 556 A2d 651.

Law Reviews: Presumptions in Civil Actions Reconsidered, 66 Iowa L Rev 843 (1981).

E. Particular Presumptions [202-300]

Research References

ALR Digests: Evidence §§ 123 et seq.

ALR Index: Presumptions and Burden of Proof

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 356

7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:931

Jones on Evidence (7th ed) §§ 5:8 et seq., 6:1 et seq.

Wharton's Criminal Evidence (14th ed, Torcia) §§ 35 et seq.

1. Relating to Official Conduct [202-213]

a. Official Acts, Duties, and Proceedings [202-206]

§ 202 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Public officials and agencies are presumed to act in good faith and in accordance with applicable law and regulations. 39 Where an official act is shown on its face to have been regularly taken, it is presumed to be regular and valid in all respects. 40 Such a situation arises when a party seeks to prove that an agency or officer, who is not a party to the case, acted in a certain way, to support some other inference. 41 For example, judgments imposing prior prison sentences constituted court orders directing the prison warden to carry out the judgment and permitted the presumption that a public official acts in accordance with his or her duty and satisfies the prosecutor's burden of proof that defendant actually served the sentence, unless defendant offered sufficient evidence rebutting the presumption. 42

The law's recognition of the probability of official regularity is applied in other contexts as well, such as at an evidentiary hearing in which a party challenges the validity of a public agency's act or decision, where the challenger has the burdens of production and persuasion to prove invalidity. 43 Courts often refer to a presumption of official regularity and propriety; but it is more precise and accurate to eschew the term "presumption" in this context, and to refer directly to the petitioner's burden of proving impropriety. 44

When assessing the fairness of an agency's proceeding and the validity of its action, a court's scope of review is generally limited. 45 In expressing this principle, courts sometimes refer to a "presumption" that the agency's action was valid, 46 and speak of a party's heavy burden of proof to overcome the presumption. 47 When used in an evidentiary hearing, such statements describe the burden of persuasion imposed upon the party seeking to overturn the agency action. 48

Footnotes

Footnote 39. *People v Goodenough*, 89 Misc 2d 455, 391 NYS2d 940; *Edmondson v Burke* (Okla) 435 P2d 576; *Houston v Moody* (Tex Civ App Houston (1st Dist)) 572 SW2d 13, writ ref n r e (Dec 6, 1978) and reh'g of writ of error overr (Feb 7, 1979).

Footnote 40. *Citizens to Preserve Overton Park, Inc. v Volpe*, 401 US 402, 28 L Ed 2d 136, 91 S Ct 814, 2 Env't Rep Cas 1250, 1 ELR 20110, on remand (WD Tenn) 335 F Supp 873, 3 Env't Rep Cas 1510, 2 ELR 20061, supp op (WD Tenn) 357 F Supp 846, 5 Env't Rep Cas 1241, 3 ELR 20423, rev'd (CA6 Tenn) 494 F2d 1212, 6 Env't Rep Cas 1573, 4 ELR 20327, cert den 421 US 991, 44 L Ed 2d 481, 95 S Ct 1997; *Re Petersen*,

51 Cal 2d 177, 331 P2d 24, 77 ALR2d 1291, app dismd 360 US 314, 3 L Ed 2d 1259, 79 S Ct 1294; Florida Nat. Bank v Simpson (Fla) 59 So 2d 751, 33 ALR2d 581; Skinner v New Mexico State Tax Com., 66 NM 221, 345 P2d 750, 76 ALR2d 1071; State v Lumbra, 122 Vt 467, 177 A2d 356, 91 ALR2d 1235.

Footnote 41. Smiddy v Varney (CA9 Cal) 665 F2d 261, cert den 459 US 829, 74 L Ed 2d 66, 103 S Ct 65, later proceeding (CD Cal) 574 F Supp 710, later proceeding (CA9 Cal) 803 F2d 1469, reh gr, in part, amd, reh den, in part (CA9 Cal) 811 F2d 504.

Footnote 42. People v Elmore (1st Dist) 225 Cal App 3d 953, 275 Cal Rptr 315, 90 CDOS 8591, review den (Cal) 1991 Cal LEXIS 483.

Footnote 43. Southeast Grove Management, Inc. v McKiness (Fla App D1) 578 So 2d 883, 16 FLW D 1197 (a nonfinal order entered by the Department of Agriculture in favor of growers in a dispute with a fruit-picker/producer created a "presumption" that growers were entitled to relief, that is, imposed upon the picker/producer the burden of producing credible evidence to the contrary at the Department's final hearing).

Footnote 44. Person v Department of Social Services, 234 Neb 865, 453 NW2d 390 (party appealing the denial of public assistance has the burden of proving its entitlement to the benefits).

Footnote 45. 2 Am Jur 2d, Administrative Law.

Footnote 46. United States v R. Enters., Inc., 498 US 292, 112 L Ed 2d 795, 111 S Ct 722, 91 CDOS 650, 91 Daily Journal DAR 954, on remand (CA4 Va) 955 F2d 229, 19 Media L R 1953; Van Dalen v Washington Township, 120 NJ 234, 576 A2d 819, later proceeding 247 NJ Super 186, 588 A2d 1248, certif den 127 NJ 557, 606 A2d 369 and revd on other grounds, remanded 132 NJ 1, 622 A2d 1257 (citing the presumption of validity and reasonableness in upholding the decision by the State Council on Affordable Housing to rely upon a ten-year-old State Development Guidance Plan in assessing whether the township had complied with the state's Fair Housing Act); McCallen v Memphis (Tenn) 786 SW2d 633 (explaining that review is limited to whether the official or agency exceeded its authority or acted illegally, arbitrarily or fraudulently, court cited the presumption that a public agency acted properly); Brammer v West Virginia Human Rights Comm'n, 183 W Va 108, 394 SE2d 340.

Footnote 47. McCallen v Memphis (Tenn) 786 SW2d 633.

Footnote 48. Permian Basin Area Rate Cases, 390 US 747, 20 L Ed 2d 312, 88 S Ct 1344, 28 OGR 689, reh den 392 US 917, 20 L Ed 2d 1379, 88 S Ct 2050.

§ 203 Presumptions related to government officers

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Until the contrary appears, due appointment to office may be presumed from the fact that

one has acted in an official capacity. 49

In the absence of evidence to the contrary, the law assumes that public officials have performed their duties properly, 50 unless the official act in question appears irregular on its face. 51

A public officer, acting in his official capacity, is presumed to act with knowledge of what he is doing 52 and of the material facts upon which his official action is predicated. 53

The presumption has been applied to the acts of almost every class of federal officers, including the President of the United States, 54 cabinet officers and their assistants, 55 and all other federal officers, such as agents of the Treasury Department. 56 Similarly, the presumption applies to state officials, including the governor of a state, 57 the secretary of state, 58 the attorney general and his assistants, 59 the state highway commissioner, 60 the insurance commissioner, 61 a superintendent of banks, 62 and lesser state officials, such as a water commissioner, 63 a tax assessor, 64 and a receiver of an insolvent bank. 65

The same presumption applies to county and municipal officers generally, 66 including, for example, county commissioners, 67 county treasurers, 68 county attorneys, 69 district attorneys, prosecuting attorneys, and state's attorneys, 70 sheriffs, 71 police officers, 72 health officers, 73 fire commissioners, 74 county fiscal officers, 75 election officers, 76 and school officers. 77

Under appropriate circumstances the presumption that public officials perform their official duties regularly and legally applies as well to officials of a foreign government. 78

Footnotes

Footnote 49. *State ex rel. White v Mills*, 99 Conn 217, 121 A 561, 36 ALR 500; *Winchester v Ring*, 312 Ill 544, 144 NE 333, 36 ALR 520 (not followed on other grounds by *Iowa-Illinois Gas & Electric Co. v Hoffman* (3d Dist) 127 Ill App 3d 496, 82 Ill Dec 323, 468 NE2d 977).

Footnote 50. *First Nat. Bank v Filer*, 107 Fla 526, 145 So 204, 87 ALR 267; *State ex rel. White v Grant* Superior Court, 202 Ind 197, 172 NE 897, 71 ALR 1354; *Re Moynihan*, 332 Mo 1022, 62 SW2d 410, 91 ALR 74; *Milwaukie Co. of Jehovah's Witnesses v Mullen*, 214 Or 281, 330 P2d 5, 74 ALR2d 347, cert den and app dismd 359 US 436, 3 L Ed 2d 932, 79 S Ct 940.

Footnote 51. *United States v Roses, Inc.*, 1 Fed Cir Trade Cas 39, 706 F2d 1563; *Alfred J. Sweet, Inc. v Auburn*, 134 Me 28, 180 A 803, 104 ALR 784; *Gilmore v Walker*, 195 NC 460, 142 SE 579, 59 ALR 53.

Footnote 52. *Pan American Petroleum & Transp. Co. v United States*, 273 US 456, 71 L Ed 734, 47 S Ct 416, appeal after remand (DC Cal) 24 F2d 206.

Footnote 53. *United States v Chemical Foundation, Inc.*, 272 US 1, 71 L Ed 131, 47 S

Ct 1 (superseded by statute on another point as stated in Blue Cross Asso. & Blue Shield Asso. (ASBCA) 89-2 BCA ¶ 21840).

Footnote 54. United States v Chemical Foundation, Inc., 272 US 1, 71 L Ed 131, 47 S Ct 1 (superseded by statute on other grounds as stated in Blue Cross Asso. & Blue Shield Asso. (ASBCA) 89-2 BCA ¶ 21840); Shurtleff v United States, 189 US 311, 47 L Ed 828, 23 S Ct 535 (if the President removes someone from office, it must be assumed that he acted with reference to his constitutional duty to faithfully execute the duties of his official position).

Footnote 55. United States v Carr, 132 US 644, 33 L Ed 483, 10 S Ct 182.

An assistant Secretary of the Treasury must be presumed to have had the power to order that a position of customs inspector be abolished, where his action was reduced to writing and became a part of the archives of the Department, does not appear to have been modified, or in any way changed by the Secretary, and there is nothing in the record to show that his action did not have the full sanction and approval of the Secretary. Norris v United States, 257 US 77, 66 L Ed 136, 42 S Ct 9.

Footnote 56. Cooper v United States (CA8 Mo) 233 F2d 821, 56-2 USTC ¶ 9655, 49 AFTR 1334, cert den 352 US 837, 1 L Ed 2d 55, 77 S Ct 58.

Footnote 57. State ex rel. Funk v Turner, 328 Mo 604, 42 SW2d 594; State ex rel. Davey v Owen, 133 Ohio St 96, 10 Ohio Ops 102, 12 NE2d 144, 114 ALR 686.

Footnote 58. Randles v Washington State Liquor Control Board, 33 Wash 2d 688, 206 P2d 1209, 9 ALR2d 531.

Footnote 59. De Marco v Board of Chosen Freeholders, 36 NJ Super 382, 115 A2d 635, affd 21 NJ 136, 121 A2d 396; Martin v Smith, 239 Wis 314, 1 NW2d 163, 140 ALR 1063.

Footnote 60. State ex rel. Atty. Gen. v Broadway, 192 Ark 634, 93 SW2d 1248.

Footnote 61. Long v National Bureau of Casualty Underwriters, 209 Tenn 435, 354 SW2d 255.

Footnote 62. Manley v Mobley, 174 Ga 228, 162 SE 536.

Footnote 63. Laramie Irrig. & Power Co. v Grant, 44 Wyo 392, 13 P2d 235.

Footnote 64. Great N. R. Co. v Weeks, 297 US 135, 80 L Ed 532, 56 S Ct 426; R. H. Stearns Co. v United States, 291 US 54, 78 L Ed 647, 54 S Ct 325, 4 USTC ¶ 1210, 13 AFTR 842; Welch v Helvering, 290 US 111, 78 L Ed 212, 54 S Ct 8, 3 USTC ¶ 1164, 12 AFTR 1456; Vale v Du Pont (Sup) 37 Del 254, 182 A 668, 103 ALR 946; Florida Nat. Bank v Simpson (Fla) 59 So 2d 751, 33 ALR2d 581; Murray v Zook, 205 Ind 669, 187 NE 890, 90 ALR 321; Atchison, T. & S. F. R. Co. v Drainage Dist. of Lyon County, 133 Kan 586, 1 P2d 253, 82 ALR 552; Josenhans, Inc. v Jenkins, 203 Md 465, 102 A2d 257, 43 ALR2d 961; Oakley Country Club v Long, 325 Mass 109, 89 NE2d 260, 14 ALR2d 377; Soderberg v Holt, 86 Utah 485, 46 P2d 428, 99 ALR 1041.

Footnote 65. Lothstein v Fitzpatrick, 171 Or 648, 138 P2d 919.

Footnote 66. *Lloyd Corp. v Bannock County*, 53 Idaho 478, 25 P2d 217; *Liberty Consol. School Dist. v Schindler*, 246 Iowa 1060, 70 NW2d 544; *Thorne v Squier*, 264 Mich 98, 249 NW 497, 89 ALR 126; *Ambrozich v Eveleth*, 200 Minn 473, 274 NW 635, 112 ALR 269; *Wiget v St. Louis*, 337 Mo 799, 85 SW2d 1038, 100 ALR 1284; *Evans v Berry*, 262 NY 61, 186 NE 203, 89 ALR 387; *Hall v Fayetteville*, 248 NC 474, 103 SE2d 815.

Footnote 67. *Lloyd Corp. v Bannock County*, 53 Idaho 478, 25 P2d 217; *State ex rel. Fletcher v Naumann*, 213 Iowa 418, 239 NW 93, 81 ALR 483; *Josenhans, Inc. v Jenkins*, 203 Md 465, 102 A2d 257, 43 ALR2d 961; *Oklahoma County v Queen City Lodge, I. O. O. F.*, 195 Okla 131, 156 P2d 340.

Footnote 68. *Consolidated Motors, Inc. v Skousen*, 56 Ariz 481, 109 P2d 41, 132 ALR 1040, cert den 314 US 631, 86 L Ed 507, 62 S Ct 64 (a county treasurer, charged with the duty of selling property for unpaid taxes, will be presumed, in the absence of evidence to the contrary, to have mailed a copy of the notice of sale as required by statute).

Footnote 69. *Oklahoma County v Queen City Lodge, I. O. O. F.*, 195 Okla 131, 156 P2d 340.

Footnote 70. *Smiddy v Varney* (CA9 Cal) 665 F2d 261, cert den 459 US 829, 74 L Ed 2d 66, 103 S Ct 65; *CBS, Inc. v Partee* (1st Dist) 198 Ill App 3d 936, 145 Ill Dec 30, 556 NE2d 648, 52 BNA FEP Cas 1534, 17 Media L R 2051, app den 133 Ill 2d 553, 149 Ill Dec 317, 561 NE2d 687.

Footnote 71. *Harrison v Day*, 201 Va 386, 111 SE2d 504.

Footnote 72. *NLRB v Bibb Mfg. Co.* (CA5) 188 F2d 825, 28 BNA LRRM 2007, 19 CCH LC ¶ 66302.

Footnote 73. *Baker v Lake City Sewer Dist.*, 30 Wash 2d 510, 191 P2d 844.

Footnote 74. *Kane v Walsh*, 295 NY 198, 66 NE2d 53, 163 ALR 1351.

Footnote 75. *Linz v Eastland County* (Tex Com App) 39 SW2d 599, 77 ALR 1466.

Footnote 76. *Burke v Beasley* (Fla) 75 So 2d 7, 46 ALR2d 1381; *O'Neil v Jones*, 185 Tenn 539, 206 SW2d 782, 1 ALR2d 581; *State ex rel. Robinson v Hutcheson*, 180 Tenn 46, 171 SW2d 282, 168 ALR 850.

Footnote 77. *Goodman v School Dist. No. 1* (CA8 Colo) 32 F2d 586, 63 ALR 92; *Merryman v School Dist.*, 43 Wyo 376, 5 P2d 267, 86 ALR 1181.

Footnote 78. *Hayes v United States*, 170 US 637, 42 L Ed 1174, 18 S Ct 735.

§ 204 Administrative and regulatory agencies, and other public bodies

Courts have shown deference, whether by recognition of a presumption, allocation of burden of proof, or application of a maxim defining the scope of judicial review, to a variety of agencies, both federal and local, for example, the grant of a patent for an invention carries with it a presumption of validity 79 and operability; 80 a presumption of validity attaches to acts, regulations and decisions of the Board of Immigration Appeal, 81 the National Labor Relations Board, 82 and the Securities and Exchange Commission. 83 Similarly, courts show deference to a wide variety of state and local agencies, 84 including a Department of Agriculture and Consumer Services, 85 a city council, 86 a state corporation commission, 87 a board of education, 88 a board of highway directors, 89 a housing council, 90 a board of prison directors, 91 and a public service commission. 92

Footnotes

Footnote 79. *Radio Corp. of America v Radio Engineering Laboratories, Inc.*, 293 US 1, 79 L Ed 163, 54 S Ct 752, reh den 293 US 522, 79 L Ed 634, 55 S Ct 66.

Footnote 80. *Powers-Kennedy Contracting Corp. v Concrete Mixing & Conveying Co.*, 282 US 175, 75 L Ed 278, 51 S Ct 95.

Footnote 81. *Kaczmarczyk v INS* (CA7) 933 F2d 588, cert den (US) 116 L Ed 2d 608, 112 S Ct 583 and (criticized on other grounds by *Gebremichael v INS* (CA1) 10 F3d 28) and (criticized on other grounds by *De La Llana-Castellon v INS* (CA10) 1994 US App LEXIS 2654).

Footnote 82. *NLRB v Ohio New & Rebuilt Parts, Inc.* (CA6) 760 F2d 1443, 119 BNA LRRM 2473, 102 CCH LC ¶ 11471, cert den 474 US 1020, 88 L Ed 2d 554, 106 S Ct 569, 120 BNA LRRM 3456, 103 CCH LC ¶ 11621.

Footnote 83. *Blinder, Robinson & Co. v United States SEC* (CA10 Colo) 748 F2d 1415, CCH Fed Secur L Rep ¶ 91850, cert den 471 US 1125, 86 L Ed 2d 272, 105 S Ct 2655.

Footnote 84. *Thompson v Consolidated Gas Utilities Corp.*, 300 US 55, 81 L Ed 510, 57 S Ct 364; *Boswell v Bethea*, 242 Ala 292, 5 So 2d 816; *Liberty Consol. School Dist. v Schindler*, 246 Iowa 1060, 70 NW2d 544; *Ingelson v Olson*, 199 Minn 422, 272 NW 270, 110 ALR 167; *Evans v Berry*, 262 NY 61, 186 NE 203, 89 ALR 387; *Fleming v Commonwealth*, 191 Va 288, 61 SE2d 1.

Footnote 85. *Southeast Grove Management, Inc. v McKiness* (Fla App D1) 578 So 2d 883, 16 FLW D 1197.

Footnote 86. *McCallen v Memphis* (Tenn) 786 SW2d 633.

Footnote 87. *Fleming v Commonwealth*, 191 Va 288, 61 SE2d 1.

Footnote 88. *Liberty Consol. School Dist. v Schindler*, 246 Iowa 1060, 70 NW2d 544.

In an action to restrain a school board from excluding a minor from school because he had not complied with school regulations with respect to his haircut, it was presumed that the rules adopted were based on mature deliberation and for the welfare of the community, as the rule in this case had a reasonable connection with the successful operation of the school. *Leonard v School Committee of Attleboro*, 349 Mass 704, 212 NE2d 468, 14 ALR3d 1192.

Footnote 89. *State v Wendler*, 83 Idaho 213, 360 P2d 697.

Footnote 90. *Van Dalen v Washington Township*, 120 NJ 234, 576 A2d 819, later proceeding 247 NJ Super 186, 588 A2d 1248, cert den 127 NJ 557, 606 A2d 369 and revd on other grounds, remanded 132 NJ 1, 622 A2d 1257.

Footnote 91. *Re Sichofsky*, 201 Cal 360, 257 P 439, 53 ALR 615.

Footnote 92. *Darnell v Edwards*, 244 US 564, 61 L Ed 1317, 37 S Ct 701.

§ 205 Legislative acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is often said that the law presumes the regularity and validity of legislative acts of all levels of government, including the official acts of Congress; 93 state legislative bodies; 94 the electorate at large, acting by initiative; 95 municipal ordinances; 96 rules and regulations adopted by a city commission or board; 97 and disciplinary rules and regulations promulgated by a board of school trustees. 98

Footnotes

Footnote 93. *United States v Butler*, 297 US 1, 80 L Ed 477, 56 S Ct 312, 4 Ohio Ops 401, 36-1 USTC ¶ 9039, 16 AFTR 1289, 102 ALR 914; *Becker Steel Co. v Cummings*, 296 US 74, 80 L Ed 54, 56 S Ct 15; *Tim v Long Branch*, 135 NJL 549, 53 A2d 164, 171 ALR 320.

Footnote 94. *Ex parte Ashton*, 231 Ala 497, 165 So 773, 104 ALR 54; *Duhamel v State Tax Com.*, 65 Ariz 268, 179 P2d 252, 171 ALR 684; *Rebsamen Motor Co. v Phillips*, 226 Ark 146, 289 SW2d 170, 57 ALR2d 1256 (ovrld on other grounds by *Arkansas Motor Vehicle Com. v Cliff Peck Chevrolet, Inc.*, 277 Ark 185, 640 SW2d 453); *North Little Rock Transp. Co. v North Little Rock*, 207 Ark 976, 184 SW2d 52, 159 ALR 813; *Adams v Spillyards*, 187 Ark 641, 61 SW2d 686, 86 ALR 1493; *Rainey v Michel*, 6 Cal 2d 259, 57 P2d 932, 105 ALR 148; *Smith v Peterson* (4th Dist) 131 Cal App 2d 241, 280 P2d 522, 49 ALR2d 1194; *Amsel v Brooks*, 141 Conn 288, 106 A2d 152, 45 ALR2d 1234, app dismd 348 US 880, 99 L Ed 693, 75 S Ct 125; *Sage-Allen Co. v Wheeler*, 119 Conn 667, 179 A 195, 98 ALR 897; *Bodner v Gray* (Fla) 129 So 2d 419, 89 ALR2d

860; *McDougall v Lueder*, 389 Ill 141, 58 NE2d 899, 156 ALR 1059; *People ex rel. Barrett v Union Bank & Trust Co.*, 362 Ill 164, 199 NE 272, 104 ALR 1090; *Peachey v Boswell*, 240 Ind 604, 167 NE2d 48, 89 ALR2d 801; *Bolivar Tp. Bd. of Finance v Hawkins*, 207 Ind 171, 191 NE 158, 96 ALR 271; *Stoner McCray System v Des Moines*, 247 Iowa 1313, 78 NW2d 843, 58 ALR2d 1304; *Rohan v Detroit Racing Ass'n.*, 314 Mich 326, 22 NW2d 433, 166 ALR 1246; *Boyer-Campbell Co. v Fry*, 271 Mich 282, 260 NW 165, 98 ALR 827; *State v Hales*, 256 NC 27, 122 SE2d 768, 90 ALR2d 804; *Milwaukie Co. of Jehovah's Witnesses v Mullen*, 214 Or 281, 330 P2d 5, 74 ALR2d 347, cert den and app dismd 359 US 436, 3 L Ed 2d 932, 79 S Ct 940; *Re Estate of Moore*, 210 Or 23, 307 P2d 483, 65 ALR2d 715, recalled 210 Or 44, 308 P2d 180; *Dufour v Maize*, 358 Pa 309, 56 A2d 675, 1 ALR2d 563; *Narragansett Electric Lighting Co. v Sabre*, 50 RI 288, 146 A 777, 66 ALR 1553, reh den (RI) 147 A 668, 66 ALR 1567 and appeal after remand 51 RI 37, 150 A 756, 70 ALR 46, reh den (RI) 151 A 363, 70 ALR 52; *Re Squires*, 114 Vt 285, 44 A2d 133, 161 ALR 349; *Staples v Gilmer*, 183 Va 613, 33 SE2d 49, 158 ALR 495; *Robb v Tacoma*, 175 Wash 580, 28 P2d 327, 91 ALR 1010.

Footnote 95. *Commonwelath v Higgins*, 277 Mass 191, 178 NE 536, 79 ALR 1304.

Footnote 96. *New Orleans Public Service, Inc. v New Orleans*, 281 US 682, 74 L Ed 1115, 50 S Ct 449; *Sedalia ex rel. Bauman v Standard Oil Co. (CA8 Mo)* 66 F2d 757, 95 ALR 1514, cert den 290 US 706, 78 L Ed 607, 54 S Ct 374; *Re Petersen*, 51 Cal 2d 177, 331 P2d 24, 77 ALR2d 1291, app dismd 360 US 314, 3 L Ed 2d 1259, 79 S Ct 1294; *Re Porterfield*, 28 Cal 2d 91, 168 P2d 706, 19 BNA LRRM 2585, 11 CCH LC ¶ 63132, 167 ALR 675; *Murphy, Inc. v Westport*, 131 Conn 292, 40 A2d 177, 156 ALR 568; *Palangio v Chicago*, 23 Ill 2d 570, 179 NE2d 663, 92 ALR2d 1276; *State Bank & Trust Co. v Wilmette*, 358 Ill 311, 193 NE 131, 96 ALR 1327 (ovrld on other grounds by *La Salle Nat. Bank v Evanston*, 57 Ill 2d 415, 312 NE2d 625) as stated in *Champaign v Kroger Co. (4th Dist)* 88 Ill App 3d 498, 43 Ill Dec 661, 410 NE2d 661; *Matheny v Hutchinson*, 154 Kan 682, 121 P2d 227, 151 ALR 1187; *Cities Service Oil Co. v Marysville*, 117 Kan 514, 231 P 1031, 43 ALR 854, error dismd 270 US 665, 70 L Ed 788, 46 S Ct 207; *G. I. Veterans' Taxicab Ass'n v Yellow Cab Co.*, 192 Md 551, 65 A2d 173, 8 ALR2d 568; *122 Main Street Corp. v Brockton*, 323 Mass 646, 84 NE2d 13, 8 ALR2d 955; *Osius v St. Clair Shores*, 344 Mich 693, 75 NW2d 25, 58 ALR2d 1079; *Harrigan & Reid Co. v Burton*, 224 Mich 564, 195 NW 60, 33 ALR 142; *Ballard v Smith*, 234 Miss 531, 107 So 2d 580, 75 ALR2d 152; *Bettey v Sidney*, 79 Mont 314, 257 P 1007, 56 ALR 872; *Samuel Braen, Inc. v Mayor & General Council of Waldwick*, 28 NJ 476, 147 A2d 40, 75 ALR2d 371; *Durham v Southern R. Co.*, 185 NC 240, 117 SE 17, 35 ALR 1313, affd 266 US 178, 69 L Ed 231, 45 S Ct 51; *Fylken v Minot*, 66 ND 251, 264 NW 728, 103 ALR 320; *Milwaukie Co. of Jehovah's Witnesses v Mullen*, 214 Or 281, 330 P2d 5, 74 ALR2d 347, cert den and app dismd 359 US 436, 3 L Ed 2d 932, 79 S Ct 940; *Greenberg v Lee*, 196 Or 157, 248 P2d 324, 35 ALR2d 567; *Bellaire v Lamkin*, 159 Tex 141, 317 SW2d 43, 66 ALR2d 1289.

Footnote 97. *Thorne v Squier*, 264 Mich 98, 249 NW 497, 89 ALR 126; *Hartman v May*, 168 Miss 477, 151 So 737, 93 ALR 1408.

Footnote 98. *McLeod v State*, 154 Miss 468, 122 So 737, 63 ALR 1161.

§ 206 Quasi-public officers

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption of regularity has been applied to acts of quasi-public officers, such as administrators and executors, 99 a guardian ad litem, 1 and a notary public. 2

Footnotes

Footnote 99. *Beebe v Kirkpatrick*, 321 Ill 612, 152 NE 539, 47 ALR 891; *Leach v Farmers' Sav. Bank*, 205 Iowa 114, 213 NW 414, 56 ALR 801, mod on other grounds 205 Iowa 119, 217 NW 437, 56 ALR 806.

Footnote 1. *Spotts v Spotts*, 331 Mo 917, 55 SW2d 977, 87 ALR 660.

Footnote 2. *White v Inman*, 212 Miss 237, 54 So 2d 375, 30 ALR2d 380.

b. Regularity of Judicial Proceedings [207-213]

§ 207 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When any judicial or official act is shown to have been done in a manner substantially regular it is presumed that the court complied with the formal requisites for its validity. 3 The burden is on the individual challenging the action to show unlawfulness or illegality. 4

The law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. 5

Footnotes

Footnote 3. *Winegar v Corrections Dept.* (WD Mich) 400 F Supp 392, affd without op (CA6 Mich) 549 F2d 803, cert den 430 US 972, 52 L Ed 2d 366, 97 S Ct 1660; *Houston v Hennessey* (Mo App) 534 SW2d 52.

A court order empaneling a special grand jury enjoyed a presumption of regularity; hence it is presumed that the grand jury, called to investigate the nursing home industry, was regularly empaneled. *L & S Hospital & Institutional Supplies Co. v Hynes*, 84 Misc 2d 431, 375 NYS2d 934, affd (1st Dept) 51 App Div 2d 515, 378 NYS2d 78.

Footnote 4. *United States v Roses, Inc.*, 1 Fed Cir Trade Cas 39, 706 F2d 1563;

Applewhite v Kreiger (Fla App D4) 392 So 2d 317.

Footnote 5. United States v R. Enters., Inc., 498 US 292, 112 L Ed 2d 795, 111 S Ct 722, 91 CDOS 650, 91 Daily Journal DAR 954, on remand (CA4 Va) 955 F2d 229, 19 Media L R 1953.

§ 208 Subject matter jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes that a court has acted within its jurisdiction in the absence of a clear showing to the contrary. 6

Where the judgment recites the facts conferring jurisdiction, the recitals are presumed to be correct. 7 This presumption is rebuttable in a subsequent direct proceeding between the parties to the judgment. 8 In a collateral attack on a judgment, the law presumes the original court acted within its jurisdiction, that is, defendant has the burden of proving lack of jurisdiction even if the jurisdictional facts do not appear on the record. 9

Footnotes

Footnote 6. Smith v United States (CA8 Mo) 339 F2d 519; Pardo v Wilson Line of Washington, Inc., 134 US App DC 249, 414 F2d 1145; Re Adoption of a Minor, 94 US App DC 131, 214 F2d 844, 47 ALR2d 813.

An appellate court cannot presume the absence of subject matter jurisdiction in a case in which the record does not disclose a lack of jurisdiction; instead any presumption is in favor of the trial court's action, deciding the jurisdictional question presented. Schoffstall v Failey, 180 Ind App 528, 389 NE2d 361.

Footnote 7. Cook v Cook, 342 US 126, 96 L Ed 146, 72 S Ct 157; State v Hashimoto, 46 Hawaii 183, 377 P2d 728.

Footnote 8. Farnsworth v United States, 98 US App DC 59, 232 F2d 59, 62 ALR2d 423.

Footnote 9. Smith v United States (CA8 Mo) 339 F2d 519.

§ 209 Courts of general or special jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A court of general jurisdiction is presumed to have jurisdiction unless someone proves that there is some valid constitutional or legislative enactment that has withdrawn jurisdiction in a particular case. 10 With regard to certain inferior courts of special and limited jurisdiction, however, the presumption in favor of jurisdiction does not apply. 11 Because an inferior court's judgment enjoys no presumption that it was within the court's jurisdiction, the judgment of such a court should affirmatively demonstrate through the record or minutes that the court acted within the scope of its authority, and that all essential jurisdictional facts existed. 12

It does not necessarily follow, however, that the judgment is absolutely void if the matters essential to jurisdiction do not thus appear; although there is no presumption in favor of jurisdiction, it has sometimes been held permissible to show the necessary facts by extraneous evidence. 13 It is also sometimes held contrarily that where a court of limited jurisdiction does not show affirmatively on the face of the record that court has authority to act, the order or judgment of court is without jurisdiction and void. 14

The rule that no presumptions are indulged in favor of the proceedings of inferior courts applies only to the question of jurisdiction; these courts, like others, are presumed to have acted correctly as to matters within their jurisdictions. 15

Footnotes

Footnote 10. *People v Kellerman* (3d Dept) 102 App Div 2d 629, 479 NYS2d 815.

Footnote 11. *Burge v San Francisco*, 41 Cal 2d 608, 262 P2d 6; *Culberth v Keith* (Fla App D4) 354 So 2d 460; *State ex rel. Sorensen v Baird*, 201 Or 240, 269 P2d 535.

Annotation: *Res judicata* as affected by limitation of jurisdiction of court which rendered judgment, 83 ALR2d 977.

Footnote 12. *Re Application of Rosewell* (1st Dist) 139 Ill App 3d 482, 94 Ill Dec 75, 487 NE2d 952, *revd on other grounds* 117 Ill 2d 479, 111 Ill Dec 619, 512 NE2d 1256; *State ex rel. Smilack v Bushong* (Allen Co) 93 Ohio App 201, 50 Ohio Ops 499, 112 NE2d 675, *affd* 159 Ohio St 259, 50 Ohio Ops 280, 111 NE2d 918; *State ex rel. Sorensen v Baird*, 201 Or 240, 269 P2d 535.

Footnote 13. *Burge v San Francisco*, 41 Cal 2d 608, 262 P2d 6.

Footnote 14. *Re Jennings* (2d Dist) 32 Ill App 3d 857, 336 NE2d 786, *affd*, *cause remanded* 68 Ill 2d 125, 11 Ill Dec 256, 368 NE2d 864.

Footnote 15. *Doherty v McMillen* (Mo App) 805 SW2d 361 (a small claims court judgment has *res judicata* effect); *Sines v Ball*, 182 W Va 719, 391 SE2d 632 (a civil action filed in appellate court could not be dismissed on grounds that it was based on matters tried and determined in a lower magistrate court, that is, that the magistrate court was not competent to rule on the matter).

§ 210 --Probate courts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The authority given to probate courts is governed by state statute. Hence, the records of their judgments in some states must show on their face the jurisdictional facts conferring power on the courts to enter judgment, and no intendment will be made in its favor. 16

Most courts, however, view probate courts as courts of general or superior jurisdiction in respect of the settlement, distribution and partition of estates coming within their cognizance; orders and judgments of such courts are entitled to the same favorable presumptions and the same immunity from collateral attack as are those of courts of general jurisdiction. 17

Footnotes

Footnote 16. *Curtiss v McCall* (Fla App D1) 224 So 2d 354, cert dismd (Fla) 237 So 2d 533 (probate courts are not courts of general jurisdiction and are not subject to the rule of presumptions as to jurisdiction); *J. A. Mennella Foods Corp. v Neptune's Nuggets, Inc.*, 74 Misc 2d 839, 346 NYS2d 43.

Footnote 17. *Lappan v Lovette* (Ala) 577 So 2d 893; *Cloyd v Dawson* (Okla App) 569 P2d 534; *Mower v Boyer* (Tex) 811 SW2d 560 (a probate court acting within its statutory powers is a court of general jurisdiction whose judgments are immune from collateral attack); *Estate of Torrance v State* (Tex App El Paso) 812 SW2d 393; *Hadley v Cowan*, 60 Wash App 433, 804 P2d 1271.

§ 211 Judgments in other states

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the doctrine of comity and under the doctrine of full faith and credit, a judgment rendered by a court in one state (referred to hereinafter as the "judgment state") is generally enforceable by the tribunals of a sister state (hereinafter, the "forum state") unless the judgment was invalid. 18 Unless the record demonstrates lack of jurisdiction on its face, the forum state court will assume that the judgment was properly rendered, that is, the burden is upon the defendant to establish that the judgment court lacked jurisdiction; 19 and this is true even though the facts upon which jurisdiction depend do not affirmatively appear. 20 If defendant claims that the judgment court lacked jurisdiction to render the judgment according to the laws of the judgment state, defendant has the burden of proving what the law of the judgment state is. 21 If the party supplies the forum state court with the necessary materials and information, in most states the forum state court must take judicial notice of the laws of the judgment state. 22 If the party fails to provide these materials and information, the forum state court may take

such judicial notice sua sponte, 23 but is not obliged to do so; instead, the forum state court may presume that the law of the judgment state is the same as that of the forum state. This latter presumption should be applied, however, only if it is consistent with the presumption that the judgment state court acted within its jurisdiction. 24

Footnotes

Footnote 18. 30 Am Jur 2d, Execution and Enforcement of Judgments.

Footnote 19. *Takahashi v Board of Trustees* (CA9 Cal) 783 F2d 848, 40 BNA FEP Cas 267, 39 CCH EPD ¶ 36033, cert den 476 US 1182, 91 L Ed 2d 545, 106 S Ct 2916, 40 BNA FEP Cas 1873, 40 CCH EPD ¶ 36248, later proceeding (5th Dist) 202 Cal App 3d 1464, 249 Cal Rptr 578, reh den (Aug 18, 1988) and review den (Oct 12, 1988); *Davis v Davis* (Mo App) 799 SW2d 127; *G & R Gourmet Foods, Inc. v Natural Choice, Inc.* (Tex App Houston (1st Dist)) 811 SW2d 184; *Reiff v McGuire* (Tex Civ App Texarkana) 616 SW2d 349.

Footnote 20. *Takahashi v Board of Trustees* (CA9 Cal) 783 F2d 848, 40 BNA FEP Cas 267, 39 CCH EPD ¶ 36033, cert den 476 US 1182, 91 L Ed 2d 545, 106 S Ct 2916, 40 BNA FEP Cas 1873, 40 CCH EPD ¶ 36248, later proceeding (5th Dist) 202 Cal App 3d 1464, 249 Cal Rptr 578, reh den (Aug 18, 1988) and review den (Oct 12, 1988) and (criticized on other grounds by *Rojo v Kliger* (2nd Dist) 205 Cal App 3d 646, 252 Cal Rptr 605) and cert den 490 US 1011, 104 L Ed 2d 168, 109 S Ct 1654.

Unless extrinsic evidence or record establishes that the foreign court lacked jurisdiction to render judgment, a state court will presume that the foreign court did have jurisdiction. *G & R Gourmet Foods, Inc. v Natural Choice, Inc.* (Tex App Houston (1st Dist)) 811 SW2d 184.

Footnote 21. *Johnson v Johnson* (Mo App) 770 SW2d 483 (a foreign judgment, regular on its face, is entitled to strong presumption that foreign court had jurisdiction both over parties and subject matter and that court followed its laws and entered valid judgment; the burden of overcoming this presumption of validity is upon party attacking the judgment in subsequent proceeding).

Footnote 22. See §§ 109 et seq. for a discussion of judicial notice of foreign laws.

Footnote 23. *Boyles v Boyles*, 59 NC App 389, 297 SE2d 405, affd 308 NC 488, 302 SE2d 790, later proceeding 70 NC App 415, 319 SE2d 923 (a court may make its own independent inquiry into jurisdiction of a court which rendered judgment by examining laws of judgment state); *Prather, Thomas, Campbell, Pridgeon, Inc. v Florilina Properties, Inc.*, 29 NC App 316, 224 SE2d 289.

Footnote 24. *Barnhill v Barnhill* (La App 3d Cir) 488 So 2d 299.

§ 212 Service

[View Entire Section](#)

When the civil rules regarding service of process are followed, there is a presumption that service was valid. 25 This presumption is based on the premise that judicial acts are duly and regularly performed. 26

No such presumption is indulged for service prescribed by a statute or rule for substituted or constructive service. 27 Strict compliance with statutes which allow service on nonresidents will be enforced and no presumption of regularity will be followed. 28 The inquiry in those situations must be as to whether the requisites of the statute have been complied with, and such compliance must appear on the record. 29

No presumption may be given effect, however, against the express statement of the record. 30 In addition, there is no presumption of validity when direct attack is made upon default judgment. 31

Footnotes

Footnote 25. *Greenup v Register*, 104 NC App 618, 410 SE2d 398; *Rogers v United Presidential Life Ins. Co. (Franklin Co)* 36 Ohio App 3d 126, 521 NE2d 845; *Reed v Reed (Utah)* 806 P2d 1182, 154 Utah Adv Rep 6.

Footnote 26. *Winegar v Corrections Dept. (WD Mich)* 400 F Supp 392, affd without op (CA6 Mich) 549 F2d 803, cert den 430 US 972, 52 L Ed 2d 366, 97 S Ct 1660; *Principal Mut. Life Ins. Co. v Dohm (2d Dist)* 201 Ill App 3d 960, 147 Ill Dec 391, 559 NE2d 564; *Comyn v Southeastern Pennsylvania Transp. Authority*, 141 Pa Cmwlth 53, 594 A2d 857.

Footnote 27. *Prudential Property & Casualty Ins. Co. v Dickerson (1st Dist)* 202 Ill App 3d 180, 147 Ill Dec 514, 559 NE2d 854.

Footnote 28. *Polskie Linie Oceaniczne v Seasafe Transport A/S (CA11 Fla)* 795 F2d 968; *Oriental Imports & Exports, Inc. v Maduro & Curiel's Bank, N.V. (CA11 Fla)* 701 F2d 889.

Footnote 29. *Electro Engineering Products Co. v Lewis (Fla)* 352 So 2d 862 (to withstand an attack on service under a long-arm statute, a plaintiff must substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, not merely reiterating the factual allegations).

Footnote 30. *Dickinson v National Soc. of Health (La App 5th Cir)* 589 So 2d 632.

Footnote 31. *Allied Bank of Dallas v Pleasant Homes, Inc. (Tex App Dallas)* 757 SW2d 460.

§ 213 Regularity of proceedings subsequent to gaining jurisdiction

The presumption of regularity applies not only to the fact of jurisdiction, but also to proceedings subsequent to the gaining of jurisdiction. 32 When the jurisdiction of a competent court has attached, every act is presumed to have been rightly done until the contrary appears. 33

Unless the record shows the contrary, it will be presumed that the trial court gave due consideration to testimony appearing in the record, 34 that a criminal defendant was properly arraigned, 35 that the court considered sending defendants to a state youth facility, 36 that a defendant did, as indicated by court records, serve a prison sentence for a prior conviction, thereby qualifying for enhanced sentencing, 37 that the trial judge found preliminary requisites to the admissibility of evidence, 38 and that the jury followed the instructions given to them. 39

Footnotes

Footnote 32. *Prouty v Prouty* (Ala App) 388 So 2d 1012 (a trial court's decisions have a presumption of correctness); *Robert Half of Iowa, Inc. v Citizens Bank of Newburg* (Iowa App) 453 NW2d 236; *Middleburg Heights v Brown*, 24 Ohio St 3d 66, 24 Ohio BR 215, 493 NE2d 547.

Footnote 33. *Burden v Zant*, 498 US 433, 112 L Ed 2d 962, 111 S Ct 862, 91 Daily Journal DAR 2049, on remand (CA11 Ga) 975 F2d 771, 6 FLW Fed C 1244, reh, en banc, den (CA11 Ga) 983 F2d 1084 and revd on other grounds, remanded (US) 126 L Ed 2d 611, 114 S Ct 654, 94 Daily Journal DAR 364 (trial court's finding that a codefendant had testified under an immunity agreement was entitled to the presumption of correctness).

A reviewing court should presume that trial court followed the law, until the contrary is shown. *Shelby Mut. Ins. Co. v Grand Rapids*, 6 Mich App 95, 148 NW2d 260.

In the absence of evidence to the contrary, it is presumed that a court of general jurisdiction has proceeded within the general scope of its powers and this presumption of regularity attaches with particularity to judicial proceedings in which the jurisdiction of the tribunal is unquestioned. *John v Centennial Ins. Co.* (3d Dept) 91 App Div 2d 1104, 458 NYS2d 350.

Footnote 34. *Columbus Gas & Fuel Co. v Public Utilities Com.*, 292 US 398, 78 L Ed 1327, 54 S Ct 763, 91 ALR 1403.

Footnote 35. *People v Guevara* (2nd Dist) 132 Cal App 3d 193, 183 Cal Rptr 18.

Footnote 36. *People v Waite* (4th Dist) 146 Cal App 3d 585, 194 Cal Rptr 245.

Footnote 37. *People v Crockett* (2nd Dist) 222 Cal App 3d 258, 271 Cal Rptr 500, review den (Cal) 1990 Cal LEXIS 4423.

Footnote 38. *Stitt v Tribe*, 270 Mass 204, 170 NE 48.

Footnote 39. *Carnation Co. v Hill*, 115 Wash 2d 184, 796 P2d 416.

2. Relating to the Family [214-235]

a. Marriage [214-225]

(1). Existence and Validity [214-217]

§ 214 Ceremonial marriage

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes that any marriage which has been solemnized in accordance with the laws of the jurisdiction where the ceremony is performed is valid. 40 This presumption may shift the burden of persuasion as well as the burden of production. 41 Courts categorize this presumption as particularly strong, 42 some going so far as to say that it can be overcome only by clear and convincing evidence. 43 Moreover, where there is proof of a marriage ceremony, the law will presume the capacity of the parties, and all essentials to the validity of the marriage. 44

The presumption in favor of the validity of a marriage increases with time. 45 It is a logical extension of these presumptions that the marital relationship, once entered into, is presumed to continue until its dissolution by death, annulment or divorce. 46

Footnotes

Footnote 40. *Dennis v Railroad Retirement Bd.* (CA6) 585 F2d 151; *Re Estate of Nowak* (2d Dist) 130 Ill App 2d 573, 264 NE2d 307; *Miller v AMF Harley-Davidson Motor Co.* (Iowa App) 328 NW2d 348; *Re Estate of Tomlinson* (Mo App) 493 SW2d 402; *Guggenmos v Guggenmos*, 218 Neb 746, 359 NW2d 87; *Johnson v Johnson* (ND) 104 NW2d 8, 82 ALR2d 1029.

Annotation: Rights in decedent's estate as between lawful and putative spouses, 81 ALR3d 6.

Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Mental capacity to marry, 82 ALR2d 1040.

Validity of solemnized marriage as affected by absence of license required by statute,

61 ALR2d 847.

What constitutes intoxication sufficient to warrant annulment of marriage, 57 ALR2d 1250.

Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third persons, 20 ALR2d 1163.

Practice References Validity of Marriage. 36 Am Jur POF2d 441.

Footnote 41. Guggenmos v Guggenmos, 218 Neb 746, 359 NW2d 87.

Footnote 42. Compton v Davis Oil Co. (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587 (once the existence of a marriage is established, a strong, though rebuttable, presumption arises that such marriage is valid; Miller v AMF Harley-Davidson Motor Co. (Iowa App) 328 NW2d 348 (a marriage in fact is presumed valid)).

Footnote 43. Compton v Davis Oil Co. (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587.

Footnote 44. Stewart v Hampton (Fla App D5) 506 So 2d 70, 12 FLW 1134 (once a marriage is shown to have been ceremonially entered into, it is presumed legal and valid); Smith v Weir (Miss) 387 So 2d 761 (the burden of producing evidence to rebut the presumption of validity attaching to an individual's ceremonial marriage rested on the parties attacking it, and that burden of proof could be met only by producing proof so cogent and conclusive as fairly to preclude any other result).

Annotation: Recognition by forum state of marriage which, although invalid where contracted, would have been valid if contracted within forum state, 82 ALR3d 1240.

Footnote 45. Metropolitan Life Ins. Co. v Manning (CA2 NY) 568 F2d 922; Milano v Secretary of Health & Human Services (ED NY) 586 F Supp 1431; Compton v Davis Oil Co. (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587.

Footnote 46. Heyman v Heyman (ND Ill) 548 F Supp 1041; Commonwealth ex rel. Alexander v Alexander, 445 Pa 406, 289 A2d 83.

§ 215 Common law marriage; cohabitation and repute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When a couple cohabits together and are reputedly husband and wife, the law has traditionally recognized a presumption that they are in fact married; 47 and this presumption is applied whether the underlying marriage was ceremonial or contracted pursuant to common-law. 48 The rule allowing a finding of marriage based on cohabitation and reputation alone, moreover, is one of necessity to be applied only where other proof is unavailable. 49

Both cohabitation and reputation must be shown in order to raise the presumption of marriage. 50 Cohabitation and reputation are often required to be constant and continuous. 51 Proof of reputation must also be general and not confined to a few persons in the immediate neighborhood. 52

The presumption may be said to gain strength, as measured by the test of probability, in proportion to the length of time during which cohabitation and reputation of marriage have continued. 53 But each case is decided on its own facts. 54

In a divorce action, some courts, reasoning that the plaintiff can testify that a marriage had taken place, have held that the presumption should therefore be inapplicable. 55

Parties to a common-law marriage are presumed to have had the requisite mental capacity to contract marriage. 56

Footnotes

Footnote 47. *Langdon v Langdon*, 204 Ind 321, 183 NE 400, 85 ALR 1297.

Footnote 48. *Re Marriage of Gebhardt* (Iowa App) 426 NW2d 651 (cohabitation and reputation raise fair presumption that common-law marital relationship exists); *Rahill v 645 Restaurant Corp.* (3d Dept) 59 App Div 2d 988, 399 NYS2d 342 (cohabitation does not create marriage but merely raises presumption that marriage exists); *Estate of Gavula*, 490 Pa 535, 417 A2d 168 (rebuttable presumption of marriage where constant cohabitation and general reputation of marriage coexist); *Jackson v Culp*, 400 Pa Super 519, 583 A2d 1236, app den 529 Pa 621, 600 A2d 537 (there must at least be evidence of cohabitation and reputation of marriage to give rise to presumption of common-law marriage); *Re Estate of Corace*, 364 Pa Super 269, 527 A2d 1058.

Annotation: Common-law marriage between parties previously divorced, 82 ALR2d 688.

Practice References Presumptions concerning marriage relation. 36 Am Jur POF2d 441.

Footnote 49. *Cross v Cross* (1st Dept) 146 App Div 2d 302, 541 NYS2d 202.

Footnote 50. *Compton v Davis Oil Co.* (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587; *Weaver v G.D. Searle & Co.* (ND Ala) 558 F Supp 720; *Re Estate of Fisher* (Iowa) 176 NW2d 801; *Jackson v Culp*, 400 Pa Super 519, 583 A2d 1236, app den 529 Pa 621, 600 A2d 537.

Footnote 51. *McCoy v District of Columbia* (Dist Col App) 256 A2d 908 (cohabitation cannot be established on basis of a two-day visit to the District of Columbia); *Cross v Cross* (1st Dept) 146 App Div 2d 302, 541 NYS2d 202 (fact that parties stayed in Pennsylvania two nights at most was not enough to establish presumption of marriage based on cohabitation and reputation); *Re Estate of Kovalchick*, 345 Pa Super 229, 498 A2d 374.

Footnote 52. Re Estate of Rees, 331 Pa Super 225, 480 A2d 327.

Footnote 53. Re Estate of Marden (Fla App D3) 355 So 2d 121, cert den (Fla) 361 So 2d 833 and cert den (Fla) 361 So 2d 833.

Footnote 54. People v Vogel, 46 Cal 2d 798, 299 P2d 850; Cross v Cross (1st Dept) 146 App Div 2d 302, 541 NYS2d 202 (even though both parties divorced their former spouses and cohabited for about eighteen years, and represented themselves as husband and wife, the court found that no marriage existed because they argued over whether to get married and were still married to both former spouses during much of their cohabitation); Steadman v Turner, 357 Pa Super 361, 516 A2d 21, app den 515 Pa 624, 531 A2d 431 (evidence of cohabitation and reputation do not raise presumption of marriage where parties know their relationship is meretricious).

Footnote 55. East v East (Dist Col App) 536 A2d 1103.

Annotation: Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 ALR4th 814.

Footnote 56. Re Estate of Hendrickson, 248 Kan 72, 805 P2d 20.

§ 216 --Rebutting presumption; shifting burdens

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Once a presumption of marriage has been created by proof of cohabitation and repute, the burden of persuasion shifts to the adverse party to disprove its existence by clear evidence. 57

Footnotes

Footnote 57. Cross v Rudder (Ala) 380 So 2d 766, appeal after remand (Ala) 404 So 2d 8; Carter v Carter (Fla App D3) 309 So 2d 625 (once prima facie case of common-law marriage has been proved, thereby raising the presumption from proof of general repute and cohabitation, burden of proving illegality of marriage shifts to those who challenge it); Metropolitan Life Ins. Co. v Johnson, 103 Idaho 122, 645 P2d 356 (presumption of marriage, once established, must be overcome by clear and positive evidence); Re Estate of Lowney (2d Dept) 152 App Div 2d 574, 543 NYS2d 698 (where persons live and cohabit as husband and wife and are reputed to be such, a presumption arises that they have been legally married and this presumption, especially in a case involving legitimacy, can be rebutted only by cogent and satisfactory evidence); Re Estate of Allen (Okla) 738 P2d 142; Steadman v Turner, 357 Pa Super 361, 516 A2d 21, app den 515 Pa 624, 531 A2d 431 (cohabitation and reputation are only mere circumstances from which a marriage may be presumed and rebutted by other facts and circumstances).

§ 217 --Cohabitation without marriage

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes that cohabitation that was illicit or meretricious at its outset remains so. 58 The presumption that a relationship that begins as meretricious continues as such depends on two related things—the knowledge of the parties and the intent of the parties. 59

A relationship which began as nonmarital cohabitation may, and often does, ripen into marriage: the couple may exchange vows in a formal wedding ceremony, or they may contract a common-law marriage. 60 Because the relationship began as nonmarital cohabitation, however, the law presumes that the relationship remained nonmarital. 61 Thus, the party seeking to prove that the couple did at some point marry each other has at least the initial burden to produce evidence to overcome the presumption. 62

Footnotes

Footnote 58. *Beebe v Beebe*, 227 Ga 248, 179 SE2d 758; *Dowd v Dowd*, 275 Pa Super 472, 418 A2d 1387; *Yarbrough v Yarbrough* (App) 280 SC 546, 314 SE2d 16 (a relationship illicit at its inception does not ripen into common-law marriage once the impediment to marriage is removed; *Lightsey v Lightsey*, 56 Tenn App 394, 407 SW2d 684.

Footnote 59. *Beebe v Beebe*, 227 Ga 248, 179 SE2d 758; *Dowd v Dowd*, 275 Pa Super 472, 418 A2d 1387; *Lightsey v Lightsey*, 56 Tenn App 394, 407 SW2d 684.

Footnote 60. *Coleman v Aubert* (Ala) 531 So 2d 881; *Fields v Fields* (Montgomery Co) 39 Ohio App 3d 187, 530 NE2d 933.

Footnote 61. *Mixon v Mize* (Fla App D1) 198 So 2d 373, cert den (Fla) 204 So 2d 211; *Re Estate of Murnion*, 212 Mont 107, 686 P2d 893; *Cross v Cross* (1st Dept) 146 App Div 2d 302, 541 NYS2d 202; *Re Estate of Dodge*, 361 Pa Super 188, 522 A2d 77; *Re Estate of Kovalchick*, 345 Pa Super 229, 498 A2d 374.

See 52 Am Jur 2d, Marriage § 132 for a discussion of the presumption of the existence of a marriage from cohabitation and reputation.

Footnote 62. *Metropolitan Life Ins. Co. v Johnson*, 103 Idaho 122, 645 P2d 356.

(2). Validity of Second Marriage [218-222]

§ 218 Generally

The law presumes that a second marriage, like the first, 63 is valid and that a prior marriage of one of the parties ended in death or divorce. A key factor in raising the presumption will be evidence that the parties acted in good faith and intended to marry. 64

Once it is proven that a marriage exists, the law presumes that the marriage is valid and lawful and continues without termination. 65 The presumption of the validity of a marriage, on the other hand, supports the inference that the second marriage was valid and that the first marriage therefore ended prior to the second marriage. 66 When confronting this inconsistency, the law generally gives the latter presumption precedence, presuming the validity of the second marriage. 67

Among the policy considerations supporting this presumption is the need to protect family stability, particularly where invalidating the second marriage would render children born of that marriage illegitimate. 68 But the presumption is also occasionally indulged in, even though children are not involved. 69 Another important reason for the presumption is the need to protect the financial interests of an innocent spouse who was unaware of the other spouse's prior marriage or doubts as to its dissolution. 70

The party seeking to invoke the presumption must first prove the basic fact—that there was an apparently valid second marriage. 71

Footnotes

Footnote 63. See §§ 214 et seq., for a discussion of the presumption of the validity and continuance of marriages.

Footnote 64. *Kelly v Kelly*, 144 Ga App 43, 240 SE2d 312, appeal after remand 147 Ga App 745, 250 SE2d 194; *Re Felber's Estate*, 193 Or 231, 238 P2d 203, 31 ALR2d 231; *Dowd v Dowd*, 275 Pa Super 472, 418 A2d 1387.

Footnote 65. See 52 Am Jur 2d, Marriage § 137 for a discussion of the presumption of the continuance of existing marriages.

Footnote 66. See 52 Am Jur 2d, Marriage §§ 140 et seq. for a discussion of the presumption in favor of the validity of the latest of successive marriages.

Footnote 67. *Grey v Heckler* (CA2 NY) 721 F2d 41; *Metropolitan Life Ins. Co. v Manning* (CA2 NY) 568 F2d 922; *McKnight v Schweiker* (DC Md) 516 F Supp 1102; *Crosby v Ellsworth* (CA9 Mont) 431 F2d 35; *Gainey v Flemming* (CA10 Colo) 279 F2d 56; *Compton v Davis Oil Co.* (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587; *Brantley v Skeens*, 105 US App DC 246, 266 F2d 447; *Yarbrough v United States*, 169 Ct Cl 589, 341 F2d 621; *Lockett v Coleman*, 293 Ala 613, 308 So 2d 689, cert den 423 US 839, 46 L Ed 2d 59, 96 S Ct 69; *Wilson v Wilson*, 1 Ariz App 77, 399 P2d 698; *Clark v Clark*, 19 Ark App 280, 719 SW2d 712, supp op, en banc 19 Ark App 283, 725

SW2d 1; Vargas v Superior Court of Los Angeles County (2nd Dist) 9 Cal App 3d 470, 88 Cal Rptr 281; Williamson v Williamson (Super) 48 Del 379, 104 A2d 463; Re Estate of Yohn (Fla) 238 So 2d 290; Re Estate of Donner (Fla App D3) 364 So 2d 742; Johnson v Johnson, 239 Ga 714, 238 SE2d 437; Glover v Glover, 172 Ga App 278, 322 SE2d 755; Re Application of Soriano, 35 Hawaii 756; Nicholas v Idaho Power Co., 63 Idaho 675, 125 P2d 321; Baer v De Berry (1st Dist) 31 Ill App 2d 86, 175 NE2d 673; Ross v Red Cab Co., 105 Ind App 440, 14 NE2d 333; Miller v AMF Harley-Davidson Motor Co. (Iowa App) 328 NW2d 348; Harper v Dupree, 185 Kan 483, 345 P2d 644; Rose v Rose, 274 Ky 208, 118 SW2d 529; Gathright v Smith (La) 368 So 2d 679; Zanders v Zanders (La App 1st Cir) 434 So 2d 1213; Browning v Browning, 224 Md 399, 168 A2d 506; Re Estate of Adams, 362 Mich 624, 107 NW2d 764; Smith v Weir (Miss) 387 So 2d 761; Estate of Holloway v Whitaker (Mo App) 697 SW2d 551; Villalon v Bowen, 70 Nev 456, 273 P2d 409; Dawson v Hatfield Wire & Cable Co., 59 NJ 190, 280 A2d 173; Allen v Allen, 98 NM 652, 651 P2d 1296; Re Estate of Lowney (2d Dept) 152 App Div 2d 574, 543 NYS2d 698; Stewart v Rogers, 260 NC 475, 133 SE2d 155; Re Estate of Swinson, 62 NC App 412, 303 SE2d 361; Norton v Coffield (Okla) 357 P2d 434; Smith v Smith, 169 Or 650, 131 P2d 447; Yarbrough v Yarbrough (App) 280 SC 546, 314 SE2d 16; Troxel v Jones, 45 Tenn App 264, 322 SW2d 251; Texas Employers' Ins. Ass'n v Elder, 155 Tex 27, 282 SW2d 371; Medrano v State (Tex App El Paso) 701 SW2d 337, petition for discretionary review ref (Oct 22, 1986) and appeal after remand (Tex App El Paso) 768 SW2d 502, petition for discretionary review ref (Oct 25, 1989); Martin v Martin, 29 Utah 2d 413, 510 P2d 1102; Parker v American Lumber Corp., 190 Va 181, 56 SE2d 214, 14 ALR2d 1; Davis v Davis, 3 Wash 2d 448, 101 P2d 313; Meade v State Compensation Com'r, 147 W Va 72, 125 SE2d 771.

Footnote 68. Faggard v Filipowich, 248 Ala 182, 27 So 2d 10; Re Estate of Adams, 362 Mich 624, 107 NW2d 764.

Footnote 69. Re McNell's Estate (Sur) 66 NYS2d 217, affd 270 App Div 857, 61 NYS2d 392.

Footnote 70. Grey v Heckler (CA2 NY) 721 F2d 41; Parker v American Lumber Corp., 190 Va 181, 56 SE2d 214, 14 ALR2d 1.

Footnote 71. Belle Isle v Belle Isle, 47 Ga App 168, 170 SE 211.

§ 219 Subsequent common-law marriage

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts also generally apply the presumption of the validity of a subsequent marriage to a subsequent common-law marriage. ⁷² The presumption's application raises no serious difficulty if the spouse from the first marriage had not been heard from for more than seven years prior to the second marriage, ⁷³ because this is consistent with the presumption that a person who has been neither seen nor heard from for seven years is dead. ⁷⁴ Even without a seven-year period, courts have been willing to apply a presumption that the first marriage ended in death or divorce in order to recognize a

subsequent common-law marriage. 75

A few cases have been unwilling to recognize as a common law marriage a relationship that began as cohabitation during the existence of the first marriage. 76

Footnotes

Footnote 72. *Georgia Casualty & Surety Co. v Bloodworth*, 120 Ga App 313, 170 SE2d 433.

Footnote 73. *Georgia Casualty & Surety Co. v Bloodworth*, 120 Ga App 313, 170 SE2d 433 (presumptions that one who was absent from his accustomed place of abode and unheard from for seven years was dead and, in absence of proof to the contrary, that death occurred at the end of seven-year period, operated in favor of the validity of a subsequent common-law marriage).

Footnote 74. See 22A Am Jur 2d, Death § 551 for a discussion of the presumption of death after seven years.

Footnote 75. *Lott v Toomey* (Ala) 477 So 2d 316; *Barnett v Barnett*, 262 Ala 655, 80 So 2d 626; *Sikes v Guest* (Fla App D2) 170 So 2d 322; *Carr v Walker*, 205 Ga 1, 52 SE2d 426; *Warner v Warner*, 76 Idaho 399, 283 P2d 931; *Miller v AMF Harley-Davidson Motor Co.* (Iowa App) 328 NW2d 348; *Braymer v Overton Mach. Co.*, 324 Mich 648, 37 NW2d 659; *Re Estate of Erwin* (Miss) 317 So 2d 55; *Re Marriage of Sumners* (Mo App) 645 SW2d 205; *Winn v Wiggins*, 47 NJ Super 215, 135 A2d 673; *Mayo v Mayo*, 73 NC App 406, 326 SE2d 283; *Hill v Shreve* (Okla) 448 P2d 848; *Re Estate of Booker*, 27 Or App 779, 557 P2d 248; *Troxel v Jones*, 45 Tenn App 264, 322 SW2d 251; *Texas Employers' Ins. Ass'n v Elder*, 155 Tex 27, 282 SW2d 371.

Footnote 76. *Pace v Celebrezze* (SD W Va) 243 F Supp 317; *Cross v Cross* (1st Dept) 146 App Div 2d 302, 541 NYS2d 202.

§ 220 Equitable considerations affecting standing to raise the presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption that a second marriage is valid does not run in favor of a spouse who has been shown to have a prior undissolved marriage unless that spouse can show good faith in contracting the second marriage. 77 The spouse of the second marriage, however, would be entitled to rely on the presumption of validity without proof of his or her own good faith where it was her deceased spouse who had a prior undissolved marriage. 78

The presumption is particularly strong when there are children of the second marriage 79 or when an undeserving party seeks an inequitable advantage. 80

Courts have refused to allow a party to the second marriage to use the presumption to deny the continued validity of his own first marriage. 81 This refusal is based on two considerations: the party's presumed access to direct proof, and judicial unwillingness to allow the party to use the presumption to gain an unfair advantage. 82 Courts have also refused to permit use of the presumption in situations in which the party seeking to invoke it had unclean hands or sought to use it unfairly, 83 or where equitable considerations favored the surviving spouse of the first marriage. 84

Several courts have also made it particularly difficult for strangers to the marriage to invoke the presumption to deny death benefits or similar benefits to the surviving spouse. 85

Footnotes

Footnote 77. Succession of City v Succession of Manuel (La App 3d Cir) 469 So 2d 467.

Footnote 78. Succession of City v Succession of Manuel (La App 3d Cir) 469 So 2d 467.

A claim by heirs of the second husband of a twice-married woman to real property that had been owned by the woman and her second husband as tenants by entirety, based on successive deaths of woman and second husband, was properly upheld as against the woman's collateral heirs, based on presumption of validity of woman's second marriage where no evidence was produced to show the lack of a divorce dissolving the woman's first marriage, or that the second husband contracted the marriage in absence of honest and reasonable belief that such marriage was valid and no legal impediment to it existed. Zanders v Zanders (La App 1st Cir) 434 So 2d 1213.

Footnote 79. Esmond v Thomas Lyons Bar & Grill (3d Dept) 26 App Div 2d 884, 274 NYS2d 225.

Footnote 80. Re Marriage of Sumners (Mo App) 645 SW2d 205 (defendant was equitably estopped from attacking validity of prior divorce in light of the fact that he and his second wife cohabited for 16 years, had four children together, had, throughout the marriage, filed joint income tax returns together, had acquired several parcels of realty as tenants by entirety, and the defendant judicially admitted, in original answer filed in divorce action, that the second marriage was lawful).

Footnote 81. Lands v Equitable Life Assur. Soc., 239 La 782, 120 So 2d 74; Mara v Mara (La App 4th Cir) 452 So 2d 329, later proceeding (La App 4th Cir) 513 So 2d 1220, cert den (La) 517 So 2d 813.

Footnote 82. Mara v Mara (La App 4th Cir) 452 So 2d 329, later proceeding (La App 4th Cir) 513 So 2d 1220, cert den (La) 517 So 2d 813.

Footnote 83. Succession of City v Succession of Manuel (La App 3d Cir) 469 So 2d 467, holding that the presumption of validity of a second marriage does not run in favor of a spouse who has been shown to have a prior undissolved marriage, unless that spouse can show good faith in contracting a second marriage; Mara v Mara (La App 4th Cir) 452 So 2d 329, later proceeding (La App 4th Cir) 513 So 2d 1220, cert den (La) 517 So 2d 813; Mayer v Mayer, 66 NC App 522, 311 SE2d 659, review den 311 NC 760, 321 SE2d 140.

The presumption is not available to one who deserted or abandoned the spouse of prior marriage in another state and subsequently in this state remarried in bad faith and without reason to believe that first marriage had been dissolved by death, divorce, or annulment. *Lands v Equitable Life Assur. Soc.*, 239 La 782, 120 So 2d 74.

Alleged husband was held to have no interest in the estate property of deceased wife, who had left all her property to her children, where their ceremonial marriage was void by reason of a prior undissolved common-law marriage between the alleged husband and a woman whose previous husband had been absent for 22 years prior to the alleged husband's common-law marriage. *Estate of Claveria v Claveria* (Tex) 615 SW2d 164, reh'g of cause overr'd (Mar 18, 1981) and (superseded by statute on other grounds as stated in *Russell v Russell* (Tex) 865 SW2d 929).

Footnote 84. *Boyd v Heckler* (ED NY) 588 F Supp 31 (presumption in favor of the validity of decedent's latest marriage was rebutted where: (a) no record of divorce was found in two locations most likely for a divorce to have been procured; (b) the wife and a daughter of the first marriage testified that there was no divorce; and (c) equitable considerations did not weigh as heavily in favor of the second marriage, which was of short duration and yielded no children).

Footnote 85. *Steele v Richardson* (CA2 NY) 472 F2d 49; *Miller v AMF Harley-Davidson Motor Co.* (Iowa App) 328 NW2d 348; *Esmond v Thomas Lyons Bar & Grill* (3d Dept) 26 App Div 2d 884, 274 NYS2d 225.

§ 221 Strength and effect of presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption that a second marriage is valid, that is, that a previous marriage of a spouse terminated by death or divorce prior to the second marriage, is a particularly strong one. 86 Although a few cases state that the party seeking to invalidate the second marriage need only do so by a preponderance of the evidence, 87 most courts insist that the challenging party must disprove every reasonable possibility that the second marriage is valid, 88 or establish the validity of the first marriage at the time of the second by clear and convincing 89 or even stronger proof. 90

Jurisdictions that follow Federal Rule 301 direct that presumptions shift only the burden of production, not the burden of persuasion, unless otherwise provided by statute, 91 affording the presumption less weight than it had been given prior to the adoption of the rule. 92

Footnotes

Footnote 86. *Boyd v Heckler* (ED NY) 588 F Supp 31; *McKnight v Schweiker* (DC Md) 516 F Supp 1102; *Yarbrough v Celebrezze* (MD NC) 217 F Supp 943; *Gardner v Oldham*

(CA5 Fla) 381 F2d 804; *Smith v Heckler* (CA11 Fla) 707 F2d 1284; *Yarbrough v United States*, 169 Ct Cl 589, 341 F2d 621; *Cole v Cole*, 249 Ark 824, 462 SW2d 213; *Blythe v Blythe*, 241 Ark 768, 410 SW2d 379; *Williamson v Williamson* (Super) 48 Del 277, 101 A2d 871, adhered to (Super) 48 Del 379, 104 A2d 463; *Mayo v Ford* (Mun Ct App Dist Col) 184 A2d 38, revd on other grounds (Dist Col App) 191 A2d 603; *Stewart v Hampton* (Fla App D5) 506 So 2d 70, 12 FLW 1134; *McBride v McBride* (Fla App D2) 130 So 2d 302; *Quinn v Quinn*, 4 Mich App 536, 145 NW2d 252; *Booker v James Spence Iron Foundry, Inc.*, 80 NJ Super 68, 192 A2d 860; *Re Estate of Hadley*, 57 Misc 2d 652, 293 NYS2d 224, affd (2d Dept) 32 App Div 2d 1078, 303 NYS2d 1012; *Re Estate of Davis*, 55 Or App 982, 640 P2d 692, adhered to 57 Or App 145, 643 P2d 1351.

Footnote 87. *Gardner v Oldham* (CA5 Fla) 381 F2d 804.

Footnote 88. *Teel v Nolen Brown Motors, Inc.* (Fla) 93 So 2d 874 (first wife is not required to eliminate every remote possibility that divorce might have been secured by her husband, but she must establish absence of reasonable probability that husband actually secured divorce); *Harper v Dupree*, 185 Kan 483, 345 P2d 644 (every reasonable possibility of validity must be negated by evidence that is clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt); *Re Will of Goethie*, 9 Misc 2d 906, 161 NYS2d 785.

Footnote 89. *Newburgh v Arrigo*, 88 NJ 529, 443 A2d 1031, 42 ALR4th 795; *Dawson v Hatfield Wire & Cable Co.*, 59 NJ 190, 280 A2d 173; *Allen v Allen*, 98 NM 652, 651 P2d 1296; *Panzer v Panzer*, 87 NM 29, 528 P2d 888; *Schall v Schall* (App) 97 NM 665, 642 P2d 1124; *Re Estate of Steinberg*, 34 Or App 293, 578 P2d 487; *Anderson v Anderson*, 121 Utah 237, 240 P2d 966.

Footnote 90. *United States ex rel. Kazanos v Murff* (DC NY) 170 F Supp 182 (requiring evidence which is so strong, clear, distinct, and satisfactory as not only to demonstrate the fact and validity of the earlier marriage and its subsistence at the time of the later marriage, but also to aggressively exclude every indication or suggestion which might conceivably rescue the second marriage from the taint of invalidity); *United States v Marlow* (CA5 La) 235 F2d 366 (to overcome presumption of validity of second marriage, positive proof must be adduced to establish that prior marriage was never dissolved by judicial decree or death); *Harper v Dupree*, 185 Kan 483, 345 P2d 644 (evidence must be clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt); *Browning v Browning*, 224 Md 399, 168 A2d 506 (evidence must be sufficient to establish mental conviction which amounts to moral certainty); *Marcum v Zaring* (Okla) 406 P2d 970 (presumption of validity can be rebutted only by clear, cogent, and convincing evidence).

Footnote 91. See § 195 for a discussion of the burden shifting effects of FRE See § 301.

Footnote 92. *Hewitt v Firestone Tire & Rubber Co.* (ED Va) 490 F Supp 1358 (when the party challenging the strong presumption that the marriage last in time is valid introduces evidence which will afford reasonable grounds to presume the former marriage was not dissolved, the burden of proof shifts to the other party); *Spearman v Spearman* (CA5 Ala) 482 F2d 1203 (once the first wife presents evidence that her marriage was not dissolved, the burden of persuasion shifts to the second wife to show the first marriage was dissolved); *Patrick v Simon*, 237 Ga 742, 229 SE2d 746 (the burden is on the party asserting validity of the second marriage to go forward with evidence to show that first marriage was dissolved by divorce).

§ 222 Rebutting presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To rebut the presumption of validity of a second marriage a litigant must show, first, that at least one party to the second marriage had been married previously; second, that the prior marriage was itself valid; and third, that the prior marriage had not terminated by annulment, divorce, or the death of the other spouse. 93

Where a party to a first marriage contracts a second marriage, but then resumes living with the first spouse, courts usually conclude that the presumption has been rebutted, that is, that the first marriage never terminated and that the second, therefore, is invalid. 94

Testimony by the spurned or abandoned spouse about the first marriage, that he or she never filed for divorce and never received divorce papers, may 95 or may not 96 suffice.

The burden of proving that no court record exists of the termination of the first marriage by divorce or annulment depends on whether there was an adequate search in the jurisdictions of the prior residences of the spouses. 97 Failure to pursue a divorce action to finality is also a factor. 98

Footnotes

Footnote 93. *Tatum v Tatum* (CA9 Cal) 241 F2d 401; *Briggs v United States*, 116 Ct Cl 638, 90 F Supp 135; *Mayo v Owen*, 208 Ga 483, 67 SE2d 709.

Footnote 94. *Hewitt v Firestone Tire & Rubber Co.* (ED Va) 490 F Supp 1358; *Sloss-Sheffield Steel & Iron Co. v Watford*, 245 Ala 425, 17 So 2d 166; *Vargas v Superior Court of Los Angeles County* (2nd Dist) 9 Cal App 3d 470, 88 Cal Rptr 281; *Beaudin v Suarez*, 365 Mich 534, 113 NW2d 818; *Harrison v Burton* (Okla) 303 P2d 962.

Footnote 95. *Milano v Secretary of Health & Human Services* (ED NY) 586 F Supp 1431.

Footnote 96. *Metropolitan Life Ins. Co. v Manning* (CA2 NY) 568 F2d 922; *Pigford Bros. Constr. Co. v Evans*, 225 Miss 411, 83 So 2d 622; *Texas Employers' Ins. Asso. v Gomez* (Tex Civ App Eastland) 313 SW2d 956, writ ref n r e (Oct 8, 1958) and reh'g of writ of error overr (Nov 5, 1958).

Footnote 97. *Grey v Heckler* (CA2 NY) 721 F2d 41 (record searches in every jurisdiction in which decedent spouse would have been likely to seek a divorce had turned up no evidence of such divorce); *Lott v Toomey* (Ala) 477 So 2d 316 (affidavits showed a lack of any record of divorce in any of four counties in two states in which decedent and her first husband had lived); *Jenkins v Estate of Jenkins* (Fla App D1) 384 So 2d 266

(presumption was not overcome by proof that no record of divorce could be found in Florida, where the parties to the former marriage had also resided in Georgia and no evidence was introduced that a divorce had not been obtained in Georgia); *Re Estate of Erwin* (Miss) 317 So 2d 55 (prior spouse must show where each party to prior marriage resided up to time of second marriage and obtain a certificate from court in each appropriate county that no divorce or annulment was granted by the court of that county); *Davis v Davis* (Tex) 521 SW2d 603, reh'g of cause overr (May 7, 1975) (presumption of the validity of the second marriage was overcome by evidence that no divorce proceedings were instituted in any jurisdiction where the husband might reasonably have been expected to pursue them).

Where decedent traveled extensively, evidence that decedent did not obtain a divorce in one place, New Mexico, was not enough to rebut the presumption. *Schall v Schall* (App) 97 NM 665, 642 P2d 1124.

Evidence that the first wife never instituted divorce proceedings and was never served with divorce papers from her husband successfully rebutted the presumption that husband's second marriage was valid. *Mayo v Mayo*, 73 NC App 406, 326 SE2d 283.

Footnote 98. *Stokes v Heckler* (CA8 Ark) 773 F2d 990; *Re Estate of Warren* (2d Dept) 131 App Div 2d 681, 516 NYS2d 759, app dismd, in part, app den, in part 70 NY2d 950, 524 NYS2d 674, 519 NE2d 620 (presumption of the validity of the second marriage was rebutted by evidence that a divorce decree had not become final until more than one year after second marriage).

Annotation: Presumption as to validity of second marriage, 14 ALR2d 7.

(3). Relationship Between Spouses [223-225]

§ 223 Property ownership

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Property acquired by either spouse subsequent to the marriage and prior to dissolution is presumed to be marital property regardless of how title is held. 99 In many states the community property system prevails, which presumes that property acquired after marriage is community property of husband and wife. 1 The party asserting that property is separate has the burden of overcoming this presumption. 2

The presumption that property acquired by either spouse during the marriage is marital property can be overcome by showing that the property was acquired by gift, devise, descent, or bequest. 3

The common law presumed that the husband was the owner of all property possessed during marriage; and the vestiges of this presumption still prevail in some jurisdictions. 4 But this presumption has been largely abandoned 5 and its validity is constitutionally

Footnotes

Footnote 99. *Re Jacobs* (BC SD Cal) 48 BR 570.

Footnote 1. *Egle v Egle* (CA5 Canal Zone) 715 F2d 999, writ den 469 US 1032, 83 L Ed 2d 437, 105 S Ct 549; *Edwards v Commissioner* (CA9) 680 F2d 1268, 82-2 USTC ¶ 9472, 50 AFTR 2d 82-5390.

As to community property, generally, see 15A Am Jur 2d, Community Property §§ 1 et seq.

Footnote 2. *Carroll v Lee*, 148 Ariz 10, 712 P2d 923; *In re Marriage of Fabian*, 41 Cal 3d 440, 224 Cal Rptr 333, 715 P2d 253.

Footnote 3. *Wilson v Wilson* (Mo App) 822 SW2d 917; *Pemelton v Pemelton* (Tex App Corpus Christi) 809 SW2d 642, writ granted (Tex) 35 Tex Sup Ct Jour 38 and rev'd on other grounds (Tex) 836 SW2d 145, mod, cause remanded (Sep 9, 1992).

Footnote 4. *Re Ferguson* (BC DC Colo) 15 BR 439 (it will be presumed, in the absence of evidence to the contrary, that household goods, where husband and wife are living together, belong to the husband); *Cleveland v State*, 155 Ga App 267, 270 SE2d 687 (husband, as head of family, constructively possessed drugs found in marital home).

Annotation: Estates by entirety in personal property, 64 ALR2d 8.

Proceeds or derivatives of real property held by entirety as themselves held by entirety, 22 ALR4th 459.

Footnote 5. *Sawada v Endo*, 57 Hawaii 608, 561 P2d 1291 (married women are equal with husband as to ownership of the marital estate); *Moulton v Moulton* (Me) 309 A2d 224 (by force of married women's acts, passed in all jurisdictions, the common-law doctrine that marriage deprives a woman of separate property has been abrogated).

Footnote 6. *Kirchberg v Feenstra*, 450 US 455, 67 L Ed 2d 428, 101 S Ct 1195 (striking down Louisiana law permitting husband to dispose of jointly owned marital property); *Peddy v Montgomery* (Ala) 345 So 2d 631, appeal after remand (Ala) 355 So 2d 698 (state statute limiting freedom of married women to alienate or mortgage her lands without husband's assent violates equal protection clause of state constitution).

As to the property rights of spouses, generally, see 41 Am Jur 2d, Husband and Wife §§ 29 et seq.

§ 224 Gifts and advancements

[View Entire Section](#)

A conveyance of property from one spouse to another is presumed to be a gift. 7 Expenditures made by a spouse on property held by the entirety are presumed gifts, each spouse owning one-half unless rebutted by clear and convincing evidence that such payments were made with the intention not to be considered gifts. 8 Even where one spouse supplies all the consideration for property held as tenants by the entireties, there is a presumption of a gift to the marriage. 9

Transfer of title from one spouse to the other creates a presumption of gift; that presumption can be rebutted only by clear and convincing evidence. 10 And if a spouse transfers title of her separate property to joint names, a gift will be presumed. 11 There also is a presumption where property is held by the entireties that either spouse may act for both without specific authority, as long as the benefit inures to both. 12

Footnotes

Footnote 7. *Cook v United States* (CA1 Mass) 904 F2d 107, 90-1 USTC ¶ 50288, 65 AFTR 2d 90-1156.

Footnote 8. *Re Youmans* (BC DC NJ) 117 BR 113, 20 BCD 1430; *Amato v Amato* (Fla App D4) 16 FLW D 2803, substituted op, on reh (Fla App D4) 596 So 2d 1243, 17 FLW D 984; *Heinemann v Heinemann* (Fla App D1) 314 So 2d 220, cert den (Fla) 336 So 2d 106.

Footnote 9. *Re Marriage of Cupp* (App) 152 Ariz 161, 730 P2d 870 (when real property is paid for by one spouse and taken jointly in both names, law presumes a gift; *Valladee v Valladee* (App) 149 Ariz 304, 718 P2d 206 (investment properties purchased with husband's separate funds created a presumption of a gift to wife which husband failed to overcome simply by after-the-fact testimony that property was placed in joint tenancy only as means of avoiding probate); *Brown v Borland*, 230 Neb 391, 432 NW2d 13; *Lawrence v Lawrence*, 100 NC App 1, 394 SE2d 267 (it must be shown by clear, cogent, and convincing evidence that no gift was intended).

Footnote 10. *Graham v Graham*, 104 Nev 473, 760 P2d 772.

Footnote 11. *Charlton v Charlton*, 186 W Va 670, 413 SE2d 911.

Footnote 12. *Sgro v Sgro*, 259 Pa Super 425, 393 A2d 900.

§ 225 Agency; duty to provide

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The marital relation alone raises no presumption of agency between husband and wife. 13

The burden of proof is on the one asserting agency. 14 If there is an express statutory provision, the husband is presumed to be acting as the wife's agent where she permits him custody, control, and management of her separate estate, but this presumption can be overcome by evidence. 15

At common law, a husband was under a duty to provide his wife with the necessities of life, and she was thus presumed to have authority to bind him for necessities; should the husband neglect his duty, he may be liable to third parties for necessities furnished by them to the wife. 16 There is authority that the doctrine is still viable. 17 But, as the partners in the marital relationship become more interdependent than dependent, this common-law rule has become more egalitarian. 18

Footnotes

Footnote 13. *Re Tara of North Hills* (BC ED NC) 116 BR 455, *affd* without op (CA4 NC) 904 F2d 701; *Holt v Commissioner*, 67 TC 829; *Bennett v Mack's Supermarkets, Inc.* (Ky) 602 SW2d 143.

Footnote 14. *United States v Nelson* (WD Mich) 485 F Supp 941; *McCarthy v Wahby* (Mo App) 717 SW2d 571.

Footnote 15. *Priddy v Wood*, 245 Ark 209, 431 SW2d 744.

Footnote 16. *Smith v Hernandez* (Okla App) 794 P2d 772 (husband is not unconditionally liable for necessities furnished to wife, but becomes liable only when he neglects to make adequate provision for her support).

Footnote 17. *Re Steingesser* (CA2 NY) 602 F2d 36, 5 BCD 449, 20 CBC 761, CCH Bankr L Rptr ¶ 67155; *Richland Memorial Hospital v Burton*, 282 SC 159, 318 SE2d 12.

Annotation: Necessity, in action against husband for necessities furnished wife, of proving husband's failure to provide necessities, 19 ALR4th 432.

Footnote 18. *Webb v Hillsborough County Hospital Authority* (Fla App D2) 521 So 2d 199, 13 FLW 448, *corrected* (Fla App D2) 13 FLW 478; *White v Neeland* (3d Dist) 114 Ill App 3d 174, 69 Ill Dec 931, 448 NE2d 649 (under statute both husband and wife are jointly and severally liable for expenses of the family); *Jermunson v Jermunson*, 181 Mont 97, 592 P2d 491 (wife has joint and mutual obligation to pay for necessities).

b. Children [226-235]

(1). Presumption of Legitimacy [226-231]

§ 226 Generally

[View Entire Section](#)

The presumption of legitimacy is considered one of the strongest in the law. 19 As such, with a few exceptions, 20 it nearly always takes more than a mere preponderance of the evidence to overcome it. Courts express this burden in a variety of ways: substantial; 21 clear and convincing; 22 strong and conclusive. 23

Traditionally, the presumption of legitimacy could be rebutted only by proof that a husband was incapable of procreation 24 or had no access to his wife during the relevant period. 25 And, under the common law, neither husband nor wife could be a witness to prove access or nonaccess. 26

Footnotes

Footnote 19. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573; Re Estate of Thomas, 228 Ark 658, 310 SW2d 248; Maxwell v Maxwell, 15 Mich App 607, 167 NW2d 114; McLeod v State Board of Health (Miss) 393 So 2d 479; Peoples Nat. Bank v Manos Bros., Inc., 226 SC 257, 84 SE2d 857, 45 ALR2d 1070.

Annotation: Proof of husband's impotency or sterility as rebutting presumption of legitimacy, 84 ALR3d 495.

Footnote 20. Doe v Roe, 3 Hawaii App 233, 647 P2d 305 (requiring only a preponderance of the evidence).

Footnote 21. Adoption of Stroope (1st Dist) 232 Cal App 2d 581, 43 Cal Rptr 40; Lonning v Leonard (Mo App) 767 SW2d 577.

Footnote 22. Pyeatte v Pyeatte, 21 Ariz App 448, 520 P2d 542, 84 ALR3d 486; Cartee v Carswell (Fla App D5) 425 So 2d 204; C.C. v A.B., 406 Mass 679, 550 NE2d 365; Younkin v Younkin, 221 Neb 134, 375 NW2d 894.

Footnote 23. Finkenbinder v Burton (Ala App) 477 So 2d 459; Whitman v Whitman, 140 Ind App 289, 215 NE2d 689; Austin v Austin (Okla) 418 P2d 347.

Footnote 24. § 230.

Footnote 25. § 229.

Footnote 26. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573.

§ 227 Scope of presumption

The presumption of legitimacy applies to a child conceived during a marriage but born after annulment, divorce or separation. 27 To rebut the presumption, the presumed father must assert and prove the same grounds as if the couple had still been married when the child was born. 28

Moreover, the presumption applies to children conceived before but born during marriage. 29 The presumption is particularly strong where the husband knew that his wife was pregnant before their marriage. 30

The presumption of legitimacy is upheld sometimes even in the face of conclusive evidence proving that the man married by the pregnant woman was not, in fact, the biological father. 31

Postbirth marriage is some evidence that the husband is the child's father, but, without more, is insufficient to prove paternity, 32 even if the husband seeks status as the child's father. 33

Footnotes

Footnote 27. *Miller v Sybouts*, 97 Wash 2d 445, 645 P2d 1082.

See 10 Am Jur 2d, *Bastards* §§ 10 et seq. for a discussion of the scope of the presumption of legitimacy and paternity of children.

Annotation: Presumption of legitimacy of child born after annulment, divorce, or separation, 46 ALR3d 158.

Footnote 28. *Kusior v Silver*, 54 Cal 2d 603, 7 Cal Rptr 129, 354 P2d 657.

Footnote 29. *Sturdy v Sturdy* (4th Dist) 67 Ill App 2d 469, 214 NE2d 607; *Madden v Madden* (Miss) 338 So 2d 1000; *B. S. P. v W. W. W.* (Mo App) 411 SW2d 834; *Lawson v Baker* (Tex Civ App Houston (1st Dist)) 351 SW2d 571; *Ripplinger v Ripplinger*, 9 Wash App 166, 511 P2d 82; *M. v M.*, 162 W Va 273, 250 SE2d 40.

Annotation: Presumption of legitimacy, or of paternity, of child conceived or born before marriage, 57 ALR2d 729.

Footnote 30. *Blitch v Blitch* (Fla App D1) 341 So 2d 251; *Verneuille v Verneuille* (La App 4th Cir) 438 So 2d 615, cert den (La) 443 So 2d 596; *Re W.C.*, 206 Mont 432, 671 P2d 621.

Footnote 31. *Cook v Perron* (La App 3d Cir) 427 So 2d 499, cert den (La) 433 So 2d 1054.

Footnote 32. *Re Estate of Braun*, 36 Misc 2d 727, 233 NYS2d 857; *Re Marriage of*

Gridley, 28 Or App 145, 558 P2d 1277.

Footnote 33. *Re Custody of C.C.*, 215 Mont 72, 695 P2d 816 (ovrld on other grounds by *Re Marriage of Miller*, 251 Mont 300, 825 P2d 189).

§ 228 Standing to rebut the presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some states, by statute or court rule, limit those who may challenge a child's legitimacy, affording standing, at most, only to members of the immediate family, that is, wife, child, husband, and their descendants. 34

When the child's mother was married to another man at the time of conception or birth and the husband considers himself to be the father, a conflict between the purported unwed father's paternal rights and the presumption of legitimacy arises. 35 Natural fathers, who were not the husbands of the child's mother, have generally been denied standing to bring legitimacy actions alleging their own paternity, 36 although occasionally natural fathers in such circumstances have been granted standing. 37 A statute denying standing to the purported biological father by means of a conclusive presumption does not violate the due process clause of the Fourteenth Amendment. 38 Nondescendant relatives of the deceased husband are also denied standing to question the presumed legitimacy of children who had been conceived by or born to the wives of the deceased husbands. 39

Footnotes

Footnote 34. *State ex rel. Goodno v Cobb* (Ala App) 567 So 2d 376; *Puffpaff v Hull*, 169 Mich App 688, 426 NW2d 778; *Banta v Banta* (Okla App) 782 P2d 946; *Davis v Houston* (Tex App Fort Worth) 734 SW2d 210.

Annotation: Who may dispute presumption of legitimacy of child conceived or born during wedlock, 90 ALR3d 1032.

Footnote 35. *Michael H. v Gerald D.*, 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573.

Footnote 36. *Pierce v Pierce* (Minn App) 374 NW2d 450; *Czajak v Vavonese*, 104 Misc 2d 601, 428 NYS2d 986; *Cline v Drew* (Tenn App) 735 SW2d 232; *In Interest of M.R.M.* (Tex App Houston (14th Dist)) 807 SW2d 779, writ of error filed (May 7, 1991) and writ den (Jun 19, 1991) and reh of writ of error overr (Sep 5, 1991).

Footnote 37. *Williams v Milliken*, 351 Pa Super 567, 506 A2d 918, later proceeding 2 Pa D & C4th 263.

Footnote 38. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573.

Footnote 39. Re Estate of Raulston (Okla App) 805 P2d 113.

§ 229 Grounds—lack of access

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The common-law rule that husband and wife are not competent to testify as to lack of intercourse as a way of proving that a child was illegitimate has been rejected in many jurisdictions. 40 In some states, however, the rule remains in force. 41 In such cases, corroboration of inaccessibility is sometimes required. 42

Footnotes

Footnote 40. Vasquez v Esquibel, 141 Colo 5, 346 P2d 293; Peters v District of Columbia (Mun Ct App Dist Col) 84 A2d 115; Gibbons v Maryland Casualty Co., 114 Ga App 788, 152 SE2d 815; Ventresco v Bushey, 159 Me 241, 191 A2d 104; Shelley v Smith, 249 Md 619, 241 A2d 682; C.C. v A.B., 406 Mass 679, 550 NE2d 365; Re L---- (Mo) 499 SW2d 490; Melvin v Kazhe, 83 NM 356, 492 P2d 138; Commonwealth ex rel. Savruk v Derby, 235 Pa Super 560, 344 A2d 624; Davis v Davis (Tex) 521 SW2d 603, reh'g of cause overr (May 7, 1975); State v Schimschal, 73 Wash 2d 141, 437 P2d 169; Schmidt v Schmidt, 21 Wis 2d 433, 124 NW2d 569.

Annotation: Comment Note.—Rule as regards competency of husband or wife to testify as to nonaccess, 49 ALR3d 212.

Presumption of legitimacy of child born after annulment, divorce, or separation, 46 ALR3d 158.

Footnote 41. Wright v Vales, 1 Ark App 175, 613 SW2d 850; People ex rel. Adams v Mitchell (1st Dist) 89 Ill App 3d 1023, 45 Ill Dec 327, 412 NE2d 678.

Wife not permitted to testify to the ultimate fact of illegitimacy, but the trial court did properly permit her and the first husband to testify as to the first husband's nonaccess at time of conception, thus showing the impossibility of the first husband's paternity. Evans v Evans (Ala App) 434 So 2d 254, cert quashed (Ala) 434 So 2d 257.

Although the mother could not properly testify to the ultimate fact of illegitimacy, she could testify to circumstances from which nonaccess, and the impossibility that her husband was the father, could be inferred. Adams v State (Ala App) 428 So 2d 117.

§ 230 --Husband's sterility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of a husband's sterility, without more, does not generally overcome the presumption of legitimacy. 43

However, evidence that the husband has undergone a vasectomy prior to conception, coupled with postpregnancy evidence of sterility, has often been considered sufficient to overcome the presumption of legitimacy. 44 But where the couple was cohabiting and having sex at the time the wife became pregnant and there was no evidence, other than the pregnancy, suggesting that the wife had intercourse with anyone other than her husband, courts have seized on comparatively minor weaknesses in the husband's evidence to conclude that evidence of a vasectomy was insufficient to overcome the presumption. 45

Footnotes

Footnote 43. *Pyeatte v Pyeatte*, 21 Ariz App 448, 520 P2d 542, 84 ALR3d 486; *Shepherd v Shepherd*, 314 Ky 575, 236 SW2d 477; *Lucas v Williams*, 218 Md 322, 146 A2d 764; *Houston v Houston*, 199 Misc 469, 99 NYS2d 199; *Smith v Smith*, 71 SD 305, 24 NW2d 8.

The fact that the husband was diagnosed as having a low sperm count did not overcome presumption of legitimacy. *Happel v Mecklenburger* (1st Dist) 101 Ill App 3d 107, 56 Ill Dec 569, 427 NE2d 974.

Annotation: Proof of husband's impotency or sterility as rebutting presumption of legitimacy, 84 ALR3d 495.

Footnote 44. *Adoption of Stroope* (1st Dist) 232 Cal App 2d 581, 43 Cal Rptr 40; *Hughes v Hughes*, 125 Cal App 2d 781, 271 P2d 172; *Re Adoption of McFadyen* (1st Dist) 108 Ill App 3d 329, 64 Ill Dec 43, 438 NE2d 1362, cert den 460 US 1015, 75 L Ed 2d 486, 103 S Ct 1259; *S---- v S----* (Mo App) 520 SW2d 652; *Re Kessler's Estate*, 76 SD 158, 74 NW2d 599; *Cochran v Cochran*, 2 Wash App 514, 468 P2d 729.

Footnote 45. *Tosh v Tosh* (1st Dist) 214 Cal App 2d 483, 29 Cal Rptr 613 (the doctor who performed the vasectomy testified that there was a one-in-fifty chance that a man might regain fertility after a vasectomy); *Whitman v Whitman*, 140 Ind App 289, 215 NE2d 689 (the doctor who conducted a pretrial fertility test testified only that it was almost certain that the husband could not have fathered the child); *L. v M.*, 134 NJ Super 69, 338 A2d 227 (tests normally taken in the second and third month following a vasectomy were not taken); *Walkup v Walkup* (Brown Co) 31 Ohio App 3d 248, 31 Ohio

BR 532, 511 NE2d 119 (the test to determine whether vasectomy had been successful was not performed until approximately ten years after surgery and five years after child's birth, and his own expert stated that vasectomies sometimes fail and that their effect may be reversible); *Barcelo v Barcelo* (Tex Civ App Houston (14th Dist)) 603 SW2d 276, writ dismissed (Oct 29, 1980).

§ 231 Scientific evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Scientific tests are generally admissible to rebut the presumption of legitimacy; indeed, the result of a properly conducted test that satisfies legal standards of probability is sufficient to permit a factfinder to conclude that the presumption has been overcome. 46 But scientific evidence is not admissible where there is a conclusive presumption of legitimacy. 47 Nor is scientific evidence admissible if a husband is estopped by law from denying paternity. 48

When a married woman alleges that a man other than her husband fathered her child, scientific evidence may suffice to overcome the presumption of legitimacy when the husband does not contest the issue. 49 Scientific evidence may also be admissible where a wife seeks to overcome the presumption of legitimacy in order to deprive her husband of his rights as father to a child he has loved, supported and helped to raise. 50

But even the certainty of scientific evidence will sometimes give way to pragmatic and policy considerations surrounding the child's overall welfare. 51

Footnotes

Footnote 46. *Blake v Division of Child Support Enforcement* (Del Sup) 525 A2d 154, holding that a presumption that a man is father of a child where he and the mother are married to each other when the child is born can be overcome by clear and convincing evidence, such as by results of scientific tests and incidents of sexual intercourse between the mother and the putative father near the time of conception.

Footnote 47. *Michael H. v Gerald D.*, 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22 and reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1645 and motion den (US) 118 L Ed 2d 538, 112 S Ct 1931, later proceeding (App Div, 2d Dept) 604 NYS2d 573, upholding the constitutionality of such a conclusive presumption; *Vincent B. v Joan R.* (2nd Dist) 126 Cal App 3d 619, 179 Cal Rptr 9, app dismissed 459 US 807, 74 L Ed 2d 45, 103 S Ct 31.

Footnote 48. *Smith v Smith* (La App 3d Cir) 300 So 2d 205; *McRae v McRae*, 115 NH 353, 341 A2d 762; *Brite v Brite*, 61 Misc 2d 10, 305 NYS2d 65; *Commonwealth ex rel. Palchinski v Palchinski*, 253 Pa Super 171, 384 A2d 1285.

Where putative father held himself out to be father of child by marrying mother and

assuming responsibility for care of child, paternity was established and evidence of blood tests was inadmissible to disprove paternity for any purpose. *Re Montenegro*, 365 Pa Super 98, 528 A2d 1381.

Footnote 49. *Wake County ex rel. Manning v Green*, 53 NC App 26, 279 SE2d 901, holding that HLA blood-grouping tests may be admitted to rebut the presumption of legitimacy of a child born of a married woman where she was estranged from her husband and did not know where he was or how to locate him at the time of the child's conception or delivery.

Footnote 50. *Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516, 84 ALR4th 643, app den 429 Mich 884 (trial court properly admitted the results of husband's test; a husband denying paternity is permitted to present the best evidence to overcome the presumption of legitimacy, the court reasoned; a wife similarly should be allowed as mother to present the best evidence challenging father's claim of paternity).

Footnote 51. *Re Marriage of Ross*, 245 Kan 591, 783 P2d 331, mod on other grounds (Kan) 1990 Kan LEXIS 1 (prior to deciding whether to order blood tests to determine whether a presumed parent is the biological parent, the District Court must consider the best interests of the child, including its physical, mental, and emotional needs).

(2). Other Presumptions Involving Children [232-235]

§ 232 Possibility of having children

[View Entire Section](#)
[Go to Parallel Reference Table](#)

American courts have frequently, with regard to both men and women and under various circumstances involving property rights, applied the presumption that the possibility of issue is never extinct as long as a person lives. 52 With respect to women, most of the cases recognizing the presumption have supported the view that the presumption is conclusive or absolute, and is applicable even though the underlying facts seemingly support a contrary conclusion. 53 However, in an increasing number of cases, it has been held that the presumption will not be followed in the face of positive evidence that a woman is incapable of having children, and other cases have, without discussion, simply disregarded the presumption of the possibility of issue. 54 In one such case it has been said that the principle that there is an "irrebuttable presumption," or rule of substantive law, that a woman is capable of bearing children throughout her life, regardless of the actual truth of the matter, is not so firmly established in the law as to require its indiscriminate application in all cases, but whether it is applicable must depend upon the nature of the particular case. 55 Advanced age, 56 or a surgical operation resulting in the cessation of the power to procreate, 57 has been frequently considered as the primary factor in determining that the evidence was sufficient to rebut such presumption.

There is authority to the effect that while the presumption of the possibility of issue may

be rebuttable as far as women are concerned, it is not rebuttable as to a man. 58 Currently, however, the rebuttability of the presumption of the possibility of issue as to a man has been gaining recognition. 59 Evidence of a physical condition showing the lack of the power to procreate has been held sufficient to rebut the presumption. 60

Footnotes

Footnote 52. *Farrington v Commissioner* (CA1) 30 F2d 915, 1 USTC ¶ 370, 7 AFTR 8510, 67 ALR 535, cert den 279 US 873, 73 L Ed 1008, 49 S Ct 513; *Willimantic Investors, Inc. v Covell*, 147 Conn 34, 156 A2d 473; *P v Wilmington Trust Co.*, 41 Del Ch 109, 188 A2d 361; *Byers v Beddow*, 106 Fla 166, 142 So 894; *Landrum v National City Bank*, 210 Ga 316, 80 SE2d 300; *Burrell v Jean*, 196 Ind 187, 146 NE 754; *Brown v Owsley*, 198 Ky 344, 248 SW 889; *Marty v First Nat. Bank*, 209 Md 210, 120 A2d 841; *Schumacher v Howard Sav. Inst.*, 126 NJ Eq 325, 8 A2d 908; *Re Lawton's Estate*, 231 App Div 406, 248 NYS 110; *Griffin v Springer*, 244 NC 95, 92 SE2d 682; *Re Sterrett's Estate*, 300 Pa 116, 150 A 159; *Lux v Lux*, 109 RI 592, 288 A2d 701; *Crockett v Scott*, 199 Tenn 90, 284 SW2d 289, 56 ALR2d 442; *Donald v Troxell* (Tex Civ App Eastland) 346 SW2d 398, writ ref n r e (Oct 18, 1961) and reh'g of writ of error overr (Nov 29, 1961); *Tiffany v Thomas*, 168 Va 31, 190 SE 101; *Betchard v Iverson*, 35 Wash 2d 344, 212 P2d 783.

In the absence of any showing to the contrary, it was presumed that a female was capable of bearing children. *Fletcher v Hurdle*, 259 Ark 640, 536 SW2d 109.

Annotation: Modern status of presumption against possibility of issue being extinct, 98 ALR2d 1285.

Footnote 53. *Chase Nat. Bank v Guthrie*, 139 Conn 178, 90 A2d 643; *Landrum v National City Bank*, 210 Ga 316, 80 SE2d 300; *Betchard v Iverson*, 35 Wash 2d 344, 212 P2d 783.

Footnote 54. *United States v Provident Trust Co.*, 291 US 272, 78 L Ed 793, 54 S Ct 389, 4 USTC ¶ 1229, 13 AFTR 861; *Korten v Chicago City Bank & Trust Co.* (1st Dist) 178 Ill App 3d 397, 127 Ill Dec 484, 533 NE2d 102 (under the theory that once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes, if evidence is introduced showing that it is contrary to the presumption that a woman is still capable of bearing children, the presumption vanishes); *Re Bassett's Estate*, 104 NH 504, 190 A2d 415, 98 ALR2d 1281; *Re Will of Lattouf*, 87 NJ Super 137, 208 A2d 411.

The Restatement of Property § 274 states four instances in which the presumption of the possibility of issue is not conclusive: (1) to enable the distribution of an estate or fund; (2) to terminate a trust; (3) to permit specific performance of a contract for the sale of land; and (4) in determining the amount of an estate tax. As to application of the rule against perpetuities, the Restatement of Property § 377 has adopted the traditional view treating the presumption as conclusive. Similar provisions are not contained in Restatement 2d, Property, although Restatement 2d, Property (Donative Transfers) § 1.4, Comment h, adopts a wait and see approach, under which the failure of an interest that may occur as the result of the birth of another child will not occur if another child is not born.

Footnote 55. *Commissioner of Corps. & Taxation v Bullard*, 313 Mass 72, 46 NE2d 557, 146 ALR 772.

Footnote 56. *Korten v Chicago City Bank & Trust Co.* (1st Dist) 178 Ill App 3d 397, 127 Ill Dec 484, 533 NE2d 102 (65 and 72-year-old women); *Commissioner of Corps. & Taxation v Bullard*, 313 Mass 72, 46 NE2d 557, 146 ALR 772 (62-year-old woman); *Re Estate of Ransom*, 89 NJ Super 224, 214 A2d 521 (72-year-old woman); *Lare's Estate*, 57 Pa D & C 163 (woman near 70).

Footnote 57. *United States v Provident Trust Co.*, 291 US 272, 78 L Ed 793, 54 S Ct 389, 4 USTC ¶ 1229, 13 AFTR 861; *Citizens Nat. Bank v Longshore (Miss)* 304 So 2d 287; *Re Will of Lattouf*, 87 NJ Super 137, 208 A2d 411; *Hicks v Hicks*, 259 NC 387, 130 SE2d 666.

Footnote 58. *Owings v Owings (Ky)* 247 SW2d 221.

Footnote 59. *Re Bassett's Estate*, 104 NH 504, 190 A2d 415, 98 ALR2d 1281; *Kelby Estate*, 80 Pa D & C 1.

In *Hamilton Nat. Bank v United States (ED Tenn)* 236 F Supp 1005, 65-2 USTC ¶ 12319, 15 AFTR 2d 1373, affd (CA6 Tenn) 367 F2d 554, 66-2 USTC ¶ 12430, 18 AFTR 2d 6290, it was held that a finding that the possibility of a life beneficiary having issue was "so remote as to be negligible" within the meaning of a treasury regulation respecting the possibility that a charitable transfer will not become effective was supported by evidence that a life beneficiary was 54 years old, had been single since his divorce about 30 years previously, had never had children and was unknown to have had any association of any kind with the opposite sex since his divorce, and was described as being dirty, offensive, and an odd character, with a history of ill health and lack of co-operation with medical advisers.

Footnote 60. *Kelby Estate*, 80 Pa D & C 1 (man was impotent and sterile).

§ 233 Custody; primary caretaker preference

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In awarding child custody, some states recognize a presumption that the best interests of the child, particularly one of tender years, would be served by awarding custody to the parent that was the primary caretaker. 61 Under the primary caretaker presumption, the court must determine whether the primary caretaker is a fit parent, that is, whether he or she achieves a minimum objective standard of behavior which qualifies him or her as a fit parent. 62

The primary caretaker analysis replaces the common-law presumption that, at least as to children of tender years, usually below the age of five, a preference should be afforded to the mother. 63

Footnotes

Footnote 61. *Sefkow v Sefkow* (Minn) 427 NW2d 203; *David M. v Margaret M.*, 182 W Va 57, 385 SE2d 912.

Footnote 62. *Stacy v Stacy* (W Va) 332 SE2d 260.

Footnote 63. *Cochran v Lowe* (Ala App) 532 So 2d 1265; *Stamm v Stamm* (Fla App D5) 489 So 2d 851, 11 FLW 1289; *Re Marriage of Mangan* (1st Dist) 182 Ill App 3d 140, 130 Ill Dec 631, 537 NE2d 960; *Re Marriage of Lacaeyse* (Iowa App) 461 NW2d 475; *Grubbs v Grubbs*, 5 Kan App 2d 694, 623 P2d 546, review den 229 Kan 669; *Nicklson v Nicklson* (La App 3d Cir) 488 So 2d 375; *Linderman v Linderman* (Minn App) 364 NW2d 872; *Re Marriage of Bell* (Mo App) 796 SW2d 130; *Bier v Sherrard* (Mont) 623 P2d 550; *Fleharty v Fleharty*, 202 Neb 245, 274 NW2d 871; *Arnold v Arnold*, 95 Nev 951, 604 P2d 109; *Lemay v Lemay*, 109 NH 217, 247 A2d 189; *Linda R. v Richard E.* (App Div, 2d Dept) 561 NYS2d 29, later proceeding (2d Dept) 162 App Div 2d 48, 560 NYS2d 750, later proceeding (App Div, 2d Dept) 560 NYS2d 750; *Charles v Charles* (Franklin Co) 23 Ohio App 3d 109, 23 Ohio BR 175, 491 NE2d 378; *Re Marriage of Van Dyke*, 48 Or App 965, 618 P2d 465; *Hugo v Hugo*, 288 Pa Super 1, 430 A2d 1183; *Prentice v Prentice* (SD) 322 NW2d 880; *Sharp v Sharp* (Tex App Dallas) 710 SW2d 696; *Visikides v Derr*, 3 Va App 69, 348 SE2d 40; *Re Marriage of Janovich*, 30 Wash App 169, 632 P2d 889; *David M. v Margaret M.*, 182 W Va 57, 385 SE2d 912.

§ 234 Capacity to commit torts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some states may recognize a rebuttable presumption that a child between specified ages was incapable of committing a tort. 64 A few states recognize a rebuttable presumption that children between certain ages, usually between seven and fourteen, are not capable of acting negligently. 65 Most states that say that a child under a specified age is unable to commit negligence as matter of law 66 do not recognize any true presumptions as to whether a child above these specified ages is liable for a negligent tort; the prevailing view is that children above that age may be capable of negligence and that whether a particular child was negligent is a question of fact. 67 Occasionally, a child's noncompliance with the law raises a rebuttable presumption of negligence, so that the child has the burden of showing that he exercised the standard of care reasonably expected of a child of like age, experience, education, and intelligence. 68

Footnotes

Footnote 64. *Faia v Landry* (La App 4th Cir) 249 So 2d 317 (child between the ages of seven and ten years presumed incapable of committing a tortious act).

Footnote 65. *Kurowsky v Deutsch* (Ind) 533 NE2d 1210 (between seven and fourteen); *Willoughby v Stilz* (Ky) 387 SW2d 10 (acknowledging the presumption for children between the ages of seven and fourteen years where a nine-year-old plaintiff struck by a car was held accountable for his contributory negligence while crossing the street on the red light); *Dunn v Teti*, 280 Pa Super 399, 421 A2d 782; *Prater v Burns* (Tenn App) 525 SW2d 846.

As to the rule governing the standard of care of a child in a negligence case, see 57A Am Jur 2d, Negligence §§ 197 et seq. Particular presumptions regarding the capacity of a young child to commit a tort are discussed in 57A Am Jur 2d, Negligence §§ 968 et seq.

Footnote 66. 57A Am Jur 2d, Negligence § 963.

Footnote 67. *Seaburg v Williams* (2d Dist) 23 Ill App 2d 25, 161 NE2d 576; *Peterson v Taylor* (Iowa) 316 NW2d 869 (ovrld on other grounds by *Goetzman v Wichern* (Iowa) 327 NW2d 742); *American Family Mut. Ins. Co. v Grim*, 201 Kan 340, 440 P2d 621; *Camerlinck v Thomas*, 209 Neb 843, 312 NW2d 260, 27 ALR4th 1; *Deliso v Cangialosi*, 117 Misc 2d 105, 457 NYS2d 396, affd (Sup App T) 124 Misc 2d 822, 480 NYS2d 315; *Federer v Davis* (Okla) 434 P2d 197; *Thomas v Inman*, 282 Or 279, 578 P2d 399.

Footnote 68. *Kurowsky v Deutsch* (Ind) 533 NE2d 1210.

§ 235 --Contributory negligence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A child below some certain age is conclusively presumed incapable of contributory negligence. 69 A few states recognize a rebuttable presumption of incapacity for children between certain ages. 70

Footnotes

Footnote 69. *Wagh v Duke Corp.* (MD NC) 248 F Supp 626; *Chambers v United States* (SD Tex) 656 F Supp 1447; *English v 1st Augusta, Ltd.* (SD Ga) 614 F Supp 1406; *Mort v Walter*, 98 Ill 2d 391, 75 Ill Dec 228, 457 NE2d 18; *McFarland v Industrial Helicopters, Inc.* (La App 3d Cir) 502 So 2d 593; *Hampton v Hammons* (Okla) 743 P2d 1053.

Annotation: Modern trends as to contributory negligence of children, 32 ALR4th 56.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 ALR3d 1168.

Footnote 70. *Smith v Bradford* (Ala) 475 So 2d 526, later proceeding (Ala) 512 So 2d 50; *Matthews v State Farm Fire & Casualty Ins. Co.* (La App 3d Cir) 550 So 2d 936; *Learue v State* (Tenn App) 757 SW2d 3.

3. Relating to Criminal Law or Proceedings [236-242]

§ 236 Presumption of innocence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption of innocence has been described as that axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. ⁷¹ But it is not a presumption at all in the legal sense; the term presumption of innocence is merely an inaccurate, shorthand description of the right of the criminal defendant to remain inactive and secure, until the prosecution has taken up its burden and produced evidence. ⁷² It is not evidence, but merely determines the burden of proof. ⁷³

The presumption of innocence may also arise in civil cases where the commission of a crime comes collaterally into question, in which case the law presumes, until the contrary is shown, that a criminal offense was not committed. ⁷⁴ However, in a civil case, this presumption controls only to the point that it is overcome by the preponderance of the evidence. ⁷⁵

Footnotes

Footnote 71. *Re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323, conformed to 27 NY2d 728, 314 NYS2d 536, 262 NE2d 675 and (criticized on other grounds by *Patterson v New York*, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319) as stated in *State v Krantz*, 241 Mont 501, 788 P2d 298, cert den 498 US 938, 112 L Ed 2d 306, 111 S Ct 341.

As to jury instructions on the presumption of innocence, see 75B Am Jur 2d, Trial §§ 1297 et seq.

Forms: Instruction—Presumption of innocence. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 356; 7 Federal Procedural Forms, L Ed 20:931.

Footnote 72. *Taylor v Kentucky*, 436 US 478, 56 L Ed 2d 468, 98 S Ct 1930.

Law Reviews: Fox, The "Presumption of Innocence" as Constitutional Doctrine, 28 Cath U L Rev 253, 258-262 (1979).

Footnote 73. *Holt v United States*, 218 US 245, 54 L Ed 1021, 31 S Ct 2; *United States v Nimerick* (CA2 Vt) 118 F2d 464, 152 ALR 620, cert den 313 US 592, 85 L Ed 1546, 61 S Ct 1117; *Re Mayberry*, 295 Mass 155, 3 NE2d 248, 105 ALR 976; *White v Philadelphia*, 197 Miss 166, 19 So 2d 493, sugg of error overr 197 Miss 178, 19 So 2d 744.

Footnote 74. *Southern Pacific Co. v Schuyler*, 227 US 601, 57 L Ed 662, 33 S Ct 277; *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded by statute on other grounds as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113); *Falls v Kamping* (Hamilton Co) 105 Ohio App 157, 5 Ohio Ops 2d 430, 144 NE2d 894.

Footnote 75. *Kurz v Doerr*, 180 NY 88, 72 NE 926.

§ 237 --Effect of exhibiting defendant in prison garb or restraints

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. 76

The issue of necessary restraints upon a defendant during trial, however, has led to different results. 77 The use of physical restraints has been upheld in the absence of disruptive conduct at trial where the trial court has reason to believe it is necessary to maintain the security of the courtroom, 78 and in appropriate circumstances, the accused's right to the indicia of innocence before the jury must bow to the competing right of participants in the courtroom and society at large. 79

Footnotes

Footnote 76. *Estelle v Williams*, 425 US 501, 48 L Ed 2d 126, 96 S Ct 1691, reh den 426 US 954, 49 L Ed 2d 1194, 96 S Ct 3182 and on remand (CA5 Tex) 537 F2d 856.

Footnote 77. *Illinois v Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057, 51 Ohio Ops 2d 163, reh den 398 US 915, 26 L Ed 2d 80, 90 S Ct 1684.

Footnote 78. *Holbrook v Flynn*, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340, where the Court held that the presence four extra uniformed state troopers sitting in the front row during trial as an extra security measure did not violate the defendant's right to a fair trial; *Loux v United States* (CA9 Wash) 389 F2d 911, cert den 393 US 867, 21 L Ed 2d 135, 89 S Ct 151 and cert den 393 US 869, 21 L Ed 2d 138, 89 S Ct 156; *Woodard v Perrin* (CA1 NH) 692 F2d 220 (no abuse of discretion by the trial judge to have defendant shackled during trial where there were extensive pretrial hearings to decide whether the defendant would restrain himself during the trial and had grossly misbehaved earlier in the week); *Payne v Smith* (CA6 Ky) 667 F2d 541, cert den 456 US 932, 72 L Ed 2d 449, 102 S Ct 1983 (held no error where judge remarked to sheriff that defendants should consider themselves in custody); *Harrell v Israel* (CA7 Wis) 672 F2d 632 (use of shackles on defendant and his witnesses not error where the judge made great efforts to be sure jury did not see the restraints); *State v Woolcock*, 201 Conn 605, 518 A2d 1377,

habeas corpus proceeding (Conn Super) 1990 Conn Super LEXIS 1104 (shackling defendant not error where trial judge found him to be a security risk), *People v Cox*, 53 Cal 3d 618, 280 Cal Rptr 692, 809 P2d 351, 91 CDOS 3261, 91 Daily Journal DAR 5280, reh den (Cal) 1991 Cal LEXIS 2899 and stay gr (Cal) 1991 Cal LEXIS 5363 and cert den (US) 117 L Ed 2d 114, 112 S Ct 945 (shackling defendant during trial not error where judge took precautions that restraints not be seen even though it was an abuse of discretion to have defendant restrained).

But shackling the defendant was error upon consideration of the whole record, which reflected that he was seen in restraints by the jurors and the defendant's guilt presented a close question. *Dickson v State*, 108 Nev 1, 822 P2d 1122.

Footnote 79. *Harrell v Israel* (CA7 Wis) 672 F2d 632.

§ 238 Capacity of children to commit crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A child under the age of seven years is presumed to lack the capacity to commit a criminal offense. 80

At common law, a child between the ages of seven and fourteen years was presumed to lack the capacity to form mens rea, the mental element of crime. 81 This presumption could be rebutted by evidence tending to show capacity. 82

Occasionally the presumed incapacity was physical; for example, common law presumed that a male between age seven and fourteen was incapable of committing rape, acknowledging a presumption that could be rebutted with proof that the child had reached puberty. 83 The modern trend is to reject the presumption of incapacity in sexual assault cases, requiring the state to prove capacity beyond a reasonable doubt once the defendant, of whatever age, introduces minimal evidence of incapacity. 84

Footnotes

Footnote 80. *Re Gault*, 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428, 40 Ohio Ops 2d 378 (criticized on other grounds by *Allen v Illinois*, 478 US 364, 92 L Ed 2d 296, 106 S Ct 2988); *Gammons v Berlat*, 144 Ariz 148, 696 P2d 700; *Re William A.*, 313 Md 690, 548 A2d 130, 83 ALR4th 1125; *Re M.*, 91 Misc 2d 813, 398 NYS2d 824.

Footnote 81. *Gammons v Berlat*, 144 Ariz 148, 696 P2d 700; *In re Billie Y.* (5th Dist) 220 Cal App 3d 127, 269 Cal Rptr 212, review den (disapproved on other grounds by *In re Manuel L.*, 7 Cal 4th 229, 94 CDOS 751, 94 Daily Journal DAR 1238); *Re William A.*, 313 Md 690, 548 A2d 130, 83 ALR4th 1125; *Re M.*, 91 Misc 2d 813, 398 NYS2d 824; *State v Q.D.*, 102 Wash 2d 19, 685 P2d 557.

Footnote 82. *Re Gault*, 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428, 40 Ohio Ops 2d 378

(criticized on other grounds by *Allen v Illinois*, 478 US 364, 92 L Ed 2d 296, 106 S Ct 2988); *Gammons v Berlat*, 144 Ariz 148, 696 P2d 700; *In re Billie Y.* (5th Dist) 220 Cal App 3d 127, 269 Cal Rptr 212, review den (disapproved on other grounds by *In re Manuel L.*, 7 Cal 4th 229, 94 CDOS 751, 94 Daily Journal DAR 1238); *Re William A.*, 313 Md 690, 548 A2d 130, 83 ALR4th 1125; *State v Barrette* (RI) 554 A2d 1045.

Footnote 83. *State v Barrette* (RI) 554 A2d 1045.

Footnote 84. *In Interest of Dow* (1st Dist) 75 Ill App 3d 1002, 31 Ill Dec 39, 393 NE2d 1346; *State v Danny A. (Me)* 536 A2d 1136; *State ex rel. Juvenile Dept. of Deschutes County v Merritt*, 83 Or App 378, 732 P2d 46 (rejecting both the conclusive and rebuttable presumptions of physical incapacity, and holding that the physical incapacity of a male under the age of fourteen, as with any other claim of impotence, was a matter of defense.

Annotation: Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 23 ALR3d 1351.

§ 239 Intent to distribute drugs based on quantity possessed

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Some statutes include a provision that possession of more than a specified quantity of certain drugs creates a presumption that the defendant intended to distribute them. 85 As with any criminal presumption, the prosecutor must satisfy its burden of persuasion as to the basic fact—possession. 86 Moreover, the presumption must satisfy the rational connection test. 87 Application of the test in this context depends both upon the quantity specified in the statute, and the facts of the case, including the quantity actually possessed by the defendant. Several courts have upheld presumptions specifying comparatively small quantities of marijuana, 88 although other courts have held otherwise. 89 By contrast, given their high cost and potency, there clearly is a rational connection between possession and intent to distribute of even a few grams of heroin, cocaine, and other controlled substances. 90

Even in the absence of a statutory presumption, the principle is well established that intent to sell may be inferred from the quantity of drugs possessed. 91

Possession of comparatively small quantities, however, will not support the inference of intent to distribute. 92

§ 239 ----Intent to distribute drugs based on quantity possessed [SUPPLEMENT]

Case authorities:

Court did not err in using total quantity of cocaine seized rather than quantity found on defendant in calculating defendant's offense level where evidence indicated defendant

had access to cocaine in co- defendants' apartment, hence defendant could have reasonably foreseen amount of drugs involved in jointly undertaken criminal activity. Ramey v United States (1993, CA8 Mo) 8 F3d 1313, reh, en banc, den (CA8) 1993 US App LEXIS 33962.

Footnotes

Footnote 85. Lockwood v State, 257 Ga 796, 364 SE2d 574, on remand 186 Ga App 223, 367 SE2d 887 and (superseded by statute on other grounds as stated in Christopher v State, 190 Ga App 393, 379 SE2d 205) and (superseded by statute on other grounds as stated in McCrief v State, 260 Ga 87, 390 SE2d 32) and (superseded by statute on other grounds as stated in White v State, 196 Ga App 813, 397 SE2d 299).

Annotation: Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Footnote 86. Lockwood v State, 257 Ga 796, 364 SE2d 574, on remand 186 Ga App 223, 367 SE2d 887 and (superseded by statute on other grounds as stated in Christopher v State, 190 Ga App 393, 379 SE2d 205) and (superseded by statute on other grounds as stated in McCrief v State, 260 Ga 87, 390 SE2d 32) and (superseded by statute on other grounds as stated in White v State, 196 Ga App 813, 397 SE2d 299).

Footnote 87. § 191.

Footnote 88. State v Garcia, 16 NC App 344, 192 SE2d 2, 60 ALR3d 1123, cert den 282 NC 427, 192 SE2d 837 (upholding a statutory presumption that possession of 5 grams—less than one-fifth of an ounce—was presumptive evidence of intent to distribute); State v Birdwell, 6 Wash App 284, 492 P2d 249, review den 80 Wash 2d 1009 and cert den and app dismd 409 US 973, 34 L Ed 2d 237, 93 S Ct 346 (possession of more than 40 grams was more likely than not with intent to sell).

Footnote 89. People v Serra, 55 Mich App 514, 223 NW2d 28 (ovrld on other grounds by People v Gallagher, 68 Mich App 63, 241 NW2d 759) and (disapproved on other grounds by People v Gallagher, 404 Mich 429, 273 NW2d 440) (a statutory presumption that possession of more than 2 ounces of marijuana created prima facie case of possession with intent to deliver violated the due process clauses of the Fifth and Fourteenth Amendments of United States Constitution; there was no rational connection between proven fact, possession of 2 ounces of marijuana, and presumed fact, intent to deliver, in light of today's common experience).

Footnote 90. Traylor v State (Del Sup) 458 A2d 1170 (a statute, which included in its prohibition of drug "trafficking," actual or constructive possession of eight grams or more of any morphine derivative including heroin, was not invalid on the basis that it created a rebuttable presumption that anyone possessing such quantity of heroin mixture was engaged in trafficking drug).

Footnote 91. United States v Rush (CA1 Me) 738 F2d 497, cert den 470 US 1004, 84 L Ed 2d 378, 105 S Ct 1355, reh den 471 US 1120, 86 L Ed 2d 269, 105 S Ct 2370; United States v Edwards (CA1 Mass) 602 F2d 458; United States v Tussa (CA2 NY) 816 F2d 58, 22 Fed Rules Evid Serv 1415, later proceeding (ED NY) 723 F Supp 888; United

States v Gaviria (CA2 NY) 740 F2d 174; United States v Forrest (ED Pa) 434 F Supp 1131, *affd* without op (CA3 Pa) 573 F2d 1302; United States v Seni (CA4 NC) 662 F2d 277, *cert den* 455 US 950, 71 L Ed 2d 664, 102 S Ct 1453; United States v Laughman (CA4 SC) 618 F2d 1067, *cert den* 447 US 925, 65 L Ed 2d 1117, 100 S Ct 3018; United States v Romero-Reyna (CA5 Tex) 867 F2d 834, *appeal after remand* (CA5 Tex) 889 F2d 559, *cert den* 494 US 1084, 108 L Ed 2d 948, 110 S Ct 1818; United States v Hernandez-Beltran (CA5 Tex) 867 F2d 224, *cert den* 490 US 1094, 104 L Ed 2d 995, 109 S Ct 2439; United States v Williams-Hendricks (CA5 Tex) 805 F2d 496, *reh den, en banc* (CA5 Tex) 808 F2d 56; United States v Del Aguila-Reyes (CA5 Tex) 722 F2d 155; United States v Mendoza (CA5 La) 722 F2d 96, *reh den* (CA5 La) 727 F2d 448; United States v Freeze (CA5 Tex) 707 F2d 132; United States v Borchardt (CA5 Tex) 698 F2d 697, 12 Fed Rules Evid Serv 613; United States v Dreyfus-De Campos (CA5 Tex) 698 F2d 227, *cert den* 461 US 937, 77 L Ed 2d 312, 103 S Ct 2107 and *cert den* 461 US 947, 77 L Ed 2d 1306, 103 S Ct 2128 and (criticized on other grounds by United States v Jackson (CA5 Tex) 825 F2d 853, 94 ALR Fed 327); United States v Kloock (CA5 Fla) 652 F2d 492, 8 Fed Rules Evid Serv 1110; United States v Mazyak (CA5 Fla) 650 F2d 788, 8 Fed Rules Evid Serv 1288, *cert den* 455 US 922, 71 L Ed 2d 464, 102 S Ct 1281 and (criticized on other grounds by United States v Michelena-Orovio (CA5 La) 702 F2d 496, 12 Fed Rules Evid Serv 1794); United States v De Leon (CA5 Tex) 641 F2d 330; United States v Richards (CA5 Fla) 638 F2d 765, *reh den* (CA5 Fla) 646 F2d 962 and *cert den* 454 US 1097, 70 L Ed 2d 638, 102 S Ct 669, *post-conviction proceeding* (CA11 Fla) 837 F2d 965 and (criticized on other grounds by United States v Garcia (CA11 Fla) 672 F2d 1349, 10 Fed Rules Evid Serv 359); United States v Goldstein (CA5 Fla) 635 F2d 356, *reh den* (CA5 Fla) 640 F2d 385 and *cert den* 452 US 962, 69 L Ed 2d 972, 101 S Ct 3111 and (criticized on other grounds by United States v Beale (CA9 Cal) 674 F2d 1327) and (criticized on other grounds by Horton v Goose Creek Independent School Dist. (CA5 Tex) 677 F2d 471, 34 FR Serv 2d 221); United States v Grayson (CA5 Fla) 625 F2d 66; United States v Butler (CA5 Ga) 611 F2d 1066, *reh den* (CA5 Ga) 615 F2d 685 and *cert den* 449 US 830, 66 L Ed 2d 35, 101 S Ct 97; United States v Cortez (CA5 Tex) 521 F2d 1; United States v Mather (CA5 Fla) 465 F2d 1035, *cert den* 409 US 1085, 34 L Ed 2d 672, 93 S Ct 685; Norristown-Penn Trust Co. v Cole (CA5 Tex) 80 F2d 888, *cert den* 297 US 723, 80 L Ed 1007, 56 S Ct 670; United States v Wilson (SD Tex) 432 F Supp 223, *affd* on other grounds (CA5 Tex) 553 F2d 896; United States v Giles (CA6 Mich) 536 F2d 136; United States v Garza-Hernandez (CA7 Ill) 623 F2d 496; United States v Washington (CA7 Ill) 586 F2d 1147 (criticized on other grounds by United States v Brock (CA9 Or) 667 F2d 1311, 9 Fed Rules Evid Serv 1686, 70 ALR Fed 721); United States v Nocar (CA7 Ill) 497 F2d 719, *cert den* 419 US 1038, 42 L Ed 2d 315, 95 S Ct 526; United States v Garrett (ND Ill) 712 F Supp 1327, *affd* (CA7 Ill) 903 F2d 1105, *cert den* 498 US 905, 112 L Ed 2d 227, 111 S Ct 272; United States v Wood (CA8 Mo) 851 F2d 185, 26 Fed Rules Evid Serv 45; United States v Brischetto (CA8 Mo) 538 F2d 208; United States v Mora (CA9 Cal) 876 F2d 76; United States v Espinosa (CA9 Cal) 827 F2d 604, 23 Fed Rules Evid Serv 963, *cert den* 485 US 968, 99 L Ed 2d 441, 108 S Ct 1243; United States v Daniels (CA9) 549 F2d 665; United States v Pirolli (CA11 Fla) 742 F2d 1382, 16 Fed Rules Evid Serv 1347, *cert den* 471 US 1067, 85 L Ed 2d 500, 105 S Ct 2143; Valle v State (Ind) 550 NE2d 746 (possession of 112.3 grams of unusually pure cocaine supported the inference of intent to deal).

But see United States v Manbeck (CA4 SC) 744 F2d 360, *cert den* 469 US 1217, 84 L Ed 2d 342, 105 S Ct 1197 and (criticized by United States v Wright-Barker (CA3 NJ) 784 F2d 161) which stated that the inference that a person possessing a large quantity of marijuana intends to distribute it is well recognized, but is not applicable where crew

members of a boat are charged with both conspiracy to import and conspiracy to distribute; the only supportable inference was that the crew members' knowledge of the presence of the drugs may be inferred from the large quantity on board, and that such inference supported convictions for joining a conspiracy to import; the large quantity indicated that someone planned to distribute the marijuana, but not whether the crewmembers did).

Annotation: Sufficiency of evidence that possessor of controlled substance other than cocaine, heroin, or marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 ALR Fed 507.

Sufficiency of evidence that possessor of cocaine had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 ALR Fed 397.

Sufficiency of evidence that possessor of marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 79 ALR Fed 113.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 ALR Fed 413.

Footnote 92. *Turner v United States*, 396 US 398, 24 L Ed 2d 610, 90 S Ct 642, reh den 397 US 958, 25 L Ed 2d 144, 90 S Ct 939 and (not followed on other grounds by *James v People (Colo)* 727 P2d 850); *United States v Latham (CA1 Me)* 874 F2d 852; *United States v Gaviria (CA2 NY)* 740 F2d 174; *United States v Clark (CA2 NY)* 475 F2d 240, appeal after remand (CA2 NY) 498 F2d 535; *United States v Moses (WD Pa)* 360 F Supp 301; *United States v Olvera (CA5 Tex)* 523 F2d 1252; *United States v Clayborn (WD Tex)* 383 F Supp 1186; *United States v Owens (WD Tex)* 344 F Supp 1355, affd on other grounds (CA5 Tex) 475 F2d 759; *Jackson v Wyrick (CA8 Mo)* 730 F2d 1177, cert den 469 US 849, 83 L Ed 2d 102, 105 S Ct 167; *United States v Franklin (CA8 Mo)* 728 F2d 994, 15 Fed Rules Evid Serv 174, 80 ALR Fed 385; *United States v Martin (CA9 Cal)* 599 F2d 880, cert den 441 US 962, 60 L Ed 2d 1067, 99 S Ct 2407, 99 S Ct 2408 and (criticized on other grounds by *United States v De Bright (CA9 Ariz)* 710 F2d 1404) and (ovrld on other grounds by *United States v De Bright (CA9 Ariz)* 730 F2d 1255) and (criticized on other grounds by *United States v Binkley (CA7 Ill)* 903 F2d 1130, 30 Fed Rules Evid Serv 543); *United States v Brown (CA11 Fla)* 872 F2d 385, cert den 493 US 898, 107 L Ed 2d 203, 110 S Ct 253; *United States v Walker*, 146 US App DC 95, 449 F2d 1171.

§ 240 Alcohol tests—presumption of impairment

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

State statutes that make it a crime to operate a motor vehicle while under the influence of alcohol create a presumption that a person whose test reveals more than the statutorily permitted concentration of alcohol is in fact impaired or intoxicated. 93 It is, generally speaking, unconstitutional to treat such provisions as creating a mandatory presumption,

94 but it is permissible to treat them as creating a permissible inference. 95 Other states take a second approach which more straightforwardly makes it a crime for a person to drive while having a concentration of alcohol in his system in excess of the permitted percent. 96 Such a statute does not presume a defendant having the specified blood-alcohol concentration is impaired or intoxicated; hence, it can not violate due process rules governing presumptions. 97

Such statutes might be said, however, to establish the subsidiary presumption that if a defendant had a specified percent blood alcohol level at the time the test was performed, he also had at least that level at the time he was driving the vehicle; assuming the statute requires the test to be taken fairly soon after the defendant is stopped, however, this is no bar to constitutionality. 98

Nor do such statutes impermissibly shift the burden of proof to the defendant. 99

§ 240 ----Alcohol tests--presumption of impairment [SUPPLEMENT]

Practice Aids: Driving Under the Influence: Tactical Considerations in Sobriety Checkpoint Cases. 59 Am Jur Trials 79.

Footnotes

Footnote 93. Uniform Chemical Test for Intoxication Act, which provides that if a chemical analysis shows there was 0.05 percent or less by weight of alcohol in a person's blood, such fact is prima facie evidence that the person was not under the influence of intoxicating liquor; if the amount was in excess of 0.05 percent but less than 0.15 percent by weight of alcohol, such evidence is relevant but is not to be given prima facie effect in indicating whether the person was under the influence of intoxicating liquor; and if evidence discloses that there was, at that time, 0.15 percent or more by weight of alcohol, such evidence shall be admitted as prima facie evidence that the person was under the influence of intoxicating liquor.

Footnote 94. *Ethridge v State*, 9 Ark App 111, 654 SW2d 595; *Busch v State* (Fla App D4) 547 So 2d 245, 14 FLW 1719, review den (Fla) 560 So 2d 232; *Commonwealth v Moreira*, 385 Mass 792, 434 NE2d 196; *Olympia v Sprout*, 5 Wash App 897, 492 P2d 586.

Annotation: Construction and application of statutes creating presumption or other inference of intoxication from specified percentages of alcohol present in system, 16 ALR3d 748.

Validity of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176.

Footnote 95. *State v Tollefson*, 239 Mont 305, 780 P2d 621, cert den 495 US 918, 109 L Ed 2d 309, 110 S Ct 1946 (a statutory presumption that a person with an alcohol concentration of 0.10 or more was under influence of alcohol created a permissive inference rather than relieving state from being required to prove every element of case beyond reasonable doubt and was thus constitutional); *State v Ball*, 164 W Va 588, 264

SE2d 844 (a statute providing that one tenth of one percent or more, by weight, of blood-alcohol in defendant's system would be admitted as prima facie evidence of intoxication was not unconstitutional).

Footnote 96. *Coxe v State* (Del Sup) 281 A2d 606.

Annotation: Validity, construction, and application of statutes directly proscribing driving with blood-alcohol level in excess of established percentage, 54 ALR4th 149.

Law Reviews: Driving with 0.10% Blood Alcohol: Can the State Prove It? 16 U San Fran L Rev 817 (Summer 1983).

Footnote 97. *State v Lujan* (App) 139 Ariz 236, 677 P2d 1344; *Tausch v State*, 285 Ark 226, 685 SW2d 802; *People v Lewis* (4th Dist) 148 Cal App 3d 614, 196 Cal Rptr 161; *Coxe v State* (Del Sup) 281 A2d 606; *Cunningham v State*, 255 Ga 35, 334 SE2d 656; *People v Ziltz*, 98 Ill 2d 38, 74 Ill Dec 40, 455 NE2d 70; *State v Conner* (Iowa App) 377 NW2d 664; *State v Larson*, 12 Kan App 2d 198, 737 P2d 880, later proceeding (Kan App) 1988 Kan App LEXIS 279; *State v Marble* (Minn App) 396 NW2d 708; *State v Tischio*, 208 NJ Super 343, 506 A2d 14, cert den 104 NJ 420, 517 A2d 416, reconsideration gr 105 NJ 518, 523 A2d 163 and affd 107 NJ 504, 527 A2d 388, app dismd 484 US 1038, 98 L Ed 2d 855, 108 S Ct 768; *People v Lebron* (Sup App T) 130 Misc 2d 831, 501 NYS2d 975; *State v Howren*, 312 NC 454, 323 SE2d 335; *State v Tanner*, 15 Ohio St 3d 1, 15 Ohio BR 1, 472 NE2d 689, 54 ALR4th 139; *State v Evans* (Portage Co) 21 Ohio App 3d 169, 21 Ohio BR 180, 486 NE2d 1248; *State v Clark*, 286 Or 33, 593 P2d 123; *Commonwealth v Hernandez*, 339 Pa Super 32, 488 A2d 293; *Scherlie v State* (Tex App Houston (1st Dist)) 689 SW2d 294, petition for discretionary review gr (Jan 29, 1986) and affd (Tex Crim) 715 SW2d 653.

Footnote 98. *Chilcutt v State* (Ind App) 544 NE2d 856.

Footnote 99. *Doty v State*, 285 Ark 270, 686 SW2d 413; *People v Ziltz*, 98 Ill 2d 38, 74 Ill Dec 40, 455 NE2d 70; *Chilcutt v State* (Ind App) 544 NE2d 856 (among conflicting authorities noted in *Sturgeon v State* (Ind App) 575 NE2d 679, which held that a jury instruction tracking the language of such a statute without an advisement that the jury was free to accept or reject the presumption if the defendant did not come forward with evidence to rebut it, did compel the trier of fact to find the presumed fact of blood alcohol content at the time of vehicle operation, which under the facts of the case resulted in reversible error); *State v Marble* (Minn App) 396 NW2d 708; *Commonwealth v Hernandez*, 339 Pa Super 32, 488 A2d 293; *Scherlie v State* (Tex App Houston (1st Dist)) 689 SW2d 294, petition for discretionary review gr (Jan 29, 1986) and affd (Tex Crim) 715 SW2d 653.

§ 241 Possession of stolen property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a

circumstance from which the factfinder may reasonably draw the inference that the person in possession knew the property had been stolen. 1

A properly worded instruction on this inference does not constitute a comment on the defendant's failure to testify, and therefore does not violate the Fifth Amendment privilege against self-incrimination. 2 An instruction that "intent to commit theft is presumed" unless otherwise explained, however, violates due process and cannot be harmless error. 3

Footnotes

Footnote 1. *Barnes v United States*, 412 US 837, 37 L Ed 2d 380, 93 S Ct 2357; *People v Roder*, 33 Cal 3d 491, 189 Cal Rptr 501, 658 P2d 1302; *State v Anonymous*, 190 Conn 715, 463 A2d 533; *Winborne v State* (Del Sup) 455 A2d 357; *Williamson v State*, 248 Ga 47, 281 SE2d 512; *Ward v State* (Ind) 439 NE2d 156; *State v Atkinson*, 215 Kan 139, 523 P2d 737; *Bush v State* (Tenn) 541 SW2d 391.

Annotation: Presumptions and inferences arising in Prosecutions under National Motor Vehicle Theft Act (Dyer Act) (18 USCS §§ 2312, 2313) from unexplained possession of stolen motor vehicle, 15 ALR Fed 856.

Footnote 2. *Barnes v United States*, 412 US 837, 37 L Ed 2d 380, 93 S Ct 2357; *United States v Johnson*, 140 US App DC 54, 433 F2d 1160; *State v Dixon* (App) 127 Ariz 554, 622 P2d 501; *Wells v People*, 197 Colo 350, 592 P2d 1321; *State v Young* (Fla) 217 So 2d 567, cert den 396 US 853, 24 L Ed 2d 101, 90 S Ct 112; *Weldon v Barnes*, 251 Ga 689, 309 SE2d 137; *People v Housby*, 84 Ill 2d 415, 50 Ill Dec 834, 420 NE2d 151, cert den 454 US 845, 70 L Ed 2d 131, 102 S Ct 160; *Luman v State* (Okla Crim) 626 P2d 869.

Annotation: Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 ALR3d 1178.

Footnote 3. *Carella v California*, 491 US 263, 105 L Ed 2d 218, 109 S Ct 2419, reh den 492 US 937, 106 L Ed 2d 636, 110 S Ct 23; *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965 (criticized on other grounds by *Estelle v McGuire* (US) 116 L Ed 2d 385, 112 S Ct 475, 91 Daily Journal DAR 14785, 33 Fed Rules Evid Serv 305) as stated in *People v Clair*, 2 Cal 4th 629, 7 Cal Rptr 2d 564, 828 P2d 705, 92 CDOS 3966, 92 Daily Journal DAR 6358, reh den (Cal) 1992 Cal LEXIS 3179 and stay gr (Cal) 1992 Cal LEXIS 4259 and cert den (US) 122 L Ed 2d 155, 113 S Ct 1006; *Sandstrom v Montana*, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450, on remand 184 Mont 391, 603 P2d 244 and (criticized on other grounds by *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965) as stated in *Myrick v Maschner* (CA10 Kan) 799 F2d 642.

§ 242 Presumption that witnesses tell truth

[View Entire Section](#)

An instruction to the jury that the law presumes that every witness is telling the truth conflicts with the prosecution's burden to prove defendant's guilt beyond a reasonable doubt. 4 Although improper, the instruction may not require a court to set aside a conviction on due process grounds as long as the rest of the jury instructions undo the damage by emphasizing the prosecution's burden. 5

◆ **Caution:** It is uncertain whether this tolerance survives the case dealing with the prosecution's burden to prove defendant's guilt beyond a reasonable doubt on all issues. 6

A related instruction, that it is the jury's duty to reconcile, if possible, conflicts between different witnesses' testimony, but that if such reconciliation is not possible the jury must decide which witnesses are to be believed, does not constitute an improper presumption of truth instruction. 7

Footnotes

Footnote 4. *Cupp v Naughten*, 414 US 141, 38 L Ed 2d 368, 94 S Ct 396, on remand (CA9 Or) 489 F2d 734 and (ovrld on other grounds by *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965) as stated in *Lakes v Ford* (CA11 Ga) 779 F2d 1578.

Annotation: Propriety and prejudicial effect of instruction, in federal criminal trial, that witnesses are presumed to tell the truth, 8 ALR Fed 319.

Footnote 5. *Cupp v Naughten*, 414 US 141, 38 L Ed 2d 368, 94 S Ct 396, on remand (CA9 Or) 489 F2d 734 and (ovrld on other grounds by *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965) as stated in *Lakes v Ford* (CA11 Ga) 779 F2d 1578.

Footnote 6. *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777, 99 S Ct 2213, discussed in § 192.

Footnote 7. *United States v Hyman* (CA7 Ind) 741 F2d 906, 16 Fed Rules Evid Serv 87.

4. Nonproduction, Suppression, or Fabrication of Evidence [243-257]

a. In General [243-246]

§ 243 Fabrication of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fabrication of evidence raises a presumption or inference that the supposed cause of action or defense of the party guilty of fabrication is without substantial foundation. 8 A party's attempt to procure false testimony or to corrupt a witness, though collateral to the issues, is competent as an admission by acts and conduct that the party's case is weak and its evidence dishonest. 9 However, such presumption or inference may be overcome by evidence giving a satisfactory explanation, even when there is actual tampering with the evidence. 10 Such presumption or inference cannot prevail where the other evidence in the case establishes the cause of action or the defense. 11

Footnotes

Footnote 8. *Silva v Northern California Power Co.*, 32 Cal App 139, 162 P 412; *Kuhnen v Kuhnen*, 351 Ill 591, 184 NE 874; *Nowack v Metropolitan S. R. Co.*, 166 NY 433, 60 NE 32; *Western States Grocery Co. v Mirt*, 190 Okla 299, 123 P2d 266; *Hall v Pennsylvania R. Co.*, 257 Pa 54, 100 A 1035.

In *Lubin v Lubin* (2nd Dist) 144 Cal App 2d 781, 302 P2d 49, it was said that the fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth, but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.

The representative character of an executrix will not prevent evidence that she has attempted to procure false testimony, especially when she is personally interested in the litigation. *McHugh v McHugh*, 186 Pa 197, 40 A 410.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) §§ 86, 87.

Footnote 9. *People v Davis*, 43 NY2d 17, 400 NYS2d 735, 371 NE2d 456, cert den 435 US 998, 56 L Ed 2d 88, 98 S Ct 1653 and cert den 438 US 914, 57 L Ed 2d 1160, 98 S Ct 3143.

Annotation: Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Footnote 10. *Wong v Swier* (CA9 Wash) 267 F2d 749.

Footnote 11. *Kuhnen v Kuhnen*, 351 Ill 591, 184 NE 874.

§ 244 Destruction or spoliation of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have

been unfavorable. 12 Such a presumption or inference arises, however, only where the act was intentional, and indicates fraud and a desire to suppress the truth, 13 and it does not arise where the destruction was a matter of routine with no fraudulent intent. 14 Thus, a conscious awareness of the existence of the dispute and that the act done will destroy evidence or access to evidence are prerequisites to applying the inference. 15 Furthermore, any presumption that may arise from the spoliation or destruction of evidence is not conclusive, but rather is rebuttable, 16 the spoliation of evidence being a circumstance open to explanation. 17

The presumption against a person who has damaged or destroyed evidence does not relieve the other party of the obligation to meet his or her burden of proof. 18 This presumption or inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's cause. 19 Thus, even though it was established that a doctor altered a hospital record, the doctrine of spoliation only gave rise to the inference that the record previously stated that a patient's knee was burned, not ulcerated, and not that the knee was burned in fact. 20

§ 244 ----Destruction or spoliation of evidence [SUPPLEMENT]

Practice Aids: Evidence spoliation warrants presumption of negligence, 140 Chi Daily L Bull 236:5 (1995).

Plaintiff can sue over evidence lost in product liability case, 141 Chi Daily L Bull 13:1 (1995).

Do not fold, spindle, or mutilate: The trend toward recognition of spoliation as a separate tort, 43 Def LJ 4:723-756 (1995).

Spoliation of evidence in products litigation, 35 For the Defense 5:8 (1993).

Federal courts' authority to impose sanctions for prelitigation or pre-order spoliation of evidence, 156 FRD 2:313 (1994).

Do not fold spindle or mutilate: The trend towards recognition of spoliation as a separate tort, 30 Idaho LR 37 (1994).

Spoliation of evidence is not affirmative defense, 17 Pa L Weekly 30:9 (1994).

When relevant evidence no longer exists; The bright-line approach to spoliation gives way to a balancing test, 18 Pa L Weekly 4:11 (1995).

Future battlegrounds in spoliation; Design v. manufacturing defects, tort remedies, are just two of the new issues, 18 Pa L Weekly 5:13 (1995).

Spoliation of evidence in California, 24 Southw U LR 1:123 (1994).

The spoliation tort: An approach to underlying principles, 26 St Mary's LJ 2:351 (1995).

Spoliation: Remedies—Including punitive damages, 38 Tr Law Guide 4:519 (1995).

Case authorities:

In products liability action against fire engine manufacturer, district court did not abuse its discretion in admitting evidence suggesting that injured firefighter was involved in destruction of fire house journal that may have recorded some of details of accident since court did not allow manufacturer to focus jury's attention on allegedly missing journal and evidence that was admitted regarding close relationship among firefighters could be understood as simply providing jury with background information. *Walsh v Emergency One* (1994, CA7 Ill) 26 F3d 1417, CCH Prod Liab Rep ¶ 13950.

In suit alleging rape and other torts resulting from abuse of plaintiff while a child, testimony of witness that defendant called her after not seeing him for 20 years, and threatened to bring up something about a relationship if she testified, was properly admitted as evidence of spoliation, showing defendant's state of mind as to his consciousness of weakness of his case. *Shpak v Schertle* (1993, Md App) 625 A2d 1037, op withdrawn, reported at 96 Md App 579, adopted, on reconsideration 97 Md App 207, 629 A2d 763.

The trial court did not err in refusing to strike the testimony of a State's witness and in denying defendant's motion for mistrial based on the State's failure to produce a videotaped interview of the witness, since the tape appeared to be lost; a subsequent interview of the witness was conducted; the statement given then was consistent with the videotaped statement and was provided to defendant; and there was no bad faith on the part of the State with respect to production of the videotape. GS § 15A- 910. *State v Thibodeaux* (1995) 341 NC 53, 459 SE2d 501.

Defendant's due process rights were not denied by the destruction of the rape kit and all articles of clothing worn by the victim on the night of the rape after a computer printout indicated that the case had been voluntarily dismissed, where the evidence was not exculpatory and there was no evidence of bad faith. *State v Graham* (1995) 118 NC App 231, 454 SE2d 878, review den 340 NC 262, 456 SE2d 834.

Finding of bad-faith or egregious conduct in context of document destruction case consists of conscious attempt to affect outcome of litigation or flagrant, knowing disregard of judicial process. *Milwaukee Constructors II v Milwaukee Metro. Sewerage Dist.* (1993, App) 177 Wis 2d 523, 502 NW2d 881, review den (Wis) 508 NW2d 421.

Footnotes

Footnote 12. *Equitable Trust Co. v Gallagher* (Sup) 32 Del Ch 401, 77 A2d 548; *Maszczenski v Myers*, 212 Md 346, 129 A2d 109; *Trupiano v Cully*, 349 Mich 568, 84 NW2d 747; *Fonda v St. Paul C. R. Co.*, 71 Minn 438, 74 NW 166, motion den 72 Minn 1, 80 NW 366; *McHugh v McHugh*, 186 Pa 197, 40 A 410; *Thurman-Bryant Electric Supply Co. v Unisys Corp.* (Tenn App) CCH Prod Liab Rep ¶ 13077, app den (Tenn) 1992 Tenn LEXIS 263 (noting that cases from other jurisdictions are generally in accord with this rule); *F. R. Patch Mfg. Co. v Protection Lodge International Ass'n of Machinists*, 77 Vt 294, 60 A 74; *Hay v Peterson*, 6 Wyo 419, 45 P 1073.

The behavior of a litigant with respect to relevant evidence may permit an inference that his behavior was prompted by a conscious appreciation that the evidence might or would be hurtful to his position. *State by Commissioner of Transp. v Council in Div. of*

Resource Dev., etc., 60 NJ 199, 287 A2d 713, 3 Env't Rep Cas 1765.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) §§ 86, 87.

Footnote 13. *Berthold-Jennings Lumber Co. v St. Louis, I. M. & S. R. Co.* (CA8 Mo) 80 F2d 32, 102 ALR 688, cert den 297 US 715, 80 L Ed 1001, 56 S Ct 591; *Trupiano v Cully*, 349 Mich 568, 84 NW2d 747.

Footnote 14. *Berthold-Jennings Lumber Co. v St. Louis, I. M. & S. R. Co.* (CA8 Mo) 80 F2d 32, 102 ALR 688, cert den 297 US 715, 80 L Ed 1001, 56 S Ct 591; *State v Langlet* (Iowa) 283 NW2d 330 (recognizing rule); *Washington v State* (Miss) 478 So 2d 1028.

In the case of evidence sought by the accused to be suppressed on the ground of its acquisition by the prosecution in violation of a federal statute prohibiting wiretapping, and sought by the prosecution to be introduced on the ground that the wiretapping information had not led directly or indirectly to discovery of the evidence involved, an inference is not justified, under the canon contra spoliatores that disks and resumes of wiretapping in New York and destroyed by the New York prosecution agents contained leads to some of the evidence involved, where it appears that the disks and papers were destroyed pursuant to a practice of the New York office to send letters of its contents to Washington weekly and destroy the originals after a fixed period, and where such letters were preserved and produced at the trial. *United States v Coplon* (CA2 NY) 185 F2d 629, 28 ALR2d 1041, cert den 342 US 920, 96 L Ed 688, 72 S Ct 362 and (disapproved on other grounds by *McCray v Illinois*, 386 US 300, 18 L Ed 2d 62, 87 S Ct 1056) as stated in *United States v De Los Santos* (CA5 Tex) 819 F2d 94, 22 Fed Rules Evid Serv 1821.

Footnote 15. *State by Commissioner of Transp. v Council in Div. of Resource Dev., etc.*, 60 NJ 199, 287 A2d 713, 3 Env't Rep Cas 1765.

Footnote 16. *Wong v Swier* (CA9 Wash) 267 F2d 749; *State v Langlet* (Iowa) 283 NW2d 330.

Footnote 17. *Trupiano v Cully*, 349 Mich 568, 84 NW2d 747.

Footnote 18. *Estate of Bould* (2nd Dist) 135 Cal App 2d 260, 287 P2d 8, hear den by sup ct as reported in (2nd Dist) 135 Cal App 2d 277, 289 P2d 15; *Trupiano v Cully*, 349 Mich 568, 84 NW2d 747; *State by Commissioner of Transp. v Council in Div. of Resource Dev., etc.*, 60 NJ 199, 287 A2d 713, 3 Env't Rep Cas 1765; *F. R. Patch Mfg. Co. v Protection Lodge International Ass'n of Machinists*, 77 Vt 294, 60 A 74.

Footnote 19. *Maszczenksi v Myers*, 212 Md 346, 129 A2d 109.

Footnote 20. *Furlong v Stokes* (Mo) 427 SW2d 513, 35 ALR3d 1059.

§ 245 Withholding of evidence

[View Entire Section](#)

An inference may be drawn that withheld evidence would be unfavorable if it is relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it. 21 Similarly, it is the rule that where a party has the means in his power of rebutting and explaining evidence adduced against him if it does not tend to the truth, the failure to furnish rebuttal evidence gives rise to a strong presumption or inference that he cannot do so. 22 But these rules apply only to a party in presenting evidence in support of his own case, no unfavorable inference arising from the failure of a party to produce evidence who has not been called upon to do so. 23 The rules do not apply where the party against whom they are sought to be invoked has no right to submit the evidence without the consent of his adversary. 24

If weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the court and jury that proof of a more direct and explicit character is within the power of the party, it may be presumed or inferred that the better evidence, if given, would have been unfavorable. 25

The presumption or inference arising from the failure of a party to produce available evidence does not amount to substantive proof and does not take the place of proof of a fact necessary to the other party's case. 26 It will not supply a missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved. 27

Footnotes

Footnote 21. *Wetmore v Rymer*, 169 US 115, 42 L Ed 682, 18 S Ct 293; *Kirby v Tallmadge*, 160 US 379, 40 L Ed 463, 16 S Ct 349; *Runkle v Burnham*, 153 US 216, 38 L Ed 694, 14 S Ct 837; *Wood v Holly Manuf'g. Co.*, 100 Ala 326, 13 So 948; *Saliba v Saliba*, 178 Ark 250, 11 SW2d 774, 61 ALR 1348; *Western & A. R. Co. v Morrison*, 102 Ga 319, 29 SE 104; *Lyon v Melgard*, 66 Idaho 599, 163 P2d 1019; *Cartier v Troy Lumber Co.*, 138 Ill 533, 28 NE 932; *Quint-Cities Petroleum Co. v Maas*, 259 Iowa 122, 143 NW2d 345; *Re Ratner*, 194 Kan 362, 399 P2d 865; *McClure v McClintock*, 150 Ky 265, 150 SW 332, motion overr 150 Ky 773, 150 SW 849; *Kennon v Brooks-Scanlon Co.*, 148 La 120, 86 So 675; *Critzer v Shegogue*, 236 Md 411, 204 A2d 180; *D'Addio v Hinckley Rendering Co.*, 213 Mass 465, 100 NE 647; *Barringer v Arnold*, 358 Mich 594, 101 NW2d 365; *Vorlicky v Metropolitan Life Ins. Co.*, 206 Minn 34, 287 NW 109; *Cheney v Dunlap*, 27 Neb 401, 43 NW 178; *Stocker v Boston & M. R. R.*, 84 NH 377, 151 A 457, 70 ALR 1320; *Orange & Rockland Utilities, Inc. v Amerada Hess Corp.* (2d Dept) 59 App Div 2d 110, 397 NYS2d 814, 22 UCCRS 310, 96 ALR3d 1263; *State v Farmer*, 156 Ohio St 214, 46 Ohio Ops 97, 102 NE2d 11; *State ex rel. Raydel v Raible* (App, Cuyahoga Co) 69 Ohio L Abs 356, 117 NE2d 480, 40 ALR2d 950, app dismd for want of debat q 162 Ohio St 74, 54 Ohio Ops 18, 120 NE2d 590; *Loyal Protective Ins. Co. v Shoemaker*, 178 Okla 612, 63 P2d 960; *Weber v Rothchild*, 15 Or 385, 15 P 650; *Alexander v Wilkes-Barre Anthracite Coal Co.*, 254 Pa 1, 98 A 794; *Collins v Merrimack Mut. Fire Ins. Co.*, 210 SC 207, 42 SE2d 67; *Standard Oil Co. v State*, 117 Tenn 618, 100 SW 705; *Bowe v Palmer*, 36 Utah 214, 102 P 1007; *F. R. Patch Mfg. Co. v Protection Lodge International Ass'n of Machinists*, 77 Vt 294, 60 A 74; *State v Davis*, 73 Wash 2d 271, 438 P2d 185 (ovrld on other grounds by *State v Braun*, 82 Wash 2d 157, 509 P2d

742) as stated in *State v Davis*, 34 Wash App 546, 662 P2d 78, review den 100 Wash 2d 1005; *British Columbia Breweries (1918), Ltd. v King County*, 17 Wash 2d 437, 135 P2d 870; *Coney v Milwaukee & Suburban Transport Corp.*, 8 Wis 2d 520, 99 NW2d 713; *Hay v Peterson*, 6 Wyo 419, 45 P 1073.

A liberal presumption ought to be indulged in favor of the plaintiff's evidence as to the value of land in controversy, when this is a jurisdictional question, and the court gave leave to both parties to file affidavits on the question, and the defendant fails to procure a single sworn statement on the subject. *Wetmore v Rymer*, 169 US 115, 42 L Ed 682, 18 S Ct 293.

Where an adversary withholds evidence in his possession or control that would be likely to support his version of the case for which support is needed, the strongest inferences may be drawn against him which the opposing evidence in the record permits. *Jarrett v Madifari* (1st Dept) 67 App Div 2d 396, 415 NYS2d 644.

Forms: Instructions on inferences drawn from failure to produce evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 62 et seq.

Footnote 22. *Mammoth Oil Co. v United States*, 275 US 13, 72 L Ed 137, 48 S Ct 1; *Lebanon Light, Heat & Power Co. v Leap*, 139 Ind 443, 39 NE 57; *Donald v Chicago, B. & Q. R. Co.*, 93 Iowa 284, 61 NW 971.

Footnote 23. *Cartier v Troy Lumber Co.*, 138 Ill 533, 28 NE 932; *Hogue v Wurdack* (Mo App) 298 SW2d 492; *Hubbard v Cleveland, Columbus & Cincinnati Highway, Inc.* (Franklin Co) 81 Ohio App 445, 37 Ohio Ops 279, 50 Ohio L Abs 78, 76 NE2d 721; *Horicon v Langlois' Estate*, 115 Vt 470, 66 A2d 16, 9 ALR2d 195.

Footnote 24. *Cartier v Troy Lumber Co.*, 138 Ill 533, 28 NE 932.

Footnote 25. *Interstate Circuit, Inc. v United States*, 306 US 208, 83 L Ed 610, 59 S Ct 467, 40 USPQ 299; *Runkle v Burnham*, 153 US 216, 38 L Ed 694, 14 S Ct 837; *Clifton v United States*, 45 US 242, 4 How 242, 11 L Ed 957; *Goodwin v Misticos*, 207 Miss 361, 42 So 2d 397; *Masonite Corp. v Hill*, 170 Miss 158, 154 So 295, 95 ALR 157; *State v Farmer*, 156 Ohio St 214, 46 Ohio Ops 97, 102 NE2d 11.

Footnote 26. *Guthrie v Gillespie*, 319 Mo 1137, 6 SW2d 886; *Epton v Moskee Inv. Co.*, 180 Or 86, 174 P2d 418.

Footnote 27. *Collins v Merrimack Mut. Fire Ins. Co.*, 210 SC 207, 42 SE2d 67.

§ 246 --Documentary evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the application of the rule that an unfavorable inference may be drawn from the failure of a party, without satisfactory explanation, to produce evidence, properly a part of a

case, which is within the party's control, 28 the law ordinarily creates an unfavorable inference from the failure of a party to produce pertinent documents or papers. 29 If, after due notice to produce available books and papers at the trial, a party refuses or fails to do so, it may be presumed that such failure or refusal is because such books or papers, if produced, would operate against his claim and in favor of the claim of the opposite party. 30 For instance, the failure by hospital employees or a physician to produce medical records may lead to a rebuttable 31 presumption or inference of negligence. 32 However, no adverse inference can be raised against a party for failure to produce books or papers, where secondary evidence fully establishes their contents so far as they are material. 33 It is further clear that where a party lacks notice that any issue will be raised which will make production of a document material, 34 or where he has no right to give a document in evidence without the consent of his adversary, and he is not called upon to produce it, 35 an unfavorable inference from its nonproduction cannot be raised. Nor can an unfavorable inference be drawn against a party for failure to produce a record if the evidence is uncontradicted that no such record was kept. 36

The failure to produce demanded books and papers does not raise the inference that, if produced, they would establish the facts which it is alleged they would prove. 37

Footnotes

Footnote 28. § 245.

Footnote 29. *Runkle v Burnham*, 153 US 216, 38 L Ed 694, 14 S Ct 837; *The Cheshire*, 70 US 231, 3 Wall 231, 18 L Ed 175; *Clifton v United States*, 45 US 242, 4 How 242, 11 L Ed 957; *Maciejewska v Lombard Bros., Inc.*, 171 Conn 35, 368 A2d 206 (recognizing rule); *Pullman Co. v Schaffner*, 126 Ga 609, 55 SE 933; *Hodgson v John Deere Plow Co.*, 104 Kan 237, 178 P 607; *Arthur v Commonwealth (Ky)* 307 SW2d 182; *People ex rel. Woronoff v Mallon*, 222 NY 456, 119 NE 102, 4 ALR 463; *Mullen v J. J. Quinlan & Co.*, 195 NY 109, 87 NE 1078; *Bowe v Palmer*, 36 Utah 214, 102 P 1007; *West Milwaukee v Bergstrom Mfg. Co.*, 242 Wis 137, 7 NW2d 587.

It may be presumed that if record evidence of title exists it will be produced. *Romero v United States*, 68 US 721, 1 Wall 721, 17 L Ed 627.

The suppression by one accused of causing a surety to withdraw from a bond of a letter alleged to have contained the false statement causing such action and the failure to produce it in response to a subpoena duces tecum are sufficient to support a verdict against him. *McClure v McClintock*, 150 Ky 265, 150 SW 332, motion overr 150 Ky 773, 150 SW 849.

Footnote 30. *Hanson v Lessee of Eustace*, 43 US 653, 2 How 653, 11 L Ed 416; *Lebanon Light, Heat & Power Co. v Leap*, 139 Ind 443, 39 NE 57; *Donald v Chicago, B. & Q. R. Co.*, 93 Iowa 284, 61 NW 971; *Vorlicky v Metropolitan Life Ins. Co.*, 206 Minn 34, 287 NW 109; *Scott v Astoria R. Co.*, 43 Or 26, 72 P 594; *F. R. Patch Mfg. Co. v Protection Lodge International Ass'n of Machinists*, 77 Vt 294, 60 A 74; *Board of Trustees v Mankin Inv. Co.*, 118 W Va 134, 189 SE 96; *Hay v Peterson*, 6 Wyo 419, 45 P 1073.

Notices to produce documents for discovery are generally discussed in 23 Am Jur 2d,

Depositions and Discovery §§ 244 et seq. Subpoenas duces tecum to compel witnesses to bring documents to court are discussed in 81 Am Jur 2d, Witnesses §§ 18 et seq.

Footnote 31. Thor v Boska (2nd Dist) 38 Cal App 3d 558, 113 Cal Rptr 296; Public Health Trust v Valcin (Fla) 507 So 2d 596, 12 FLW 211, 69 ALR4th 895; DeLaughter v Lawrence County Hosp. (Miss) 601 So 2d 818.

Footnote 32. Carr v St. Paul Fire & Marine Ins. Co. (WD Ark) 384 F Supp 821 (applying Arkansas law); May v Moore (Ala) 424 So 2d 596; Public Health Trust v Valcin (Fla) 507 So 2d 596, 12 FLW 211, 69 ALR4th 895; DeLaughter v Lawrence County Hosp. (Miss) 601 So 2d 818.

Annotation: Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

Footnote 33. Cartier v Troy Lumber Co., 138 Ill 533, 28 NE 932.

Footnote 34. Rochester German Ins. Co. v Monumental Sav. Ass'n, 107 Va 701, 60 SE 93.

Footnote 35. Cartier v Troy Lumber Co., 138 Ill 533, 28 NE 932.

Footnote 36. Hench v Pennsylvania R. Co., 246 Pa 1, 91 A 1056.

Footnote 37. Hanson v Lessee of Eustace, 43 US 653, 2 How 653, 11 L Ed 416; Cartier v Troy Lumber Co., 138 Ill 533, 28 NE 932; Hench v Pennsylvania R. Co., 246 Pa 1, 91 A 1056.

b. Failure to Call or Examine Witnesses [247-257]

§ 247 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If a party knows of the existence of an available witness on a material issue and such witness is within his control, and if, without satisfactory explanation, he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party. 38 Even in criminal cases, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption or inference that the testimony, if produced, would be unfavorable. 39 Thus, a state's failure to call police officers as witnesses in a criminal case to contradict the defendant's version of the events may lend support to the conclusion that their testimony would have been unfavorable to the prosecution, 40 at least where such testimony would not have been cumulative. 41 However, the continued validity of the principle that the testimony of an uncalled witness

would be unfavorable has been questioned in light of Rule 607, providing, in effect, that a party no longer has to vouch for the credibility of the witnesses he or she calls, 42 on the basis that since neither party vouches for any witness's credibility, the failure to call a witness cannot be treated as an evidentiary fact that permits any inference as to the content of the witness's testimony. 43 Also, the principle of allowing comment on the failure of a criminal defendant to call witnesses may be to impermissibly distort the allocation of the burden of proof, 44 and if allowed at all, is to be applied cautiously, and with a strict regard for the rights of persons accused, and the jury should ordinarily be instructed not to draw inferences from the neglect of a defendant to call witnesses, unless it appears to be within his power to call others than himself, and unless the evidence against him is so strong that, if innocent, he would be expected to call them. 45 In effect, when it is shown why the witness was not called upon to testify and the reasons for not calling him are reasonable and proper, no inference that his testimony would be unfavorable is permitted. 46

§ 247 ----Generally [SUPPLEMENT]

Case authorities:

In action by railroad engineer against railroad under Federal Employers' Liability Act to recover for hearing loss caused by noise in workplace, railroad was entitled to invoke adverse inference from plaintiff's failure to produce treating physician who initially gave hearing examination that revealed plaintiff's hearing loss, where physician's diagnosis of plaintiff's hearing problems, and any opinion he might have had of their cause, as well as possible history taken from plaintiff, was important in determining defendant's liability. Further, whether plaintiff was advised by physician of possible cause of his hearing problems was relevant to pleaded defense of statute of limitations. Although physician's records were before jury, that did not preclude utilization of adverse inference, and records did not contain information about which doctor could have been expected to testify, i.e., diagnosis, history, and/or causation. *Piper v Missouri P. R. Co.* (1993, Mo App) 847 SW2d 907.

Footnotes

Footnote 38. *Culbertson v The Steamer Southern Belle*, 59 US 584, 18 How 584, 15 L Ed 493; *Overstreet v Missouri P. R. Co.* (WD Ark) 195 F Supp 542; *Billeci v United States*, 87 US App DC 274, 184 F2d 394, 24 ALR2d 881; *Waller v State*, 242 Ala 1, 4 So 2d 911; *Hays v Viscome*, 122 Cal App 2d 135, 264 P2d 173, 39 ALR2d 1435; *Freitas v Peerless Stages, Inc.*, 108 Cal App 2d 749, 239 P2d 671, 33 ALR2d 778; *State v Leecan*, 198 Conn 517, 504 A2d 480, 79 ALR4th 667, cert den 476 US 1184, 91 L Ed 2d 550, 106 S Ct 2922, habeas corpus den (CA2 Conn) 893 F2d 1434, cert den 496 US 929, 110 L Ed 2d 647, 110 S Ct 2627, habeas corpus dismissed (DC Conn) 822 F Supp 54; *East T., V. & G. R. Co. v Kane*, 92 Ga 187, 18 SE 18; *Re Heirich*, 10 Ill 2d 357, 140 NE2d 825, 67 ALR2d 827, cert den 355 US 805, 2 L Ed 2d 49, 78 S Ct 22; *Santucci Constr. Co. v County of Cook* (1st Dist) 21 Ill App 3d 527, 315 NE2d 565; *Bircher v Wasson*, 133 Ind App 27, 180 NE2d 118; *Quint-Cities Petroleum Co. v Maas*, 259 Iowa 122, 143 NW2d 345; *Succession of Yeates*, 213 La 541, 35 So 2d 210; *Bates v Blitz*, 205 La 536, 17 So 2d 816; *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725; *Commonwealth v Groce*, 25 Mass App 327, 517 NE2d 1297; *Barringer v Arnold*, 358

Mich 594, 101 NW2d 365; State v Engstrom, 226 Minn 301, 32 NW2d 553; Hawkins v Rye, 233 Miss 132, 101 So 2d 516, 77 ALR2d 663; Linton v State Dept. of Public Health & Welfare (Mo App) 252 SW2d 841; Stocker v Boston & M. R. R., 84 NH 377, 151 A 457, 70 ALR 1320; Laffin v Ryan (3d Dept) 4 App Div 2d 21, 162 NYS2d 730; Ridge v Norfolk S. R. Co., 167 NC 510, 83 SE 762; Scherbenske v Maier (ND) 71 NW2d 770; Llewellyn v Cincinnati S. R. Co. (Hamilton Co) 66 Ohio App 107, 19 Ohio Ops 360, 32 Ohio L Abs 153, 32 NE2d 33; Alexander v Wilkes-Barre Anthracite Coal Co., 254 Pa 1, 98 A 794; Robinson v Duke Power Co., 213 SC 185, 48 SE2d 808; Ex parte Hernlen, 156 SC 181, 153 SE 133, 69 ALR 443; National Life & Acci. Ins. Co. v Eddings, 188 Tenn 512, 221 SW2d 695; Bland v Richmond, 190 Va 42, 55 SE2d 289; British Columbia Breweries (1918), Ltd. v King County, 17 Wash 2d 437, 135 P2d 870; Coney v Milwaukee & Suburban Transport Corp., 8 Wis 2d 520, 99 NW2d 713.

When the government has introduced evidence in a proceeding to cancel an oil lease, which is uncontradicted and unexplained, and is sufficient to sustain its charge of fraud in the procuring of the lease, it is not required to call the principal representative of the corporation defendant as a witness, but his silence operates against the corporation as though he personally held the lease and failed to testify. Mammoth Oil Co. v United States, 275 US 13, 72 L Ed 137, 48 S Ct 1.

There are two criteria to be met before a jury may infer that the testimony of an absent witness would have been adverse: the witness is peculiarly within the power of the party to produce and the testimony is likely to elucidate the transaction at issue. Kleinbart v United States (Dist Col App) 426 A2d 343, recalled, appeal after remand (Dist Col App) 553 A2d 1236, remanded (Dist Col App) 604 A2d 861.

Availability is not the sole criterion; there must also be some evidence to support a finding that the witness had knowledge of the facts and was apparently qualified to testify about them. Goodman v Firmin Desloge Hospital (Mo App) 540 SW2d 907.

As to the propriety of argument regarding the failure of a party to call witnesses, see 75A Am Jur 2d, Trial §§ 590 et seq.

Annotation: Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue—modern cases, 81 ALR4th 939.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution—modern cases, 80 ALR4th 547.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party—modern cases, 80 ALR4th 405.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Forms: Instructions on inferences drawn from failure to produce evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 62 et seq.

Footnote 39. *Graves v United States*, 150 US 118, 37 L Ed 1021, 14 S Ct 40; *Ford v United States* (CA5 Tex) 210 F2d 313, 54-1 USTC ¶ 9233, 45 AFTR 319; *Commonwealth v Domanski*, 332 Mass 66, 123 NE2d 368.

Footnote 40. *Sims v Georgia*, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523, conformed to 224 Ga 36, 159 SE2d 290; *People v King* (1st Dist) 4 Ill App 3d 1066, 282 NE2d 746; *People v Erts*, 73 NY2d 872, 537 NYS2d 796, 534 NE2d 833; *Ex parte Turner* (Tex Crim) 545 SW2d 470.

Footnote 41. *People v Brown*, 34 NY2d 658, 355 NYS2d 579, 311 NE2d 650.

Annotation: Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel—modern cases, 81 ALR4th 872.

Footnote 42. FR Civ P 607; Uniform Rules of Evidence Rule 607, generally discussed in 81 Am Jur 2d, Witnesses §§ 978 et seq.

Footnote 43. *State v Brewer* (Me) 505 A2d 774.

Footnote 44. *State v Brewer* (Me) 505 A2d 774; *State v Jefferson*, 116 RI 124, 353 A2d 190, later proceeding (RI) 472 A2d 1200 and (ovrld on other grounds by *State v Romano* (RI) 456 A2d 746) as stated in *State v Caruolo* (RI) 524 A2d 575.

Footnote 45. *State v Parker*, 261 Iowa 88, 151 NW2d 505; *Commonwealth v Domanski*, 332 Mass 66, 123 NE2d 368.

The use of the missing witness inference should be only reluctantly permitted in a criminal trial, because of concern that it creates evidence out of nonevidence. *Carr v United States* (Dist Col App) 531 A2d 1010.

Footnote 46. *Critzer v Shegogue*, 236 Md 411, 204 A2d 180.

§ 248 Control and availability

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If an inference is based upon the absence of a possible witness, it must appear that the witness is in the "control" of the party and "available." 47 "Control" in this connection means only that the witness is in such relationship with the party that it is likely that his presence could be procured. 48 The word "available" is sometimes used with a meaning similar to "control," 49 and is held not to mean merely available or accessible for service of compulsory process. 50 Under this meaning of the word, the question whether a witness is available to one or the other of contending parties depends upon such matters as the one party's superior means of knowledge of the existence and identity of the witness, the nature of the testimony that the witness would be expected to give in the light of his previous statements or declarations, if any, about the facts of the case, 51 and the relationship borne by the witness to a particular party as the same would reasonably be expected to affect his personal interest in the outcome of the litigation. 52 However, in some cases the meaning ascribed to the word "available" has been the narrower one of immediate physical availability. 53 And a distinction has been recognized between civil and criminal cases, with one court saying that in criminal cases there is a stringent requirement that the absent witness be peculiarly available to the defendant, rather than simply available as in civil cases, for an adverse inference to arise, in order to protect the defendant's Sixth Amendment right to confront witnesses. 54

It has frequently been stated that an unfavorable inference cannot arise because of the failure of a party to call a witness who is equally available to the other party. 55 But this rule does not apply where there is likelihood of bias on the part of the person not called as a witness in favor of one party, for then that person is not, in a true sense, "equally available" to both parties. 56 Furthermore, there is authority to the effect that the failure to call a witness equally available to both parties gives rise to an inference against both parties, the particular strength of the inference depending on the circumstances. 57 And even though an adverse inference would normally be drawn against a party for failure to call a witness whose testimony would, presumably, be favorable to his cause, only where the witness would be more easily available to the party against whom the inference is to be drawn, it is fair for defense counsel to state in closing argument that the plaintiff's counsel said in opening argument that he would call a particular witness, but did not do so, regardless of whether the witness was equally available to both sides. 58

There should be no adverse inference from the nonproduction of a witness where it appears that the party has made all reasonable effort to procure his testimony. 59 And, in the absence of a special relationship, 60 a witness may be considered equally available to both sides, if his name and address are included in a witness list produced before trial, 61 or his whereabouts have otherwise been disclosed, 62 since once the witness is identified, the opposition can subpoena him or her. 63

◆ Practice guide: It is improper to give a missing witness instruction unless the jury is first told that it must determine whether the witness was available at the time of the trial. Thus, the party seeking the missing witness instruction should lay a foundation, giving the name of the potential witness and the reason why his or her testimony would be material. This gives the opposing party an opportunity to either call the witness or to explain the witness's absence. 64

A witness who is presumptively entitled to refuse to testify by invoking the privilege against self incrimination is not within the power of a party to produce. 65 Such a witness is not available to the government, even though it is claimed that the government

has the right to grant immunity, and in such a case the defendant is not entitled to a missing witness instruction. 66

The rule applicable to a party who fails to call witnesses exclusively in his control does not apply to a defendant who introduces no evidence at all, 67 since the defendant may let the case go to the jury on the basis that the plaintiff did not meet his or her burden of proof. 68

Footnotes

Footnote 47. *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725; *Llewellyn v Cincinnati S. R. Co. (Hamilton Co)* 66 Ohio App 107, 19 Ohio Ops 360, 32 Ohio L Abs 153, 32 NE2d 33.

Footnote 48. *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725.

Footnote 49. *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725.

Footnote 50. *Blick v Nickel Sav., Inv. & Bldg. Ass'n (Mo)* 216 SW2d 509.

Footnote 51. *Blick v Nickel Sav., Inv. & Bldg. Ass'n (Mo)* 216 SW2d 509.

Availability may mean either physical availability or practical availability, the latter which may be affected by a special relationship with one party creating an expectation that the witness may be hostile to the other party, such as where, because of prior grand jury testimony, the prosecution already knew that the witness's testimony was not likely to favor the defendant. *Dent v United States (Dist Col App)* 404 A2d 165.

Footnote 52. §§ 249 et seq.

Footnote 53. *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725.

Footnote 54. *Hayes v State*, 57 Md App 489, 470 A2d 1301, cert den 300 Md 90, 475 A2d 1201.

Footnote 55. *Mutual Ben. Health & Acci. Ass'n v Bradford*, 242 Ala 431, 7 So 2d 20; *Waller v State*, 242 Ala 1, 4 So 2d 911; *Parker v State*, 265 Ark 315, 578 SW2d 206; *Gillett v Gillett (2nd Dist)* 168 Cal App 2d 102, 335 P2d 736; *State v Zagora*, 6 Conn Cir 260, 270 A2d 574; *Pippin v Burnum*, 172 Ga App 553, 323 SE2d 857; *Young v State*, 161 Ind App 532, 316 NE2d 435; *State v Parker*, 261 Iowa 88, 151 NW2d 505 (no presumption arises when it is shown that witness is equally available to either party or when testimony would be merely cumulative); *Commonwealth v Leonard*, 352 Mass 636, 227 NE2d 721; *Barringer v Arnold*, 358 Mich 594, 101 NW2d 365; *Brown v State*, 98 Miss 786, 54 So 305; *Jefferson-Gravois Bank v Cunningham (Mo App)* 674 SW2d 561; *Douglas v Hoeh (Mo App)* 622 SW2d 765; *Longacre v Yonkers R. Co.*, 236 NY 119, 140 NE 215, 28 ALR 1030; *State ex rel. Raydel v Raible (App, Cuyahoga Co)* 69 Ohio L Abs 356, 117 NE2d 480, 40 ALR2d 950, app dismd for want of debat q 162 Ohio St 74, 54 Ohio Ops 18, 120 NE2d 590; *Watonga v Morrison*, 78 Okla 74, 189 P 737; *Vogt v S. M. Byrne Constr. Co.*, 17 Wis 2d 96, 115 NW2d 485, mod on other grounds 17 Wis 2d 100, 117 NW2d 362.

Footnote 56. *United States v Beekman* (CA2 NY) 155 F2d 580; *People v Alexander* (1st Dist) 184 Ill App 3d 855, 133 Ill Dec 83, 540 NE2d 949, app den (Ill) 136 Ill Dec 591, 545 NE2d 115.

While a witness is not equally available if he or she is hostile to one party, an adverse inference cannot be claimed if such hostility is not the case. *Prestype, Inc. v Carr* (Iowa) 248 NW2d 111.

Footnote 57. *United States v Dibrizzi* (CA2 NY) 393 F2d 642, 68 BNA LRRM 2377, 57 CCH LC ¶ 12645; *United States v Cotter* (CA2 NY) 60 F2d 689, cert den 287 US 666, 77 L Ed 575, 53 S Ct 291; *Wood v Mobil Chemical Co.* (5th Dist) 50 Ill App 3d 465, 8 Ill Dec 701, 365 NE2d 1087.

In a prosecution for violating the proxy and reporting requirements of the Securities Exchange Act of 1934, the trial judge properly instructed the jury that an adverse inference could be drawn against either side from their failure to call accountants, where the prosecutor and defense had both questioned the accountants prior to trial. *United States v Dixon* (CA2 NY) 536 F2d 1388, CCH Fed Secur L Rep ¶ 95471.

Footnote 58. *Hinton v Waste Techniques Corp.*, 243 Pa Super 189, 364 A2d 724 (superseded by statute on other grounds as stated in *McDevitt v Terminal Warehouse Co.*, 346 Pa Super 186, 499 A2d 374).

Footnote 59. *Pittsburg, C., C. & S. L. R. Co. v Robson*, 204 Ill 254, 68 NE 468; *Commonwealth v Spencer*, 212 Mass 438, 99 NE 266.

See, for instance, *Spright v State*, 254 Ind 420, 260 NE2d 770, holding that an unfavorable inference cannot be drawn against the state by reason of the absence of a witness who was subpoenaed, but who, through no fault of the state, failed to appear, and *Bergeron v Murrell* (La App 4th Cir) 499 So 2d 356, noting that a subpoena could not be served because the witness was no longer at his last address and could not be located.

Footnote 60. §§ 249 et seq.

Footnote 61. *Thoreson v Milwaukee & Suburban Transport Co.*, 56 Wis 2d 231, 201 NW2d 745.

Footnote 62. *Hinnant v United States* (Dist Col App) 520 A2d 292 (once a criminal defendant testified that he knew how to reach his employer and co-workers, identifying them by name and giving precise addresses for most of them, the trial judge should not have given a missing witness instruction without first inquiring whether the government had been able to locate any of the named witnesses).

Footnote 63. *Carr v United States* (Dist Col App) 531 A2d 1010.

Footnote 64. *Benevides v Canario*, 111 RI 204, 301 A2d 75.

Footnote 65. *People v Nilsson*, 44 Ill 2d 244, 255 NE2d 432, cert den 398 US 954, 26 L Ed 2d 296, 90 S Ct 1881.

Footnote 66. *United States v St. Michael's Credit Union* (CA1 Mass) 880 F2d 579, 28

Fed Rules Evid Serv 840; *United States v Stulga* (CA6 Tenn) 584 F2d 142; *Morrison v United States*, 124 US App DC 330, 365 F2d 521; *State v Rosa*, 170 Conn 417, 365 A2d 1135, cert den 429 US 845, 50 L Ed 2d 116, 97 S Ct 126; *People v Bracey* (1st Dist) 93 Ill App 3d 864, 49 Ill Dec 202, 417 NE2d 1029.

Annotation: Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812 § 11.

Footnote 67. *Robins Dry Dock & Repair Co. v Navigazione Libera Triestina, S.A.* (CA2 NY) 32 F2d 209, cert den 280 US 574, 74 L Ed 626, 50 S Ct 30; *Johnson v Toscano*, 144 Conn 582, 136 A2d 341; *Tucker v Delmar Cleaners, Inc.* (Mo App) 637 SW2d 222; *State v Simmons*, 267 SC 479, 229 SE2d 597.

Footnote 68. *Robins Dry Dock & Repair Co. v Navigazione Libera Triestina, S.A.* (CA2 NY) 32 F2d 209, cert den 280 US 574, 74 L Ed 626, 50 S Ct 30; *Tucker v Delmar Cleaners, Inc.* (Mo App) 637 SW2d 222.

§ 249 Effect of relationship between party and witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One of the factors that is determinative of the question as to whether the failure of a party to call a witness will justify an inference that the testimony of such witness would be adverse to the party who failed to call him is the relationship that the potential witness bears to the parties, the logical inference being that a person will be likely to call as a witness one bound to him by ties of interest or affection unless he has reason to believe that the testimony given would be unfavorable, and that a party closely connected with the witness will be more likely to be able to determine in advance what his testimony will be if he is called. In addition to family, 69 economic, 70 or professional 71 relationships, inferences have been drawn based on a failure to call—

—sellers or prior owners in litigation involving contract or property rights. 72

—an alleged donor of property. 73

—a broker or sales agent. 74

—a creditor. 75

—passengers as witnesses in an automobile accident case, 76 although there are other cases holding that the failure to call a passenger as a witness would not give rise of an adverse inference. 77

—an alibi witness, 78 unless the witness is presumptively entitled to refuse to testify by invoking his privilege against self incrimination. 79

—a friend, roommate, or cohabitant, where the witness was particularly available to one party, 80 but not where the requisite relationship of interest or affection was not present. 81

The failure of a defendant in a criminal case to call a codefendant or accomplice not presently on trial has, in most cases, been held not to justify any adverse inference against the accused, especially if it is likely that the witness would be likely to invoke his own Fifth Amendment right not to testify, 82 although there is some authority to the contrary. 83 An insurer's failure to call an insured as a witness does not give rise to an unfavorable presumption, usually on the basis that the insured is not under the insurance company's control. 84

Footnotes

Footnote 69. § 250.

Footnote 70. § 251.

Footnote 71. §§ 252, 253.

Footnote 72. *United States Bond & Mortg. Co. v Reddick*, 199 Ark 82, 133 SW2d 23; *Dawson v Davis*, 125 Conn 330, 5 A2d 703; *Canton Motorcar Works, Inc. v Di Martino*, 6 Conn App 447, 505 A2d 1255, cert den 200 Conn 802, 509 A2d 516; *Re Estate of Ruebush* (3d Dist) 53 Ill App 2d 54, 202 NE2d 344; *Scott v Slater* (Ky) 253 SW2d 232; *Fidelity Financial Services, Inc. v McCoy* (La App 1st Cir) 392 So 2d 118.

Where defendant alleged that the stolen windshield wiper found in his possession had been purchased by him from another, but he failed to call the alleged seller to corroborate his testimony, it was held in *Phelps v Commonwealth*, 255 Ky 655, 75 SW2d 217, that there was a presumption that the witness would not have testified in his favor.

Annotation: Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue—modern cases, 81 ALR4th 939.

Footnote 73. *Scanlon v United States* (CA1 NH) 223 F2d 382, 55-1 USTC ¶ 9508, 47 AFTR 1271 (tax evasion case).

Footnote 74. *Karavos Compania Naviera S. A. v Atlantica Export Corp.* (CA2 NY) 588 F2d 1; *Christman v Maristella Compania Naviera* (SD NY) 349 F Supp 845, affd (CA2 NY) 468 F2d 620; *Williams v Morgan* (La App 2d Cir) 180 So 2d 11; *R. T. Cornell Pharmacy, Inc. v Guzzo* (3d Dept) 135 App Div 2d 1000, 522 NYS2d 725, 81 ALR4th 933, motion dismd 71 NY2d 928, 528 NYS2d 826, 524 NE2d 146; *General Electric Credit Corp. v Aetna Casualty & Surety Co.*, 437 Pa 463, 263 A2d 448.

Footnote 75. *Lynn v Caraway* (WD La) 252 F Supp 858, affd (CA5 La) 379 F2d 943, 3 ALR Fed 587, cert den 393 US 951, 21 L Ed 2d 362, 89 S Ct 373; *Nunez v Nunez* (La App 4th Cir) 436 So 2d 682; *South Orange Trust Co. v Conner*, 228 SC 218, 89 SE2d 372.

Footnote 76. *Moore v Bellamy* (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214; *Rohrkaste v Terre Haute* (Ind App) 470 NE2d 738; *Rigouts v Larkan*, 244 La 479, 153 So 2d 363; *Moore v Skidmore* (La App 4th Cir) 301 So 2d 428; *Grady v Collins Transp. Co.*, 341 Mass 502, 170 NE2d 725; *Daugharty v Anderson*, 275 Minn 371, 147 NW2d 378; *Hancock v Light* (Mo App) 435 SW2d 695; *Litt v Allen* (Mo App) 313 SW2d 183; *Baker v Salvation Army, Inc.*, 91 NH 1, 12 A2d 514; *Rosa v Blander* (2d Dept) 47 App Div 2d 865, 366 NYS2d 36; *Kuntz v Stelmachuk* (ND) 136 NW2d 810; *Canady v Martschink Beer Distributors, Inc.*, 255 SC 119, 177 SE2d 475; *Daniels v State*, 167 Tex Crim 219, 319 SW2d 321.

Annotation: Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Footnote 77. *Sileo v Curran*, 161 Conn 572, 290 A2d 325 (witness was out of state and his deposition had been introduced into evidence); *Ballard v Jones* (1st Dist) 21 Ill App 3d 496, 316 NE2d 281 (testimony would have been cumulative); *Clinton G. Cauldwell, Inc. v Patterson*, 133 Ind App 138, 177 NE2d 490 (passenger equally available); *Watson v United States Fidelity & Guaranty Co.* (La App 4th Cir) 353 So 2d 403 (testimony would have been cumulative); *Barringer v Arnold*, 358 Mich 594, 101 NW2d 365 (cumulative and witness was equally available); *Bean v Riddle* (Mo) 423 SW2d 709 (deposition available); *Benevides v Canario*, 111 RI 204, 301 A2d 75 (witness not available); *Oliphant v Snyder*, 206 Va 932, 147 SE2d 122 (not shown that testimony would be material); *Thoreson v Milwaukee & Suburban Transport Co.*, 56 Wis 2d 231, 201 NW2d 745 (missing witness instruction should not have been given where witnesses were equally available, but error was not prejudicial under facts of case); *Schmiedeck v Gerard*, 42 Wis 2d 135, 166 NW2d 136 (witness not under driver's control).

Footnote 78. *Commonwealth v Wright*, 444 Pa 536, 282 A2d 323.

Footnote 79. *People v Nilsson*, 44 Ill 2d 244, 255 NE2d 432, cert den 398 US 954, 26 L Ed 2d 296, 90 S Ct 1881.

Footnote 80. *United States v Lawrenson* (CA4 Md) 298 F2d 880, cert den 370 US 947, 8 L Ed 2d 812, 82 S Ct 1594; *United States v Parr* (CA5 Tex) 516 F2d 458; *State v Daniels*, 180 Conn 101, 429 A2d 813; *State v McNellis*, 15 Conn App 416, 546 A2d 292, 79 ALR4th 745, app den 209 Conn 809, 548 A2d 441; *Brown v United States* (Dist Col App) 555 A2d 1034; *Wells v United States* (Dist Col App) 281 A2d 226, cert den 405 US 995, 31 L Ed 2d 464, 92 S Ct 1271; *People v Carr* (1st Dist) 114 Ill App 2d 370, 252 NE2d 912; *State v Pounds* (La) 359 So 2d 150; *Campo v Dupre* (La App 4th Cir) 470 So 2d 234; *Robinson v State*, 315 Md 309, 554 A2d 395; *Whitley v Whitley* (Mo App) 778 SW2d 233; *State v Karnes* (Mo App) 608 SW2d 455; *State v Collins* (Mo App) 587 SW2d 303; *State v Irving*, 114 NJ 427, 555 A2d 575; *People v Morales* (2d Dept) 126 App Div 2d 575, 510 NYS2d 693; *Orsuto v Orsuto*, 171 Pa Super 532, 91 A2d 284; *Wray v Commonwealth*, 191 Va 738, 62 SE2d 889.

Annotation: Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Footnote 81. *Woodland v State*, 62 Md App 503, 490 A2d 286, cert den 304 Md 96, 497 A2d 819.

Footnote 82. *United States v Chapman* (CA5 Fla) 435 F2d 1245, cert den 402 US 912, 28 L Ed 2d 654, 91 S Ct 1392; *Bradley v United States*, 136 US App DC 339, 420 F2d 181; *Morgan v State*, 49 Ala App 330, 272 So 2d 256, cert den 289 Ala 747, 272 So 2d 261; *Lawson v United States* (Dist Col App) 514 A2d 787; *State v Cavness*, 46 Hawaii 470, 381 P2d 685; *Christiansen v State*, 274 Md 133, 333 A2d 45, appeal after remand 33 Md App 635, 365 A2d 562; *State v Hustead* (Mo App) 615 SW2d 556; *Commonwealth v Rohach*, 344 Pa Super 229, 496 A2d 768; *Commonwealth v Sacarakis*, 196 Pa Super 455, 175 A2d 127; *Russell v Commonwealth*, 216 Va 833, 223 SE2d 877; *Werner v State*, 189 Wis 26, 206 NW 898.

An instruction that the jury might draw an inference against the defendant from failure to call witnesses named by the prosecution as participants in gambling activities was erroneous where the witnesses were not peculiarly available to the defendant and the government called some and not others. *Billeci v United States*, 87 US App DC 274, 184 F2d 394, 24 ALR2d 881.

A trial court erroneously ruled that a defendant could avoid a missing witness instruction only by presenting the witness in the presence of the jury to see if he would invoke his Fifth Amendment privilege. *State v Crews*, 208 NJ Super 224, 505 A2d 198, certif gr 104 NJ 428, 517 A2d 422 and affd 105 NJ 498, 523 A2d 149.

Annotation: Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812.

Footnote 83. *United States v Deutsch* (CA2 NY) 451 F2d 98, CCH Fed Secur L Rep ¶ 93231, cert den 404 US 1019, 30 L Ed 2d 667, 92 S Ct 682; *United States v Craven*, 147 US App DC 383, 458 F2d 802; *People v Ford*, 45 Cal 3d 431, 247 Cal Rptr 121, 754 P2d 168, 76 ALR4th 785; *State v Madden*, 170 Iowa 230, 148 NW 995; *State v Hogan*, 115 Iowa 455, 88 NW 1074; *State v Wilkerson* (Mo App) 559 SW2d 228; *Herring v State* (Tex App Corpus Christi) 758 SW2d 849, reh overr (Tex App Corpus Christi) 1988 Tex App LEXIS 2673, petition for discretionary review ref (May 24, 1989) and motion for rehearing on PDR denied (Jun 28, 1989) and cert den 493 US 896, 107 L Ed 2d 197, 110 S Ct 247.

Footnote 84. *Florists' Mut. Ins. Co. v Homecraft Corp.* (La App 1st Cir) 506 So 2d 746, cert den (La) 512 So 2d 435; *Dugan v Rippee* (Mo App) 278 SW2d 812; *Moon Cab Corp. v De Hart* (1st Dept) 56 App Div 2d 516, 391 NYS2d 125.

In a subrogation case brought in the insured homeowner's name, where the real party in interest is the insurer, the insurer has less control over witnesses in the homeowner's family than the homeowner; thus no unfavorable inference arose out of the failure to have the homeowner's children testify. *Sollberger v Walcott* (La App 1st Cir) 101 So 2d 483.

§ 250 --Family relationship

[View Entire Section](#)

In civil cases, the failure of a party to call his or her spouse, 85 parent, 86 child, 87 brother or sister, 88 or other relative 89 who is available, to give relevant testimony, has frequently been held to give rise to an inference that such testimony would have been unfavorable to the cause of action or the defense of such party. Moreover, such an adverse inference has generally been raised with respect to the failure of the defendant in a criminal case to call his or her spouse, 90 parent, 91 child, 92 brother or sister, 93 or other relative, 94 where available and within his control.

Where applicable, a marital privilege or statute providing that spouses are disqualified from testifying against each other 95 precludes an adverse inference based on a criminal defendant's failure to call his or her spouse to testify. 96 However, where the defendant can waive the privilege, it has sometimes been held that the spouse is more available to the defendant than the prosecution, and that an adverse inference may be made if the defendant fails to call the spouse as a witness. 97 If the privilege is not applicable, such as where an alibi is not considered a confidential communication subject to the privilege, a missing witness instruction may be given if a spouse does not testify in support of the defendant's alibi. 98

It may be improper to make an adverse inference where the defendant failed to call his or her young child who was not competent to testify or who might have suffered psychological harm as a result of the incident. 99

Footnotes

Footnote 85. *Steiner v Commissioner* (CA7) 350 F2d 217, 65-2 USTC ¶ 9550, 16 AFTR 2d 5174; *Broderick v Shea*, 143 Conn 590, 124 A2d 229; *Pennsylvania Fire Ins. Co. v Thomason*, 293 Ky 142, 168 SW2d 547; *Rider v R. P. Farnsworth Co.* (La App 2d Cir) 61 So 2d 204; *Wright v Bubar*, 151 Me 85, 115 A2d 722; *Feese v Anderson* (Mo App) 648 SW2d 638; *Garrison v United States Fidelity & Guaranty Co.* (Mo App) 506 SW2d 87; *Kuntz v Stelmachuk* (ND) 136 NW2d 810; *McCanless v Pearson*, 190 Tenn 123, 228 SW2d 84; *Davis v Davis*, 190 Va 468, 57 SE2d 137; *Carr v Amusement, Inc.*, 47 Wis 2d 368, 177 NW2d 388; *Jones v Wettlin*, 39 Wyo 331, 271 P 217, 69 ALR 840.

Annotation: Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Footnote 86. *Re Rickey* (BC MD Fla) 8 BR 860, CCH Bankr L Rptr ¶ 67866; *Estate of Guerin* (2nd Dist) 194 Cal App 2d 566, 15 Cal Rptr 512; *Graham v Lounsbury*, 341 Ill App 76, 93 NE2d 135; *Fontana v Ford Motor Co.*, 278 Mich 199, 270 NW 266; *Hawkins v Rye*, 233 Miss 132, 101 So 2d 516, 77 ALR2d 663; *Spica v McDonald* (Mo) 334 SW2d 365; *Donato v Wyman* (2d Dept) 32 App Div 2d 1061, 303 NYS2d 935; *Duchossois v Duchossois*, 139 Pa Super 1, 10 A2d 824.

Annotation: Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Footnote 87. *Illinois T. R. Co. v Friedman* (CA8 Mo) 210 F2d 229; *Williams v Williams*,

86 Ariz 201, 344 P2d 161; Zack v Guzauskas, 171 Conn 98, 368 A2d 193; Biehler v White Metal Rolling & Stamping Corp. (3d Dist) 65 Ill App 3d 1001, 22 Ill Dec 634, 382 NE2d 1389; Martin v Howard Bros. Discount (La App 2d Cir) 412 So 2d 631; McGeorge v Grand Realty Trust, Inc., 316 Mass 373, 55 NE2d 694; Irle v Irle (Mo App) 284 SW2d 44; Burney v Washington Nat. Ins. Co., 68 NJ Super 373, 172 A2d 449; Davidson v Davidson, 191 Pa Super 305, 156 A2d 549; First State Bank v Dillard (Tex Civ App) 71 SW2d 407.

Footnote 88. United States Bond & Mortg. Co. v Reddick, 199 Ark 82, 133 SW2d 23; Western & A. R. Co. v Morrison, 102 Ga 319, 29 SE 104 (dictum); Monk v Monk, 243 La 429, 144 So 2d 384; Schwab on behalf of Schwab v Galuszka (La App 4th Cir) 463 So 2d 737, cert den (La) 464 So 2d 1386 and cert den and app dismd 474 US 803, 88 L Ed 2d 30, 106 S Ct 37; Ausch v St. Paul Fire & Marine Ins. Co. (2d Dept) 125 App Div 2d 43, 511 NYS2d 919, app den 70 NY2d 610, 522 NYS2d 110, 516 NE2d 1223; Hodges v Hodges, 243 SC 299, 133 SE2d 816.

Footnote 89. Stoumen v Commissioner (CA3) 208 F2d 903, 54-1 USTC ¶ 9112, 45 AFTR 60 (brother-in-law); Williams v Williams, 86 Ariz 201, 344 P2d 161 (son-in-law); Northern Ins. Co. v Fischer (Mun Ct App Dist Col) 103 A2d 581 (brother-in-law); Nakis v Amabile (1st Dist) 103 Ill App 3d 840, 59 Ill Dec 498, 431 NE2d 1255 (cousin); Jolivet v Lafayette (La App 3d Cir) 408 So 2d 309, cert den (La) 413 So 2d 495, cert den 459 US 867, 74 L Ed 2d 124, 103 S Ct 147 (cousin); Burney v Washington Nat. Ins. Co., 68 NJ Super 373, 172 A2d 449 (son-in-law); Button v Knight, 95 Vt 381, 115 A 499 (mother-in-law); Lubner v Peerless Ins. Co., 19 Wis 2d 364, 120 NW2d 54 (close relatives who were in courtroom during trial).

Footnote 90. United States ex rel. Young v Rundle (ED Pa) 308 F Supp 147; Ford v United States (CA5 Tex) 210 F2d 313, 54-1 USTC ¶ 9233, 45 AFTR 319; Clayton v United States (CA9 Wash) 152 F2d 402; Marrone v State (Alaska) 359 P2d 969; State v Leecan, 198 Conn 517, 504 A2d 480, 79 ALR4th 667, cert den 476 US 1184, 91 L Ed 2d 550, 106 S Ct 2922, habeas corpus den (CA2 Conn) 893 F2d 1434, cert den 496 US 929, 110 L Ed 2d 647, 110 S Ct 2627, habeas corpus dismissed (DC Conn) 822 F Supp 54 (common-law wife); State v Hassard, 45 Hawaii 221, 365 P2d 202; People v Tervin (4th Dist) 23 Ill App 3d 409, 318 NE2d 656; Commonwealth v Happnie, 3 Mass App 193, 326 NE2d 25; State v Lowery, 49 NJ 476, 231 A2d 361; People v Rodriguez (2d Dept) 38 NY2d 95, 378 NYS2d 665, 341 NE2d 231; Hampton v State, 7 Okla Crim 291, 123 P 571; Fisher v State (Tex Crim) 511 SW2d 506; Seyle v State (Wyo) 584 P2d 1081.

Footnote 91. United States v Welp (CA9 Or) 446 F2d 867, cert den 405 US 933, 30 L Ed 2d 808, 92 S Ct 991; State v Ruiz, 202 Conn 316, 521 A2d 1025; People v Carr (1st Dist) 114 Ill App 2d 370, 252 NE2d 912; State v Thomas, 127 La 576, 53 So 868; State v Clark (Mo App) 711 SW2d 928; State v Davis (Mo App) 686 SW2d 503; State v Martin, 32 NM 48, 250 P 842; Cooper v State (Tex App Texarkana) 783 SW2d 235.

Footnote 92. State v Michaels (Fla) 454 So 2d 560; State v Gardin, 251 Minn 157, 86 NW2d 711; State v Parker, 172 Mo 191, 72 SW 650.

Footnote 93. United States v Garcia (CA10 NM) 412 F2d 999, 69-2 USTC ¶ 9600, 24 AFTR 2d 69-5253; State v Greene, 209 Conn 458, 551 A2d 1231, 80 ALR4th 315; State v Reid, 193 Conn 646, 480 A2d 463; Harris v United States (Dist Col App) 430 A2d 536; Contreras v State, 242 Ga 369, 249 SE2d 56; People v Morando (1st Dist) 169 Ill App 3d 716, 120 Ill Dec 150, 523 NE2d 1061, app den 122 Ill 2d 587, 125 Ill Dec 229, 530 NE2d

257; *State v Wilkins*, 215 Kan 145, 523 P2d 728; *Brown v State*, 200 Miss 881, 27 So 2d 838; *State v Sanders* (Mo App) 619 SW2d 344; *People v Rides*, 273 NY 214, 7 NE2d 105; *Commonwealth v Bright*, 361 Pa Super 261, 522 A2d 573, app den 517 Pa 597, 535 A2d 1056; *Simon v State* (Tex Crim) 406 SW2d 460, cert den 386 US 968, 18 L Ed 2d 123, 87 S Ct 1054.

Footnote 94. *Barnes v State*, 31 Ala App 187, 14 So 2d 242, cert den 244 Ala 597, 14 So 2d 246 (party's wife's brother-in-law); *People v Romero* (1st Dist) 244 Cal App 2d 495, 53 Cal Rptr 260 (in-laws); *People v McElroy* (1st Dist) 81 Ill App 3d 1067, 36 Ill Dec 931, 401 NE2d 1069 (cousin); *State v Boyd*, 199 Iowa 1206, 200 NW 205, reh overr (Iowa) 203 NW 36 (stepson); *Hamilton v Georgia Pacific Corp.* (La App 1st Cir) 344 So 2d 400 (nephew); *State v Hemphill* (Mo App) 721 SW2d 86 (cousin and uncle); *Commonwealth v Dorman*, 377 Pa Super 419, 547 A2d 757, app den 524 Pa 617, 571 A2d 380 (cousin); *Torres v State* (Tex Crim) 552 SW2d 821 (sister-in-law); *Thomas v State* (Tex Crim) 519 SW2d 430 (prosecutor could call to jury's attention defendant's failure to call niece to testify on his behalf, but it was improper to suggest that the reason that the niece did not testify was that she was afraid of the defendant).

Footnote 95. 81 Am Jur 2d, Witnesses §§ 242 et seq.

Footnote 96. *United States v Smith* (CA5 Ala) 591 F2d 1105; *United States v Tapia-Lopez* (CA9 Cal) 521 F2d 582; *Ex parte Tomlin* (Ala) 540 So 2d 668, on remand (Ala App) 540 So 2d 674, appeal after remand (Ala App) 591 So 2d 550; *State v Holsinger*, 124 Ariz 18, 601 P2d 1054; *Ferry v State*, 161 Ga App 795, 287 SE2d 732, 26 ALR4th 1; *Simpson v State* (Miss) 497 So 2d 424; *State v Wyatt* (Mo) 276 SW2d 86 (by implication); *George v State*, 98 Nev 196, 644 P2d 510; *State v Frank*, 92 NM 456, 589 P2d 1047; *Commonwealth v Moore*, 453 Pa 302, 309 A2d 569; *Commonwealth v Whiting*, 358 Pa Super 465, 517 A2d 1327; *Jones v Commonwealth*, 218 Va 732, 240 SE2d 526; *State v Charlton*, 90 Wash 2d 657, 585 P2d 142.

Footnote 97. *United States ex rel. Young v Rundle* (ED Pa) 308 F Supp 147; *Marrone v State* (Alaska) 359 P2d 969; *State v Walker*, 80 NJ 187, 403 A2d 1 (defendant waived privilege by testifying that he had been home with his wife at the time of the alleged offense); *State v Ayers*, 16 Or App 300, 518 P2d 190, cert den 419 US 1093, 42 L Ed 2d 686, 95 S Ct 687 (by implication); *Collvins v State* (Tex App Texarkana) 686 SW2d 647, petition for discretionary review ref (Oct 23, 1985).

Footnote 98. *People v Wilson*, 64 NY2d 634, 485 NYS2d 40, 474 NE2d 248.

Footnote 99. *State v Scott*, 20 Conn App 513, 568 A2d 1048, app den 214 Conn 802, 573 A2d 316; *State v Francis* (Tenn) 669 SW2d 85.

§ 251 --Employment relationship

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of special circumstances, a party's employee is generally considered to be

under the party's control so that the party's failure to call the employee may lead to a missing witness inference. 1 However, some courts have rejected presumptions of availability arising from special relationships of a party and a witness, in favor of an analysis of various factors including one party's superior means of knowledge of the existence and identity of the witness; the nature of the testimony the witness would be expected to give in light of previous statements or declarations; and the relationship borne by the witness to a particular party as it would reasonably be expected to affect the witness' personal interest in the outcome of the litigation and make it natural that the witness would be expected to testify in favor of one party against the other. 2 A former employee is not ordinarily considered to be under the control of the party for the purpose of the missing witness rule, 3 but courts in some situations have justified the application of the rule permitting an adverse inference although the missing witness was no longer employed by the party at the time of the trial. 4 It has also been indicated that in an action by an employee against the employer, the employee-plaintiff is not entitled to a missing witness instruction because a fellow worker failed to testify, where there is no factual basis for concluding that the missing witness would have testified more favorably for the plaintiff or the corporate employer. 5

Similarly, it has generally been held that the failure of a principal to introduce the testimony of his agent entitles the opposing party to an inference that the testimony would have been adverse, if given. 6

In some cases it has been held that the employer or supervisor of a party stood in such close relation to him that his failure to call the superior as a witness justified an adverse inference, 7 but not where the supervisor was no longer employed by the party's employer, and the individual did not know the former supervisor's current address. 8 It has been suggested or held that the failure of a party to call fellow workers should justify an adverse inference, 9 but not when the fellow workers are equally available to both the plaintiff and the employer or other type of defendant. 10

Footnotes

Footnote 1. *United States ex rel. Cannon v Smith* (CA2 NY) 527 F2d 702 (detectives who were still government employees); *Acme Boat Rentals, Inc. v J. Ray McDermott & Co.* (CA5 La) 424 F2d 393; *Wilcox v Kerr-McGee Corp.* (ED La) 706 F Supp 1258; *Grant v Arizona Public Service Co.*, 133 Ariz 434, 652 P2d 507; *Southern Farm Bureau Casualty Ins. Co. v McGibboney*, 245 Ark 1016, 436 SW2d 824; *Thomas v United States* (Dist Col App) 447 A2d 52 (recognizing rule); *Tri-State Systems, Inc. v Department of Transp.* (Fla App D1) 500 So 2d 212, 11 FLW 2193, review den (Fla) 506 So 2d 1041 (government employee); *Western & A. R. Co. v Morrison*, 102 Ga 319, 29 SE 104; *Johnson v Owens-Corning Fiberglas Corp.* (4th Dist) 233 Ill App 3d 425, 174 Ill Dec 583, 599 NE2d 129, app den 147 Ill 2d 627, 180 Ill Dec 150, 606 NE2d 1227 and cert den (US) 124 L Ed 2d 246, 113 S Ct 2335; *Shiner v Friedman* (1st Dist) 161 Ill App 3d 73, 112 Ill Dec 253, 513 NE2d 862; *Slade v Slade*, 337 Ill App 575, 86 NE2d 425 (auditor); *Rigouts v Larkan*, 244 La 479, 153 So 2d 363; *Hawthorne v Kinder Corp.* (La App 2d Cir) 513 So 2d 509; *Commonwealth v United Food Corp.*, 374 Mass 765, 374 NE2d 1331; *Patton v Oakman*, 298 Mich 672, 299 NW 761; *Ellerman v Skelly Oil Co.*, 227 Minn 65, 34 NW2d 251, 5 ALR2d 886; *Lambert v Hamlin*, 73 NH 138, 59 A 941; *Michaels v Brookchester, Inc.*, 26 NJ 379, 140 A2d 199; *Schultz v Hinz*, 20 NJ Super 346, 90 A2d 19; *Trainor v Oasis Roller World, Inc.* (1st Dept) 151 App Div 2d 323, 543

NYS2d 61, appeal after remand (1st Dept) 168 App Div 2d 235, 562 NYS2d 501; Ridge v Norfolk S. R. Co., 167 NC 510, 83 SE 762; Alexander v Wilkes-Barre Anthracite Coal Co., 254 Pa 1, 98 A 794; Duckworth v First Nat. Bank, 254 SC 563, 176 SE2d 297; Brown v State, 1 Tenn Crim 294, 441 SW2d 485 (adverse inference against criminal defendant who did not call employee); Dealers Supply Co. v First Christian Church, 38 Tenn App 568, 276 SW2d 769; John Deere Co. v May (Tex App Waco) 773 SW2d 369, CCH Prod Liab Rep ¶ 12271, writ den (Dec 13, 1989) and reh'g of writ of error overr (Feb 7, 1990); Dunn Bros. Pipe Line Contractors v Caldwell (Tex Civ App) 224 SW2d 765; Evans v State Compensation Director, 150 W Va 161, 144 SE2d 663 (ovrld on other grounds by Brogan v Workers' Compensation Comm'r, 174 W Va 517, 327 SE2d 694).

Annotation: Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party—modern cases, 80 ALR4th 405.

Footnote 2. Kelly v Jackson (Mo) 798 SW2d 699.

Footnote 3. D.S. Magazines, Inc. v Warner Publisher Services, Inc. (SD NY) 640 F Supp 1194; Chicago College of Osteopathic Medicine v George A. Fuller Co. (CA7 Ill) 719 F2d 1335, 14 Fed Rules Evid Serv 635, appeal after remand (CA7 Ill) 776 F2d 198, later proceeding (CA7 Ill) 801 F2d 908, 5 FR Serv 3d 1242; RKO Bottlers of Forrest City, Inc. v Halley, 265 Ark 129, 577 SW2d 409; New England Whalers Hockey Club v Nair, 1 Conn App 680, 474 A2d 810; Buckley v R. H. Johnson & Co. (Super) 41 Del 546, 25 A2d 392; Goshey v Dunlap (1st Dist) 16 Ill App 3d 29, 305 NE2d 648; Universal C. I. T. Corp. v Kennedy (La App 1st Cir) 185 So 2d 542; Heina v Broadway Fruit Market, Inc., 304 Mass 608, 24 NE2d 510; Urban v Public Bank, 365 Mich 279, 112 NW2d 444; Hahn v Aetna Finance Co., 251 Minn 315, 87 NW2d 588; Zuber v Northern P. R. Co., 246 Minn 157, 74 NW2d 641; Ellerman v Skelly Oil Co., 227 Minn 65, 34 NW2d 251, 5 ALR2d 886; Farley v Johnny Londoff Chevrolet, Inc. (Mo App) 673 SW2d 800; Hershkovitz v St. Michel (2d Dept) 143 App Div 2d 809, 533 NYS2d 344; Sachs v Fumex Sanitation, Inc. (2d Dept) 75 App Div 2d 595, 426 NYS2d 817; Peugeot Motors of America, Inc. v Stout, 310 Pa Super 412, 456 A2d 1002, 36 UCCRS 34; Helms v T & L Bldg. Contractors, Inc., 287 SC 605, 340 SE2d 548.

Footnote 4. United Broadcasting Co. v Armes (CA5 Tex) 506 F2d 766, 19 FR Serv 2d 888, cert den 421 US 965, 44 L Ed 2d 452, 95 S Ct 1953; King v Karpe (4th Dist) 170 Cal App 2d 344, 338 P2d 979; Donnelly v Washington Nat. Ins. Co. (1st Dist) 136 Ill App 3d 78, 90 Ill Dec 605, 482 NE2d 424; Santiemmo v Days Transfer, Inc. (1st Dist) 9 Ill App 2d 487, 133 NE2d 539; Clark v Skaggs Cos. (Mo App) 724 SW2d 545; Central Nat. Gulfbank v Comdata Network, Inc. (Tex App Corpus Christi) 773 SW2d 626.

An adverse inference from failure of a party to call a former employee was proper where there was no showing that he was beyond the reach of process or that his whereabouts were unknown. White v Metropolitan Life Ins. Co. (Mo App) 218 SW2d 795.

Footnote 5. Felice v Long Island R. Co. (CA2 NY) 426 F2d 192, cert den 400 US 820, 27 L Ed 2d 47, 91 S Ct 37.

Footnote 6. Milbank Mut. Ins. Co. v Wentz (CA8 ND) 352 F2d 592 (insurance company's failure to call agent); Christian Benev. Burial Ass'n. v Huff, 241 Ala 119, 1 So 2d 390; Jones v Jones, 227 Ark 836, 301 SW2d 737 (insurance agent); Masterson v Pig'n

Whistle Corp. (2nd Dist) 161 Cal App 2d 323, 326 P2d 918; Ezzo v Geremiah, 107 Conn 670, 142 A 461; Arnone v Anzalone (La App 1st Cir) 481 So 2d 1047 (insurance agent); Matthews v National Fidelity Ins. Co., 228 SC 124, 89 SE2d 95; Shelby Mut. Ins. Co. v Wilson, 53 Tenn App 428, 383 SW2d 791.

Where a person acting for the defendant in a personal injury case engaged a photographer to take photographs of the highway where the accident occurred, it was held in *Woodman v Peck*, 90 NH 292, 7 A2d 251, 122 ALR 1402, that it was proper for the plaintiff's counsel to comment on the failure to present such person as a witness to prove the instructions given the photographer, and to suggest to the jury that his evidence, if presented, would have been unfavorable to defendant.

Failure of a fire insurance company to call its adjuster warranted an inference that his testimony would have been unfavorable to the company's contention. *American Mut. Fire Ins. Co. v Green*, 233 SC 588, 106 SE2d 265.

Footnote 7. *Milton v United States*, 71 App DC 394, 110 F2d 556; *Bartlett v Cain* (Mo App) 366 SW2d 491 (comment allowed on the absence of plaintiff's boss).

Footnote 8. *Goshey v Dunlap* (1st Dist) 16 Ill App 3d 29, 305 NE2d 648.

Footnote 9. *Felice v Long Island R. Co.* (CA2 NY) 426 F2d 192, cert den 400 US 820, 27 L Ed 2d 47, 91 S Ct 37; *United States v Stevenson*, 138 US App DC 10, 424 F2d 923; *Hughes v Chrysler Corp.* (La App 4th Cir) 216 So 2d 636; *Wooten v Thompson* (La App 1st Cir) 69 So 2d 557; *State v Collins* (Mo App) 587 SW2d 303; *McGowan v Nelson*, 36 Mont 67, 92 P 40; *Bayer v Frank P. Farrell, Inc.*, 69 NJ Super 347, 174 A2d 221, certif den 36 NJ 597, 178 A2d 388.

Footnote 10. *Ponce v Industrial Com.* (App) 120 Ariz 134, 584 P2d 598; *George v United Fruit Co.* (La App 4th Cir) 131 So 2d 360; *Zipp v Gasen's Drug Stores, Inc.* (Mo) 449 SW2d 612.

§ 252 --Physician-patient relationship

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An adverse inference can be drawn from a failure to call a treating physician as a witness, usually based on the view that a physician is or presumed to be available to the patient for the purposes of the missing witness inference. 11 However, the presumption that a treating physician is more available to the patient may be rebutted by the facts and circumstances of the particular case. 12 Former treating physicians may not be under the control of a party or willing to provide favorable testimony, 13 although the burden is on the party opposing the missing witness inference to show that the former doctor was not available or under his or her control. 14

A party's waiver of the physician-patient privilege usually renders the physician equally available to testify for either party, thereby making the inference unnecessary, 15 unless

the physician is not considered "available" to the other party for other reasons, such as personal interest. 16 However, a refusal to waive the privilege makes the doctor unavailable to the defense, justifying an inference that the testimony would be unfavorable to the plaintiff. 17

When a defendant has a physician examine the plaintiff, but then fails to call the doctor as a witness, an adverse inference against the defendant may be warranted, 18 unless the doctor is not within the defendant's power to produce. 19

Footnotes

Footnote 11. *Cromling v Pittsburgh & L. E. R. Co.* (CA3 Pa) 327 F2d 142; *Townsend v Sullivan*, 149 Conn 666, 183 A2d 266; *Beardsley v Suburban Coach Co.*, 83 Ga App 381, 63 SE2d 911; *Pattison v B.F. Goodrich Co.* (La App 4th Cir) 522 So 2d 1212; *Paxton v American Family Mut. Ins. Co.* (Mo App) 682 SW2d 896; *Wilson v Bodian* (2d Dept) 130 App Div 2d 221, 519 NYS2d 126; *Martin v Estrella*, 107 RI 247, 266 A2d 41; *American Ben. Life Ins. Co. v Hill Country Life Ins. Co.* (Tex Civ App Fort Worth) 582 SW2d 227, writ ref n r e (Oct 17, 1979) and reh of writ of error overr (Nov 21, 1979).

Annotation: Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 ALR4th 463.

Footnote 12. *O'Donnell v Heutel* (Mo App) 637 SW2d 377 (orthopedist was equally available to both parties, where the patient did not chose orthopedist but was referred to him, both parties had equal access, and no previous statements existed to indicate whether the orthopedist's testimony would be harmful to either party).

Proof of the existence of the relationship alone will not satisfy the burden of availability, as it must also be shown that the patient can secure the doctor's presence in court. *McGloin v Southington*, 15 Conn App 668, 546 A2d 906, app den 209 Conn 813, 550 A2d 1083.

Footnote 13. *Wilson v Bodian* (2d Dept) 130 App Div 2d 221, 519 NYS2d 126; *Oswald v Heaney* (2d Dept) 70 App Div 2d 653, 416 NYS2d 826.

Footnote 14. *Shiner v Insetta* (Sup App T) 137 Misc 2d 1012, 525 NYS2d 982.

Footnote 15. *Patania v Silverstone*, 3 Ariz App 424, 415 P2d 139 (criticized on other grounds by *Buffa v Scott* (App) 147 Ariz 140, 708 P2d 1331); *Magda v Johns*, 374 Mich 14, 130 NW2d 902; *Dubois v Clark*, 253 Minn 556, 93 NW2d 533; *Ward v Foster* (Miss) 517 So 2d 513.

The physician-patient privilege is discussed in 81 Am Jur 2d, Witnesses §§ 436 et seq.

Footnote 16. *Eickmann v St. Louis Public Service Co.* (Mo) 323 SW2d 802.

Footnote 17. *Jackson v Brumfield* (Miss) 458 So 2d 736.

Footnote 18. *Hays v Viscome*, 122 Cal App 2d 135, 264 P2d 173, 39 ALR2d 1435; *Dugan v Weber* (1st Dist) 175 Ill App 3d 1088, 125 Ill Dec 598, 530 NE2d 1007, 77

ALR4th 447, app den 124 Ill 2d 554, 129 Ill Dec 148, 535 NE2d 913; Hollembaek v Dominick's Finer Foods, Inc. (1st Dist) 137 Ill App 3d 773, 92 Ill Dec 382, 484 NE2d 1237; Parnell v Monroe (La App 2d Cir) 98 So 2d 820; Stacy v Goff, 241 Minn 301, 62 NW2d 920; Hamilton v Ross (Mo) 304 SW2d 812; Parentini v S. Klein Dept. Stores, Inc., 94 NJ Super 452, 228 A2d 725, certif den 49 NJ 371, 230 A2d 402; Grey v United Leasing, Inc. (1st Dept) 91 App Div 2d 932, 457 NYS2d 823; Feldstein v Harrington, 4 Wis 2d 380, 90 NW2d 566.

Footnote 19. Herbert v Wal-Mart Stores, Inc. (CA5 La) 911 F2d 1044, 31 Fed Rules Evid Serv 273, reh den, en banc (CA5 La) 917 F2d 559.

§ 253 --Attorney-client relationship

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts have been reluctant to base an adverse inference on the failure of a party to call his attorney to testify, particularly in view of the privileged nature of the attorney-client relationship, 20 and in several cases have refused to draw such an inference. 21 On other occasions, however, such an adverse inference has been drawn, 22 particularly in cases where the attorney-client privilege does not apply or has been waived. 23

In post-conviction proceedings, the petitioner's failure to present testimony from the attorney who represented him or her in the criminal proceedings has usually resulted in an adverse inference or presumption against the petitioner. 24

Footnotes

Footnote 20. 81 Am Jur 2d, Witnesses §§ 337 et seq.

Footnote 21. Ravenscroft v Stull, 280 Ill 406, 117 NE 602; Lipton Realty, Inc. v St. Louis Housing Authority (Mo App) 705 SW2d 565, 78 ALR4th 557.

Annotation: Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Footnote 22. Harris v Commissioner (CA5) 461 F2d 554, 72-1 USTC ¶ 12853, 29 AFTR 2d 72-1587 (taxpayer's counsel had drafted trust documents); Coal Processing Equipment, Inc. v Campbell (SD Ohio) 578 F Supp 445, 211 USPQ 986 (patent holder's testimony that he had relied on the advice of his attorney when sending infringement letters was undercut by the fact that the attorney did not testify); Re Unit, Inc. (BC SD Ohio) 45 BR 425 (attorney had taken lead in settlement negotiations for limited partnership); Leitch v Gay, 64 Cal App 2d 16, 147 P2d 631; Marcus v Marcus, 175 Conn 138, 394 A2d 727 (need for attorney to testify regarding the intent of the parties and the drafting of a separation agreement); Fried v Bradley, 219 La 59, 52 So 2d 247; Guilbeau v C & D Reprographics-Lafayette, Inc. (La App 3d Cir) 568 So 2d 206, cert den (La) 571

So 2d 653 (attorney who drafted lease); *Welsh v Lagasse* (La App 4th Cir) 128 So 2d 705 (failure of attorney to explain real estate transaction he handled); *Sebree v Rosen* (Mo) 393 SW2d 590; *Brandolini v Grand Lodge of Pennsylvania, etc.*, 358 Pa 303, 56 A2d 662; *Arnold v Yarborough* (App) 281 SC 570, 316 SE2d 416 (noting need to support defendant's position that his attorney had proceeded without authority); *Bayou Drilling Co. v Baillio* (Tex Civ App Houston (1st Dist)) 312 SW2d 705, writ ref n r e (Oct 1, 1958); *Macon v Commonwealth*, 187 Va 363, 46 SE2d 396.

Where an attorney was the scrivener and a subscribing witness to a will, his failure to testify must be considered as a material and damaging circumstance against the proponents. *Re Estate of McFadden*, 177 Pa Super 37, 108 A2d 247.

Footnote 23. Failure of defendants to call the attorney, who drafted a joint will, to testify as to statements made to him by the parties who executed the will, such statements not being privileged, raised an inference that his testimony would have been adverse if produced. *Van Houten v Whitaker* (2nd Dist) 169 Cal App 2d 510, 337 P2d 900.

When the defendant testified as to legal advice given him he waived the privilege he could have otherwise had asserted to testimony of his attorney, and such waiver also raises an inference that testimony would be unfavorable and allows comment to the jury on the failure to call the attorney as a witness. *McClanahan v United States* (CA5 Tex) 230 F2d 919, cert den 352 US 824, 1 L Ed 2d 47, 77 S Ct 33.

Footnote 24. *Bell v State*, 243 Ark 839, 422 SW2d 668; *Dickson v State* (Ind) 533 NE2d 586; *McChristion v State* (Ind) 511 NE2d 297; *Schmittler v State*, 228 Ind 450, 93 NE2d 184 (ovrld on other grounds by *State v Lindsey*, 231 Ind 126, 106 NE2d 230); *State ex rel. Schuler v Tahash*, 278 Minn 302, 154 NW2d 200; *Commonwealth ex rel. Spader v Myers*, 187 Pa Super 654, 145 A2d 870; *Lampkins v State*, 51 Wis 2d 564, 187 NW2d 164.

§ 254 Failure to examine witnesses as to particular issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that a witness is called and gives testimony but is not examined as to some of the issues in the case as to which he apparently has information has been held to justify an inference against the party calling the witness that such testimony, if elicited, would have been unfavorable. 25 Any relationship between the party and the witness, either economic, professional, or familial, gives weight to such inference. 26

When a party calls a witness and questions her about some issues, that party cannot then comment about the failure of the opposing party to produce that witness and question her on other issues. 27

Footnotes

Footnote 25. *Balcus v Sterling Express Co.*, 94 NH 270, 51 A2d 479; *Anderson v Dutton*, 100 Vt 464, 139 A 210.

Where the plaintiff in an action arising from an automobile accident failed to question her guest passenger about the accident itself, the questioning being confined merely to her injuries, the presumption was that the testimony of the passenger relating to the cause of the accident would have been adverse. *Talbot v Eusea* (La App 4th Cir) 151 So 2d 531.

Failure to examine further the attending physician called as a witness by the defendant on another issue, after he incidentally made a statement favorable to the plaintiff, warrants the inference that his testimony would have been unfavorable, in that respect, to the defendant. *Gibson County Electric Membership Corp. v Hall*, 32 Tenn App 394, 222 SW2d 689.

Footnote 26. *Carson v State*, 80 Tex Crim 311, 190 SW 145 (doctors); *Anderson v Dutton*, 100 Vt 464, 139 A 210 (wife).

Footnote 27. *Anderson v Universal Delta* (1st Dist) 90 Ill App 2d 105, 234 NE2d 21.

§ 255 Corroborative or cumulative testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The failure of a party to call a witness to prove facts does not give rise to an inference that the testimony of the witness, if he had been called, would have been unfavorable to such party, where other qualified witnesses have testified for the party concerning such facts, 28 or such facts have been admitted by the pleadings of the opposite party 29 or otherwise, 30 so that the testimony of the uncalled witness would have been merely cumulative or corroborative. Under this rule, a party is not bound to introduce every witness who might know anything about the matter at issue, at the risk of being burdened with an unfavorable inference because of his failure to do so. 31 A party should not be forced to act at its peril when determining that the testimony of a particular witness is not necessary, 32 and the testimony of a possible witness that is for any reason comparatively unimportant, cumulative, or inferior to what has been offered should be dispensed with on the ground of expense and inconvenience, without anticipating that an adverse inference will be created. 33 Similarly, testimony may be considered cumulative, in view of the witness's testimony at a deposition, if the deposition testimony was not of a weak or inferior nature so as to create an unfavorable presumption, 34 where nothing in the deposition testimony gives rise to a sound inference that the witness's testimony at trial would have been unfavorable, 35 or where the deposition indicated that it would be doubtful that the missing witness could have shed any more light on the question at issue. 36 Some courts have adopted the view, however, that while no unfavorable inference arises, as a matter of law, from the failure of a party to call available witnesses where he has introduced other witnesses who testified concerning the same matters, yet the jury is at liberty to consider such an omission and to draw from it whatever inferences it may deem warranted under the circumstances. 37

The failure of a party to introduce an available witness to corroborate a witness who has been contradicted by other witnesses has been held in some cases to give rise to an inference that the testimony so withheld would have been unfavorable. 38 And in numerous cases the failure of a party to produce an available witness to corroborate the testimony of another witness on a disputed point has been treated by the courts as a suspicious circumstance. 39

Testimony by character witnesses does not elucidate the transaction at issue, and where several character witnesses have already been presented, the testimony of additional character witnesses is cumulative. Thus, in such a situation, even if assuming that the missing witness rule applies to character witnesses, the jury should not be required to speculate why the defendant did not call other available character witnesses. 40

§ 255 ----Corroborative or cumulative testimony [SUPPLEMENT]

Case authorities:

Although the State is not required to corroborate a victim's testimony, when the key witness's credibility has been put in issue, it cannot be doubted that corroborating testimony may play a substantial role in the jury's weighing of the evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and the alleged victim's credibility as to the use of a weapon was attacked by the defense, and the State sought to bolster its case by introducing impermissible hearsay testimony from a police dispatch report and victim's examining physician. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

There was no prejudice in a first- degree murder prosecution from the court's exclusion of testimony concerning a bullet mark on the porch of the apartment where the killing occurred and the direction from which the bullet came where there was other testimony to the same effect and there was nothing particularly significant about the direction from which the shots were fired. *State v Perry* (1994) 338 NC 457, 450 SE2d 471.

Footnotes

Footnote 28. *United States v Jennings* (CA5 Miss) 724 F2d 436, 14 Fed Rules Evid Serv 1625, cert den 467 US 1227, 81 L Ed 2d 877, 104 S Ct 2682, later proceeding (Miss) 533 So 2d 443; *Atlantic C. L. R. Co. v Larisey*, 269 Ala 203, 112 So 2d 203; *Howard v Obie*, 190 Ga 394, 9 SE2d 666; *Lewis v Cotton Belt Route-St. Louis Southwestern Ry.* (5th Dist) 217 Ill App 3d 94, 159 Ill Dec 995, 576 NE2d 918, app den 142 Ill 2d 655, 164 Ill Dec 918, 584 NE2d 130; *Chuhak v Chicago Transit Authority* (1st Dist) 152 Ill App 3d 480, 105 Ill Dec 590, 504 NE2d 875; *Watson v United States Fidelity & Guaranty Co.* (La App 4th Cir) 353 So 2d 403; *Galloway v Gaspard* (La App 1st Cir) 340 So 2d 579; *Commonwealth v Groce*, 25 Mass App 327, 517 NE2d 1297; *Barringer v Arnold*, 358 Mich 594, 101 NW2d 365; *Wild v Roman*, 91 NJ Super 410, 220 A2d 711; *Weinstein v Daman* (2d Dept) 132 App Div 2d 547, 517 NYS2d 278, app dismd without op 70 NY2d 872, 523 NYS2d 498, 518 NE2d 8 and app dismd without op 70 NY2d 951, 524 NYS2d 678, 519 NE2d 624; *State v Davis*, 73 Wash 2d 271, 438 P2d 185 (ovrld on other grounds by *State v Braun*, 82 Wash 2d 157, 509 P2d 742) as stated in *State v Davis*, 34

Wash App 546, 662 P2d 78, review den 100 Wash 2d 1005; Wright v Safeway Stores, Inc., 7 Wash 2d 341, 109 P2d 542, 135 ALR 1367; Montgomery v Chesapeake & Potomac Tel. Co., 121 W Va 163, 3 SE2d 58.

No jurisprudential presumption arose that plaintiff's wife who did not testify would have testified adversely to plaintiff where plaintiff positively testified and produced an independent witness of unquestioned veracity. Watson v United States Fidelity & Guaranty Co. (La App 4th Cir) 353 So 2d 403.

Footnote 29. East T., V. & G. R. Co. v Kane, 92 Ga 187, 18 SE 18.

Footnote 30. Sollberger v Walcott (La App 1st Cir) 101 So 2d 483 (no unfavorable inference arose from a failure to call children who had witnessed the incident, given that there was no indication that the children could testify to anything other than what was admitted by all parties).

In a malpractice case involving the failure to diagnose a tumor, the trial judge erroneously gave a missing witness instruction with respect to the plaintiff's failure to call certain doctors who had treated him, where the defendant doctors did not dispute that there was a tumor and the hospital records were admitted into evidence. Weinstein v Daman (2d Dept) 132 App Div 2d 547, 517 NYS2d 278, app dismd without op 70 NY2d 872, 523 NYS2d 498, 518 NE2d 8 and app dismd without op 70 NY2d 951, 524 NYS2d 678, 519 NE2d 624.

Footnote 31. King v Robbins, 201 Kan 748, 443 P2d 308; Fulsom-Morris Coal & Mining Co. v Mitchell, 37 Okla 575, 132 P 1103; Baker v Baker, 24 Tenn App 220, 142 SW2d 737; Robinson v Commonwealth, 207 Va 66, 147 SE2d 730.

A malpractice plaintiff is not under an obligation to call as a witness every doctor he has seen or else be subject to an adverse inference. Alexander v Bergmann (Mo App) 666 SW2d 849.

Footnote 32. Ponce v Industrial Com. (App) 120 Ariz 134, 584 P2d 598.

Footnote 33. State v Brown, 169 Conn 692, 364 A2d 186.

Footnote 34. Meacham v Barber, 183 Ga App 533, 359 SE2d 424.

Footnote 35. Kerr v Allard, 130 NH 247, 536 A2d 197.

Footnote 36. United States v Warwick (CA7 Wis) 695 F2d 1063.

Footnote 37. Sugarman v Brengel, 68 App Div 377, 74 NYS 167.

Footnote 38. Pope v Hoopes (CC NJ) 84 F 927; Bates v Blitz, 205 La 536, 17 So 2d 816; Button v Knight, 95 Vt 381, 115 A 499.

Footnote 39. Nalls v United States (CA5 Tex) 240 F2d 707; Pruyn v Young, 51 La Ann 320, 25 So 125; Schwier v New York C. & H. R. R. Co., 90 NY 558; Galveston, H. & S. A. R. Co. v Walker, 38 Tex Civ App 76, 85 SW 28.

If an interested party tells an improbable story, the failure to call an available

corroborating witness, who must be cognizant of the facts, will weigh heavily against such party, and the testimony of such a witness becomes more unsatisfactory upon failure to produce corroboration which might have been easily produced. *Graham v Lounsbury*, 341 Ill App 76, 93 NE2d 135.

Footnote 40. *Woodland v State*, 62 Md App 503, 490 A2d 286, cert den 304 Md 96, 497 A2d 819.

§ 256 Probative force and effect of inference

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The unfavorable inference arising from the failure of a party to call available witnesses 41 does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case; 42 it does not relieve the other party from the burden of proving his case. 43 The rule has been stated that the inference will not supply a missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved. 44 Evidence of such conduct is persuasive rather than probative and cannot be invoked as substantive proof of any facts essential to the case of the opponent. 45 The extent of a party's right to invoke his opponent's failure to call an available witness, when such right exists, is to impair the value of the latter's proofs and to give greater credence to the positive evidence of the former, upon any issue upon which it is shown that such witness might have knowledge. 46

The unfavorable inference arising from the failure of a party to call an available material witness relates only to the question of contradicting or corroborating evidence that is already in the case. No inference may be drawn as to the possible testimony of the witness upon a new subject not touched upon by the proof in the case, but rather, the most the jury can be allowed to infer is that the witness would not have contradicted the proof offered by the adverse party, concerning the matter with which the witness was presumably familiar, or that the witness would not have corroborated or supported the proof offered by the party in whose control he was. 47 The inference from the failure to call the witness therefore is operative only in the process of weighing the evidence in the case; it cannot be used as the basis for a finding upon a point on which there is no evidence in the case at all. 48 Accordingly, the inference has the effect only of authorizing the jury to give greater weight to the evidence of the adverse party, or to give less weight to the evidence of the party who had failed to call the witness, than it might otherwise have done. 49 Conversely, a defendant is not entitled to a verdict at the close of the plaintiff's evidence, even though the plaintiff's failure to call witnesses who were readily available may raise a presumption that their testimony would have been adverse to the plaintiff, since this conclusion is merely a permissible inference available to the trier of fact and does not foreclose the possibility that other favorable inferences may support the plaintiff's case. 50

§ 256 ----Probative force and effect of inference [SUPPLEMENT]

Case authorities:

There was no prejudice in a first- degree murder prosecution from the court's exclusion of testimony concerning a bullet mark on the porch of the apartment where the killing occurred and the direction from which the bullet came where there was other testimony to the same effect and there was nothing particularly significant about the direction from which the shots were fired. *State v Perry* (1994) 338 NC 457, 450 SE2d 471.

Footnotes

Footnote 41. §§ 247 et seq.

Footnote 42. *People v Wade* (2nd Dist) 138 Cal App 2d 531, 292 P2d 303; *Stimpson v Hunter*, 234 Mass 61, 125 NE 155, 7 ALR 1067; *Stocker v Boston & M. R. R.*, 84 NH 377, 151 A 457, 70 ALR 1320; *Laffin v Ryan* (3d Dept) 4 App Div 2d 21, 162 NYS2d 730; *National Life & Acci. Ins. Co. v Eddings*, 188 Tenn 512, 221 SW2d 695.

In *Stimpson v Hunter*, 234 Mass 61, 125 NE 155, 7 ALR 1067, where a father denied liability for dental services rendered to, and at the request of, his minor son, it was held that the failure of the father and of the son to testify, although present in the courtroom, was not equivalent to affirmative proof of facts necessary to maintain the action.

Footnote 43. *El Rancho, Inc. v First Nat. Bank* (CA9 Nev) 406 F2d 1205, cert den 396 US 875, 24 L Ed 2d 133, 90 S Ct 150 and cert den 396 US 875, 24 L Ed 2d 133, 90 S Ct 154; *National Life & Acci. Ins. Co. v Eddings*, 188 Tenn 512, 221 SW2d 695; *Vogue, Inc. v Cox*, 28 Tenn App 344, 190 SW2d 307; *British Columbia Breweries (1918), Ltd. v King County*, 17 Wash 2d 437, 135 P2d 870; *Stout v Sands*, 56 W Va 663, 49 SE 428 (ovrld on other grounds by *State v Kopa*, 173 W Va 43, 311 SE2d 412).

The adverse presumption arising from the failure of a party to produce testimony relating to a fact peculiarly within his own knowledge does not operate to relieve a party from proving his necessary allegations merely because it is difficult or inconvenient to do so. *Sturgeon v Baker*, 312 Ky 338, 227 SW2d 202, 17 ALR2d 593.

Footnote 44. *Estate of Bould* (2nd Dist) 135 Cal App 2d 260, 287 P2d 8, hear den by sup ct as reported in (2nd Dist) 135 Cal App 2d 277, 289 P2d 15; *Guthrie v Gillespie*, 319 Mo 1137, 6 SW2d 886; *National Life & Acci. Ins. Co. v Eddings*, 188 Tenn 512, 221 SW2d 695; *British Columbia Breweries (1918), Ltd. v King County*, 17 Wash 2d 437, 135 P2d 870.

Footnote 45. *Waller v State*, 242 Ala 1, 4 So 2d 911; *Estate of Bould* (2nd Dist) 135 Cal App 2d 260, 287 P2d 8, hear den by sup ct as reported in (2nd Dist) 135 Cal App 2d 277, 289 P2d 15; *Stocker v Boston & M. R. R.*, 84 NH 377, 151 A 457, 70 ALR 1320; *Laffin v Ryan* (3d Dept) 4 App Div 2d 21, 162 NYS2d 730; *British Columbia Breweries (1918), Ltd. v King County*, 17 Wash 2d 437, 135 P2d 870.

Footnote 46. *Stocker v Boston & M. R. R.*, 84 NH 377, 151 A 457, 70 ALR 1320.

Footnote 47. *Laffin v Ryan* (3d Dept) 4 App Div 2d 21, 162 NYS2d 730.

Footnote 48. *Laffin v Ryan* (3d Dept) 4 App Div 2d 21, 162 NYS2d 730.

Footnote 49. *Laffin v Ryan* (3d Dept) 4 App Div 2d 21, 162 NYS2d 730.

Footnote 50. *Williams v Vaughan*, 214 Va 307, 199 SE2d 515.

§ 257 Failure or refusal of party in civil case to testify

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In a few jurisdictions it has been held that in a civil case the failure or refusal of a party to testify with respect to material facts peculiarly within his knowledge does not give rise to an adverse inference against him. 51 In most jurisdictions, however, the rule is that the failure or refusal of a party to testify under such circumstances gives rise to an inference that his testimony, if it had been elicited, would have been unfavorable to his cause or defense. 52

More properly, it has been said that while ordinarily, in a civil action, the failure to testify, standing alone, counts for naught against a party, and the jury should presume nothing from it, when the case is such as to call for an explanation, or the evidence is such as to call for a denial, the situation is different. 53 In any event, an unfavorable inference does not arise from the refusal or failure of a party to testify to material facts in issue where he has no personal knowledge of such facts, 54 or where such facts are fully known to other witnesses, 55 or where it is unnecessary for him to testify, 56 or where he has a good excuse for not attending the trial. 57

Where a party, without his own testimony, makes out a prima facie case that is not rebutted by evidence on the other side, his unexplained failure to testify does not raise any unfavorable inference against him. 58 Conversely, where a party who has the burden of proof fails to make out a prima facie case, the failure of the opposing party to testify does not raise any unfavorable inference against the latter. 59

The fact that a party does not testify on direct examination does not give rise to an adverse inference where he does testify on cross-examination as to all facts that the opposing party seeks to elicit. 60 Likewise, the fact that a party does not testify at his pretrial deposition does not give rise to an unfavorable inference against him where he later testifies at the trial. 61

It is generally held that the failure to testify fully of a party taking the stand raises an unfavorable inference against him. 62 The refusal of a party taking the stand to answer questions that involve no self-incrimination or privileged communications raises an inference that his answers to such questions would be adverse to his interests. 63 And drawing an adverse inference from a defendant's failure to take the stand in his own behalf in a civil action does not infringe on his privilege against self-incrimination. 64

The unfavorable inference arising from the failure of a party in a civil action to testify does not constitute affirmative proof of the facts sought to be established through such party. 65 The inference drawn from the failure to testify does not supply the place of

evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced. 66 In other words, such an inference will not supply a missing link in an adversary's case, and cannot be treated as independent evidence of a fact otherwise unproved, but it can be considered in measuring the credibility or probative force of the evidence presented. 67

Footnotes

Footnote 51. *McCallie v McCallie*, 192 Ga 699, 16 SE2d 562; *Thompson v Davitte*, 59 Ga 472; *Lowe v Massey*, 62 Ill 47.

In *McCallie v McCallie*, 192 Ga 699, 16 SE2d 562, it was held that a statute providing that where a party who has evidence within his power by which he may repel a charge against him omits to produce it, a presumption arises that the charge is well founded, does not apply to raise a presumption against a party who fails to testify on a material issue. However, in *Johnson v Johnson*, 218 Ga 28, 126 SE2d 229, such statute was applied to raise a presumption of adultery on the part of a wife who failed to testify on such issue in a divorce action.

Footnote 52. *Northern R. Co. v Page*, 274 US 65, 71 L Ed 929, 47 S Ct 491; *The New York*, 175 US 187, 44 L Ed 126, 20 S Ct 67; *Runkle v Burnham*, 153 US 216, 38 L Ed 694, 14 S Ct 837; *Daniel v United States (CA5 Tex)* 234 F2d 102, cert den 352 US 971, 1 L Ed 2d 324, 77 S Ct 362; *Meier v Commissioner (CA8)* 199 F2d 392, 52-2 USTC ¶ 9514, 42 AFTR 705; *Atlantic C. L. R. Co. v Larisey*, 269 Ala 203, 112 So 2d 203; *Morgan v Kendall*, 124 Ind 454, 24 NE 143; *Henks v Panning*, 175 Kan 424, 264 P2d 483; *State v Jahraus*, 117 La 286, 41 So 575; *Arthur & Boyle v Morrow Bros.*, 131 Md 59, 101 A 777; *Stimpson v Hunter*, 234 Mass 61, 125 NE 155, 7 ALR 1067; *Mooney v Davis*, 75 Mich 188, 42 NW 802; *Guthrie v Gillespie*, 319 Mo 1137, 6 SW2d 886; *Re Adoption of L*, 56 NJ Super 46, 151 A2d 435; *Rozan v Rozan (ND)* 129 NW2d 694; *Huyett v Reading*, 34 Pa D & C2d 193; *Weeks v McNulty*, 101 Tenn 495, 48 SW 809; *Mitchell v Watson*, 58 Wash 2d 206, 361 P2d 744; *Glasgow v Nicholls*, 124 Wash 281, 214 P 165, 35 ALR 419, adhered to 127 Wash 693, 219 P 883, 35 ALR 427 and mod on other grounds 129 Wash 319, 225 P 1118; *Kirchner v Smith*, 61 W Va 434, 58 SE 614.

The failure of a party to testify in reference to an instrument, when its contents were peculiarly within his knowledge, justifies the presumption that its provisions would have been unfavorable to his position. *Runkle v Burnham*, 153 US 216, 38 L Ed 694, 14 S Ct 837.

In an action for personal injuries caused by a horse when it jumped out of an exhibition ring and struck plaintiff with its hoofs, the failure of the defendant in charge of the horse to testify, after it was shown that the horse had previously jumped out of the ring into an area where spectators could stand, justifies an inference that her testimony would not have been favorable to the defense. *Talizin v Oak Creek Riding Club (1st Dist)* 176 Cal App 2d 429, 1 Cal Rptr 514, 80 ALR2d 878.

Failure of the principal contractor to take the stand in a suit by a subcontractor to hold him for money due, which he alleges to have been released by an intermediate contractor, raises a presumption against him. *Arthur & Boyle v Morrow Bros.*, 131 Md 59, 101 A

Footnote 53. *Cuthrell v Greene*, 229 NC 475, 50 SE2d 525.

Footnote 54. *Thomas v Ganezer*, 137 Conn 415, 78 A2d 539; *Wilson v St. Louis & S. F. R. Co.*, 108 Mo 588, 18 SW 286; *Johnson v Windham*, 224 SC 502, 80 SE2d 234.

Footnote 55. *Weeks v McNulty*, 101 Tenn 495, 48 SW 809.

Footnote 56. *Atlantic C. L. R. Co. v Larisey*, 269 Ala 203, 112 So 2d 203.

Footnote 57. *Wodehouse v Commissioner (CA2)* 177 F2d 881, 83 USPQ 405, 49-2 USTC ¶ 9474, 38 AFTR 998.

Footnote 58. *Hanifen v Lupton (CC Pa)* 95 F 465, revd on other grounds (CA3 Pa) 101 F 462; *Russo v Dinerstein*, 138 Conn 220, 83 A2d 222.

Footnote 59. *Hosford v Henry*, 107 Cal App 2d 765, 238 P2d 91; *Hinds v Bowen*, 268 Mass 55, 167 NE 332.

Footnote 60. *State ex rel. Johnson v Mooney (App, Cuyahoga Co)* 86 Ohio L Abs 105, 171 NE2d 918.

Footnote 61. *Buzard v Griffin*, 89 Ariz 42, 358 P2d 155.

Footnote 62. *Illinois Mut. Fire Ins. Co. v Malloy*, 50 Ill 419.

Evasive answers in patent cases afford strong presumptive evidence against the respondents. *Agawam Co. v Jordan*, 74 US 583, 7 Wall 583, 19 L Ed 177, costs/fees proceeding (CCD Mass) 3 Cliff 239, 13 F Cas 1084, No 7516.

Footnote 63. *United States ex rel. Vajtauer v Commissioner of Immigration*, 273 US 103, 71 L Ed 560, 47 S Ct 302 (criticized on other grounds by *Garner v United States*, 424 US 648, 47 L Ed 2d 370, 96 S Ct 1178, 76-1 USTC ¶ 9301, 76-1 USTC ¶ 16218, 37 AFTR 2d 76-1042-A); *Memphis Keeley Institute v Leslie E. Keeley Co. (CA6 Tenn)* 155 F 964; *Harding v American Glucose Co.*, 182 Ill 551, 55 NE 577, error dismd 187 US 651, 47 L Ed 349, 23 S Ct 841; *Morgan v Kendall*, 124 Ind 454, 24 NE 143; *Belknap Hardware Co. v Sleeth*, 77 Kan 164, 93 P 580; *Aragon Coffee Co. v Rogers*, 105 Va 51, 52 SE 843.

Footnote 64. *Duratron Corp. v Republic Stuyvesant Corp.*, 95 NJ Super 527, 231 A2d 854, certif den 50 NJ 404, 235 A2d 897.

A party to a civil action need not incriminate himself, but he has no constitutional assurance that the jurors must seal up their minds to the only reasonable inference that could be drawn from his failure to give evidence that would throw light upon the matter before the court. *Gerard v Young*, 20 Utah 2d 30, 432 P2d 343.

Footnote 65. *Stimpson v Hunter*, 234 Mass 61, 125 NE 155, 7 ALR 1067.

Footnote 66. *Russo v Dinerstein*, 138 Conn 220, 83 A2d 222; *Gilmore v Alexander*, 268 Pa 415, 112 A 9.

5. Foreign Laws [258-260]

§ 258 Laws of foreign countries

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some jurisdictions and cases it has been held that there is no presumption that the laws of foreign countries whose systems of jurisprudence are in no way connected with our own or the common law are the same as those of the forum, so that when made an issue in a case, such laws must be pleaded and proved like other facts. 68 In particular, these courts will not presume that the statutory law of a foreign country is the same as that of the forum. 69

Most courts subscribe to the view that in the absence of evidence to the contrary, it will be presumed that the common law prevails in a foreign country of common-law origin, and they will indulge such presumption rather than the presumption that the foreign law is the same as that of the forum. 70 Thus, the presumption may be indulged with respect to the law of the provinces of Canada, 71 or the law of England, 72 the jurisprudence of which is judicially known to be based upon the common law. However, some courts are committed to the presumption that the law of a foreign country is the same as that of the forum regardless of whether the law of the forum is common law or statutory, and since such presumption is not dependent upon the basis of the jurisprudence of the foreign country, the courts committed to it apply it without regard to whether the jurisprudence of the foreign country is based upon the common law or the civil law, or springs from a source not judicially known. 73

A number of cases reflect the broad view that in the absence of proof of the law of a foreign country which should properly govern a transaction or question involved, the law of the forum should be applied without any presumption as to the foreign law, because the law of the forum is the only law on the subject of which the court may take judicial cognizance, and the parties, by failing to prove the foreign law, have tacitly agreed to have their controversy determined under the local law. 74 This doctrine has frequently been applied by courts which are in general committed to the presumption in favor of the common law, but which could not indulge that presumption in the particular case because the foreign country was not of common-law origin. 75

Many courts presume that certain principles of law consonant with reason and natural justice in other countries are the same as the law of the place of trial. 76 Thus, the right of self-preservation, the privileges and exemptions of necessity, the common duties of humanity, and other similar characteristics of a civilized state of society, will be recognized as existent in foreign states. 77 In the absence of evidence to the contrary, it will be presumed that in countries in which the common law does not prevail, the law of such country recognizes an enforceable obligation arising out of a simple contract to

pay money for a valuable consideration. 78 Similarly, the right to immunity from personal restraint and personal violence is such a natural right and so broadly recognized that he who sues for assault in another country need not in the first instance prove that the act complained of was unlawful where committed. 79

Footnotes

Footnote 68. *Cuba R. Co. v Crosby*, 222 US 473, 56 L Ed 274, 32 S Ct 132; *Lloyd v Mathews*, 155 US 222, 39 L Ed 128, 15 S Ct 70; *Wickersham v Johnston*, 104 Cal 407, 38 P 89; *Banco De Sonora v Bankers' Mut. Casualty Co.*, 124 Iowa 576, 100 NW 532; *Gordon v Knott*, 199 Mass 173, 85 NE 184; *Aslanian v Dostumian*, 174 Mass 328, 54 NE 845; *Robertson v Stead*, 135 Mo 135, 36 SW 610; *St. Sure v Lindsfelt*, 82 Wis 346, 52 NW 308.

As to whether a court will take judicial notice of laws of another country, see §§ 112 et seq.

Annotation: Comment Note.—Presumption as to law of foreign countries, 75 ALR2d 529.

Practice References 21 Am Jur POF2d 1, Law of Foreign Jurisdiction.

Footnote 69. *Philp v Macri* (CA9 Wash) 261 F2d 945, 75 ALR2d 523; *Booth v Scott*, 276 Mo 1, 205 SW 633, error dismd 253 US 475, 64 L Ed 1020, 40 S Ct 484.

Footnote 70. *Connecticut Valley Lumber Co. v Maine C. R. R.*, 78 NH 553, 103 A 263; *Leary v Gledhill*, 8 NJ 260, 84 A2d 725; *St. Sure v Lindsfelt*, 82 Wis 346, 52 NW 308.

Footnote 71. *Stewar's Adm'x v Bacon*, 253 Ky 748, 70 SW2d 522.

Footnote 72. *Wickersham v Johnston*, 104 Cal 407, 38 P 89; *Leary v Gledhill*, 8 NJ 260, 84 A2d 725.

Footnote 73. *The Hoxie* (CA4 Md) 297 F 189, cert den 266 US 608, 69 L Ed 465, 45 S Ct 91 (Denmark); *Wells Fargo & Co., Express, S. A., v Tribolet*, 46 Ariz 311, 50 P2d 878 (Mexico); *Seth v Lew Hing*, 125 Cal App 729, 14 P2d 537, reh den 125 Cal App 738, 15 P2d 190 (China); *Linton v Moorhead*, 209 Pa 646, 59 A 264 (England).

Footnote 74. *The "Scotland"*, 105 US 24, 15 Otto 24, 26 L Ed 1001, appeal after remand 118 US 507, 30 L Ed 153, 6 S Ct 1174; *Pauska v Daus*, 31 Tex 67.

The decision of *The "Scotland"*, 105 US 24, 15 Otto 24, 26 L Ed 1001, appeal after remand 118 US 507, 30 L Ed 153, 6 S Ct 1174, was subsequently limited in *Cuba R. Co. v Crosby*, 222 US 473, 56 L Ed 274, 32 S Ct 132, to admiralty cases involving collision between vessels belonging to different nations, and so subject to no common law.

Two accepted theories governing the presumption as to foreign law are that foreign law is identical to the law of the forum, or that, dispensing with the presumption, the law of the forum is to govern unless the court is satisfied that some other law should displace it.

Michael v SS Thanasis (ND Cal) 311 F Supp 170.

Footnote 75. Leary v Gledhill, 8 NJ 260, 84 A2d 725; Ehag Eisenbahnwerte Holding Aktiengesellschaft v Banca Nationala A Romaniei, 306 NY 242, 117 NE2d 346.

Footnote 76. Tidewater Oil Co. v Waller (CA10 Okla) 302 F2d 638; Bethune v Bethune, 192 Ark 811, 94 SW2d 1043, 105 ALR 814; Mittenthal v Mascagni, 183 Mass 19, 66 NE 425.

The court cannot presume the laws of any country to have been enacted in terrorem or that they will be disregarded by its judicial authority. Talbot v Seeman, 5 US 1, 1 Cranch 1, 2 L Ed 15.

Footnote 77. Cuba R. Co. v Crosby, 222 US 473, 56 L Ed 274, 32 S Ct 132; Rice v Ames, 180 US 371, 45 L Ed 577, 21 S Ct 406; Wickersham v Johnston, 104 Cal 407, 38 P 89; Parrot v Mexican C. R. Co., 207 Mass 184, 93 NE 590; Gordon v Knott, 199 Mass 173, 85 NE 184; State v Morrill, 68 Vt 60, 33 A 1070.

Footnote 78. Parrot v Mexican C. R. Co., 207 Mass 184, 93 NE 590.

Footnote 79. Carpenter v Grand Trunk R. Co., 72 Me 388; State v Morrill, 68 Vt 60, 33 A 1070.

§ 259 Laws of sister states

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule has frequently been stated that in the absence of a showing to the contrary, the law of a sister state will be presumed to be the same as the law of the forum. ⁸⁰ Another way in which the rule has been stated is that unless the court's attention is directed to a statute or decision of another state bearing on a question before it, the law of such state will be presumed to be the same as that of the forum. ⁸¹ In the absence of proof to the contrary it will be presumed that the common law prevails and is in force in sister state which is judicially known to be of common-law origin, ⁸² and that the common law of such sister state is the same as the common law of the forum. ⁸³ In any event, the common law will not be presumed to be in force in a sister state the jurisprudence of which is not founded upon, or derived from, the common law. ⁸⁴ Even though a statute provides that the courts of a state shall take judicial notice of the law of other states, the presumption with respect to the common law continues, and will prevail unless overcome by evidence or by pertinent decisions or statutes called to or coming to the attention of the court. ⁸⁵

The court of one state cannot presume that the common law has been altered in another state, in the absence of proof to that effect. ⁸⁶ Thus, in a suit upon a contract made and to be executed in another state, the court will presume that the rules of the common law still prevail in such jurisdiction, unless, of course, proof is presented to the contrary. ⁸⁷

Footnotes

Footnote 80. *Reeves v Schulmeier* (CA5 Tex) 303 F2d 802, 97 ALR2d 718; *Southern Express Co. v Owens*, 146 Ala 412, 41 So 752; *Brown v Wright*, 58 Ark 20, 22 SW 1022; *Mercantile Acceptance Co. v Frank*, 203 Cal 483, 265 P 190, 57 ALR 696; *American Woolen Co. v Maaget*, 86 Conn 234, 85 A 583; *Hagen v Viney*, 124 Fla 747, 169 So 391; *Thomas v Clarkson*, 125 Ga 72, 54 SE 77 (ovrld on other grounds by *Balboa Ins. Co. v A. J. Kellos Const. Co.*, 247 Ga 393, 276 SE2d 599) as stated in *Preston Carroll Co. v Morrison Assur. Co.*, 173 Ga App 412, 326 SE2d 486; *Gapsch v Gapsch*, 76 Idaho 44, 277 P2d 278, 54 ALR2d 416; *Occidental Chemical Co. v Agri Profit Systems, Inc.* (2d Dist) 37 Ill App 3d 599, 346 NE2d 482; *Mitchell v Burnett* (5th Dist) 1 Ill App 3d 24, 272 NE2d 393; *Blystone v Burgett*, 10 Ind 28; *Eddards v Suhr* (Iowa) 193 NW2d 113; *Re Estate of Drumheller*, 252 Iowa 1378, 110 NW2d 833, 87 ALR2d 1233; *Scott v Mundy & Scott*, 193 Iowa 1360, 188 NW 972, 23 ALR 460; *United States Banking v Veale*, 84 Kan 385, 114 P 229; *Williams v Pope Mfg. Co.*, 52 La Ann 1417, 27 So 851; *Frericks v General Motors Corp.*, 274 Md 288, 336 A2d 118, 16 UCCRS 1232, appeal after remand 278 Md 304, 363 A2d 460, 20 UCCRS 371; *Schultz v Howard*, 63 Minn 196, 65 NW 363; *Lyons v Metropolitan S. R. Co.*, 253 Mo 143, 161 SW 726; *Bannard v Duncan*, 79 Neb 189, 112 NW 353; *Gaines v Jacobsen*, 308 NY 218, 124 NE2d 290, 48 ALR2d 312; *Woods v Western Union Tel. Co.*, 148 NC 1, 61 SE 653; *Allen v Allen*, 201 Okla 442, 209 P2d 172, 14 ALR2d 216, cert den 336 US 956, 93 L Ed 1110, 69 S Ct 891; *Cushing v Perot*, 175 Pa 66, 34 A 447; *Moore v Hood*, 30 SC Eq 311; *Commercial Credit Co. v Nissen*, 49 SD 303, 207 NW 61, 51 ALR 287, mod on other grounds 51 SD 357, 213 NW 943, 51 ALR 293; *Loud v Hamilton* (Tenn Ch) 51 SW 140; *Burgess v Western Union Tel. Co.*, 92 Tex 125, 46 SW 794; *Dickson v Mullings*, 66 Utah 282, 241 P 840, 43 ALR 136; *State v Shattuck*, 69 Vt 403, 38 A 81; *German American Bank v Wright*, 85 Wash 460, 148 P 769; *Save-Way Drug, Inc. v Standard Invest. Co.*, 5 Wash App 726, 490 P2d 1342; *Osborn v Blackburn*, 78 Wis 209, 47 NW 175, error dismd 149 US 766, 37 L Ed 960, 13 S Ct 1043.

As to whether a court will take judicial notice of laws of another state, see §§ 110 et seq.

Practice References 21 Am Jur POF2d 1, Law of Foreign Jurisdiction.

Wharton's Criminal Evidence (14th ed, Torcia) § 51.

Footnote 81. *Hanson v Hanson*, 287 Mass 154, 191 NE 673, 93 ALR 701.

Footnote 82. *Birmingham Waterworks Co. v Hume*, 121 Ala 168, 25 So 806; *Garner v Wright*, 52 Ark 385, 12 SW 785; *Thompson v Monrow*, 2 Cal 99; *Wolf v Burke*, 18 Colo 264, 32 P 427; *Slaton v Hall*, 168 Ga 710, 148 SE 741, 73 ALR 891, conformed to 40 Ga App 288, 149 SE 306; *Green v Johnson*, 71 Ga App 777, 32 SE2d 443; *Maloney v Winston Bros. Co.*, 18 Idaho 740, 111 P 1080; *Forsyth v Barnes*, 228 Ill 326, 81 NE 1028; *Jackson v Pittsburgh, C., C. & S. L. R. Co.*, 140 Ind 241, 39 NE 663; *Hudson v Northern P. R. Co.*, 92 Iowa 231, 60 NW 608; *Carpenter v Grand Trunk R. Co.*, 72 Me 388; *Dimpfel v Wilson*, 107 Md 329, 68 A 561; *Engstrand v Kleffman*, 86 Minn 403, 90 NW 1054; *Burdiet v Missouri P. R. Co.*, 123 Mo 221, 27 SW 453; *Leary v Gledhill*, 8 NJ 260, 84 A2d 725; *Friedman v Greenberg*, 110 NJL 462, 166 A 119, 87 ALR 849; *Fisher v Fisher*, 250 NY 313, 165 NE 460, 61 ALR 1523; *Terry v Robbins*, 128 NC 140, 38 SE 470; *Hanson v Great N. R. Co.*, 18 ND 324, 121 NW 78.

In a suit upon a contract made and to be executed in another state, in the absence of any evidence to the contrary, the court will presume that the rules of the common law prevail there. *Pattillo v Alexander*, 96 Ga 60, 22 SE 646.

Statutory restrictions on the alienation of property will not be presumed to be the law of another state, but the common-law rules in equity will be presumed to obtain there in the absence of proof on the subject. *First Nat. Bank v National Broadway Bank*, 156 NY 459, 51 NE 398.

Footnote 83. *Southern Express Co. v Owens*, 146 Ala 412, 41 So 752; *Garner v Wright*, 52 Ark 385, 12 SW 785; *Mercantile Acceptance Co. v Frank*, 203 Cal 483, 265 P 190, 57 ALR 696; *Smith v Kent Oil Co.*, 128 Colo 80, 261 P2d 149; *Hoxie v New York, N. H. & H. R. Co.*, 82 Conn 352, 73 A 754; *Thomas v Clarkson*, 125 Ga 72, 54 SE 77 (ovrld on other grounds by *Balboa Ins. Co. v A. J. Kellos Const. Co.*, 247 Ga 393, 276 SE2d 599) as stated in *Preston Carroll Co. v Morrison Assur. Co.*, 173 Ga App 412, 326 SE2d 486; *Maloney v Winston Bros. Co.*, 18 Idaho 740, 111 P 1080; *Baltimore & O. S. W. R. Co. v Read*, 158 Ind 25, 62 NE 488; *Scott v Mundy & Scott*, 193 Iowa 1360, 188 NW 972, 23 ALR 460; *Sykes v Citizens' Nat. Bank*, 78 Kan 688, 98 P 206; *Public Service Co. v Schneider's Adm'r*, 260 Ky 334, 85 SW2d 676, 102 ALR 712; *Strout v Burgess*, 144 Me 263, 68 A2d 241, 12 ALR2d 939; *American Garment Co. v Taylor*, 308 Mass 527, 33 NE2d 296, 135 ALR 453; *Hite v Hite*, 301 Mass 294, 17 NE2d 176, 119 ALR 517; *State ex rel. Shapiro v Wall*, 187 Minn 246, 244 NW 811, 85 ALR 114; *Wentz v Chicago, B. & Q. R. Co.*, 259 Mo 450, 168 SW 1166; *Scott v Scott*, 153 Neb 906, 46 NW2d 627, 23 ALR2d 1431; *International Text-Book Co. v Connelly*, 206 NY 188, 99 NE 722; *Southworth v Morgan*, 205 NY 293, 98 NE 490; *Gooch v Faucett*, 122 NC 270, 29 SE 362; *Heater v Mittendorf (Hamilton Co)* 72 Ohio App 4, 26 Ohio Ops 508, 38 Ohio L Abs 323, 50 NE2d 559, motion overr; *Owens v Hagenbeck-Wallace Shows Co.*, 58 RI 162, 192 A 158, 112 ALR 113, reh den 58 RI 268, 192 A 464, 112 ALR 124; *Commercial Credit Co. v Nissen*, 49 SD 303, 207 NW 61, 51 ALR 287, mod on other grounds 51 SD 357, 213 NW 943, 51 ALR 293; *German American Bank v Wright*, 85 Wash 460, 148 P 769.

Footnote 84. *Brown v Wright*, 58 Ark 20, 22 SW 1022; *Garner v Wright*, 52 Ark 385, 12 SW 785; *Gatton v Chicago, R. I. & P. R. Co.*, 95 Iowa 112, 63 NW 589; *Owen v Boyle*, 15 Me 147; *Aslanian v Dostumian*, 174 Mass 328, 54 NE 845.

The common law is not presumed to exist in the state of Louisiana. *Peet v Hatcher*, 114 Ala 514, 21 So 711.

Footnote 85. *Strout v Burgess*, 144 Me 263, 68 A2d 241, 12 ALR2d 939; *Haggard v First Nat. Bank*, 72 ND 434, 8 NW2d 5; *Respole v Respole (CP)* 34 Ohio Ops 1, 70 NE2d 465, 170 ALR 942.

Notwithstanding the Uniform Judicial Notice of Foreign Law Act, the statutory rule of Nebraska refusing recognition to common-law marriages will be presumed by Nebraska courts to be the law of the state where the parties lived together, in the absence of pleading and presentation of the laws of that state. *Scott v Scott*, 153 Neb 906, 46 NW2d 627, 23 ALR2d 1431.

Annotation: Uniform Judicial Notice of Foreign Law Act, 23 ALR2d 1437.

Footnote 86. *Vanderpoel v Gorman*, 140 NY 563, 35 NE 932; *Heater v Mittendorf* (Hamilton Co) 72 Ohio App 4, 26 Ohio Ops 508, 38 Ohio L Abs 323, 50 NE2d 559, motion overr.

Footnote 87. *Pattillo v Alexander*, 96 Ga 60, 22 SE 646.

§ 260 --Statutory enactments

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is some difference of opinion as to whether the principle that in the absence of a showing to the contrary the laws of a sister state are presumed to be the same as those in the forum⁸⁸ extends to the statutory law of another state. While that principle, as thus stated, would appear to be broad enough to extend to such statutory law, there is a line of authorities which squarely supports the view that there is no presumption that the statutory law of another state is the same as that of the forum, unless it is a codification of the common law,⁸⁹ but rather the statutory law of another state is a fact that must be proved like any other fact.⁹⁰

On the other hand, a number of courts have adopted the rule that in the absence of proof of the statutory law of a sister state, the presumption is that it is the same as the statutory law of the state within which an action is brought.⁹¹ Such presumptions, however, do not extend to such statutory enactments as are penal in their nature,⁹² or which prescribe penalties and forfeitures.⁹³

Footnotes

Footnote 88. § 259.

Footnote 89. *Standard Casing Co. v California Casing Co.*, 233 NY 413, 135 NE 834.

Footnote 90. *Smith v Kent Oil Co.*, 128 Colo 80, 261 P2d 149; *Thomas v Clarkson*, 125 Ga 72, 54 SE 77 (ovrld on other grounds by *Balboa Ins. Co. v A. J. Kellos Const. Co.*, 247 Ga 393, 276 SE2d 599) as stated in *Preston Carroll Co. v Morrison Assur. Co.*, 173 Ga App 412, 326 SE2d 486; *Sealy v Missouri, K. & T. R. Co.*, 84 Kan 479, 114 P 1077; *Holbrook v Libby*, 113 Me 389, 94 A 482; *Cherry v Sprague*, 187 Mass 113, 72 NE 456; *Wilcox v Bergman*, 96 Minn 219, 104 NW 955; *Conrad v Fisher*, 37 Mo App 352; *First Nat. Bank v National Broadway Bank*, 156 NY 459, 51 NE 398; *O'Reilly v New York & N. E. R. Co.*, 16 RI 388, 17 A 171, supp op on other grounds 16 RI 395, 19 A 244 and (ovrld on other grounds by *Woodward v Stewart*, 104 RI 290, 243 A2d 917); *Dickson v Mullings*, 66 Utah 282, 241 P 840, 43 ALR 136; *State v Shattuck*, 69 Vt 403, 38 A 81.

In a controversy over a contract made in another state, it will not be presumed that such other state has any statute upon the subject, although there is one in the state of the forum. *Meuer v Chicago, M. & S. P. R. Co.*, 11 SD 94, 75 NW 823.

The statute of limitations of the state in which a cause of action arose is not available in an action in another jurisdiction for the enforcement of such cause of action, unless offered in evidence. *Eingartner v Illinois Steel Co.*, 94 Wis 70, 68 NW 664.

Footnote 91. *Hobbs v Tom Reed Gold Mining Co.*, 164 Cal 497, 129 P 781; *United Mercantile Agencies v Bissonnette*, 155 Fla 22, 19 So 2d 466, 155 ALR 916; *Gapsch v Gapsch*, 76 Idaho 44, 277 P2d 278, 54 ALR2d 416; *O'Brien v Rautenbush*, 10 Ill 2d 167, 139 NE2d 222 (ovrld on other grounds by *Rylander v Chicago S. L. R. Co.*, 17 Ill 2d 618, 161 NE2d 812); *Re Kees' Estate*, 239 Iowa 287, 31 NW2d 380; *Williams v Pope Mfg. Co.*, 52 La Ann 1417, 27 So 851; *Scott v Scott*, 153 Neb 906, 46 NW2d 627, 23 ALR2d 1431; *Baid's, Inc. v Frankel (Erie Co)* 56 Ohio App 305, 9 Ohio Ops 391, 25 Ohio L Abs 27, 10 NE2d 787; *Allen v Allen*, 201 Okla 442, 209 P2d 172, 14 ALR2d 216, cert den 336 US 956, 93 L Ed 1110, 69 S Ct 891; *Cousineau v Cousineau*, 155 Or 184, 63 P2d 897, 109 ALR 643; *Cushing v Perot*, 175 Pa 66, 34 A 447; *Pennsylvania R. Co. v Naive*, 112 Tenn 239, 79 SW 124; *Van Riper v Constitutional Government League*, 1 Wash 2d 635, 96 P2d 588, 125 ALR 1100.

Footnote 92. *St. Sure v Lindsfelt*, 82 Wis 346, 52 NW 308.

Footnote 93. *State ex rel. Beck v Associates Discount Corp.*, 168 Neb 298, 96 NW2d 55, mod on other grounds and reh den 168 Neb 803, 97 NW2d 583 and (ovrld on other grounds by *Dailey v A. C. Nelsen Co.*, 178 Neb 881, 136 NW2d 186).

6. Communications [261-269]

§ 261 Presumptions regarding whether letter was mailed

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Proof of the failure of a letter to arrive at its destination raises a presumption that it was never mailed. 94 Thus, if there is no direct evidence that a letter was received, there must be evidence that the letter was duly mailed, otherwise the rule that proof of due mailing raises a presumption of receipt 95 is not available. 96 A presumption that a letter was mailed may arise from the testimony of the officer of a corporation that he wrote a letter and placed it in the regular course for mailing followed by mail going out from the corporation. 97

There is no presumption that a letter was mailed on the day of its date or on the day it was written; 98 and no presumption arises from the date of a postmark on a letter 99 that it was not put in the post office until that day, although the date of the postmark is some evidence that it was forwarded on the day named. 1

§ 261 ----Presumptions regarding whether letter was mailed [SUPPLEMENT]

Practice Aids: Instruction to jury—Presumption that account mailed was received. 1 Am Jur Pl & Pr Forms (Rev), Accounts and Accounting 1 Am Jur Pl & Pr Forms (Rev) Form 80.

Footnotes

Footnote 94. Matlock v Citizens' Nat. Bank, 43 Idaho 214, 250 P 648, 50 ALR 1418; American Family Ins. Group v Ford, 155 Ind App 573, 293 NE2d 524.

Footnote 95. § 262.

Footnote 96. U.S. Life Title Ins. Co. v Department of Commerce & Ins. (Tenn App) 770 SW2d 537.

Footnote 97. Myers v Moore-Kile Co. (CA5 Tex) 279 F 233, 25 ALR 1.

Although pertinent records of an insurer regarding the cancellation of its insured's policy had been destroyed by a fire, defendant sufficiently raised the presumption that it had properly addressed and mailed a notice of cancellation to its insured, where its witness, a member of the underwriting department of its assigned risk department, testified in detail as to when the notice of cancellation was drawn, its contents and type size, and the procedure followed in depositing it in the mail. Liberty Mut. Ins. Co. v Romero (1st Dept) 109 App Div 2d 712, 487 NYS2d 37.

Footnote 98. Phelan v Northwestern Mut. Life Ins. Co., 113 NY 147, 20 NE 827; Associates Discount v Barstow, 2 Ohio Misc 73, 30 Ohio Ops 2d 463, 205 NE2d 667.

Footnote 99. Schlobohm v Police Bd. of Chicago (1st Dist) 122 Ill App 3d 541, 78 Ill Dec 17, 461 NE2d 601.

Footnote 1. Shelburne Falls Nat. Bank v Townsley, 102 Mass 177.

In Copren v State Bar, 64 Nev 364, 183 P2d 833, 173 ALR 284, it was held that the possibility that envelopes were postmarked at a later date than that on which they were claimed to have been mailed is not sufficient to create a reasonable doubt as to the falsity of an affidavit of earlier mailing.

§ 262 Presumption of receipt of letter from proof of mailing

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

It is generally recognized that a presumption of the due receipt of a letter or of a communication through the mails arises upon proof that such letter or communication properly addressed to the addressee and properly stamped with sufficient postage was

mailed—that is, deposited in the post office or other place where mail may properly and legally be deposited for collection and transmission. 2 The presumption is based on the probability that postal employees perform their duty in transmitting and delivering mail. 3 However, the evidence must establish the elements described above before the presumption can be invoked. 4

The rule that the receipt of a letter is presumed from its mailing is not affected by the contents of the letter. 5 Under the general rule stated, the due receipt of a necessary notice may be presumed from proof of the mailing of the notice properly addressed to the person to whom such notice is required to be given. 6 The presumption exists even where the receipt of the letter subjects the person sending it to a penalty. 7

The presumption of the receipt of a letter which was duly mailed is strengthened where the envelope bears a notice requesting the return of the letter to the sender if not delivered within a specified time and it appears that the letter was never returned. 8

◆ Recommendation: Since a sender becomes aware that a certified letter was not received, if it is returned and not signed for, it was suggested in one case that ordinary mailing should then be used to create the presumption of receipt. 9

When the usual course of business is for an agent to receive his principal's mail, the presumption is that the agent received it, rather than the principal. 10

The presumption that a letter properly mailed was received by the person to whom it was addressed is generally viewed as a presumption of fact, and not of law, 11 and hence subject to explanation by other facts in the case 12 and to rebuttal. 13 The presumption is ordinarily followed only in the absence of evidence to the contrary. 14 Furthermore, the presumption of receipt of a letter duly mailed will not apply where the law requires actual delivery of a letter 15 or, according to some decisions, where the person addressed has no opportunity to deny the receipt of a letter claimed to have been mailed to him. 16

◆ Caution: While evidence of mailing may be sufficient to give rise to an inference that a letter was received, it does not necessarily prove that the contents of the letter were communicated to a third party, which is an essential element of such causes of action as defamation. 17

§ 262 ----Presumption of receipt of letter from proof of mailing [SUPPLEMENT]

Case authorities:

Evidence of mailing of letter creates rebuttable presumption that letter was delivered and received which merely shifts to challenging party burden of presenting credible evidence of nonreceipt and presumption may not be given conclusive effect without violating due process clause. *State ex rel. Flores v State* (1994) 183 Wis 2d 587, 516 NW2d 362.

For purposes of creating presumption that mailed letter was delivered and received, proof of office practice or routine as to mailing does not necessarily require testimony by person who actually typed or deposited letter. *State ex rel. Flores v State* (1994) 183 Wis 2d 587, 516 NW2d 362.

Footnotes

Footnote 2. *Hagner v United States*, 285 US 427, 76 L Ed 861, 52 S Ct 417; *Davidson S.S. Co. v United States*, 205 US 187, 51 L Ed 764, 27 S Ct 480; *Atherton v Atherton*, 181 US 155, 45 L Ed 794, 21 S Ct 544; *Corry v Sylvia y Cia*, 192 Ala 550, 68 So 891; *State v Mays*, 96 Ariz 366, 395 P2d 719; *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *German Nat. Bank v Burns*, 12 Colo 539, 21 P 714; *Console v Torchinsky*, 97 Conn 353, 116 A 613; *Thompson v Coe*, 96 Conn 644, 115 A 219, 17 ALR 1233; *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153; *Matlock v Citizens' Nat. Bank*, 43 Idaho 214, 250 P 648, 50 ALR 1418; *Keogh v Peck*, 316 Ill 318, 147 NE 266, 38 ALR 1151; *Roshek Realty Co. v Roshek Bros. Co.*, 249 Iowa 349, 87 NW2d 8; *Shriver v Union Stockyards Nat. Bank*, 117 Kan 638, 232 P 1062; *McFerren v Goldsmith-Stern Co.*, 137 Md 573, 113 A 107, 18 ALR 1125; *Marston v Bigelow*, 150 Mass 45, 22 NE 71; *Merchants Nat. Bank v Detroit Trust Co.*, 258 Mich 526, 242 NW 739, 85 ALR 350; *First Nat. Bank v Mid-Century Ins. Co. (Mo App)* 559 SW2d 50; *Farmer v Pitts*, 108 Neb 9, 187 NW 95, 24 ALR 719; *Hurley v Olcott*, 198 NY 132, 91 NE 270; *New York New Jersey Producer Dealers Cooperative, Inc. v Mocker (3d Dept)* 59 App Div 2d 970, 399 NYS2d 280; *Holloman v Southern R. Co.*, 172 NC 372, 90 SE 292; *Myra Foundation v Harvey (ND)* 100 NW2d 435, 76 ALR2d 1313; *Kvale v Keane*, 39 ND 560, 168 NW 74, 9 ALR 972; *Jensen v McCorkell*, 154 Pa 323, 26 A 366; *Larocque v Rhode Island Joint Reinsurance Asso. (RI)* 536 A2d 529; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925; *U.S. Life Title Ins. Co. v Department of Commerce & Ins. (Tenn App)* 770 SW2d 537; *Southern Region Industrial Realty, Inc. v Chattanooga Warehouse & Cold Storage Co. (Tenn App)* 612 SW2d 162, 27 ALR4th 259; *W. E. Richmond & Co. v Security Nat. Bank*, 16 Tenn App 414, 64 SW2d 863; *Employers' Nat. Life Ins. Co. v Willits (Tex Civ App Amarillo)* 436 SW2d 918, writ ref n r e (Mar 5, 1969) and reh'g of writ of error overr (Apr 2, 1969); *Campbell v Gowans*, 35 Utah 268, 100 P 397; *Walworth v Seaver*, 30 Vt 728; *Hartford Fire Ins. Co. v Mutual Sav. & Loan Co.*, 193 Va 269, 68 SE2d 541, 31 ALR2d 1191; *Lieb v Webster*, 30 Wash 2d 43, 190 P2d 701; *Antonwich v Home Life Ins. Co. (1935)* 116 W Va 155, 179 SE 601.

Practice References Proof of mailing of letter, raising presumption of receipt. 7 Am Jur Proof of Facts 417, Mailing, Proof 1.

Footnote 3. *Roshek Realty Co. v Roshek Bros. Co.*, 249 Iowa 349, 87 NW2d 8.

Footnote 4. *State v Kleen (Mo)* 481 SW2d 229.

Footnote 5. *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382.

Footnote 6. *Minnick v State Farm Mut. Auto. Ins. Co. (Super)* 54 Del 125, 174 A2d 706; *Keogh v Peck*, 316 Ill 318, 147 NE 266, 38 ALR 1151; *Bickerdike v Allen*, 157 Ill 95, 41 NE 740; *Pennypacker v Capital Ins. Co.*, 80 Iowa 56, 45 NW 408; *Boston v Boston Port Dev. Co.*, 308 Mass 72, 30 NE2d 896, 133 ALR 515; *Merchants Nat. Bank v Detroit Trust Co.*, 258 Mich 526, 242 NW 739, 85 ALR 350.

A postal card notice properly addressed and mailed will be presumed to have been received, in the absence of evidence that it was not. *Holloman v Southern R. Co.*, 172

NC 372, 90 SE 292.

Footnote 7. Hagner v United States, 285 US 427, 76 L Ed 861, 52 S Ct 417.

Footnote 8. Roshek Realty Co. v Roshek Bros. Co., 249 Iowa 349, 87 NW2d 8; Hedden v Roberts, 134 Mass 38; Jensen v McCorkell, 154 Pa 323, 26 A 366; Lieb v Webster, 30 Wash 2d 43, 190 P2d 701.

Footnote 9. Larocque v Rhode Island Joint Reinsurance Asso. (RI) 536 A2d 529.

Footnote 10. Schutz v Jordan, 141 US 213, 35 L Ed 705, 11 S Ct 906.

Footnote 11. Schutz v Jordan, 141 US 213, 35 L Ed 705, 11 S Ct 906; Henderson v Carbondale Coal & Coke Co., 140 US 25, 35 L Ed 332, 11 S Ct 691; Pitts v Hartford Life & Annuity Ins. Co., 66 Conn 376, 34 A 95; Sullivan v Kuykendall, 82 Ky 483; Marston v Bigelow, 150 Mass 45, 22 NE 71; Long Bell Lumber Co. v Nyman, 145 Mich 477, 108 NW 1019; Plath v Minnesota Farmers' Mut. Fire Ins. Asso., 23 Minn 479; Austin v Holland, 69 NY 571; Jensen v McCorkell, 154 Pa 323, 26 A 366; Campbell v Gowans, 35 Utah 268, 100 P 397; Walworth v Seaver, 30 Vt 728.

Footnote 12. Merchants Nat. Bank v Detroit Trust Co., 258 Mich 526, 242 NW 739, 85 ALR 350.

Footnote 13. § 266.

Footnote 14. Roshek Realty Co. v Roshek Bros. Co., 249 Iowa 349, 87 NW2d 8; Cox v Brookings International Life Ins. Co. (SD) 331 NW2d 299; Ebert v Ft. Pierre Moose Lodge # 1813 (SD) 312 NW2d 119.

Footnote 15. Commonwealth v O'Bryan, Utley & Co., 153 Ky 406, 155 SW 1126; Groton v Lancaster, 16 Mass 110.

Footnote 16. Cleghorn v State, 8 Ala App 272, 62 So 329.

Footnote 17. Young v First State Bank (Okla) 628 P2d 707.

§ 263 --Mailing and payment of postage

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is self evident that no presumption of the receipt of a letter can arise in the absence of proof of the proper mailing of the letter. 18 It must first appear that the letter was deposited in some post office, 19 or other place, 20 such as a mail chute, 21 where mail may properly and legally be deposited for collection.

Prepayment of postage is also one of the essential and necessary elements on which the presumption of the receipt of a letter is founded, and this fact must be made to appear

before the courts will indulge in such presumption. 22 Many courts hold, however, that in view of the universality of the prepayment of postage on letters and mail, the inference of prepayment necessarily follows proof of mailing, 23 although this inference is not universally adopted. 24

Decisions in which the general statement is made that proof of the proper mailing of a letter or other communication raises the presumption of receipt, must be understood to include in the term "mailing," both addressing and stamping. 25 Moreover, in cases in which it is said that proof of proper mailing and addressing raises the presumption of receipt, it is evident that the courts mean to include stamping in the term "mailing." 26

Footnotes

Footnote 18. *Reserve Ins. Co. v Johnson*, 260 Iowa 740, 150 NW2d 632; *Sawyer v Central Louisiana Electric Co.* (La App 3d Cir) 136 So 2d 153; *Suits v Order of United Commercial Travelers*, 139 Minn 246, 166 NW 222.

Footnote 19. *Keese v Beardsley*, 190 Cal 465, 213 P 500, 26 ALR 1538; *Matlock v Citizens' Nat. Bank*, 43 Idaho 214, 250 P 648, 50 ALR 1418; *Kvale v Keane*, 39 ND 560, 168 NW 74, 9 ALR 972.

Footnote 20. *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

Footnote 21. *Tobin v Taintor*, 229 Mass 174, 118 NE 247.

Footnote 22. *Keese v Beardsley*, 190 Cal 465, 213 P 500, 26 ALR 1538; *Hartford Trust Co. v West Hartford*, 84 Conn 646, 81 A 244; *Reserve Ins. Co. v Johnson*, 260 Iowa 740, 150 NW2d 632; *State v Kleen (Mo)* 481 SW2d 229; *Feder Silberberg Co. v McNeil*, 18 NM 44, 133 P 975; *Kvale v Keane*, 39 ND 560, 168 NW 74, 9 ALR 972; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

Footnote 23. *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *Johnson v New York, N. H. & H. R. R.*, 111 Me 263, 88 A 988; *Feder Silberberg Co. v McNeil*, 18 NM 44, 133 P 975; *People ex rel. Soer v Crane*, 125 NY 535, 26 NE 736.

Footnote 24. *Morton v Morton*, 16 Colo 358, 27 P 718; *Bankers Mut. Casualty Co. v Peoples Bank of Talbotton*, 127 Ga 326, 56 SE 429.

Footnote 25. *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *Garland v Gaines*, 73 Conn 662, 49 A 19; *George F. Sloan & Bro. v Grollman*, 113 Md 192, 77 A 577; *Long Bell Lumber Co. v Nyman*, 145 Mich 477, 108 NW 1019; *Russell v Buckley*, 4 RI 525.

Footnote 26. *Schutz v Jordan*, 141 US 213, 35 L Ed 705, 11 S Ct 906; *Kimberly v Arms*, 129 US 512, 32 L Ed 764, 9 S Ct 355; *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382; *Marston v Bigelow*, 150 Mass 45, 22 NE 71; *Austin v Holland*, 69 NY 571.

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A correct address is one of the essential elements on which the presumption of the receipt of a letter from evidence of its proper mailing is founded; as a general rule, a failure to show that the letter was correctly addressed will deprive the sender of the benefit of such presumption. 27 No presumption arises that a person to whom a letter is sent by mail received it unless he resides in the city or town to which the letter is addressed. 28 The street and number of the addressee must ordinarily be included in the address, 29 although, where the addressee is a large corporation or a well-known public official, a more general and less definite designation or address may be sufficient. 30 There is no presumption that the addressee of a letter received it from the fact that it was not returned to the sender, if it was not directed to the place in which the addressee resided at the time. 31

Where it is shown that the postal authorities have been informed of a change in address, the law presumes that a communication addressed to a person at his former residence or place of business has been forwarded. 32

According to the view that is adopted in some jurisdictions, proof of the mailing of a letter carries with it the implication that it was properly addressed; 33 others hold that no such implication arises from the mere fact of mailing. 34 The more reasonable rule on this point would seem to be that while the inference from mailing is broad enough to include all things necessary to proper mailing in the general terms, including the prepayment of postage, 35 it does not go further and does not, therefore, imply that the letter was properly addressed to the addressee. 36

Footnotes

Footnote 27. *Minnick v State Farm Mut. Auto. Ins. Co.* (Super) 54 Del 125, 174 A2d 706; *Reserve Ins. Co. v Johnson*, 260 Iowa 740, 150 NW2d 632; *Goodwin v Provident Sav. Life Assur. Soc.*, 97 Iowa 226, 66 NW 157; *Sawyer v Central Louisiana Electric Co.* (La App 3d Cir) 136 So 2d 153; *State v Kleen* (Mo) 481 SW2d 229; *Feder Silberberg Co. v McNeil*, 18 NM 44, 133 P 975; *Phelan v Northwestern Mut. Life Ins. Co.*, 113 NY 147, 20 NE 827; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

In *Grannis v Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779, a letter addressed to Albert Guilfuss in a designated place was presumed to have been received by a person in that place who is named Albert Geilfuss, for whom it was intended.

It could be presumed that bank statements were regularly received where the address, to which the statements were mailed, was proper. *Swanco Trust Co. v Nebraska Nat. Bank*, 1 NCA 41, 1992 Neb App LEXIS 54.

Footnote 28. *Henderson v Carbondale Coal & Coke Co.*, 140 US 25, 35 L Ed 332, 11 S Ct 691.

Footnote 29. *Chicago, R. I. & P. R. Co. v Chickasha Nat. Bank* (CA8 Okla) 174 F 923; *Fleming & Ayrest Co. v Evans*, 9 Kan App 858, 61 P 503, revd on other grounds 62 Kan 811, 64 P 591; *Manhattan Life Ins. Co. v Fields* (Tex Civ App) 26 SW 280.

Footnote 30. *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153; *Barnet v Norton*, 90 Vt 544, 99 A 238.

Footnote 31. *Goodwin v Provident Sav. Life Assur. Soc.*, 97 Iowa 226, 66 NW 157.

Footnote 32. *Marston v Bigelow*, 150 Mass 45, 22 NE 71.

Footnote 33. *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *Model Mill Co. v Webb*, 164 NC 87, 80 SE 232.

Footnote 34. *Johnson v New York, N. H. & H. R. R.*, 111 Me 263, 88 A 988; *Feder Silberberg Co. v McNeil*, 18 NM 44, 133 P 975.

Footnote 35. § 263.

Footnote 36. *Feder Silberberg Co. v McNeil*, 18 NM 44, 133 P 975.

§ 265 --Time of receipt

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is well settled that where it is proved that a letter was properly mailed, the presumption arises that it was received in the ordinary course of the public mails, in the absence of evidence to the contrary. 37 But no presumption as to the time of the receipt of a letter will be indulged in the absence of any proof as to where and when it was mailed or as to the frequency of the mails or the usual course or time of the mails between the place of mailing and the place of the purported receipt of the letter. 38

Footnotes

Footnote 37. *Schutz v Jordan*, 141 US 213, 35 L Ed 705, 11 S Ct 906; *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382; *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *German Nat. Bank v Burns*, 12 Colo 539, 21 P 714; *Pitts v Hartford Life & Annuity Ins. Co.*, 66 Conn 376, 34 A 95; *Matlock v Citizens' Nat. Bank*, 43 Idaho 214, 250 P 648, 50 ALR 1418; *Plath v Minnesota Farmers' Mut. Fire Ins. Asso.*, 23 Minn 479; *Jensen v McCorkell*, 154 Pa 323, 26 A 366; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

Footnote 38. *Starr v Holck*, 318 Mich 452, 28 NW2d 289, 172 ALR 413; *Boon v State Ins. Co.*, 37 Minn 426, 34 NW 902; *Hood v M. F. A. Mut. Ins. Co.* (Mo App) 379 SW2d 806.

The presumption did not arise, where, inter alia, there was no evidence as to the time for delivery in the ordinary course of the mails of a letter mailed from one town in Missouri to another. *State v Kleen* (Mo) 481 SW2d 229.

A letter will not be presumed to have reached the person to whom it was addressed on the day of its date or at any time earlier than it is actually shown to have been in his possession, when it is found among his papers after his death, but is addressed to him at a place other than his regular post-office address. *Phelan v Northwestern Mut. Life Ins. Co.*, 113 NY 147, 20 NE 827.

Absent proof of the normal course of the mails and the time usually required to convey a letter from the place of dispatch to the place of delivery, the law indulges no presumption as to the time a letter was received. *Davis v American Interinsurance Exchange*, 228 Va 1, 319 SE2d 723.

§ 266 --Rebuttal and probative effect of presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The presumption that a letter properly mailed was received by the addressee is not conclusive, but may be rebutted by evidence showing that the letter was not in fact received. 39 Some authority holds that the presumption is entirely overcome by the uncontradicted testimony of the addressee that the letter was never received, 40 but the rule followed by most of the courts is that the denial of the receipt of the letter raises an issue of fact to be determined by the jury. 41 In such cases, the question of the credibility of the rebutting testimony is for the trier of fact. 42 In any event, the presumption arising from proof of mailing a communication has been held not to be overcome by the testimony of the addressee that he does not remember whether he received it, but that he is inclined to think that he did not, 43 or that he did not remember seeing it, 44 or by the testimony of an officer or employee of a firm showing that he did not receive the communication, without a showing that no one else in authority received it. 45 Similarly, the denial of receipt of a letter by company officials in charge of a branch office to which the letter was mailed will not overcome the presumption of its receipt. 46

There is authority to the effect that the presumption that a letter properly mailed was received by the addressee is not evidence and has no weight as such, but is merely a rule controlling the duty of going forward with evidence. 47 There is other authority holding that the presumption continues as evidence, even in the face of controverting evidence, to be considered in the light of all the facts and circumstances adduced on the trial, and to be given such weight as the triers think it entitled to in determining the fact at issue—that is, whether the mailed letter was received. 48

§ 266 --Rebuttal and probative effect of presumption [SUPPLEMENT]

Case authorities:

If defendant denies receipt of mailing, rebuttable presumption of delivery and receipt of mailing created by evidence of mailing is spent and question of fact is raised so that issue is then one of credibility for factfinder and factfinder may believe or disbelieve denial of receipt. *State ex rel. Flores v State* (1994) 183 Wis 2d 587, 516 NW2d 362.

Footnotes

Footnote 39. *Schutz v Jordan*, 141 US 213, 35 L Ed 705, 11 S Ct 906; *Henderson v Carbondale Coal & Coke Co.*, 140 US 25, 35 L Ed 332, 11 S Ct 691; *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382; *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *German Nat. Bank v Burns*, 12 Colo 539, 21 P 714; *Pitts v Hartford Life & Annuity Ins. Co.*, 66 Conn 376, 34 A 95; *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153; *Roshek Realty Co. v Roshek Bros. Co.*, 249 Iowa 349, 87 NW2d 8; *Sullivan v Kuykendall*, 82 Ky 483; *McFerren v Goldsmith-Stern Co.*, 137 Md 573, 113 A 107, 18 ALR 1125; *Marston v Bigelow*, 150 Mass 45, 22 NE 71; *Merchants Nat. Bank v Detroit Trust Co.*, 258 Mich 526, 242 NW 739, 85 ALR 350; *Plath v Minnesota Farmers' Mut. Fire Ins. Asso.*, 23 Minn 479; *Jensen v McCorkell*, 154 Pa 323, 26 A 366; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925; *W. E. Richmond & Co. v Security Nat. Bank*, 16 Tenn App 414, 64 SW2d 863; *Gregg v De Shong* (Tex Civ App) 107 SW2d 893, writ dismissed; *Campbell v Gowans*, 35 Utah 268, 100 P 397; *Walworth v Seaver*, 30 Vt 728; *Yanago v Aetna Life Ins. Co.*, 164 Va 258, 178 SE 904; *Antonowich v Home Life Ins. Co.*, 116 W Va 155, 179 SE 601; *Department of Labor v I. Employment Secur. v Davidson* (Terr Ct) 25 VI 109, 1990 VI LEXIS 18.

Footnote 40. *Planters' Mut. Ins. Ass'n v Green*, 72 Ark 305, 80 SW 151; *Campbell v Gowans*, 35 Utah 268, 100 P 397.

A tax collector's denial that he received a check claimed to have been mailed was held sufficient to overcome any presumption of its receipt. *State ex rel. Guaranty Bank & Trust Co. v Downs*, 10 La App 234, 119 So 723.

Upon the assumption that a letter was mailed to a partnership, positive testimony of both of the partners and their bookkeeper that it was not received has been held to overcome such assumption. *George F. Sloan & Bro. v Grollman*, 113 Md 192, 77 A 577.

Footnote 41. *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382; *Wright v Grain Dealers Nat. Mut. Fire Ins. Co.* (CA4 Va) 186 F2d 956; *Simpson v Jefferson Standard Life Ins. Co.* (CA6 Ohio) 465 F2d 1320, 65 Ohio Ops 2d 196; *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913; *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153; *B. F. Bonewell & Co. v Jacobson*, 130 Iowa 170, 106 NW 614; *Osborne v Unigard Indem. Co.* (Ky App) 719 SW2d 737; *Marston v Bigelow*, 150 Mass 45, 22 NE 71; *Long Bell Lumber Co. v Nyman*, 145 Mich 477, 108 NW 1019; *Plath v Minnesota Farmers' Mut. Fire Ins. Asso.*, 23 Minn 479; *Crissey v State Highway*

Com., 147 Mont 374, 413 P2d 308; *Austin v Holland*, 69 NY 571; *Myra Foundation v Harvey* (ND) 100 NW2d 435, 76 ALR2d 1313; *Jensen v McCorkell*, 154 Pa 323, 26 A 366; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925; *Walworth v Seaver*, 30 Vt 728.

The testimony of an officer of a mercantile company that he did not remember seeing a letter and was sure it had not been received was held to raise an issue for the jury, together with any other facts or circumstances tending to rebut the presumption of receipt. *McFerren v Goldsmith-Stern Co.*, 137 Md 573, 113 A 107, 18 ALR 1125.

Footnote 42. *Larocque v Rhode Island Joint Reinsurance Asso. (RI)* 536 A2d 529.

Footnote 43. *Ashley Wire Co. v Illinois Steel Co.*, 164 Ill 149, 45 NE 410; *Jensen v McCorkell*, 154 Pa 323, 26 A 366.

Footnote 44. *McFerren v Goldsmith-Stern Co.*, 137 Md 573, 113 A 107, 18 ALR 1125.

Footnote 45. *Merchants' Exch. Co. v Sanders*, 74 Ark 16, 84 SW 786; *Pennypacker v Capital Ins. Co.*, 80 Iowa 56, 45 NW 408; *Merchants Nat. Bank v Detroit Trust Co.*, 258 Mich 526, 242 NW 739, 85 ALR 350; *Whitmore v Dwelling House Ins. Co.*, 148 Pa 405, 23 A 1131; *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

A sales manager's statement that to the best of his knowledge and belief and from the course and custom of the business at his office, a letter was not received, where at least 12 persons there handled correspondence and he never opened a letter himself, will not overcome the presumption of its receipt. *Southern Engine & Boiler Works v Vaughan*, 98 Ark 388, 135 SW 913.

Footnote 46. *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153.

Footnote 47. *Dunn v Goldman*, 111 NJL 249, 168 A 299.

Footnote 48. *Atlantic Dredging & Constr. Co. v Nashville Bridge Co. (CA5 Fla)* 57 F2d 519.

A jury was properly instructed that proof that a properly directed letter was placed in a post office created a presumption that it reached its destination and was actually received by the addressee, and that the jury could regard such presumption as sufficient evidence of the basic fact established by the presumption, but was not required to do so. *United States v Perry (CA10 Okla)* 496 F2d 429.

In sustaining a finding that a money order in payment of a life insurance premium was received in due course, the jury could take into account testimony by a postmaster that postal employees could have made a mistake as to the time and date of a postmark, and that the alleged delay in receipt was unusual, as such testimony tended to sustain the presumed finding of fact, where the only substantial probative evidence to the contrary was that the stamp was cancelled on September 14 and that a letter mailed on that date would not have reached its destination in the due course of the mail before September 15; a fact issue was presented which the jury resolved in favor of the sender of the letter. *Employers' Nat. Life Ins. Co. v Willits (Tex Civ App Amarillo)* 436 SW2d 918, writ ref n r e (Mar 5, 1969) and reh of writ of error overr (Apr 2, 1969).

Annotation: Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19 § 16.

§ 267 Receipt of telegram

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The delivery of a properly addressed telegram to a telegraph company for transmission, with the required fee, or the sending of the message, raises a presumption in the absence of proof to the contrary that the telegram reached its destination and was delivered to the sendee in accordance with the obligation which the law imposes upon telegraph companies. 49 In other words, the same presumption exists, in such cases, as arises when a letter has been deposited in the mail duly addressed and stamped. 50 The presumption is one of fact and is entitled to more or less weight, according to the circumstances under which the telegram was sent, but its receipt may be disproved. 51

Proper dispatch usually means that the telegram was sent prepaid, properly addressed, and delivered to the telegraph company. 52 But in the absence of any evidence of how or for what purpose a supposed telegram comes into the telegraph company's possession, proof that the requisite fee was paid or that the telegram was sent is no basis for the inference of delivery. 53 And in at least one state it has been held that before the presumption applies it must be shown that the telegram was received by the telegraph company at its office in the place to which it was directed. 54

The rule that the receipt of a telegram is presumed from its delivery for transmission is limited to actions involving disputes between the sender and sendee and their privies, and the presumption will not arise where the telegraph company is a party to the action. 55 Nor does the presumption apply, it has been held, to cablegrams sent during a period of unusual disturbance such as war. 56

Footnotes

Footnote 49. *Wagner Tractor, Inc. v Shields* (CA9 Or) 381 F2d 441, 24 ALR3d 1423 (applying Oregon law); *Corry v Sylvia y Cia*, 192 Ala 550, 68 So 891; *Eppinger v Scott*, 112 Cal 369, 44 P 723; *Ottumwa v McCarthy Improv. Co.*, 175 Iowa 233, 150 NW 586, supp op on other grounds 175 Iowa 235, 154 NW 306; *Smith v Easton*, 54 Md 138; *Long Bell Lumber Co. v Nyman*, 145 Mich 477, 108 NW 1019; *Perry v German-American Bank*, 53 Neb 89, 73 NW 538; *Oregon S.S. Co. v Otis*, 100 NY 446, 3 NE 485, error dismd 116 US 548, 29 L Ed 719, 6 S Ct 523; *Western Twine Co. v Wright*, 11 SD 521, 78 NW 942.

Annotation: Applicability and application, in civil case, of presumption of addressee's receipt of telegram, 24 ALR3d 1434.

Footnote 50. *Ottumwa v McCarthy Improv. Co.*, 175 Iowa 233, 150 NW 586, supp op on

other grounds 175 Iowa 235, 154 NW 306; *Perry v German-American Bank*, 53 Neb 89, 73 NW 538; *Oregon S.S. Co. v Otis*, 100 NY 446, 3 NE 485, error dismd 116 US 548, 29 L Ed 719, 6 S Ct 523.

As to presumption of receipt of letter from proof of mailing, see § 262.

Footnote 51. *Eppinger v Scott*, 112 Cal 369, 44 P 723; *Ottumwa v McCarthy Improv. Co.*, 175 Iowa 233, 150 NW 586, supp op on other grounds 175 Iowa 235, 154 NW 306.

Footnote 52. *Wagner Tractor, Inc. v Shields* (CA9 Or) 381 F2d 441, 24 ALR3d 1423 (holding that it would not be reasonable to presume delivery where there was no evidence that the addressee's name or street address was on the telegram, and the only evidence was the telegraph operator's recollection that the message was sent to the city where the addressee lived).

Footnote 53. *Ottumwa v McCarthy Improv. Co.*, 175 Iowa 233, 150 NW 586, supp op on other grounds 175 Iowa 235, 154 NW 306.

Footnote 54. *State v Gritzner*, 134 Mo 512, 36 SW 39.

Footnote 55. *Commercial Cable Co. v Philipp Bauer Co.*, 100 Misc 663, 165 NYS 399, revd on other grounds 102 Misc 699, 169 NYS 450.

Footnote 56. *Commercial Cable Co. v Philipp Bauer Co.*, 100 Misc 663, 165 NYS 399, revd on other grounds 102 Misc 699, 169 NYS 450.

§ 268 Authenticity of reply to letter or message

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed on it. 57 This is especially true where the letter is written on his business stationery. 58 The broad principle underlying this rule is that there exists a presumption that those in charge of receiving and transmitting mail perform their duties in the regular and proper manner. 59 However, testimony that a person received a letter which he believed was from a certain person, but which was not signed, and whose writing he was not acquainted with, is no proof that the letter was written by such person. 60

It is also well settled that a telegram received in reply to a telegram addressed to the sender is presumed to be genuine, and is admissible in evidence without further proof of the identity of the sender. 61 However, such a presumption is rebuttable, the question of the genuineness of the telegram being for the jury. 62

Footnotes

Footnote 57. *New York, N. H. & H. R. Co. v Cella*, 88 Conn 515, 91 A 972; *Marcotte's Estate v Clay*, 170 Kan 189, 224 P2d 998; *Gulf Refining Co. v Bagby*, 200 La 258, 7 So 2d 903; *American Bonding Co. v Ensey*, 105 Md 211, 65 A 921; *Leunis Co. v Singer*, 102 NJL 68, 130 A 457; *Edwards Bros. v Erwin*, 148 NC 429, 62 SE 545; *First Nat. Bank v Ford*, 30 Wyo 110, 216 P 691, 31 ALR 1441.

Footnote 58. *Marcotte's Estate v Clay*, 170 Kan 189, 224 P2d 998.

Footnote 59. *Gulf Refining Co. v Bagby*, 200 La 258, 7 So 2d 903; *Edwards Bros. v Erwin*, 148 NC 429, 62 SE 545.

Footnote 60. *Cochran v Butterfield*, 18 NH 115.

Footnote 61. *House Grain Co. v Finerman & Sons*, 116 Cal App 2d 485, 253 P2d 1034; *People v Hammond*, 132 Mich 422, 93 NW 1084; *Western Twine Co. v Wright*, 11 SD 521, 78 NW 942.

Footnote 62. *House Grain Co. v Finerman & Sons*, 116 Cal App 2d 485, 253 P2d 1034.

§ 269 --Telephone calls

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One who answers a telephone call at the place of business of the person called for, and undertakes to respond as the agent, is presumed to speak for him in respect to matters of the general business carried on by such person at that place. 63 The presumption rests on the apparent authority of an agent. 64 The presumption may be very slight or strong, according to the circumstances, but the statements of such persons should be admitted in evidence as prima facie the statements of one having authority to speak. 65

◆ **Caution:** The presumption extends only to communications relating to the usual business carried on at the place from which the telephone communication comes. 66

As the result of the presumption that the person answering the telephone in place of business has authority to speak in respect to matters of the general business carried on at such establishment, the burden rests on the business establishment to rebut the presumption, and in the absence of such rebutting evidence, the presumption controls as a matter of law. The presumption may be rebutted by showing that the person calling the place of business was not acting in good faith or had no reason to believe that the person answering the telephone had authority to act. Once evidence competent to rebut the presumption is introduced, it becomes a question of fact whether the person calling had good reason to rely on the apparent authority of the person answering. 67

Footnotes

Footnote 63. *New York Life Ins. Co. v Silverstein* (CA8 Mo) 53 F2d 986; *Collins v Lewis*, 111 Conn 299, 149 A 668; *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591; *Cohen v Standard Acc. Ins. Co.*, 194 SC 533, 9 SE2d 222.

Footnote 64. *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591.

Footnote 65. *Collins v Lewis*, 111 Conn 299, 149 A 668; *Cohen v Standard Acc. Ins. Co.*, 194 SC 533, 9 SE2d 222; *Gilliland v Southern R. Co.*, 85 SC 26, 67 SE 20.

Generally, as to the admissibility in evidence of telephone conversations, see §§ 577 et seq.

Footnote 66. *Gilliland v Southern R. Co.*, 85 SC 26, 67 SE 20.

Footnote 67. *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591.

7. Conditions or Character [270-277]

§ 270 Regularity and legality

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes integrity of conduct and that one intends to do only what one has a right to do. 68 Thus, in the absence of evidence to the contrary, there is a presumption that persons act fairly, honestly, and in good faith. 69 One may assume that others will obey the law. 70 However, the presumption is rebuttable, by evidence which demonstrates that the parties intended to conduct the activity in a manner not sanctioned by the law. 71 In addition, the question may be presented whether the factual conclusion desired necessarily flows from the presumption that someone acted in accord with his contractual obligations. 72

Footnotes

Footnote 68. *Golden Press, Inc. v Rylands*, 124 Colo 122, 235 P2d 592, 28 ALR2d 672; *Kalpakis v Kalpakis*, 221 La 739, 60 So 2d 217, 33 ALR2d 1224; *Cunningham v Great N. R. Co.*, 73 ND 315, 14 NW2d 753.

Footnote 69. *Sunday Lake Iron Co. v Wakefield*, 247 US 350, 62 L Ed 1154, 38 S Ct 495 (not followed by *Rocky Mountain Oil & Gas Asso. v State Bd. of Equalization*, Dept. of Revenue & Taxation (Wyo) 749 P2d 221); *Queen Ins. Co. v Jones*, 76 Ariz 198, 262 P2d 241; *Golden Press, Inc. v Rylands*, 124 Colo 122, 235 P2d 592, 28 ALR2d 672; *Whittington v Cameron*, 385 Ill 99, 52 NE2d 134, 150 ALR 551; *Farmers' Nat. Bank v Jones*, 234 Ky 591, 28 SW2d 787, 70 ALR 335; *Kalpakis v Kalpakis*, 221 La 739, 60 So 2d 217, 33 ALR2d 1224; *Mairs v Madden*, 307 Mass 378, 30 NE2d 242, 132 ALR 256

(ovrld on other grounds by *Donahue v Rodd Electrotype Co.*, 367 Mass 578, 328 NE2d 505); *Bernheimer v First Nat. Bank*, 359 Mo 1119, 225 SW2d 745 (ovrld on other grounds by *Re L----* (Mo) 499 SW2d 490) as stated in *Retirement Bd. of Police Retirement System v Noel* (Mo App) 652 SW2d 874; *Cunningham v Great N. R. Co.*, 73 ND 315, 14 NW2d 753; *Maberry v Julian* (Tex Civ App Texarkana) 456 SW2d 234, appeal after remand (Tex Civ App Dallas) 479 SW2d 770, writ ref n r e (Oct 4, 1972) and reh'g of writ of error overr (Nov 1, 1972); *Shaw v Massachusetts Bonding & Ins. Co.* (Tex Civ App Dallas) 373 SW2d 553; *New York Life Ins. Co. v Davis*, 96 Va 737, 32 SE 475.

Where evidence is equally capable of an honest or dishonest interpretation, the court will adopt the interpretation that favors honesty. *Hendrickson v Syverson* (ND) 82 NW2d 827.

The burden placed on an insurer to rebut the presumption that a settlement is presumptive evidence of the liability of the insured and the amount of damages, by showing that the settlement was unreasonable or in bad faith, is consistent with the general assumption that in the absence of contrary evidence, persons act fairly, honestly, and in good faith. *Griggs v Bertram*, 88 NJ 347, 443 A2d 163.

Footnote 70. *Cooper v Dasher*, 290 US 106, 78 L Ed 203, 54 S Ct 6; *Roadway Express, Inc. v Piekenbrock* (Iowa) 306 NW2d 784; *Wilcox Oil Co. v Corporation Com.* (Okla) 393 P2d 242, 21 OGR 67; *Norton v Coffield* (Okla) 357 P2d 434.

One is entitled to the benefit of the presumption that the law has been obeyed, that everyone will conduct his or her business in conformity with the law, that an individual intends to do right rather than wrong, and intends to do only what he or she has a right to do. *Acting Director, Dept. of Forests & Parks v Walker*, 271 Md 711, 319 A2d 806.

In a loitering prosecution, where the defendant's presence may have had a proper purpose, it does not give rise to any presumption of improper activity. *Palmentere v Wright* (Mo) 485 SW2d 104.

Footnote 71. *Lynn v Cepurneek*, 352 Pa Super 379, 508 A2d 308, later proceeding 373 Pa Super 479, 541 A2d 771.

Footnote 72. *Maberry v Julian* (Tex Civ App Texarkana) 456 SW2d 234, appeal after remand (Tex Civ App Dallas) 479 SW2d 770, writ ref n r e (Oct 4, 1972) and reh'g of writ of error overr (Nov 1, 1972) (holding that even though a real-estate broker is presumed to have acted properly when returning a deposit because he thought the real-estate purchase contract had terminated, the inference could not be made that the purchaser did indeed terminate the contract).

§ 271 Intent as to consequences of acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Every sane person is presumed to intend the ordinary, natural, probable, or necessary consequence of his or her voluntary, intentional, and deliberate act. 73 Stated otherwise, persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequence of their acts. 74 In some cases, it is said that one is conclusively presumed to intend the obvious and probable consequences of his voluntary act. 75 However, in light of the requirement that the prosecution prove every element of a criminal offense beyond a reasonable doubt, there can be no conclusive presumption of intent where intent is an element of the crime charged, 76 even if the jury is instructed that the presumption may be rebutted, 77 in criminal cases, the statement that a person intends the ordinary consequences of his acts is merely a rule assisting the jury in reaching its conclusion upon a question of fact, and is not a presumption of law; it establishes only a permissive inference and does not shift the burden of proof. 78 Thus, it is sounder to say that in light of the circumstances of a particular case and normal human experience, it is reasonable to infer that the results of a defendant's acts were intended. 79 In many criminal cases where there is no direct evidence of intent, intent is established by the jury's inference of malice from the defendant's conduct. 80

Footnotes

Footnote 73. *Whitfield v United States*, 92 US 165, 2 Otto 165, 23 L Ed 705; *Wilson v City Bank*, 84 US 473, 17 Wall 473, 21 L Ed 723; *Duke v United States* (CA4 Va) 90 F2d 840, 112 ALR 317, cert den 302 US 685, 82 L Ed 528, 58 S Ct 33, reh den 302 US 349, 82 L Ed 503, 58 S Ct 135 and reh den 302 US 650, 82 L Ed 504, 58 S Ct 261 and reh den 302 US 785, 82 L Ed 600, 58 S Ct 135; *Cleo-Syrup Corp. v Coca-Cola Co.* (CA8 Mo) 139 F2d 416, 60 USPQ 98, 150 ALR 1056, cert den 321 US 781, 88 L Ed 1074, 64 S Ct 638, 60 USPQ 578; *Continental Casualty Co. v Cunningham*, 188 Ala 159, 66 So 41; *People ex rel. Connor v Stapleton*, 18 Colo 568, 33 P 167; *Brown v Jacobs Pharmacy Co.*, 115 Ga 429, 41 SE 553; *Long v State*, 192 Ind 524, 137 NE 49, 24 ALR 1234; *State v Eye*, 161 Kan 69, 166 P2d 572; *Weikel v Sterns*, 142 Ky 513, 134 SW 908; *Smith v Lyons*, 142 La 975, 77 So 896; *Smith v Clark*, 242 Mass 1, 136 NE 66, 23 ALR 582; *Foster v Wright*, 240 Miss 566, 127 So 2d 873; *Peterson v Wahlquist*, 125 Neb 247, 249 NW 678, 89 ALR 747; *Delaware, L. & W. R. Co. v Reich*, 61 NJL 635, 40 A 682; *May v Western Union Tel. Co.*, 157 NC 416, 72 SE 1059; *State v Farmer*, 156 Ohio St 214, 46 Ohio Ops 97, 102 NE2d 11; *Benway v Hooper*, 110 Vt 497, 8 A2d 658; *Conrad v Baltimore & O. R. Co.*, 64 W Va 176, 61 SE 44; *Pewaukee v Savoy*, 103 Wis 271, 79 NW 436 (criticized on other grounds by *Haase v Kingston Co-op. Creamery Ass'n*, 212 Wis 585, 250 NW 444) as stated in *Klingeisen v Department of Natural Resources* (App) 163 Wis 2d 921, 472 NW2d 603, review den (Wis) 477 NW2d 287.

Footnote 74. *Clarion Bank v Jones*, 88 US 325, 21 Wall 325, 22 L Ed 542; *Foster v Wright*, 240 Miss 566, 127 So 2d 873.

Footnote 75. *Peterson v Wahlquist*, 125 Neb 247, 249 NW 678, 89 ALR 747; *Jamison v Metropolitan Life Ins. Co.*, 24 Tenn App 398, 145 SW2d 553.

In a civil matter, a person is presumed to have intended the necessary and unavoidable consequences of his voluntary act no matter how earnestly he asserts a different intent. *Standard Oil Co. v Review Board of Indiana Employment Secur. Div.*, 119 Ind App 576, 88 NE2d 567.

Footnote 76. *Sandstrom v Montana*, 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450.

Footnote 77. *Francis v Franklin*, 471 US 307, 85 L Ed 2d 344, 105 S Ct 1965.

Footnote 78. *State v Burton*, 235 Kan 472, 681 P2d 646; *People v Flack*, 125 NY 324, 26 NE 267.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) § 74.

Footnote 79. *State v Boisvert (Me)* 236 A2d 419; *State v Jones*, 143 Mont 155, 387 P2d 913.

Footnote 80. *Rose v Clark*, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (among conflicting authorities noted on other grounds in *State v Seward (La)* 509 So 2d 413) and on remand (CA6) 822 F2d 596.

Annotation: Homicide: presumption of deliberation or premeditation from the circumstances attending the killing, 96 ALR2d 1435.

Homicide: presumption of deliberation or premeditation from the fact of killing, 86 ALR2d 656.

§ 272 Health and physical condition

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes, in the absence of evidence to the contrary, that a person is in average normal health. 81 As far as the natural functions of the body or organs are concerned, all persons are presumed to be normal until the contrary is made to appear. 82 There is also a presumption that every organ of the human body, including glands, has some function to perform in maintaining the body in sound health. 83

Human beings are not sufficiently alike to warrant the presumption that when a drug produces a certain effect upon a person, it will to a certain extent similarly affect another, taking into account age, strength, and other conditions present. 84

A blind person is presumed, in the absence of proof of experience, to be unfit to travel alone. 85

Footnotes

Footnote 81. *Green v Los Angeles T. R. Co.*, 143 Cal 31, 76 P 724.

Footnote 82. *Ledy v National Council K. L. S.*, 129 Minn 137, 151 NW 905; *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213; *Brooker v Silverthorne*,

111 SC 553, 99 SE 350, 5 ALR 1283; Harris v Ogden Steam Laundry Co., 39 Utah 436, 117 P 700 (holding that if the gases or fumes emanating from a particular liquid or substance are shown to have had certain effects when they come in contact with a number of individuals, it is fair to infer that all persons will be similarly affected under like circumstances).

Footnote 83. Hively v Higgs, 120 Or 588, 253 P 363, 53 ALR 1052.

This presumption is not overcome with respect to the tonsils by the fact that medical science has not discovered the precise function performed by them. Hively v Higgs, 120 Or 588, 253 P 363, 53 ALR 1052.

Footnote 84. Ohio County Drug Co. v Howard, 201 Ky 346, 256 SW 705, 31 ALR 1355.

Footnote 85. Illinois C. R. Co. v Smith, 85 Miss 349, 37 So 643.

§ 273 Sobriety or drunkenness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A state of sobriety is the normal condition and it is the condition which is presumed to exist as to every person in any given case; this presumption stands in favor of a party in the place of proof. 86 Where evidence is introduced tending to show a condition of intoxication, the presumption of a state of sobriety is overcome. 87 However, the fact that one is in possession of liquor does not have the effect of overcoming the presumption of sobriety. 88

§ 273 ----Sobriety or drunkenness [SUPPLEMENT]

Case authorities:

The Court of Appeals did not err in considering the granting of a summary judgment motion for defendant social hosts in declining to consider any evidence of the driver's condition or appearance after he left the party. While admissible to prove intoxication, the evidence was not probative on the question of whether defendants knew or should have known that he was intoxicated at the time alcohol was served to him at the party. Camalier v Jeffries (1995) 340 NC 699, 460 SE2d 133.

Footnotes

Footnote 86. Richardson v Sioux City, 172 Iowa 260, 154 NW 430; Re Townley's Will (Sur) 144 NYS 750, affd 164 App Div 919, 149 NYS 1114.

Footnote 87. Hubbard v Mason City, 60 Iowa 400, 14 NW 772.

Statutory presumptions arising from medical or chemical tests administered to persons suspected of driving while intoxicated are discussed in § 240.

Footnote 88. *Richardson v Sioux City*, 172 Iowa 260, 154 NW 430.

§ 274 Character and reputation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While it has been said that the law does not presume that a witness does or does not tell the truth, 89 it has also been said that the law presumes every person to be reputed truthful until evidence is produced to the contrary. 90 In civil cases the law presumes that the reputation of the plaintiff is good until the contrary is shown. 91

It has been held that the fact that one has committed an offense involving turpitude is conclusive evidence that he was not at the time of good moral character, and reformation is not to be presumed merely from the lapse of a brief period. 92

Footnotes

Footnote 89. *State v Halvorson*, 103 Minn 265, 114 NW 957.

Footnote 90. *Johnson v State*, 129 Wis 146, 108 NW 55.

Footnote 91. *Burns v Burns* (Mo App) 193 SW2d 951; *Sloneker v Van Ausdall*, 106 Ohio St 320, 1 Ohio L Abs 134, 140 NE 121, 28 ALR 759; *Lewis v Williams*, 105 SC 165, 89 SE 647.

Footnote 92. *Hempstead v Atchison, Topeka & Santa Fe Hospital Ass'n*, 112 Kan 241, 210 P 492, 30 ALR 243.

§ 275 --In criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In criminal cases, the doctrine which is supported by most of the cases is that there is no presumption one way or the other upon the question whether the general character of the accused in a criminal case is good or bad. 93 The accused is not bound to place his character in issue; in the event he omits to do so, no inference of his guilt can be drawn therefrom by the jury. In other words, the omission to show the good character of the

accused does not justify a presumption that his character is bad, from which an inference of guilt can be drawn. 94 The fact, however, that in a criminal case the state cannot offer evidence to impeach the character of the accused until the accused has put his character in issue by offering evidence in support of it 95 has led many courts to assert that the law invests every person accused of crime with a presumption in favor of good character, 96 which continues and must be indulged so long, at least, as the accused rests upon the presumption without offering affirmative evidence of his character. 97 Moreover, the offering by the accused of evidence of his good character for truth and veracity does not deprive him of the presumption that his character is good. 98

The presumption of good character in behalf of the defendant in a criminal prosecution has been held not to constitute evidence and to have no probative effect when countervailing proof is given. 99

Footnotes

Footnote 93. Greer v United States, 245 US 559, 62 L Ed 469, 38 S Ct 209; Price v United States (CA8 Okla) 218 F 149; Danner v State, 54 Ala 127; People v Walls, 231 Mich 110, 203 NW 656; People v Lingley, 207 NY 396, 101 NE 170, reh den 208 NY 597, 102 NE 1109; State v Runnion, 122 W Va 134, 7 SE2d 648.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) § 44.

Footnote 94. United States v Lancaster (CC Ga) 44 F 896; Bennett v State, 86 Ga 401, 12 SE 806.

Footnote 95. § 365.

Footnote 96. Bennett v State, 86 Ga 401, 12 SE 806; Fletcher v State, 49 Ind 124; Biester v State, 65 Neb 276, 91 NW 416; Sabo v State, 119 Ohio St 231, 6 Ohio L Abs 386, 163 NE 28; State v Mewhinney, 43 Utah 135, 134 P 632 (superseded by statute on other grounds as stated in State v Crick (Utah) 675 P2d 527).

In Durham v State, 128 Tenn 636, 163 SW 447, which recognized such a presumption, it was held that the presumption of good character does not have any effect as evidence and cannot be resorted to as an independent probative element to re-enforce the presumption of innocence and to create a reasonable doubt.

Footnote 97. Fletcher v State, 49 Ind 124.

Footnote 98. Durham v State, 128 Tenn 636, 163 SW 447.

Footnote 99. Chambliss v United States (CA8 Okla) 218 F 154; Price v United States (CA8 Okla) 218 F 149.

Annotation: Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19 §§ 8 et seq.

§ 276 Consent or acquiescence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The conduct of an individual may give rise to an inference or presumption that he has consented to a particular state of affairs. 1 In particular, the assent or acquiescence of a party to an act done for his benefit ordinarily will be presumed, 2 even though he is a minor. 3

Assent may be inferred or presumed from silence and acquiescence insofar as no other explanation is equally consistent with silence. 4 However, no implication of assent or presumption of acquiescence can arise from the failure of an incompetent to act. 5

Footnotes

Footnote 1. *Weaver Bros., Inc. v Newlin* (Mun Ct App Dist Col) 74 A2d 65, 18 ALR2d 877 (landlord by its conduct impliedly gave consent to the keeping of a dog).

Footnote 2. *Games v Stiles*, 39 US 322, 14 Pet 322, 10 L Ed 476; *Carver v Jackson*, 29 US 1, 4 Pet 1, 7 L Ed 761; *Smith v Fox* (Okla) 289 P2d 126.

The assent of a creditor to an absolute assignment of property to him by his debtor, to secure a pre-existing debt, will be presumed, in the absence of evidence to the contrary. *Grove v Brien*, 49 US 429, 8 How 429, 12 L Ed 1142.

An acceptance by the grantees of a deed of assignment for creditors, absolute and unconditional, will be presumed in the absence of all evidence to the contrary. *Tompkins v Wheeler*, 41 US 106, 16 Pet 106, 10 L Ed 903.

Footnote 3. *Standiford v Standiford*, 97 Mo 231, 10 SW 836.

Footnote 4. *Carroll County v Smith*, 111 US 556, 28 L Ed 517, 4 S Ct 539; *Barings v Dabney*, 86 US 1, 19 Wall 1, 22 L Ed 90; *Withers v Withers*, 33 US 355, 8 Pet 355, 8 L Ed 972; *Brashear v West*, 32 US 608, 7 Pet 608, 8 L Ed 801; *Roberts v Sioux City & P. R. Co.*, 73 Neb 8, 102 NW 60; *Burton v Horn & Hardart Baking Co.*, 371 Pa 60, 88 A2d 873, 63 ALR2d 731.

As to whether silence or inaction constitutes acceptance of an offer under the law of contracts, see 17A Am Jur 2d, Contracts § 103.

Footnote 5. *Andrews v Bassett*, 92 Mich 449, 52 NW 743.

§ 277 Solvency

The law presumes solvency, rather than insolvency. 6 Insolvency may, however, be inferred from the circumstances surrounding a transaction. 7

Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time before that. 8 Also, there is no presumption that an adjudication of insolvency indicates that a party continues to be insolvent. 9

Footnotes

Footnote 6. *Benton v Benton*, 78 Kan 366, 97 P 378; *Stewart v Citizens Casualty Co.*, 61 Misc 2d 809, 306 NYS2d 973, revd on other grounds (1st Dept) 34 App Div 2d 525, 308 NYS2d 513, motion gr 26 NY2d 963, 311 NYS2d 6, 259 NE2d 478 and affd 27 NY2d 685, 314 NYS2d 7, 262 NE2d 215, cert den 401 US 910, 27 L Ed 2d 808, 91 S Ct 871; *Commonwealth, Ins. Dept. v Safeguard Mut. Ins. Co.*, 18 Pa Cmwlt 195, 336 A2d 674, mod on other grounds 478 Pa 592, 387 A2d 647.

Illustrative applications of the rule include that an indorser was presumably solvent (*Lee v Southern Pipe & Supply Co.*, 283 Ala 37, 214 So 2d 313), that a judgment debtor is presumed solvent and a judgment is worth its face value (*Bush v Reid (Alaska)* 516 P2d 1215, 74 ALR3d 669), that a criminal defendant is presumed solvent under a statute providing for the appointment of counsel (*Holmes v State (Fla App D1)* 448 So 2d 1070 (among conflicting authorities noted in *Chiles v State (Fla App D5)* 454 So 2d 726, 9 FLW 1794)), and that, for the purpose of contribution, joint tortfeasors are presumed to be solvent (*Hardy v State (La App 3d Cir)* 404 So 2d 981, cert den (La) 407 So 2d 741 and cert den (La) 407 So 2d 741; *Underwood v Waterslides of Mid-America, Inc. (Tenn App)* 823 SW2d 171).

A bank, so long as it is a going institution receiving deposits and paying out moneys in the usual way, will be presumed to have funds on hand with which to pay the checks of its depositors in the usual manner. *Schafer v Olson*, 24 ND 542, 139 NW 983.

As to the presumption of solvency in a fraudulent conveyance case, see 37 Am Jur 2d, *Fraudulent Conveyances* § 218.

Footnote 7. *Frederick Town Sav. Inst. v Michael*, 81 Md 487, 32 A 189. See also *Re Howell's Estate*, 66 Neb 575, 92 NW 760.

Footnote 8. *Ellis v State*, 138 Wis 513, 119 NW 1110.

Footnote 9. *Stewart v Citizens Casualty Co.*, 61 Misc 2d 809, 306 NYS2d 973, revd on other grounds (1st Dept) 34 App Div 2d 525, 308 NYS2d 513, motion gr 26 NY2d 963, 311 NYS2d 6, 259 NE2d 478 and affd 27 NY2d 685, 314 NYS2d 7, 262 NE2d 215, cert den 401 US 910, 27 L Ed 2d 808, 91 S Ct 871.

8. Suicide or Accidental Death [278-281]

§ 278 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In cases where the cause of death is in issue but there is nothing to show how death was caused, there is a negative presumption against suicide ¹⁰ and an affirmative presumption of death by accidental means. ¹¹ However, there is no presumption that death was caused by accidental means where it is shown to be caused by external and violent means. ¹²

The presumption against suicide is one of law and not of fact. ¹³ It is based on the almost universal human characteristics of love of life and fear of death, ¹⁴ rather than upon any difficulty of producing evidence. ¹⁵

Although a presumption against suicide is recognized, it does not follow that the law should also create a presumption against attempted suicide, since when death does not result, the injured party is normally available to testify as to his version of the occurrence. ¹⁶

Footnotes

Footnote 10. *Del Vecchio v Bowers*, 296 US 280, 80 L Ed 229, 56 S Ct 190; *International Life Ins. Co. v Carroll* (CA6 Tenn) 17 F2d 42, 50 ALR 362; *Industrial Com. of Colorado State Compensation Ins. Fund v Peterson*, 151 Colo 289, 377 P2d 542; *Smith v Miller*, 241 Iowa 625, 40 NW2d 597, 14 ALR2d 345; *Muzenich v Grand Carniolian Slovenian Catholic Union*, 154 Kan 537, 119 P2d 504, 138 ALR 818; *Re Von Ette*, 223 Mass 56, 111 NE 696; *Re Sponatski*, 220 Mass 526, 108 NE 466; *State ex rel. Hawkins v Industrial Com. of Minnesota*, 157 Minn 33, 195 NW 766, 36 ALR 394; *Bragg v Ross*, 349 Mo 511, 162 SW2d 263; *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213; *Dill v Sovereign Camp W. O. W.*, 126 SC 303, 120 SE 61, 37 ALR 167; *Carter v Standard Acc. Ins. Co.*, 65 Utah 465, 238 P 259, 41 ALR 1495; *McDaniel v Metropolitan Life Ins. Co.*, 119 W Va 650, 195 SE 597.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) § 38.

Footnote 11. *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded by statute on other grounds as stated in *Poitrass v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113).

Footnote 12. *Smith v John Hancock Mut. Life Ins. Co.* (WD Pa) 254 F Supp 622.

Footnote 13. *Strawhorne v Atlantic Coast Life Ins. Co.*, 238 SC 40, 119 SE2d 101.

Footnote 14. *Consumers Co. v Industrial Com.*, 364 Ill 145, 4 NE2d 34, 107 ALR 811; *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703

(superseded by statute on other grounds as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113); *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213.

Footnote 15. *Jefferson Standard Life Ins. Co. v Clemmer* (CA4 Va) 79 F2d 724, 103 ALR 171.

Footnote 16. *Rinaldo v New York City Transit Authority*, 39 NY2d 285, 383 NYS2d 571, 347 NE2d 897 (holding that a personal injury plaintiff, who suffered severe personal injuries in a subway accident, was not entitled to a jury charge that there is a presumption against suicide in personal injury actions, where there was evidence that he threw himself headlong at the lead car of a decelerating subway train when it was no more than ten feet away).

§ 279 Insanity as affecting presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The sanity or insanity of a decedent is of material weight and aid in determining the vital question as to whether he committed suicide, 17 because the presumption against suicide is said to rest upon the common knowledge that sane persons do not ordinarily kill themselves. 18 The presumption against suicide does not exist where it appears that the decedent was insane, 19 particularly where the insanity was of a nature usually accompanied by suicidal tendencies. 20 In other words, proof of insanity will ordinarily rebut any presumption that might otherwise arise against suicide. 21 However, the presumption against suicide is not necessarily vitiated merely by mental unsoundness, it being necessary to take into consideration the variety, phase, or degree of the illness. 22

Footnotes

Footnote 17. *Van Norman v Modern Brotherhood of America*, 143 Iowa 536, 121 NW 1080; *Metropolitan Life Ins. Co. v Plunkett*, 129 Okla 292, 264 P 827.

Footnote 18. *Travelers' Ins. Co. v Wilkes* (CA5 Fla) 76 F2d 701, cert den 296 US 604, 80 L Ed 428, 56 S Ct 120.

Footnote 19. *Webster v New York Life Ins. Co.*, 160 La 854, 107 So 599; *Honrath v New York Life Ins. Co.*, 65 SD 480, 275 NW 258, 112 ALR 1272.

Footnote 20. *Wasey v Travelers' Ins. Co.*, 126 Mich 119, 85 NW 459.

Footnote 21. *Bachmeyer v Mutual Reserve Fund Life Ass'n.*, 87 Wis 325, 58 NW 399.

Footnote 22. *Van Norman v Modern Brotherhood of America*, 143 Iowa 536, 121 NW 1080.

§ 280 Probative force and effect of presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption against suicide is a rule of law which permits, and according to some courts requires, the conclusion, in the event of an unexplained death by violent injury, that the death was not suicidal, until credible evidence of self-destruction is offered. 23 It is a strong presumption which should not be displaced by slight contrary proof, 24 and can be overcome by circumstantial evidence only if it is of such quality and weight as to negate every reasonable inference of death by accident. 25 Of course, the presumption does not control where there is substantial proof from which rational consideration may reach the conclusion of suicide. 26

The authorities are not agreed upon the broad question whether the presumption against suicide has any probative force after the introduction of evidence bearing upon the claim of suicide. Most courts adhere to the view that this presumption does not constitute evidence or possess probative force after the introduction of evidence tending to show how death occurred. 27 According to this view, the presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence 28 and it disappears when circumstances are adduced showing how the death occurred. 29 In other words, when such evidence is offered in the course of either the plaintiff's or the defendant's proof, the presumption as a rule of law disappears from the case and the triers of the facts pass upon the issues in the usual way. 30

There are other courts affirming the view that the presumption against suicide is in the nature of evidence, to be submitted to, and weighed by, the jury in the light of the other facts and circumstances in determining the issue of suicide. 31 The presumption remains throughout the trial unless the evidence of suicide is so conclusive that suicide is the only reasonable deduction that can be drawn from the evidence; then it becomes a question of law for the court to decide. 32 It has been said that the proper practice is to submit to the jury the presumption against suicide and to leave to the jury the question whether the evidence overbalances the presumption. 33 Of course, even under such view, where there is direct and positive evidence of suicide, and there is no conflicting inference from any evidence as to suicide, the presumption against suicide has no field of operation. 34

Footnotes

Footnote 23. *Jefferson Standard Life Ins. Co. v Clemmer* (CA4 Va) 79 F2d 724, 103 ALR 171; *Standard Life & Acci. Ins. Co. v Thornton* (CA6 Tenn) 100 F 582.

Footnote 24. *State ex rel. Hawkins v Industrial Com. of Minnesota*, 157 Minn 33, 195 NW 766, 36 ALR 394.

Footnote 25. *Bragg v Ross*, 349 Mo 511, 162 SW2d 263; *Carter v Standard Acc. Ins. Co.*, 65 Utah 465, 238 P 259, 41 ALR 1495.

Footnote 26. *State ex rel. Hawkins v Industrial Com. of Minnesota*, 157 Minn 33, 195 NW 766, 36 ALR 394.

Footnote 27. *New York Life Ins. Co. v Gamer*, 303 US 161, 82 L Ed 726, 58 S Ct 500, 114 ALR 1218; *Del Vecchio v Bowers*, 296 US 280, 80 L Ed 229, 56 S Ct 190; *Jefferson Standard Life Ins. Co. v Clemmer* (CA4 Va) 79 F2d 724, 103 ALR 171; *Wirthlin v Mutual Life Ins. Co.* (CA10 Utah) 56 F2d 137, 86 ALR 138; *Hinds v John Hancock Mut. Life Ins. Co.*, 155 Me 349, 155 A2d 721, 85 ALR2d 703 (superseded by statute on other grounds as stated in *Poitras v R. E. Glidden Body Shop, Inc.* (Me) 430 A2d 1113); *State ex rel. Hawkins v Industrial Com. of Minnesota*, 157 Minn 33, 195 NW 766, 36 ALR 394; *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213; *Carson v Metropolitan Life Ins. Co.*, 165 Ohio St 238, 59 Ohio Ops 310, 135 NE2d 259; *Watkins v Prudential Ins. Co.*, 315 Pa 497, 173 A 644, 95 ALR 869; *McMillan v General American Life Ins. Co.*, 194 SC 146, 9 SE2d 562; *Woodmen of World v Alexander* (Tex Civ App) 239 SW 343; *McDaniel v Metropolitan Life Ins. Co.*, 119 W Va 650, 195 SE 597.

Annotation: Comment Note.—Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19 § 9.

Footnote 28. *Headlee v New York Life Ins. Co.*, 69 SD 499, 12 NW2d 313.

The presumption against suicide is only a term to designate the burden, upon the side against which the presumption operates, of producing evidence to rebut the finality of the legal conclusion which might be drawn from it. *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213.

Footnote 29. *Wirthlin v Mutual Life Ins. Co.* (CA10 Utah) 56 F2d 137, 86 ALR 138; *Carson v Metropolitan Life Ins. Co.*, 156 Ohio St 104, 45 Ohio Ops 103, 100 NE2d 197, 28 ALR2d 344.

Footnote 30. *Jefferson Standard Life Ins. Co. v Clemmer* (CA4 Va) 79 F2d 724, 103 ALR 171; *Brunswick v Standard Acc. Ins. Co.*, 278 Mo 154, 213 SW 45, 7 ALR 1213; *McMillan v General American Life Ins. Co.*, 194 SC 146, 9 SE2d 562.

Footnote 31. *Dick v New York Life Ins. Co.*, 359 US 437, 3 L Ed 2d 935, 79 S Ct 921 (under North Dakota law); *Travellers' Ins. Co. v McConkey*, 127 US 661, 32 L Ed 308, 8 S Ct 1360; *Pilot Life Ins. Co. v Boone* (CA5 Ala) 236 F2d 457; *Fleetwood v Pacific Mut. Life Ins. Co.*, 246 Ala 571, 21 So 2d 696, 159 ALR 171; *Aetna Life Ins. Co. v Taylor*, 128 Ark 155, 193 SW 540; *Allison v Bankers Life Co.*, 230 Iowa 995, 299 NW 889; *Reddick v Grand Union Tea Co.*, 230 Iowa 108, 296 NW 800; *Wirtanen v Prudential Ins. Co.*, 27 Mich App 260, 183 NW2d 456; *Fisher v Travelers' Ins. Co.*, 124 Tenn 450, 138 SW 316; *Life & Casualty Ins. Co. v Daniel*, 209 Va 332, 163 SE2d 577.

Footnote 32. *Life & Casualty Ins. Co. v Daniel*, 209 Va 332, 163 SE2d 577.

Footnote 33. *Krogh v Modern Brotherhood of America*, 153 Wis 397, 141 NW 276.

Footnote 34. Fleetwood v Pacific Mut. Life Ins. Co., 246 Ala 571, 21 So 2d 696, 159 ALR 171.

Annotation: Insurance: coroner's verdict or report as evidence on issue of suicide, 28 ALR2d 352 § 15.

§ 281 Effect of death certificate or coroner's inquest to overcome presumption

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An official death certificate giving the cause of death as suicide has been held sufficient to prevail over the presumption against suicide, where by statute it is made prima facie evidence of the facts stated in it and there is no conflicting inference as to suicide arising from rebuttal evidence in the case. 35 However, where the statement of the cause of death as suicide in a death certificate is not warranted by the evidence in the case, such a certificate is not sufficient to take the presumption against suicide out of the case. 36

It has been held that the presumption against suicide is not overcome by the introduction in evidence of the coroner's finding or the verdict of a coroner's jury indicating that death was caused by suicide. 37 And even though a death certificate listing the cause of death as suicide is admissible, it does not create a presumption of death by suicide. 38 However, there is some authority to the effect that a coroner's verdict may be prima facie evidence of the fact of suicide. 39

Footnotes

Footnote 35. Fleetwood v Pacific Mut. Life Ins. Co., 246 Ala 571, 21 So 2d 696, 159 ALR 171.

Footnote 36. Basham v Prudential Ins. Co., 232 Mo App 782, 113 SW2d 126.

Footnote 37. New York Life Ins. Co. v Turner, 213 Ala 286, 104 So 643; Goldschmidt v Mutual Life Ins. Co., 102 NY 486, 7 NE 408.

Annotation: Insurance: coroner's verdict or report as evidence on issue of suicide, 28 ALR2d 352 § 15.

Footnote 38. Schleunes v American Casualty Co. (CA5 La) 528 F2d 634.

Footnote 39. Bickford v Metropolitan Life Ins. Co. (1974) 114 NH 237, 317 A2d 573 (under statute making report prima facie evidence in any judicial proceeding); Mutual Life Ins. Co. v Hayward (Tex Civ App) 27 SW 36, writ dismissed 88 Tex 315 and appeal after remand 12 Tex Civ App 392, 34 SW 801.

9. Knowledge [282-284]

§ 282 Generally; knowledge of facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A knowledge of facts may be presumed or inferred under the circumstances of case, 40 at least insofar as there is a duty to know such facts. 41 One is presumed to know the truth in regard to facts within his own special means of knowledge, 42 what a reasonable person ought to know from facts brought to his attention, 43 and, where there is a duty of inquiry, whatever proper inquiry would disclose. 44 The actual existence of a condition for a considerable period of time is presumptive evidence of notice or knowledge of its existence. 45 Every person is presumed to know his or her own signature 46 and the contents of contracts to which he becomes a party. 47 Even in criminal prosecutions, even though there is no general presumption of the knowledge of facts, 48 the law raises a presumption in some cases that the defendant had knowledge of the existence of the facts involved in the case. 49

The presumption of knowledge of facts which inquiry would disclose may be rebutted by showing the existence of other and attendant circumstances of a nature to allay suspicion, and to lead to the belief that inquiry was unnecessary. 50 Furthermore, the law does not presume that a fact once known is never forgotten. 51

Footnotes

Footnote 40. *Avery v Commissioner* (CA5) 22 F2d 6, 1 USTC ¶ 254, 6 AFTR 7019, 55 ALR 1277; *Farley v Edward E. Tower & Co.*, 271 Mass 230, 171 NE 639, 86 ALR 941; *South Texas Development Co. v Martwick* (Tex Civ App Waco) 328 SW2d 230, writ *re n r e* (Mar 16, 1960) and *rehg of writ of error overr* (Apr 20, 1960); *Green v Ashland Water Co.*, 101 Wis 258, 77 NW 722.

Local authorities are presumed to have knowledge of local conditions. *Missouri P. R. Co. v Omaha*, 235 US 121, 59 L Ed 157, 35 S Ct 82.

Footnote 41. *Voorhees v Chicago, R. I. & P. R. Co.*, 325 Mo 835, 30 SW2d 22, 70 ALR 1106.

Footnote 42. *Chesapeake & O. R. Co. v Johns' Adm'x*, 155 Ky 264, 159 SW 822; *Clifton v Montague*, 40 W Va 207, 21 SE 858 (superseded by statute on other grounds as stated in *Teller v McCoy*, 162 W Va 367, 253 SE2d 114).

One who has been ousted from possession of his real estate by an open, visible, and exclusive possession in another, which has continued uninterruptedly for the limitation period, will be presumed to have had knowledge of it. *Carney v Hennessey*, 74 Conn 107, 49 A 910.

The owner of property is presumed to know the business conducted thereon. *State ex rel.*

Wilcox v Gilbert, 126 Minn 95, 147 NW 953, 5 ALR 1449.

Corporate officials are presumed to have knowledge of the contents of instruments and documents shown to be in their possession. South Texas Development Co. v Martwick (Tex Civ App Waco) 328 SW2d 230, writ ref n r e (Mar 16, 1960) and reh'g of writ of error overr (Apr 20, 1960).

Footnote 43. Avery v Commissioner (CA5) 22 F2d 6, 1 USTC ¶ 254, 6 AFTR 7019, 55 ALR 1277.

The law assumes that one who has knowledge of a danger has knowledge of the injurious results naturally and proximately flowing from the danger. Nordstrom v Spokane & I. E. R. Co., 55 Wash 521, 104 P 809.

Footnote 44. Rochester & C. Turnpike Road Co. v Paviour, 164 NY 281, 58 NE 114.

Footnote 45. Kanawha & M. R. Co. v Kerse, 239 US 576, 60 L Ed 448, 36 S Ct 174.

The condition of a city prison for several months is presumed to be within the knowledge of the authorities. Shields v Durham, 118 NC 450, 24 SE 794.

However, a tenant in an apartment house is not, by reason of her occupancy of the premises for a year prior to a fire in it, conclusively presumed to have had knowledge that there were no fire escapes provided, as required by law, and to have waived their erection. Cittadino v Schackter, 83 NJL 593, 85 A 174.

As to actual and constructive notice of a defect in premises, see 62 Am Jur 2d, Premises Liability §§ 39, 40.

Footnote 46. Cooke v United States, 91 US 389, 1 Otto 389, 23 L Ed 237.

Footnote 47. 17A Am Jur 2d, Contracts §§ 224 et seq.

Footnote 48. Wharton's Criminal Evidence (14th ed, Torcia) § 52.

Footnote 49. State v Scoggins, 107 NC 959, 12 SE 59.

Footnote 50. Gifford v Rutland Sav. Bank, 63 Vt 108, 21 A 340.

Footnote 51. Hall & Brown Wood Working Mach. Co. v Haley Furniture & Mfg. Co., 174 Ala 190, 56 So 726.

§ 283 Knowledge of law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A rule frequently stated is that everyone is presumed to know the law, 52 and

this rule has been deemed applicable whether the law involved is state 53 or federal. 54 This presumption is merely a restatement of the substantive rule that ignorance of the law is not a defense, or excuses no one, or is wholly irrelevant. 55 While ignorance of the law excuses no one from the legal consequences of his wrongful or negligent acts, nor will it relieve him from the legal effect of his contract obligations, 56 in cases where ignorance of the law is a defense, such as where a statute includes a specific intent requirement, 57 the rule has no application. 58

Parties to business or commercial transactions are conclusively presumed to know the relevant law. 59 It has been held that everyone is presumed to know the limitations fixed by law upon powers of corporations, 60 the effect of recording as constructive notice of title, 61 the power and authority of federal agencies with which he deals, 62 laws establishing legal relations, such as joint tenancy, 63 the law of descent and wills, 64 that the use of certain dangerous devices or products is subject to regulation, 65 and the validity or invalidity of a divorce decree to which he is a party. 66

It has sometimes been broadly stated that the presumption that all persons know the law is conclusive. 67 However, a better statement is that such presumption is rebuttable, varying in force with the facts—strong in the case of a lawyer, or with respect to general laws which are matters of common knowledge, and weak, almost nonexistent, in respect to details or to laws which touch few persons. 68 While a person is, for public reasons, held responsible for his conduct, although ignorant of the law, there is no conclusive presumption that he actually knows the law. 69 Furthermore, while everyone is presumed to know the general laws of a state or country where he resides, 70 everyone is not presumed to know orders of local officials, 71 or regulations of administrative departments. 72 However, all persons who contract with reference to a subject matter within the limits of a municipality as to which there are police regulations are charged with knowledge of and are presumed to know the provisions of the regulations, to have entered into such contracts with reference to them. 73

Footnotes

Footnote 52. *Lawder v Stone*, 187 US 281, 47 L Ed 178, 23 S Ct 79; *Parsons v District of Columbia*, 170 US 45, 42 L Ed 943, 18 S Ct 521; *United States v Realty Co.*, 163 US 427, 41 L Ed 215, 16 S Ct 1120; *Banigan v Bard*, 134 US 291, 33 L Ed 932, 10 S Ct 565; *Southern Express Co. v Owens*, 146 Ala 412, 41 So 752; *State v Paup*, 13 Ark 129; *Macfarlane v Department of Alcoholic Beverage Control*, 51 Cal 2d 84, 330 P2d 769; *Hallett v Alexander*, 50 Colo 37, 114 P 490; *Appeal of Lane*, 57 Conn 182, 17 A 926; *First Nat. Bank v Monroe*, 135 Ga 614, 69 SE 1123; *Kessel v Murray*, 197 Iowa 17, 196 NW 591, 33 ALR 1346; *Thornton v State*, 232 Md 542, 194 A2d 617; *Smith v State*, 38 Nev 477, 151 P 512; *Widmer v Mahwah*, 151 NJ Super 79, 376 A2d 567; *Regional Agricultural Credit Corp. v Stewart*, 69 ND 694, 289 NW 801; *Roth v State*, 51 Ohio St 209, 37 NE 259; *Clark v Board of Com'rs*, 62 Okla 7, 161 P 791; *Scott v Ford*, 45 Or 531, 78 P 742, reh den 45 Or 550, 80 P 899; *State v Butts*, 3 SD 577, 54 NW 603; *Haynes v State*, 118 Tenn 709, 105 SW 251; *State ex rel. Utah Sav. & Trust Co. v Salt Lake City*, 35 Utah 25, 99 P 255; *Corbett v Physicians' Casualty Ass'n*, 135 Wis 505, 115 NW 365.

It is presumed that a driver knows the law regarding the use of public highways. *Vigil v Motor Vehicle Div. of Dept. of Revenue*, 184 Colo 142, 519 P2d 332.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) § 50.

Footnote 53. *Closson v Closson*, 30 Wyo 1, 215 P 485, 29 ALR 1371.

Footnote 54. *Wilkes v Dinsman*, 48 US 89, 7 How 89, 12 L Ed 618 (not followed by *Trerice v Pedersen* (CA9 Cal) 769 F2d 1398) and (superseded by statute on other grounds as stated in *Knutson v Wisconsin Air Nat'l Guard* (CA7 Wis) 995 F2d 765); *Regional Agricultural Credit Corp. v Stewart*, 69 ND 694, 289 NW 801.

Footnote 55. *Edwards v United States* (CA5 Fla) 334 F2d 360, 64-2 USTC ¶ 15577, 15 AFTR 2d 746, cert den 379 US 1000, 13 L Ed 2d 702, 85 S Ct 721 and (superseded by statute on other grounds as stated in *Cheeves v Southern Clays, Inc.* (MD Ga) 797 F Supp 1570, 36 Fed Rules Evid Serv 958); *Grantham v State* (Ala App) 540 So 2d 775, revd on other grounds (Ala) 540 So 2d 779, on remand (Ala App) 540 So 2d 782; *Schaffer v Federal Trust Co.*, 132 NJ Eq 235, 28 A2d 75; *State ex rel. Kaser v Leonard*, 164 Or 579, 94 P2d 1113.

Footnote 56. *Jacksonville Public Service Corp. v Calhoun Water Co.*, 219 Ala 616, 123 So 79, 64 ALR 1550; *Harper v Atlanta & W. P. R. Co.*, 33 Ga App 259, 125 SE 885.

Footnote 57. 21 Am Jur 2d, Criminal Law § 130.

Footnote 58. *Edwards v United States* (CA5 Fla) 334 F2d 360, 64-2 USTC ¶ 15577, 15 AFTR 2d 746, cert den 379 US 1000, 13 L Ed 2d 702, 85 S Ct 721 and (superseded by statute on other grounds as stated in *Cheeves v Southern Clays, Inc.* (MD Ga) 797 F Supp 1570, 36 Fed Rules Evid Serv 958); *Hargrove v United States* (CA5 Tex) 67 F2d 820, 3 USTC ¶ 1192, 13 AFTR 401, 90 ALR 1276.

Footnote 59. *Mammoth Oil Co. v United States*, 275 US 13, 72 L Ed 137, 48 S Ct 1 (holding that one purchasing structures erected on government property by one operating under a lease of the property, which lease is void because not authorized by law, is presumed to know that no law authorized the making of the lease); *Cooke v United States*, 91 US 389, 1 Otto 389, 23 L Ed 237 (holding that all who deal with the government in respect of treasury notes are presumed to know the exclusive authority of the Secretary of the Treasury to act for the government in retiring them); *Jacksonville Public Service Corp. v Calhoun Water Co.*, 219 Ala 616, 123 So 79, 64 ALR 1550; *Territory v Craig Enterprises, Inc.* (Alaska) 355 P2d 397, 84 ALR2d 1082; *Kessel v Murray*, 197 Iowa 17, 196 NW 591, 33 ALR 1346 (holding that one indorsing a promissory note is presumed to know the law governing his liability thereon); *Sachs Steel & Supply Co. v St. Louis Auto Parts & Salvage Co.* (Mo App) 322 SW2d 183.

The owner of land is chargeable with knowledge of general laws prescribing the manner in which it may be enjoyed or the title thereto affected. *McDaniel v McElvy*, 91 Fla 770, 108 So 820, 51 ALR 731.

Parties to a contract are charged with knowledge of the law existing at the time they enter into the contract and at the time it is to become operative. *Twiehaus v Rosner*, 362 Mo 949, 245 SW2d 107, 28 ALR2d 1192.

One contracting with a national bank for information as to the financial standing of

persons is conclusively presumed to know that he acquires no rights thereby which may be enforced against the bank. *People's Nat. Bank v Southern States Finance Co.*, 192 NC 69, 133 SE 415, 48 ALR 519.

A party is presumed to know about the statute of frauds. *Czapla v Grieves* (Wyo) 549 P2d 650.

Footnote 60. *First Nat. Bank v Monroe*, 135 Ga 614, 69 SE 1123; *Crimmins & Peirce Co. v Kidder Peabody Acceptance Corp.*, 282 Mass 367, 185 NE 383, 88 ALR 1122; *People's Nat. Bank v Southern States Finance Co.*, 192 NC 69, 133 SE 415, 48 ALR 519; *Pollitz v Public Utilities Com.*, 96 Ohio St 49, 117 NE 149.

Knowledge on the part of the holder, of the invalidity of corporate stock, its validity being a question of law, must be presumed. *Banigan v Bard*, 134 US 291, 33 L Ed 932, 10 S Ct 565.

Every creditor of a corporation must be presumed to understand the nature and incidents of such a body politic and to contract with reference to them. *Mumma v Potomac Co.*, 33 US 281, 8 Pet 281, 8 L Ed 945.

Footnote 61. *Goldberg v Parker*, 87 Conn 99, 87 A 555.

Footnote 62. *Wilber Nat. Bank v United States*, 294 US 120, 79 L Ed 798, 55 S Ct 362; *Regional Agricultural Credit Corp. v Stewart*, 69 ND 694, 289 NW 801.

Footnote 63. *Melton v Ensley* (Mo App) 421 SW2d 44 (disapproved on other grounds by *Re Estate of La Garce* (Mo) 487 SW2d 493) as stated in *Re Estate of Hysinger* (Mo App) 785 SW2d 619.

Footnote 64. *Hallett v Alexander*, 50 Colo 37, 114 P 490; *Muse v Muse*, 186 Va 914, 45 SE2d 158, 2 ALR2d 603.

Footnote 65. *United States v International Minerals & Chemical Corp.*, 402 US 558, 29 L Ed 2d 178, 91 S Ct 1697.

Footnote 66. *Arthur v Israel*, 15 Colo 147, 25 P 81, appeal after remand 18 Colo 158, 32 P 68, error dismd 152 US 355, 38 L Ed 474, 14 S Ct 583; *Hopping v Hopping*, 233 Iowa 993, 10 NW2d 87, 152 ALR 436.

Footnote 67. *Jacksonville Public Service Corp. v Calhoun Water Co.*, 219 Ala 616, 123 So 79, 64 ALR 1550; *Hallett v Alexander*, 50 Colo 37, 114 P 490; *Smith v State*, 38 Nev 477, 151 P 512; *Regional Agricultural Credit Corp. v Stewart*, 69 ND 694, 289 NW 801.

Footnote 68. *Schaffer v Federal Trust Co.*, 132 NJ Eq 235, 28 A2d 75.

Footnote 69. *Harper v Atlanta & W. P. R. Co.*, 33 Ga App 259, 125 SE 885; *Hess v Culver*, 77 Mich 598, 43 NW 994; *Black v Ward*, 27 Mich 191.

Footnote 70. *Hospelhorn v Poe*, 174 Md 242, 198 A 582, 118 ALR 682; *Prucha v Department of Motor Vehicles*, 172 Neb 415, 110 NW2d 75, 88 ALR2d 1055.

Footnote 71. *State v Butts*, 3 SD 577, 54 NW 603, holding that a quarantine order

prohibiting a person from going upon the street is not like a general law, of which he will be presumed to have knowledge.

Footnote 72. Schaffer v Federal Trust Co., 132 NJ Eq 235, 28 A2d 75.

Footnote 73. Sachs Steel & Supply Co. v St. Louis Auto Parts & Salvage Co. (Mo App) 322 SW2d 183.

§ 284 --Law of foreign jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law will ordinarily indulge no presumption of knowledge of the law in the instance of the law of a foreign jurisdiction ⁷⁴ or the law of another state. ⁷⁵ However, a person who transacts business in a foreign jurisdiction is presumed to know so much of the law of that jurisdiction as is applicable to his business there. ⁷⁶

Footnotes

Footnote 74. Waterman v Sprague Manuf'g Co., 55 Conn 554, 12 A 240; Stedman v Davis, 93 NY 32.

Footnote 75. Smeltzer v White, 92 US 390, 2 Otto 390, 23 L Ed 508; Bolinger v Beacham, 81 Kan 746, 106 P 1094.

Footnote 76. Farmers' Sav. Bank v Jameson, 175 Iowa 676, 157 NW 460; Corbett v Physicians' Casualty Ass'n, 135 Wis 505, 115 NW 365.

10. Identity of Names and Persons [285-287]

§ 285 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is generally held that identity of names gives rise to a presumption of identity of persons, or is prima facie evidence of it. ⁷⁷ At best, however, the presumption of identity of person from identity of name is ordinarily deemed to be an inference of a slight and inconclusive character; ⁷⁸ it is a weak presumption which may be shaken by the very slightest proof of facts or showing of circumstances which produces a doubt of identity. ⁷⁹

It has been held that the fact that there are many persons of the same name does not defeat the presumption of identity of person from arising from identity of name, 80 although there is other authority to the effect that the presumption will not arise where the name is a very common one. 81 It has also been said that if any circumstance appears to cast a reasonable doubt upon the identity of the person upon which a matter depends, a mere similarity of names will not suffice to establish such presumption. 82

Footnotes

Footnote 77. *Stebbins v Duncan*, 108 US 32, 27 L Ed 641, 2 S Ct 313; *Eley v Gamble* (CA4 Va) 75 F2d 171; *Simon v Wyler*, 222 Ala 91, 130 So 778; *Re Estate of Williams*, 128 Cal 552, 61 P 670; *Summer v Mitchell*, 29 Fla 179, 10 So 562; *Howell v J. Mandelbaum & Sons*, 160 Iowa 119, 140 NW 397; *Atwood v Sault Ste. Marie Light Heat & Power Co.*, 148 Mich 224, 111 NW 747; *State v West*, 175 Minn 516, 221 NW 903; *Huston v Graves* (Mo) 213 SW 77, 5 ALR 423; *Rupert v Penner*, 35 Neb 587, 53 NW 598; *State v Mitchner*, 256 NC 620, 124 SE2d 831; *Mozingo v Board of Liquor Control* (CP) 69 Ohio L Abs 597, 118 NE2d 925; *Herbert v Northern Trust Co.*, 269 Pa 306, 112 A 471; *Memorial Hospital v Woolf*, 86 RI 357, 134 A2d 397; *Chamblee v Tarbox*, 27 Tex 139.

Footnote 78. *State v Mitchner*, 256 NC 620, 124 SE2d 831; *State v Kilmer*, 31 ND 442, 153 NW 1089.

Footnote 79. *Re Estate of Williams*, 128 Cal 552, 61 P 670; *Woolridge v La Crosse Lumber Co.*, 291 Mo 239, 236 SW 294, 19 ALR 1068.

Footnote 80. *Flournoy v Warden*, 17 Mo 435.

Footnote 81. *Wilson v Holt*, 83 Ala 528, 3 So 321.

Footnote 82. *Ambs v Chicago, S. P., M. & O. R. Co.*, 44 Minn 266, 46 NW 321.

§ 286 Name in chain of title

<p>View Entire Section Go to Parallel Reference Table</p>

The rule that a presumption of identity of persons arises from identity of names or, as is often stated, that identity from name is presumptive or prima facie evidence of identity of person, 83 is often applied in tracing titles to real property. Thus, if the same name appears successively in a chain of title as grantee or grantor, the presumption is that it was the same person in each case, 84 or as it is often said, such identity of names is prima facie evidence of identity of person. 85 The fact that the residence of the person is not the same in the two instruments does not alter the rule. 86

If the same name appears as a witness to the execution of a deed and to the certificate of

acknowledgement as the officer taking it, it may be presumed, in support of the certificate, that these names represent the same person. 87

Footnotes

Footnote 83. § 285.

Footnote 84. *Breznik v Braun*, 11 Ill 2d 564, 144 NE2d 586; *Brown v Metz*, 33 Ill 339; *Huston v Graves (Mo)* 213 SW 77, 5 ALR 423; *Rupert v Penner*, 35 Neb 587, 53 NW 598.

Footnote 85. *Stebbins v Duncan*, 108 US 32, 27 L Ed 641, 2 S Ct 313; *Rupert v Penner*, 35 Neb 587, 53 NW 598; *Chamblee v Tarbox*, 27 Tex 139.

Footnote 86. *Geer v Missouri Lumber & Mining Co.*, 134 Mo 85, 34 SW 1099.

The fact that the grantee is of a certain city and the grantor, 20 years later, is of a county in another state across a river from such city, does not interfere with the conclusion of identity. *Tillotson v Webber*, 96 Mich 144, 55 NW 837.

Footnote 87. *Summer v Mitchell*, 29 Fla 179, 10 So 562.

§ 287 In criminal cases

<p>View Entire Section Go to Parallel Reference Table</p>

In a criminal prosecution where the name is not a common one and there is nothing to indicate that more than one person in the vicinity was known by the same name, proof of the identity of names is sufficient to warrant the conclusion of identity of persons, until the contrary appears. 88 The rule has been held to be otherwise where the name is a common one and there are several persons who are known by it and are located in the same place. 89

Identity can be presumed from the name and other circumstances, 90 and there is some authority to the effect that identity of names alone, without other circumstances, gives rise to a rebuttable presumption of identity of persons. 91

Footnotes

Footnote 88. *Garrett v State*, 76 Ala 18; *State v Mitchner*, 256 NC 620, 124 SE2d 831; *Mozingo v Board of Liquor Control (CP)* 69 Ohio L Abs 597, 118 NE2d 925.

As to evidence showing the identity of a habitual offender, see 39 Am Jur 2d, *Habitual Criminals and Subsequent Offenders* § 26.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) § 43.

Footnote 89. *People v Cline*, 44 Mich 290, 6 NW 671; *Mozingo v Board of Liquor Control* (CP) 69 Ohio L Abs 597, 118 NE2d 925.

Footnote 90. *State v Nelson*, 130 Mont 466, 304 P2d 1110.

Footnote 91. *People v Theodore*, 121 Cal App 2d 17, 262 P2d 630; *Application of De Gina*, 94 NJ Super 267, 228 A2d 74, certif den 49 NJ 368, 230 A2d 400.

11. Possession, Ownership, and Value of Property [288-290]

§ 288 Possession and ownership of property—real property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a general rule that the fact that a person is in the possession of real property, exercising rights of ownership and performing acts of dominion, creates a rebuttable presumption that he is invested with some right or title to it, 92 which, where the possession was peaceably acquired, is lawful. 93 Possession of land is always presumed to be in subservience to the title of the true owner, 94 and it is also presumed that possession continues under the same right by which it was originally taken. 95 Where one enters into possession of land under a deed, it is presumed that he claims only that title given him by his deed and that his possession is restricted to the premises granted. 96

Unimproved and unoccupied land is deemed to be in possession of the holder of the legal title. 97

Footnotes

Footnote 92. *Gonzales v Ross*, 120 US 605, 30 L Ed 801, 7 S Ct 705; *Oaksmith's Lessee v Johnston*, 92 US 343, 2 Otto 343, 23 L Ed 682; *Younge v Guilbeau*, 70 US 636, 3 Wall 636, 18 L Ed 262; *Potter v Cline*, 161 Ind App 349, 316 NE2d 422; *Howard v Mitchell*, 268 Ky 429, 105 SW2d 128; *Broadsword v Kauer*, 161 Ohio St 524, 53 Ohio Ops 395, 120 NE2d 111, 46 ALR2d 1309; *Kramp v Toledo Edison Co. (Lucas Co)* 114 Ohio App 9, 18 Ohio Ops 2d 298, 180 NE2d 172, motion overr; *Hanns v Friedly*, 181 Or 631, 184 P2d 855.

Whenever one claims property as owner and exercises acts of ownership over it, unquestioned and without objection by those most deeply interested, until the statute of limitations has run, the presumption is that his title is correctly stated by him. *Teall v Schroder*, 158 US 172, 39 L Ed 938, 15 S Ct 768.

A party will be presumed to have an interest in land that he can sell or assign where, at

the time of the contract of sale, he is in possession and cultivating the premises and afterward acquires a complete legal title. *Townsend v Boyd*, 217 Pa 386, 66 A 1099.

Footnote 93. *Sabariego v Maverick*, 124 US 261, 31 L Ed 430, 8 S Ct 461; *Ricard v Williams*, 20 US 59, 7 Wheat 59, 5 L Ed 398; *Broadsword v Kauer*, 161 Ohio St 524, 53 Ohio Ops 395, 120 NE2d 111, 46 ALR2d 1309.

Long-continued possession and use of real property create a presumption of lawful origin. *Fletcher v Fuller*, 120 US 534, 30 L Ed 759, 7 S Ct 667.

Footnote 94. *Rock Springs v Sturm*, 39 Wyo 494, 273 P 908, 97 ALR 1.

Ownership and possession being shown of a building located upon the land of another, it will not be presumed that the building was located without authority. *Jones v Great N. R. Co.*, 100 Minn 56, 110 NW 260.

Footnote 95. *M'Iver v Ragan*, 15 US 25, 2 Wheat 25, 4 L Ed 175.

Footnote 96. *Edwards v Fleming*, 83 Kan 653, 112 P 836.

Footnote 97. *Butler v Smith*, 84 Neb 78, 120 NW 1106.

§ 289 --Personal property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a general rule, proof of the possession of personal property is prima facie evidence of title or is said to raise a presumption of ownership, 98 which may be rebutted or overcome by evidence of ownership in another, 99 or by evidence of the circumstances surrounding the possession. 1 Statutory provisions creating a disputable presumption that things in possession of a person are owned by him are but declarations of the general common-law rule. 2 But a rebuttable presumption that contraband found in a house belongs to the husband by virtue of his statutory status as head of the household is unconstitutional. 3

When a question of a party's possession and control of personal property or its use is an issue, proof of his ownership at the time in question implies that it was in his possession or that he had the right of possession and control. 4

Footnotes

Footnote 98. *Vaughan v Borland*, 234 Ala 414, 175 So 367, 111 ALR 1370; *Golenternek v Kurth*, 213 Ark 643, 212 SW2d 14, 3 ALR2d 593; *Herr v Denver Milling & Mercantile Co.*, 13 Colo 406, 22 P 770; *Warman v First Nat. Bank*, 185 Ill 60, 57 NE 6; *Howell v J. Mandelbaum & Sons*, 160 Iowa 119, 140 NW 397; *State v Wilson* (Kan App) 1992 Kan App LEXIS 104, review den 250 Kan 807; *Scott v Slater* (Ky) 253 SW2d 232;

James v Wood, 82 Me 173, 19 A 160; Frye v Baskin, 241 Mo App 319, 231 SW2d 630; Bank of Italy v Burns, 39 Nev 326, 156 P 932, reh den 39 Nev 334, 159 P 863; Adrian v McCaskill, 103 NC 182, 9 SE 284; Wipperman Mercantile Co. v Robbins, 23 ND 208, 135 NW 785; Mielke v Leeberson, 150 Ohio St 528, 38 Ohio Ops 352, 83 NE2d 209, 7 ALR2d 1342; Chicago, R. I. & P. R. Co. v Newburn, 27 Okla 9, 110 P 1065; Re Wohleber's Estate, 320 Pa 83, 181 A 479, 101 ALR 829.

In an action of trespass de bonis asportatis the ownership of the property need not be alleged or proved; possession is sufficient, because it is prima facie evidence of some sort of rightful ownership or title. Northern P. R. Co. v Lewis, 162 US 366, 40 L Ed 1002, 16 S Ct 831.

Possession of a certificate, with power of attorney from the stockholder authorizing the holder to transfer the stock, is prima facie evidence that he is at least the equitable owner. Tafft v Presidio & F. R. Co., 84 Cal 131, 24 P 436.

Where one is in possession of a house or land which he occupies and over which he manifests an intention of exercising a control and preventing unauthorized interference and something is found in that house or on that land by a stranger or a servant, the presumption is that the possession of the article found is in the owner of the locus in quo. Ferguson v Ray, 44 Or 557, 77 P 600.

As to presumption of ownership of negotiable paper, see 12 Am Jur 2d, Bills and Notes §§ 1189, 1194.

Footnote 99. State v Wilson (Kan App) 1992 Kan App LEXIS 104, review den 250 Kan 807; Mielke v Leeberson, 150 Ohio St 528, 38 Ohio Ops 352, 83 NE2d 209, 7 ALR2d 1342; Re Wohleber's Estate, 320 Pa 83, 181 A 479, 101 ALR 829; Escamilla v Pingree, 44 Utah 421, 141 P 103.

Footnote 1. Bergen v Riggs, 34 Ill 170.

Where the source of title to personalty is a will, possession raises no presumption as to extent of the interest. Hopkins v Heywood, 86 Vt 486, 86 A 305.

Footnote 2. Dencer v Jory, 131 Or 653, 284 P 163, 70 ALR 855.

Footnote 3. Knighton v State, 248 Ga 199, 282 SE2d 102.

Footnote 4. Howell v J. Mandelbaum & Sons, 160 Iowa 119, 140 NW 397; Dennery v Great Atlantic & Pacific Tea Co., 82 NJL 517, 81 A 861; Judson v Bee Hive Auto Service Co., 136 Or 1, 294 P 588, 74 ALR 944, different results reached on reh 136 Or 5, 297 P 1050, 74 ALR 944; Birch v Abercrombie, 74 Wash 486, 133 P 1020, mod and reh den (Wash) 135 P 821.

As to the application of this rule in cases involving the identity of person driving a motor vehicle at the time of an accident, see 8 Am Jur 2d, Automobiles and Highway Traffic § 996.

§ 290 Value of property

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, there is no presumption as to the value of property other than the presumption sometimes indulged that value once shown may be presumed to continue in the absence of proof to the contrary. 5 Proof of value is generally required whenever value is in issue, 6 and it will not be presumed that the value of property is what it cost at an earlier date. 7

§ 290 ----Value of property [SUPPLEMENT]

Case authorities:

In trial on amount of compensation for land allegedly taken or damaged in construction of state highway, it was error for court to allow evidence of comparable sales that took place after taking. State ex rel. Dep't of Transp. v Panell (1993, Okla App) 853 P2d 244.

Footnotes

Footnote 5. § 294.

Footnote 6. Rogers v State, 248 Ark 696, 453 SW2d 393, appeal after remand 250 Ark 68, 464 SW2d 56; Barrier v Kelly, 82 Miss 233, 33 So 974.

Footnote 7. Burnet v Porter, 283 US 230, 75 L Ed 996, 51 S Ct 416, 2 USTC ¶ 711, 9 AFTR 1433; Burnet v Henry, 283 US 229, 75 L Ed 995, 51 S Ct 416, 9 AFTR 1433; Burnet v Houston, 283 US 223, 75 L Ed 991, 51 S Ct 413, 2 USTC ¶ 710, 9 AFTR 1430.

12. Continuance of Condition or State of Facts [291-298]

§ 291 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When the existence of a condition or state of facts is once established by proof, an inference or rebuttable presumption arises that the condition or state of facts continues to exist as before, until the contrary is shown. 8 Such inference or presumption is not a rule of law to be applied in all cases, with or without reason, but rather it calls for the exercise of sound discretion by a trial judge according to the

likelihood of the persistence of a condition or fact under the circumstances of the case at bar. 9 In general, with the lapse of time such inference or presumption loses probative force. 10 Accordingly, the only rule that can be formulated as to when the inference or presumption of continuance will arise is the broad one calling for a discretionary determination in which the nature of the subject matter and the time interval must figure prominently. 11

The inference or presumption of the continuance of a condition or state of facts is a rule of evidence. 12 It has been held to be subordinate to the presumption of innocence, 13 and given the inviolate nature of the presumption of innocence, there is authority that the presumption of the continuance of a state of facts once proved does not apply in criminal cases. 14

Footnotes

Footnote 8. *Bean v Morris*, 221 US 485, 55 L Ed 821, 31 S Ct 703 (holding that it will be presumed that states upon their incorporation will continue the system of prior appropriation that has prevailed theretofore and make no changes other than those necessarily implied or expressed); *Williams v Paine*, 169 US 55, 42 L Ed 658, 18 S Ct 279; *Sparks v Southeastern Greyhound Lines* (DC Miss) 173 F Supp 896, revd on other grounds (CA5 Miss) 283 F2d 44; *Asbury v New York Life Ins. Co.* (DC Ky) 45 F Supp 513; *Curtis v Cutler* (CA8 Minn) 76 F 16; *Vidmer v Lloyd*, 193 Ala 386, 69 So 480; *Day v Frazer*, 51 Ariz 474, 78 P2d 140; *White v White*, 82 Cal 427, 23 P 276; *State v Halpin*, 2 Conn Cir 409, 199 A2d 570; *Smith v Reed*, 145 Ga 724, 89 SE 815; *Old Salem Chautauqua Asso. v Illinois Dist. Council of Assembly of God*, 16 Ill 2d 470, 158 NE2d 38, cert den 361 US 864, 4 L Ed 2d 104, 80 S Ct 123; *Metzger v Schultz*, 16 Ind App 454, 43 NE 886, reh overr 16 Ind App 463, 45 NE 619; *Bunn v Standard Oil Co.*, 251 Iowa 7, 99 NW2d 436; *Chilletti v Missouri, K. & T. R. Co.*, 102 Kan 297, 171 P 14; *Quaker Realty Co. v Starkey*, 136 La 28, 66 So 386; *Louisiana State Bd. of Medical Examiners v Boisvert* (La App 2d Cir) 103 So 2d 507; *Hartford v McGillicuddy*, 103 Me 224, 68 A 860; *Searle v Roman Catholic Bishop*, 203 Mass 493, 89 NE 809; *Fowler v Hamilton Moving & Storage Co.*, 324 Mich 614, 37 NW2d 649; *Benson v Lehigh Valley Coal Co.*, 124 Minn 222, 144 NW 774; *Tesar v Bartles*, 149 Neb 889, 32 NW2d 911, 2 ALR2d 1037; *Blochowitz v Blochowitz*, 122 Neb 385, 240 NW 586, 82 ALR 949; *Table Mountain Gold & Silver Mining Co. v Waller's Defeat Silver Mining Co.*, 4 Nev 218; *Brinson v Hernandez*, 24 NJ 391, 132 A2d 289; *Buffalo v Delaware, L. & W. R. Co.*, 190 NY 84, 82 NE 513; *Wails v Farrington*, 27 Okla 754, 116 P 428; *Marsters v Umpqua Valley Oil Co.*, 49 Or 374, 90 P 151; *Proctor v M'Call*, 18 SCL 298; *National Bank of Commerce v Bottolfson*, 55 SD 196, 225 NW 385, 69 ALR 892; *Mayhew v McFarland*, 137 Tex 391, 153 SW2d 428, conformed to (Tex Civ App) 154 SW2d 214; *Partridge v Cole*, 96 Vt 281, 119 A 398, 32 ALR 854 (holding that a healthy condition of livestock will be presumed to continue over a period of few months, in the absence of evidence to the contrary); *State v Jackson*, 59 Wash 2d 117, 366 P2d 217; *Union Bank & Trust Co. v Long Pole Lumber Co.*, 70 W Va 558, 74 SE 674; *S. S. Kresge Co. v Garrick Realty Co.*, 209 Wis 305, 245 NW 118, 85 ALR 283.

Proof of the establishment of a highway raises a presumption of its continuance, placing the burden of proof of abandonment of a portion thereof on him who asserts it. *Central P. R. Co. v Alameda County*, 284 US 463, 76 L Ed 402, 52 S Ct 225.

A blockade once established and duly notified must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance. *The Circassian*, 69 US 135, 2 Wall 135, 17 L Ed 796.

A foreign law proved by a governmental publication is presumed to continue until the present time, in the absence of proof to the contrary. *Re Gehrig's Estate*, 126 NY 537, 27 NE 784.

A quorum shown to have been present will be presumed to continue present at proceedings taken the same day, until the contrary is shown. *State ex rel. State ex rel. Stanford v Ellington*, 117 NC 158, 23 SE 250.

Footnote 9. *Maggio v Zeitz*, 333 US 56, 92 L Ed 476, 68 S Ct 401; *State v Halpin*, 2 Conn Cir 409, 199 A2d 570; *Brinson v Hernandez*, 24 NJ 391, 132 A2d 289; *Yankton Nat. Bank v Benson*, 33 SD 399, 146 NW 582.

The presumption that conditions, once existing, continue until they are shown to have changed is no more than a common sense inference, as strong or as weak as the nature of the surrounding circumstances permits. *Hynes v Sloma* (4th Dept) 59 App Div 2d 1014, 399 NYS2d 745.

Footnote 10. *Louisiana State Bd. of Medical Examiners v Boisvert* (La App 2d Cir) 103 So 2d 507.

Footnote 11. *Brinson v Hernandez*, 24 NJ 391, 132 A2d 289.

Footnote 12. *Herzog v Atchison, T. & S. F. R. Co.*, 153 Cal 496, 95 P 898; *Steele v Locke Cotton Mills Co.*, 231 NC 636, 58 SE2d 620.

Footnote 13. *White v State*, 183 Miss 351, 184 So 303; *State v Sanford*, 44 NM 66, 97 P2d 915.

Footnote 14. *Sokolic v State*, 228 Ga 788, 187 SE2d 822.

Practice References Wharton's Criminal Evidence (14th ed, Torcia) §§ 38 et seq.

§ 292 Business, property, and financial matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule that a condition or state of facts once shown to exist is presumed to continue to exist ¹⁵ has been applied so as to raise a presumption or inference as to the continuance of an occupation, or business, ¹⁶ or of the status as an independent contractor, ¹⁷ previously established by proof. Where one engages in a business or profession without a license or permit as required by statute, an inference or presumption arises that such illegal activity continues to exist. ¹⁸

The condition of an instrument once proved to exist is presumed to continue until a modification or addition is proved. 19 It has also been held that a heavily encumbered condition of real estate will be presumed to continue unless something to the contrary appears. 20 And where personal property is situated in a specified county immediately prior to the time a mortgage on it is recorded, it is presumed that the property is in such county on the date on which the mortgage is filed for record. 21

The rent charged for the lease of property at a particular date does not give rise to an inference or presumption that such is the rent for such property many years thereafter. 22 Nor is the defective condition of property at a particular time presumed to continue to exist, at least where such defective condition is of a very temporary character. 23 And the presumption of continued conditions does not apparently overcome the presumption of solvency. 24

Footnotes

Footnote 15. § 291.

Footnote 16. *Mayhew v McFarland*, 137 Tex 391, 153 SW2d 428, conformed to (Tex Civ App) 154 SW2d 214, holding that proof that a defendant was doing business in a county as a common carrier only a short time prior to the filing of a suit against the defendant as such is sufficient to raise a prima facie presumption of his doing business as a common carrier in such county at the time the suit is filed.

Footnote 17. *Winerich Motor Sales Co. v Ochoa* (Tex Civ App) 58 SW2d 193, revd on other grounds 127 Tex 542, 94 SW2d 416.

Footnote 18. *Louisiana State Bd. of Medical Examiners v Boisvert* (La App 2d Cir) 103 So 2d 507; *Louisiana State Board of Medical Examiners v Stephenson* (La App 1st Cir) 93 So 2d 330.

Footnote 19. *Curtis v Cutler* (CA8 Minn) 76 F 16; *Park-In Theatres, Inc. v Paramount-Richards Theatres, Inc.* (DC Del) 81 F Supp 466, 80 USPQ 6, affd (CA3 Del) 185 F2d 407, 88 USPQ 165, cert den 341 US 950, 95 L Ed 1373, 71 S Ct 1017, 89 USPQ 650.

Footnote 20. *Childs v Merrill*, 63 Vt 463, 22 A 626.

Footnote 21. *United States v White* (DC Idaho) 143 F Supp 754.

Footnote 22. *Brinson v Hernandez*, 24 NJ 391, 132 A2d 289.

Footnote 23. *Fanelty v Rogers Jewelers, Inc.*, 230 NC 694, 55 SE2d 493.

Footnote 24. § 277.

§ 293 --Ownership and possession of property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Title to, or ownership of, property shown to have existed in a particular person, is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law. 25 The weight of such a presumption is affected by such factors as the length of time that has elapsed, the character of the property as salable, consumable, or perishable, and the character of the alleged owner as thrifty or extravagant. 26

Inasmuch as possession is a fact continuous in its nature, it is, when its existence is once shown, presumed to continue until the contrary is proved. 27

Footnotes

Footnote 25. Vidmer v Lloyd, 193 Ala 386, 69 So 480; McCune v Phoenix, 83 Ariz 98, 317 P2d 537; Old Salem Chautauqua Asso. v Illinois Dist. Council of Assembly of God, 16 Ill 2d 470, 158 NE2d 38, cert den 361 US 864, 4 L Ed 2d 104, 80 S Ct 123; State v Rosenberg, 238 Iowa 621, 27 NW2d 904; Preston v Newcomb, 149 Mich 512, 113 NW 29; Oxford Sporting Goods Mfg. Co. v Gillman (Hamilton Co) 97 Ohio App 269, 56 Ohio Ops 63, 125 NE2d 214; Keifer v Schuneman (Cuyahoga Co) 82 Ohio App 285, 38 Ohio Ops 5, 50 Ohio L Abs 423, 78 NE2d 780; Re Wohleber's Estate, 320 Pa 83, 181 A 479, 101 ALR 829; Dahlberg v Holden, 150 Tex 179, 238 SW2d 699.

Footnote 26. Maggio v Zeitz, 333 US 56, 92 L Ed 476, 68 S Ct 401.

Footnote 27. Lazarus v Phelps, 156 US 202, 39 L Ed 397, 15 S Ct 271; Wimberly v State, 214 Ark 930, 218 SW2d 730; State v Rosenberg, 238 Iowa 621, 27 NW2d 904; Tesar v Bartles, 149 Neb 889, 32 NW2d 911, 2 ALR2d 1037; Wails v Farrington, 27 Okla 754, 116 P 428; Higgins v Lewis, 23 Tenn App 648, 137 SW2d 308.

§ 294 --Value of property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption of the continuance of a condition or fact has been applied to the matter of value of property. 28 Such presumption is clearly not conclusive, but is deemed relatively weak and becomes progressively weaker with the passing of time. 29

Footnotes

Footnote 28. Stout v Haynes, 165 La 680, 115 So 823; Re Morrissey's Will, 171 Misc 204, 12 NYS2d 324.

Footnote 29. *Monk v Park Royal, Inc.*, 275 App Div 905, 89 NYS2d 682, affd 302 NY 575, 96 NE2d 889.

§ 295 --Sanity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of proof to the contrary, a person is presumed to be of a sound mind at any particular time and the condition is presumed to continue to exist. 30 Thus, where sanity is shown to have existed just prior to and immediately after the commission of a crime, it is presumed to have existed at the time of the act, in the absence of evidence to the contrary. 31

Footnotes

Footnote 30. *Norwood v Norwood*, 207 Ga 148, 60 SE2d 449.

Competency and freedom from undue influence, shown to have existed, are presumed to continue until the contrary is shown. *Blochowitz v Blochowitz*, 122 Neb 385, 240 NW 586, 82 ALR 949.

Footnote 31. *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1; *Commonwealth v Wireback*, 190 Pa 138, 42 A 542.

§ 296 --Insanity or mental incapacity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Whether a presumption of the continuance of insanity or an unsound mental condition will be invoked depends upon the character of the mental condition. 32 It is generally held that the presumption arises only where the earlier insanity shown by the evidence was permanent, chronic, or of a continuing nature, and not merely temporary or spasmodic. 33

In line with the generally recognized requirement that in order to give rise to a presumption of continuing insanity the prior insanity must have been of a permanent or continuing nature, it has generally been held that no such presumption arises from evidence that on prior occasions the accused has been subject to fits or spells of delirium tremens. 34 Similarly, where the insanity is of such a nature that, while permanent and continuing, it is interrupted by lucid intervals, no presumption of continuing insanity

Where a person has been adjudged to be insane, 36 or where one has been acquitted of crime on the ground of insanity, 37 the insanity is presumed to continue until overcome by evidence to the contrary. 38 While a prior adjudication of insanity is not a condition precedent to the presumption of continuing insanity, such an adjudication is the most satisfactory form of such evidence. In the majority of the cases where a presumption of continuing insanity was recognized without any statement of the qualification that the prior insanity must be permanent or continuing, the court has been dealing with prior insanity shown by an unreversed adjudication. 39 But while the courts in one state have abandoned the requirement of a showing of permanency where a prior adjudication is relied upon, 40 there are decisions from other jurisdictions indicating that an adjudication is not, of itself, conclusive evidence of the permanency of the prior insanity. 41

Some courts have indicated that in order to justify a presumption of continuing insanity in a criminal case, it must be shown that the prior insanity was of such a nature as to excuse the offense charged, or that the commission of the offense was affected by the insanity. 42

A number of courts have held that the existence, or at least the weight, of the presumption of continuing insanity in a criminal case, may be affected by the remoteness of the evidence as to the prior insanity relied upon to raise the presumption. 43 It has frequently been held that the presumption of continuing insanity will not arise in a criminal case from evidence that the defendant on an earlier occasion was adjudged or declared insane and committed to an asylum, where it is shown that he was subsequently declared sane, or discharged as cured; 44 however, a provisional discharge from a hospital may not be sufficient to rebut the presumption of continued insanity. 45 There is some question as to the evidentiary value of a certificate of discharge, with a case holding that it is sufficient to rebut the presumption of continuing insanity, 46 but with another court stating that a discharge certificate and letter from a doctor could be considered by the jury as rebutting the presumption that the condition of incompetency had continued, but no more. 47

The presumption of the continued state of insanity or mental incapacity of a person shown to have existed is not conclusive, but may be rebutted by competent proof to the contrary. 48 The presumption is one of fact rather than of law. 49

Where there is no presumption of continuing insanity under a state's statutory scheme, an adjudication that a criminal defendant previously was afflicted with a mental disease or defect only constitutes one item of evidence to be weighed by the jury. 50

Footnotes

Footnote 32. *Re Murphy's Estate*, 43 Mont 353, 116 P 1004.

Footnote 33. *Re Dennis*, 51 Cal 2d 666, 335 P2d 657; *People v Baker*, 42 Cal 2d 550, 268 P2d 705 (criticized on other grounds by *People v Saille*, 54 Cal 3d 1103, 2 Cal Rptr 2d 364, 820 P2d 588, 91 Daily Journal DAR 15308); *Hixon v State* (Fla App D2) 165 So 2d 436; *Glenn v People*, 9 Ill 2d 335, 137 NE2d 336; *Ex parte Clark*, 86 Kan 539, 121 P

492; *Broz v Omaha Maternity & General Hospital Ass'n.*, 96 Neb 648, 148 NW 575; *State v Garver*, 190 Or 291, 225 P2d 771, 27 ALR2d 105.

Proof that the defendant was afflicted with permanent insanity, as distinguished from temporary or transient insanity, prior to the commission of the crime charged, will raise the presumption that his insanity continued to exist until the time of commission of the crime. *Re Dennis*, 51 Cal 2d 666, 335 P2d 657.

Holding that there was no presumption of continuing insanity except where the defendant's prior insanity was permanent and incurable, the court in *Commonwealth ex rel. Mulligan v Smith*, 156 Pa Super 469, 40 A2d 701, noted that in the present case the relator's insanity was not permanent, since he was admittedly sane at the present time and had been for years.

Annotation: Presumption of continuing insanity as applied to accused in criminal case, 27 ALR2d 121.

Footnote 34. *State v Potts*, 100 NC 457, 6 SE 657; *State v Garver*, 190 Or 291, 225 P2d 771, 27 ALR2d 105.

Holding that evidence that on several occasions before the murder with which he was charged, the defendant, when drinking, had been subject to hallucinations such as usually manifest themselves in cases of mania a potu was properly rejected, the court in *People v Bremer*, 24 Cal App 315, 141 P 222, said that while, when the existence of general insanity was established, it was presumed to continue, this presumption did not apply to that form of the disease known as delirium tremens, brought on by one's own procurement and passing away with the removal of the exciting cause.

Footnote 35. *Grammer v State*, 239 Ala 633, 196 So 268; *Murphy v State*, 70 Ga App 387, 28 SE2d 198; *Commonwealth ex rel. Mulligan v Smith*, 156 Pa Super 469, 40 A2d 701; *Trahan v State*, 117 Tex Crim 320, 35 SW2d 169; *Starr v State*, 134 Ga App 149, 213 SE2d 531.

A jury was entitled to rely on observations that there were remissions between the defendant's delusional episodes. *Abbott v Cunningham* (CA1 NH) 959 F2d 1.

Footnote 36. *Re Kehler* (CA2 NY) 159 F 55, cert den 212 US 573, 53 L Ed 656, 29 S Ct 683; *Clark v Beto* (CA5 Tex) 359 F2d 554, cert den 386 US 927, 17 L Ed 2d 799, 87 S Ct 875 and on remand (SD Tex) 283 F Supp 272, affd (CA5 Tex) 415 F2d 71; *Hurt v United States* (CA8 ND) 327 F2d 978; *Livingston v State* (Fla App D2) 383 So 2d 947, appeal after remand (Fla App D2) 415 So 2d 872; *Hixon v State* (Fla App D2) 165 So 2d 436; *Hankinson v State*, 129 Ga App 568, 200 SE2d 315; *Weber v Chicago, R. I. & P. R. Co.*, 175 Iowa 358, 151 NW 852; *Manning v State* (Tex Crim) 730 SW2d 744, motion for rehearing on PDR denied (May 20, 1987) and appeal after remand (Tex App Dallas) 766 SW2d 551, affd (Tex Crim) 773 SW2d 568; *Morris v State* (Tex App Corpus Christi) 744 SW2d 290, petition for discretionary review ref (May 25, 1988); *Criez v Sunset Motor Co.*, 123 Wash 604, 213 P 7, 32 ALR 627; *State ex rel. Thompson v Snell*, 46 Wash 327, 89 P 931.

But where the petition on which the prior order was based did not charge the defendant with insanity but merely that he was "a psychopathic and defective delinquent," the order

based thereon was not an adjudication of insanity and the defendant was not entitled to an instruction on a presumption of continued insanity. *State v Jensen*, 209 Or 243, 296 P2d 618, app dismd 352 US 948, 1 L Ed 2d 241, 77 S Ct 329, reh den 352 US 990, 1 L Ed 2d 369, 77 S Ct 388.

The previous adjudication of the defendant as a feeble-minded person did not, in a criminal prosecution, give rise to a continuing presumption of insanity. *Martinez v State*, 169 Tex Crim 229, 333 SW2d 370.

Footnote 37. *Re Franklin*, 7 Cal 3d 126, 101 Cal Rptr 553, 496 P2d 465 (superseded by statute on other grounds as stated in *People v Catron* (4th Dist) 200 Cal App 3d 546, 246 Cal Rptr 303) and (superseded by statute on other grounds as stated in *People v Tilbury*, 54 Cal 3d 56, 284 Cal Rptr 288, 813 P2d 1318, 91 CDOS 6061, 91 Daily Journal DAR 9444); *State ex rel. Thompson v Snell*, 46 Wash 327, 89 P 931.

Footnote 38. Until there has been a judicial determination of restored competency, one who has been judicially determined to be incompetent is, at least prima facie, legally incapable of making the choices involved in such processes as abandonment, waiver, or consent. *Blunt v United States*, 100 US App DC 266, 244 F2d 355.

An adjudication of insanity created a rebuttable presumption of continued insanity or mental incompetency, and it is constitutional error to ignore the presumption and simply leave it to counsel to decide whether to raise any question of the party's mental condition. *Bumgarner v Lockhart* (ED Ark) 361 F Supp 829.

Footnote 39. *Byrd v Pescor* (CA8 Mo) 163 F2d 775, cert den 333 US 846, 92 L Ed 1129, 68 S Ct 648; *Waters v State*, 22 Ala App 644, 119 So 248; *People v Scott*, 326 Ill 327, 157 NE 247.

Footnote 40. *Kizer v State*, 130 Tex Crim 185, 92 SW2d 439.

Footnote 41. *State v Peterson* (Mo) 154 SW2d 134; *Commonwealth ex rel. Smith v Ashe*, 364 Pa 93, 71 A2d 107, cert den 340 US 812, 95 L Ed 597, 71 S Ct 40.

A bona fide doubt as to a defendant's present sanity is not necessarily raised by a prior adjudication of mental illness, unless it appears that the insanity was of a permanent and continuing nature. *Holden Hospital Corp. v Southern Illinois Hospital Corp.*, 22 Ill 2d 150, 174 NE2d 793.

Footnote 42. *Grammer v State*, 239 Ala 633, 196 So 268.

An instruction placing the burden upon the prosecution of proving that the defendant was of sound mind at the time he killed the deceased, based upon the conception that insanity once established was presumed to continue, was held to have been properly refused, the court saying that no such presumption arose in a criminal prosecution, where it was necessary to show not only insanity, but the inability to distinguish right from wrong, or insufficient willpower to control the defendant's actions. *Gulley v Commonwealth*, 284 Ky 98, 143 SW2d 1059.

In a murder prosecution involving the stabbing of a patient in a state hospital to which the defendant had been committed by a probate court, the defendant was not entitled to a proposed instruction regarding a presumption of continuing insanity, given that the prior

commitment was a civil commitment, and where the trial court's instruction that the prosecution was required to prove sanity beyond a reasonable doubt was more favorable. *People v Stockwell*, 68 Mich App 290, 242 NW2d 559.

A criminal defendant was not entitled to an instruction that insanity, once having been shown to exist, was legally presumed to continue, even though the defendant had previously been involuntarily committed to a mental institution, since the defendant did not limit his request to the particular diagnosed condition that resulted in the civil commitment. *State v Weller*, 285 Or 457, 591 P2d 732.

Footnote 43. *Armstrong v State*, 30 Fla 170, 11 So 618; *People v Woods*, 26 Ill 2d 557, 188 NE2d 1, cert den 373 US 945, 10 L Ed 2d 699, 83 S Ct 1555; *Glenn v People*, 9 Ill 2d 335, 137 NE2d 336.

Holding that the trial court had erred in refusing to receive evidence of an adjudication of the defendant's insanity entered over 7 years earlier, the court in *State v McMurry*, 61 Kan 87, 58 P 961, said that it knew of no subsequent time at which the presumption ceased, although the lapse of much time during which the patient had not been confined for his malady, or known as a fact to be insane, might so materially weaken the presumption as practically to neutralize it.

Footnote 44. *Daly v United States* (CA7 Ill) 33 F2d 443; *State v Snethen* (Iowa) 245 NW2d 308, post-conviction proceeding (Iowa) 308 NW2d 11, habeas corpus proceeding (CA8 Iowa) 736 F2d 1241, habeas corpus proceeding (CA8 Iowa) 885 F2d 456, cert den 496 US 940, 110 L Ed 2d 670, 110 S Ct 3223 (after being first found incompetent to stand trial, defendant was held at medical facility and director then reported that defendant had been mentally restored); *State v Stucker*, 352 Mo 1056, 180 SW2d 719.

An administrative release, after several months of therapy, cancelled the continuing presumption of insanity arising from the original commitment. *Gilbert v State*, 235 Ga 501, 220 SE2d 262.

Footnote 45. *State v Jensen*, 278 Minn 212, 153 NW2d 339, appeal after remand 286 Minn 65, 174 NW2d 226.

Footnote 46. *State v Myers*, 47 Wash 2d 840, 290 P2d 253 (not followed by *State v Smith*, 16 Wash App 425, 558 P2d 265).

Footnote 47. *Johnson v State* (Fla App D2) 118 So 2d 234.

Footnote 48. *Hurt v United States* (CA8 ND) 327 F2d 978; *Kitchens v United States* (CA10 Wyo) 272 F2d 757, 60-1 USTC ¶ 9178, 4 AFTR 2d 6008, cert den 362 US 942, 4 L Ed 2d 772, 80 S Ct 809; *Wells v State* (Fla) 98 So 2d 795; *Eason v State* (Fla App D3) 421 So 2d 35; *Hixon v State* (Fla App D2) 165 So 2d 436; *Glenn v People*, 9 Ill 2d 335, 137 NE2d 336; *People ex rel. McElhaney v Robinson*, 413 Ill 401, 108 NE2d 772; *Covington v O'Meara*, 133 Ky 762, 119 SW 187; *Galbraith v Lackey* (Okla Crim) 340 P2d 497; *State v Garver*, 190 Or 291, 225 P2d 771, 27 ALR2d 105.

Evidence of a party's subsequent conduct and that his relatives and friends may be sufficient to overcome the presumption of continued insanity. *Field v Koonce*, 178 Ark 862, 12 SW2d 772, 68 ALR 1303.

The jury should be instructed that where it was undisputed that the defendant had been adjudged insane and not restored to sanity, the presumption had to be overcome by the state by competent evidence. *Johnson v State* (Fla App D2) 118 So 2d 234.

The fact that defendant was insane once, or several times before, may render it more probable that he was insane at the time of the offense, if there is any direct proof that he was insane at that time. But standing by itself it proves nothing where the state shows a subsequent return to reason. *State v Scelfo*, 58 NJ Super 472, 156 A2d 714, cert denied 31 NJ 555, 158 A2d 454 and cert denied 371 US 847, 9 L Ed 2d 83, 83 S Ct 82.

Footnote 49. *Yankulov v Bushong* (Allen Co) 80 Ohio App 497, 36 Ohio Ops 292, 77 NE2d 88.

Footnote 50. *Burton v State* (Mo) 641 SW2d 95.

§ 297 --Drunkenness

<p>View Entire Section Go to Parallel Reference Table</p>

It has been held that the habit of drunkenness, once established, is presumed to continue, 51 although there is authority to the contrary. 52 However, it has also been held that it cannot be presumed that a drinking man, or one addicted to the use of liquor, is always drunk, or always in a condition which excludes the possibility of exercising due care. 53 In any event, it is clear that the fact that the habitual drunkenness of an individual is established on a particular date does not give rise to a presumption that this habit existed at any previous point of time. 54

It may be presumed or inferred from the fact that a person was drunk a few hours before an accident in which he was involved that he was drunk at the time of the accident. 55

Footnotes

Footnote 51. *McGraw v McGraw*, 171 Mass 146, 50 NE 526.

Footnote 52. *Meares v Meares*, 256 Ala 596, 56 So 2d 661.

Footnote 53. *Langworthy v Green*, 88 Mich 207, 50 NW 130.

Footnote 54. *Ceresola v Joseph F. Paul Co.*, 224 Mass 395, 113 NE 358.

Footnote 55. *Cowgill v Boock*, 189 Or 282, 218 P2d 445, 19 ALR2d 405 (overruled on other grounds by *Winn v Gilroy*, 296 Or 718, 681 P2d 776).

§ 298 Retrospective presumption or inference as to previous condition or state of

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The presumption or inference of the continued existence of a condition or state of facts is generally considered to be prospective, and not retrospective. 56 It has frequently been said that such a presumption never runs backward, the law not presuming, from proof of the existence of present conditions or facts, that the same facts or conditions had existed or continued for any length of time previously. 57 Thus, the presumption of continuing insanity 58 runs from the date of its establishment and does not run backward; it is prospective and not retrospective, 59 and proof of insanity at a particular time is not competent to prove, on the principle of natural and probable relation, the same condition for a considerable prior period. 60

There is other authority, however, to the effect that presumptions can run backward, and that a presumption or an inference, as to the past existence of a condition or state of facts may be proper under some circumstances. 61 Whether the past existence of a condition or a state of facts may be inferred or presumed from a later condition or state of facts depends on the facts and circumstances of the individual case, and on the likelihood of intervening circumstances. 62 Likewise, the interval of time to which any such retrospective presumption or inference will be allowable depend on the nature of the thing and the circumstances of the particular case. 63

Footnotes

Footnote 56. *Killoren Electric Co. v Hon*, 211 Ark 403, 200 SW2d 775; *State v Halpin*, 2 Conn Cir 409, 199 A2d 570; *Bunn v Standard Oil Co.*, 251 Iowa 7, 99 NW2d 436; *Nash v Normandy State Bank (Mo)* 201 SW2d 299; *Richardson v Farmers Union Oil Co.*, 131 Mont 535, 312 P2d 134; *Burrows v Nash*, 199 Or 114, 259 P2d 106 (criticized on other grounds by *Arena v Gingrich*, 305 Or 1, 748 P2d 547).

Footnote 57. *Killoren Electric Co. v Hon*, 211 Ark 403, 200 SW2d 775; *Professional Bldg., Inc. v Reagen*, 129 Ga App 183, 199 SE2d 266; *Butler v Ragsdale*, 54 Ga App 565, 188 SE 578; *Snowwhite v Metropolitan Life Ins. Co.*, 344 Mo 705, 127 SW2d 718; *Rounds v Bucher*, 137 Mont 39, 349 P2d 1026, 98 ALR2d 962; *Richardson v Farmers Union Oil Co.*, 131 Mont 535, 312 P2d 134; *Tonopah & G. R. Co. v Fellanbaum*, 32 Nev 278, 107 P 882; *Burrows v Nash*, 199 Or 114, 259 P2d 106 (criticized on other grounds by *Arena v Gingrich*, 305 Or 1, 748 P2d 547).

Annotation: Comment Note.—Relation back of presumption of continuance of condition of property, 7 ALR3d 1302 § 3.

Footnote 58. § 296.

Footnote 59. *Davidson v Piper*, 221 Iowa 171, 265 NW 107.

Footnote 60. *Re Estate of Perkins*, 195 Cal 699, 235 P 45; *Ellis v State*, 138 Wis 513, 119 NW 1110.

Footnote 61. *People v Wong* (1st Dist) 245 Cal App 2d 844, 54 Cal Rptr 273; *Slovick v James I. Barnes Constr. Co.* (2nd Dist) 142 Cal App 2d 618, 298 P2d 923; *Shipley v Southern Pacific Co.* (1st Dist) 44 Ill App 2d 1, 193 NE2d 862; *Grand T. W. R. Co. v M. S. Kaplan Co.* (1st Dist) 43 Ill App 2d 230, 193 NE2d 456, 7 ALR3d 1289; *Laplante v Warren Cotton Mills*, 165 Mass 487, 43 NE 294; *Henderson v William Moors Concrete Products, Inc.*, 353 Mich 509, 91 NW2d 910; *Byrd v Baltimore & O. R. Co.* (Montgomery Co) 10 Ohio App 2d 187, 39 Ohio Ops 2d 376, 227 NE2d 252; *Barbour v Baltimore & O. R. Co.* (Summit Co) 105 Ohio App 191, 6 Ohio Ops 2d 30, 152 NE2d 134.

Footnote 62. *Jenkins v Hawthorne*, 269 NC 672, 153 SE2d 339; *Miller v Lucas*, 267 NC 1, 147 SE2d 537.

Footnote 63. *Millman v United States Mortg. & Title Guaranty Co.*, 121 NJL 28, 1 A2d 265, wherein the court said that it is elementary that the condition of a place or thing at the time of an injury may always be evidenced by showing its condition before or after that time, provided no substantial change has occurred, and added that the propriety of an inference in the individual case will depend on the likelihood of intervening circumstances as the true origin of the subsequent existence.

In *Henderson v William Moors Concrete Products, Inc.*, 353 Mich 509, 91 NW2d 910, an action for injuries sustained by the plaintiff when cinder blocks which had been delivered to a building site collapsed while the plaintiff was removing blocks from the pile, the court held that from the fact that the planks on which the blocks were placed were uneven on the date of the accident it would be reasonable to infer that they were equally uneven 4 days earlier when the blocks were placed there.

13. Other Particular Presumptions and Inferences [299, 300]

§ 299 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The law presumes that a child was alive when born. 64 There is also a presumption against the fact that a person found dead was murdered. 65 But no presumption as to the age of a person at time of death arises from evidence of the age of his oldest child and of his widow. 66

It is to be presumed that neither party to an action will offer any evidence other than the exact facts. 67

Footnotes

Footnote 64. *Turner v Person*, 175 NC 219, 95 SE 362.

Footnote 65. *Nichols v Mutual Life Ins. Co.*, 178 Tenn 209, 156 SW2d 436.

Footnote 66. *Re Kueter's Estate*, 45 SD 341, 187 NW 625, 21 ALR 1330.

Footnote 67. *Western Union Tel. Co. v Williams*, 129 Ky 515, 112 SW 651.

§ 300 Proper execution of written instruments

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Contracts and other written instruments which are regular on their face are presumed to have been properly executed and to have had included in their execution all formalities which were essential to their validity. 68 It is presumed also that a written instrument was executed on the day of its date 69 and, if it purports to have been witnessed, that it was witnessed at the time of its execution. 70 Such presumptions are rebuttable, 71 and it has been said that after testimony is adduced tending to overcome them, they cease to have probative force. 72

Footnotes

Footnote 68. *Clements v Macheboeuf*, 92 US 418, 2 Otto 418, 23 L Ed 504; *Ogonowski v Bankers Leasing Corp.*, 8 Ariz App 484, 447 P2d 576; *Gates v American Nat. Bank*, 173 Colo 371, 479 P2d 285.

An unconditional legal delivery of a note may be presumed from its manual delivery. *Cockrell v Taylor*, 122 Fla 798, 165 So 887, 105 ALR 1338.

Footnote 69. *Conley v Finn*, 171 Mass 70, 50 NE 460; *Jackson City Bank & Trust Co. v Sternburg*, 281 Mich 313, 274 NW 806, 112 ALR 1195; *McFarlane v Loudon*, 99 Wis 620, 75 NW 394.

As to presumption of date of execution of a deed, see 23 Am Jur 2d, Deeds § 109.

Footnote 70. *Pringle v Dunn*, 37 Wis 449.

Footnote 71. The presumption that a receipt was made on the date it bears is not conclusive. *Erickson v Brookings County*, 3 SD 434, 53 NW 857.

Footnote 72. *Jackson City Bank & Trust Co. v Sternburg*, 281 Mich 313, 274 NW 806, 112 ALR 1195.

V. ADMISSIBILITY, GENERALLY [301-657]

A. Relevant, Competent and Material Evidence (Rules 401, 402) [301-323]

Research References

US Const, Amends 4, 6

FRE 401-412

Uniform Rules of Evidence 401-412

8 USCS § 1202; 10 USCS §§ 3392, 8693; 13 USCS § 9(a); 18 USCS § 3501; 47

USCS § 605(a)

ALR Digests: Evidence §§ 1134-1413

ALR Index: Character and Reputation; Demonstrative and Real Evidence; Description and Identification; Documentary Evidence; Entrapment; Evidence; Evidence Rules; Experiments or Tests; Expert and Opinion Evidence; Hypothetical Questions; Impeachment of Witnesses; Offer of Proof; Rebuttal; Same or Similar Acts or Matters; Witnesses

1A Federal Procedural Forms, L Ed, Actions in District Court §§ 1:3623, 1:3624; 7

Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:646, 20:647, 20:649

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 15, 18, 20, 104, 105, 108

1 Wharton's Criminal Evidence (14th Ed) § 92

1. General Principles [301-306]

§ 301 Requirement that evidence be admissible

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence offered by either party in the trial of an action, to be admissible against the objection of the other party, must be relevant to the issues of the case and tend to establish or disprove them; matters that are wholly irrelevant and that are incapable of affording any legitimate proof, presumption, or inference regarding the fact or facts in issue, must be excluded. 73

The Federal Rules provide that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by act of Congress, by the Federal Rules of Evidence, or by other rules prescribed by the Supreme Court pursuant to statutory authority. 74 To similar effect, the Uniform Rules provide that all relevant evidence is admissible, except as otherwise provided by statute, by the Rules of Evidence or by other rules applicable in the courts of the adopting state. 75 Both the Federal and Uniform Rule further provide that evidence which is not relevant is not admissible. 76

The principle of full revelation of pertinent evidence to the trier is embodied in Rule 102, 401, and 402, 77 and it is necessary to refer to the definition of "relevant evidence" in Rule 401 to determine what constitutes "relevant evidence" so as to be admissible under Rule 402. 78 Relevant evidence is admissible under Rule 402 unless made

◆ Practice guide: Where irrelevant evidence is admitted, such admission will often constitute no more than harmless error, 80 although in some instances such admission may constitute prejudicial error. 81

◆ Caution: While admissible evidence is relevant, not all relevant evidence is admissible. Such evidence may be excluded because it is untestable and untrustworthy, as in the case of hearsay, 82 or because it is contrary to scientific principles or in conflict with natural laws; 83 or because of practical considerations of undue delay, confusion of issues, or risks of prejudice to a party. 84

It has been held that the burden is on the party seeking to exclude relevant evidence to show a reason for inadmissibility. 85 But it has also been said that if evidence offered by a party is objected to as inadmissible, the party offering the evidence has the burden of establishing its admissibility. 86

◆ Caution: Counsel must show the relevance and probative value of the evidence when it is offered; if counsel fails to do so and the evidence is ruled inadmissible, the fact that the evidence's relevancy becomes clear in retrospect after the trial does not affect the ruling as to its inadmissibility. 87 Where counsel seeks no opportunity to alter a pretrial ruling of inadmissibility, but disregards the ruling and repeatedly suggests to the jury the fact of such evidence, a new trial must be ordered in the interest of fairness to the parties. 88

§ 301 ----Requirement that evidence be admissible [SUPPLEMENT]

Case authorities:

In hostile work environment context for Title VII claims, scope of admissibility of evidence of events which preceded 300-day period preceding filing of administrative complaint must be grounded in substantive law at issue and therefore statutory limitations period is not necessarily bar to admissibility of pre-statute acts which bear on work environment and on employer's awareness of that environment. *West v Philadelphia Elec. Co.* (1995, CA3 Pa) 45 F3d 744, 66 BNA FEP Cas 1524.

Evidence of negotiations over terms of effort to refinance shopping center is relevant under FRE 402 and admissible under FRE 403, where shopping center land purchaser is suing seller regarding its and consultant's breach of environmental audit and cleanup agreement, because it is certainly probative that lender abandoned refinancing due to its environmental concerns, jury will not be so confused as to award damages to purchaser for failed refinancing, and seller and consultant may impeach lender on cross-examination. *Hawthorne Partners v AT & T Technologies* (1993, ND Ill) 831 F Supp 1398, motion den (ND Ill) 1993 US Dist LEXIS 17119.

Evidence of crack cocaine conspiracy defendant's possession of cocaine was properly admitted since defendant gave pretrial notice that he might rely on defense of lack of knowledge of contraband and lack of intent. *United States v Minh The Tran* (1994, CA8 Mo) 16 F3d 897.

Offer of proof that defendant had purchased property adjacent to plaintiffs' property because defendant had polluted that property with its oil field activities was insufficient since it could not be determined from it whether excluded evidence would have been relevant or helpful to plaintiffs' case; therefore, district court did not abuse its discretion in excluding evidence. *Inselman v S & J Operating Co.* (1995, CA10 Okla) 44 F3d 894.

It was error in a murder prosecution for the court to permit the State to elicit testimony from a witness (defendant's girlfriend) that defendant had discussed Satanism with her and for the prosecutor to refer to Satanism in his final argument. However, defendant was not prejudiced by this error since there was no real contention that defendant practiced Satanism, and there was other evidence concerning bizarre behavior and conversations by defendant. *State v Lovin* (1995) 339 NC 695, 454 SE2d 229.

Admissibility of evidence is determined by trial judge subject to limits of relevancy and adequacy of proof (Stats § 901.04). In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 1993 Wisc LEXIS 754.

Admissibility of evidence is determined by trial judge subject to limits of relevancy and adequacy of proof (Stats § 901.04). In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 505 NW2d 142.

Footnotes

Footnote 73. § 308.

Evidence that is prima facie irrelevant should be rejected unless the person offering it shows how it can be made relevant by connecting it with other facts and circumstances. § 311.

Footnote 74. FRE 402.

◆ Comment: Prior to a 1972 amendment, the Federal Rules of Criminal Procedure (Rule 26) provided that the admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. This Rule contemplated the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts; it was based on *Funk v United States*, 290 US 371, 78 L Ed 369, 54 S Ct 212, 93 ALR 1136 and *Wolfie v United States*, 291 US 7, 78 L Ed 617, 54 S Ct 279 which indicated that in the absence of statute, the Federal Courts in criminal cases are not bound by the state law of evidence but are guided by common law principles as interpreted by the Federal courts "in the light of reason and experience." Notes of Advisory Committee to USCS Rules of Crim Proc, Rule 26.

This part of Rule 26 was deleted by the 1972 amendment because the Federal Rules of Evidence now govern admissibility of evidence. Notes of Advisory Committee on 1972 Amendments to Rules (USCS Rules of Crim Proc, Rule 26).

Practice References Louisell and Mueller, Federal Evidence § 111.

Hunter, Federal Trial Handbook 2d § 32.5.

Forms: Allegation–Error of law–In refusing to allow introduction of relevant evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3623.

Allegation–Error of law–In admitting inadmissible evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3624.

Footnote 75. Uniform Rules of Evidence, Rule 402.

Footnote 76. FRE 402; Uniform Rules of Evidence, Rule 402.

Footnote 77. *United States v King* (ED NY) 73 FRD 103, 1 Fed Rules Evid Serv 521.

In connection with a competency issue, the general rule is that the trial court should freely admit all evidence that appears to be relevant. *United States v Bennett* (CA10 Kan) 539 F2d 45, cert den 429 US 925, 50 L Ed 2d 293, 97 S Ct 327.

Footnote 78. *United States v Brown* (CA5 La) 574 F2d 1274, 78-2 USTC ¶ 9550, 42 AFTR 2d 78-5253, reh den (CA5 La) 578 F2d 871 and cert den 439 US 1046, 58 L Ed 2d 704, 99 S Ct 720 and appeal after remand (CA5 La) 628 F2d 471, reh den (CA5 La) 633 F2d 582; *United States v Watkins* (CA9 Or) 600 F2d 201, 79-2 USTC ¶ 9548, 44 AFTR 2d 79-5222, cert den 444 US 871, 62 L Ed 2d 96, 100 S Ct 148.

For a discussion of FRE 401, see §§ 307 et seq.

Footnote 79. *United States v Juarez* (CA7 Ind) 549 F2d 1113.

Footnote 80. *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054.

Footnote 81. *United States v Brown* (CA9 Or) 720 F2d 1059, 14 Fed Rules Evid Serv 1592.

Footnote 82. §§ 658 et seq.

Footnote 83. *Kelly v Jones*, 290 Ill 375, 125 NE 334, 8 ALR 792; *Wolf v City R. Co.*, 50 Or 64, 85 P 620; *Seiwell v Hines*, 273 Pa 259, 116 A 919, 21 ALR 139.

Footnote 84. §§ 324 et seq.

Footnote 85. *United States v Dupee* (CA9 Wash) 569 F2d 1061.

Footnote 86. *Liebow v Jones Store Co.* (Mo) 303 SW2d 660.

Footnote 87. *Jones v United States* (CA10 Kan) 387 F2d 1004, 68-1 USTC ¶ 9111, 21 AFTR 2d 420, cert den 392 US 927, 20 L Ed 2d 1385, 88 S Ct 2284.

Footnote 88. *Brown v Royalty* (CA8 Mo) 535 F2d 1024.

§ 302 Exceptions to rule of admissibility: federal constitutional and statutory provisions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Relevant evidence that is inadmissible pursuant to the United States Constitution includes evidence obtained illegally, since the 4th Amendment prohibits unreasonable searches and seizures, 89 and incriminating statements elicited from the accused in violation of the right to counsel, since the 6th Amendment guarantees the right of the accused to the assistance of counsel. 90

Evidence that is relevant but inadmissible pursuant to an act of Congress includes records of refusal of visas or permits to enter the United States; 91 replacement certificates of honorable discharge from the Army 92 or the Air Force; 93 census information; 94 wire or radio communications, unless authorized by the sender, 95 and a confession not given voluntarily. 96

Regulations may also bar the admission of evidence. Thus, it has been held that it was error to admit as evidence conclusions and recommendations of Coast Guard investigating officers made in reports arising out of a maritime accident where federal regulations forbade use of such reports in civil or criminal proceedings, since Congress may impose limitations on admissibility of evidence beyond those provided in Federal Rules of Evidence. 97

§ 302 ----Exceptions to rule of admissibility: federal constitutional and statutory provisions [SUPPLEMENT]

Case authorities:

Evidence that is admissible for some purposes or parties may not be admissible for others and, in such event, court may admit evidence but must instruct jury as to proper scope of admission. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 1993 Wisc LEXIS 754.

Footnotes

Footnote 89. *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507; *Weeks v United States*, 232 US 383, 58 L Ed 652, 34 S Ct 341 (ovrld on other grounds by *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437).

For a discussion of illegally obtained evidence, see §§ 589 et seq.

Generally, as to unreasonable searches and seizures, see 68 Am Jur 2d, *Searches and Seizures*.

Footnote 90. *Massiah v United States*, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199.

Footnote 91. 8 USCS § 1202(f).

Footnote 92. 10 USCS § 3392.

Footnote 93. 10 USCS § 8693.

Footnote 94. 13 USCS § 9(a).

Footnote 95. 47 USCS § 605(a).

Footnote 96. 18 USCS § 3501.

Footnote 97. *Huber v United States* (CA9 Cal) 838 F2d 398, 1988 AMC 1796, 25 Fed Rules Evid Serv 283.

§ 303 --Checklist of rules creating exceptions to rule of admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal and Uniform Rules of Evidence specifically preclude the admission of certain relevant evidence:

- Rule 403, involving prejudicial, confusing, or time-wasting evidence
- Rule 404, involving character evidence
- Rule 407, relating to subsequent remedial measures
- Rule 408, relating to compromise and offers to compromise
- Rule 409, relating to payment of medical and similar expenses
- Rule 410, relating to offers to plead guilty or nolo contendere, and to withdrawn pleas of guilty
- Rule 411, relating to liability insurance
- Rule 412, relating to a rape victim's past sexual behavior 98
- Rule 501, relating to privileges
- Rules 608-611, relating to the character and conduct of witnesses, their credibility, and their religious beliefs or opinions

- Rules 701-705, specifying requirements with respect to opinion and expert testimony
- Rule 802, excluding hearsay not falling within an exception
- Rules 1003-1004, restricting the admissibility of a duplicate and of evidence of the contents of a writing or recording

Rules of court other than the Federal Rules of Evidence which preclude the admission of relevant evidence include—

—FR Civ P 30(b) and 32(a), which place limits on the use of relevant depositions.

—FR Civ P 37(b)(2)(B), which authorizes sanctions by the court in the form of an order prohibiting a party from introducing designated matters in evidence for failure to obey an order to provide or permit discovery.

—FR Crim P 15, which restricts the use of depositions in criminal cases.

Footnotes

Footnote 98.

- ◆ Observation: The Uniform Rules, as originally promulgated, did not contain a Rule 412; while such a rule was added in 1986, it has not been adopted in a number of states. See 13A ULA, Uniform Rules of Evidence (Supp), Note to Rule 412.

§ 304 "Materiality" requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Prior to the adoption of the Federal and Uniform Rules of Evidence, one of the elementary rules of evidence was that matters offered in evidence in a case must not only be relevant to the issues and tend to establish or disprove them, 99 but that they must also be "material" in that they must relate to the issues in the case. The sole fact that evidence is logically relevant was said not to require its admission; the evidence must also have some probative force over and above logical relevancy, 1 which was referred to as "legal relevancy" or "materiality." 2

- ◆ Distinction: "Immaterial" denotes evidence that is offered to prove or disprove a fact or proposition that is not at issue, whereas "irrelevant" denotes evidence that does not logically tend to prove or disprove any material fact or proposition. 3

The term "material" is not used in Rule 401, because it is considered "loosely used and ambiguous." 4 Thus, where evidence is related to the central issues in a case, it cannot be excluded on grounds that it is not material, since such a ground for inadmissibility

does not appear in the Federal Rules of Evidence, or in any other exception listed in Rule 402. 5

◆ Observation: The Rules in effect substitute the phrase "fact that is of consequence to the determination of the action" 6 for the term "materiality." 7 It has been noted that the decision of the federal rulemakers to avoid the term "material" is perhaps unfortunate, as the usage in the Model Code and the former uniform rules seems to be sufficiently settled to create no appreciable confusion, and the consequential fact terminology is no less ambiguous. 8

◆ Caution: Some states, despite their adoption of the Uniform Rules, still appear to recognize the effect of materiality. 9 Furthermore, materiality may continue to be a necessary element in states that have not adopted the Uniform Rules. 10

§ 304 ----"Materiality" requirement [SUPPLEMENT]

Practice Aids: Conditional probative value and the reconstruction of the Federal Rules of Evidence, 94 Mich LR 2:419 (1995).

Case authorities:

In a prosecution for first-degree murder of a police officer who was executing a search warrant for defendant's apartment wherein defendant contended that he and others in his apartment did not hear the police yell, "Police, search warrant," because they were listening to a compact disc entitled "Blacktronic Science," the State did not violate *Brady v. Maryland*, 373 U.S. 83, by failing to disclose to defendant that the "Blacktronic Science" compact disc was discovered in defendant's stereo system because this evidence would not have affected the outcome of the trial and was not material where the jury heard testimony from defendant and two others that they were listening to the "Blacktronic Science" compact disc at the time police entered defendant's apartment and that the music was loud, and a visitor in another apartment testified that defendant's music was very loud that night and he did not hear the police announce their identification. *State v Lyons* (1995) 340 NC 646, 459 SE2d 770.

Judges exercise broad discretion with respect to admissibility of evidence as long as evidence tends to prove material fact. Material facts are those that are of consequence to merits of litigation while relevancy, in turn, is function of whether evidence tends to make existence of material fact more probable or less probable than it would be without evidence. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 1993 Wisc LEXIS 754.

Footnotes

Footnote 99. *Bird v United States*, 180 US 356, 45 L Ed 570, 21 S Ct 403; *Atlanta Joint Terminals v Knight*, 98 Ga App 482, 106 SE2d 417, 79 ALR2d 539; *Williams v Idaho Potato Starch Co.*, 73 Idaho 13, 245 P2d 1045; *State v Knox*, 236 Iowa 499, 18 NW2d 716; *Whiteman v State*, 119 Ohio St 285, 6 Ohio L Abs 695, 164 NE 51, 63 ALR 595.

Footnote 1. *State v Lee*, 227 Ind 25, 83 NE2d 778; *Conley v Kaney* (Mo) 250 SW2d 350;

Long v Leonard, 113 Vt 258, 32 A2d 679.

Footnote 2. State v Lee, 227 Ind 25, 83 NE2d 778; Conley v Kaney (Mo) 250 SW2d 350.

Footnote 3. Hansson v Catalytic Constr. Co., 43 NJ Super 23, 127 A2d 431.

That challenged evidence alone proves neither the connecting link in a chain of circumstances nor the ultimate fact in issue does not make it immaterial; materiality depends on whether evidence tends to link up other evidence or prove an ultimate fact in issue. State v Gersvold, 66 Wash 2d 900, 406 P2d 318.

Footnote 4. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

◆ Note: Texas enacted the following variation when it adopted the Uniform Rules:

"(a) 'Materiality' inquires whether there is any rational relationship or pertinence of the proffered evidence to any provable or controlling fact issue in dispute.

"(b) 'Relevancy' inquires whether the proffered evidence has probative value tending to establish the presence or absence, truth or falsity, of a fact.

"(c) TEST: Is it material? If not, exclude. If yes, and only in that event, is it relevant? If not exclude. If yes, admit." 13A ULA, Uniform Rules of Evidence, Note to Rule 401.

Footnote 5. United States v Carriger (CA6 Mich) 592 F2d 312, 79-1 USTC ¶ 9195, 4 Fed Rules Evid Serv 124, 43 AFTR 2d 79-538.

Footnote 6. For construction of this phrase, see § 310.

Footnote 7. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

Footnote 8. Wellborn, The Federal Rules of Evidence and the Application of State Law in Federal Courts, 55 Tex L Rev 371, 392 (1977).

Footnote 9. See Sims v Brown (Fla) 574 So 2d 131, 16 FLW S 112, stating that to be legally relevant, evidence must pass the test of materiality (defined as bearing on a fact to be proved), competency, and legal relevancy and must not be excluded for other countervailing reasons.

Footnote 10. People v Davis, 43 NY2d 17, 400 NYS2d 735, 371 NE2d 456, cert den 435 US 998, 56 L Ed 2d 88, 98 S Ct 1653 and cert den 438 US 914, 57 L Ed 2d 1160, 98 S Ct 3143 (relevant evidence is evidence having any tendency in reason to prove any material fact and tending to convince that the fact sought to be established is so).

In order to be admissible, the evidence offered must have some material bearing upon issues of the case. Wilmot v McPadden, 79 Conn 367, 65 A 157 (holding immaterial, in an action involving the safety of chimneys left standing during the demolition of a building, evidence that persons, in passing the building, walked on the opposite side of the street because they were afraid that the chimney would fall).

§ 305 "Competency" requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Prior to the adoption of the Federal and Uniform Rules of Evidence, the courts frequently referred to the "competency" of evidence. The terms "relevancy," "competency," and "materiality" were often used conjunctively in such manner as to suggest that they are synonymous, although it was recognized that a matter relevant to an issue may be incompetent and inadmissible under the established rules of evidence, such as the rule that excludes hearsay evidence. 11

Competent evidence was defined to mean that which the very nature of things to be proved required as the fit and appropriate proof in the particular case; it was evidence which in legal proceedings was admissible for the purpose of proving relevant fact. 12 Stated otherwise, the competency of evidence depends on whether it is of the sort or type which may be accepted on any issue to which it is relevant. 13

In general, the exclusion of evidence is proper if it is incompetent on any ground. It is immaterial on what ground the court excludes it, provided its incompetency is established. 14 Incompetent and irrelevant evidence cannot be converted into competent and relevant evidence simply because it is contained in an official communication. 15 However, evidence may be clearly incompetent for one purpose but be entirely proper for another purpose; 16 such evidence was held admissible for the latter purpose even though the jury may erroneously use it for other purposes. 17

The trend of the law even prior to the adoption of the Rules was to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given to it. This change was wrought partially by legislation and partially by judicial construction. 18 Statutes determining the competency of a person as a witness 19 do not necessarily affect the admissibility of proof that may be offered by witness. A statute making a party to an action a competent witness does not make that part of his evidence competent that was before incompetent; but, if the evidence was in its nature competent before the statute and was unavailable by reason of incompetency of the witness, such evidence becomes available upon the statutory removal of such incompetency, so that it may be proved by such witness. 20

◆ Observation: Although the Federal and Uniform Rules of Evidence make no reference to competency or materiality, 21 some courts continue to refer to competency as an element of relevance or admissibility. 22 Thus, it has been noted that it is elementary that any evidence is competent that makes more or less probable the fact in controversy. 23

§ 305 ----"Competency" requirement [SUPPLEMENT]

Case authorities:

Identical affidavits offered by five jurors stating that jury acquitted defendant of first-degree murder based on conclusion that he was not present at crime scene were not offered as part of inquiry into validity of verdict, and thus were competent evidence admissible on defendant's claim of double jeopardy. *Jacobs v Marathon County* (1996, CA7 Wis) 73 F3d 164, reh, en banc, den (1996, CA7 Wis) 1996 US App LEXIS 2410.

Footnotes

Footnote 11. § 659.

Footnote 12. *Chiordi v Jernigan*, 46 NM 396, 129 P2d 640.

Footnote 13. *Mattox v News Syndicate Co.* (CA2 NY) 176 F2d 897, 12 ALR2d 988, cert den 338 US 858, 94 L Ed 525, 70 S Ct 100.

Footnote 14. *Egger v Egger*, 225 Mo 116, 123 SW 928.

Footnote 15. *United States v Corwin*, 129 US 381, 32 L Ed 710, 9 S Ct 318; *Chiordi v Jernigan*, 46 NM 396, 129 P2d 640.

Footnote 16. *Leigh v Swartz*, 74 Ariz 108, 245 P2d 262; *Maas v Laursen*, 219 Minn 461, 18 NW2d 233, 158 ALR 215; *Louis Steinbaum Real Estate Co. v Maltz* (Mo) 247 SW2d 652, 31 ALR2d 1052; *Caples v State*, 3 Okla Crim 72, 104 P 493.

Footnote 17. *Sims v Struthers*, 267 Ala 80, 100 So 2d 23; *Pioneer Constructors v Symes*, 77 Ariz 107, 267 P2d 740, 41 ALR2d 668; *Daggett v Atchison, T. & S. F. R. Co.*, 48 Cal 2d 655, 313 P2d 557, 64 ALR2d 1283; *State v Volpe*, 113 Conn 288, 155 A 223, 76 ALR 1083; *Martin v Mercantile Trust Co.* (Mo) 293 SW2d 319; *Fox v Manchester*, 183 NY 141, 75 NE 1116; *State v Cooper*, 114 Utah 531, 201 P2d 764.

If evidence is competent for any purpose, it is not rendered incompetent by the fact that it also has a tendency to influence the mind in another direction, for which alone it would not be competent. *United States v Vandersee* (CA3 NJ) 279 F2d 176, cert den 364 US 943, 5 L Ed 2d 374, 81 S Ct 463; *Curtin v Benjamin*, 305 Mass 489, 26 NE2d 354, 129 ALR 433.

Footnote 18. *Funk v United States*, 290 US 371, 78 L Ed 369, 54 S Ct 212, 93 ALR 1136.

Footnote 19. 81 Am Jur 2d, Witnesses §§ 163 et seq.

Footnote 20. *Garrett v Hanshue*, 53 Ohio St 482, 42 NE 256.

Footnote 21. As to materiality, see § 304.

Footnote 22. *Sims v Brown* (Fla) 574 So 2d 131, 16 FLW S 112 (stating that to be legally relevant, evidence must pass the test of materiality, competency—being testified by one in a position to know—and legal relevancy and must not be excluded for other countervailing reasons).

"Competent evidence" is that which tends to establish a fact in issue. *Weiner v State*, 217 Neb 372, 348 NW2d 879.

Forms: Instructions to jury—Consideration of competent evidence only. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 20.

Footnote 23. *Cincinnati Bell, Inc. v Hinterlong*, 70 Ohio Misc 38, 24 Ohio Ops 3d 52, 437 NE2d 11.

Generally as to the necessity for the evidence to tend to make probable the existence of a fact, see § 309.

§ 306 Effect of state-law restrictions on admissibility in federal court

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Federal Rules of Evidence, Rule 402 was designed to bar common-law rules of evidence or state rules of evidence that are inconsistent with it. 24 Federal Rules of Evidence, Rule 402 has been invoked to reject objections based on state-created common-law limits upon receipt of relevant evidence, and to make clear that the trial court is to apply federal relevancy standards even where state law supplies the rule of decision. 25 However, some courts have applied state restrictions on the admissibility of evidence under certain narrow circumstances. 26

◆ **Observation:** Although there are some matters of state policy so basic that they should be accorded the same treatment in federal courts as they have in the state courts, 27 in the absence of any indication of state policy, the Federal District Court should be guided by the literal terms of the Federal Rules of Evidence. 28

Footnotes

Footnote 24. *United States v Jacobs* (CA2 NY) 547 F2d 772.

Annotation: Federal Rules of Evidence or state evidentiary rules as applicable in diversity cases, 84 ALR Fed 283.

Footnote 25. *United States v Jacobs* (CA2 NY) 547 F2d 772, cert gr 431 US 937, 53 L Ed 2d 254, 97 S Ct 2647, cert dismd 436 US 31, 56 L Ed 2d 53, 98 S Ct 1873; *Papizzo v O. Robertson Transport, Ltd.* (ED Mich) 401 F Supp 540, 1 Fed Rules Evid Serv 109 (disapproved on other grounds by *Caldarera v Eastern Airlines, Inc.* (CA5 La) 705 F2d 778, 12 Fed Rules Evid Serv 1996).

Footnote 26. *Caldarera v Eastern Airlines, Inc.* (CA5 La) 705 F2d 778, 12 Fed Rules Evid Serv 1996 (applying Louisiana rule excluding evidence of remarriage in suit seeking damages for loss of spouse); *Bailey v Southern Pacific Transp. Co.* (CA5 Tex)

613 F2d 1385, 5 Fed Rules Evid Serv 956, reh den (CA5 Tex) 618 F2d 781 and cert den 449 US 836, 66 L Ed 2d 42, 101 S Ct 109 (applying state rule that evidence of remarriage not admissible for purpose of mitigation of damages).

Footnote 27. Conway v Chemical Leaman Tank Lines, Inc. (CA5 Tex) 540 F2d 837, appeal after remand (CA5 Tex) 610 F2d 360, reh den (CA5 Tex) 614 F2d 1298 and on remand (ED Tex) 487 F Supp 647, motion gr (ED Tex) 87 FRD 712, 30 FR Serv 2d 856, affd (CA5 Tex) 644 F2d 1059, reh den (CA5 Tex) 650 F2d 282 and appeal after remand (CA5 Tex) 687 F2d 108, 11 Fed Rules Evid Serv 1895, 34 FR Serv 2d 1485, reh den (CA5 Tex) 693 F2d 133 (applying Texas statute governing admissibility of evidence of widow's ceremonial remarriage in wrongful death action as constituting evidentiary rule so bound up with state substantive law that federal court should accord it same treatment as state courts to give full effect to state policy).

Footnote 28. Stonehocker v General Motors Corp. (CA4 SC) 587 F2d 151, 3 Fed Rules Evid Serv 1334.

2. What Constitutes "Relevant Evidence" [307-312]

§ 307 Definition of "relevant" evidence; effect of collateral issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

"Relevant evidence" is defined by the Rules as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 29 Thus, the Rules definition embodies two separate requirements, namely:

- (1) that the evidence tends to make more or less probable the existence of a fact, 30 and
- (2) that the fact be of consequence to the determination of the action. 31

It has long been recognized that evidence which, when taken alone or in connection with other evidence, 32 tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical and reasonable inference with respect to the matter or a principal fact in issue, is relevant. 33 As thus defined, relevancy means the logical relation between the proposed evidence and a fact to be established. 34 For evidence to be relevant, it must tend to convince that the fact sought to be established is so. 35

Evidence of collateral issues may be relevant if the fact which it tends to establish will tend to prove or disprove the fact in issue, 36 as where it has a natural tendency to corroborate or supplement admitted direct evidence. 37 In other words, while the evidence offered must be confined to, it need not bear directly upon the issue. 38

Moreover, evidence that is relevant and admissible is not made inadmissible by carrying with it collateral facts advantageous to the party offering it, which of themselves could not be offered. 39

◆ Observation: Under Rule 104(b) of the Uniform Rules of Evidence and the Federal Rules of Evidence, even the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**§ 307 ----Definition of "relevant" evidence; effect of collateral issues
[SUPPLEMENT]**

Case authorities:

Evidence of manufacturer's profits from sale of all-terrain vehicles was somewhat relevant to plaintiff's failure to warn claim since it was probative of manufacturer's explanation for its inaction, but danger that it would unfairly prejudice jury was overwhelming, particularly since limiting instruction did not alert jury to impropriety of punishing manufacturer for unsavory motive of greed. *La Plante v American Honda Motor Co.* (1994, CA1 RI) 27 F3d 731, CCH Prod Liab Rep ¶ 13935, 39 Fed Rules Evid Serv 987.

Ledger was relevant evidence in cocaine distribution conspiracy, offered as evidence of narcotics conspiracy alleged; expert testified that drug dealers generally keep ledgers recording their drug transactions and "running tab" to track balance of money due on transactions, and that entry in question appeared to be such record. *United States v Quiroz* (1993, CA2 NY) 13 F3d 505, on reh, in part, reh den, in part (CA2) 1994 US App LEXIS 8404.

Evidence of mail fraud victims' financial losses was relevant to proving defendants' specific intent, but some went beyond anything that was reasonable to prove such intent where witnesses testified that money they used to pay back losses came from their children's college savings or savings for other specific purposes, or that paying back money affected their health. *United States v Copple* (1994, CA3 Pa) 24 F3d 535, 94-1 USTC ¶ 50237, 74 AFTR 2d 94-6133, 94 TNT 178-23, 39 Fed Rules Evid Serv 941, cert den (1994, US) 1994 US LEXIS 7908.

District court erred in excluding employment discrimination plaintiff's evidence of racially hostile work environment and from eliciting testimony of how it related to plaintiff's performance where it admitted employer's evidence of plaintiff's performance but prohibited plaintiff from cross-examining employer's witnesses as to basis or extent of their knowledge, and evidence was relevant to whether principal nondiscriminatory reasons for employer's action was pretextual. *Glass v Philadelphia Elec. Co.* (1994, CA3 Pa) 34 F3d 188.

In plaintiff's action against employer alleging sexually hostile work atmosphere and retaliation for raising claims of sexual harassment, plaintiff is not ordered to execute authorization enabling employer to obtain her psychological/psychiatric records, where plaintiff withdrew claim for pain, suffering, mental anguish, humiliation, and loss of enjoyment of life, because records are not likely to lead to relevant evidence; but plaintiff

is ordered to submit records to court for in camera review for purpose of determining whether psychotherapist/patient privilege applies to records. *Covell v CNG Transmission Corp.* (1994, MD Pa) 863 F Supp 202.

Evidence of bankruptcy fraud/money laundering defendant's declining net worth, purchase and use of cashier's checks, participation in large cash transactions, and rental or use of more than one safety deposit box was relevant to whether defendant acted with requisite intent or plan to defeat rights of his creditors. *United States v West* (1994, CA5 Tex) 22 F3d 586, CCH Bankr L Rptr ¶ 75970, reh, en banc, den (1994, CA5 Tex) 1994 US App LEXIS 22090.

Age-related remarks by discharged employee's supervisor over four-year period of his supervision were relevant to employee's age discrimination claim since they indicated pattern of discriminatory comments and were directly relevant to showing existence of discriminatory motive for firing employee, and fact that supervisor's supervisor is one who terminated employee did not make them less relevant since supervisor recommended employee's discharge and deciding official relied on that recommendation. *EEOC v Manville Sales Corp.* (1994, CA5 Tex) 27 F3d 1089, 65 BNA FEP Cas 804, reh, en banc, den (1994, CA5 Tex) 1994 US App LEXIS 27068.

Evidence of illegal kickbacks and unauthorized use of police department planes was properly admitted in obstruction of justice prosecution as relevant to defendant's motive for altering and ordering others to alter aviation department logbooks. *United States v Mullins* (1994, CA6 Mich) 22 F3d 1365, 1994 FED App 133P.

Court did not abuse its discretion in age discrimination case in admitting testimony that plaintiff's superior admitted to belief during his teenage years that all people over 30 should be put in concentration camps and his comment that he did not want to spend Thanksgiving with his family because he did not like to be around old people, since they were relevant to plaintiff's heavy evidentiary burden to prove that defendant's alleged discriminatory animus was not vague, ambiguous, or isolated, and any error was harmless given suspicious circumstances of plaintiff's firing and other evidence of superior's animus toward old people. *Cooley v Carmike Cinemas* (1994, CA6 Tenn) 25 F3d 1325, 65 BNA FEP Cas 46, 64 CCH EPD ¶ 43151, 39 Fed Rules Evid Serv 950, 1994 FED App 208P.

District court erred in excluding evidence that witnesses had been subjected to electroshock and beatings by defendant police officers several days before civil rights plaintiff's arrest and alleged beating and electroshock treatment by officers, since evidence was relevant to plaintiff's claims and could have been used to impeach one officer's denial of having ever used electroshock instrument. *Wilson v City of Chicago* (1993, CA7 Ill) 6 F3d 1233, mod, on reh, in part, reh den (CA7 Ill) 1993 US App LEXIS 31896.

Evidence that when defendant was arrested for drug trafficking he was in possession of false driver's license issued in name of deceased person and bearing that person's social security number was properly admitted since, by indicating that defendant wished to conceal his identity during ongoing involvement with drugs, it was relevant to proving culpable state of mind. *United States v Acevedo* (1994, CA7 Ill) 28 F3d 686.

Court in age discrimination suit did not err in excluding compilations from defendant's records listing pilots who moved into first officer positions pursuant to process known as

"one-step downbidding," since relevance was predicated on factual hypothesis which was itself in dispute and debate over its validity might have consumed considerable time and distracted jury from focus on two-step downbidding at issue. *Baker v Delta Air Lines* (1993, CA9 Cal) 6 F3d 632, 93 CDOS 7294, 93 Daily Journal DAR 12428, 62 BNA FEP Cas 1588, 62 CCH EPD ¶ 42574, amd, on reh, reh, en banc, den (CA9 Cal) 93 CDOS 9058, 93 Daily Journal DAR 15576 and reprinted as amd (CA9 Cal) 1993 US App LEXIS 31919.

Evidence that person who sold cocaine to defendant had disappeared after his car was last seen at defendant's residence was inadmissible since it did not tend to prove any material element of any charged drug or RICO offenses, but admission was harmless since government did not argue that person's disappearance was result of foul play attributable to defendant, jury did not hear defendant's statement that he killed person, and evidence of defendant's guilt was overwhelming. *United States v Robertson* (1994, CA9 Cal) 15 F3d 862, 94 CDOS 745, 94 Daily Journal DAR 1264, 38 Fed Rules Evid Serv 1340.

In prosecution of prisoner for possession of prohibited object, allegedly weapon, testimony explaining why witness had been moved from one area of correctional facility to another after confiscation of prohibited object should have been excluded since witness's transfer had to do with unrelated objects found in his shared cell area one week after object at issue had been confiscated and which allegedly could have been used in attempted escape. *United States v Rodriguez* (1995, CA9 Cal) 45 F3d 302, 95 CDOS 323, 95 Daily Journal DAR 547.

In prosecution for various sexual offenses, including forcible rape, defendant was entitled to instructions on lesser-related offense of prostitution where defendant admitted he engaged in acts of vaginal intercourse with victims, but claimed acts were consensual in exchange for drugs. For lesser uncharged offense to be closely related to greater charged offense, evidence of the lesser offense must be relevant to issue of whether defendant is guilty of greater one. Accordingly, if jurors believed defendant's testimony that he traded drugs for consensual sex, they would have acquitted him of rape charges. Thus, evidence that charged rapes were simply acts of prostitution was relevant to determination of defendant's guilt of greater charges and, under these circumstances, prostitution was offense closely related to rape. *People v Whitfield* (1993, 3rd Dist) 19 Cal App 4th 1652, 24 Cal Rptr 2d 210, 93 CDOS 8284, 93 Daily Journal DAR 14058.

Assuming arguendo that the trial court in a murder-robbery trial erred by admitting walkie-talkies, a crowbar, a Redfield scope, clips, ammunition, and a .22 caliber bolt-action rifle found in a duffel bag in defendant's apartment because these items were not linked to the crimes charged, there is no reasonable possibility that the admission of these items affected the outcome of the trial in light of the State's minimal reference to these items at trial and the State's other evidence, including defendant's inculpatory statement and firearms found in defendant's apartment which were linked to the crimes. G.S. § 15A-1443(b). *State v Harris* (1994) 338 NC 211, 449 SE2d 462.

In this prosecution for first-degree murder and armed robbery, the trial court did not err in sustaining the State's objections to questions concerning whether defendant's father abandoned him, when defendant's drug use began, the nature of the area where the murder- robbery occurred, and the location of the victim's husband, the reasons he was in jail, and his relationship with the codefendant since the evidence sought to be elicited was not material to any issue in the case; the psychiatrist who testified that defendant suffered from chronic and acute intoxication of cocaine, marijuana and alcohol on the

day of the crimes did not state that when defendant began using drugs affected his diagnoses; and defendant was permitted to elicit from another witness that the area was known for drug activity. *State v Harris* (1994) 338 NC 211, 449 SE2d 462.

A juvenile's confession was not improperly admitted because the trial court sustained the State's objections to defendant's questions concerning an officer's training in taking statements from juveniles in criminal cases where such officer never conducted any interview or questioning of defendant, and his training was thus not a proper matter for consideration in determining whether defendant's confession was admissible. *State v Gibson* (1995) 342 NC 142, 463 SE2d 193.

Although evidence of a prior altercation with an eyewitness is relevant as a general rule, that evidence loses its relevance when, as here, the identity of the person with whom defendant argued is merely speculation. *State v Floyd* (1994) 115 NC App 412, 445 SE2d 54.

Where various witnesses testified that the sheriff and his deputies did not investigate other potential perpetrators in a rape case involving children, it was relevant for the sheriff to testify that "if [defendant] had any innocence, we would check it all" and that he had told defendant's father that "if [defendant] is not guilty we will prove that he is not guilty." *State v Weaver* (1994) 117 NC App 434, 451 SE2d 15.

Evidence pertaining to party's bias generally is relevant to question before court. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 505 NW2d 142.

Relevant evidence is evidence having any tendency to make existence of any fact that is of consequence to determination of action more probable or less probable than it would be without evidence (Stats § 904.01). *State v Patricia A. M.* (1993, App) 176 Wis 2d 542, 500 NW2d 289.

Matter is collateral if fact to which error is predicated could not be shown in evidence for any purpose independently of contradiction. *State v Olson* (1993, App) 179 Wis 2d 715, 508 NW2d 616.

Footnotes

Footnote 29. FRE 401; Uniform Rules of Evidence, Rule 401.

◆ Observation: Although New York has not adopted the Uniform Rules, its highest court has quoted the language of Rule 401 approvingly. *People v Davis*, 43 NY2d 17, 400 NYS2d 735, 371 NE2d 456, cert den 435 US 998, 56 L Ed 2d 88, 98 S Ct 1653 and cert den 438 US 914, 57 L Ed 2d 1160, 98 S Ct 3143.

Practice References *Louisell and Mueller, Federal Evidence* § 91.

Hunter, Federal Trial Handbook 2d § 32.5.

Forms: Allegation—Error of law—In refusing to allow introduction of relevant evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3623.

Allegation—Error of law—In admitting inadmissible evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3624.

Footnote 30. § 309.

Footnote 31. § 310.

Footnote 32. As to effect of other evidence in the case, see § 311.

Footnote 33. Williams v Vreeland, 250 US 295, 63 L Ed 989, 39 S Ct 438, 3 ALR 1038; Chesbrough v Woodworth, 244 US 72, 61 L Ed 1000, 37 S Ct 579; Andersen v United States, 170 US 481, 42 L Ed 1116, 18 S Ct 689; Peagler v Davis, 143 Ga 11, 84 SE 59; Brazil Block Coal Co. v Gibson, 160 Ind 319, 66 NE 882; Lynch v Rosenberger, 121 Kan 601, 249 P 682, 60 ALR 376; White v Graves, 107 Mass 325; State v Knight, 356 Mo 1233, 206 SW2d 330; State v Shiren, 15 NJ Super 440, 83 A2d 620, affd 9 NJ 445, 88 A2d 601; People v Thompson, 212 NY 249, 106 NE 78; Holmes v Chartiers Oil Co., 138 Pa 546, 21 A 231.

Footnote 34. State v Knox, 236 Iowa 499, 18 NW2d 716; Keisel v Bredick, 192 Wash 665, 74 P2d 473.

Footnote 35. People v Johnson (4th Dept) 62 App Div 2d 555, 405 NYS2d 538, affd 47 NY2d 785, 417 NYS2d 925, 391 NE2d 1006, cert den 444 US 857, 62 L Ed 2d 75, 100 S Ct 116, later proceeding (CA2 NY) 764 F2d 114.

Relevant evidence is "any matter of fact the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative of its existence." Edmonds v State, 163 Neb 323, 79 NW2d 453.

Footnote 36. Cleveland, C., C. & I. R. Co. v Closser, 126 Ind 348, 26 NE 159; Re Estate of Isom, 193 Kan 357, 394 P2d 21; Edgerton v H. P. Welch Co., 321 Mass 603, 74 NE2d 674, 174 ALR 462 (ovrld on other grounds by Pridgen v Boston Housing Authority, 364 Mass 696, 308 NE2d 467, 70 ALR3d 1106).

Footnote 37. Re Estate of Isom, 193 Kan 357, 394 P2d 21; People v Thompson, 212 NY 249, 106 NE 78.

Footnote 38. State v Gauger, 200 Kan 563, 438 P2d 463.

Footnote 39. Weston v Barnicoat, 175 Mass 454, 56 NE 619.

§ 308 Definition of "irrelevant" evidence; speculative evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

"Irrelevant" evidence denotes evidence that does not logically tend to prove or disprove any material fact or proposition. 40 In other words, evidence of collateral or other facts that are incapable of affording any reasonable presumption or inference as to a principal fact or matter in dispute, 41 or evidence that is too remote, 42 is irrelevant and inadmissible. 43 Thus, evidence that produces only speculative inferences is irrelevant evidence. 44

Irrelevant facts and circumstances—that is, those which do not throw any light upon, or have any logical relation to, the facts in issue that must be established by one party or disproved by the other, or that are too remote—are 45 not properly admissible in evidence and upon proper objection must be excluded. 46 In other words, where there is nothing in the issues presented to warrant the proof offered, it is properly excluded. 47

§ 308 ----Definition of "irrelevant" evidence; speculative evidence [SUPPLEMENT]

Case authorities:

In prosecution on charges of wire fraud and transporting stolen property in interstate commerce arising out of defendant's allegedly fraudulent acquisition of insurance company, district court did not abuse its discretion in excluding as irrelevant report of investigation by state's department of business regulation indicating that acquired company was in financial trouble; report was received by company after defendant had already purchased it and thus said nothing about what information might have been withheld from him prior to purchase, and was cumulative of other evidence showing that defendant had been informed repeatedly of company's precarious financial status prior to purchasing it. *United States v Newman* (1995, CA1 RI) 49 F3d 1.

Evidence that alleged mail fraud victims had attempted to take over defendant's business was irrelevant; fact that victims sought security after they discovered defendant's fraud with their investments hardly suggested they were previously plotting to take over his business, and even plot to obtain control would tell little about whether defendant had made false statements when he obtained their funds. *United States v Camuti* (1996, CA1 Mass) 78 F3d 738.

Although existence and substance of combine manufacturer's decal program and factory and field modification programs were evidence of subsequent remedial measures relevant to strict liability, its post-retrofit conduct was not relevant to liability issue, hence not relevant to issue of punitive damages since any "bad conduct" for which manufacturer might be assessed punitive damages must have occurred at or before time it sold or attempted to retrofit combine in issue with warning decal. *Burke v Deere & Co.* (1993, CA8 Iowa) 6 F3d 497, amd, substituted op, remanded (CA8 Iowa) CCH Prod Liab Rep ¶ 13609, reh, en banc, den (CA8) 1993 US App LEXIS 24434 and petition for certiorari filed (Dec 21, 1993).

Opposing counsel's references to age discrimination plaintiff as millionaire, Jewish, and recipient of unemployment compensation benefits emphasized irrelevant information having no bearing on issues and demonstrated persistent attempt to get information

before jury; new trial should have been granted. *Silbergleit v First Interstate Bank, N.A.* (1994, CA8 ND) 37 F3d 394, 65 BNA FEP Cas 1718.

Plaintiff in sexual harassment suit would be precluded from asking defendant former university president about his sexual activity while at previous university since trustees' knowledge of president's sexual activity while at other university was irrelevant to plaintiff's sexual harassment claims; likewise plaintiff had right to be protected from invasive inquiry into her sexual history, and defendant's generalized allegation that there might be some other acts evidence somewhere in case was insufficient to overcome potential of requested discovery to harass plaintiff. *Longmire v Alabama State Univ.* (1992, MD Ala) 151 FRD 414.

Retailer's motion to alter or amend products liability verdict arising out of defective seat on exercise bicycle is denied, where retailer challenges exclusion of evidence regarding insurance payment of victim's medical bills incurred as result of serious impalement injury, because evidence was properly excluded as irrelevant under FRE 401, and alternatively as unfairly prejudicial, confusing, and misleading to jury under FRE 403. *Craig v F.W. Woolworth Co.* (1993, ND Ala) 866 F Supp 1369.

Evidence of common profiles of homes where child abuse occurs, and of child abusers, is inadmissible at trial of child abuser, because to extent that it is background information it is irrelevant to determination of guilt or innocence of individual child abuser, and to extent it is offered to show guilt of individual child abuser, it is inadmissible because it is not generally accepted as indicator of individual guilt in child abuse cases in scientific community, and is contrary to FS § :90.404(1); erroneous admission of evidence is not sufficiently harmful to require overturning abuser's conviction, where overwhelming direct evidence, including testimony of doctors, second abuser, and second child, was given and where doctor who gave profile testimony stated that it could not be used to determine guilt in individual cases. *Flanagan v State* (1993, Fla) 625 So 2d 827, 18 FLW S 475.

Although evidence of a prior altercation with an eyewitness is relevant as a general rule, that evidence loses its relevance when, as here, the identity of the person with whom defendant argued is merely speculation. *State v Floyd* (1994) 115 NC App 412, 445 SE2d 54.

In an action to set aside a deed based on undue influence, the trial court did not err in admitting the testimony of testatrix's attendant and physician regarding her mental condition, since there was no merit to defendant's contention that this testimony was irrelevant and too remote in time to be admissible. *Caudill v Smith* (1994) 117 NC App 64, 450 SE2d 8, review den (NC) 1995 NC LEXIS 75.

Footnotes

Footnote 40. *Hansson v Catalytic Constr. Co.*, 43 NJ Super 23, 127 A2d 431.

Footnote 41. *Bird v United States*, 180 US 356, 45 L Ed 570, 21 S Ct 403; *Lawson v Hicks*, 38 Ala 279; *Packer v Benton*, 35 Conn 343; *Peagler v Davis*, 143 Ga 11, 84 SE 59; *McKee v Trisler*, 311 Ill 536, 143 NE 69, 33 ALR 1298; *Pittsburgh, C. C. & S. L. R. Co. v Collard's Adm'r*, 170 Ky 239, 185 SW 1108, error dismd 246 US 653, 62 L Ed

922, 38 S Ct 336; New York, P. & N. R. Co. v Waldron, 116 Md 441, 82 A 709; Third Great Western Turnpike Road Co. v Loomis, 32 NY 127; Orth v Board of Public Education, 272 Pa 411, 116 A 366, 20 ALR 1352.

In a robbery prosecution, the testimony of a detective who had been instrumental in securing the arrest of defendant attempting to establish that a large percentage of those arrested by the detective for robbery were ultimately proven guilty, was patently irrelevant since it undertook to collaterally establish the detective's investigative successes but had no probative value intending to establish the proposition in issue, the identity of defendant as one of the robbers. *Dorsey v State*, 276 Md 638, 350 A2d 665.

Footnote 42. § 319.

Footnote 43. A trial court has no discretion to admit irrelevant evidence. *People v Babbitt*, 45 Cal 3d 660, 248 Cal Rptr 69, 755 P2d 253, stay gr (Cal) 1988 Cal LEXIS 863 and cert den 488 US 1034, 102 L Ed 2d 981, 109 S Ct 849 and stay gr (Cal) 1989 Cal LEXIS 1428, stay vac (Cal) 1989 Cal LEXIS 1683.

Footnote 44. *People v Babbitt*, 45 Cal 3d 660, 248 Cal Rptr 69, 755 P2d 253, stay gr (Cal) 1988 Cal LEXIS 863 and cert den 488 US 1034, 102 L Ed 2d 981, 109 S Ct 849 and stay gr (Cal) 1989 Cal LEXIS 1428, stay vac (Cal) 1989 Cal LEXIS 1683 (holding that speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of the California Evidence Code which requires that evidence offered to prove or disprove disputed facts must have a tendency in reason for such purpose).

Statutorily-required report of automobile-train collisions was inadmissible as speculative where report was not based upon independent investigation but upon hearsay. *Harrison v Grand T. W. R. Co.*, 162 Mich App 464, 413 NW2d 429, app den 429 Mich 903.

Where a witness would have allegedly testified that he was afraid that prosecution's key witness would start stories about him if he testified truthfully, such testimony was properly excluded as speculative and irrelevant. *Dixon v State (Okla Crim)* 732 P2d 4.

Footnote 45. § 319.

Footnote 46. *Bird v United States*, 180 US 356, 45 L Ed 570, 21 S Ct 403; *Peagler v Davis*, 143 Ga 11, 84 SE 59; *People v Chicago, M. & S. P. R. Co.*, 306 Ill 486, 138 NE 155, 28 ALR 610; *Lynch v Rosenberger*, 121 Kan 601, 249 P 682, 60 ALR 376; *Pittsburgh, C. C. & S. L. R. Co. v Collard's Adm'r*, 170 Ky 239, 185 SW 1108, error dismd 246 US 653, 62 L Ed 922, 38 S Ct 336; *Harrington v Boston E. R. Co.*, 229 Mass 421, 118 NE 880, 2 ALR 1057; *State v Knight*, 356 Mo 1233, 206 SW2d 330; *People v Roach*, 215 NY 592, 109 NE 618; *Clark v Patapsco Guano Co.*, 144 NC 64, 56 SE 858.

Footnote 47. *Johnson v Whitfield*, 124 Ala 508, 27 So 406; *Hartford Deposit Co. v Sollitt*, 172 Ill 222, 50 NE 178; *Cromwell v Norton*, 193 Mass 291, 79 NE 433; *Dillon v Hunt*, 105 Mo 154, 16 SW 516; *Morningstar v Lafayette Hotel Co.*, 211 NY 465, 105 NE 656; *Elder v Lykens Val. Coal Co.*, 157 Pa 490, 27 A 545; *Bridger v Asheville & S. R. Co.*, 27 SC 456, 3 SE 860.

§ 309 Evidence tending to make probable existence of fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

One of the requirements for "relevant evidence" under the Rules is that the evidence must "tend to make more or less probable the existence of a fact." 48 Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case, 49 a relationship summarized in Rule 401 as a "tendency to make the existence" of the fact to be proved "more probable or less probable." 50

◆ Observation: Matters tending to reduce or enhance the apparent probative value of evidence affect only the weight of such evidence and not its admissibility. 51

As stated in earlier cases, whatever to the ordinary reasoning mind is logically probative of a fact in issue is prima facie admissible and should not be excluded unless its admission violates a rule of law or policy. 52 This rule applies in all types of civil actions, that is, in contract actions, 53 as well as actions to recover for negligent injuries 54 or wrongful death, 55 as well as in criminal prosecutions, where all competent evidence which legitimately tends to show that the defendant had the opportunity of committing the crime with which he is charged is clearly admissible as tending to show his connection therewith. 56

◆ Caution: It has been noted that practical considerations do not permit the court to hear every matter that may be in any degree logically relevant to the issue, but require that matters received as evidence shall have a higher degree of probative force. 57

Relevancy has been said to describe the relationship between a proffered item of evidence and a proposition that is provable or material in a given case. There is no legal test of relevancy and reference must be made to logic or general experience to demonstrate the existence of a relationship and its proximity or remoteness. 58 According to certain authorities, no more probative worth is required than that which reasonable persons would require in making thoughtful decisions in life outside the courtroom. 59

◆ Practice guide: In determining whether evidence has any tendency to make the existence of a fact of consequence to the action more or less probable, a rule of thumb is to inquire whether a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the proffered evidence. 60

§ 309 ----Evidence tending to make probable existence of fact [SUPPLEMENT]

Case authorities:

Evidence of carjacking victim's death, including photographs of wounds and forensic

pathologist's testimony, was not unfairly prejudicial, since they were so tightly linked to elements of offense that it would be difficult to justify their exclusion on such grounds; evidence also corroborated government's theory of case. *United States v Cruz-Kuilan* (1996, CA1 Puerto Rico) 75 F3d 59.

In garment jobber's suit against union for unfair labor practice in picketing jobber to induce it to sign jobber's agreement, evidence of international union's letter to affiliated locals recommended that contentious clauses be reworded or removed was subsequent remedial measure and, as such, not probative of international's intent to apply trimmings clause to jobber in unlawful manner. *R.M. Perlman, Inc. v New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89-22- 1* (1994, CA2 NY) 33 F3d 145, 147 BNA LRRM 2092, 128 CCH LC ¶ 11163.

Lawnmower manufacturer was properly permitted to introduce evidence of safety standards addressing length of time in which lawnmower blade should stop rotating after user releases foot pedal that disengages power to blade, since it was relevant as tending to make existence of unreasonably dangerous condition more or less probable than it would be without such evidence. *Miller v Yazoo Mfg. Co.* (1994, CA8 Mo) 26 F3d 81, CCH Prod Liab Rep ¶ 13897.

A chrome bar or pipe recovered from underneath a murder victim's automobile at the scene of the shooting was not relevant in this murder prosecution and was properly excluded as an exhibit where the pipe itself did not impeach eyewitness testimony that no one saw the pipe until after the shooting; defendant did not contend that he acted in self-defense but relied upon the defense that he had no specific intent to kill because he could not premeditate and deliberate; and the fact that the chrome pipe was underneath the victim's automobile did not tend to make it more or less probable that defendant had no specific intent to kill the victim. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

Judges exercise broad discretion with respect to admissibility of evidence as long as evidence tends to prove material fact. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 505 NW2d 142.

Material facts are those that are of consequence to merits of litigation while relevancy, in turn, is function of whether evidence tends to make existence of material fact more probable or less probable than it would be without evidence. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 505 NW2d 142.

Relevant evidence is evidence having any tendency to make existence of any fact that is of consequence to determination of action more probable or less probable than it would be without evidence (Stats § 904.01). *State v Patricia A. M.* (1993, App) 176 Wis 2d 542, 500 NW2d 289.

Footnotes

Footnote 48. FRE 401; Uniform Rules of Evidence, Rule 401.

In suit by professional corporation against its professional liability insurer for breach of contract and bad faith, compensation paid to principals in professional corporation was relevant evidence for purpose of recovering damages for lost profits because such

compensation tended to prove corporation's net profit. *Bettius & Sanderson, P.C. v National Union Fire Ins. Co.* (CA4 Va) 839 F2d 1009, 24 Fed Rules Evid Serv 1031, appeal after remand (CA4 Va) 892 F2d 34.

It suffices for purposes of admissibility if, by fair preponderance of the evidence, it is more probable than not that the exhibit is one related to the case. *State v Nason* (Me) 498 A2d 252.

Footnote 49. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1.

In a non-Rule state it has been said that a fact is relevant to another fact when the existence of the one renders the existence of the other highly probable or highly improbable, according to the common course of events. *People v Nitzberg*, 287 NY 183, 38 NE2d 490, 138 ALR 1253, reh den 287 NY 754, 40 NE2d 40, 138 ALR 1266.

Footnote 50. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

Law enforcement officer's testimony about radio communication received from undercover agent concerning imminent drug transaction was admissible to explain why officers were observing defendant. *United States v Martinez* (CA7 Ill) 937 F2d 299, 33 Fed Rules Evid Serv 334.

Footnote 51. *United States v Bear Killer* (CA8 SD) 534 F2d 1253, cert den 429 US 846, 50 L Ed 2d 118, 97 S Ct 129; *United States v Dupee* (CA9 Wash) 569 F2d 1061.

Footnote 52. *Thiede v Utah Territory*, 159 US 510, 40 L Ed 237, 16 S Ct 62; *White v Van Horn*, 159 US 3, 40 L Ed 55, 15 S Ct 1027; *People v Jennings*, 252 Ill 534, 96 NE 1077; *Cleveland, C., C. & I. R. Co. v Closser*, 126 Ind 348, 26 NE 159; *Epp v Hinton*, 91 Kan 513, 138 P 576, mod and reh den 91 Kan 919, 139 P 379; *Edelen v Herman*, 162 Ky 500, 172 SW 936; *Lewis v Tapman*, 90 Md 294, 45 A 459; *Harrington v Boston E. R. Co.*, 229 Mass 421, 118 NE 880, 2 ALR 1057; *Downey v Finucane*, 205 NY 251, 98 NE 391.

Footnote 53. On an issue as to whether a contract was made as claimed, any circumstances bearing thereon or any evidence which tends to render that fact probable or improbable is relevant, provided, of course, the evidence is not otherwise objectionable. *Edelen v Herman*, 162 Ky 500, 172 SW 936; *Yezbak v Croce*, 370 Pa 263, 88 A2d 80.

Footnote 54. In an action to recover damages alleged to have been sustained by reason of the defendant's negligence, proof of any facts and circumstances attending the act which produced the injury that have some tendency to prove or disprove lack of care on the part of either of the parties litigant is competent and proper to be admitted in evidence. *Tombari v Connors*, 85 Conn 231, 82 A 640; *Illinois C. R. Co. v Slater*, 129 Ill 91, 21 NE 575.

In order, however, to be admissible, the evidence offered must have some material bearing upon issues of the case. *Wilmot v McPadden*, 79 Conn 367, 65 A 157, holding immaterial, in an action involving the safety of chimneys left standing during the demolition of a building, evidence that persons, in passing the building, walked on the opposite side of the street because they were afraid that the chimney would fall.

As to the admissibility of evidence pertaining to the amount of damages to be awarded in a negligence action, see 22 Am Jur 2d, Damages §§ 304 et seq.

Footnote 55. On the issue of the cause of death, a description of the injuries received by the decedent is admissible in evidence, where it tends to show that they were received in the manner claimed by the plaintiff and denied by the defendant. *Wende v Chicago C. R. Co.*, 271 Ill 437, 111 NE 275; *Louisville & N. R. Co. v Smith's Adm'r.*, 203 Ky 513, 263 SW 29, 35 ALR 1238.

As to evidence pertaining to the amount of damages to be awarded in an action for wrongful death, see 22A Am Jur 2d, Death §§ 470 et seq.

Footnote 56. *Smith v State*, 133 Ala 145, 31 So 806; *Everett v State*, 231 Ark 880, 333 SW2d 233; *Commonwealth v Polian*, 288 Mass 494, 193 NE 68, 96 ALR 615; *People v Roach*, 215 NY 592, 109 NE 618; *Goodloe v Smith*, 158 Va 571, 164 SE 379.

Footnote 57. *State v Lee*, 227 Ind 25, 83 NE2d 778.

Footnote 58. *United States v Craft* (CA6 Mich) 407 F2d 1065.

◆ Observation: It has been noted that whether the necessary relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. *James, Relevancy, Probability and the Law*, 29 Cal L Rev 689, 696, n 15 (1941).

Footnote 59. *Louisell & Mueller*, Federal Evidence § 91.

Footnote 60. *United States v Brashier* (CA9 Cal) 548 F2d 1315, CCH Fed Secur L Rep ¶ 95827, 1 Fed Rules Evid Serv 1285, cert den 429 US 1111, 51 L Ed 2d 565, 97 S Ct 1149.

§ 310 Evidence of fact of consequence to determination of action

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A basic requirement for "relevant evidence" under the Rules is that the fact be of "consequence to the determination of the action." 61 It has been noted that three general categories of facts are covered by this requirement, namely—

—facts which amount to elements of a claim or defense, that is, those facts which may properly be alleged in the pleadings, and to which the applicable substantive law assigns legal consequences in the case.

—facts from which may be inferred facts amounting to elements of claims or defenses, that is, facts that are properly viewed as circumstantial evidence of the elements of claims

and defenses. 62

—facts which bear upon the evaluation of other evidence in the case, including the assessment of the credibility of a witness. 63

Whether a proposition is of consequence to a determination of the action is question that is governed by substantive law, which simply stated means that the proposition to be proved must be part of the hypothesis governing the case, must be a matter that is in issue, or must be probative of the matter that is in issue. 64 The fact to be proved may be ultimate, intermediate, or evidentiary, so long as it is of consequence to the determination of the action. 65 The facts to which the evidence is directed need not be in dispute; for example, background material may be offered and admitted as an aid to understanding. 66 Furthermore, evidence need not be dispositive of an issue to be relevant. For example, the reasonableness of a manufacturer's conduct is not at issue in a strict liability case; nevertheless, industry custom is relevant in a strict liability case if it has any bearing on the condition of the product. 67

In particular, credibility is always an issue of consequence. 68 Thus, testimony as to bias on the part of a witness is relevant under Rule 401, since it would have a tendency to make the facts to which the witness testified less probable in the eyes of the jury than it would be without such testimony. 69

Any evidence revealing a relationship between parties is relevant because it may tend to make their relative positions less credible. 70 In general, matters which show a prior background of acquaintanceship, or the nature and existence of the relationship, between persons charged with an offense and persons who are witnesses are relevant matters. 71

Under Rule 401, the practice of "bolstering" an identification, whereby an identification made by one witness is corroborated by the testimony of another witness who merely testifies that the identification did occur, is admissible assuming no unfair prejudice prohibited by Rule 403 would result, in the judgment of the trial court. 72

◆ Illustration: In a defendant's second trial on drug charges, the fact that he was acquitted in the earlier trial on two counts of drug charges is inadmissible, since it has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. 73

Under non-Rule law, it has been held that evidence of the defendant's presence near the scene of a crime about the time of its commission is admissible upon trial of an indictment charging him with its commission, 74 and if wearing apparel and other items of personal property belonging to the accused, such as he would likely have upon his person, are found at or near the scene of the crime with which he is charged, such fact may be shown as tending to connect the defendant with the crime as its guilty agent. 75 Similarly, where an accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is admissible. 76

§ 310 ----Evidence of fact of consequence to determination of action

[SUPPLEMENT]

Case authorities:

In § 1983 action by diagnosed paranoid schizophrenic who claimed that police officers used excessive force in subduing him while he advanced toward them with hatchet, district court did not abuse its discretion in excluding certified documents showing number of involuntary commitment petitions that had been filed in county court over three-year period since documents did not indicate in which, if any, police had played role and thus did not make fact of consequence more or less probable. *McKeel v City of Pine Bluff* (1996, CA8 Ark) 73 F3d 207.

Footnotes

Footnote 61. FRE 401; Uniform Rules of Evidence, Rule 401.

Footnote 62. As to the admissibility of circumstantial evidence, see §§ 313 et seq.

Footnote 63. *Louisell & Mueller*, Federal Evidence § 95.

Footnote 64. *United States v Hall* (CA5 La) 653 F2d 1002, 8 Fed Rules Evid Serv 1342.

Footnote 65. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

Footnote 66. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

Footnote 67. *Carter v Massey-Ferguson, Inc.* (CA5 Tex) 716 F2d 344, CCH Prod Liab Rep ¶ 9803, 14 Fed Rules Evid Serv 566.

Footnote 68. *United States v Quinto* (CA2 NY) 582 F2d 224, 78-2 USTC ¶ 9633, 3 Fed Rules Evid Serv 1097, 42 AFTR 2d 78-5601, 47 ALR Fed 621.

Footnote 69. *United States v Abel*, 469 US 45, 83 L Ed 2d 450, 105 S Ct 465, 16 Fed Rules Evid Serv 838.

Footnote 70. *Brocklesby v United States* (CA9 Cal) 767 F2d 1288, cert den 474 US 1101, 88 L Ed 2d 918, 106 S Ct 882 (admitting indemnity agreement between government and private publisher of graphic aircraft instrument approach chart in wrongful death action against them).

Footnote 71. *United States v Di Pasquale* (ED Pa) 561 F Supp 1338, 13 Fed Rules Evid Serv 773, affd (CA3 Pa) 740 F2d 1282, 16 Fed Rules Evid Serv 499, cert den 469 US 1228, 84 L Ed 2d 364, 105 S Ct 1226, 105 S Ct 1227.

Footnote 72. *Snow v Reid* (SD NY) 619 F Supp 579.

Footnote 73. *United States v Hill* (ED Pa) 550 F Supp 983, 11 Fed Rules Evid Serv 1943, affd without op (CA3 Pa) 716 F2d 893, cert den 464 US 1039, 79 L Ed 2d 165, 104 S Ct 699.

Footnote 74. *Commonwealth v Minnich*, 250 Pa 363, 95 A 565, holding this to be so although his presence there is explained in a manner consistent with his innocence to the satisfaction of his counsel.

Footnote 75. *Thornton v State*, 113 Ala 43, 21 So 356; *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618.

Footnote 76. *State v Montgomery*, 175 Kan 176, 261 P2d 1009; *State v Miller (Mo)* 368 SW2d 353.

§ 311 Effect of other evidence in case

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It has been recognized that evidence need not necessarily, standing alone, be relevant and material, but that it is sufficient if it forms a chain or link which, when connected with other evidence, will be relevant and material. 77 In other words, any legal evidence from which a jury may legitimately deduce fact in issue is admissible, if, when taken with other evidence in the case, its relevancy appears. 78 However, evidence that is prima facie irrelevant should be rejected unless the person offering it shows how it can be made relevant by connecting it with other facts and circumstances. 79

◆ Practice guide: If evidence is permitted to be introduced over the objection that it is irrelevant, upon the theory that its relevancy may be shown by subsequent evidence, and evidence showing such relevancy is not introduced, it is generally held that the objection to it should be renewed. 80

Evidence not in and of itself admissible may become admissible, by reason of evidence introduced by an adversary, in explanation of testimony that has been given. 81

◆ Caution: Where evidence that is prejudicially immaterial is admitted, 82 it is not made material and relevant by the addition of corroborating immaterial evidence. 83

Footnotes

Footnote 77. *State ex rel. Boswell v Curtis (Mo App)* 334 SW2d 757.

Practice References Eliciting testimony subject to connection. 5 Am Jur Trials 611, Presenting Plaintiff's Case § 25.

Footnote 78. *Pool v State*, 16 Ala App 395, 78 So 311; *Thompson v State*, 58 Fla 106, 50 So 507; *Stone v State*, 118 Ga 705, 45 SE 630; *Cleveland, C., C. & I. R. Co. v Closser*, 126 Ind 348, 26 NE 159.

In a prosecution for robbery and murder of a pharmacist, exclusion of testimony of a

defense witness that the pharmacist had sold drugs without prescription to young men in the neighborhood was reversible error where that evidence would have supported the accused's defense that he entered the pharmacy only to pick up some barbiturates that he had purchased earlier. *Commonwealth v Greene*, 469 Pa 399, 366 A2d 234, appeal after remand 483 Pa 195, 394 A2d 978.

Law Reviews: Ball, *The Myth of Conditional Relevancy*. 1977 *Ariz St LJ* 295.

Footnote 79. *Abney v Kingsland, & Co.*, 10 Ala 355; *Wilkins v Gulf, C. & S. F. R. Co.* (Tex Civ App) 260 SW 214, writ diss.

Footnote 80. 5 Am Jur 2d, Appeal and Error § 602.

Footnote 81. *Packet Co. v Sickles*, 72 US 580, 5 Wall 580, 18 L Ed 550; *Dundas v Lansing*, 75 Mich 499, 42 NW 1011; *Parker v Atlantic C. L. R. Co.*, 133 NC 335, 45 SE 658; *Kramer v Kister*, 187 Pa 227, 40 A 1008.

Footnote 82. As to the exclusion of prejudicial evidence, see §§ 331 et seq.

Footnote 83. *Gordon v State (Fla)* 104 So 2d 524 (ovrld on other grounds by *State v Marshall (Fla)* 476 So 2d 150, 10 FLW 445) as stated in *State v DiGuilio (Fla)* 491 So 2d 1129, 11 FLW 339.

§ 312 Determining relevancy

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Relevancy of an exhibit or testimony can only be determined in the context of the proposition which it seeks to prove: if a contested item tends to prove or disprove the matter under consideration, then it is relevant and admissible unless its receipt is prohibited by the Rules of Evidence or the Constitution. 84

The relevancy of a given piece of circumstantial evidence must be determined by the trial judge in view of the judge's experience, judgment, and knowledge of human motivation and conduct. 85 The court's function is usually to decide whether a reasonable person might have his or her assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted; if it may affect that evaluation, it is relevant and admissible, subject to other rules. 86 Relevancy and admissibility of evidence are to be tested without deciding the weight or significance of such evidence when received, or the validity of the theory upon which a party presents its case. 87

◆ Practice guide: The relevancy of evidence is a threshold inquiry, and the rule that the party introducing evidence carries the burden of establishing its relevance does not also require the introducing party to anticipate and rebut possible objections to the offered evidence. 88

The trial judge has broad discretion to determine what evidence is relevant and when relevant evidence should be excluded because of the considerations enumerated in Rule 403 and similar state rules. 89 Similarly, it has been held in non-Rule jurisdictions that the exclusion of evidence as not relevant or material because it is either too remote, too uncertain, or too conjectural, is a matter largely within the discretion of the trial court. 90 An appellate court will not substitute its judgment for that of the trial court but will determine only whether the court has abused its discretion, 91 and a determination of irrelevance will not be disturbed absent a clear showing of abuse of discretion 92 that affects substantial rights. 93

◆ **Caution:** There is some authority that before evidence can be excluded on the ground that it is irrelevant, it must appear so beyond doubt. 94

◆ **Practice guide:** In doubtful cases, where relevancy is not immediately apparent, the judge and counsel should clearly identify the terms of the relevancy relationship by describing the item of evidence being proffered, the consequential fact to which it is directed, and the hypothesis required to infer the consequential fact from the evidence; such analysis is necessary to a decision of how the evidence may alter the probability of the existence of the consequential fact. 95 The following devices may assist the trial judge in ruling on relevancy: (1) varying the order of proof, particularly where evidence can be said to be relevant only upon fulfillment of a factual condition; (2) delaying a ruling on relevancy questions, particularly in judge-tried cases; (3) hearing a proffer of evidence first in chambers; and (4) seeking the assistance of counsel to learn the "general premise" or "evidential hypothesis" that links the proffered proof to the proposition sought to be proved. 96

◆ **Comment:** Since the rules of evidence furnish no test of relevancy outside the guidelines set forth in Federal Rules of Evidence 404-412, relevancy issues must be decided on a case-by-case basis, each issue being highly dependent upon the particular surrounding facts and circumstances. For guidance, the trial judge has the standard of relevancy prescribed in Federal Rules of Evidence 401, and case law. 97

§ 312 ----Determining relevancy [SUPPLEMENT]

Practice Aids: Exaggerated and misleading reports of the death of conditional relevance, 93 Mich LR 3:478-484 (1995).

Case authorities:

Evidence of plaintiff's alcohol consumption on night of his auto accident is not admissible in medical malpractice action against hospital, because evidence was not relevant to (1) assessment of his overall condition by emergency personnel, (2) show that plaintiff was combative with emergency personnel during ambulance ride, (3) plaintiff's combativeness and failure to cooperate in hospital emergency room, (4) length of time plaintiff remained under anesthesia, and (5) issue of purported dispute between plaintiff's wife and police over whether police could take blood alcohol sample from plaintiff. *Walsh v New London Hosp.* (1994, DC NH) 856 F Supp 22.

Documents and testimony relating to advice by counsel that client was not infringing on patent were relevant and admissible under FRE 401, where alleged infringer was

responding to claim of willful infringement, because issue of good- faith reliance on legal advice was relevant to willfulness of infringement. *Thorn EMI N. Am. v Micron Technology* (1993, DC Del) 837 F Supp 616, 29 USPQ2d 1872.

In prosecution for conspiring to illegally transport hazardous wastes, evidence that defendant knew of other wastes stored at facility to which defendant transported wastes in question, though not relevant to defendant's knowledge of contents of drums he transported, was harmless in light of evidence of defendant's knowledge of contents of drums he transported. *United States v Bentley-Smith* (1993, CA5 La) 2 F3d 1368, motion gr, reh den (CA5 La) 1993 US App LEXIS 29021 and reh den (CA5 La) 1993 US App LEXIS 29026.

District court erred in having jury decide whether cocaine was admissible under plain view exception to search warrant requirement; preliminary question was within sole province of district court since cocaine's relevancy did not depend upon fulfillment of condition of fact because it would have been relevant to show defendant's guilt of charged offense notwithstanding whether officer saw it in plain view. *United States v Lang* (1993, CA5 Miss) 8 F3d 268.

In prisoner's excessive force claim, evidence that prisoner spat on guard immediately before being punched was relevant to guard's use of force, and guard's testimony that prisoner ignored his repeated orders to return to his cell, jerked away from him and was going to hit him if he didn't strike him first, was relevant to guard's claims that he felt threatened. *Wilson v Groaning* (1994, CA7 Ill) 25 F3d 581.

In § 1983 action by high school student for, inter alia, being impregnated by truant officer, evidence of plaintiff's abortions and other sexual relationships was properly admitted on damages issues since defendant was not responsible for any emotional or physical injuries caused by plaintiff's sexual activity with other men, evidence was relevant to whether defendant impregnated her, and each time such evidence was elicited trial court instructed jury to consider it only as to plaintiff's request for damages. *Berry v Deloney* (1994, CA7 Ill) 28 F3d 604.

Admission into evidence of firearms found in heroin distribution conspirator's bedroom was not unduly prejudicial despite defendant's claim that there was already ample evidence to show that she was engaged in heroin trafficking, since presence of loaded firearms in house where drug transactions occurred is evidence that they were used to facilitate drug trafficking and helped to establish conspiracy with which defendant was charged. *United States v Logan* (1995, CA8 Mo) 54 F3d 452.

In breach of warranty suit by recreational vehicle manufacturer against adhesive supplier, trial court did not err in introducing evidence that another RV manufacturer used defendant's adhesive on its fiberglass-sided vehicles and suffered similar delamination problems since two manufacturers' experiences with adhesive were startlingly similar. *Western Recreational Vehicles v Swift Adhesives* (1994, CA9 Wash) 23 F3d 1547, 94 CDOS 3319, 94 Daily Journal DAR 6300.

In trial on intentional gender discrimination in employment practices, evidence of supervisor's sexual harassment and disparaging remarks about women was relevant since it made it more or less probable that employee was discharged or not rehired because of her gender. *EEOC v Farmer Bros. Co.* (1994, CA9 Cal) 31 F3d 891, 94 CDOS 5967, 94 Daily Journal DAR 10869, 65 BNA FEP Cas 857.

Trial court's failure to sua sponte strike conditionally admitted evidence of ammunition and rifle clip found when drug defendant was arrested after prosecution failed to establish its relevance, did not affect defendant's substantial rights since evidence did not have any bearing on credibility of either defendant or witness in whose apartment evidence was found, neither was asked about items, and case turned on whether jury believed witness. *United States v Ruffin* (1994, App DC) 40 F3d 1296.

In prosecution for sexual assault of daughter, trial court did not abuse its discretion by admitting evidence of defendant's prior uncharged sexual misconduct with his daughter, where defendant's history of incestuous relationship with his daughter was particularly relevant because it supplied context within which charged incidents of sexual misconduct occurred, point of establishing existence of incestuous relationship was not to make issue of defendant's general character for sexually abusing females of minor age, but was to establish specifically defendant's propensity to engage in sexual contact with his daughter as object of his desire, and daughter's allegations of sexual contact on one night would have seemed incredible absent context of continuous sexual relationship with her father. *State v Forbes* (1993, Vt) 640 A2d 13.

In arson prosecution in which trial court properly admitted testimony of neighbor that 3 nights before the arson she had seen defendant and another man set fire to car parked in front of residence they allegedly burned 3 nights later, trial court erred in excluding defense evidence in form of testimony of another witness who would have testified that he saw companion set fires alone, without defendant, on two prior occasions. Evidence was relevant and admissible, and, if believed, it weakened inference that because defendant aided companion in burning car, he aided him in burning house; it showed that only sometimes did defendant aid companion in setting fires, but at other times companion set them alone and, therefore, may have set subject fire alone. *People v Robinson* (1995, 2nd Dist) 31 Cal App 4th 494, 37 Cal Rptr 2d 183, 95 CDOS 339, 95 Daily Journal DAR 533, review den (Apr 12, 1995).

Footnotes

Footnote 84. *United States v American Cyanamid Co.* (SD NY) 427 F Supp 859, 1977-1 CCH Trade Cases ¶ 61408, 1 Fed Rules Evid Serv 672, later proceeding (SD NY) 556 F Supp 357, 1983-1 CCH Trade Cases ¶ 65400, 36 FR Serv 2d 152, later proceeding (SD NY) 556 F Supp 361, 1982-83 CCH Trade Cases ¶ 65152, *affd* in part and *revd* in part on other grounds (CA2 NY) 719 F2d 558, 1983-2 CCH Trade Cases ¶ 65656, 37 FR Serv 2d 1034, *cert den* 465 US 1101, 80 L Ed 2d 127, 104 S Ct 1596, later proceeding (SD NY) 598 F Supp 1516, 1985-1 CCH Trade Cases ¶ 66385, *amd* (SD NY) 1989-1 CCH Trade Cases ¶ 68517.

Practice References Relevancy to the issues. 6 Am Jur Trials 208.

Footnote 85. *United States v Williams* (CA8 Ark) 545 F2d 47, 1 Fed Rules Evid Serv 440.

As to the admissibility of circumstantial evidence, generally, see § 313.

Footnote 86. *United States v Williams* (CA8 Ark) 545 F2d 47, 1 Fed Rules Evid Serv

Footnote 87. *United States v American Cyanamid Co.* (SD NY) 427 F Supp 859, 1977-1 CCH Trade Cases ¶ 61408, 1 Fed Rules Evid Serv 672, later proceeding (SD NY) 556 F Supp 357, 1983-1 CCH Trade Cases ¶ 65400, 36 FR Serv 2d 152, later proceeding (SD NY) 556 F Supp 361, 1982-83 CCH Trade Cases ¶ 65152, *affd* in part and *revd* in part on other grounds (CA2 NY) 719 F2d 558, 1983-2 CCH Trade Cases ¶ 65656, 37 FR Serv 2d 1034, *cert den* 465 US 1101, 80 L Ed 2d 127, 104 S Ct 1596, later proceeding (SD NY) 598 F Supp 1516, 1985-1 CCH Trade Cases ¶ 66385, *amd* (SD NY) 1989-1 CCH Trade Cases ¶ 68517.

Footnote 88. *Dowling v United States*, 493 US 342, 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1.

Footnote 89. *United States v Harris* (CA7 Ind) 542 F2d 1283, *cert den* 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558; *United States v Williams* (CA8 Ark) 545 F2d 47, 1 Fed Rules Evid Serv 440; *People v Babbitt*, 45 Cal 3d 660, 248 Cal Rptr 69, 755 P2d 253, *stay gr* (Cal) 1988 Cal LEXIS 863 and *cert den* 488 US 1034, 102 L Ed 2d 981, 109 S Ct 849 and *stay gr* (Cal) 1989 Cal LEXIS 1428, *stay vac* (Cal) 1989 Cal LEXIS 1683.

Law Reviews: Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*. 79 *Northw U LR* 1097 (1985-1986).

Footnote 90. *Big Apple Super Markets, Inc. v W. J. Milner & Co.*, 111 Ga App 282, 141 SE2d 567; *State v Lee*, 227 Ind 25, 83 NE2d 778; *State v Schuman*, 151 Kan 749, 100 P2d 706; *Liebow v Jones Store Co. (Mo)* 303 SW2d 660; *Conley v Kaney (Mo)* 250 SW2d 350; *State v Shiren*, 15 NJ Super 440, 83 A2d 620, *affd* 9 NJ 445, 88 A2d 601; *Elliott v Black River Electric Cooperative*, 233 SC 233, 104 SE2d 357, 74 ALR2d 907.

Footnote 91. *United States v Ashley* (CA5 Fla) 555 F2d 462, *reh den* (CA5 Fla) 559 F2d 29 and *cert den* 434 US 869, 54 L Ed 2d 147, 98 S Ct 210; *United States v Harris* (CA7 Ind) 542 F2d 1283, *cert den* 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558; *United States v Williams* (CA8 Ark) 545 F2d 47, 1 Fed Rules Evid Serv 440; *United States v Hanigan* (CA9 Ariz) 681 F2d 1127, 10 Fed Rules Evid Serv 1553, *cert den* 459 US 1203, 75 L Ed 2d 435, 103 S Ct 1189.

Forms: Allegation—Error of law—In refusing to allow introduction of relevant evidence. 1A *Federal Procedural Forms*, L Ed, *Actions in District Court* § 1:3623.

Footnote 92. *United States v Ashley* (CA5 Fla) 555 F2d 462, *reh den* (CA5 Fla) 559 F2d 29 and *cert den* 434 US 869, 54 L Ed 2d 147, 98 S Ct 210; *United States v Kelley* (CA8 Mo) 545 F2d 619, 94 BNA LRRM 2550, 81 CCH LC ¶ 13124, 1 Fed Rules Evid Serv 469, *cert den* 430 US 933, 51 L Ed 2d 777, 97 S Ct 1555, 94 BNA LRRM 2962, 81 CCH LC ¶ 13128.

Footnote 93. *Marquis v Chrysler Corp.* (CA9 Cal) 577 F2d 624, 1978-2 CCH Trade Cases ¶ 62155, 25 FR Serv 2d 1314.

Footnote 94. *State v Tevis* (Mo App) 340 SW2d 415; *Luechtefeld v Marglous* (Mo App) 151 SW2d 710.

Footnote 95. *United States v Mann* (CA1 Puerto Rico) 590 F2d 361, 4 Fed Rules Evid Serv 339.

Footnote 96. *Louisell & Mueller*, Federal Evidence § 96.

Footnote 97. Advisory Committee Notes to Federal Rules of Evidence, FRE 401.

Practice References *Louisell & Mueller*, Federal Evidence § 96.

3. Specific Types of Evidence [313-323]

§ 313 Circumstantial evidence, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

◆ **Definition:** Circumstantial evidence means proof that does not actually assert or represent the proposition in question, but that asserts or describes something else, from which the trier of fact may either (1) reasonably infer the truth of the proposition, in which case the evidence is not only relevant under Rule 401 but is sufficient as well, or (2) at least reasonably infer an increase in the probability that the proposition is in fact true, in which case the evidence is relevant under Rule 401 (assuming that the proposition is of consequence to the determination of the action) 98 but may not be sufficient by itself to create a question for the trier of fact to decide. 99

The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to common experience. 1 Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what in human experience has been found to be generally the cause or result of similar occurrences. 2

In many cases, circumstantial evidence may be the only evidence available, as where evidence of state of mind is crucial to the case. 3 Such evidence is usually the only means of proving intent, knowledge, 4 or fraud. 5 In fact, despite the lack of any reference in the Rules to circumstantial evidence, modern cases have recognized that circumstantial evidence is intrinsically as probative as direct evidence, 6 and that circumstantial facts may even be strong enough to overcome the effect of direct testimony to the contrary. 7

◆ **Caution:** When it is disclosed that direct evidence of a material fact is probably in existence, circumstantial evidence of that fact cannot be resorted to without accounting for the absence of the direct evidence, according to some authority. 8

When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in its reception. 9 To render circumstantial evidence admissible, it is necessary only that it tend to prove the issue or that it constitute a link in the chain of evidence; 10 it must lead to a reasonable inference and not a mere suspicion of the existence of the fact sought to be proved. 11 No evidence should be excluded of any fact or circumstance connected with the principal transaction in dispute from which an inference as to the truth of a disputed fact can reasonably be made. 12 Objections upon the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. 13 However, a fact is admissible as a basis of an inference only where the desired inference is a probable or natural explanation of the fact and a more probable and natural one than other explanations, if any. 14

◆ Practice guide: The relevancy of a given piece of circumstantial evidence must be determined by the trial judge in view of his or her experience, judgment, and knowledge of human motivation and conduct. 15

§ 313 ----Circumstantial evidence, generally [SUPPLEMENT]

Practice Aids: The circumstantial evidence generation: Twenty-five tips to help you win the circumstantial evidence case, 18 Tr Dipl J 2:IV (1995).

Footnotes

Footnote 98. § 679.

Footnote 99. Louisell and Mueller, Federal Evidence § 94.

Footnote 1. McCoy v United States (CA9 Mont) 169 F2d 776, cert den 335 US 898, 93 L Ed 433, 69 S Ct 298; Devine v Delano, 272 Ill 166, 111 NE 742; State v Famber, 358 Mo 288, 214 SW2d 40; Franz v State, 156 Neb 587, 57 NW2d 139.

A written confession, duly signed, attested, and proved, is not circumstantial evidence within the provision of a statute forbidding infliction of the death penalty on circumstantial evidence; and the same is true of a duly established oral confession. Mitchell v People, 76 Colo 346, 232 P 685, 40 ALR 566.

Forms: Instructions to jury—Character of evidence—Direct or circumstantial. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 104, 105.

—Circumstantial evidence to be considered in connection with other evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 108.

Footnote 2. Aetna Life Ins. Co. v Milward, 118 Ky 716, 82 SW 364.

Footnote 3. As to evidence of state of mind, see §§ 556 et seq.

Footnote 4. Crane v Lessee of Morris, 31 US 598, 6 Pet 598, 8 L Ed 514; Gantner &

Mattern Co. v Hawkins, 89 Cal App 2d 783, 201 P2d 847.

The knowledge of an adverse claim to property, necessary in order that the inference of a grant may arise from acquiescence by the apparent owner in the adverse claim, may be shown by circumstances, and the consequent acquiescence may also be shown in the same way and by the same circumstances. Masterson v Harris County Houston Ship Channel Nav. Dist. (Tex Com App) 15 SW2d 1011, 67 ALR 1324, reh den (Tex Com App) 18 SW2d 588, 67 ALR 1332.

Footnote 5. 37 Am Jur 2d, Fraud and Deceit § 450.

Footnote 6. United States v Russell (CA1 Mass) 919 F2d 795; United States v Brown (CA8 Iowa) 605 F2d 389, cert den 444 US 972, 62 L Ed 2d 387, 100 S Ct 466; United States v Knife (CA8 SD) 592 F2d 472, 4 Fed Rules Evid Serv 284; United States v Pelton (CA8 Mo) 578 F2d 701, 4 Fed Rules Evid Serv 334, cert den 439 US 964, 58 L Ed 2d 422, 99 S Ct 451; United States v Young (CA8 Mo) 568 F2d 588.

The fact that evidence is categorized as circumstantial does not make it less probative. United States v Bycer (CA3 Pa) 593 F2d 549.

Footnote 7. Madison v Deseret Livestock Co. (CA10 Utah) 574 F2d 1027.

Footnote 8. Sollberger v Walcott (La App 1st Cir) 101 So 2d 483; Gabrielsky v State, 13 Tex App 428.

Footnote 9. Thiede v Utah Territory, 159 US 510, 40 L Ed 237, 16 S Ct 62; Bowline v Cox, 248 Ala 55, 26 So 2d 574; State v Marcus, 240 Iowa 116, 34 NW2d 179.

Footnote 10. State v Marcus, 240 Iowa 116, 34 NW2d 179; State v Sedig, 235 Iowa 609, 16 NW2d 247; Haley v State, 84 Tex Crim 629, 209 SW 675, 3 ALR 779.

Footnote 11. Bowline v Cox, 248 Ala 55, 26 So 2d 574.

Footnote 12. Holmes v Goldsmith, 147 US 150, 37 L Ed 118, 13 S Ct 288; Bond v Williams, 279 Mo 215, 214 SW 202, 16 ALR 755; Karnes v Commonwealth, 125 Va 758, 99 SE 562, 4 ALR 1509.

The whole conduct of a county, before, at the time of, and after, the issue of its bonds, may be shown to aid in determining under what statute and by what authority the county proceeded in the issue of the bonds. Knox County v Ninth Nat. Bank, 147 US 91, 37 L Ed 93, 13 S Ct 267.

Footnote 13. Moore v United States, 150 US 57, 37 L Ed 996, 14 S Ct 26; Castle v Bullard, 64 US 172, 23 How 172, 16 L Ed 424; Bowline v Cox, 248 Ala 55, 26 So 2d 574.

Footnote 14. Doane v Farmers Cooperative Co., 250 Iowa 390, 94 NW2d 115, 81 ALR2d 128; Engel v United Traction Co., 203 NY 321, 96 NE 731; Toler v Commonwealth, 188 Va 774, 51 SE2d 210.

Footnote 15. United States v Williams (CA8 Ark) 545 F2d 47, 1 Fed Rules Evid Serv 440.

§ 314 --In civil cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the absence of a statute 16 or a valid and binding contractual provision 17 to the contrary, circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case 18 and is sometimes as cogent and irresistible as direct and positive testimony. Upon the issue of reasonableness of conduct, all the surrounding circumstances become facts material to the case. 19

In tort actions, evidence of the relevant conditions and circumstances surrounding and relating to the tortious acts complained of is admissible in order that the jury may draw the inferences, if any, which they create. 20 The law does not require every fact and circumstance that make up a case of negligence to be proved by direct and positive testimony, or by the testimony of eyewitnesses. 21 Negligence and contributory negligence may be shown by circumstantial, as well as by direct, proof. 22

The terms of an oral contract, and the assent of the parties to it, may be shown by their acts and the attending circumstances, as well as by the words they have employed. 23 Also, in accordance with the rules for the construction of contracts, 24 where a contract is ambiguous on its face, evidence of the surrounding circumstances and the subsequent conduct of the parties thereto in the execution of the contract is admissible, 25 not to contradict or vary the contract, but to aid in its interpretation. 26 And the circumstances in which the parties to a contract are placed are generally admissible in evidence where they will throw light upon the problems submitted to the court. 27

§ 314 --In civil cases [SUPPLEMENT]**Case authorities:**

Evidence of precomplaint negotiations between RTC and S&L director defendants was not relevant to whether defendant law firm breached any fiduciary duty or negligently performed any duties by failing to adequately recognize, investigate, and disclose to either RTC or directors damaging facts regarding certain loan transactions. *Resolution Trust Corp. v Blasdel* (1993, DC Ariz) 154 FRD 675.

Footnotes

Footnote 16. *Wittemann v Sands*, 238 NY 434, 144 NE 671, 37 ALR 1216.

Footnote 17. § 8.

Footnote 18. *Franke's, Inc. v Wallace*, 219 Ark 467, 242 SW2d 968; *Continental Nat.*

Bank v Cole, 51 Idaho 140, 3 P2d 1103, 77 ALR 484; Bunten v Davis, 82 NH 304, 133 A 16, 45 ALR 1409; Rewis v New York Life Ins. Co., 226 NC 325, 38 SE2d 97; Watkins v Prudential Ins. Co., 315 Pa 497, 173 A 644, 95 ALR 869.

Fact that a plaintiff in a negligence action is required to rely, for the most part, upon circumstantial evidence, is not fatal where the chain of circumstances leads to a conclusion that is more probable than any other hypothesis reflected by the evidence. *McComis v Baker* (Madison Co) 40 Ohio App 2d 332, 69 Ohio Ops 2d 304, 319 NE2d 391, motion overr.

Forms: Instructions to jury—Character of evidence—Direct or circumstantial. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 104, 105.

Circumstantial evidence to be considered in connection with other evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 108.

Footnote 19. *Bunten v Davis*, 82 NH 304, 133 A 16, 45 ALR 1409.

Footnote 20. *Petro v Hines*, 299 Ill 236, 132 NE 462, 18 ALR 1106; *Judd v Rudolph*, 207 Iowa 113, 222 NW 416, 62 ALR 1174; *Harrington v Boston E. R. Co.*, 229 Mass 421, 118 NE 880, 2 ALR 1057; *Bond v Williams*, 279 Mo 215, 214 SW 202, 16 ALR 755; *Lyman v Boston & M. R. Co.*, 66 NH 200, 20 A 976; *Fagan v Atlantic C. L. R. Co.*, 220 NY 301, 115 NE 704; *Rodgers v Saxton*, 305 Pa 479, 158 A 166, 80 ALR 280; *Fuller v Bailey*, 237 SC 573, 118 SE2d 340.

Footnote 21. *Sollberger v Walcott* (La App 1st Cir) 101 So 2d 483.

Footnote 22. 57A Am Jur 2d, Negligence §§ 1102, 1103.

As to the admissibility of circumstantial evidence in motor vehicle accident cases, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1020.

Footnote 23. *Newark Mach. Co. v Kenton Ins. Co.*, 50 Ohio St 549, 35 NE 1060; *Yezbak v Croce*, 370 Pa 263, 88 A2d 80.

Footnote 24. 17A Am Jur 2d, Contracts § 355.

Footnote 25. *Michigan Crown Fender Co. v Welch*, 211 Mich 148, 178 NW 684, 13 ALR 896; *Light v E. M. Grant & Co.*, 73 W Va 56, 79 SE 1011.

Footnote 26. *Michigan Crown Fender Co. v Welch*, 211 Mich 148, 178 NW 684, 13 ALR 896.

Footnote 27. *Yellowstone Sheep Co. v Diamond Dot Live Stock Co.*, 43 Wyo 15, 297 P 1107, 75 ALR 1151.

§ 315 --In criminal cases

[View Entire Section](#)

The admissibility of circumstantial evidence in criminal cases is well established and has been repeatedly affirmed. 28 The rule is one of necessity since only few convictions could be obtained if direct testimony of eyewitnesses was required. 29 The modern doctrine is extremely liberal in the admission of any circumstances that may throw light upon the matter being investigated, 30 and great latitude must be given the prosecution in the production of its evidence in proof of criminal charges. 31 In general, whatever may be established by direct evidence in a criminal case may also be established by circumstantial evidence. 32 However, circumstantial evidence may be inadmissible where it is so vague that it does not have any probative value. 33 Moreover, it may as irrelevant be inadmissible because a link in the chain of facts is missing which is required to give probative value to the evidence. 34

Much is left to the discretion of the trial judge, but where the proper determination of a fact depends upon circumstantial evidence, the safe practical rule to follow is that in no case is evidence to be excluded of facts or circumstances connected with the principal transaction from which an inference can be reasonably drawn as to the truth of a disputed fact. 35

In criminal cases, all facts tending to elucidate the matter at issue 36 that are referable to the point in issue, tend to exhibit the *res gestae*, or tend to establish a chain of circumstantial evidence in respect of the act charged, 37 are admissible. It is necessary only that they tend to prove the issue or constitute a link in the chain of evidence. 38 Evidence of circumstances which tend to connect the accused with the commission of a crime is properly admitted, even though inconclusive in character. 39

Circumstantial evidence is competent to establish many varying facts in criminal cases. 40 Circumstantial evidence may alone be available in proving elements of crime, such as malice, intent, or motive, which exist only in the mind of the perpetrator of the deed. 41 But evidence of intent to commit crime, if circumstantial, must exclude every reasonable hypothesis except guilt. 42

§ 315 --In criminal cases [SUPPLEMENT]

Case authorities:

Evidence of defendant's threats against lives of prosecutor, judges, and other public officials involved in defendant's trial on conspiracy, racketeering, and other charges relating to defendant's involvement in international drug cartel is not admissible, where defendant was not charged with threatening public officials or attempting to escape from lawful custody and acts of terrorism charged in indictment were acts directed against Columbian officials, not United States officials, because evidence was not relevant to crime for which defendant was on trial. *United States v Escobar* (1994, ED NY) 842 F Supp 1519.

Evidence seized from defendant's home consisting of weapons, ammunition, bullet-proof vest, and spoon coated with cocaine residue was properly admitted in prosecution for cocaine distribution conspiracy and weapons charge since it was similar to evidence

seized in instant offense, hence relevant to defendant's intent. *United States v Elwood* (1993, CA5 La) 999 F2d 814, reh den (CA5 La) 1993 US App LEXIS 27090.

In trial on charges of drug distribution and money laundering conspiracy, evidence regarding defendant's aliases, carrying of briefcase containing \$ 10,000, and putting assets in other persons' names will not be excluded, because, depending on context, evidence could be relevant under FRE 401. *United States v Messino* (1995, ND Ill) 873 F Supp 1177.

Evidence that defendant, charged with sexual abuse based on consensual intercourse with 11-year- old, had made sexual advances toward two other teen-aged girls was relevant to charged crime only insofar as they showed propensity to commit such acts, hence should not have been admitted. *United States v Has No Horse* (1993, CA8 SD) 11 F3d 104.

Evidence that defendant charged with cocaine distribution conspiracy had previously been arrested for selling cocaine to undercover police officer was admissible as relevant to whether defendant agreed to distribute cocaine in instant case. *United States v Casas* (1993, CA8 Iowa) 999 F2d 1225, reh den (CA8 Iowa) 1993 US App LEXIS 22644 and petition for certiorari filed (Dec 2, 1993).

Evidence of cocaine found on defendant when he was arrested was not admissible in his trial on charges of marijuana distribution and using firearm during drug trafficking crime since it was not relevant evidence to prove any elements of those crimes. *United States v Sauseda* (1994, CA10 NM) 24 F3d 97, 39 Fed Rules Evid Serv 939.

Evidence of three carjackings committed by defendant during three weeks prior to carjacking in instant case were properly admitted to demonstrate defendant's identity, which he placed in issue with his alibi defense; in each case defendant cruised shopping centers accompanied by one or two companions looking for high-performance sports cars to steal, used a gun to wrest car from its occupant, and deposited stolen car in same neighborhood. *United States v Clemons* (1994, CA11 Ala) 32 F3d 1504, 8 FLW Fed C 659.

Plaster cast of boot print was properly admitted as relevant evidence since it was same size as defendant's, thus counsel was not ineffective for failing to object to its admission. *Snow v State* (1994, Okla Crim) 876 P2d 291, reh den (Okla Crim) 879 P2d 150.

Footnotes

Footnote 28. *Tot v United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241; *United States v Brown* (CA8 Iowa) 605 F2d 389, cert den 444 US 972, 62 L Ed 2d 387, 100 S Ct 466; *Politano v United States* (CA10 Colo) 220 F2d 217; *Corbett v People*, 153 Colo 457, 387 P2d 409, cert den 377 US 939, 12 L Ed 2d 302, 84 S Ct 1346; *Pittman v State*, 51 Fla 94, 41 So 385; *Des Moines v Rosenberg*, 243 Iowa 262, 51 NW2d 450; *Shanks v State*, 185 Md 437, 45 A2d 85, 163 ALR 931; *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618; *State v Paglino* (Mo) 291 SW2d 850; *Liakas v State*, 161 Neb 130, 72 NW2d 677, cert den 351 US 924, 100 L Ed 1454, 76 S Ct 780; *State v Mihoy*, 98 NH 38, 93 A2d 661, 35 ALR2d 852; *State v Weinstein*, 224 NC 645, 31 SE2d 920, 156 ALR 625, cert den 324 US 849, 89 L Ed 1410, 65 S Ct 689; *Williams v Kozlowski*, 313 Pa 219, 169 A 148, 94 ALR 536; *State v Brown*, 103 SC 437, 88 SE 21; *Toler v*

Commonwealth, 188 Va 774, 51 SE2d 210; State v Bennett, 6 Wash 2d 208, 107 P2d 344; State v Dunn, 10 Wis 2d 447, 103 NW2d 36.

Generally, as to instructions as to the proper use of circumstantial evidence in criminal cases, see 75B Am Jur 2d, Trial §§ 1387 et seq.

Forms: Instructions to jury—Character of evidence—Direct or circumstantial. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 104, 105.

Circumstantial evidence to be considered in connection with other evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 108.

Footnote 29. State v Cor, 144 Mont 323, 396 P2d 86; Toler v Commonwealth, 188 Va 774, 51 SE2d 210; State v Dunn, 10 Wis 2d 447, 103 NW2d 36; Buel v State, 104 Wis 132, 80 NW 78.

Footnote 30. Coffin v United States, 162 US 664, 40 L Ed 1109, 16 S Ct 943; Karnes v Commonwealth, 125 Va 758, 99 SE 562, 4 ALR 1509; Kopacka v State, 22 Wis 2d 457, 126 NW2d 78.

In a prosecution for commercial obscenity, statistical evidence of community patronage of the movie "Deep Throat," offered as circumstantial evidence of the contemporary community standards, was legally relevant and its exclusion was reversible error. Keller v State (Tex Crim) 606 SW2d 931.

Footnote 31. State v Sedig, 235 Iowa 609, 16 NW2d 247; Kopacka v State, 22 Wis 2d 457, 126 NW2d 78.

Footnote 32. Politano v United States (CA10 Colo) 220 F2d 217; Moffitt v United States (CA10 Okla) 154 F2d 402, cert den 328 US 853, 90 L Ed 1625, 66 S Ct 1343; Debaca v People, 160 Colo 543, 418 P2d 286; State v Cor, 144 Mont 323, 396 P2d 86; Toler v Commonwealth, 188 Va 774, 51 SE2d 210.

Footnote 33. People v Rickey, 375 Ill 525, 31 NE2d 973; Commonwealth v Libonati, 346 Pa 504, 31 A2d 95.

Footnote 34. People v Kauffman, 48 Cal App 2d 393, 119 P2d 998; Hodgins v State, 139 Fla 226, 190 So 875, 124 ALR 450.

Footnote 35. State v Myers, 248 Iowa 44, 79 NW2d 382; Karnes v Commonwealth, 125 Va 758, 99 SE 562, 4 ALR 1509; State v Dunn, 10 Wis 2d 447, 103 NW2d 36.

Footnote 36. Johnson v Commonwealth, 115 Pa 369, 9 A 78.

Footnote 37. State v Buck, 88 Kan 114, 127 P 631; State v Dunn, 10 Wis 2d 447, 103 NW2d 36.

Footnote 38. Haley v State, 84 Tex Crim 629, 209 SW 675, 3 ALR 779; Kopacka v State, 22 Wis 2d 457, 126 NW2d 78.

Footnote 39. Pittman v State, 51 Fla 94, 41 So 385.

Footnote 40. Carr v State, 24 Tex App 562, 7 SW 328.

Footnote 41. United States v Stoehr (MD Pa) 100 F Supp 143, 52-1 USTC ¶ 9118, 41 AFTR 67, affd (CA3 Pa) 196 F2d 276, 52-1 USTC ¶ 9299, 41 AFTR 1190, 33 ALR2d 836, cert den 344 US 826, 97 L Ed 643, 73 S Ct 28; McCoy v United States (CA9 Mont) 169 F2d 776, cert den 335 US 898, 93 L Ed 433, 69 S Ct 298; Corbett v People, 153 Colo 457, 387 P2d 409, cert den 377 US 939, 12 L Ed 2d 302, 84 S Ct 1346; State v Paglino (Mo) 291 SW2d 850.

Footnote 42. McGuire v State (Fla App D4) 288 So 2d 271.

§ 316 --Circumstantial evidence of "consciousness of guilt"

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Proof that after a crime was committed, the accused did any number of acts calculated to avoid detection, arrest, prosecution or conviction has been considered circumstantial evidence probative of a mental state called "consciousness of guilt." 43

Behavior indicative of a "guilty mind" encompasses a wide range of acts, including such acts as:

- Concealment or flight by the accused 44
- Attempted suicide by the accused 45
- Alteration of appearance 46
- Possession of stolen goods 47
- Destruction or concealment of evidence 48
- Attempt to bribe public officials in order to secure the accused's freedom 49
- Refusal to cooperate in government attempt to obtain fingerprints 50
- Use of false identification or aliases 51
- Threats or killings to impede witnesses for the prosecution 52
- Motives, declarations, preparations for committing the crime 53

§ 316 --Circumstantial evidence of "consciousness of guilt" [SUPPLEMENT]

Case authorities:

Evidence that tax fraud defendant's clients had received large sums from his firm and then returned money to defendant personally was relevant to defendant's scheme to defraud, notwithstanding his contention that his "crazed" state of mind caused him to want to hide money from his ex-wife who was making excessive alimony demands. *United States v Myerson* (1994, CA2 NY) 18 F3d 153, petition for certiorari filed (Jun 3, 1994).

Evidence that the defendant misrepresented his identity to a police officer on the day after the assault and robbery at issue was properly admitted to show consciousness of guilt, notwithstanding the contention that the officer was investigating an unrelated crime at the time of the misrepresentation and that it was likely that the defendant misrepresented his identity to the officer because of the unrelated crime, which occurred on the same day that he spoke to the officer. *Commonwealth v Jackson* (1995) 419 Mass 716, 647 NE2d 401.

Testimony that defendant and his friends threatened the State's principal witness and warned him not to testify and that defendant on one occasion shot the witness in the thigh was relevant to show defendant's awareness of his guilt, and the trial court did not err by finding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. G.S. § 8C-1, Rule 403. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

Evidence of a defendant's attempt to dispose of a witness may be relevant and admissible to establish consciousness of guilt. *Commonwealth v Jones* (1995, Pa) 658 A2d 746, reh den (Pa) 1995 Pa LEXIS 494.

In a prosecution for murder, it was error for the court to permit a prosecution witness to testify that the defendant attempted to kill her because she knew that he had murdered the victim where (1) the witness, who was a prostitute, had sexual relations with the defendant after the murder and was given cocaine as payment, (2) the witness thought that the cocaine was either not real cocaine or that it was tainted, based on its smell and her attempt to cook it, and (3) the witness testified that when she next saw the defendant, he looked at her like he saw a ghost; the witness's opinion that the cocaine was tainted was highly speculative, and it was also conjecture to assume that the defendant knew that the cocaine was defective. *Commonwealth v Jones* (1995, Pa) 658 A2d 746, reh den (Pa) 1995 Pa LEXIS 494.

Footnotes

Footnote 43.

Practice References *Louisell and Mueller, Federal Evidence* § 97.

Generally, as to state of mind, see §§ 556 et seq.

Footnote 44. §§ 532 et seq.

Footnote 45. *People v Campbell* (2d Dist) 126 Ill App 3d 1028, 82 Ill Dec 39, 467 NE2d 1112, cert den 471 US 1136, 86 L Ed 2d 695, 105 S Ct 2677; *State v Mitchell* (Iowa)

450 NW2d 828; *Pettie v State*, 70 Md App 602, 522 A2d 394, cert gr 310 Md 144, 527 A2d 331 and revd, en banc on other grounds 316 Md 509, 560 A2d 577; *State v Brown*, 128 NH 606, 517 A2d 831.

Testimony that defendant slashed his left forearm in jail on night of his arrest for murder was admissible as tending to show consciousness of guilt. *People v Butler* (2nd Dist) 12 Cal App 3d 189, 90 Cal Rptr 497.

As to the admissibility of evidence of an attempted suicide, generally, see § 536.

Annotation: Admissibility of evidence relating to accused's attempt to commit suicide, 22 ALR3d 840.

Footnote 46. *United States v Felix-Gutierrez* (CA9 Cal) 940 F2d 1200, 91 CDOS 5808, 91 Daily Journal DAR 8790, related proceeding (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924 and cert den (US) 124 L Ed 2d 244, 113 S Ct 2332 (cosmetic surgery and removal of tattoo).

Footnote 47. § 541.

Footnote 48. *United States v Briscoe* (CA7 Ill) 896 F2d 1476, 30 Fed Rules Evid Serv 831, cert den 498 US 863, 112 L Ed 2d 137, 111 S Ct 173; *Marcoux v United States* (CA9 Ariz) 405 F2d 719.

Footnote 49. *United States v Posey* (CA5 Ga) 611 F2d 1389, 5 Fed Rules Evid Serv 771 (evidence that defendant offered sheriff \$100,000 to let him out of the car).

Footnote 50. *United States v Terry* (CA2 NY) 702 F2d 299, 12 Fed Rules Evid Serv 951, cert den 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095, later proceeding (CA2 NY) 731 F2d 138, cert den 469 US 1188, 83 L Ed 2d 963, 105 S Ct 956, later proceeding (SD NY) 741 F Supp 409, later proceeding (SD NY) 1990 US Dist LEXIS 6362 and reconsideration den (SD NY) 1990 US Dist LEXIS 7095 and affd without op (CA2 NY) 930 F2d 910 and cert den 464 US 992, 78 L Ed 2d 680, 104 S Ct 482.

Footnote 51. *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474 (false passport); *United States v Guerrero* (CA9 Or) 756 F2d 1342, cert den 469 US 934, 83 L Ed 2d 270, 105 S Ct 334 (accused carrying false ID papers at time of arrest); *Marcoux v United States* (CA9 Ariz) 405 F2d 719.

Footnote 52. *United States v Cirillo* (CA2 NY) 468 F2d 1233, cert den 410 US 989, 36 L Ed 2d 188, 93 S Ct 1501, later proceeding (SD NY) 425 F Supp 1254, affd (CA2 NY) 554 F2d 54, cert dismd 434 US 801, 54 L Ed 2d 59, 98 S Ct 28, later proceeding (SD NY) 566 F Supp 1340, affd without op (CA2 NY) 742 F2d 1445, later proceeding (SD NY) 666 F Supp 613; *United States v Adcock* (CA5 Fla) 651 F2d 338, 8 Fed Rules Evid Serv 1268; *United States v Maddox* (CA6 Mich) 944 F2d 1223, 33 Fed Rules Evid Serv 1254; *United States v Flick* (CA7 Ind) 516 F2d 489, cert den 423 US 931, 46 L Ed 2d 260, 96 S Ct 282 and cert den 423 US 931, 46 L Ed 2d 260, 96 S Ct 282.

Footnote 53. *People v Morrow*, 60 Cal 142; *Carlton v People*, 150 Ill 181, 37 NE 244.

§ 317 Incomplete or inconclusive evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The mere fact that evidence otherwise relevant and of probative value is incomplete, 54 or will not independently establish a fact at issue, 55 or will not, standing alone, justify a verdict, 56 does not render it inadmissible under the rules of relevancy. Evidence is relevant and admissible if it tends to prove a certain element of an ultimate fact even though it does not tend to establish all elements of the ultimate fact necessary to be proved; and evidence is relevant and admissible if it tends to corroborate evidence of certain, although not all, elements of a necessary ultimate fact. 57

Relevancy does not depend upon the conclusiveness of the evidence offered, but upon its legitimate tendency to establish a controverted fact. 58 Evidence that tends to prove a fact, regardless of how slight such tendency is, should be admitted. 59

§ 317 ----Incomplete or inconclusive evidence [SUPPLEMENT]

Case authorities:

Allegations that police officer had planted cocaine on suspect in unrelated case were properly excluded since there was no evidence that would lead to reasonable inference that officer planted cocaine on defendant in instant case. *United States v Peters* (1994, CA6 Tenn) 15 F3d 540, reh, en banc, den (CA6) 1994 US App LEXIS 5949.

Footnotes

Footnote 54. *Commonwealth v Tucker*, 189 Mass 457, 76 NE 127; *Adams v Moberg*, 356 Mo 1175, 205 SW2d 553.

Footnote 55. *Livingston v Barnett*, 193 Ga 640, 19 SE2d 385; *Cleveland, C., C. & I. R. Co. v Closser*, 126 Ind 348, 26 NE 159.

Footnote 56. *Interstate Commerce Com. v Baird*, 194 US 25, 48 L Ed 860, 24 S Ct 563, 4 AFTR 4683; *Dougherty v White* (Sup) 25 Del 316, 2 Boyce 316, 80 A 237.

Footnote 57. *Fox v Industrial Com. of Ohio*, 162 Ohio St 569, 55 Ohio Ops 472, 125 NE2d 1.

Footnote 58. *Interstate Commerce Com. v Baird*, 194 US 25, 48 L Ed 860, 24 S Ct 563, 4 AFTR 4683; *Holmes v Goldsmith*, 147 US 150, 37 L Ed 118, 13 S Ct 288; *Evans v Oregon S. L. R. Co.*, 37 Utah 431, 108 P 638.

Footnote 59. *Holmes v Goldsmith*, 147 US 150, 37 L Ed 118, 13 S Ct 288; *Alabama G. S. R. Co. v Hill*, 93 Ala 514, 9 So 722; *Chilton v 85 Mining Co.*, 23 NM 451, 168 P 1066; *People v Roach*, 215 NY 592, 109 NE 618; *Clark v Patapsco Guano Co.*, 144 NC 64, 56 SE 858; *Rodgers v Stophel*, 32 Pa 111.

§ 318 Negative evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The definition of relevant evidence encompasses evidence tending to establish negative facts as well as positive ones. 60 It has long been recognized that negative testimony is admissible where the attending circumstances are such as to show that it has some probative force, 61 provided the competency of the witness and his knowledge of the matter of which he speaks are established. 62 In other words, the testimony of a witness is not confined to what he saw or heard, but he may also state what he did not see or did not hear. 63 For instance, if a crime involves the presence of certain persons, testimony by a witness who lived next door to the effect that he had never seen such persons on the premises of the accused is admissible. 64 Evidence is admissible that the witness did not see the defendant, 65 or that he did not see the defendant approach the victim with a knife. 66 And when the defendant claims that the victim of the homicide had struck him on the head with a hammer, a state toxicologist may testify that he found nothing on the hammer. 67

Negative testimony is admissible when a qualified person, who has examined certain records or documents, testifies that he did not find any reference to or entry of a particular item or transaction. 68 When it is claimed that the defendant entered fictitious names of purchasers on his records, government investigators may testify to their search for such purchasers and that they were unable to find any evidence that they existed. 69

If the absence of positive evidence of the fact does not logically suggest the negative, evidence of a negative character is not admissible. 70 Thus in a prosecution for murder by poisoning, evidence that no druggist immediately accessible to the defendant had sold him poison within two years was not admissible, since such evidence had no value unless it were shown that the accused could not have obtained the poison in any other manner. 71 Similarly, testimony of a lay witness that he never observed an abnormal act by the defendant is not significant unless the witness had a continued and prolonged relationship with the defendant of such nature that he would have observed an abnormal act had any been committed. 72

The absence of a complaint by third persons as to the conduct of the defendant is not admissible as evidence that his conduct was lawful, 73 nor is the fact that the defendant did not commit the same offense at other times. 74

When negative evidence is admissible, it is no objection that such evidence is not by itself so persuasive as to be dispositive of the facts in controversy, and the weight to be ascribed to it is for the determination of the jury. 75

◆ Caution: Negative evidence is weak and usually not sufficient to overcome positive testimony that the alleged fact did exist. 76

Negative evidence is admissible to establish a good reputation, 77 and frequently, for certain purposes in negligence actions, evidence is held to be admissible to show the absence of other similar accidents or injuries. 78

Footnotes

Footnote 60. *United States v Fearn* (CA7 Ill) 589 F2d 1316, 3 Fed Rules Evid Serv 1329.

Footnote 61. *Nelson v Iverson*, 24 Ala 9; *Calkins v Hartford*, 33 Conn 57; *Berg v New York C. R. Co.*, 391 Ill 52, 62 NE2d 676; *Snow v Cannelton Sewer Pipe Co.*, 138 Ind App 119, 210 NE2d 118; *Loos v Wilkinson*, 110 NY 195, 18 NE 99, appeal after remand 113 NY 485, 21 NE 392; *McBroom v Meyer* (Okla) 303 P2d 303; *Comstock's Adm'r v Jacobs*, 84 Vt 277, 78 A 1017; *Webber v Park Auto Transp. Co.*, 138 Wash 325, 244 P 718, 47 ALR 590.

Evidence that a railroad company made no attempt during the winter and after an accident to remove snow from cattle guards is admissible as tending to show a failure to exercise any diligence or degree of care in respect of such cattle guards. *Grahlman v Chicago, St. P. & K. C. R. Co.*, 78 Iowa 564, 43 NW 529.

Negative evidence is relevant and admissible when it tends to prove the nonexistence of a material fact. *State v Smtih* (Mo) 222 SW 455.

Footnote 62. *Wilson v Hartford Acci. & Indem. Co.*, 272 NC 183, 158 SE2d 1 (witness may not testify to nonexistence of a fact where the fact might have existed without his being aware of it).

A bank teller should not be permitted to testify that he had no information of any money being received at the bank on a specified date from a given person where it does not appear that payments of money might have been made to the bank without his knowledge. *Xenia Bank v Stewart*, 114 US 224, 29 L Ed 101, 5 S Ct 845.

In an action to recover for damages to plaintiff's truck which was struck while being towed by one defendant, the trial court erred in allowing the jury to consider negative evidence that the amber light on defendant's tow truck was not flashing, since the witness who gave the negative testimony could not tell whether the light was flashing because of the noonday sun. *Leisure Products, Inc. v Clifton*, 44 NC App 233, 260 SE2d 803.

Law Reviews: *Saunders, The Mythic Difficulty in Proving a Negative*. 15 Set H LR 276 (1985).

Footnote 63. *Webber v Park Auto Transp. Co.*, 138 Wash 325, 244 P 718, 47 ALR 590.

Footnote 64. *Railey v State*, 170 Ark 979, 282 SW 5, appeal after remand 174 Ark 742, 297 SW 819.

Footnote 65. *Underwood v State*, 239 Ala 29, 193 So 155.

Footnote 66. *Sanders v State*, 243 Ala 691, 11 So 2d 740.

Footnote 67. *Morris v State*, 268 Ala 60, 104 So 2d 810.

Footnote 68. *People v Kosearas*, 410 Ill 456, 102 NE2d 534.

The absence of an entry from a record may be testified to by a person who has examined the record, as against the contention that only the custodian of the record could so testify. *Jackson v United States* (CA5 Ala) 250 F2d 897.

Footnote 69. *Keith v United States* (CA5 Tex) 250 F2d 355.

Footnote 70. *State v Berube*, 139 Me 11, 26 A2d 654; *State v Corn*, 215 SC 166, 54 SE2d 559.

Footnote 71. *State v Smtih* (Mo) 222 SW 455.

Footnote 72. *Wright v United States*, 102 US App DC 36, 250 F2d 4.

Footnote 73. *United States v Paddock* (DC Mo) 68 F Supp 407.

Footnote 74. *United States v Shapiro* (CA2 NY) 159 F2d 890, affd 335 US 1, 92 L Ed 1787, 68 S Ct 1375, reh den 335 US 836, 93 L Ed 388, 69 S Ct 9.

Footnote 75. *Railey v State*, 170 Ark 979, 282 SW 5, appeal after remand 174 Ark 742, 297 SW 819; *People v Chambers* (4th Dist) 162 Cal App 2d 215, 328 P2d 236.

Footnote 76. As to weight of negative evidence, see Division VII of this article, dealing with weight and sufficiency of evidence.

Footnote 77. § 383.

Footnote 78. §§ 553 et seq.

§ 319 Remote nature of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence may appear relevant but may relate to a time so remote from the date of an occurrence or the commission of the crime that the evidence has no probative value. Evidence must relate to, and be connected with, the transaction which it is to elucidate, and this connection must be immediate. 79 However, that a fact is remote in point of time or probative value does not of itself preclude its admissibility, its admissibility depending to a large extent on the nature and circumstances of the case. 80 In applying the federal rules, it has been stated that matters tending to reduce or enhance

the apparent probative value of evidence affect only the weight of such evidence and not its admissibility. 81

◆ Observation: In effect, the objection that evidence is too remote goes to the credibility of the evidence rather than to its admissibility, unless the remoteness is so great that the proffered evidence has no probative value at all. 82 However, a federal court has excluded testimony on the ground that evidence dealing with a remote incident had a potential to confuse and mislead the jury under Rule 403. 83

Evidence will be excluded as irrelevant when it relates to a matter too remote in point of time to have probative value, 84 but there being no fixed standard for determining remoteness, 85 it is necessary to consider all the attendant circumstances, the nature of the evidence offered, and in criminal prosecutions, the nature of the crime. 86 Thus, in a prosecution for killing his wife, evidence of threats made by the accused three weeks before the killing, 87 or an indefinite period before the killing, 88 have been held not too remote. And while evidence that after defendant had sexual intercourse with a 13-year-old girl, he had continued encounters with her in efforts to encourage her to have sex with him again was not admissible to show his character or propensity, it was admissible to show why the girl did not report the sexual assault until some 9 months after it had occurred. 89

◆ Observation: Remoteness may refer to distance as well as to time. 90

The question whether evidence is too remote to be relevant is left to the discretion of the trial judge, 91 and his decision will not be disturbed unless a clear abuse of that discretion has been demonstrated. 92 If given evidence is relevant, the interval of time between the event to which the offered evidence relates and the commission of the offense is a factor for the jury to consider in evaluating the weight or probative value of the offered evidence. 93

§ 319 ----Remote nature of evidence [SUPPLEMENT]

Case authorities:

Defendant's in court identification was admissible despite significant lapse of time between commission of crime and trial, where witness had ample opportunity to view defendant for 30 minutes in well-lighted room and witness described defendant's vehicle and appearance in significant detail. *United States v Rutledge* (1994, CA7 Ill) 40 F3d 879, reh, en banc, den (1995, CA7 Ill) 1995 US App LEXIS 9.

It was error to permit witness to testify that he accompanied victim to defendant's house on several occasions more than 10 years prior to crime since such evidence was so remote as to be irrelevant; error was exacerbated when court noted during jury charge that witness was called by People and then refused to remind jurors that his testimony had been stricken and that they were to disregard it. *People v Andre* (1992, 2d Dept) 185 AD2d 276, 585 NYS2d 792.

In an action to set aside a deed based on undue influence, the trial court did not err in admitting the testimony of testatrix's attendant and physician regarding her mental condition, since there was no merit to defendant's contention that this testimony was

irrelevant and too remote in time to be admissible. *Caudill v Smith* (1994) 117 NC App 64, 450 SE2d 8, review den (NC) 1995 NC LEXIS 75.

Footnotes

Footnote 79. *Westinghouse v Boyden Power Brake Co.*, 170 US 537, 42 L Ed 1136, 18 S Ct 707; *United States v Budd*, 144 US 154, 36 L Ed 384, 12 S Ct 575; *Aetna Life Ins. Co. v Ward*, 140 US 76, 35 L Ed 371, 11 S Ct 720; *Gormley v Bunyan*, 138 US 623, 34 L Ed 1086, 11 S Ct 453.

Evidence relating to contributory negligence of the beneficiaries of the action has been held inadmissible where such alleged negligent acts were a remote, and not a proximate, cause of the injury and death. *Davis v Raymond*, 102 Vt 65, 146 A 5.

Footnote 80. *Big Apple Super Markets, Inc. v W. J. Milner & Co.*, 111 Ga App 282, 141 SE2d 567; *State v Shiren*, 15 NJ Super 440, 83 A2d 620, affd 9 NJ 445, 88 A2d 601; *Parker v Hoefer*, 118 Vt 1, 100 A2d 434, 38 ALR2d 1216.

Footnote 81. *United States v Bear Killer* (CA8 SD) 534 F2d 1253, cert den 429 US 846, 50 L Ed 2d 118, 97 S Ct 129; *United States v Dupee* (CA9 Wash) 569 F2d 1061.

Deposition describing events that occurred during Korean War will not be excluded despite fact that deponent fails to recall many details surrounding incident in question and that parts of deposition are contradicted by other witnesses, because deposition implicates none of dangers proscribed by Rule 403; rather, objections to deposition go to weight of testimony, which is a jury question. *Robertson v McCloskey* (DC Dist Col) 680 F Supp 412, 24 Fed Rules Evid Serv 682, later proceeding (DC Dist Col) 680 F Supp 414.

Generally as to applicability of Rule 403 (exclusions on ground of prejudice, etc.) see § 331.

Footnote 82. *State v Satterfield*, 114 Mont 122, 132 P2d 372.

Footnote 83. *Patterson v McLean Credit Union* (CA4 NC) 805 F2d 1143, 42 BNA FEP Cas 662, 41 CCH EPD ¶ 36644, 22 Fed Rules Evid Serv 104, cert gr 484 US 814, 98 L Ed 2d 29, 108 S Ct 65, 44 CCH EPD ¶ 37425, later proceeding on other grounds 485 US 617, 99 L Ed 2d 879, 108 S Ct 1419, 46 BNA FEP Cas 979, 46 CCH EPD ¶ 37923 (in racial harassment suit by employee laid off in 1982, it was not error to exclude testimony by former employee that she had experienced harassment in 1972).

Confusion of issues and misleading the jury are discussed in §§ 324 et seq.

Footnote 84. *Bird v United States*, 180 US 356, 45 L Ed 570, 21 S Ct 403; *Cotton v United States* (CA8 Mo) 361 F2d 673; *People v Chambers*, 22 Cal App 2d 687, 72 P2d 746; *State v Isaacson*, 114 Conn 567, 159 A 483; *State v Vaccaro*, 142 NJ Super 167, 361 A2d 47, certif den 71 NJ 518, 366 A2d 674.

Trial court did not err in refusing affidavits presented by inmates under sentence of death seeking to show that jury instructions could have been interpreted as not allowing jury to

consider mitigating circumstances where such affidavits were offered 8 years after trial by 7 academic experts in fields such as anthropology, linguistics, and communications; such affidavits are irrelevant to show how reasonable juror would have interpreted instructions after hearing 3 weeks of testimony. *McDougall v Dixon* (CA4 NC) 921 F2d 518, cert den (US) 115 L Ed 2d 1009, 111 S Ct 2840 and stay den, cert den (US) 116 L Ed 2d 274, 112 S Ct 334.

Evidence of statements and acts at a time when the deceased merely threatened to strike defendant, a year before the quarrel began that led to the shooting, is too remote. *Pruitt v State*, 198 Ind 141, 152 NE 830.

A plaintiff's bankruptcy 30 years previous is too remote in time to render evidence of its details admissible in an action for slander. *Gambrill v Schooley*, 95 Md 260, 52 A 500.

Where ex-wife had not lived with shooting victim for 15 months, her knowledge of his drinking habits was too remote to establish the current pattern of the victim's conduct. *Stouffer v State* (Okla Crim) 738 P2d 1349, mod, in part, reh den, in part (Okla Crim) 742 P2d 562 and cert den 484 US 1036, 98 L Ed 2d 779, 108 S Ct 763, post-conviction proceeding (Okla Crim) 817 P2d 1275, motion gr (US) 117 L Ed 2d 402, 112 S Ct 1153 and cert den (US) 118 L Ed 2d 217, 112 S Ct 1573.

Footnote 85. *State v O'Toole*, 118 Me 314, 108 A 99.

Footnote 86. *State v Fenley*, 309 Mo 520, 275 SW 36.

In a prosecution for drunken driving, evidence of the defendant's condition a half-hour after the collision is not too remote. *Rice v State*, 98 Ga App 803, 107 SE2d 270.

The victim's condition about twelve hours after the offense is not too remote in a prosecution for forcible rape. *State v Chandler* (Mo) 314 SW2d 897.

Footnote 87. *Rooker v State*, 211 Ga 361, 86 SE2d 307.

Footnote 88. *Belton v Commonwealth*, 200 Va 5, 104 SE2d 1.

Footnote 89. *State v Zybach*, 308 Or 96, 775 P2d 318.

Footnote 90. *Hart v State*, 75 Wis 2d 371, 249 NW2d 810 (ovrld on other grounds by *Re Estate of Safran*, 102 Wis 2d 79, 306 NW2d 27, 25 ALR4th 766) (in prosecution for homicide by negligent use of vehicle, witness's testimony that defendant ran 2 stop signs and tailgated a truck more than 12 miles from place where accident occurred was too remote to be relevant to defendant's conduct at scene of accident).

Footnote 91. *Barbour v State*, 262 Ala 297, 78 So 2d 328; *People v Arrangoiz*, 24 Cal App 2d 116, 74 P2d 789; *State v Penn*, 144 Conn 148, 127 A2d 833; *State v Schuman*, 151 Kan 749, 100 P2d 706; *State v White*, 339 Mo 1019, 99 SW2d 72; *State v Kollarik*, 22 NJ 558, 126 A2d 875; *Hart v State*, 75 Wis 2d 371, 249 NW2d 810 (ovrld on other grounds by *Re Estate of Safran*, 102 Wis 2d 79, 306 NW2d 27, 25 ALR4th 766).

How far back before the commission of a crime one may go in the admission of evidence is a matter of degree, within the general control of the trial judge. *United States v Hickey* (CA7 Ill) 360 F2d 127, cert den 385 US 928, 17 L Ed 2d 210, 87 S Ct 284.

Footnote 92. *State v Schuman*, 151 Kan 749, 100 P2d 706; *State v Kollarik*, 22 NJ 558, 126 A2d 875.

Footnote 93. *Gray v State*, 219 Md 557, 150 A2d 221; *State v Satterfield*, 114 Mont122, 132 P2d 372; *State v Shook*, 224 NC 728, 32 SE2d 329.

§ 320 Acts or declarations of nonparties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some jurisdictions, evidence of acts and declarations of nonparties, or dealings of parties with nonparties, 94 is declared inadmissible as a rule on the ground of irrelevancy. 95 The rationale underlying this rule of evidence is that such collateral facts are incapable of affording any reasonable presumption or inference as to the principal matter in dispute. 96 However, because the focus of the rule is upon the relevancy of the evidence, rather than the fact that the evidence involves the acts and declarations of a non-party to the lawsuit, relevant evidence has been found admissible even though involving the acts and declarations of a non-party to the lawsuit. 97 Furthermore, it has been held that this doctrine no longer exists independently of Rules 401, 402, 403, and 404(b), the thrust of which is that all relevant evidence is admissible unless otherwise provided by Constitution, statute, or court rule. 98

Footnotes

Footnote 94. *Kabel v Brady* (Ala) 519 So 2d 912.

Footnote 95. *Gruss v Cummins* (Tex Civ App El Paso) 329 SW2d 496, 12 OGR 567, writ ref n r e (Mar 16, 1960).

Footnote 96. *State v McCarty* (Iowa) 179 NW2d 548.

Footnote 97. *Loftin's Rent-All, Inc. v Universal Petroleum Services, Inc.* (Ala App) 344 So 2d 781.

Footnote 98. *Missouri Pac. R.R. Co. v Roberts* (Tex App Eastland) 849 SW2d 367, writ den (Jun 3, 1993).

§ 321 Evidence admissible for limited purposes only

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence may be inadmissible for one purpose but be entirely proper for another purpose; 99 such evidence is admissible for the latter purpose even though the jury may erroneously use it for other purposes. 1 In other words, evidence competent for one purpose cannot be excluded because it is incompetent for another purpose, 2 unless the risk of confusion by the jury is so great as to upset the balance of advantage of receiving it. 3

Evidence may be admissible in connection with only one count, charge, or defense in a criminal case, and in a civil case only upon one count, claim, or defense, and in such circumstances the adversary upon request is entitled under Federal Rules of Evidence 105 to an instruction so limiting the evidence. 4 Examples of evidence that may be admissible on one claim, charge, or issue while inadmissible on others include:

(1) hearsay evidence offered to prove the state of mind of the declarant rather than to prove the truth of the matter asserted; 5

(2) evidence of remedial measures subsequent to alleged negligent or culpable conduct offered to show exercise of control by a defendant over certain premises, 6 to show the existence of a condition, 7 to show the duty of a party to make repairs, 8 or to show the feasibility of preventive measures, 9 and not to show the negligence of a party;

(3) evidence of liability insurance to show ownership or agency, 10 not to show that a defendant acted negligently;

(4) evidence for impeachment purposes, rather than as substantive evidence, 11 or use of evidence of prior crimes of an accused to impeach the accused as a witness if the accused takes the stand; 12

(5) the use of charts and materials of like nature to illustrate, summarize, or amplify and dramatize testimony of a witness; 13

(6) evidence of other crimes, wrongs, or acts admitted under Federal Rules of Evidence 404(b). 14

◆ Practice guide: A proponent of apparently inadmissible evidence offered for a limited purpose has the burden of identifying the limited purpose before the trial court rules on the admissibility of such evidence. 15

Evidence may also be admissible against one party but not another whenever there is more than one party on a single side of a trial, in civil as well as criminal cases. Thus, in an action against two defendants, evidence may be admitted notwithstanding it is competent as against only one of them. 16 Examples of evidence admissible against one party but inadmissible against another include:

(1) an out of court admission or confession of one defendant implicating another, unless one defendant's Sixth Amendment right to confront witnesses is violated when the codefendant who confessed is not present at trial; 17

(2) guilty pleas by one of two or more codefendants where the pleas are entered after the jury has been impaneled; 18 and

(3) evidence that one of two or more codefendants have previously been convicted of a crime. 19

However, evidence that is incompetent as to one issue or party, but admissible as to another, cannot properly be considered for its bearing on the former issue or party. 20 Such evidence should be offered by a party and received by the court only for the specific purpose for which it is competent. 21

The mere fact that a trial is bifurcated does not preclude consideration in one phase of the trial of evidence introduced during another phase. 22

§ 321 ----Evidence admissible for limited purposes only [SUPPLEMENT]

Case authorities:

In declaratory judgment action brought by manufacturer of polyurethane flotation foam used in construction of 2 docks after designer and builder of floating dock system used at 2 marinas alleged loss of "freeboard" (distance between dock and water), admission into evidence of defendants' decision to put tops or seals on their pontoons was not erroneous where it was not offered as proof of defendants' negligence, but rather to impeach defendants' evidence that tops were not necessary to keep water out of pontoons, and that their floating dock system was "one of strongest in world." *Polythane Sys., Inc. v Marina Ventures Int'l, Ltd.* (1993, CA5) 993 F2d 1201, reh, en banc, den (CA5 Tex) 1993 US App LEXIS 24118.

A collateral crime proven by similar evidence need not be absolutely identical to the crime charged. *Schwab v State* (1994, Fla) 636 So 2d 3, 19 FLW S 113.

Similar fact evidence of other crimes is relevant and admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme identity or a system or general pattern of criminality, and should be admitted if relevant for any purpose save that of showing bad character or propensity. *Schwab v State* (1994, Fla) 636 So 2d 3, 19 FLW S 113.

There was no error in a prosecution for attempted rape and first- degree murder in the trial court's limiting instruction on evidence of another rape. The evidence was relevant and the instructions properly expounded the theories underlying the admissibility of the evidence. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Trial court in personal-injury action arising from single-vehicle accident in which college baseball team van blew tire and rolled over properly allowed limited testimony that severely injured team member had dream of professional baseball career, where evidence was admitted solely to establish mental- suffering element of damages and not as to any claimed loss of future income, and where court specifically told jury that no evidence was in record to indicate that loss of future professional opportunity had resulted in compensable income loss. *Clement v Griffin* (1994, La App 4th Cir) 634 So 2d 412, cert den (La) 637 So 2d 478 and cert den (La) 637 So 2d 478 and cert den (La) 637 So 2d 478 and cert den (La) 637 So 2d 479 and cert den (La) 637 So 2d 479 and cert den (La) 637

Footnotes

Footnote 99. Leigh v Swartz, 74 Ariz 108, 245 P2d 262; Maas v Laursen, 219 Minn 461, 18 NW2d 233, 158 ALR 215; Louis Steinbaum Real Estate Co. v Maltz (Mo) 247 SW2d 652, 31 ALR2d 1052; Caples v State, 3 Okla Crim 72, 104 P 493.

Footnote 1. Sims v Struthers, 267 Ala 80, 100 So 2d 23; Daggett v Atchison, T. & S. F. R. Co., 48 Cal 2d 655, 313 P2d 557, 64 ALR2d 1283; State v Volpe, 113 Conn 288, 155 A 223, 76 ALR 1083 (holding that evidence of a contrary statement made by a witness out of court, when admissible, is allowed for the purpose of affecting credibility and weakening the force of the testimony, but is not evidence of the fact); Irvine v Baxter Stove Co., 70 Ind App 105, 123 NE 185; Martin v Mercantile Trust Co. (Mo) 293 SW2d 319; Blodgett v Park, 76 NH 435, 84 A 42; Dolan v Newark Iron & Metal Co., 18 NJ Super 450, 87 A2d 444; Fox v Manchester, 183 NY 141, 75 NE 1116; Nappi v Falcon Truck Renting Corp., 286 App Div 123, 141 NYS2d 424, affd 1 NY2d 750, 152 NYS2d 297, 135 NE2d 51.

In a prosecution for burglary and grand larceny, inadmissibility of evidence on the grand larceny issue because of the naming of the wrong person in the information as the owner of the property taken does not preclude its admission on the burglary issue. State v Turner (Mo) 272 SW2d 266, 48 ALR2d 1008.

Forms: Instruction to jury—Consideration of evidence admitted for limited purpose. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 18.

Footnote 2. Palmiter v Monroe County Bd. of Rd. Comrs., 149 Mich App 678, 387 NW2d 388.

If evidence is competent for any purpose, it is not rendered incompetent by the fact that it also has a tendency to influence the mind in another direction, for which alone it would not be competent. Curtin v Benjamin, 305 Mass 489, 26 NE2d 354, 129 ALR 433.

Footnote 3. §§ 324 et seq.

Footnote 4. § 322.

Footnote 5. United States v De Carlo (CA3 NJ) 458 F2d 358, cert den 409 US 843, 34 L Ed 2d 83, 93 S Ct 107, 93 S Ct 112.

Footnote 6. Woolard v Mobil Pipe Line Co. (CA5 Tex) 479 F2d 557, reh den (CA5 Tex) 480 F2d 925 and cert den 414 US 1025, 38 L Ed 2d 316, 94 S Ct 450.

Footnote 7. Bailey v Kawasaki-Kisen, K. K. (CA5 La) 455 F2d 392, 16 FR Serv 2d 324, appeal after remand (CA5 La) 478 F2d 839.

Footnote 8. Wallner v Kitchens of Sara Lee, Inc. (CA7 Ill) 419 F2d 1028.

Footnote 9. Nice v Chesapeake & O. R. Co. (WD Mich) 305 F Supp 1167; Boeing

Airplane Co. v Brown (CA9 Wash) 291 F2d 310.

Footnote 10. Newell v Harold Shaffer Leasing Co. (CA5 Miss) 489 F2d 103.

Footnote 11. Michelson v United States, 335 US 469, 93 L Ed 168, 69 S Ct 213 (superseded by statute on other grounds as stated in United States v Solomon (CA11 Fla) 686 F2d 863, 11 Fed Rules Evid Serv 717); United States v Eddy (CA5 Ala) 597 F2d 430, 4 Fed Rules Evid Serv 629.

Footnote 12. United States v Oakes (CA1 Mass) 565 F2d 170, 2 Fed Rules Evid Serv 513.

Footnote 13. Lloyd v United States (CA5 Ala) 226 F2d 9, 55-2 USTC ¶ 9665, 47 AFTR 1955.

Footnote 14. §§ 404 et seq.

Footnote 15. Anthony v State (Iowa) 374 NW2d 662.

Footnote 16. Illinois C. R. Co. v Houchins, 121 Ky 526, 89 SW 530; Grimm v Gargis (Mo) 303 SW2d 43, 74 ALR2d 599; Lamm v Gardner, 250 NC 540, 108 SE2d 847.

Footnote 17. Cruz v New York, 481 US 186, 95 L Ed 2d 162, 107 S Ct 1714, 22 Fed Rules Evid Serv 369, on remand 70 NY2d 733, 519 NYS2d 959, 514 NE2d 379 and (ovrld on other grounds by Idaho v Wright, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24) as stated in People v Watkins, 438 Mich 627, 475 NW2d 727, cert den (US) 117 L Ed 2d 105, 112 S Ct 933, habeas corpus den (ED Mich) 784 F Supp 390, affd without op (CA6 Mich) 983 F2d 1067, reported in full (CA6) 1992 US App LEXIS 33622 and cert den (US) 123 L Ed 2d 182, 113 S Ct 1624; Bruton v United States, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, appeal after remand (CA8 Mo) 416 F2d 310, 21 ALR Fed 958, cert den 397 US 1014, 25 L Ed 2d 428, 90 S Ct 1248.

Footnote 18. United States v Johnson (CA4 Va) 451 F2d 1321, cert den 405 US 1018, 31 L Ed 2d 480, 92 S Ct 1298.

Footnote 19. United States v Arcuri (CA2 NY) 405 F2d 691, cert den 395 US 913, 23 L Ed 2d 227, 89 S Ct 1760.

Footnote 20. McDonald v United States, 335 US 451, 93 L Ed 153, 69 S Ct 191; Stronge v Supreme Lodge, K. P., 189 NY 346, 82 NE 433; William Deering & Co. v Mortell, 21 SD 159, 110 NW 86; Mankin v Jones, 63 W Va 373, 60 SE 248.

The fact that evidence is admissible for the purpose of contradicting a witness does not authorize its use as affirmative evidence of a fact in dispute. Fox v Manchester, 183 NY 141, 75 NE 1116.

Footnote 21. Waldron v Waldron, 156 US 361, 39 L Ed 453, 15 S Ct 383; Wabash, S. L. & P. R. Co. v McDougall, 126 Ill 111, 18 NE 291; Schworm v Fraternal Bankers' Reserve Soc., 168 Iowa 579, 150 NW 714.

One offering in evidence documents that are competent for one purpose, and incompetent

for all others, has a right to protect himself against their use as evidence upon any other question by limiting his offer to the specific purpose for which they are competent. *Close v Stuyvesant*, 132 Ill 607, 24 NE 868.

Footnote 22. *Foreman & Clark Corp. v Fallon*, 3 Cal 3d 875, 92 Cal Rptr 162, 479 P2d 362 (even had an appropriate request for limitation of scope of evidence been made, that request would properly have been denied and the evidence considered for all purposes).

§ 322 --Court's duty to restrict use of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 105 provides that when evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, 23 the court, upon request, must restrict the evidence to its proper scope and instruct the jury accordingly. 24 This Rule codifies earlier law which was to the effect that the court should limit its application of such evidence by proper instructions, at least when requested to do so or when objection is made to the introduction of the evidence. 25

◆ Comment: A close relationship exists between Federal Rules of Evidence 105 and Federal Rules of Evidence 403, which requires exclusion of relevant evidence when the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of the time, or needless presentation of cumulative evidence. 26 Federal Rules of Evidence 105 recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly, and the availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude evidence for unfair prejudice under Federal Rules of Evidence 403. 27 Thus, although evidence may be of such low probative value against one defendant or conspirator that the possibility of prejudicial use of the evidence against another defendant calls for its exclusion altogether under Federal Rules of Evidence 403, the probative value of evidence against one defendant may outweigh its potential prejudicial affect on another defendant under the circumstances, and such evidence may be received subject to a cautionary instruction to the jury not to consider the evidence against the defendant who would be prejudiced by it. 28

Although proper limiting instructions may not entirely prevent a jury from considering evidence, either consciously or unconsciously, for a purpose other than the limited purpose for which it may have been introduced, there is a strong presumption that proper limiting instructions will reduce the possibility of prejudice to an acceptable level. 29 Federal Rules of Evidence 105 calls for a limiting instruction only if the evidence complained of has been admitted, and not, for example, where prior testimony is used to refresh the memory of a witness. 30

◆ Reminder: Counsel may wish to refrain from requesting an instruction under Federal

Rules of Evidence 105 in order not to emphasize potentially damaging evidence. 31 However, counsel wishing to object to the admissibility of evidence for a limited purpose must comply with the requirements of Rule 103 in order to preserve the point for review on appeal. 32

◆ Practice guide: The burden of requesting a limiting jury instruction under Federal Rules of Evidence 105 falls on the party who desires that the instruction be given. 33 Moreover, the request must be explicit and cannot be implied based on counsel's comment at the time of admission about what the opposing party's evidence was apparently being admitted for. 34

Upon receiving a request for limiting jury instructions, a trial judge is required to give such instruction where the evidence in question has only limited admissibility. 35 The failure of the court to give such a limiting instruction upon request may be reversible error 36 and entitle the party adversely affected to a new trial. 37 However, the trial court properly refuses to give an instruction requested by counsel where the instruction proposed is manifestly intended to present the defendant's construction of the evidence as opposed to the government's. 38

§ 322 --Court's duty to restrict use of evidence [SUPPLEMENT]

Case authorities:

Trial court should not have excluded, on grounds of confusing and misleading jury and delaying proceedings, evidence that victim's husband had assaulted her when she was living with him, since it showed that someone other than defendant, victim's boyfriend, had opportunity, ability, and motive to commit crime, would have lent support to defendant's theory that someone else beat victim and undermined prosecutor's claim that more thorough investigation would have turned up nothing of value; it actually could have decreased confusion by providing explanation for victim's changing testimony and posed only minimal risk of delay. *United States v Crosby* (1996, CA9 Ariz) 75 F3d 1343, 96 CDOS 633, 96 Daily Journal DAR 962, 43 Fed Rules Evid Serv 974, amd, reh den (1996, CA9) 1996 US App LEXIS 6295.

Although the correct procedure would have been for the trial court to give defendant's requested limiting instruction with regard to a prior inconsistent statement at the time the request was made and in conjunction with the admission of the statement, because the trial court gave a correct limiting instruction in its charge, the error was not prejudicial. *State v Williams* (1995) 341 NC 1, 459 SE2d 208.

The purpose for which the jury could consider corroborating evidence was adequately explained to the jury where the court instructed the jury to consider a prior statement solely for corroborating the witness's testimony at trial if the jury found that the prior statement did corroborate the trial testimony; the court instructed the jury not to consider prior statements as evidence of the truth of what was said at the earlier time; and defendant made no special request for an instruction concerning the difference between corroborative and substantive evidence. *State v Williams* (1995) 341 NC 1, 459 SE2d 208.

Footnotes

Footnote 23. As to the admissibility of such evidence, see § 321.

Footnote 24. FRE 105; Uniform Rules of Evidence 105.

Practice References Hunter, Federal Trial Handbook 2d § 41:4.

Louisell & Mueller, Federal Evidence §§ 40-44.

Footnote 25. Howard v State, 172 Ala 402, 55 So 255; Daggett v Atchison, T. & S. F. R. Co., 48 Cal 2d 655, 313 P2d 557, 64 ALR2d 1283; Denton v Etheridge, 73 Ga App 221, 36 SE2d 365; Grimm v Gargis (Mo) 303 SW2d 43, 74 ALR2d 599; State v Dolbow, 117 NJL 560, 189 A 915, 109 ALR 1488, app dismd 301 US 669, 81 L Ed 1334, 57 S Ct 943.

Footnote 26. Advisory Committee Notes to Federal Rules of Evidence, FRE 105.

For a discussion of FRE 403, see §§ 324 et seq.

Footnote 27. United States v Beechum (CA5 Tex) 582 F2d 898, 3 Fed Rules Evid Serv 1185, cert den 440 US 920, 59 L Ed 2d 472, 99 S Ct 1244.

Advisory Committee Notes to Federal Rules of Evidence, FRE 105.

Footnote 28. United States v Alpern (CA7 Ill) 564 F2d 755, 2 Fed Rules Evid Serv 763.

Forms: Instruction to jury—Consideration of evidence admitted for limited purpose. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 18.

Footnote 29. United States v Kilcullen (CA1 Mass) 546 F2d 435, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175.

Generally, as to the court's instructions to the jury on limiting the use of evidence, see 75B Am Jur 2d, Trial § 1283.

Practice References Louisell & Mueller, Federal Evidence § 45.

Forms: Instruction to jury—Duty to disregard stricken testimony. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 15.

Footnote 30. United States v Booty (CA5 La) 621 F2d 1291, 6 Fed Rules Evid Serv 737, mod and reh den (CA5 La) 627 F2d 762.

Footnote 31. United States v Barnes (CA5 Fla) 586 F2d 1052, 3 Fed Rules Evid Serv 1278.

Footnote 32. § 323.

Footnote 33. United States v Capital Sav. Asso. (ND Ind) 576 F Supp 790, 83-2 USTC ¶ 9585, 52 AFTR 2d 83-6179; United States v Gilmore (CA8 Mo) 730 F2d 550, 15 Fed

Rules Evid Serv 721; *United States v McLennan* (CA9 Or) 563 F2d 943, 2 Fed Rules Evid Serv 750, cert den 435 US 969, 56 L Ed 2d 60, 98 S Ct 1607; *United States v Bridwell* (CA10 Okla) 583 F2d 1135, 3 Fed Rules Evid Serv 628.

Footnote 34. *United States v Capital Sav. Asso.* (ND Ind) 576 F Supp 790, 83-2 USTC ¶ 9585, 52 AFTR 2d 83-6179.

Footnote 35. *United States v Washington* (CA2 NY) 592 F2d 680, 3 Fed Rules Evid Serv 878; *United States v Dugger* (ED Tenn) 422 F Supp 1344.

Footnote 36. *United States v Washington* (CA2 NY) 592 F2d 680, 3 Fed Rules Evid Serv 878.

Footnote 37. *Sprynczynatyk v General Motors Corp.* (CA8 ND) 771 F2d 1112, 18 Fed Rules Evid Serv 952, cert den 475 US 1046, 89 L Ed 2d 572, 106 S Ct 1263.

Footnote 38. *United States v Multi-Management, Inc.* (CA9 Mont) 743 F2d 1359, 16 Fed Rules Evid Serv 603.

§ 323 --Effect of failure to request limiting instructions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The failure of a party to request a limiting instruction pursuant to Federal Rules of Evidence 105, either during the trial or at the close of the case in the charge to the jury, precludes review on appeal of the alleged error in failing to give such an instruction. 39 Thus, a party may waive any objection as to a trial court's failure to give a limiting instruction under Federal Rules of Evidence 105 so as to restrict the way in which the jury should consider certain evidence, where such party does not object to the omission of the limiting instruction nor ask for any others. 40

Even in the absence of a request for a limiting instruction a Court of Appeals may reverse if plain error exists. 41 However, only in those rare situations in which other aggravating circumstances have exacerbated the prejudice will the failure to give cautionary instructions in the absence of a request result in plain and reversible error. 42 The prevailing inquiry is one of fairness, and to this end jury instructions are important only insofar as they protect the substantive rights of the accused. 43

In the usual case, the court is not required to give a limiting instruction sua sponte, 44 and no such limiting instruction is required where:

- (1) the evidence is relevant to an issue in the case; 45
- (2) the probative nature of the evidence outweighs the possibility for prejudice; 46
- (3) any potential for prejudice is negated. 47

Since the impact on a party's substantial rights varies with the facts of each case, it cannot be said that plain error may never result from the failure of the trial court to give cautionary instructions in the absence of a request where the conduct shown is egregious and its particular relevance questionable. 48 Thus, the failure of a court to give a limiting instruction, in the absence of a request to do so, that impeachment evidence is not admitted as evidence in the offeror's favor or to establish the truth of the subject matter, but merely to destroy the credibility of a witness, may be plain error when the impeaching evidence is extremely damaging, the need for instruction is obvious, and the failure to give it is so prejudicial as to affect the substantial rights of the accused. 49 On the other hand, a trial court's failure to give a limiting instruction sua sponte on the limited use of evidence is not plain error where such failure is not extremely damaging in view of testimony of other witnesses, 50 or where the court's instructions as a whole are taken into account. 51

§ 323 --Effect of failure to request limiting instructions [SUPPLEMENT]

Case authorities:

Because party cannot wait until after receiving unfavorable verdict, then raise objection or state different grounds in motions after verdict, defendant's objection to learned treatises on relevancy grounds in motions after verdict was untimely because it prevented trial court from reviewing relevancy of evidence before it was presented to jury, and defendant's failure to object or move to strike in timely manner waived objection to learned treatises evidence. *Wingad v John Deere & Co.* (1994, App) 187 Wis 2d 441, 523 NW2d 274.

Footnotes

Footnote 39. *United States v Natale* (CA2 NY) 526 F2d 1160, cert den 425 US 950, 48 L Ed 2d 193, 96 S Ct 1724; *United States v Echeverri-Jaramillo* (CA4 NC) 777 F2d 933, 19 Fed Rules Evid Serv 1106, cert den 475 US 1031, 89 L Ed 2d 345, 106 S Ct 1237.

Footnote 40. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154; *United States v Christian* (CA6 Tenn) 786 F2d 203; *United States v Gilmore* (CA8 Mo) 730 F2d 550, 15 Fed Rules Evid Serv 721.

Footnote 41. FRE 103(d).

Footnote 42. *United States v Christian* (CA6 Tenn) 786 F2d 203.

Footnote 43. *United States v Christian* (CA6 Tenn) 786 F2d 203.

Footnote 44. *United States v Sliker* (CA2 NY) 751 F2d 477, 16 Fed Rules Evid Serv 1089, cert den 470 US 1058, 84 L Ed 2d 832, 105 S Ct 1772 and cert den 471 US 1137, 86 L Ed 2d 697, 105 S Ct 2679; *United States v Multi-Management, Inc.* (CA9 Mont) 743 F2d 1359, 16 Fed Rules Evid Serv 603; *United States v McLennan* (CA9 Or) 563 F2d 943, 2 Fed Rules Evid Serv 750, cert den 435 US 969, 56 L Ed 2d 60, 98 S Ct 1607.

Footnote 45. United States v Conley (CA8 Mo) 523 F2d 650, cert den 424 US 920, 47 L Ed 2d 327, 96 S Ct 1125.

Footnote 46. United States v Brown (CA9 Wash) 562 F2d 1144, 2 Fed Rules Evid Serv 741.

Footnote 47. United States v Christian (CA6 Tenn) 786 F2d 203 (the admission of the guilty plea of the codefendant was not prejudicial to the defendant as it was reasonable to believe that the jury used the testimony regarding the specific facts underlying the crimes in issue to convict the codefendant and the testimony regarding the guilty plea to assess the witness' credibility).

Footnote 48. United States v Cooper (CA6 Tenn) 577 F2d 1079, 3 Fed Rules Evid Serv 969, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

Footnote 49. United States v Garcia (CA5 Tex) 530 F2d 650, 2 Fed Rules Evid Serv 564.

Footnote 50. United States v Barnes (CA5 Fla) 586 F2d 1052, 3 Fed Rules Evid Serv 1278.

Footnote 51. United States v Barrett (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154.

B. Exclusion of Relevant Evidence Where Probative Value is Outweighed by Specified Dangers (Rule 403) [324-356]

Research References

US Const, Amend 6

FRE Rules 403, 608, 609

Uniform Rules of Evidence, Rule 403

22 USCS §§ 2751 et seq.; 42 USCS § 1983

ALR Digests: Evidence §§ 1134-1413

ALR Index: Character and Reputation; Demonstrative and Real Evidence; Description and Identification; Documentary Evidence; Entrapment; Evidence; Evidence Rules; Experiments or Tests; Hypothetical Questions; Impeachment of Witnesses; Offer of Proof; Rebuttal; Same or Similar Acts or Matters; Witnesses

1A Federal Procedural Forms, L Ed, Actions in District Court §§ 1:3623, 1:3624; 7

Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:646, 20:647, 20:649, 20:926, 20:955

Louisell and Mueller, Federal Evidence §§ 124, 125

Hunter, Federal Trial Handbook 2d § 32.6

1. In General [324-330]

§ 324 Generally

Rule 403 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 52 The Rule is substantially a restatement of pre-existing law. 53 It is meant to relax the iron rule of relevance by permitting the trial judge to preserve the fairness of the proceedings by excluding evidence despite its relevance. 54

FRE Rule 403 may justify the exclusion of evidence the necessary rebuttal of which would require undue consumption of time and excessive cost, 55 and of matters of scant or cumulative probative force dragged in by the heels for the sake of its prejudicial effect. 56 However, exclusion of relevant evidence under FRE Rule 403 is said to be an extraordinary remedy to be used sparingly, 57 and the less drastic action of compelling compliance with conditions to remove or alleviate prejudicial or time-wasting aspects of the introduction of evidence is also authorized under FRE Rule 403. 58

Where a defendant makes a motion to exclude evidence under FRE Rule 403 but the balancing test required by that Rule cannot be done effectively in advance of trial, the motion can be denied without prejudice to its renewal at trial. 59

◆ Comment: The grounds stated in FRE Rule 403 are the sole grounds for exclusion of relevant evidence which is otherwise admissible. 60 FRE Rule 403 does not include surprise as a ground of exclusion. Although claims of unfair surprise may be justified despite procedural requirements of notice and discovery, the grant of a continuance is a more appropriate remedy than exclusion of the evidence under FRE Rule 403. 61

◆ Observation: It has been noted that the problem under FRE Rule 403 of balancing probative force and counterweights such as confusion of issues normally constitutes a procedural matter and therefore may be decided without reference to state law, and that state decisions or statutes striking the balance in a different way for particular offers in particular kinds of cases need not be followed. However, state decisions of this nature should be carefully examined because if they are so bound up with the accompanying substantive rule that to ignore the evidentiary determination would significantly "modify" the substantive rule, the federal court ought not ignore such evidentiary determinations. 62

§ 324 ----Generally [SUPPLEMENT]

Case authorities:

In a criminal case, when the probative force of the prosecution's evidence depends on the circumstances in which it was obtained, and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. *Kyles v Whitley* (1995, US) 131 L Ed 2d 490, 115 S Ct 1555, 95

Defendant may not develop evidence of codefendants' post-indictment plan to bribe or kill witness, where defendant was not involved in plan but seeks to use his lack of participation in plan to prove lack of participation in racketeering acts for which all three stand trial, since evidence sought is only marginally relevant but is extremely prejudicial to codefendants. *United States v Ruggiero* (1993, SD NY) 824 F Supp 379.

District court did not err in excluding testimony of defendant's expert economist concerning worklife expectancy of oilfield worker, in oilfield worker's suit for damages, since, without some indication of how oilfield worklife differs from that of other occupations, district court could have excluded evidence upon finding that probative value of expert's study did not outweigh prejudice to plaintiffs or that it was not sufficiently reliable. *Marcel v Placid Oil Co.* (1994, CA5 La) 11 F3d 563.

Evidence that mail and wire fraud defendant had once filed false charges against former employee was not probative of defendant's intent to defraud in instant case, but admission was harmless in view of overwhelming evidence against defendant. *United States v Macey* (1993, CA7 Ill) 8 F3d 462.

Defendant waived argument that he was prejudiced by court's refusal to exclude witnesses where he never moved to exclude them. *United States v Abbott* (1994, CA7 Ill) 30 F3d 71.

The trial court did not err in a first-degree murder sentencing hearing by not excluding as more prejudicial than probative testimony from the victim's five-year-old daughter delivered from her stepmother's lap. Although defendant contended that the testimony concerned only background matters and was only cumulative while the manner in which it was introduced was highly inflammatory, the Supreme Court paid deference to the ruling of the trial judge and could not say that he committed error in the admission of otherwise relevant testimony because of the manner in which the testimony was presented. *State v Reeves* (1994) 337 NC 700, 448 SE2d 802.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by other factors, including risk of unfair prejudice (Stats § 904.03). *State v Patricia A. M.* (1993, App) 176 Wis 2d 542, 500 NW2d 289.

Evidence which is relevant may nonetheless be excluded pursuant to statute if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury (Stats § 904.03). *State v Patricia A. M.* (1993, App) 176 Wis 2d 542, 500 NW2d 289.

Evidence which is relevant may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury. *Johnson by Adler v Kokemoor* (1996) 199 Wis 2d 615, 545 NW2d 495.

Footnotes

Footnote 52. FRE Rule 403; Uniform Rules of Evidence, Rule 403.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 ALR Fed 390.

Practice References Louisell and Mueller, Federal Evidence § 124.

Hunter, Federal Trial Handbook 2d § 32.6.

Forms: Allegation—Error of law—In refusing to allow introduction of relevant evidence. 1 Federal Procedural Forms, L Ed, Actions in District Court § 1:1964.

Allegation—Error of law—In admitting inadmissible evidence. 1 Federal Procedural Forms, L Ed, Actions in District Court § 1:1965.

Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 53. United States v Hajal (CA6 Mich) 555 F2d 558, 1 Fed Rules Evid Serv 697, cert den 434 US 849, 54 L Ed 2d 117, 98 S Ct 159.

If evidence pertaining to collateral matters, otherwise relevant, brings into a case new controversial matters which would result in confusion of issues, constitute unfair surprise, or cause prejudice wholly disproportionate to the value and usefulness of the offered evidence, it should be excluded. Vogel v Sylvester, 148 Conn 666, 174 A2d 122, 96 ALR2d 893 (criticized on other grounds by State v John, 210 Conn 652, 557 A2d 93); Conley v Kaney (Mo) 250 SW2d 350.

Evidence which will only serve to prejudice the minds of the jury is properly excluded. McKay v State, 90 Neb 63, 132 NW 741, mod 91 Neb 281, 135 NW 1024; Deitz v Providence Washington Ins. Co., 33 W Va 526, 11 SE 50.

If evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties. People v Davis, 43 NY2d 17, 400 NYS2d 735, 371 NE2d 456, cert den 435 US 998, 56 L Ed 2d 88, 98 S Ct 1653 and cert den 438 US 914, 57 L Ed 2d 1160, 98 S Ct 3143.

Footnote 54. United States v McRae (CA5 Tex) 593 F2d 700, 4 Fed Rules Evid Serv 503, reh den (CA5 Tex) 597 F2d 283 and cert den 444 US 862, 62 L Ed 2d 83, 100 S Ct 128.

Footnote 55. *United States v Callahan* (DC Minn) 442 F Supp 1213, 2 Fed Rules Evid Serv 890, later proceeding (DC Minn) 455 F Supp 524, revd on other grounds (CA8 Minn) 596 F2d 759.

Footnote 56. *United States v McRae* (CA5 Tex) 593 F2d 700, 4 Fed Rules Evid Serv 503, reh den (CA5 Tex) 597 F2d 283 and cert den 444 US 862, 62 L Ed 2d 83, 100 S Ct 128.

Footnote 57. *K-B Trucking Co. v Riss International Corp.* (CA10 Kan) 763 F2d 1148, 18 Fed Rules Evid Serv 682; *United States v Terzado-Madruga* (CA11 Ga) 897 F2d 1099, 30 Fed Rules Evid Serv 662; *United States v Elkins* (CA11 Ga) 885 F2d 775, 28 Fed Rules Evid Serv 1469, cert den 494 US 1005, 108 L Ed 2d 477, 110 S Ct 1300; *United States v Blanton* (CA11 Ga) 793 F2d 1553, 105 CCH LC ¶ 11990, 21 Fed Rules Evid Serv 25, reh den, en banc (CA11 Ga) 801 F2d 404 and cert den 479 US 1021, 93 L Ed 2d 728, 107 S Ct 678; *Ebanks v Great Lakes Dredge & Dock Co.* (CA11 Fla) 688 F2d 716, 11 Fed Rules Evid Serv 980, reh den (CA11 Fla) 693 F2d 135, cert den 460 US 1083, 76 L Ed 2d 346, 103 S Ct 1774 and on remand (MD Fla) 613 F Supp 1428, affd in part and revd in part on other grounds (CA11 Fla) 832 F2d 1540, 1988 AMC 2278, 24 Fed Rules Evid Serv 949, reh den, en banc (CA11 Fla) 837 F2d 1095 and reh den, en banc (CA11 Fla) 837 F2d 1095 and reh den, en banc (CA11 Fla) 837 F2d 1095 and cert den 486 US 1033, 100 L Ed 2d 604, 108 S Ct 2017, 1988 AMC 2402, later proceeding (MD Fla) 1990 AMC 2247, revd on other grounds (CA11 Fla) 957 F2d 1575, 1992 AMC 2310, 6 FLW Fed C 419, cert den (US) 121 L Ed 2d 388, 113 S Ct 484.

Footnote 58. *United States v Algie* (ED Ky) 503 F Supp 783, 7 Fed Rules Evid Serv 800, revd on other grounds, remanded (CA6 Ky) 667 F2d 569, 9 Fed Rules Evid Serv 1206, appeal after remand (CA6 Ky) 721 F2d 1039.

Footnote 59. *United States v Rastelli* (ED NY) 653 F Supp 1034.

Footnote 60. *United States v Dolliole* (CA7 Ill) 597 F2d 102, 4 Fed Rules Evid Serv 1030, cert den 442 US 946, 61 L Ed 2d 318, 99 S Ct 2894.

Footnote 61. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Footnote 62. Wellborn, *The Federal Rules of Evidence and the Application of State Law in Federal Courts*, 55 Tex L Rev 371, 406 (1977).

§ 325 Relation to other rules

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

FRE Rule 403 is closely related to, and must be read in conjunction with, other rules. Thus, one must look to FRE Rule 401 for the definition of "relevant evidence," 63 and under FRE Rule 402 a judge is required to admit evidence, otherwise relevant on an issue

under FRE Rule 401, unless he finds it excludible under an exception provided in FRE Rule 403. 64

◆ **Comment:** FRE Rules 404-412 are concrete applications designed for particular situations; they reflect the policies underlying FRE Rule 403, which constitutes a guide for the handling of situations for which no specific rules have been formulated. 65

When determining admission of relevant evidence of similar acts under FRE Rule 404(b), the judge must find that the probative value of the evidence is not substantially outweighed by one of the dangers enumerated in FRE Rule 403. 66 Thus, evidence of other crimes, which prove identity, scheme or motive, although admissible under Rule 404, may not be admissible if its probative value is outweighed by its potential prejudice. 67 FRE Rule 403 was not designed to allow the blanket exclusion of evidence of insurance 68 absent some indicia of prejudice, as such a result would defeat the obvious purpose of FRE Rule 411. 69

FRE Rule 403 might afford a trial court discretion to exclude evidence of a witness's prior conviction even where the defendant in a criminal case is not the party prejudiced. 70

§ 325 ----Relation to other rules [SUPPLEMENT]

Case authorities:

In action by former employee against employer, alleging entitlement to benefits under collective bargaining agreement, ledger pages allegedly containing evidence of illegal bribes employer paid to union officer are admitted subject to renewal of motion to exclude at trial, because even if pages are authenticated and relevant, substantial issue exists as to whether they should be excluded pursuant to T28 403. *Ladson v Ulltra E. Parking Corp.* (1995, SD NY) 878 F Supp 25.

Admission of all evidence that is least bit probative of credibility of witness is not always constitutionally required. *State v Olson* (1993, App) 179 Wis 2d 715, 508 NW2d 616.

Footnotes

Footnote 63. *United States v Jackson* (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 64. *Contemporary Mission, Inc. v Famous Music Corp.* (CA2 NY) 557 F2d 918, 2 Fed Rules Evid Serv 16.

Footnote 65. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Footnote 66. *United States v Williams* (CA2 NY) 596 F2d 44, 4 Fed Rules Evid Serv 57, cert den 442 US 946, 61 L Ed 2d 317, 99 S Ct 2893.

Footnote 67. *United States v Martinez* (CA10 Colo) 744 F2d 76, 16 Fed Rules Evid Serv 797, later proceeding on other grounds (CA10 Colo) 771 F2d 424, mod, in part, reh den, in part on other grounds (CA10 Colo) 778 F2d 553, vacated on other grounds 475 US 1138, 90 L Ed 2d 333, 106 S Ct 1787, on remand (CA10 Colo) 800 F2d 230.

Footnote 68. Generally, as to the admissibility of evidence concerning insurance coverage, see §§ 483 et seq.

Footnote 69. *Charter v Chleborad* (CA8 Neb) 551 F2d 246, 1 Fed Rules Evid Serv 878, cert den 434 US 856, 54 L Ed 2d 128, 98 S Ct 176.

Footnote 70. *United States v Dixon* (CA9 Cal) 547 F2d 1079, 2 Fed Rules Evid Serv 256.

Forms: Affidavit—In support of motion to exclude evidence of prior convictions—Need for defendant's testimony on other issues. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:649.

§ 326 --In impeachment situations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although the extent of impeachment of witnesses is committed to the discretion of the trial court by FRE Rule 608(b), 71 the court must determine whether the probative value of impeachment evidence is outweighed by the danger of confusion, prejudice, or waste of time under FRE Rule 403. 72 Thus, cross-examination of a witness may be limited where the Sixth Amendment interest in full confrontation is outweighed by the danger of harassing witnesses or unduly prejudicing the jury, and the trial court may limit or even prohibit a proffered line of inquiry that is minimally relevant. 73

In a criminal case, the general balancing test of FRE Rule 403 is not applicable to impeachment under FRE Rule 609(a)(2) by introduction of evidence of crimes involving dishonesty or false statement, 74 and the trial court has no discretion to prevent introduction for impeachment purposes of evidence of prior convictions for crimes involving dishonesty or false statement, subject only to the 10-year time limit embodied in FRE Rule 609(b). 75

With regard to civil cases, a 1990 amendment to Rule 609(a)(1) requires the application of Rule 403 before the criminal record of a civil defendant can be used against him or her for impeachment purposes. 76

◆ **Observation:** The FRE Rule 403 balancing test is considerably different from the FRE Rule 609(a) balancing test. Under Rule 609(a), the court looks to see if the probative value outweighs the prejudicial effect, while the FRE Rule 403 balancing test

requires that the probative value be substantially outweighed by the danger of unfair prejudice before the evidence is excluded. 77

§ 326 --In impeachment situations [SUPPLEMENT]

Practice Aids: Impeachment by conviction evidence: Judicial discretion and the politics of Rule 609, 15 Card LR 2295 (1994).

Case authorities:

Defendant did not attempt to explain away his prior burglary convictions or otherwise equivocate in self-serving manner; therefore, that part of government's cross-examination related only to defendant's credibility and any impeachment by evidence of convictions should have been conducted in accordance with rule. *United States v Rogers* (1994, CA1 NH) 41 F3d 25.

Evidence that government informant solicited sex for money from defendant when they first met, had been arrested for deviate sexual conduct, and had sex with man just prior to meeting defendant to exchange drugs was properly excluded to impeach informant. *United States v Gootee* (1994, CA7 Ind) 34 F3d 475.

District court did not abuse its discretion in preventing defense counsel from questioning witnesses about other armed robberies in which they were allegedly involved to impeach their credibility, since their credibility was already severely damaged by testimony district court did allow. *United States v Nelson* (1994, CA7 Ind) 39 F3d 705.

Convicted cocaine conspirator is denied new trial on basis of newly discovered evidence of alleged wrongdoing by one of prosecution's primary witnesses, even though such wrongdoing—taking money allocated to government informants, lying on search warrant applications, and stealing money found during police searches—was unquestionably serious and would have been of value for impeachment purposes, because FRE 608(b) would have precluded defense counsel from impeaching witness with extrinsic evidence supporting allegations against witness, who did not know of allegations at time he testified and who now has denied them all; and counsel would not have been able to change outcome of trial since he would have been unable to elicit any admissible material evidence impacting on witness's credibility. *United States v Veras* (1994, ND Ill) 860 F Supp 471.

In a prosecution of defendant for the murder of a four-month-old child, Alamance County DSS records relating to the one-year supervision and investigation of the child's mother following the child's death were not admissible to show the mother's guilt of the murder where the records showed that the mother was having difficulty in performing her parental duties but contained no evidence that the mother physically abused or acted violently toward her children. Further, any probative value of this evidence to impeach the mother's testimony that she had done nothing wrong to her other children was substantially outweighed by the danger of confusion and undue delay where defendant had been allowed to impeach the mother with evidence similar to the evidence in the DSS records and the evidence in the DSS records would have been merely cumulative. GS § 8C-1, Rule 403. *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

Footnotes

Footnote 71. *United States v Lustig* (CA9 Alaska) 555 F2d 737, 2 Fed Rules Evid Serv 300, 46 ALR Fed 714, cert den 434 US 926, 54 L Ed 2d 285, 98 S Ct 408 and cert den 434 US 1045, 54 L Ed 2d 795, 98 S Ct 889.

As to impeachment of witnesses, generally, see 81 Am Jur 2d, Witnesses §§ 862 et seq.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 ALR Fed 390.

Footnote 72. *Moore v Volkswagenwerk, A.G.* (DC Md) 575 F Supp 919, 15 Fed Rules Evid Serv 614; *United States v Lustig* (CA9 Alaska) 555 F2d 737, 2 Fed Rules Evid Serv 300, 46 ALR Fed 714, cert den 434 US 926, 54 L Ed 2d 285, 98 S Ct 408 and cert den 434 US 1045, 54 L Ed 2d 795, 98 S Ct 889; *United States v Atwell* (CA10 Okla) 766 F2d 416, 18 Fed Rules Evid Serv 1064, cert den 474 US 921, 88 L Ed 2d 259, 106 S Ct 251.

Footnote 73. *United States v Herzberg* (CA5 Tex) 558 F2d 1219, 2 Fed Rules Evid Serv 454, cert den 434 US 930, 54 L Ed 2d 290, 98 S Ct 417.

Footnote 74. *United States v Leyva* (CA9 Cal) 659 F2d 118, 9 Fed Rules Evid Serv 169, cert den 454 US 1156, 71 L Ed 2d 314, 102 S Ct 1030.

Annotation: Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime, 39 ALR Fed 570.

Footnote 75. *United States v Kuecker* (CA7 Wis) 740 F2d 496, 15 Fed Rules Evid Serv 2050.

Footnote 76. *Davis v Marion* (CA7) 1991 US App LEXIS 13544.

Footnote 77. *Donald v Wilson* (CA6 Ohio) 847 F2d 1191, 25 Fed Rules Evid Serv 1308 (disapproved by *Green v Bock Laundry Machine Co.*, 490 US 504, 104 L Ed 2d 557, 109 S Ct 1981, 27 Fed Rules Evid Serv 577) (the point of disapproval being on whether the FRE Rule 403 standard should prevail, the Supreme Court holding, as noted above, that FRE Rule 609 overrides FRE Rule 403).

Rule 403 has no application to use of convictions to impeach witness' testimony in either criminal or civil case where, as in Rule 609(a), Congress has taken pains to specify conditions for both admission and exclusion of a specific class of evidence; District Courts may not use Rule 403 to set that specification aside, and therefore, District Court did not err when it refused to exclude evidence of plaintiff's prior convictions for rape and kidnapping in suit alleging violation of civil rights of arrestee. *Hernandez v Cepeda*

§ 327 Assessing probative value of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The term "probative value" is not defined by Rule 403, but in weighing the probative value of an item of evidence against the specific considerations enumerated in the Rule, the courts have considered certain factors, including—

—whether the same facts could be proved by other evidence 78 (in a criminal case, the prosecutorial need for such evidence), 79 because, where ample evidence is available to establish a particular element of a case, the probative value of particular evidence is often greatly reduced, and the risk which accompanies admission of such evidence may not be justified. 80

—the length of time which separates the crime charged from other crimes of the accused offered in evidence for specific purposes, since remoteness in time depreciates the probative value of such other crimes evidence. 81

—the reliability of the evidence, such as evidence of a prior crime, which must be clear and convincing to overcome its inherent potential for prejudice. 82

—the length of the chain of inferences necessary to connect the evidence with the ultimate facts to be proved, 83 such that when the evidence indicates a closer relationship to the offense charged, the balance should be struck in favor of admissibility. 84

—the existence of a close parallel between the offense charged and the acts shown, 85 particularly where evidence of similar acts is used to prove willfulness or intent. 86

◆ Practice guide: It is usually preferable for the trial court to await the conclusion of the defendant's case before admitting inherently prejudicial evidence, since the prosecutor's need for the evidence is most apparent at that time, and the weighing of probative value can then be best accomplished. 87

◆ Observation: It has been suggested that the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. Because a piece of evidence is generally not offered solely for its immediate inference but rather as part of a sequence or chain of inferential steps, the probative value of evidence in general will depend upon two distinct factors, namely (1) its probative value with respect to an immediate fact, and (2) the logical distance between the immediate fact and the ultimate issues of the case. 88

§ 327 ----Assessing probative value of evidence [SUPPLEMENT]

Case authorities:

Taperecorded conversation in wire fraud conspiracy case involving "land flip" scheme, in which defendant discussed using falsified employment information for third person, was probative of defendant's knowledge concerning how to defraud a lender and properly admitted. *United States v Cassiere* (1993, CA1 Mass) 4 F3d 1006, summary op at (CA1 Mass) 22 M.L.W. 66, 14 R.I.L.W. 495.

Evidence that FBI agent gave information to member of Persico faction of Colombo organized crime family is ruled out under FRE 403, in murder conspiracy case against 7 members of Orena faction, where defendants allege evidence would support defense of entrapment and counter evidence of intent to murder by showing motive of self-defense, because there is no basis for defense of entrapment, and admission would require diversionary trial of issues of no critical or substantial probative value in case. *United States v Cutolo* (1994, ED NY) 868 F Supp 39.

Pretrial motion in limine to prohibit insurer from using evidence of 1986 and 1989 fires in case regarding dispute over coverage of 1990 fires is denied at this time with leave to renew at such time as precise use of evidence and any prejudice resulting therefrom is made clear, where insurer intends to show that previous fires were incendiary and were started in manner similar to start of 1990 fires, because several courts have found that such evidence is admissible under FRE 404(b) to show motive and intent, but probative/prejudicial balance under FRE 403 cannot be determined before trial commencement. *Wagschal v Sea Ins. Co.* (1994, SD NY) 861 F Supp 263.

District court abused its discretion in excluding evidence that sexual discrimination/harassment plaintiff's superior solicited and accepted loans from plaintiff in violation of federal regulations since it was probative to understanding why plaintiff's coworkers continued to see her privately with superior even after she and superior knew of rumors that they were having affair and why superior did not take steps to stop rumors. *Spain v Gallegos* (1994, CA3 Pa) 26 F3d 439, 65 BNA FEP Cas 141, 64 CCH EPD ¶ 43153, 29 FR Serv 3d 706.

Evidence of RICO defendant's affiliation with organized crime family, indicative of knowledge of structure of family enterprise, did not violate Rule 403; evidence was probative of existence of defendant's knowing participation in and association with RICO enterprise, both essential elements of RICO charges. *United States v DiSalvo* (1994, CA3 Pa) 34 F3d 1204, reh, en banc, den (1994, CA3 Pa) 1994 US App LEXIS 27599 and reh, en banc, den (1994, CA3 Pa) 1994 US App LEXIS 27600.

Evidence that coconspirators had sold defendant's mother cocaine at residence she shared with defendant, although it revealed defendant's mother's identity to jury, was more probative than prejudicial where coconspirators testified that they had been discussing legitimate business venture in defendant's residence and denied ever discussing cocaine deal, and also particularly probative in connection with other evidence that defendant's mother had introduced coconspirators to defendant. *United States v Johnson-Dix* (1995, CA7 Ill) 54 F3d 1295.

Indictment against debtor is not admissible in action by receiver of defunct investment

entities against defendants to whom debtor made monetary conveyances during pendency of fraudulent investment scheme, because indictment is conclusory, contains only hearsay, and is of no probative value. *Scholes v African Enter.* (1994, ND Ill) 854 F Supp 1315.

In prosecution arising out of defendants' conduct in diverting drugs purchased at institutional prices presumably for nursing home inpatients and reselling them to pharmaceutical wholesalers, evidence that—when one diverter asked codefendant why he had not received defendant's diversion business—codefendant testified that "number one person in Kansas City liked" his competitor was properly admitted; it had significant probative value in that it showed that quoted codefendant was no longer in charge of diversion operation and implied that defendant was, and was not unfairly prejudicial since there was no reason to believe jury would infer that reference was to Mafia. *United States v Costanzo* (1993, CA8 Mo) 4 F3d 658, reh den (CA8 Mo) 1993 US App LEXIS 26304.

Witness's testimony about defendant's accidentally shooting him and defendant's possession of handgun prior to his arrest was probative of crime charged, i.e., being felon in possession of firearm, because it tended to prove that defendant knowingly possessed handgun and provided context for defendant's arrest. *United States v Klein* (1994, CA8 Mo) 13 F3d 1182, reh, en banc, den (CA8 Mo) 1994 US App LEXIS 3674 and petition for certiorari filed (May 17, 1994).

District court did not abuse its discretion in admitting autopsy photographs of involuntary manslaughter victim since they were circumstantial evidence of pistol's firing position because trajectory of bullet was relevant to whether defendant acted negligently. *United States v Moore* (1994, CA8 SD) 38 F3d 977.

Evidence of plaintiff's intoxication, including blood-alcohol test taken at hospital where he was treated, is admissible under FRE 403 in automobile products liability case seeking recovery for injuries sustained in car fire started either by (1) design defect, or (2) plaintiff's passing out in parking place with car running and his foot on gas pedal, because probative value exceeds danger of unfair prejudice. *Hansen v General Motors Corp.* (1996, ED Mo) 915 F Supp 118, 43 Fed Rules Evid Serv 1046.

In suit involving alleged breach of agreement between typeface designers, report by principal of company that specialized in design of digital typefaces for computer formats, in which he stated opinion that typefaces he had been asked to work on for computer software firm were not legitimate, had been copied, and violated moral code of typographical trade association, was properly excluded under Rule 403 since court explained that author's opinion based on industry moral code and his own beliefs as to certain typefaces did not represent useable standard for opinion testimony which would assist jury, and, when author made his initial statement that typefaces were copies, he had not seen actual typefaces. *Monotype Corp. PLC v International Typeface Corp.* (1994, CA9 Wash) 43 F3d 443, 94 CDOS 9633, 94 Daily Journal DAR 17901, 41 Fed Rules Evid Serv 86.

Although defendant opened door to government's asking defense witness whether he'd heard that civil RICO action had been filed against defendant by asking witness to vouch for defendant's character, evidence was not probative, since witness's negative answer was entirely consistent with his original testimony that he had never known defendant to be in trouble before, and it was highly prejudicial since it suggested that RICO charges

represented separate incident in defendant's past when in fact they were based on same misconduct as instant criminal charges. *United States v Bush* (1995, CA9 Cal) 58 F3d 482, 95 CDOS 4924, 95 Daily Journal DAR 8482.

District judge did not abuse her discretion in ruling that evidence of insured's epileptic seizures and medications he took to control them had little probative value, bearing only on insured's loss of memory, was outweighed by potential of inappropriate appeal to jury's sympathy in action against insurer, particularly where jury had already learned of insured's earlier heart attack but been instructed to disregard that fact. *Thompson v State Farm Fire & Casualty Co.* (1994, CA10 Okla) 34 F3d 932.

Employer is not entitled to new trial of former employee's sex discrimination claim after verdict in favor of employee, where court admitted evidence of other employees who claimed to have been discriminated against or harassed by same supervisor within past few years, because (1) testimony was relevant and highly probative since it provided direct evidence of contemporaneous hostile environment regarding preferential treatment toward attractive women, (2) it concerned substantially similar behavior when compared with acts alleged by plaintiff, and (3) limiting instruction given minimized any prejudice testimony caused. *Webb v Hyman* (1994, DC Dist Col) 861 F Supp 1094.

Extrajudicial statements by three witnesses relating to shooting of homicide victim and identifying defendants as perpetrators were admissible as substantive evidence at defendants' trial for first-degree murder, after statements were repudiated by witnesses, where there were adequate guarantees that substance of those statements was of probative value: Witnesses were interviewed about events they said they had observed first hand; they provided full, descriptive answers, rather than responses of "Yes" or "No," to questions asked; questions were not unduly leading; detectives committed their questions and declarants' answer to paper as literally as possible, which gave little room for subjective interpretation of what was said; witnesses expressly acknowledged contents of written statements to be true and accurate, and then signed them; and witnesses were present at trial for cross-examination and thus available to explain, if they could, inconsistencies between their trial testimony and prior statements. Factual portion of inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when statement is based on declarant's own knowledge of facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at trial in which prior statement is introduced. *Nance v State* (1993) 331 Md 549, 629 A2d 633.

The trial court did not abuse its discretion in a sentencing hearing for first-degree murder by allowing the State to ask a psychiatrist questions on cross-examination which revealed rapes and assaults by defendant in Virginia and Tennessee. The witness testified that he had used the evidence of the Tennessee and Virginia crimes in forming his opinion as to defendant's condition, which made it relevant under G.S. § 8C-1, Rule 705. Whether evidence should be excluded under G.S. § 8C-1, Rule 403 as being more prejudicial than probative is within the discretion of the judge. *State v Reeves* (1994) 337 NC 700, 448 SE2d 802.

Although not introduced in defendant wife's murder prosecution, expert testimony regarding battered woman syndrome would be admissible as probative evidence of defendant's state of mind as it relates to theory of self-defense. *Commonwealth v Miller* (1993, Pa Super) 634 A2d 614.

In murder prosecution involving drive-by shooting, trial court properly excluded evidence that at least one and possibly two other drive-by shootings had occurred that same evening. As to one alleged other shooting, evidence consisted of nothing more than that witness had heard noise that sounded like gunshot, while as to other, only evidence was marks on tire that could have been made by shotgun; in view of weakness of evidence, any probative value in defendant's favor was outweighed by state's legitimate interest in presenting reliable evidence and promoting orderly and efficient trials. *State v Larson* (1994, SD) 512 NW2d 732.

In prosecution for sexual assault, trial court did not err in admitting tape of victim's call to 911 operator; tape had probative value in that it showed victim's hysterical state of mind, which was relevant in case, and such value outweighed tape's prejudicial effect. *Brooks v State* (1992, Tex App Fort Worth) 833 SW2d 302, petition for discretionary review ref (Sep 30, 1992).

In prosecution for offense of indecency with a child, trial court erred in admitting, for impeachment purposes, evidence of defendant's 15-year-old prior conviction for rape where, despite court order to do so, prosecution did not advise defendant as to its intent to use prior conviction until after defendant had already testified on direct, and probative value of former- conviction evidence did not outweigh its prejudicial effect. *Brown v State* (1994, Tex App El Paso) 880 SW2d 249.

Footnotes

Footnote 78. *Gross v Black & Decker (U.S.), Inc.* (CA5 Tex) 695 F2d 858, CCH Prod Liab Rep ¶ 9498, 12 Fed Rules Evid Serv 716.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 79. *United States v Spletzer* (CA5 Tex) 535 F2d 950, 2 Fed Rules Evid Serv 218.

Footnote 80. *United States v Check* (CA2 NY) 582 F2d 668, 3 Fed Rules Evid Serv 685 (disapproved on other grounds by *United States v Inadi*, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121, 19 Fed Rules Evid Serv 1009) as stated in *Reardon v Manson* (CA2 Conn) 806 F2d 39, cert den 481 US 1020, 95 L Ed 2d 509, 107 S Ct 1903 (death threat); *United States v Dolliole* (CA7 Ill) 597 F2d 102, 4 Fed Rules Evid Serv 1030, cert den 442 US 946, 61 L Ed 2d 318, 99 S Ct 2894.

Footnote 81. *United States v Beechum* (CA5 Tex) 582 F2d 898, 3 Fed Rules Evid Serv 1185, cert den 440 US 920, 59 L Ed 2d 472, 99 S Ct 1244; *United States v Krohn* (CA7 Ill) 560 F2d 293, 2 Fed Rules Evid Serv 166, cert den 434 US 895, 54 L Ed 2d 182, 98 S Ct 275.

Generally, as to effect of remoteness of evidence, see § 319.

Footnote 82. *United States v Dolliole* (CA7 Ill) 597 F2d 102, 4 Fed Rules Evid Serv

1030, cert den 442 US 946, 61 L Ed 2d 318, 99 S Ct 2894.

Footnote 83. *United States v Lyles* (CA2 NY) 593 F2d 182, 3 Fed Rules Evid Serv 928, cert den 440 US 972, 59 L Ed 2d 789, 99 S Ct 1537 and cert den 440 US 975, 59 L Ed 2d 794, 99 S Ct 1545 and cert den 444 US 847, 62 L Ed 2d 61, 100 S Ct 94.

Footnote 84. *United States v Day*, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 85. *United States v Beechum* (CA5 Tex) 582 F2d 898, 3 Fed Rules Evid Serv 1185, cert den 440 US 920, 59 L Ed 2d 472, 99 S Ct 1244.

Footnote 86. *United States v Leonard* (CA2 NY) 524 F2d 1076, 75-2 USTC ¶ 9695, 75-2 USTC ¶ 9852, 1 Fed Rules Evid Serv 82, 36 AFTR 2d 75-5679, 36 AFTR 2d 75-6358, cert den 425 US 958, 48 L Ed 2d 202, 96 S Ct 1737.

Footnote 87. *United States v Danzey* (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179.

Footnote 88. *Dolan*, Rule 403: The Prejudice Rule in Evidence, 49 Southern Cal L Rev 220, 233 (1976).

§ 328 Balancing probative value against particular dangers in admitting evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In weighing the delicate balance between the probative value of testimony and its capacity to engender vindictive passions within the jury or to confuse the issues, the court should seek to maximize its legitimate bearing upon the issues while minimizing its potentially abusive overtones. 89 The task of striking such a balance is clearly committed to the trial judge's discretion, 90 and the trial court was not required to make explicit finding of probative versus prejudicial value where its balancing process is apparent from the record as whole. 91 The balancing process involves a sensitive analysis of the need for the evidence as proof of a contested factual issue, of the prejudice which may eventuate from admission, and of the relevant public policies. 92 The balance between probativeness and prejudice will differ according to the purpose for which an item of evidence is to be admitted. 93

Since FRE Rule 403 requires that the probative value of the challenged evidence be substantially outweighed by the danger of prejudice, the rule favors admissibility of relevant evidence, 94 and tilts toward admission of evidence in close cases. 95 Thus, a slight danger that the admission of such evidence will cause unfair prejudice is to be ignored. 96

Since the discretion allowed by FRE Rule 403 must be applied evenhandedly between the parties, the court may not exclude the otherwise admissible opinion of a party's expert on

a critical issue, while allowing the opinion of his adversary's expert on the same issue. 97 However, there may be cases in which the prejudicial effect of evidence outweighs its probative value when it is sought to be introduced on direct examination, but where, once the defense introduces contradictory evidence, such as on cross-examination, the probative value of the evidence is enhanced such that it outweighs its prejudicial effect and may be admitted. 98

§ 328 ----Balancing probative value against particular dangers in admitting evidence [SUPPLEMENT]

Case authorities:

Evidence of loansharking operative's statement that he should "cut out" debtor's eyes was pertinent in depicting nature of loansharking organization which defendant had associated and, as mere threat, with no actual known victim, did not overwhelm jury. *United States v Weiner* (1993, CA1 Mass) 3 F3d 17, summary op at (CA1 Mass) 21 M.L.W. 3363, 14 R.I.L.W. 437 and digest op at (CA1 Mass) RICO Bus Disp Guide (CCH) ¶ 8374 and amd (Aug 26, 1993).

Comments and evidence of how plant manager treated older employees were probative of whether he harbored discriminatory attitude against older workers and made existence of improper motive for plaintiff's discharge more probable, and was not outweighed by its prejudicial impact; because discriminatory comments by executive connected with decisionmaking process will often be plaintiff's strongest circumstantial evidence of discrimination, they are highly relevant and trial court's decision to admit such evidence should ordinarily be upheld. *Abrams v Lightolier Inc.* (1995, CA3 NJ) 50 F3d 1204, 67 BNA FEP Cas 543, 41 Fed Rules Evid Serv 1046.

District court did not abuse its discretion in sex discrimination trial in excluding testimony by plaintiff's coworker that hotel supervisor had made suggestive remark upon seeing woman in tight dress and had refused coworker's offer to park cars with comment that she could not do so because she was woman; comments had little probative value as to whether supervisor had gender-based animus against plaintiff and whether this animus was determinative of actions taken, yet raised substantial danger of unfair prejudice. *Sheridan v E. I. duPont de Nemours & Co.* (1996, CA3 Del) 74 F3d 1439, 69 BNA FEP Cas 1705, 67 CCH EPD ¶ 43868, op withdrawn, vacated, reh, en banc, gr (1996, CA3) 70 BNA FEP Cas 98, 67 CCH EPD ¶ 43950.

Defendant charged with conspiracy to possess cocaine with intent to distribute was properly cross-examined about his silence between his arrest and Miranda warnings since it had probative value on defendant's claim at trial that he and his coconspirators were simply trying to get DEA reward money by turning in narcotics dealers; reasonable juror may have supposed that defendant would have explained, when confronted by police, if he was in fact trying to assist police in catching drug dealers. *United States v Musquiz* (1995, CA5 Tex) 45 F3d 927.

Tax court did not abuse its discretion in excluding taxpayers' polygraph tests under Rule 403; neither court nor Commissioner were aware that taxpayers voluntarily and unilaterally arranged for such tests after Commissioner refused to agree to them. *Conti v Commissioner* (1994, CA6) 39 F3d 658, 94-2 USTC ¶ 50582, 94 TNT 223-21, 1994 FED App 379P.

Probative value of photographs of storage room to which defendant had access and which contained 20 kilograms of cocaine on day of cocaine transaction for which defendant was convicted was not outweighed by its prejudicial effect; at minimum, it was relevant of defendant's knowledge and involvement in drug activity. *United States v Thompson* (1996, CA7 Ill) 76 F3d 166.

Introduction of DNA match testimony without evidence concerning statistical probability that another individual could provide matching DNA was not reversible error where court followed proper procedures in admitting evidence and excluded, at defense counsel's request, 1:2600 probability evidence on grounds that it was more prejudicial than probative. *United States v Martinez* (1993, CA8 Minn) 3 F3d 1191, 37 Fed Rules Evid Serv 863, op withdrawn, substituted op (CA8 Minn) 1993 US App LEXIS 31026, cert den (US) 62 USLW 3453.

Evidence that drug-trafficking defendant illegally entered country with woman with same last name as codefendant might make more probable some relationship with codefendant six months before conspiracy at issue and could not have been prejudicial since relationship was established by other evidence. *United States v Casares- Cardenas* (1994, CA8 Minn) 14 F3d 1283, reh, en banc, den (CA8) 1994 US App LEXIS 4543.

Cross-examination of narcotics defendant on his prior use of another name on his application for permanent residency status was proper since defendant's past use of another name was probative of his truthfulness; if person would lie about his name, jury may infer that he would lie about other matters. *United States v Ojeda* (1994, CA8 Iowa) 23 F3d 1473.

Evidence that third party may have set fire forming basis of arson charge against defendant was properly excluded as having slight probative value where it consisted of dismissed arson charge against third party and possible eyewitness to another fire allegedly set by third party. *United States v Flaherty* (1996, CA8 Minn) 76 F3d 967, 43 Fed Rules Evid Serv 1025 (criticized in *United States v Gomez* (1996, CA9 Cal) 1996 US App LEXIS 15768).

In trial on charge of being felon in possession of firearm, proof of more than one prior felony adds very little of probative value and amounts to unfair piling on; error was not harmless in instant case where evidence linking defendant to firearm was limited to rifle's presence behind seat of stolen car he was driving, no fingerprints or other indicia of ownership were introduced, so it was likely that jury's inference from circumstantial evidence was influenced by knowledge of defendant's prior criminal history. *United States v Breitreutz* (1993, CA9 Idaho) 8 F3d 688, 93 CDOS 8001, 93 Daily Journal DAR 13704.

Evidence of government informant's unauthorized drug sales and use was properly excluded since it was not probative of bias or self- interest; there was no evidence that government was aware of informant's use and sale of drugs while working for task force, or that it agreed to overlook them in exchange for his testimony. *United States v McCoy* (1994, CA9 Or) 23 F3d 216, 94 CDOS 2247, 94 Daily Journal DAR 4245.

Evidence that defendant's codefendants had been warned by third party that defendant had been previously involved in similar fraudulent scheme was properly admitted since codefendants raised lack of knowledge defense and evidence was directly probative of

issue, and any resultant prejudice was minimized by limiting instruction. *United States v Mende* (1995, CA9 Cal) 43 F3d 1298, 95 CDOS 55, 95 Daily Journal DAR 151.

In murder prosecution, trial court did not err in admitting tape recording of victims' child's emergency telephone call, reporting her parents' death, where court found that probative value of recording outweighed danger of unfair prejudice; tape went to prove integrity of crime scene with regard to whether child had disturbed bodies before police arrived. *Lynch v State* (1991, Del Sup) 588 A2d 1138.

Even if hearsay testimony was not used to prove the truth of the matter asserted, the inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish the logical sequence of events outweighed the probative value of such evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and although a police dispatch report indicating that an unidentified informant had called to report that a man with a rifle was chasing a female down the street was admitted to show why the officer had been dispatched to the scene, the State linked the report with other evidence to establish that accused had used a rifle to commit the offenses, because the contents of the statement were not relevant to establish a logical sequence of events, nor was the reason why officers arrived at the scene a material issue in the case. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

Even if evidence on collateral matters has some relevancy, the evidence is subject to exclusion if its probative value is substantially outweighed by the danger of confusing the issues, unfair prejudice, misleading the jury, or needless presentation of cumulative evidence. *Caruso v State* (1994, Fla) 645 So 2d 389, 19 FLW S 508.

In prosecution for "DUI, less safe driver," trial court did not err in limiting defendant's cross-examination of arresting officer regarding officer's alleged past misconduct, consisting of sexual misconduct and having struck pedestrian with his patrol car; court acted within its discretion in finding that officer's conduct was irrelevant in that it was unrelated to investigation of charges pending against defendant, and in determining that probative value of evidence was substantially outweighed by its potential prejudicial effect. *Chapman v State* (1994) 215 Ga App 340, 449 SE2d 903, 94 Fulton County D R 3948.

In murder prosecution, video of coroner's examination of victim's body at crime scene, showing coroner turning body over and examining injuries to victim's head, neck, and arms, was properly admitted in light of defendant's claims of accident and self-defense, to assist jury in assessing nature and extent of victim's injuries, and in ascertaining whether they were deliberate or result of accident; tape was relevant to illustrate testimony of both pathologist and coroner, and tape was not unduly gruesome, nor was its prejudicial impact excessive compared to its probative value. *Isaacs v State* (1995, Ind) 659 NE2d 1036, reh den (Apr 9, 1996).

Tape was properly admitted, even though it contained police officer's moans made prior to his death, where tape tended to disprove self-defense theory and showed that officer was talking on radio prior to being shot, and evidence was presented that procedure forbade talking on radio while holding weapon, supporting theory that officer drew gun after being shot; tape also was probative of intent to kill where it showed that defendant shot second time after hearing moans. In addition, defendant was not in police custody for Fifth and Sixth Amendment purposes when tape was made in conjunction with

questioning and search of home. *State v Chamberlain* (1991) 112 NM 723, 819 P2d 673.

The trial court did not abuse its discretion during the penalty phase of a first-degree murder trial by permitting the State, as a part of its proof of the aggravating circumstance that defendant had previously been convicted of three felonies involving violence against the person, to introduce extensive testimony by defendant's three prior victims describing the circumstances of defendant's prior violent felonies, especially since defendant was able to elicit testimony during cross-examination of the witnesses tending to temper the evidence of defendant's prior convictions. G.S. § 15A-2000(e)(3). *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

A witness's testimony which described acts of prostitution between the witness and defendant and her finding a metal pipe under defendant's pillow a month before the death of the victim, a known prostitute, was properly admitted in defendant's murder trial to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death where other evidence tended to show that the victim was killed by a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. Furthermore, the trial court did not err by finding that this testimony was more probative than prejudicial under the balancing test of Rule 403. N.C.G.S. § 8C-1, Rules 403 and 404(b). *State v Weathers* (1994) 339 NC 441, 451 SE2d 266.

The trial court did not err in a first-degree murder prosecution involving poisoning by allowing the State to introduce testimony from a registered nurse who had cared for the victim during his final illness concerning medical techniques and medical equipment used to treat the victim. Although defendant contended that the sole purpose of the testimony was to generate sympathy for the victim's family, the testimony was probative to show that defendant had access to the victim in the hospital, that a correlation existed between defendant's feeding the victim and the onset of his symptoms, that the victim manifested symptoms associated with multiple system failure incident to arsenic poisoning, that the victim could swallow food notwithstanding the tubes, that arsenic could have been introduced into the victim's body via the feeding tubes, and that the victim suffered inordinate pain over an extended period of time. The probative value of the testimony outweighed any unfair prejudice to defendant; furthermore, the record discloses that similar evidence from other witnesses was admitted without objection. *State v Moore* (1994) 335 NC 567, 440 SE2d 797.

The trial court did not err in a sentencing hearing for first-degree murder by submitting evidence of a prior attempted rape conviction, submitting the aggravating circumstance of a prior felony involving violence, or in its instructions where the State submitted evidence that defendant had been convicted by General Court Martial of attempted rape. Attempted rape is a felony under North Carolina law, as well as under military law, and, since the military courts have held all rapes to be crimes of violence under military law, and all attempts to commit rape therefore by definition involve the use or threat of force, there was no need to consider whether there is a non-violent crime of attempted rape under North Carolina law. The evidence presented concerning the prior felony was proper and sufficient to establish that the defendant had been convicted of a prior felony involving the use or threat of violence to the person and the court's instruction did not constitute an impermissible conclusive presumption as it permitted the jury to make the determination as to whether defendant had been convicted. G.S. § 15A-2000(e)(3). *State v Green* (1994) 336 NC 142, 443 SE2d 14.

The trial court did not err in a first- degree murder sentencing hearing by not excluding as more prejudicial than probative testimony from the victim's five-year- old daughter delivered from her stepmother's lap. Although defendant contended that the testimony concerned only background matters and was only cumulative while the manner in which it was introduced was highly inflammatory, the Supreme Court paid deference to the ruling of the trial judge and could not say that he committed error in the admission of otherwise relevant testimony because of the manner in which the testimony was presented. *State v Reeves* (1994) 337 NC 700, 448 SE2d 802.

The trial court did not err in a first- degree murder prosecution by excluding evidence tending to show that defendant played with younger children where defendant contended that the jury should be allowed to infer from this that he was immature. Defendant's association with younger children is an ambiguous indicator of his maturity level, his maturity level is not relevant to the case in the absence of evidence that he lacked the capacity to form the intent required for the crimes charged, and, assuming relevance, exclusion of the evidence was within the court's discretion under G.S. § 8C-1, Rule 403 because the evidence would have unnecessarily confused the issues in the case, given its slight probative value. *State v Huggins* (1994) 338 NC 494, 450 SE2d 479.

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b). *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

The jury's finding of the aggravating circumstance in a capital trial that defendant had previously been convicted of a felony involving the use or threatened use of violence to the person was supported by evidence that defendant had previously been convicted of common law robbery and two counts of assault with a deadly weapon inflicting serious injury. G.S. § 15A-2000(e)(3). *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first- degree burglary, and second- degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty a times in the past. The testimony had little probative value but did not have a tendency to prejudice defendant. *State v Beamer* (1994) 339 NC 477, 451 SE2d 190.

In fraud action, trial court did not abuse its discretion in refusing to admit tape recordings of conversations plaintiff had with several agents of defendant where, although tapes contained admissions against interest of defendant, probative value was outweighed by danger of unfair prejudice in form of cumulative, self-serving, and over- emphasized testimony. *James v State Farm Mut. Auto. Ins. Co.* (1991, Okla) 810 P2d 365.

Where statute did not mention use of evidence of DUI defendant's refusal to submit to test, such evidence would be admissible provided that, on request of either prosecution or defendant, trial court first held in camera hearing to determine whether probative value of such evidence outweighed its possible prejudicial effect, and if cautionary jury instruction were given, if requested. *State v Cozart* (1986) 177 W Va 400, 352 SE2d 152.

Footnotes

Footnote 89. *United States v Green* (CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 90. *United States v De Vincent* (CA1 Mass) 546 F2d 452, 1 Fed Rules Evid Serv 1237, cert den 431 US 903, 52 L Ed 2d 387, 97 S Ct 1694, post-conviction proceeding (DC Mass) 461 F Supp 1181, revd on other grounds (CA1 Mass) 602 F2d 1006, appeal after remand (CA1 Mass) 632 F2d 145, cert den 449 US 1038, 66 L Ed 2d 501, 101 S Ct 618; *United States v Brady* (CA6 Tenn) 595 F2d 359, 4 Fed Rules Evid Serv 492, cert den 444 US 862, 62 L Ed 2d 84, 100 S Ct 129; *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65; *United States v Derring* (CA8 Ark) 592 F2d 1003, 4 Fed Rules Evid Serv 160; *Cohn v Papke* (CA9 Cal) 655 F2d 191, 8 Fed Rules Evid Serv 1362; *United States v Watkins* (CA9 Or) 600 F2d 201, 79-2 USTC ¶ 9548, 44 AFTR 2d 79-5222, cert den 444 US 871, 62 L Ed 2d 96, 100 S Ct 148; *Fernandez v Curley* (Iowa) 463 NW2d 5; *Chapin v State*, 78 Wis 2d 346, 254 NW2d 286; *Banks v Crowner* (Wyo) 694 P2d 101.

In weighing the tendency of offered evidence to prove an issue in dispute against its tendency to produce passion and prejudice out of proportion to its probative value, the matter is largely within the sound discretion of the trial court. *State v Flett*, 234 Or 124, 380 P2d 634, 94 ALR2d 1082.

Practice References *Louisell & Mueller*, Federal Evidence § 125.

Footnote 91. *United States v Bradshaw*, 290 US App DC 129, 935 F2d 295, 33 Fed Rules Evid Serv 241, on remand (DC Dist Col) 1992 US Dist LEXIS 159.

Footnote 92. *John McShain, Inc. v Cessna Aircraft Co.* (CA3) 563 F2d 632, 2 Fed Rules Evid Serv 479.

Footnote 93. *United States v Anderson* (SD NY) 575 F Supp 31, 15 Fed Rules Evid Serv 324.

In prosecution for burning a cross outside a black family's home, evidence that the defendant had once asked to join a "skinhead" picnic and that he had blamed the instant

crime on "skinheads" outweighed the prejudicial effect of reference to "skinheads" since it tended to establish defendant's racial animus and that he might act on his beliefs. *United States v Skillman* (CA9 Cal) 922 F2d 1370, 91 CDOS 230, 91 Daily Journal DAR 161, 31 Fed Rules Evid Serv 1133, cert dismd (US) 116 L Ed 2d 275, 112 S Ct 353.

Footnote 94. *Gross v Black & Decker (U.S.), Inc.* (CA5 Tex) 695 F2d 858, CCH Prod Liab Rep ¶ 9498, 12 Fed Rules Evid Serv 716.

Footnote 95. *United States v Moore*, 235 US App DC 381, 732 F2d 983, 15 Fed Rules Evid Serv 1151.

Footnote 96. *Gross v Black & Decker (U.S.), Inc.* (CA5 Tex) 695 F2d 858, CCH Prod Liab Rep ¶ 9498, 12 Fed Rules Evid Serv 716.

Footnote 97. *United States v Sellers* (CA4 SC) 566 F2d 884, 2 Fed Rules Evid Serv 840 (District Court abused discretion in not permitting defendant's expert to testify that in his opinion certain photographs of bank robbery showed that defendant was not the bandit, while permitting government's expert to express opinion that it was impossible to determine from photographs whether defendant was the bandit).

Footnote 98. *United States v Johnson* (CA11 Fla) 730 F2d 683, 15 Fed Rules Evid Serv 1115, cert den 469 US 857, 83 L Ed 2d 119, 105 S Ct 186 and cert den 469 US 867, 83 L Ed 2d 142, 105 S Ct 211.

§ 329 Review of discretionary rulings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

On appeal from a ruling including or excluding evidence, on the ground that its probative value did or did not outweigh the danger of unfair prejudice, the sole issue is whether the District Court abused its discretion. 99 In reviewing a decision concerning the probative value and prejudicial attributes of particular evidence, the appellate court does not reweigh the value of the material against the potential harm to the defendant, but looks at the evidence in the light most favorable to its proponent, thus maximizing its probative value and minimizing its prejudicial effect. 1

An appellate court normally defers to the trial court's judgment, 2 unless the trial court has clearly abused its broad discretion, 3 as, for example, by admitting evidence which is so prejudicial as to outweigh its probative value. 4

◆ Observation: The assumption that the court acted within its discretion is so strong that it has been said that to overturn the judge's decision, appellant must show that the decision was "so unprincipled" as to amount to an abuse of discretion, 5 or that the judge acted "arbitrarily or irrationally." 6

The test for assessing whether the trial court abused discretion under Rule 403 by limiting cross-examination is substantially the same as the test for assessing whether the

trial court violated the confrontation clause by limiting cross-examination. 7

Where a judge carefully considers arguments of counsel, weighs the competing interests before admitting evidence which might be prejudicial, and delays its admission until virtually all other proof is introduced, the judge's decision generally must be upheld. 8

Footnotes

Footnote 99. *United States v Martinez* (CA2 NY) 775 F2d 31, 19 Fed Rules Evid Serv 640, habeas corpus proceeding (SD NY) 1989 US Dist LEXIS 13110; *Crawford v Edmonson* (CA7 Ill) 764 F2d 479, 18 Fed Rules Evid Serv 415, cert den 474 US 905, 88 L Ed 2d 234, 106 S Ct 273 (trial court's balancing of unfair prejudice and probative value is accorded "great deference"); *Lewis v District of Columbia*, 253 US App DC 290, 793 F2d 361, 20 Fed Rules Evid Serv 1101 (trial court's ruling will be overturned on appeal only upon clear showing that District Court abused its large discretion).

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 1. *United States v Semaan* (CA8 Minn) 594 F2d 1215, 4 Fed Rules Evid Serv 561, cert den 441 US 965, 60 L Ed 2d 1070, 99 S Ct 2413.

Forms: Allegation–Error of law–In refusing to allow introduction of relevant evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3623.

Footnote 2. *United States v Derring* (CA8 Ark) 592 F2d 1003, 4 Fed Rules Evid Serv 160.

Footnote 3. *United States v Dwyer* (CA2 NY) 539 F2d 924, 1 Fed Rules Evid Serv 294; *Block v R.H. Macy & Co.* (CA8 Mo) 712 F2d 1241, 32 BNA FEP Cas 609, 32 CCH EPD ¶ 33730, 13 Fed Rules Evid Serv 1453; *Miller v Poretsky*, 193 US App DC 395, 595 F2d 780; *English-Clark v Tucson* (App) 142 Ariz 522, 690 P2d 1235.

Footnote 4. *United States v Little* (CA8 Ark) 562 F2d 578.

Footnote 5. *United States v York* (CA7 Ill) 933 F2d 1343, 33 Fed Rules Evid Serv 426, cert den (US) 116 L Ed 2d 262, 112 S Ct 321, reh den (US) 116 L Ed 2d 668, 112 S Ct 651, later proceeding (ND Ill) 1992 US Dist LEXIS 2212.

Footnote 6. *United States v Coiro* (CA2 NY) 922 F2d 1008, 32 Fed Rules Evid Serv 296, cert den (US) 115 L Ed 2d 996, 111 S Ct 2826.

Footnote 7. *United States v Jenkins* (CA9 Or) 884 F2d 433, cert den 493 US 1005, 107 L Ed 2d 562, 110 S Ct 568 (in prosecution for preparation of false income tax returns, Court did not err in prohibiting use of words "duress" and "coercion" where defendant's lawyer was permitted to explore at length pressures felt by prosecution witness at time affidavit was signed, and jury had benefit of considerable information with which to appraise motivations in signing affidavit).

§ 330 --Need for express articulation of balancing process

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where an objection invokes FRE Rule 403, the trial court should articulate the factors considered in balancing the probative value of the evidence against the negative considerations stated in the Rule, so that the court's exercise of discretion may be fairly reviewed on appeal. 9 The trial judge should indicate explicitly the reasons for the ruling, acknowledging and weighing both the prejudice and the probative worth of the proffered evidence. 10 A mere statement that evidence would be confusing is not enough since factual controversy naturally breeds confusion. 11 But while the practice of entering a written finding that the act of balancing has been performed is encouraged, failure to enter such a finding should not mandate a reversal, 12 so long as it appears from the record that an adequate balancing occurred before admission of the evidence. 13

Where issues under the Rule have not been reached by the trial court, a case can be remanded to the District Court for such necessary determinations to be made, 14 or the reviewing court can undertake to examine the record itself. 15 Under certain circumstances, a failure to articulate the balancing process may be found to be an abuse of discretion, such as where the trial judge excludes evidence which is crucial to the defense and the judge's refusal to put the reasons for exclusion of the evidence on the record substantially impairs the appellate court's ability to ascertain the source of the "prejudice" to which the judge refers in his ruling and prevents the appellate court from ascertaining what prompted or could have prompted the trial court to act as it did. 16 But a trial court's failure to make findings on the record that the probative value of evidence did not substantially outweigh the potential prejudicial effect would not require reversal where defense counsel made no request for such on-the-record balancing, and where a review of the record indicated that the evidence was properly admissible. 17

Footnotes

Footnote 9. United States v Lebovitz (CA3 Pa) 669 F2d 894, 9 Fed Rules Evid Serv 1264, cert den 456 US 929, 72 L Ed 2d 446, 102 S Ct 1979, later proceeding (CA3 Pa) 716 F2d 893, cert den 464 US 992, 78 L Ed 2d 681, 104 S Ct 484, reh den 464 US 1064, 79 L Ed 2d 205, 104 S Ct 748, later proceeding (WD Pa) 586 F Supp 265, affd without op (CA3 Pa) 746 F2d 1468.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 10. *United States v Dwyer* (CA2 NY) 539 F2d 924, 1 Fed Rules Evid Serv 294; *John McShain, Inc. v Cessna Aircraft Co.* (CA3) 563 F2d 632, 2 Fed Rules Evid Serv 479; *United States v Robinson*, 174 US App DC 224, 530 F2d 1076, 2 Fed Rules Evid Serv 1092.

The District Court erred in admitting extrinsic offense evidence under Rule 404(b) where the court did not determine, on the record, that proffered evidence possessed probative value not substantially outweighed by danger of unfair prejudice, confusion of issues, and other requirements of Rule 403, particularly since it was clear that factors in evaluation were not readily apparent from the record and the court only found that the evidence in question would not inflame the jury's passions and that the jury was probably confused as to distinctions between the crimes under the indictment and those to which the testimony related. *United States v Zabaneh* (CA5 Tex) 837 F2d 1249, 24 Fed Rules Evid Serv 1075.

Footnote 11. *United States v Collorafi* (CA2 NY) 876 F2d 303, 90-1 USTC ¶ 50188, 64 AFTR 2d 89-5013.

Footnote 12. *United States v Dolliole* (CA7 Ill) 597 F2d 102, 4 Fed Rules Evid Serv 1030, cert den 442 US 946, 61 L Ed 2d 318, 99 S Ct 2894.

Footnote 13. *United States v Lebovitz* (CA3 Pa) 669 F2d 894, 9 Fed Rules Evid Serv 1264, cert den 456 US 929, 72 L Ed 2d 446, 102 S Ct 1979, later proceeding (CA3 Pa) 716 F2d 893, cert den 464 US 992, 78 L Ed 2d 681, 104 S Ct 484, reh den 464 US 1064, 79 L Ed 2d 205, 104 S Ct 748, later proceeding (WD Pa) 586 F Supp 265, affd without op (CA3 Pa) 746 F2d 1468; *United States v Sangrey* (CA9 Mont) 586 F2d 1312, 3 Fed Rules Evid Serv 1368.

Footnote 14. *Contemporary Mission, Inc. v Famous Music Corp.* (CA2 NY) 557 F2d 918, 2 Fed Rules Evid Serv 16.

Footnote 15. *United States v Lebovitz* (CA3 Pa) 669 F2d 894, 9 Fed Rules Evid Serv 1264, cert den 456 US 929, 72 L Ed 2d 446, 102 S Ct 1979, later proceeding (CA3 Pa) 716 F2d 893, cert den 464 US 992, 78 L Ed 2d 681, 104 S Ct 484, reh den 464 US 1064, 79 L Ed 2d 205, 104 S Ct 748, later proceeding (WD Pa) 586 F Supp 265, affd without op (CA3 Pa) 746 F2d 1468.

Footnote 16. *United States v Dwyer* (CA2 NY) 539 F2d 924, 1 Fed Rules Evid Serv 294.

Footnote 17. *United States v Acosta-Cazares* (CA6 Ky) 878 F2d 945, 28 Fed Rules Evid Serv 154, cert den 493 US 899, 107 L Ed 2d 204, 110 S Ct 255.

2. Unfair Prejudice [331-346]

a. Nature and Degree of Prejudice [331-334]

§ 331 Unfair character of prejudice

In the context of FRE Rule 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, 18 "unfair prejudice" is defined as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. 19 "Unfair prejudice" has also been defined as a tendency to influence the outcome of a trial by improper means. 20 The danger of unfair prejudice in the admission of evidence always exists where it is used for something other than its logical probative force, 21 that is, its tendency to make the existence of a material fact more or less probable. 22

◆ Comment: Absent counterbalancing probative value, evidence having a strong emotional or inflammatory impact may pose a risk of unfair prejudice because it tends to distract the jury from the issues in the case and permits the trier of fact to reward the good person and punish the bad person because of their respective characters, regardless of what the evidence in the case shows actually happened. 23 The effect in such a case might be to arouse the jury's passions to a point where they would act irrationally in reaching a verdict. 24

"Unfair prejudice" is not to be equated with testimony simply adverse to an opposing party; rather, the prejudice must be "unfair." 25 Relevant evidence is inherently prejudicial; 26 but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under FRE Rule 403. 27 In a criminal prosecution, there is no requirement that the government choose the least prejudicial method of proving its case. 28

Under pre-Rule law, it was stated that relevant evidence will not be excluded upon the ground that it would create unfair prejudice if permitted, 29 at least where such evidence is not merely circumstantial. 30 Nor is the admission of evidence otherwise competent affected by the gruesome and shocking character of the evidence. Even in a criminal case the admission of gruesome evidence does not deny the defendant a fair trial as guaranteed by law. 31 However, evidence which will only serve to prejudice the minds of the jury was held properly excluded. 32

In addition to the situation of a jury decision on an improper basis, unfair prejudice may result where evidence is discovered too late for the opposing party to have an adequate opportunity to investigate and evaluate it. 33

The testimony of a government witness concerning the defendant's attorney's activities is not unfairly prejudicial within the meaning of FRE Rule 403 by reason of the fact that admission of such testimony will require the defendant to call the attorney as a witness, thereby depriving the defendant of the attorney of his choice. 34

◆ Observation: It has been noted that the lack of a clear-cut definition of "prejudice" compels an attempt to infer a definition from cases in which prejudice has been found, by which at least three common themes of prejudice are discoverable: (1) evidence which seeks to affect irrationally the jurors' perception of a party, either favorably or

unfavorably, because of some intrinsic characteristic of the individual litigant, most commonly through evidence of past crimes or bad acts, bad habits, or a party's past good acts; (2) evidence damaging the position of a party because of the party's association with certain groups, as by showing that a party is insured or associated with an unpopular political group; and (3) evidence which will incite the jury's rage or desire for revenge against defendant, the most successful method being introduction of inflammatory pictures. 35

§ 331 ----Unfair character of prejudice [SUPPLEMENT]

Case authorities:

In context of bench trial, evidence should not be excluded under Rule 403 on ground that it is unfairly prejudicial since district court can hear relevant evidence, weigh its probative value, and reject any improper inferences; Rule was designed to keep evidence not germane to any issue outside purview of jury's consideration. *Schultz v Butcher* (1994, CA4 Va) 24 F3d 626, 39 Fed Rules Evid Serv 1165.

In negligence action by passenger of small passenger boat, evidence of operator's consumption of alcohol was improperly excluded as more prejudicial than probative in bench trial, and its exclusion was not harmless error since operator's consumption of alcohol was relevant to his perceptive abilities at the time of the accident and determination of comparative fault among plaintiff, operator, and larger passenger vessel whose wake smaller boat crossed, resulting in plaintiff's injury. *Schultz v Butcher* (1994, CA4 Va) 24 F3d 626, 39 Fed Rules Evid Serv 1165.

Any error in admitting government witness's testimony that defendant conducted her affairs like rat or snake and was low person capable of anything, even murder, was harmless in light of overwhelming evidence against defendant and fact that defense counsel tried to bring out witness's prejudices against defendant on cross-examination. *United States v Whittington* (1994, CA4 NC) 26 F3d 456.

Evidence that defendant charged with manufacture and possession of destructive device falsely told her friends and acquaintances that she suffered from and was undergoing treatment for cancer was unfairly prejudicial and should not have been admitted since its probative value was slight and it was not admissible to impeach defendant's credibility. *United States v Brooke* (1993, CA9 Ariz) 4 F3d 1480, 93 CDOS 6987, 93 Daily Journal DAR 11921, 37 Fed Rules Evid Serv 1019.

In prosecution of defendant for mail and wire fraud arising out of agreements to place her unborn child with victims for adoption, defendant should have been permitted to question one victim witness about her movie contract since it might have affected victim's testimony both because of pecuniary benefit to her of guilty verdict and because of nonpecuniary benefit of favorable portrayal in movie, and information regarding movie contract was only prejudicial in as much as it revealed potential reason for witness to distort truth relating to her experiences with defendant. *United States v Dees* (1994, CA9 Cal) 34 F3d 838, 94 CDOS 6695, 94 Daily Journal DAR 12353.

In prosecution for receiving stolen property, officers' testimony that they were working as undercover narcotics agents and their testimony regarding criminal activity of individual other than defendant, but which related to officer's investigation of defendant, did not

warrant mistrial, where trial court was in best position to determine if officers' testimony was prejudicial and comment relating to criminal activity of another was no more than background statement explaining why officer would have been talking to this individual during investigation and there was no indication that defendant was linked in any way with theft of any of vehicles purchased from other individual. *State v Fleischer* (1994, Mo App) 873 SW2d 310.

The trial court did not err in a noncapital murder prosecution by excluding under GS § 8C-1, Rule 403 the pretrial statements of a codefendant who had not yet been tried who invoked the Fifth Amendment when called by defendant where the probative value of the statements was slight and the trial court specifically found the statements to be untrustworthy. The admission of a statement that is so clearly false and that was made by a witness who is unavailable to testify or be cross-examined would have been misleading to the jury. *State v Brown* (1994) 335 NC 477, 439 SE2d 589.

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first- degree burglary, and second- degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty a times in the past. The testimony had little probative value but did not have a tendency to prejudice defendant. *State v Beamer* (1994) 339 NC 477, 451 SE2d 190.

Any error was harmless beyond a reasonable doubt in a first- degree murder sentencing hearing where the trial court sustained the State's objection to defendant's question to defendant's psychotherapist concerning the witness's opinion of defendant as a friend and defense counsel concluded his questioning of the witness without an offer of proof. Even assuming that the issue was properly preserved for review, the jury heard testimony from numerous witnesses, including defendant's sister and his minister, about his good character, his quest for self-improvement while incarcerated, and his leadership role within his family. The excluded testimony would have been merely cumulative. *State v Miller* (1995) 339 NC 663, 455 SE2d 137.

In a will contest action the admission of evidence concerning theocratic warfare and allegations that Jehovah's Witnesses would lie to protect their congregation was improperly permitted, where although questions regarding the witness's affiliation with the Jehovah's Witnesses and work he had performed for the church were permissible to show bias, the remainder of the questions amounted to an attack on the tenets of the Jehovah's Witnesses' beliefs, and this tactic went beyond the issue of bias, focused on credibility, and violated the principles of relevancy, unfair prejudice, religious freedom, tolerance, and personal privacy that underlie Evid R 610. *Redman v Watch Tower Bible & Tract Soc'y*, 69 OS3d 98, 630 NE2d 676, reh den 69 OS3d 1445, 632 NE2d 913.

Evidence is unduly prejudicial when it threatens fundamental goals of accuracy and fairness of trial by misleading jury or by influencing jury to decide case on improper basis, and unfairness attaches if evidence tends to influence outcome by improper means, or it appeals to jury's sympathies, arouses its sense of horror, promotes its desire to punish, or otherwise causes jury to base its decision on extraneous considerations. *State v Patricia A. M.* (1993, App) 176 Wis 2d 542, 500 NW2d 289.

Question of whether otherwise admissible evidence is nevertheless unfairly prejudicial

rests with discretion of circuit court. *Johnson by Adler v Kokemoor* (1996) 199 Wis 2d 615, 545 NW2d 495.

In prosecution for sexual abuse of child, testimony of sheriff and sheriff's wife regarding victim's allegations against defendant, which victim made after improper influence arose, should not have been admitted as substantive evidence; however, defendant failed to timely object, and testimony was not equivocal violation of clear rule of law, and did not result in substantial prejudice to defendant. *Frenzel v State* (1993, Wyo) 849 P2d 741.

Drug dealer's motions to exclude evidence of his gang affiliation and of police officers' commendations, awards, and honors are granted, where dealer sues officers under § 1983 alleging police brutality, because prejudicial effect of evidence of gang affiliation substantially outweighs any probative value, and court finds no merit in officers' claim that evidence of their awards would be relevant to rebutting evidence of their prior acts of misconduct since such evidence would more likely serve improper function of showing their character for purpose of proving action in conformity therewith on night in question. *Charles v Cotter* (1994, ND Ill) 867 F Supp 648.

Footnotes

Footnote 18. § 324.

Footnote 19. *Gross v Black & Decker (U.S.), Inc.* (CA5 Tex) 695 F2d 858, CCH Prod Liab Rep ¶ 9498, 12 Fed Rules Evid Serv 716; *Crawford v Edmonson* (CA7 Ill) 764 F2d 479, 18 Fed Rules Evid Serv 415, cert den 474 US 905, 88 L Ed 2d 234, 106 S Ct 273; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300; *Cohn v Papke* (CA9 Cal) 655 F2d 191, 8 Fed Rules Evid Serv 1362.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 ALR Fed 390.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 20. *Christensen v Economy Fire & Casualty Co.*, 77 Wis 2d 50, 252 NW2d 81.

Footnote 21. *Empire Gas Corp. v American Bakeries Co.* (ND Ill) 646 F Supp 269, later proceeding (ND Ill) 1987 US Dist LEXIS 1324.

Footnote 22. *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300.

Footnote 23. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Footnote 24. *United States v Robinson* (CA2 NY) 560 F2d 507, 1 Fed Rules Evid Serv 752, cert den 435 US 905, 55 L Ed 2d 496, 98 S Ct 1451.

Footnote 25. *United States v Ingraham* (CA1 Me) 832 F2d 229, 24 Fed Rules Evid Serv 259, cert den 486 US 1009, 100 L Ed 2d 202, 108 S Ct 1738; *Pine Crest Preparatory School, Inc. v Phelan* (CA4 SC) 557 F2d 407, 2 Fed Rules Evid Serv 96; *Gross v Black & Decker (U.S.), Inc.* (CA5 Tex) 695 F2d 858, CCH Prod Liab Rep ¶ 9498, 12 Fed Rules Evid Serv 716; *Dollar v Long Mfg., N. C., Inc.* (CA5 Ga) 561 F2d 613, 2 Fed Rules Evid Serv 760, 24 FR Serv 2d 408, reh den (CA5 Ga) 565 F2d 163 and reh den (CA5 Ga) 565 F2d 163 and cert den 435 US 996, 56 L Ed 2d 85, 98 S Ct 1648; *Koloda v General Motors Parts Div., General Motors Corp.* (CA6 Ohio) 716 F2d 373, CCH Prod Liab Rep ¶ 9804, 13 Fed Rules Evid Serv 1567; *Crawford v Edmonson* (CA7 Ill) 764 F2d 479, 18 Fed Rules Evid Serv 415, cert den 474 US 905, 88 L Ed 2d 234, 106 S Ct 273; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300; *Cohn v Papke* (CA9 Cal) 655 F2d 191, 8 Fed Rules Evid Serv 1362; *Borden, Inc. v Florida E. C. R. Co.* (CA11 Fla) 772 F2d 750, 19 Fed Rules Evid Serv 33, 3 FR Serv 3d 1360.

Footnote 26. *United States v McNeese* (CA7 Wis) 901 F2d 585, 30 Fed Rules Evid Serv 383.

Fact that evidence was detrimental or damaging, and therefore prejudicial does not necessarily make it "unfairly prejudicial." *United States v Russell* (CA1 Mass) 919 F2d 795.

Footnote 27. *United States v McRae* (CA5 Tex) 593 F2d 700, 4 Fed Rules Evid Serv 503, reh den (CA5 Tex) 597 F2d 283 and cert den 444 US 862, 62 L Ed 2d 83, 100 S Ct 128.

Rules of Evidence do not preclude admission of evidence where its relevance is not substantially outweighed by danger of unfair prejudice. *State v Kalani*, 3 Hawaii App 334, 649 P2d 1188.

Footnote 28. *United States v Dixon* (CA11 Fla) 698 F2d 445, 83-1 USTC ¶ 9213, 12 Fed Rules Evid Serv 610, 51 AFTR 2d 83-995.

Footnote 29. *United States v Vandersee* (CA3 NJ) 279 F2d 176, cert den 364 US 943, 5 L Ed 2d 374, 81 S Ct 463.

Footnote 30. *Bunten v Davis*, 82 NH 304, 133 A 16, 45 ALR 1409; *State v Whitener*, 228 SC 244, 89 SE2d 701, cert den 350 US 861, 100 L Ed 764, 76 S Ct 101.

Footnote 31. *State v King*, 111 Kan 140, 206 P 883, 22 ALR 1006.

◆ Observation: "Gruesome" evidence frequently takes the form of photographs. As to the excludability of demonstrative evidence as prejudicial, see § 335.

Footnote 32. McKay v State, 90 Neb 63, 132 NW 741, mod 91 Neb 281, 135 NW 1024; Deitz v Providence Washington Ins. Co., 33 W Va 526, 11 SE 50.

Footnote 33. Saturn Mfg., Inc. v Williams Patent Crusher & Pulverizer Co. (CA8 Mo) 713 F2d 1347, 219 USPQ 533, 13 Fed Rules Evid Serv 1892, later proceeding (ED Mo) 598 F Supp 760, affd (CA FC) 767 F2d 882, 226 USPQ 515 (movie of device which allegedly infringed plaintiff's patent excluded when movie was first discovered during second week of trial).

Footnote 34. United States v Castellano (SD NY) 610 F Supp 1359, later proceeding (SD NY) 632 F Supp 1019, affd in part and revd in part on other grounds (CA2 NY) 811 F2d 47, 22 Fed Rules Evid Serv 586, cert den 482 US 929, 96 L Ed 2d 701, 107 S Ct 3214 and cert den 483 US 1007, 97 L Ed 2d 739, 107 S Ct 3233, later proceeding (CA2 NY) 847 F2d 42.

Footnote 35. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 So Cal L Rev 220, 238-239 (1976).

§ 332 --Unfairness to prosecution

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Most courts take the position that under FRE Rule 403 evidence offered by a criminal defendant that is otherwise relevant may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice to the prosecution. 36 Thus, in a prosecution for conspiring to violate the civil rights of another, the trial court properly granted the prosecution's motion in limine barring defense counsel from mentioning, or soliciting information during direct or cross-examination of any witness concerning defendant's acquittal in a previous trial. 37 On the other hand, some courts take the position that the danger of unfair prejudice referred to in FRE Rule 403 is danger of prejudice to a criminal defendant and not to the prosecution. 38

Footnotes

Footnote 36. United States v Fosher (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552; United States v Wilson (CA2 NY) 750 F2d 7, 16 Fed Rules Evid Serv 1114, cert den 479 US 839, 93 L Ed 2d 85, 107 S Ct 143; United States v Stanfa (CA3 Pa) 685 F2d 85, 11 Fed Rules Evid Serv 87; United States v Sellers (CA4 SC) 566 F2d 884, 2 Fed Rules Evid Serv 840; United States v Burton (CA5 Tex) 737 F2d 439, 84-2 USTC ¶ 9689, 15 Fed Rules Evid Serv 1925, 54 AFTR 2d 84-5770; United States v Cole (CA5 Ga) 670 F2d 35, 10 Fed Rules Evid Serv 46; United States v Johnson (CA5 La) 558 F2d 744, 77-2 USTC ¶ 9622, 2 Fed Rules Evid Serv 447, 40 AFTR 2d 77-5701, reh den (CA5 La) 562 F2d 1258 and cert den 434 US 1065, 55 L Ed 2d 766, 98 S Ct 1241; United States v Harris (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558; United States v Bear Ribs (CA8 SD) 722 F2d 420, 14 Fed Rules Evid Serv 1113,

76 ALR Fed 691; United States v Silverman (CA11 Fla) 745 F2d 1386, 16 Fed Rules Evid Serv 1316.

Footnote 37. United States v Irvin (CA11 Ga) 787 F2d 1506, 20 Fed Rules Evid Serv 749.

Footnote 38. Government of Virgin Islands v Carino (CA3 VI) 631 F2d 226, 6 Fed Rules Evid Serv 967; United States v Smith (CA6 Ohio) 736 F2d 1103, 15 Fed Rules Evid Serv 1398, cert den 469 US 868, 83 L Ed 2d 143, 105 S Ct 213 (District Court erred in refusing to allow expert testimony for the defense about reliability of eyewitness identifications).

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

§ 333 Prejudice as outweighing probative value

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A finding of slight probative value is insufficient to warrant exclusion of evidence, in and of itself; prejudice from its admission must substantially outweigh that value. 39 However, evidence having little or no probative value on any issue is easily outweighed by any prejudicial effect inherent in it. 40

In reaching a decision whether to exclude evidence on grounds of unfair prejudice, the court should give consideration to the probable effectiveness or lack of effectiveness of a limiting instruction, 41 and the availability of other means of proof 42 or other evidence on the same issues already in the case. 43

§ 333 ----Prejudice as outweighing probative value [SUPPLEMENT]

Case authorities:

Defendants charged with drug and firearms offenses were not unduly prejudiced by trial court's admission of folder consisting of defendant's booking photographs alongside photographs of guns and cocaine discovered near them; photos were relevant since they showed condition of evidence when it was discovered, and, although array might have prematurely connected defendants with contraband, jury was informed of how array was compiled and thus could not have concluded that defendants possessed contraband simply because their photographs were stapled alongside those of contraband, and government eventually presented overwhelming evidence connecting defendants to guns and cocaine depicted in array. United States v Lewis (1994, CA1 Mass) 40 F3d 1325.

Defense counsel's eliciting from witness reference to inmate's prior confinement in institution for mentally ill, in violation of trial court's ruling not to refer to civil rights plaintiff's psychiatric history, constituted reversible error; it risked undermining plaintiff's credibility in close case dependent on parties' conflicting testimony, and curative instruction was insufficient remedy given prejudicial factors and fact that retrial would not take long. *Davidson v Smith* (1993, CA2 NY) 9 F3d 4.

Admission of evidence of fight between defendant's gang and rival gang was not abuse of discretion; it was neither cumulative nor prejudicial since existence of gang had not yet been firmly established by prior evidence and was one of only two intercepted conversations in which one defendant took part, thus useful in connecting him to gang. *United States v Wong* (1994, CA2 NY) 40 F3d 1347.

Cocaine distribution conspirator was properly precluded from cross-examining testifying coconspirator about his sexual life since it was not probative of his character for truthfulness but exactly type of cross-examination strategy that impairs search for truth and harasses, annoys or humiliates the witness. *United States v McMillon* (1994, CA4 Va) 14 F3d 948, 38 Fed Rules Evid Serv 1334.

Although allowing defendant's probation officer to testify was not per se violation of Rule, allowing him to state his occupation was unduly prejudicial, but harmless in light of overwhelming evidence of defendant's guilt. *United States v Pace* (1993, CA5 Tex) 10 F3d 1106.

Defendant was properly precluded from cross-examining police officer about statements defendant made upon his arrest since statements about codefendant having additional drugs at residence were inadmissible hearsay as against codefendant in joint trial, and danger of unfair prejudice outweighed probative value. *United States v Winston* (1994, CA6 Tenn) 37 F3d 235, 1994 FED App 346p.

District court did not abuse its discretion in excluding as more prejudicial than probative evidence that medical malpractice defendant had failed board examinations. *McGeshick v Choucair* (1993, CA7 Wis) 9 F3d 1229.

Although evidence that defendant's medical license had been suspended 8 years earlier for overprescribing percodan was arguably relevant to whether defendant provided negligent treatment by failing to properly diagnose and hospitalize plaintiff's decedent two days before his death, danger of unfair prejudice outweighed it; license suspension was remote and did not arise out of same or similar circumstances as incident at issue. *King v Ahrens* (1994, CA8 Ark) 16 F3d 265, 43 Soc Sec Rep Serv 602, 38 Fed Rules Evid Serv 1356, reh den (CA8) 1994 US App LEXIS 4239.

Admission of robbery victim's testimony was not more prejudicial than probative since not many questions were asked of victim, questions asked and answers elicited were not communicated in manner likely to appeal to jurors' emotions, and testimony was offered to prove factual issues that were in dispute and to present jury with complete picture of events that constituted crime charged. *United States v Washington* (1994, CA8 Mo) 17 F3d 230, reh, en banc, den (CA8 Mo) 1994 US App LEXIS 8076 and petition for certiorari filed (Jun 14, 1994).

Trial court did not err in excluding evidence of sale price offered by potential purchaser of shopping mall prior to discovery of asbestos and price for which mall sold after

asbestos was removed since it was not probative of loss suffered by owners because it did not show value of property before it was diminished by presence of asbestos nor cost of repair or removal, and evidence was potentially very prejudicial since jury could have understood it to show that, despite any loss occasioned by removal and replacement of asbestos, mall was very lucrative. *Perlmutter v United States Gypsum Co.* (1993, CA10 Colo) 4 F3d 864, CCH Prod Liab Rep ¶ 13669.

In manslaughter prosecution, tape recording of defendant's call to his former wife for emergency help was properly admitted where, although some language in tape was inflammatory, it was not so prejudicial as to outweigh probative value; tape was relevant to prove defendant's intent and supported defense theories of provocation and accident. *Blackmon v State* (1990, Ala App) 574 So 2d 1037, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 2103.

Even if hearsay testimony was not used to prove the truth of the matter asserted, the inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish the logical sequence of events outweighed the probative value of such evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and although a police dispatch report indicating that an unidentified informant had called to report that a man with a rifle was chasing a female down the street was admitted to show why the officer had been dispatched to the scene, the State linked the report with other evidence to establish that accused had used a rifle to commit the offenses, because the contents of the statement were not relevant to establish a logical sequence of events, nor was the reason why officers arrived at the scene a material issue in the case. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

In drug prosecution, authenticated tape recording was properly admitted, even though tape contained minimal profanity, where profanity was not so prejudicial as to outweigh probative value. *McCollum v State* (1991, Ind) 582 NE2d 804, reh den (May 6, 1992).

Sounds recorded before, during, and after murder of daughter were properly admitted in prosecution against mother where her words betrayed both her state of mind during murder and her participation in it, and allowed jury to infer criminal intent; tape was highly probative and only potential prejudice was that it let jury hear truth firsthand. *State v Isa* (1993, Mo) 850 SW2d 876.

In prosecution for numerous counts of sexual abuse of young males, admission of evidence of acts of sexual abuse that were not subject of trial and that involved other alleged victims required reversal, where other-acts evidence was not so interrelated to charged crime that proof of one tended to establish other, and probative value of evidence was far outweighed by its prejudicial effect. *State v Conley* (1994, Mo) 873 SW2d 233.

In a prosecution of defendant inmates for the murder of a fellow inmate wherein defendants contended that another inmate killed the victim because he was afraid the victim would kill him, and the other inmate testified to this effect, evidence that the victim had twice been convicted of murder was not admissible under Rule 404(a)(2) as a pertinent character trait of the victim since neither defendant relied on self-defense or any other justifiable homicide which would have made the victim's character pertinent; and evidence that the victim had been convicted of two murders, in support of defendants' theory that another inmate killed the victim, would be more prejudicial than probative after the other inmate testified that he committed the murder but did not contend that he

killed in self-defense. *State v Leazer* (1994) 337 NC 454, 446 SE2d 54.

Testimony by two defense witnesses, a police officer and a poolroom owner, was properly excluded from a murder trial on the ground that the probative value thereof was substantially outweighed by the danger of unfair prejudice where the testimony would have shown that the officer was called to investigate shots fired outside a poolroom, the murder victim attempted to hide behind a truck, a .380 semiautomatic weapon was found behind the truck, and the poolroom owner told the officer he did not want the victim on his premises, since the testimony did not show that the victim did the shooting or that anyone other than defendant had a motive to kill him, and the testimony was prejudicial to the State. G.S. § 8C-1, Rule 403. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

The trial court erred in an automobile accident case by denying plaintiffs' motion in limine and in allowing defendants to introduce evidence of mini bottles of white lightning found at the scene where the officer who found the bottles in one driver's purse testified that he had no reason to believe that alcohol consumption contributed to the accident and the driver testified that she did not remember the accident or putting the bottles in her purse. Although defendants assert that the evidence was offered to impeach the driver in that her memory was "somewhat selective," the testimony concerning the bottles was elicited on at least ten occasions. The possible prejudicial effect of the evidence exceeded any probative value that the evidence may have had. G.S. § 8C-1, Rule 402; G.S. § 8C-1, Rule 403. *Browning v Carolina Power & Light Co.* (1994) 114 NC App 229, 441 SE2d 607.

Trial court in murder prosecution abused its discretion in admitting photographs of victim, who was burned, showing charred, cracked figure with areas of red, subcutaneous yellow, and bone, and showing absence of some limbs, heavy charring around stumps, and barely recognizable skull, where photographs were not necessary to prosecution of case, since medical examiner did not rely on them in presetting his testimony, cause of death was not incineration, but was asphyxiation, and photographs were so hideous and repulsive that they provoked immediate, prejudicially emotional response. *Livingston v State* (1995, Okla Crim) 907 P2d 1088.

In prosecution for murder, burglary, and rape, trial court did not abuse its discretion in admitting, under residual hearsay rule, evidence of statements made by murder victim; some such statements had been made to police officers in their official capacity, which fact supported their veracity. Statements made to friends were reliable due to personal nature of subject matter of statements and to corroboratory physical evidence. All such statements were relevant to issues of defendant's motive and/or identity and, although some statements were prejudicial, they were not unfairly so for limited purpose for which they were received. *State v Davi* (1993, SD) 504 NW2d 844.

Under statute, trial court is given broad discretion to exclude evidence where its probative value is substantially outweighed by danger of unfair prejudice and other factors (Stats § 904.03). *Ollhoff v Peck* (1993, App) 177 Wis 2d 719, 503 NW2d 323, review den (Wis) 508 NW2d 423.

Footnotes

Footnote 39. *United States v Robinson* (CA2 NY) 544 F2d 611, on reh (CA2 NY) 560

F2d 507, 1 Fed Rules Evid Serv 752, cert den 435 US 905, 55 L Ed 2d 496, 98 S Ct 1451; United States v Smith (CA6 Ohio) 736 F2d 1103, 15 Fed Rules Evid Serv 1398, cert den 469 US 868, 83 L Ed 2d 143, 105 S Ct 213.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Footnote 40. United States v Bell (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44 ALR Fed 617.

Footnote 41. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Forms: Instruction—Jury not to be influenced by sympathy, passion, or prejudice. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:926.

Footnote 42. United States v Cook (CA5 Tex) 557 F2d 1149, 1 Fed Rules Evid Serv 1056, cert den 434 US 1020, 54 L Ed 2d 767, 98 S Ct 744 and appeal after remand (CA5 Tex) 592 F2d 877, 4 Fed Rules Evid Serv 553, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 403.

Footnote 43. United States v Toner (CA2 NY) 728 F2d 115, 15 Fed Rules Evid Serv 66; United States v MacDonald (CA4 NC) 688 F2d 224, 11 Fed Rules Evid Serv 474, cert den 459 US 1103, 74 L Ed 2d 951, 103 S Ct 726, habeas corpus proceeding (ED NC) 640 F Supp 286, later proceeding (ED NC) 607 F Supp 1183 and affd (CA4 NC) 779 F2d 962, 19 Fed Rules Evid Serv 1151, cert den 479 US 813, 93 L Ed 2d 22, 107 S Ct 63, habeas corpus den (ED NC) 778 F Supp 1342, affd (CA4 NC) 966 F2d 854, cert den (US) 121 L Ed 2d 542, 113 S Ct 606; United States v Milstead (CA5 La) 671 F2d 950, 10 Fed Rules Evid Serv 167; United States v Garza (CA7 Ill) 664 F2d 135, cert den 455 US 993, 71 L Ed 2d 854, 102 S Ct 1620; United States v Steffen (CA8 Mo) 641 F2d 591, cert den 452 US 943, 69 L Ed 2d 959, 101 S Ct 3091.

§ 334 Effect of stipulation

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An offer to stipulate to certain evidence is a factor to be considered in carrying out the FRE Rule 403 balancing test, 44 since an important consideration relating to probative value is the prosecutorial need for such evidence, 45 and a trial court should seriously consider offers to stipulate in deciding whether to exclude or admit

evidence under FRE Rule 403. 46 However, a piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. 47 Where a stipulation may lessen the government's need for extensive evidence on the issue in question but the jury would still be unable to understand the government's theory of the case without the evidence, the decision to admit the evidence is not improper. 48

Determining the weight to be given an offer to stipulate in the balancing process is committed to the sound discretion of the trial court, tempered by the particular facts presented. 49 The court has the power to require the government to accept a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety. 50

◆ Observation: Under FRE Rule 403, when read in light of FRE Rule 102, a court may condition exclusion of unduly prejudicial evidence on a stipulation by the defendant as to aspects of the evidence which are relevant but less prejudicial in nature. 51 While eliminating references to the prejudicial material and removing the risk of inciting the jury, a stipulation can afford the jury a concrete basis for an inference of guilt and any remaining ambiguity may be intelligently evaluated by the jury in light of other evidence. 52

◆ Practice guide: Counsel should not rely upon a stipulation or an offer to stipulate as a sure-fire device to prevent reception of evidence. 53 However, in seeking to preclude the admission of evidence on the ground that there is already a stipulation or an offer to stipulate with respect thereto, counsel should point out the generous attitude of the court in considering offers to stipulate in deciding whether to admit or reject evidence under FRE Rule 403. 54

§ 334 ----Effect of stipulation [SUPPLEMENT]

Case authorities:

In a prosecution for 2 murders in which evidence of the pregnancy of one murder victim was admitted both because the police used the presence of fetal remains in the pelvic area of the victim's skeleton to identify the victim and in order to establish that the victim, as well as the other victim and the victim of a later rape, were all tall, heavy black women, the court would reject the contention that the evidence was not relevant as the defendant admitted to the killing and because the defense stipulated to the identity of the victim since the Commonwealth never agreed to stipulate to the identity of the victim and was not required to do so. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

Footnotes

Footnote 44. *United States v Grassi* (CA5 Fla) 602 F2d 1192, 4 Fed Rules Evid Serv 992, reh den (CA5 Fla) 606 F2d 321 and vacated on other grounds 448 US 902, 65 L Ed 2d 1131, 100 S Ct 3041, on remand (CA5 Fla) 626 F2d 444, cert den 450 US 956, 67 L Ed 2d 381, 101 S Ct 1415; *United States v O'Shea* (CA11 Ga) 724 F2d 1514, 14 Fed Rules Evid Serv 1548.

As to stipulating to prior convictions or the like, see § 420.

Footnote 45. *United States v Spletzer* (CA5 Tex) 535 F2d 950, 2 Fed Rules Evid Serv 218; *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422, later proceeding on other grounds (DC ND) 553 F Supp 886, post-conviction proceeding on other grounds (DC ND) 553 F Supp 890, affd in part and remanded in part on other grounds (CA8 ND) 731 F2d 550, on remand (DC ND) 609 F Supp 1143, affd (CA8 ND) 800 F2d 772, 21 Fed Rules Evid Serv 1017, cert den 484 US 822, 98 L Ed 2d 46, 108 S Ct 84, post-conviction proceeding, motion gr (DC Kan) 1991 US Dist LEXIS 2644, affd (CA8 SD) 997 F2d 461, reh, en banc, den (CA8) 1993 US App LEXIS 20526.

Footnote 46. *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422, later proceeding on other grounds (DC ND) 553 F Supp 886, post-conviction proceeding on other grounds (DC ND) 553 F Supp 890, affd in part and remanded in part on other grounds (CA8 ND) 731 F2d 550, on remand (DC ND) 609 F Supp 1143, affd (CA8 ND) 800 F2d 772, 21 Fed Rules Evid Serv 1017, cert den 484 US 822, 98 L Ed 2d 46, 108 S Ct 84, post-conviction proceeding, motion gr (DC Kan) 1991 US Dist LEXIS 2644, affd (CA8 SD) 997 F2d 461, reh, en banc, den (CA8) 1993 US App LEXIS 20526.

Footnote 47. *United States v Davis* (CA5 Miss) 792 F2d 1299, 20 Fed Rules Evid Serv 762, cert den 479 US 964, 93 L Ed 2d 409, 107 S Ct 464 (District Court did not abuse discretion in prosecution for possessing firearms in interstate commerce after having been convicted of felony, by admitting evidence about previous seizure of two of defendant's firearms by police department and that defendant paid to obtain release of firearms, despite defendant's offer to stipulate to interstate commerce element, especially since evidence was relevant to other issues as well).

Footnote 48. *United States v Pedroza* (CA2 NY) 750 F2d 187, 16 Fed Rules Evid Serv 1150, appeal after remand (CA2 NY) 790 F2d 254, 20 Fed Rules Evid Serv 848, cert den 479 US 842, 93 L Ed 2d 92, 107 S Ct 151 (evidence of prior cocaine transaction admissible on issue of motive for kidnapping charged in instant case).

Footnote 49. *United States v Grassi* (CA5 Fla) 602 F2d 1192, 4 Fed Rules Evid Serv 992, reh den (CA5 Fla) 606 F2d 321 and vacated 448 US 902, 65 L Ed 2d 1131, 100 S Ct 3041, on remand (CA5 Fla) 626 F2d 444, cert den 450 US 956, 67 L Ed 2d 381, 101 S Ct 1415; *United States v Lowe* (CA10 NM) 569 F2d 1113, cert den 435 US 932, 55 L Ed 2d 529, 98 S Ct 1507.

Footnote 50. *United States v Grassi* (CA5 Fla) 602 F2d 1192, 4 Fed Rules Evid Serv 992, reh den (CA5 Fla) 606 F2d 321 and vacated 448 US 902, 65 L Ed 2d 1131, 100 S Ct 3041, on remand (CA5 Fla) 626 F2d 444, cert den 450 US 956, 67 L Ed 2d 381, 101 S Ct 1415.

Footnote 51. *United States v Jackson* (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56; *United States v Cook* (CA3 Del) 538 F2d 1000, 1 Fed Rules Evid Serv 272 (government could ask defendant to stipulate that he had been convicted of felony, thereby avoiding undue prejudice from introduction of proof of sodomy conviction).

For a discussion of FRE Rule 102, regarding the construction of the Federal Rules of

Evidence, see §§ 20 et seq.

Footnote 52. *United States v Jackson* (ED NY) 405 F Supp 938, 1 Fed Rules Evid Serv 56.

Footnote 53. *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422, later proceeding on other grounds (DC ND) 553 F Supp 886, post-conviction proceeding on other grounds (DC ND) 553 F Supp 890, affd in part and remanded in part on other grounds (CA8 ND) 731 F2d 550, on remand (DC ND) 609 F Supp 1143, affd (CA8 ND) 800 F2d 772, 21 Fed Rules Evid Serv 1017, cert den 484 US 822, 98 L Ed 2d 46, 108 S Ct 84, post-conviction proceeding, motion gr (DC Kan) 1991 US Dist LEXIS 2644, affd (CA8 SD) 997 F2d 461, reh, en banc, den (CA8) 1993 US App LEXIS 20526; *United States v Lowe* (CA10 NM) 569 F2d 1113, cert den 435 US 932, 55 L Ed 2d 529, 98 S Ct 1507.

Footnote 54. *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422, later proceeding on other grounds (DC ND) 553 F Supp 886, post-conviction proceeding on other grounds (DC ND) 553 F Supp 890, affd in part and remanded in part on other grounds (CA8 ND) 731 F2d 550, on remand (DC ND) 609 F Supp 1143, affd (CA8 ND) 800 F2d 772, 21 Fed Rules Evid Serv 1017, cert den 484 US 822, 98 L Ed 2d 46, 108 S Ct 84, post-conviction proceeding, motion gr (DC Kan) 1991 US Dist LEXIS 2644, affd (CA8 SD) 997 F2d 461, reh, en banc, den (CA8) 1993 US App LEXIS 20526.

b. Excludability of Particular Kinds of Evidence as Prejudicial [335-346]

§ 335 Demonstrative evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts should refuse the admission of demonstrative evidence when it is likely to confuse the jury, or is more prejudicial than probative. ⁵⁵ Courts may consider whether demonstrative evidence is merely cumulative and illustrative of issues already introduced and therefore not prejudicial, or whether it is unique evidence of a factual assertion and potentially prejudicial, in determining whether evidence is more prejudicial than probative. ⁵⁶

Where evidence of a defendant's guilt is less than overwhelming, admission of a photograph which on its face implies prior criminal conduct on a defendant's part is an abuse of discretion. ⁵⁷ Also excluded was a defendant's accent exemplar which the defendant sought to present without subjecting himself to cross-examination, following testimony by a government witness that he did not recall whether the person who sold him cocaine had spoken with any distinctive accent, the court concluding that there was a possibility that the government would be unfairly prejudiced or the jury misled. ⁵⁸

A courtroom experiment may be disallowed under FRE Rule 403 if the conditions of the proposed experiment differ substantially from the actual event which the experiment is supposed to duplicate. 59 And in a products liability action against a manufacturer brought by administratrix of user of snuff tobacco, it was not an abuse of discretion to hold a videotaped deposition of a severely disfigured post-surgical cancer patient inadmissible in the absence of any evidence that the patient's oral cancer was caused by the use of snuff. 60 Similarly, it has been held that a trial court should exercise caution when ruling upon the admissibility of a filmed reenactment in a criminal case since a filmed reenactment of a particular event has the potential to cause great prejudice. 61

On the other hand, exhibits used for demonstration purposes are admissible if they are more probative than prejudicial. 62 For example, if relevant, the inflammatory nature of photographs does not necessarily outweigh the probative value. 63

§ 335 ----Demonstrative evidence [SUPPLEMENT]

Case authorities:

District court properly excluded taped telephone conversation among cocaine distribution defendant's coconspirators as more prejudicial than probative, despite defendant's claim that evidence was relevant to show he did not voluntarily agree to participate in conspiracy, since conversation did not mention defendant or his position in conspiracy, was replete with derogatory and explicit language and thus inflammatory and prejudicial, and was cumulative of other evidence before jury regarding one coconspirator's demeanor. *United States v Logan* (1995, CA8 Mo) 49 F3d 352, reh den (1995, CA8 Mo) 1995 US App LEXIS 7624.

There was no error in a first- degree murder resentencing hearing from the introduction of photographs of the cellblock in which defendant had lived since 1985 and the argument that defendant was under a twenty-four hour watch in the most secure cell block in the most secure prison in the State of North Carolina. Defendant requested several mitigating circumstances based on his time in confinement, and it was clear from defendant's evidence that he had been in maximum security in Central Prison for six or more years dating roughly from the time of the murder. If the jury learned from defendant's evidence that he had previously received a death sentence, defendant cannot be heard to complain that the State argued against mitigation from that same evidence. *State v Spruill* (1994) 338 NC 612, 452 SE2d 279.

Footnotes

Footnote 55. *Jenkins v Snohomish County Public Utility Dist. No. 1*, 105 Wash 2d 99, 713 P2d 79.

Footnote 56. *Jenkins v Snohomish County Public Utility Dist. No. 1*, 105 Wash 2d 99, 713 P2d 79.

Footnote 57. *United States v Fosher* (CA1 Mass) 568 F2d 207, 3 Fed Rules Evid Serv 537, appeal after remand (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552.

Footnote 58. *United States v Esdaille* (CA2 NY) 769 F2d 104, 18 Fed Rules Evid Serv 1125, cert den 474 US 923, 88 L Ed 2d 264, 106 S Ct 258.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 59. *United States v Michelena-Orovio* (CA5 La) 702 F2d 496, 12 Fed Rules Evid Serv 1794, on reh (CA5 La) 719 F2d 738, 14 Fed Rules Evid Serv 123, cert den 465 US 1104, 80 L Ed 2d 135, 104 S Ct 1605.

Footnote 60. *Marsee v United States Tobacco Co.* (CA10 Okla) 866 F2d 319, CCH Prod Liab Rep ¶ 12023, 27 Fed Rules Evid Serv 694 (holding that danger of unfair prejudice to defendant far outweighed probative value of deposition).

Footnote 61. *State v Leroux*, 133 NH 781, 584 A2d 778.

Footnote 62. *Palmer v Farmers Ins. Exch.*, 233 Mont 515, 761 P2d 401, related proceeding (Mont) 861 P2d 895 (where exhibits supplemented witness's spoken description of transpired event); *Assadollah v State* (Okla Crim) 632 P2d 1215 (drawing).

Footnote 63. *Morris v State*, 302 Ark 532, 792 SW2d 288; *State v Kills on Top*, 243 Mont 56, 793 P2d 1273, cert den (US) 115 L Ed 2d 1073, 111 S Ct 2910.

See *Sudduth v State* (Miss) 562 So 2d 67, stating that photographs of bodies may be admissible where they have probative value and are not so gruesome or used in such a way as to be overly prejudicial or inflammatory.

For examples of photographs found not unfairly prejudicial, see § 336.

§ 336 --Examples of demonstrative evidence found not prejudicial

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts have allowed the introduction of demonstrative evidence as against the contention that admission would result in unfair prejudice, 64 where the evidence consisted of:

- A kidnapped child brought into court for identification by its mother, since identification was relevant and its probative value substantially outweighed the danger of unfair prejudice to the defendant 65
- In a prosecution for fleeing a peace officer and criminal mischief, the use of an overhead projector to illustrate the route of a 14-mile chase of defendant, where it may have helped the jury to determine whether the defendant willfully drove through a beanfield during the chase 66

- Photographs of the alleged victim in a prosecution for assaulting a witness, since the extent of the injuries was an issue in the case, and such photographs, although stark, were not so gruesome or sensational as to be unduly prejudicial 67

- Photographs of dead prisoner, in his estate's civil rights action, despite their possible prejudicial effect since they were highly probative of the assertion that he called for help before his death and that his injuries were so obvious before his death that he should have received medical attention 68

- Photographs of inmate's body as evidence of conscious pain and suffering, in civil rights case arising from stabbing death of inmate 69

- Photographs of defendant's tattooed torso and testimony about his motorcycle club membership, which was allegedly used for purposes of inflaming the jury, since the evidence was used to prove that defendant owned a briefcase in which police discovered notes of drug transactions, business cards for tattoo parlors, and motorcycle club brochure 70

- Photographs of dead victims of a bank robbery, which were highly probative of the issue as to whether the killings were in the course of the robbery and whose admission outweighed their potential inflammatory effect 71

- Handguns found in defendant's car and bullet found in codefendant's home, in prosecution for bank robbery, bank larceny, and assault during bank robbery, since such evidence did not constitute other bad acts evidence but was probative of crimes charged against defendants 72

The display of drugs or drug-related evidence has frequently been held not prejudicial under the circumstances. 73

It has been stated that admitting drug courier profile testimony for the limited purpose of providing the jury with a full and accurate portrayal of the events surrounding customs officials' stop of defendant greatly reduces the potential for unfair prejudice and thus cannot amount to plain error. 74 But in a prosecution for trying to board a plane carrying a firearm, it was error to admit evidence of drug courier profile in the absence of evidence linking the defendant to the drug trade. 75

Footnotes

Footnote 64. § 335.

Footnote 65. *United States v Lowe* (CA10 NM) 569 F2d 1113, cert den 435 US 932, 55 L Ed 2d 529, 98 S Ct 1507.

Footnote 66. *State v Erdman* (ND) 422 NW2d 808.

Footnote 67. *United States v Bailey* (CA5 Tex) 537 F2d 845, 1 Fed Rules Evid Serv 1186, cert den 429 US 1051, 50 L Ed 2d 767, 97 S Ct 764.

Footnote 68. *Shahid v Detroit* (CA6 Mich) 889 F2d 1543, 29 Fed Rules Evid Serv 191.

Footnote 69. *Walker v Norris* (CA6 Tenn) 917 F2d 1449, reh den (CA6) 1990 US App LEXIS 22991.

Footnote 70. *United States v Thomlinson* (CA8 Mo) 897 F2d 971, 29 Fed Rules Evid Serv 908.

Footnote 71. *United States v Brady* (CA6 Tenn) 595 F2d 359, 4 Fed Rules Evid Serv 492, cert den 444 US 862, 62 L Ed 2d 84, 100 S Ct 129.

Footnote 72. *United States v Colkley* (CA4 Md) 899 F2d 297.

Footnote 73. *United States v Arango-Correa* (CA2 NY) 851 F2d 54, 26 Fed Rules Evid Serv 23 (no abuse of discretion in allowing display of 500 pounds of cocaine before jury where cocaine was principle physical evidence in case and court was careful to limit duration of display, thereby minimizing prejudicial impact of such large quantity); *United States v Goff* (CA5 Tex) 847 F2d 149, 25 Fed Rules Evid Serv 1198, mod on other grounds, reh den, en banc (CA5) 1988 US App LEXIS 11253 and cert den 488 US 932, 102 L Ed 2d 341, 109 S Ct 324, appeal after remand (CA5 Tex) 884 F2d 574, appeal after remand (CA5 Tex) 919 F2d 936 (in prosecution on multiple counts relating to importations of marijuana and cocaine, District Court did not err in allowing government to introduce in evidence weapons belonging to defendant that were seized at time of his arrest since possession of weapons is highly probative as to accused drug trafficker's criminal intent as "tools of trade" and probative value clearly outweighed any likely prejudicial impact); *United States v Gonzalez* (CA7 Ill) 933 F2d 417, 33 Fed Rules Evid Serv 1054 (physical display of 2,248 kilograms of cocaine seized from defendants was relevant to establish magnitude of conspiracy as well as fact that quantity of cocaine could not have been intended for personal use rather than for purpose of possession with intent to distribute on large scale); *United States v Chambers* (CA9 Cal) 918 F2d 1455, 90 CDOS 8331, 31 Fed Rules Evid Serv 881 (photographs demonstrating expensive manner of defendant's dress where such dress allegedly fit drug career profile, but where it was highly unlikely that jurors would attach same meaning to defendant's dress as would DEA agent); *United States v Savinovich* (CA9 Or) 845 F2d 834, 25 Fed Rules Evid Serv 1060, cert den 488 US 943, 102 L Ed 2d 358, 109 S Ct 369 (evidence of scales or firearms, both probative of charged crime); *United States v Martinez* (CA10 Colo) 938 F2d 1078, 33 Fed Rules Evid Serv 794 (evidence of cocaine, machine gun, cash and scales were properly admitted in cocaine distribution prosecution, since, as "standard tools of drug trafficking," they were probative of crime charged).

In a prosecution for conspiracy to produce and manufacture marijuana with intent to distribute, admission into evidence of plant food, marijuana and its residue, seeds, issues of High Times magazine and camping gear was not unfairly prejudicial on the ground that items related primarily to personal use of marijuana, since plant food could have been used to cultivate and grow marijuana, residue was evidence that defendants were stripping marijuana plants, seeds were direct evidence of manufacture and production, and camping items linked defendants to campsite found near marijuana patches. *United States v Bowling* (CA6 Ky) 900 F2d 926, 30 Fed Rules Evid Serv 226, cert den 498 US 837, 112 L Ed 2d 79, 111 S Ct 109.

Footnote 74. *United States v Gomez-Norena* (CA9 Cal) 908 F2d 497, 30 Fed Rules Evid Serv 888, cert den 498 US 947, 112 L Ed 2d 326, 111 S Ct 363.

§ 337 Documentary evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An intangible factor inherent in the admission of evidence when such admission is disputed is the danger that it may weigh more heavily upon the jurors because of the emphasis placed upon it by limiting instructions and arguments of counsel, a possibility which is heightened with documentary evidence, about which the jury may have a tendency to assume or infer too much just because it can be seen and read. 76 The danger of unfair prejudice is even more pronounced where the evidence is strongly suggestive of other wrongs. 77 Thus, in a police officer's civil suit charging city and certain employees with violation of his constitutional rights, the District Court did not err in refusing to admit the entire transcript of the police officer's disciplinary hearing where the court properly determined that some of the information was irrelevant and would be unfairly prejudicial and the defendants were able to present alternative evidence on all issues for which they argued the transcript was necessary. 78 And in a civil rights suit against police officers for allegedly falsifying plaintiff's breathalyzer test, evidence of prior reprimands against the officers was properly not admitted since officers' characters were not at issue and danger of unfair prejudice and confusion would outweigh any probative value. 79

On the other hand, examples of documentary evidence which the courts have admitted over objections that their admission resulted in unfair prejudice have included—

—written reports of government agents for the limited purpose of consideration by the jury with respect to the credibility of the agents' testimony concerning the reports. 80

—a notebook found on board a vessel manned by narcotics defendants, which contained the name of a company known to the DEA as a front for illicit drug smuggling. 81

—two Jamaican passports in defendant's name found in a room in which drugs were located where they were the only identification evidence linking the defendant to one of the rooms in an apartment in which drugs were found. 82

—a chemical catalog found in a storage locker rented by a defendant charged with manufacturing methamphetamine since it made the existence of the fact that the defendant had access to and/or knowledge of chemicals necessary for methamphetamine manufacture more likely than it would be without the evidence and its probative value was not substantially outweighed by the risk of unfair prejudice to the defendant. 83

—a business card found in a narcotics defendant's luggage with a pager number. 84

—a computer printout from a disk obtained from the office of a drug exporter containing names and addresses of coconspirators, which was analogous to a conspirator's address book and probative of defendant's involvement in the conspiracy. 85

—a warning letter written by an expert witness used to impeach the witness. 86

—case control studies regarding toxic shock syndrome conducted by the Center for Disease Control and state health departments. 87

—an attorney's desk calendar indicating the time spent by the attorney in preparing a case in an action by the attorney for recovery of attorneys' fees. 88

—drug test results, showing a subway train operator may have been impaired by cocaine at the time plaintiff's decedent leaped in front of a train and to her death, since they were quite probative on key issue of whether the operator's conduct was "wanton," since he may have had time to stop and prevent the tragedy but could not due to voluntary drug use, where the danger of prejudice and confusion from the admission of the results was reducible through trial bifurcation and was substantially outweighed by the probativeness of evidence. 89

Under certain circumstances, a court may admit only an edited portion of a proffered document in order to avoid unfair prejudice. 90

◆ Observation: It has been noted that it is a matter of judgment whether to employ cautionary instructions or to exclude evidence. Courts can correctly infer that juries are able to follow instructions dealing with many noninflammatory subjects, but the disadvantage to a proffering party in having evidence stricken and prejudice to the adverse party in having it admitted must be weighed; if the curative qualities of instructions will really tip the scales in favor of understanding by the jury, then the court is justified in relying on the instructions. Good faith, as well as good judgment, is needed. 91

§ 337 ----Documentary evidence [SUPPLEMENT]

Case authorities:

Maine's Health Security Act, pursuant to which pretrial screening panel's findings are admissible in subsequent litigation if unanimous, applied in medical malpractice action under federal court's diversity jurisdiction; provisions were bound up with state's substantive decision to encourage early, inexpensive resolution of medical malpractice claims and did not conflict with Federal Rules of Evidence, and district court handled potential prejudicial effect of this very probative evidence by removing official seal of state court and its caption and giving appropriate cautionary instruction. *Daigle v Maine Medical Ctr.* (1994, CA1 NH) 14 F3d 684, 38 Fed Rules Evid Serv 1044, app dismd (CA1) 1994 US App LEXIS 1501 and summary op at (CA1 NH) 22 M.L.W. 1090, 14 R.I.L.W. 784.

List of rate clerks in employer's St. Louis office delineating their age, race, gender, and seniority, was properly excluded by trial court in age discrimination action as more prejudicial than probative, even though list permitted inference that employer was aware

of demographic data relevant to St. Louis clerks at time it decided to consolidate their work with that of rate clerks in other locations. *Bradford v Norfolk S. Corp.* (1995, CA8 Mo) 54 F3d 1412, 41 Fed Rules Evid Serv 1157.

Probative value of documents showing suspension of defendant's insurance license was far outweighed by its potential for generating unfair prejudice against defendant on mail fraud or wire fraud counts in insurance fraud case, but error in admitting documents was harmless given overwhelming evidence of defendant's guilt in insurance fraud case. *United States v Sandow* (1996, CA8 Mo) 78 F3d 388, reh, en banc, den (1996, CA8) 1996 US App LEXIS 9659.

Footnotes

Footnote 76. *United States v Cook* (CA5 Tex) 557 F2d 1149, 1 Fed Rules Evid Serv 1056, cert den 434 US 1020, 54 L Ed 2d 767, 98 S Ct 744 and appeal after remand (CA5 Tex) 592 F2d 877, 4 Fed Rules Evid Serv 553, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

Footnote 77. *United States v Cook* (CA5 Tex) 557 F2d 1149, 1 Fed Rules Evid Serv 1056, cert den 434 US 1020, 54 L Ed 2d 767, 98 S Ct 744 and appeal after remand (CA5 Tex) 592 F2d 877, 4 Fed Rules Evid Serv 553, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

In suit asserting claims of negligence and strict liability for injuries sustained while working as sand blaster aboard an offshore drilling platform, court did not err in excluding arrest record which noted plaintiff's weight as substantially less than what he claimed he weighed at the time of the accident, for purposes of challenging his contention that plaintiff lost weight after the accident, since unfair prejudice which the contents of the arrest record would have produced substantially outweighed its probative value. *Williams v Chevron U.S.A., Inc.* (CA5 La) 875 F2d 501, 28 Fed Rules Evid Serv 296.

Footnote 78. *Los Angeles Police Protective League v Gates* (CA9 Cal) 907 F2d 879, amd on other grounds, reh den (CA9) 1990 US App LEXIS 16392, remanded (CA9 Cal) 995 F2d 1469, 93 CDOS 4180, 93 Daily Journal DAR 7186.

Footnote 79. *Donald v Rast* (CA8 Mo) 927 F2d 379, 32 Fed Rules Evid Serv 587, cert den (US) 116 L Ed 2d 68, 112 S Ct 96, reh den (US) 116 L Ed 2d 820, 112 S Ct 921.

Footnote 80. *United States v Juarez* (CA7 Ind) 549 F2d 1113 (stating that admission of written reports by government agents is not encouraged and district judges should exercise discretion to admit them only when necessary in their judgment to remove confusion, false impressions, or other barriers to ascertainment of truth).

Footnote 81. *United States v Pretel* (CA5 La) 939 F2d 233, 33 Fed Rules Evid Serv 1040, cert den (US) 116 L Ed 2d 267, 112 S Ct 327, post-conviction proceeding (ED La) 1991 US Dist LEXIS 17437 and cert den (US) 117 L Ed 2d 141, 112 S Ct 978, post-conviction proceeding (ED La) 1992 US Dist LEXIS 9775, habeas corpus dismissed (ED La) 1992 US Dist LEXIS 15244, post-conviction proceeding (ED La) 1992 US Dist LEXIS 15284, post-conviction proceeding (ED La) 1992 US Dist LEXIS 15263 (held properly admitted as relevant; defendant could not complain of prejudice since defense

attorney, possibly inadvertently, opened door to evidence).

Footnote 82. *United States v Blackwood* (CA4 NC) 913 F2d 139, 31 Fed Rules Evid Serv 243 (where court declined to impute to jurors the kind of xenophobia that could constitute unfair prejudice).

Footnote 83. *United States v Haar* (CA10 NM) 931 F2d 1368, 32 Fed Rules Evid Serv 1250.

Footnote 84. *United States v Ferguson* (CA7 Ill) 935 F2d 1518, 33 Fed Rules Evid Serv 451 (stating that any prejudice defendant may have suffered from admission of evidence was not unfair in light of jury's awareness of beepers' many legal uses as well as their use in drug trafficking).

Footnote 85. *United States v Vanwort* (CA2 NY) 887 F2d 375, cert den 495 US 906, 109 L Ed 2d 290, 110 S Ct 1927 and cert den 495 US 910, 109 L Ed 2d 299, 110 S Ct 1936.

Footnote 86. *Dollar v Long Mfg., N. C., Inc.* (CA5 Ga) 561 F2d 613, 2 Fed Rules Evid Serv 760, 24 FR Serv 2d 408, reh den (CA5 Ga) 565 F2d 163 and reh den (CA5 Ga) 565 F2d 163 and cert den 435 US 996, 56 L Ed 2d 85, 98 S Ct 1648.

Footnote 87. *Wolf v Procter & Gamble Co.* (DC NJ) 555 F Supp 613, 12 Fed Rules Evid Serv 294, 37 FR Serv 2d 1053.

Footnote 88. *Frank v Bloom* (CA10 Kan) 634 F2d 1245, 7 Fed Rules Evid Serv 1059.

Footnote 89. *Johnson v Washington Metro. Area Transit Authority* (DC Dist Col) 764 F Supp 1568, 34 Fed Rules Evid Serv 170, amd (DC Dist Col) 773 F Supp 459 and amd, summary judgment den, ques certified (DC Dist Col) 790 F Supp 1174, later proceeding (DC Dist Col) 1993 US Dist LEXIS 1266, motion den (DC Dist Col) 1993 US Dist LEXIS 10566.

Footnote 90. *Evans v Dugger* (CA11 Fla) 908 F2d 801 (in inmate's action alleging prison officials were deliberately indifferent to his serious medical needs, trial court did not err in admitting only redacted portions of numerous reports and court opinions reciting lengthy history of health care failure by state department of corrections, since evidence admitted clearly informed jury of historical deficiencies within prison system and defendants' notice of such deficiencies; to admit voluminous materials offered in their entirety would have contaminated case with irrelevant and prejudicial information).

Court would allow evidence of animal studies on health risk of chemicals and expert testimony on risk of future illness, but would not admit evidence of exterminator's cessation of use of certain chemical, in homeowners' action alleging exterminator contaminated home, because: (1) animal studies on pesticides are routinely used in the scientific community and their probative value outweighs their prejudicial effect; (2) expert's testimony would not be speculative since homeowners claimed present injury; and (3) admission of evidence about exterminator's cessation of use would violate subsequent remedial measure rule. *Villari v Terminix International, Inc.* (ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 ALR Fed 867.

Footnote 91. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 So Cal L Rev 220,

§ 338 Expert testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The rule that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, 92 applies to expert testimony as well as to other forms of evidence. 93 The prejudicial danger of such evidence lies in its aura of special reliability and trustworthiness, when in fact it may be unreliable. 94 Thus, evidence of experts in the field of epidemiology has been excluded on the ground that epidemiology could, at best, establish probability, but could not prove causation. 95

Often, of course, expert testimony is admitted following an evaluation mandated by the rule, 96 accompanied, if necessary, by careful limiting instructions. 97 For example, expert testimony regarding "battered child syndrome" may be admissible. 98 Expert testimony which, when added to the lay testimony before the jury, might determine the verdict is of great probative value and should be admitted in the absence of a significant showing of unfair prejudice. 99

The fact that expert opinion evidence incriminating a defendant comes as part of a codefendant's defense does not affect its relevancy, nor cause it to be unfairly prejudicial. 1

On the other hand, admission of expert testimony of dubious relevance but with cumulative prejudicial impact is an abuse of discretion. 2

◆ Observation: It has been pointed out that among the types of expert evidence which should be carefully screened is background evidence in a criminal drug manufacturing case relating to the dangers inherent in the manufactured substance, which may be capable of subliminally inciting or confusing the jury. 3

◆ Caution: An expert's testimony may be discredited on the ground that he is prejudiced. 4

§ 338 ----Expert testimony [SUPPLEMENT]

Case authorities:

The trial court did not err in a capital first-degree murder prosecution by sustaining the prosecutor's objections to a psychiatrist's testimony in the guilt- innocence phase regarding depressive problems suffered by defendant's mother and mental illness in defendant's family where no evidence had yet been offered to establish that defendant and

his mother suffered from the same mental illness or that the mental illness from which defendant suffered was hereditary. The witness was allowed to testify in depth in the guilt-innocence phase about defendant's home life and defendant's conflict with his father and to testify during the sentencing phase that defendant suffered from Asperger syndrome, that this syndrome would produce manic depressive illness in adult life, that manic depressive illness and Asperger syndrome "run in families," and evidence was then admitted that other members of defendant's family suffered from depression. *State v Lynch* (1995) 340 NC 435, 459 SE2d 679.

Footnotes

Footnote 92. § 324.

Footnote 93. *Scott v Sears, Roebuck & Co.* (CA4 Va) 789 F2d 1052, 20 Fed Rules Evid Serv 322 (testimony by "human factors expert" that condition of walkway on which plaintiff fell and was injured was "accident waiting to happen"); *United States v Burton* (CA5 Tex) 737 F2d 439, 84-2 USTC ¶ 9689, 15 Fed Rules Evid Serv 1925, 54 AFTR 2d 84-5770 (no error under FRE Rule 403 in exclusion of expert testimony of tax professor that, despite its lack of legal acceptance, defendant's theory and belief that wages were not taxable income was plausible); *United States v Schmidt* (CA5 Tex) 711 F2d 595, 13 Fed Rules Evid Serv 1415, reh den (CA5 Tex) 716 F2d 901 and cert den 464 US 1041, 79 L Ed 2d 169, 104 S Ct 705 (affirming exclusion of testimony by linguistic expert which defendant claimed indicated that whatever falsehoods he might have stated before grand jury were not knowingly and willfully uttered); *United States v Thevis* (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025, reh den (CA5 Ga) 671 F2d 1379 and reh den (CA5 Ga) 671 F2d 1379 and cert den 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and cert den 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and cert den 459 US 825, 74 L Ed 2d 61, 103 S Ct 57; *United States v Milton* (CA5 La) 555 F2d 1198, 2 Fed Rules Evid Serv 100; *United States v Davis* (CA7 Ill) 772 F2d 1339, 18 Fed Rules Evid Serv 905, cert den 474 US 1036, 88 L Ed 2d 581, 106 S Ct 603 (testimony of psychiatrist on claimed insanity defense based on compulsive gambling); *United States v Scavo* (CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62; *State v Saldana* (Minn) 324 NW2d 227.

Exclusion of expert testimony on attorney's mental condition in suit by former client charging attorney with reckless or intentional infliction of emotional distress was proper since testimony was tentative and had substantial potential to confuse or mislead because jury might improperly consider attorney's unsubstantiated problem as excuse for his negligence. *Pinkham v Burgess* (CA1 Me) 933 F2d 1066, 32 Fed Rules Evid Serv 1223.

Testimony of sociologist who conducted "ethnographical study" which allegedly showed that sexually explicit materials at issue were accepted by local adult community is not admissible as competent expert evidence of prevailing community standards where sociologist interviewed adult video store clerks, store managers and customers and newspaper editors over 8-day period, because (1) sociologist is not qualified by study to offer opinion as to contemporary community standards of obscenity, in that his "ethnography" canvassed only small fraction of public, and (2) even if sociologist were qualified, evidence is unfairly prejudicial and misleading to jury. *United States v Pryba* (ED Va) 678 F Supp 1225, 24 Fed Rules Evid Serv 755, later proceeding (ED Va) 680 F Supp 790, later proceeding (CA4 Va) 900 F2d 748, 30 Fed Rules Evid Serv 439, cert den

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700 § 5.

Forms: Weight and consideration to be given by jury to testimony of expert witnesses. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:955.

Footnote 94. *United States v Fosher* (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552 (affirming trial court's exclusion of testimony on unreliability of eyewitness identifications); *Washington v Armstrong World Industries, Inc.* (CA5 Miss) 839 F2d 1121, 25 Fed Rules Evid Serv 298, 10 FR Serv 3d 1189 (affidavit of expert witness that asbestos exposure could have caused colon cancer victim's death was properly excluded where expert never actually examined decedent but merely relied on examinations performed by other physicians who reached different conclusions); *Mercado v Ahmed* (ND Ill) 756 F Supp 1097, 32 Fed Rules Evid Serv 397, affd (CA7 Ill) 974 F2d 863, 36 Fed Rules Evid Serv 814 (excluding economist's testimony on issue of pleasure of plaintiff's life since there is no basic agreement as to what elements ought to go into life valuation).

Exclusion of "grief counselor's" expert testimony was not abuse of discretion in negligence action against hospital and doctor for treatment of pregnant plaintiff allegedly resulting in death of fetus where expert admitted that she could not testify as to grief experienced by plaintiffs immediately after death of fetus and had not met plaintiffs until 2 years after incident. *Navarro de Cosme v Hospital Pavia* (CA1 Puerto Rico) 922 F2d 926, 31 Fed Rules Evid Serv 1200.

Footnote 95. *Smith v Ortho Pharmaceutical Corp.* (ND Ga) 770 F Supp 1561, 33 Fed Rules Evid Serv 511.

Annotation: Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases, 105 ALR Fed 299.

Footnote 96. *Worsham v A.H. Robins Co.* (CA11 Fla) 734 F2d 676, CCH Prod Liab Rep ¶ 10101, 15 Fed Rules Evid Serv 1670 (testimony by physician as to other suits dealing with tubo-ovarian abscesses such as plaintiff in instant case claimed had been caused by Dalkon Shield, evidence being relevant to indicate that manufacturer had notice of connection between device and same type of injury suffered by plaintiff); *State v Hicks* (Vt) 535 A2d 776 (expert testimony that delays in reporting sexual abuse were common among child victims of abuse; admissible to explain 3-month delay in reporting sexual assault).

Footnote 97. *Mullins v Seals* (WD Va) 416 F Supp 1098, 2 Fed Rules Evid Serv 590, vacated on other grounds (CA4 Va) 562 F2d 326.

Footnote 98. *State v Hernandez* (App) 167 Ariz 236, 805 P2d 1057, 68 Ariz Adv Rep 25 (not inadmissible under Rule 403 in manslaughter prosecution).

Expert evidence regarding "battered child syndrome" is relevant evidence in child abuse cases, but once court finds evidence relevant, it must consider whether it is unduly prejudicial. *State v Moyer* (App) 151 Ariz 253, 727 P2d 31.

Footnote 99. *United States v Dwyer* (CA2 NY) 539 F2d 924, 1 Fed Rules Evid Serv 294.

In eminent domain proceedings, trial court's conclusion that government's expert witness's testimony as to his opinion of fair market value of courthouse property held risk of unfair prejudice was abuse of discretion which prevented defendant from receiving fair trial notwithstanding that records on which expert based opinion may have included sale not done at arms length since credibility of testimony was subject to question on cross-examination. *United States v 0.161 Acres of Land* (CA11 Ala) 837 F2d 1036, 25 Fed Rules Evid Serv 446.

Footnote 1. *United States v Rothman* (CA7 Ill) 567 F2d 744, 2 Fed Rules Evid Serv 869.

Footnote 2. *United States v Green* (CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661.

Where a party's own expert witness casts doubt on the possibility of reliable expert analysis of that party's exhibits, those exhibits do not have probative value and should not be received in evidence for the jury's consideration, although this does not preclude a properly qualified expert, testifying to the use of generally accepted techniques, from expressing an opinion as to authenticity, after a comparison with known works. *United States v Carter*, 173 US App DC 54, 522 F2d 666.

Footnote 3. *United States v Green* (CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661.

Footnote 4. 31A Am Jur 2d, Expert and Opinion Evidence § 95.

§ 339 Consent decrees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a rule, consent decrees are not admissible against defendants in antitrust actions under FRE Rule 403 and under antitrust law. 5 When sought to be introduced by the defendant to show that the defendant's conduct has been lawful since the date of the decree, the consent decree by itself is not very probative of the defendant's actual conduct, and is excludible under FRE Rule 403. 6

Footnotes

Footnote 5. *Metrix Warehouse, Inc. v Daimler-Benz Aktiengesellschaft* (DC Md) 555 F Supp 824, 1983-1 CCH Trade Cases ¶ 65397, 12 Fed Rules Evid Serv 1173.

Footnote 6. *Metrix Warehouse, Inc. v Daimler-Benz Aktiengesellschaft* (DC Md) 555 F Supp 824, 1983-1 CCH Trade Cases ¶ 65397, 12 Fed Rules Evid Serv 1173.

§ 340 Other crimes or wrongs; threats of violence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes or wrongs, even when logically relevant to an issue other than propensity to commit a criminal act and thus otherwise admissible under FRE Rule 404(b), 7 may be excluded under FRE Rule 403 where the probative value of the evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice. 8 Rebuttal testimony introduced to prove bias which also shows a criminal enterprise of the witness is especially prejudicial, but the benefit can outweigh the prejudice where such evidence does not place the defendant in any worse light than what is already before the jury, and an appropriate cautionary instruction is given. 9

◆ Recommendation: An instruction should be requested to the effect that the jury is not to consider such evidence as going to the character of the accused but only as going to identity, intent, or whatever proper purpose for which it is admitted. 10

Admission of evidence of "prior bad act" to which appellant was not party would normally be overwhelmed by prejudicial effect and therefore not properly admitted under Rule 403. 11 However, where there was abundant evidence of appellant's personal involvement in loan transactions—in action brought by debtors against mortgage corporation and principals—evidence was not so prejudicial to the defense as to render the verdict inconsistent with substantial justice. 12

Evidence of threats of death or violence to government informants or witnesses is governed by the balancing process of FRE Rule 403. 13

◆ Practice guide: While the potential prejudice from the admission of such threats is great, the evidence should be allowed unless its prejudicial effect substantially outweighs its probative value. Because of the great potential prejudice inherent in the admission of death threat evidence, the government must have an important purpose for the evidence in order to satisfy the FRE Rule 403 balancing test. 14

§ 340 ----Other crimes or wrongs; threats of violence [SUPPLEMENT]

Case authorities:

Admission of narcotics defendant's prior burglary conviction did not prejudice her defense because it was defense attorney, not government, who first brought fact of prior conviction to jury's attention, and government did nothing more than complete record in offering formal judgment of conviction into evidence during defendant's cross-examination. *United States v Hatchett* (1994, CA7 Ill) 31 F3d 1411.

In a prosecution for sexual offenses committed against a child, evidence of uncharged conduct by the defendant toward another child must be closely related in time, place and form of acts in order to be logically probative and admissible to show a common course of conduct by the defendant toward the 2 children. *Commonwealth v Barrett* (1994) 418 Mass 788, 641 NE2d 1302.

Admission of defendant's membership in gang was cumulative and not prejudicial where, during voir dire, defense counsel had mentioned evidence of defendant's possible gang involvement, and where defense counsel had made no objection to prosecutor's mention of gang membership during prosecutor's opening statement. *State v Griffin* (1994, Mo App) 876 SW2d 43.

There was no plain error in a prosecution for felony-murder, armed robbery, and conspiracy in the admission of evidence that an accomplice had beaten the witness and stolen things from her and her children and that she was afraid to leave him because there would be trouble when he found her. This testimony was relevant to prove that the witness's fear of the accomplice was the reason she waited as long as she did before coming forward to tell of the robbery-murder. *State v Lamb* (1995) 342 NC 151, 463 SE2d 189.

In a prosecution for first degree murder and conspiracy to commit murder in which it was alleged that the defendant was the leader of the "Junior Black Mafia" (JBM) and that he and the co- defendants conspired to and murdered the victim as a message to another high-ranking JBM member who was suspected of killing another JBM member, testimony by a codefendant that "they" sold the guns used in the murder, but that "they" were going to first use the guns again to make another hit did not constitute evidence of other criminal conduct by the defendant since the statement did not directly implicate the defendant and only indicated that the witness planned to commit another murder with another unidentified person or persons. *Commonwealth v Jones* (Pa) 668 A2d 491, reh den (Pa) 1996 Pa LEXIS 3.

The trial court erred in a second- degree murder prosecution by allowing the State to cross-examine defendant under GS § 8C-1, Rule 404(b) regarding domestic violence by defendant against his wife, who was not the victim in this case. Defendant's past violent behavior toward his wife was not relevant to prove his character in relation to motive, opportunity, intent, etc. Furthermore, there was prejudice in that the case was close, the questions alone were inflammatory and damaging, and, because defendant admitted to some violent action toward his wife, it cannot be said that the jury did not consider the evidence for the purpose of concluding that defendant had a violent disposition. *State v Brooks* (1994) 113 NC App 451, 439 SE2d 234.

Footnotes

Footnote 7. §§ 404 et seq.

Footnote 8. *United States v Cook* (CA3 Del) 538 F2d 1000, 1 Fed Rules Evid Serv 272.

Forms: Motion–To exclude evidence of prior conviction–Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 9. United States v Robinson, 174 US App DC 224, 530 F2d 1076, 2 Fed Rules Evid Serv 1092.

Footnote 10. United States v Danzey (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179.

Footnote 11. See Meller v Heil Co. (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390 (in wrongful death action by widow against manufacturer of equipment that had caused death of her husband, evidence of two hashish pipes containing marijuana found in husband's rucksack was properly excluded since probative value was substantially outweighed by danger of unfair prejudice; defendant did not provide medical foundation for claim that husband's life expectancy had been diminished by drugs).

Annotation: Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 ALR4th 1135.

Footnote 12. Faison v Nationwide Mortg. Corp., 268 US App DC 1, 839 F2d 680, cert den 488 US 823, 102 L Ed 2d 46, 109 S Ct 70.

Footnote 13. United States v Rosa (CA1 Mass) 705 F2d 1375, 12 Fed Rules Evid Serv 1643 (statement properly admitted where it did not appear to have been particularly inflammatory, could have been viewed as emotional or impulsive reaction, and would have less prejudicial impact than evidence of calculated, advanced plans to commit murder); United States v Anderson (SD NY) 575 F Supp 31, 15 Fed Rules Evid Serv 324.

Footnote 14. United States v Anderson (SD NY) 575 F Supp 31, 15 Fed Rules Evid Serv 324 (finding that court could not adequately assess probative value or potential prejudice of alleged threats of violence in context of motion to suppress and that determination would have to await trial).

§ 341 --Particular evidence of crimes or acts ruled admissible

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes or acts that has been found properly admitted, despite the prejudice inherent in such evidence, has included:

- Evidence of the defendant's assault on federal agents in a prosecution for conspiracy to

illegally distribute drugs, where the officer's testimony related the incident to the investigation of the charged offense 15

- Photographs seized from the home of a defendant charged with various cocaine-related offenses, depicting the defendant standing amidst some marijuana plants and a large sum of cash spread on the floor 16
- The defendant's passport containing alterations, and related evidence, offered to raise an inference that the defendant altered dates in order to conceal his whereabouts at the times when illegal transactions were discussed or took place and thus exhibited consciousness of his guilt 17
- A tape of a telephone conversation between an unindicted coconspirator and an unknown individual, where the prosecutorial need for the evidence was substantial in that the unindicted coconspirator served as the primary connection between two of the defendants, and it was necessary to document his activities to establish his connection and ultimately the connection of the others with a motorcycle club known to be engaged in crime, and where the record was already replete with testimony concerning the violent and illegal activities of the club 18
- Expert testimony by a psychiatrist concerning behavior of the defendant three years earlier which led to the psychiatrist's conclusion that the defendant was a pathological gambler and which had led to a conviction of the defendant for, inter alia, car theft and kidnapping 19
- Evidence of a prior felony conviction, where the trial court inquired on voir dire into the possible prejudices of potential jurors as to a witness-defendant who testified admitting to a prior felony conviction, and gave proper limiting instructions 20
- Evidence, in wrongful death action, of defendant's prior murder conviction 21
- Evidence of narcotics dealings to show a defendant's motive in a robbery prosecution 22
- Testimony that a weapon was present during the robbery 23
- Evidence of possession of counterfeit bills, offered in a prosecution for distributing counterfeit bills, to prove ability to distribute the notes described in the indictment 24
- Evidence of a criminal enterprise of a witness as part of testimony offered to prove bias, where the evidence placed the defendant in no worse light than what was already before the jury and an appropriate cautionary instruction was given 25
- Evidence of other crimes reasonably offered to show the defendant's expertise with burglar alarm systems, in a burglary prosecution, where the court restricted the evidence to that reasonably related to showing the defendant's expertise and the government did not give disproportionate emphasis to the prior criminal conduct 26
- Evidence of the defendant's failure to file federal income tax returns during particular years, in a prosecution charging conspiracy to violate federal narcotics laws, offered for the purpose of negating the existence of any legitimate source for money that the defendant expended during that period 27

- Evidence of one defendant's participation in other identical offenses, in prosecution of four defendants resulting from a hijacking, for the purpose of proving identity, where identity was at issue and where the court's detailed instructions that the evidence was to be considered only against the particular defendant in question adequately protected the other defendants 28
- Evidence of a defendant's theft of timber, in a prosecution for tax evasion, offered to prove that defendant provided false information in an effort to avoid the tax, where it served the purpose of proving a plan by which the taxes were evaded and the jury was instructed as to the limited purpose for which the evidence was admitted 29
- Testimony by an unindicted coconspirator as to a prior similar scheme participated in by the defendants, in a prosecution of police officers for using illegal wiretaps to deprive narcotics offenders of their property, to prove that in a later year the witness and a defendant were involved in a similar scheme 30

§ 341 --Particular evidence of crimes or acts ruled admissible [SUPPLEMENT]

Case authorities:

Evidence of charged attempted and completed burglaries that occurred before, during, and after time of charged bombing-burglary conspiracy were properly admitted since they revealed modus operandi by which defendants were to accomplish scheme charged. *United States v Prevatte* (1994, CA7 Ind) 16 F3d 767.

Defendant charged with being felon in possession of firearm was properly impeached with evidence of his prior convictions for burglary and aggravated battery since it was probative of his credibility and his testimony was essential because his coercion defense turned on his mental state. *United States v Toney* (1994, CA7 Ill) 27 F3d 1245, 39 Fed Rules Evid Serv 1173.

Trial judge did not abuse his discretion in allowing government witness to testify regarding defendant's threats to his life, which necessarily invoked defendant's gang affiliations; government had right to rehabilitate witness by explaining his prior perjury before grand jury and threats were highly probative of witness's prior inconsistent statements. *United States v Rutledge* (1994, CA7 Ill) 40 F3d 879, reh, en banc, den (1995, CA7 Ill) 1995 US App LEXIS 9.

Defendant could not appeal trial court's rulings that his prior convictions could be used to impeach him during cross-examination since defendant chose not to testify. *United States v Schrader* (1993, CA8 SD) 10 F3d 1345.

Evidence of cocaine distribution defendant's prior arrest for possession of sawed-off shotguns was properly admitted to corroborate witness' testimony that she had purchased shotguns for defendant and was his trusted intermediary who aided him in distribution of drugs and observed him in four separate criminal transactions with which he was charged; corroboration was significant and direct. *United States v Pitts* (1993, CA9 Wash) 6 F3d 1366, 93 CDOS 7432, 93 Daily Journal DAR 12645.

Hospital marketing representative accused of bribery cannot have evidence of his involvement in 2 previous criminal matters excluded pretrial under FRE 609, where

matters are 1986 state cocaine distribution conviction and 1990 federal conviction for filing false statement, because probative/prejudicial balancing of drug conviction must await trial as state's setting aside of conviction following completion of probation does not automatically eliminate its use for impeachment purposes; and completion of restitution, compliance with terms of probation, and law-abiding and productive life as family man for last 7 years do not preclude prosecution's use of false statement conviction. *United States v Jackson* (1994, DC Kan) 863 F Supp 1462.

Evidence that crack cocaine distribution conspirator had purchased cocaine from known drug dealer on several occasions was relevant to defendant's intent to deal in cocaine by developing relationships with established dealers, hence admissible. *United States v Beasley* (1993, CA11 Ala) 2 F3d 1551, 7 FLW Fed C 896, subsequent civil proceeding, summary judgment gr (SD Ala) 1993 US Dist LEXIS 16342.

Evidence that 8 years earlier defendant was involved in agreement that he would protect boatload of marijuana for informant was properly admitted in trial on cocaine conspiracy charges since his role in charged conspiracy was to protect coconspirators during off-loading, hence extrinsic evidence involved same mental state as charged crime because both incidents involved protecting illicit drug activity. *United States v Pessefall* (1994, CA11 Fla) 27 F3d 511, 8 FLW Fed C 440.

The general principles governing evidence of other crimes are applicable to sex offense cases in which children are victims. *People v Novak* (1994) 163 Ill 2d 93, 205 Ill Dec 471, 643 NE2d 762, reh den (Dec 5, 1994).

The trial court did not err in a sentencing hearing for first-degree murder by submitting evidence of a prior attempted rape conviction, submitting the aggravating circumstance of a prior felony involving violence, or in its instructions where the State submitted evidence that defendant had been convicted by General Court Martial of attempted rape. Attempted rape is a felony under North Carolina law, as well as under military law, and, since the military courts have held all rapes to be crimes of violence under military law, and all attempts to commit rape therefore by definition involve the use or threat of force, there was no need to consider whether there is a non-violent crime of attempted rape under North Carolina law. The evidence presented concerning the prior felony was proper and sufficient to establish that the defendant had been convicted of a prior felony involving the use or threat of violence to the person and the court's instruction did not constitute an impermissible conclusive presumption as it permitted the jury to make the determination as to whether defendant had been convicted. G.S. § 15A- 2000(e)(3). *State v Green* (1994) 336 NC 142, 443 SE2d 14.

There was no error in a first- degree murder and attempted rape prosecution where the court admitted evidence of a prior assault and defendant contended that the court improperly instructed the jury as to the purpose of the evidence by failing to specify the charged offense for which the evidence could be considered. The prior crime was relevant on the issue of the identity of the assailant as to both offenses. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

The trial court did not err in a prosecution for a first-degree murder committed in 1989 by admitting evidence of an assault committed by defendant in 1981, when he was thirteen, where there were unusual facts and strikingly similar acts in both crimes so as to permit admission of the 1981 assault for purposes of proving identity. Because the prior crime here is offered to show to show identity rather than common plan or scheme, the passage

of time in this case affects the weight of the evidence rather than its admissibility. The probative value of the evidence outweighs any potential for unfair prejudice because the identity of the perpetrator was a critical issue at trial. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

There was no error in a first-degree murder prosecution in the admission of evidence that the four year old victim had suffered from a skull fracture and severe burns on his leg and ankle several weeks before his death where a basis existed for the jury to infer that defendant was responsible for the prior injuries and the evidence that the victim suffered from a severe skull fracture and serious burns shortly before his death was relevant to the jury's determination of whether defendant was criminally negligent. Furthermore, this evidence was relevant and admissible under GS § 8C-1, Rule 404(b) as proof of defendant's preparation and planning for the commission of this crime and that the victim's death was not accidental. *State v White* (1995) 340 NC 264, 457 SE2d 841.

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence of defendant's alleged involvement in another murder where defendant was charged with the 1973 murder of her four year old stepson following a 1991 conspiracy to kill her husband and her motion in limine to exclude the evidence of her alleged involvement in her husband's death from the trial for the murder of her stepson was denied. The trial court's findings of fact and conclusions of law make it clear that the evidence of defendant's confession to the witness was admitted for the purpose of refuting accident and that the interwoven evidence of defendant's participation in her husband's murder was admitted for the purpose of establishing the witness's credibility and the contextual basis for defendant's confession; the evidence was so intertwined that the trial court did not err in concluding that all the evidence was admissible under the chain of circumstances rule. Finally, the trial court did not abuse its discretion under GS § 8C-1, Rule 403 by concluding that the probative value of the interwoven evidence outweighed any prejudicial effect. GS § 8C-1, Rule 404(b). *State v White* (1995) 340 NC 264, 457 SE2d 841.

The trial court did not err in the prosecution of defendant for the noncapital first-degree murder of her stepson by instructing the jury that it could consider evidence of defendant's involvement in her husband's murder to prove the absence of accident. The instruction was consistent with the trial court's findings of fact and conclusions of law in connection with the admission of this "other crimes" evidence. Furthermore, the trial court correctly limited the consideration of this evidence to the determination of the witness's credibility and absence of accident. *State v White* (1995) 340 NC 264, 457 SE2d 841.

The trial court did not abuse its discretion in a capital first-degree murder sentencing hearing by overruling defendant's objections and refusing a mistrial after evidence was elicited during cross-examination of two of defendant's expert witnesses that defendant had stated that he wanted "to shoot at blacks and to watch them dance." The statement was not elicited to establish any type of racial bias but instead to impeach the opinions of the experts and test the value of their testimony. The statement was also relevant to show that defendant had, prior to the shooting, manifested dangerousness and a violent attitude toward a particular group of people. Although both victims and defendant were white and nothing in the record suggests the killing of either victim was a racial act, the evidence was relevant since defendant shot at a particular group of people, his neighbors. *State v Lynch* (1995) 340 NC 435, 459 SE2d 679.

In a prosecution of defendant for first-degree murder of a law officer who was executing a search warrant for defendant's apartment, testimony by a witness that he had purchased marijuana from defendant the day before the shooting was properly admitted for the limited purpose of showing that defendant had a motive for the shooting where the State's theory of the case was that defendant, as a known drug dealer, had a motive to kill a law officer; the State's evidence tended to show that officers yelled "Police, search warrant" several times; the officers were in uniform, the front door was open, and one officer had stepped inside the apartment when defendant fired his pistol; and a civilian witness heard defendant tell an officer at the back door that he was tired of officers "trying to bust my house." Further, the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. GS § 8C-1, Rules 404(b), 403. *State v Lyons* (1995) 340 NC 646, 459 SE2d 770.

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentence arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup. *State v Ratliff* (1995) 341 NC 610, 461 SE2d 325.

In a murder prosecution wherein two teenage girls testified that defendant was one of the two shooters, testimony that, prior to the shooting, Corey Best had threatened to kick the girls if he found them again in the vicinity where the shooting occurred was not inadmissible hearsay because it was not offered to show that the declarant was going to hurt the girls but to explain why the girls had left the scene before the shooting and thus could not identify defendant as one of the shooters. Therefore, the trial court erred by excluding this testimony, but the error was not prejudicial where defendant was allowed to present this evidence through the testimony of other witnesses that the two girls were not at the scene during the shooting because of an argument with Corey Best. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

There was no plain error in a prosecution for felony-murder, armed robbery, and conspiracy in the admission of evidence that an accomplice had beaten the witness and stolen things from her and her children and that she was afraid to leave him because there would be trouble when he found her. This testimony was relevant to prove that the witness's fear of the accomplice was the reason she waited as long as she did before coming forward to tell of the robbery-murder. *State v Lamb* (1995) 342 NC 151, 463 SE2d 189.

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with a firearm on a governmental officer, the trial court did not err in allowing certain questions about defendant's conduct prior to a confrontation with two deputies and in admitting into evidence a videotape allegedly depicting this conduct, since the challenged evidence was part of the "chain of events" leading up to arrival of the deputies and was admissible to show defendant's state of mind immediately prior to the deputies being called to the scene. *State v Price* (1995) 118 NC App 212, 454 SE2d 820, cert den (NC) 1995 NC LEXIS 503.

In a prosecution for first degree murder, evidence of the defendant's rape-assaults of 2 other victims was properly admitted into evidence under the common scheme or signature crime exception to the general rule that evidence of other criminal acts of the defendant is not admissible since, notwithstanding that the victim's body was not found until 6 years after her murder, it was established (1) that the victim and the rape assault

victims were all young white women, (2) that they were all slim and attractive and had brownish shoulder length hair, (3) that they all sustained multiple stab wounds on their upper bodies with a small knife, (4) that the crimes occurred a few months apart, and (5) that the victim's body was found in a remote wooded area about 200 feet from the place in which the defendant left the rape-assault victims for dead. *Commonwealth v May* (1995, Pa) 656 A2d 1335.

In a prosecution for the murder of a friend of the defendant's ex-girlfriend and for an assault on the ex- girlfriend, the court properly permitted the introduction of evidence regarding the defendant's prior abuse of the ex-girlfriend and threats directed at her since such evidence proved motive and intent and also showed the natural progression of the events leading up to the crimes. *Commonwealth v Walker* (1995, Pa) 656 A2d 90, petition for certiorari filed (Jun 20, 1995).

In a prosecution for the murder of a friend of the defendant's ex-girlfriend and for an assault on the ex- girlfriend, the court properly permitted the introduction of evidence regarding an incident in which the defendant slashed the tires of mourners at a funeral for the ex-girlfriend's grandmother and then tried to steal the minister's car where the court instructed the jury that the evidence was introduced only to show a pattern of activity by the defendant as it related to the ex- girlfriend and her family. *Commonwealth v Walker* (1995, Pa) 656 A2d 90, petition for certiorari filed (Jun 20, 1995).

In the prosecution of the defendant for the murder of an eyewitness to a prior murder by the defendant, evidence pertaining to the prior murder was properly introduced into evidence as *res gestae*; a contrary result was not required by the fact that the defendant's conviction for the prior murder had been reversed since that reversal included a remand for a new trial and since the defendant thereafter pled guilty to first degree murder. *Commonwealth v Murphy* (1995, Pa) 657 A2d 927.

In a murder prosecution, a witness was properly permitted to testify that the defendant attempted to rape her several hours after the murder and that he told her that she would get the same thing the murder victim got if she opened her mouth, notwithstanding that the testimony implicated the defendant in an uncharged crime, since the testimony completed the story of the murder by demonstrating the history and natural development of the facts surrounding the defendant's movements on the day of the murder. *Commonwealth v Simmons* (1995, Pa) 662 A2d 621, application gr (Pa) 1995 Pa LEXIS 1336 and petition for certiorari filed (Dec 14, 1995).

In a murder prosecution, the court properly permitted the introduction of testimony by a witness that the defendant stated that he had just gotten out of jail and was going to kill the first white man he saw since such testimony was admissible as proof of the defendant's motive for the crime; the defendant's statement logically raised the inference that he perceived his previous incarceration to be the result of unexplained actions by white males for which he was seeking revenge. *Commonwealth v Williams* (1995, Pa) 660 A2d 1316, cert den (US) 1996 US LEXIS 135.

In a murder prosecution, the court properly permitted the introduction of testimony by a witness that the defendant stated that he had just gotten out of jail and was going to kill the first white man he saw since such testimony was admissible as part of the natural sequence of events which occurred shortly before the murder which formed the history of the case. *Commonwealth v Williams* (1995, Pa) 660 A2d 1316, cert den (US) 1996 US LEXIS 135.

In a murder prosecution, the defendant was barred from asserting that the trial court should have sua sponte excluded testimony by a witness that the defendant stated that he had just gotten out of jail and was going to kill the first white man he saw since defense counsel employed that testimony in his cross examination of the witness; defense counsel used the testimony to question the witness regarding whether she had seen the defendant during the prior year. *Commonwealth v Williams* (1995, Pa) 660 A2d 1316, cert den (US) 1996 US LEXIS 135.

In a prosecution arising from the murder of a police officer during his attempt to arrest the defendant in connection with an assault from which the defendant was fleeing, evidence of the defendant's prior drug activities was properly offered to show that the defendant bore a personal grudge and an aggressive malicious dislike of the slain officer because the officer had previously arrested the defendant on unrelated drug charges, because the defendant thought that the officer secretly observed neighborhood drug activities while off duty and reported them to the police and because the defendant thought that the officer was "bothering" him. *Commonwealth v Lacava* (Pa) 666 A2d 221.

In a prosecution arising from the murder of a police officer during his attempt to arrest the defendant in connection with an assault from which the defendant was fleeing, a witness was properly permitted to testify that the defendant threatened the witness's brother with a gun on the day of the murder since such testimony was relevant to discredit the defendant's statement to the police that he did not have a gun on the day of the murder. *Commonwealth v Lacava* (Pa) 666 A2d 221.

In a prosecution arising from the murder of a police officer during his attempt to arrest the defendant in connection with an assault from which the defendant was fleeing, a witness was properly permitted to testify that the defendant threatened the witness's brother with a gun on the day of the murder because he believed that the brother had called his girlfriend a bitch since evidence of such threat, when coupled with evidence of threats and assaults perpetrated by the defendant on 2 other people, was admissible to show that the defendant's day- long rampage of violence reasonably led him to fear his capture by the police and eventual punishment by the Commonwealth, thereby causing him to resist arrest and to kill the officer. *Commonwealth v Lacava* (Pa) 666 A2d 221.

In a prosecution for first degree murder and conspiracy to commit murder in which it was alleged that the defendant was the leader of the "Junior Black Mafia" (JBM) and that he and the co- defendants conspired to and murdered the victim as a message to another high-ranking JBM member who was suspected of killing another JBM member, the court properly allowed the introduction of evidence concerning the JBM's structure and activities, notwithstanding the contention that such evidence did no more than arouse the passion and prejudice of the jury, since the evidence of the JBM's hierarchy and general activities and of the defendant's involvement in the JBM was admissible to prove the motive for the murder and the existence of the conspiracy. *Commonwealth v Jones* (Pa) 668 A2d 491, reh den (Pa) 1996 Pa LEXIS 3.

In a prosecution for first degree murder and conspiracy to commit murder in which it was alleged that the defendant was the leader of the "Junior Black Mafia" (JBM) and that he and the co- defendants conspired to and murdered the victim as a message to another high-ranking JBM member who was suspected of killing another JBM member, no error occurred when evidence was introduced that the phrase "get down or lay down" in

connection with the expansion of the JBM drug network was used by the JBM to inform independent drug dealers that they could either buy drugs from the JBM or else they would be killed since such evidence was relevant to prove the motive for the killing of the victim; the evidence established that the JBM was a drug organization which enforced internal discipline with acts of violence and that in the instance at issue it resorted to murder to settle an internal dispute. *Commonwealth v Jones* (Pa) 668 A2d 491, reh den (Pa) 1996 Pa LEXIS 3.

Footnotes

Footnote 15. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558.

Footnote 16. *United States v Laughlin* (CA7 Ill) 772 F2d 1382, 18 Fed Rules Evid Serv 885 (where the defendant's wife had testified that the defendant used drugs for recreational purposes, the government was entitled to introduce evidence that he also dealt in narcotics for profit).

Footnote 17. *United States v Osorio Estrada* (CA2 NY) 751 F2d 128, 17 Fed Rules Evid Serv 443, reh gr, in part, reh den, in part (CA2 NY) 757 F2d 27 and cert den 474 US 830, 88 L Ed 2d 79, 106 S Ct 97.

Footnote 18. *United States v Watchmaker* (CA11 Fla) 761 F2d 1459, 18 Fed Rules Evid Serv 330, reh den, en banc (CA11 Fla) 766 F2d 1493, cert den 474 US 1100, 88 L Ed 2d 917, 106 S Ct 879, 106 S Ct 880, 106 S Ct 881.

Footnote 19. *United States v Gillis* (CA4 Md) 773 F2d 549, where the court noted that it was important that the factfinder know the basis of the psychiatrist's diagnosis in order to attribute to it the proper credibility and weight, that the government carefully avoided any reference to the outcome of the previous trial, and that the defendant could have avoided the entire area of questioning by relying solely on the diagnosis of his other expert witness.

Footnote 20. *United States v Hall* (CA8 Mo) 588 F2d 613, 4 Fed Rules Evid Serv 233.

Footnote 21. *Kowalski v Gagne* (CA1 Mass) 914 F2d 299, 31 Fed Rules Evid Serv 434 (admission was proper since there are few things more relevant to question of culpability than defendant's conviction of murder for conduct that caused wrongful death; trial court properly could have concluded that any prejudice caused by evidence of conviction was more than outweighed by its relevancy to question of defendant's blameworthiness for killing).

Footnote 22. *United States v Parker* (CA9 Cal) 549 F2d 1217, 1 Fed Rules Evid Serv 584, cert den 430 US 971, 52 L Ed 2d 365, 97 S Ct 1659.

Footnote 23. *United States v Moss* (CA8 Mo) 544 F2d 954, 1 Fed Rules Evid Serv 430, cert den 429 US 1077, 50 L Ed 2d 797, 97 S Ct 822 (robbery prosecution).

Footnote 24. *United States v Fairchild* (CA7 Ill) 526 F2d 185, 1 Fed Rules Evid Serv 157, cert den 425 US 942, 48 L Ed 2d 186, 96 S Ct 1682.

Footnote 25. *United States v Robinson*, 174 US App DC 224, 530 F2d 1076, 2 Fed Rules Evid Serv 1092.

Footnote 26. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154.

Footnote 27. *United States v Hinton* (CA2 NY) 543 F2d 1002, cert den 429 US 980, 50 L Ed 2d 589, 97 S Ct 493 and cert den 429 US 1051, 50 L Ed 2d 767, 97 S Ct 764 and cert den 429 US 1066, 50 L Ed 2d 783, 97 S Ct 796 and cert den 430 US 982, 52 L Ed 2d 376, 97 S Ct 1677.

Footnote 28. *United States v Di Geronimo* (CA2 NY) 598 F2d 746, 4 Fed Rules Evid Serv 796, cert den 444 US 886, 62 L Ed 2d 117, 100 S Ct 180.

Footnote 29. *United States v Watkins* (CA9 Or) 600 F2d 201, 79-2 USTC ¶ 9548, 44 AFTR 2d 79-5222, cert den 444 US 871, 62 L Ed 2d 96, 100 S Ct 148.

Footnote 30. *United States v Albert* (CA5 Tex) 595 F2d 283, 4 Fed Rules Evid Serv 750, reh den (CA5 Tex) 599 F2d 449 and cert den 444 US 963, 62 L Ed 2d 375, 100 S Ct 448.

§ 342 --Evidence of crimes or acts ruled excludible

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a number of cases the courts have excluded evidence of other crimes or acts under FRE Rule 403 on grounds of unfair prejudice, including:

- A certified copy of a prior judgment of conviction of bank robbery, offered in a prosecution for escape from federal custody, where there was no prosecutorial need for the judgment in light of a sworn admission of conviction and confinement 31
- Otherwise admissible testimony as to a subsequent similar offense, which tended to prove only criminal disposition, in a federal rape prosecution 32
- Evidence of previous pimping, pandering, and drug charges against an insured, in a declaratory action by an insurance company in which the company alleged that the defendant had set fire to his own property 33
- A tape recording and testimony of the defendant's discussion with an undercover agent concerning the murder of a coconspirator, in a prosecution for narcotics offenses 34
- Evidence of a prior similar offense offered to establish intent, where intent may be inferable from the act itself and the defense of lack of intent is not specifically raised 35

- Evidence of a conviction for possession of narcotics with intent to distribute, in a prosecution for possession of narcotics without intent to distribute, where the conviction bore questionable relevance to the charged offense and prejudice from such evidence could outweigh the value of the evidence to show motive or intent 36
- Testimony that the defendant was required to report to jail on the night of the alleged offense, in a prosecution for possession with intent to distribute and distribution of heroin, where the evidence was of little or no probative value with respect to the defendant's entrapment defense and was highly prejudicial 37
- Testimony of a prior offense revealing a modus operandi similar to that of the offenses charged in the indictment, where the evidence was admitted under a different theory from that urged on appeal, and its probative value was clearly outweighed by its prejudicial effect on the defendant's character defense 38

In a civil action, evidence of a plaintiff's past criminal conduct is excludible under FRE Rule 403 in spite of the fact that the plaintiff claims damages for a "change in personality," where the plaintiff's evidence actually describes physiological changes, such as headaches, sleeping habits, temperament, and general health, and where nothing has been brought forward to indicate that the plaintiff's moral character or honesty has been affected by the events for which he seeks damages. 39

§ 342 --Evidence of crimes or acts ruled excludible [SUPPLEMENT]

Case authorities:

Evidence of cases of candy, worker's arrest, and charges filed against him must be excluded in worker's Title VII (42 USCS §§ 2000e et seq.) racial discrimination case, where candy company worker was terminated after being caught twice outside workplace without "clocking out," second time in vicinity of 2 cases of candy for which he was arrested and criminal complaint filed but subsequently dropped, because employer considered and rejected arrest as basis for termination, and introduction of evidence of arrest would create significant danger of unfair prejudice. *Plair v E. J. Brach & Sons* (1994, ND Ill) 864 F Supp 67, 66 BNA FEP Cas 370.

Evidence of uncharged homicide separate from attempted homicide of witness was improperly admitted and highly prejudicial since it had little probative value on alleged relationship between co- conspirators and link between two incidents was extremely weak. *United States v Bradley* (1993, CA9 Cal) 5 F3d 1317, 93 CDOS 7240, 93 Daily Journal DAR 12322, 38 Fed Rules Evid Serv 56.

In a prosecution of defendant for the murder of a four-month-old child, Alamance County DSS records relating to the one-year supervision and investigation of the child's mother following the child's death were not admissible to show the mother's guilt of the murder where the records showed that the mother was having difficulty in performing her parental duties but contained no evidence that the mother physically abused or acted violently toward her children. Further, any probative value of this evidence to impeach the mother's testimony that she had done nothing wrong to her other children was substantially outweighed by the danger of confusion and undue delay where defendant had been allowed to impeach the mother with evidence similar to the evidence in the DSS records and the evidence in the DSS records would have been merely cumulative. GS §

8C-1, Rule 403. *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

The trial court did not erroneously admit evidence of prior unrelated drug use by defendant where the investigator properly testified that he believed defendant was under the influence of "something" the evening of the murder; he was attempting to find out what that something might be; defendant stated that he had abused a prescription drug in the past; but defendant's response to the investigator's question did not indicate that he had been charged with any type of drug use or drug dealing by his use of the prescription drug. *State v Cannada* (1995) 119 NC App 311, 458 SE2d 268.

Footnotes

Footnote 31. *United States v Spletzer* (CA5 Tex) 535 F2d 950, 2 Fed Rules Evid Serv 218.

Footnote 32. *United States v Aims Back* (CA9 Mont) 588 F2d 1283, 3 Fed Rules Evid Serv 937.

Footnote 33. *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360.

Footnote 34. *United States v Vila* (CA2 NY) 599 F2d 21, 4 Fed Rules Evid Serv 507, cert den 444 US 837, 62 L Ed 2d 48, 100 S Ct 73.

Footnote 35. § 439.

Footnote 36. *United States v Partyka* (CA8 Minn) 544 F2d 345, 1 Fed Rules Evid Serv 428, appeal after remand (CA8 Minn) 561 F2d 118, 2 Fed Rules Evid Serv 1126, cert den 434 US 1037, 54 L Ed 2d 785, 98 S Ct 773.

Footnote 37. *United States v Mejia* (CA9 Cal) 529 F2d 995, 1 Fed Rules Evid Serv 1104.

Footnote 38. *United States v Herman* (CA3 Pa) 589 F2d 1191, 3 Fed Rules Evid Serv 1605, cert den 441 US 913, 60 L Ed 2d 386, 99 S Ct 2014.

Footnote 39. *Williams v Union Carbide Corp.* (CA6 Tenn) 790 F2d 552, 20 Fed Rules Evid Serv 964, cert den 479 US 992, 93 L Ed 2d 592, 107 S Ct 591.

§ 343 Defendant's flight following charged offense

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of a defendant's flight soon after the charged offense took place is properly admitted where the trial court determines that the probative value of such evidence outweighs its tendency to cause prejudice, and where the trial court gives proper limiting instructions. 40 Where attempted flight is part of the events leading to a defendant's

arrest, and such evidence reveals facts which strengthen proof of identity, probative value may outweigh potential prejudice. 41 But admission of evidence of a bribery defendant's flight was found erroneous since it was not only prejudicial but irrelevant where the defendant had stipulated that he had committed bribery and the only issue was his entrapment defense. 42

Footnotes

Footnote 40. *United States v Stewart* (CA5 Ga) 579 F2d 356, 3 Fed Rules Evid Serv 588, cert den 439 US 936, 58 L Ed 2d 332, 99 S Ct 332; *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422.

Footnote 41. *United States v Milhollan* (CA3 Pa) 599 F2d 518, cert den 444 US 909, 62 L Ed 2d 144, 100 S Ct 221.

Footnote 42. *United States v Kang* (CA5 Tex) 934 F2d 621, 33 Fed Rules Evid Serv 254.

§ 344 Statements of accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence regarding statements made by an accused have been analyzed for their prejudicial impact under FRE Rule 403. Among statements which the courts have not considered sufficiently prejudicial to require exclusion are:

- A statement by a defendant which could only be explained by the defendant's taking the stand and waiving the right to remain silent 43
- Testimony that the defendant told a police officer not to "come up here any more," upon realizing he was a police officer, where the effect of the statement lacked the impact of distortion 44
- Testimony that a defendant had commented to a witness regarding the stupid setup of a bank, six weeks prior to the charged robbery. 45
- Testimony, in prosecution for burning cross on lawn of black family, that defendant had asked her whether he could attend a skinhead picnic, because it tended to establish defendant's racial animus and that he might act on his beliefs 46
- Testimony that a defendant did not want to make a statement until he had consulted with a lawyer, where the defendant raised a defense of insanity at the time of commission of the offense, because his request and his answers to personal identification questions disclosed an understanding and awareness properly considered in determining his sanity 47

On the other hand, the exclusion of a defendant's testimony (that he had never heard of anyone being prosecuted for what he had done) was proper where the testimony was considered tangentially relevant, and outweighed by the potential prejudice to the government that might arise from the suggestion that the defendant was unfairly singled out for prosecution. 48 Also excludible, to the extent that its admission by the court constituted prejudicial error, was testimony by a policeman the sole content of which was to depict the accused as a bad man because of his vulgar statements on the street, where the offensive statements which were ascribed to the accused had no substantial tendency to prove him a member of the conspiracy charged and did not relate to any of the substantive counts against him. 49

§ 344 ----Statements of accused [SUPPLEMENT]

Case authorities:

In prosecution for making extortionate loans or collection by extortionate means, testimony by one of alleged borrowers that he knew one defendant "got out of jail for murder" was properly admitted to show basis for victim's fears that defendant might resort to violence to ensure repayment, since fear of collection or reprisal by violent means went to element of offense. *United States v Oreto* (1994, CA1 Mass) 37 F3d 739.

Exculpatory portion of defendant's statement, that he had no knowledge of weapon under bed, should have been admitted along with inculpatory portion, that he knew of marijuana under bed, but exclusion was harmless where defendant's girlfriend testified that she had purchased gun and hid it from defendant and that he had no knowledge of it. *United States v Haddad* (1993, CA7 Ill) 10 F3d 1252.

In murder prosecution, trial court erred in admitting tape recording of statement made by defendant on night of shootings where tape contained inadmissible and prejudicial material in form of assertions by examining police officer. *Robinson v State* (1990, Ala App) 574 So 2d 910, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 1975.

The trial court did not abuse its discretion in a capital first-degree murder sentencing hearing by overruling defendant's objections and refusing a mistrial after evidence was elicited during cross-examination of two of defendant's expert witnesses that defendant had stated that he wanted "to shoot at blacks and to watch them dance." The statement was not elicited to establish any type of racial bias but instead to impeach the opinions of the experts and test the value of their testimony. The statement was also relevant to show that defendant had, prior to the shooting, manifested dangerousness and a violent attitude toward a particular group of people. Although both victims and defendant were white and nothing in the record suggests the killing of either victim was a racial act, the evidence was relevant since defendant shot at a particular group of people, his neighbors. *State v Lynch* (1995) 340 NC 435, 459 SE2d 679.

Footnotes

Footnote 43. *United States v Cowsen* (CA7 Ill) 530 F2d 734, cert den 426 US 906, 48 L Ed 2d 831, 96 S Ct 2227 (accused asked a bystander "to go tell his old lady that he was

gone for good this time," at the time of his arrest).

Footnote 44. *United States v Robinson*, 174 US App DC 224, 530 F2d 1076, 2 Fed Rules Evid Serv 1092.

Footnote 45. *United States v Moss* (CA8 Mo) 544 F2d 954, 1 Fed Rules Evid Serv 430, cert den 429 US 1077, 50 L Ed 2d 797, 97 S Ct 822.

Footnote 46. *United States v Skillman* (CA9 Cal) 922 F2d 1370, 91 CDOS 230, 91 Daily Journal DAR 161, 31 Fed Rules Evid Serv 1133, cert dismd (US) 116 L Ed 2d 275, 112 S Ct 353.

Footnote 47. *United States v Trujillo* (CA10 Colo) 578 F2d 285, cert den 439 US 858, 58 L Ed 2d 166, 99 S Ct 175.

Footnote 48. *United States v Chiarella* (CA2 NY) 588 F2d 1358, CCH Fed Secur L Rep ¶ 96608, 3 Fed Rules Evid Serv 1347, revd on other grounds 445 US 222, 63 L Ed 2d 348, 100 S Ct 1108, CCH Fed Secur L Rep ¶ 97309.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 49. *United States v Brown* (CA9 Or) 720 F2d 1059, 14 Fed Rules Evid Serv 1592.

§ 345 Other evidence of acts ruled admissible

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence has been admitted involving other acts offered for a variety of purposes, over objections that the prejudicial impact exceeded probative value, including:

- Testimony, in a criminal prosecution in which the defendant's cohort testified for the prosecution, by the cohort that the defendant and a defense witness belonged to a secret prison gang and that the tenets of the gang required its members to lie for one another 50
- A note from a revolutionary group advocating a prison escape, in a prosecution for harboring a prison escapee, although the note was not drafted by defendant or in his presence, where a major part of the prosecution's theory of the conspiracy was that all of the defendants were members of an organization whose central committee dictated the actions of the members who followed orders in military fashion 51
- Evidence of a refusal to submit to a breathalyzer test by a plaintiff in an action under the civil rights laws 52 for false arrest, use of excessive force in an arrest, and illegal search

and seizure, the evidence being admissible on the issue of the defendant officer's good faith 53

- Evidence that loan applicants had used drugs in presence of a loan consultant charged with submitting false loan applications, as relevant to the loan consultant's state of mind concerning the creditworthiness of applicants whose loan applications he obtained for purpose of getting money from a bank to fund loans, even though such evidence may have had some prejudicial effect 54
- Cross-examination of defense witnesses about civil rights picketing, in a prosecution for violating the Hobbs Act by conspiring to extort money from promoters, where the defense opened up the matter of civil-rights picketing in its direct examination, and where the jury was constantly reminded that the civil-rights picketing itself was totally proper 55
- Negotiated checks found in the defendant's car as a result of a search, and expert testimony as to how checks were collected, in a prosecution for aiding and abetting interstate transportation of falsely made and forged checks, where the defendant admitted driving two codefendants on the route of the check-cashing scheme and a fingerprint expert identified the defendant's fingerprints on an unnegotiated check and the fingerprints of the codefendant were found on other checks 56
- A portion of grand jury transcript which highlighted the witness's consultation with his counsel, in a perjury prosecution, where it could not be characterized as possessing prejudicial impact substantially outweighing its probative force as to the deliberateness of all statements 57
- Evidence regarding the silence of the accused's accountant, at an Internal Revenue Service conference held to discuss the defendant's tax liability, where the court instructed the jury that the appellant had the right to remain silent and that his silence could not be used against him 58
- Evidence in ADEA case brought by employee discharged at age 60, that two 60-year-old employees who were kept on when the plaintiff was terminated were laid off by defendant about year later 59
- Testimony of a Secret Service agent, in a prosecution for possessing a stolen \$5,000 United States Treasury note and for counterfeiting such notes, as to the seizure of counterfeit Treasury notes and that they were produced from a genuine note possessed by the defendants, and that before seizure of these notes no such other notes had come to the attention of the Secret Service 60
- Testimony by the defendant's wife and his parole officer that photos taken of a bank robber resembled the defendant, in a bank-robbery prosecution, although such testimony was cumulative, somewhat equivocal, and made comparisons which the jurors could have made 61
- Statement by wife of sexual assault defendant to law enforcement officers that "you guys better find the guy before I kill him" 62
- Testimony of a detective, in a prosecution for dealing in firearms without a license, regarding information about possible criminal activity conducted at particular bar,

admitted to explain why he went to that particular bar 63

- The grand jury testimony of a witness which was inconsistent with testimony at trial, admitted into evidence to impeach the witness 64
- Testimony of five witnesses who lost portions of their right arms while clearing augers on combines, in suit alleging strict products liability against a manufacturer of such combine for damages resulting from similar accidents 65

As a general rule, evidence of collateral source payments may be admitted for the purpose of showing malingering of a condition unless the prejudicial impact attending the possibility that the jury will consider such evidence for the purpose of directly reducing recoverable damages is so high, when compared to its probative value for an acceptable purpose, that the admission of the evidence would be an abuse of discretion. 66

§ 345 ----Other evidence of acts ruled admissible [SUPPLEMENT]

Practice Aids: Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like. 18 ALR5th 804.

Case authorities:

In a prosecution for first degree murder and conspiracy to commit murder in which it was alleged that the defendant was the leader of the "Junior Black Mafia" (JBM) and that he and the co- defendants conspired to and murdered the victim as a message to another high-ranking JBM member who was suspected of killing another JBM member, no error occurred when a witness testified to his conversation with the defendant in which he told the defendant that he suspected the high-ranking member of the JBM in the murder of the other JBM member since the testimony was relevant to prove the motive of revenge. Commonwealth v Jones (Pa) 668 A2d 491, reh den (Pa) 1996 Pa LEXIS 3.

Footnotes

Footnote 50. United States v Abel, 469 US 45, 83 L Ed 2d 450, 105 S Ct 465, 16 Fed Rules Evid Serv 838 (testimony offered by the prosecution to impeach the defense witness's testimony on grounds of bias).

Footnote 51. United States v Hobson (CA9 Cal) 519 F2d 765, cert den 423 US 931, 46 L Ed 2d 261, 96 S Ct 283 (where the note indicated a central committee decision both to publicize and facilitate an escape, and where there was evidence of ratification by the defendant).

Footnote 52. 42 USCS § 1983.

Footnote 53. McKinney v Galvin (CA6 Mich) 701 F2d 584, 12 Fed Rules Evid Serv 1601.

Footnote 54. United States v Castro (CA9 Cal) 887 F2d 988, 28 Fed Rules Evid Serv

1479.

Footnote 55. *United States v Beasley* (CA5 Ala) 545 F2d 403, 2 Fed Rules Evid Serv 263, on reh (CA5 Ala) 563 F2d 1225.

Footnote 56. *United States v Brown* (CA5 Ga) 547 F2d 1264, 2 Fed Rules Evid Serv 294.

Footnote 57. *United States v Kopel* (CA7 Ill) 552 F2d 1265, cert den 434 US 970, 54 L Ed 2d 459, 98 S Ct 520.

Footnote 58. *United States v Shields* (CA9 Wash) 571 F2d 1115, 78-1 USTC ¶ 9410, 2 Fed Rules Evid Serv 1050, 41 AFTR 2d 78-1112.

Footnote 59. *Bingman v Natkin & Co.* (CA10 Colo) 937 F2d 553, 56 BNA FEP Cas 570, 56 CCH EPD ¶ 40841 (such evidence was not unduly prejudicial because of prior stipulation that employees age 60 were retained in work force at time plaintiff was terminated since evidence of subsequent terminations did not contradict terms of stipulation and defendant had opportunity to present evidence and explain later terminations).

Footnote 60. *United States v Strahl* (CA1 Mass) 590 F2d 10, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1237.

Footnote 61. *United States v Young Buffalo* (CA9 Or) 591 F2d 506, 4 Fed Rules Evid Serv 145, cert den 441 US 950, 60 L Ed 2d 1055, 99 S Ct 2178.

Footnote 62. *United States v Barrett* (CA8 Minn) 937 F2d 1346, 34 Fed Rules Evid Serv 374, cert den (US) 116 L Ed 2d 263, 112 S Ct 322 (properly admitted as relevant excited utterance and not unfairly prejudicial).

Footnote 63. *United States v Vitale* (CA5 La) 596 F2d 688, 4 Fed Rules Evid Serv 466, cert den 444 US 868, 62 L Ed 2d 93, 100 S Ct 143.

Footnote 64. *United States v Brighton Bldg. & Maintenance Co.* (CA7 Ill) 598 F2d 1101, 1979-1 CCH Trade Cases ¶ 62637, 4 Fed Rules Evid Serv 769, cert den 444 US 840, 62 L Ed 2d 52, 100 S Ct 79, 100 S Ct 80.

Footnote 65. *Wheeler v John Deere Co.* (CA10 Kan) 862 F2d 1404, CCH Prod Liab Rep ¶ 11982, 27 Fed Rules Evid Serv 518, later proceeding (DC Kan) 1990 US Dist LEXIS 3543 and appeal after remand (CA10 Kan) 935 F2d 1090, CCH Prod Liab Rep ¶ 12850, 33 Fed Rules Evid Serv 292, reh, en banc, den (CA10) 1991 US App LEXIS 20184.

Footnote 66. *Vanskike v ACF Industries, Inc.* (CA8 Mo) 665 F2d 188, CCH Prod Liab Rep ¶ 9127, cert den 455 US 1000, 71 L Ed 2d 867, 102 S Ct 1632, appeal after remand (CA8 Mo) 725 F2d 1146, 14 Fed Rules Evid Serv 1728.

§ 346 Other evidence of acts ruled excludible

[View Entire Section](#)

The courts have excluded a variety of evidence involving other acts where the danger of prejudicial impact was considered to exceed probative value, including:

- Evidence in a race and sex discrimination case, of an alleged assault against an employee where the assault occurred several years before her discharge, the supervisor who assaulted her had nothing to do with her discharge, and the employees who fired her apparently never knew of the assault 67
- Evidence of a victim's unchastity, in a rape prosecution, since such evidence is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant to outweigh its highly prejudicial effect 68
- Testimony by the defendant's lawyer that the plaintiff in a contract action willfully withheld documents concerning the merchantability of goods covered by the contract 69
- Evidence, in action by insured alleging a bad faith failure of the insurer to pay a claim, of the insurer's relationship with other policyholders 70
- Evidence, in a negligence action brought against a movie theater by parents of a theater patron who was stabbed and killed in the theater's parking lot, that the patron's assailant was convicted of manslaughter, notwithstanding the theater's contention that the evidence was relevant to the issue of foreseeability, where the plaintiffs offered to stipulate that the stabbing was a criminal act 71
- Testimony by a defendant as to certain covert activities of the United States in which he claimed to have participated during the years in which his alleged felonies took place 72
- Reference to an immunity agreement between a government witness and the United States in connection with the witness's testimony before a grand jury investigating a judge's assassination 73
- Testimony that an FBI agent was aware that a witness had failed certain polygraph examinations relating to his allegedly procured testimony against the defendant 74
- Evidence that the defendant was earlier picked up with another who was carrying narcotics but was released, in a prosecution for importing narcotics and possessing with intent to distribute, since its relevance is heavily outweighed by the potential for prejudice if jurors know of the previous close call 75
- Admission of drug courier profile in firearms possession prosecution, without any other evidence linking defendant to drug trade 76
- Facts relating to widespread manifestations of a conspiracy, its membership and its fruits, in a prosecution for aiding and abetting importation of narcotics 77
- Evidence that an injured plaintiff applied for retirement benefits after an accident, since the jury might conclude that the plaintiff did not intend to continue to work, thereby reducing his worklife expectancy, which would be prejudicial to the plaintiff's damages

claim 78

- Evidence of other claims brought by the plaintiff to show the plaintiff's claim mindedness in a negligence case where there was no proof that the plaintiff's other claims were fraudulent 79
- Evidence, in action by shareholders challenging a leveraged buy out and the adequacy of a proxy statement, of the post-merger performance of a company since possible prejudice arising from the use of events long after the preparation of the proxy statement to cast light on defendants' earlier intention outweighed its limited probative value. 80

§ 346 ----Other evidence of acts ruled excludible [SUPPLEMENT]

Practice Aids: Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like. 18 ALR5th 804.

Case authorities:

Exclusion of evidence of hysterectomies physician performed on other patients was not abuse of discretion in medical malpractice action alleging unnecessary hysterectomy, as more prejudicial than probative of plaintiff's punitive damages claim. *Buford v Howe* (1994, CA5 Miss) 10 F3d 1184, reh den (CA5) 1994 US App LEXIS 4817.

In action against sailboat manufacturer by personal representatives of estates of decedents who died when recreational sailboat on which they were passengers capsized, evidence of conviction of owner and operator of sailboat, by plea of nolo contendere to negligent homicide in connection with capsizing and evidence of plaintiffs' settlement of all potential claims against owner by accepting payment from owner's homeowner's insurer will not be admitted, because even if evidence were otherwise admissible, unfair prejudice and confusion it posed would compel its exclusion. *Powers v Bayliner Marine Corp.* (1994, WD Mich) 855 F Supp 199.

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first- degree burglary, and second- degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty a times in the past. The testimony had little probative value but did not have a tendency to prejudice defendant. *State v Beamer* (1994) 339 NC 477, 451 SE2d 190.

Footnotes

Footnote 67. *Campbell v Ingersoll Milling Machine Co.* (CA7 Ill) 893 F2d 925, 51 BNA FEP Cas 1798, 52 CCH EPD ¶ 39575, 29 Fed Rules Evid Serv 1242, 15 FR Serv 3d 753, cert den 498 US 844, 112 L Ed 2d 95, 111 S Ct 127, 53 BNA FEP Cas 1512.

Footnote 68. *United States v Kasto* (CA8 SD) 584 F2d 268, 3 Fed Rules Evid Serv 20,

cert den 440 US 930, 59 L Ed 2d 486, 99 S Ct 1267.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 69. *Empire Gas Corp. v American Bakeries Co.* (ND Ill) 646 F Supp 269, later proceeding (ND Ill) 1987 US Dist LEXIS 1324 (where the court noted that the defendant offered the testimony not to prove the breach in question but to show what it called despicable conduct of the plaintiff during the discovery phase of the case).

Footnote 70. *Jones v Automobile Ins. Co.* (CA11 Ga) 917 F2d 1528, 17 FR Serv 3d 1045, reh den, en banc (CA11 Ga) 920 F2d 13.

Footnote 71. *Silva v Showcase Cinemas Concessions, Inc.* (CA1 RI) 736 F2d 810, 15 Fed Rules Evid Serv 1827, cert den 469 US 883, 83 L Ed 2d 189, 105 S Ct 251.

Footnote 72. *United States v Wilson* (CA2 NY) 750 F2d 7, 16 Fed Rules Evid Serv 1114, cert den 479 US 839, 93 L Ed 2d 85, 107 S Ct 143 (finding no error in the District Court's holding that the defendant could testify as to his employment with various agencies in the federal intelligence community and his involvement in covert operations but that he would not be permitted to describe the details of the operations).

Footnote 73. *United States v Milstead* (CA5 La) 671 F2d 950, 10 Fed Rules Evid Serv 167.

Footnote 74. *United States v Thevis* (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025, reh den (CA5 Ga) 671 F2d 1379 and reh den (CA5 Ga) 671 F2d 1379 and cert den 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and cert den 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and cert den 459 US 825, 74 L Ed 2d 61, 103 S Ct 57.

The results of a polygraph examination were properly excluded from trial as too prejudicial where the purpose of the evidence was to show that the results of the polygraph examination were fabricated as part of the conspiracy, since the jury would be reasonably likely to infer that the defendant failed the polygraph examination and was therefore guilty. *United States v Bowen* (CA9 Cal) 857 F2d 1337, 26 Fed Rules Evid Serv 1324.

Footnote 75. *United States v Mann* (CA1 Puerto Rico) 590 F2d 361, 4 Fed Rules Evid Serv 339.

Footnote 76. *United States v Simpson* (CA4 Va) 910 F2d 154, 30 Fed Rules Evid Serv 1219.

Footnote 77. *United States v Praetorius* (ED NY) 462 F Supp 924, 3 Fed Rules Evid Serv 1344.

Footnote 78. *McCarthy v Silver Bulk Shipping, Ltd.* (ED Pa) 5 Fed Rules Evid Serv 1009.

Footnote 79. *Bunion v Allstate Ins. Co.* (ED Pa) 502 F Supp 340.

Footnote 80. *Herskowitz v Nutri/System* (CA3 Pa) 857 F2d 179, CCH Fed Secur L Rep ¶ 94012, 26 Fed Rules Evid Serv 1224, cert den 489 US 1054, 103 L Ed 2d 584, 109 S Ct 1315 and cert den 489 US 1060, 103 L Ed 2d 599, 109 S Ct 1331.

3. Confusion of Issues or Misleading Jury [347-352]

§ 347 Danger of confusion of issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Relevant evidence may be excluded where its potential for confusion of the issues outweighs its probative value. 81 This rule applies to expert 82 and documentary evidence 83 as well as to other forms of testimony and evidence.

The principle that the risk of confusion, when it is so great as to upset the balance of advantage, requires the exclusion of evidence was recognized even before the adoption of the Rules. 84

The courts have been inclined to hold relevant evidence inadmissible on grounds of confusion of the issues in certain factual situations, such as—

- when evidence with great potential to confuse is of questionable relevance, limited probative value, or both. 85
- when the same facts can be presented in a simpler manner. 86
- when material allegedly offered for a legitimate purpose carries with it highly prejudicial, inadmissible evidence which will be detected and retained by the jury. 87
- when the admission of relevant evidence would lead to litigation of collateral issues. 88

But in a personal injury action arising from alleged asbestos exposure, defendant was improperly precluded from presenting evidence of exposure to asbestos products other than its own since such evidence went to the fundamental issue of cause and its admission would cause only slight confusion, if any, and would not mislead the jury. 89

◆ Observation: Evidence may be both confusing and misleading. 90

§ 347 ----Danger of confusion of issues [SUPPLEMENT]

Case authorities:

Evidence of officer's comments before Police Commission and Board of Mediation and Arbitration was properly excluded under FRE 403, where mayor found liable for invasion of privacy for criticizing officer for abuse of sick leave policy asserts that he should have been permitted to establish that Commission properly terminated officer and that Board incorrectly reversed decision, because focus of this action was upon mayor's statements concerning officer, and evidence of officer's termination or process he received before Commission concerned collateral issue that would have confused jury unnecessarily. *Sargeant v Serrani* (1994, DC Conn) 866 F Supp 657.

Court will exercise pendent jurisdiction over former employee's state civil rights claim in employee's age discrimination action against former employer, where state and federal claim arose out of same facts so evidence of discrimination will be same for both claims and where jury confusion and prejudice will be slight, because considerations of judicial economy, convenience, and fairness to litigants weighed in favor of hearing claims at same time. *Sirota v Welbilt Appliance* (1994, ED NY) 840 F Supp 11.

Former state official, charged with conspiracy to defraud IRS by concealing source of income by falsifying property sale documents, was properly precluded from introducing price paid by State for other parcels of property to show that price paid to third party in question was not unusually high, since evidence would have risked jury confusion and had little relevance since issue was whether defendant was paid by third party in order to receive special treatment, not whether he received such treatment. *United States v Graves* (1993, CA5 La) 5 F3d 1546, petition for certiorari filed (Jan 18, 1994).

In FTCA action arising out of plaintiff's slip and fall at post office, district court committed clear error by critically discounting probative value of expert's affidavit concerning slip resistance of floor tiles while significantly overstating risk of prejudice and confusion its admission would engender, given that case would be tried to district judge, not jury, where government did not contest expert's qualifications and affidavit supported Rule 702's requirements in support of plaintiff's theory that, wet or dry, tile floor was unreasonably slippery. *Buscaglia v United States* (1994, CA7 Ill) 25 F3d 530, 39 Fed Rules Evid Serv 679.

Tape of defendant's arrest was properly excluded, even though defendant alleged denial of due process, where jury may have been sidetracked from ultimate issues to be determined by improprieties engaged in by officers in effecting arrest, and prejudicial effect on trial would have greatly outweighed any relevance to evidence. *State v Allen* (1992, Utah) 839 P2d 291, 194 Utah Adv Rep 12.

Footnotes

Footnote 81. § 324.

Footnote 82. § 351.

Footnote 83. § 352.

Footnote 84. *Shepard v United States*, 290 US 96, 78 L Ed 196, 54 S Ct 22 (ovrld on other grounds by *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065) as stated in *Adamson v Ricketts* (CA9 Ariz) 758 F2d 441, 18 Fed Rules

Evid Serv 346, op withdrawn, reh gr, en banc (CA9) 764 F2d 1343 and different results reached on reh, en banc (CA9 Ariz) 789 F2d 722, cert gr 479 US 812, 93 L Ed 2d 21, 107 S Ct 62.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 ALR Fed 390.

Footnote 85. *United States v Bowe* (CA2 NY) 360 F2d 1, cert den 385 US 961, 17 L Ed 2d 306, 87 S Ct 401 and cert den 385 US 1042, 17 L Ed 2d 686, 87 S Ct 779, reh den 386 US 969, 18 L Ed 2d 127, 87 S Ct 1040; *Seven Provinces Ins. Co. v Commerce & Industry Ins. Co.* (WD Mo) 65 FRD 674; *Estate of Le Baron v Rohm & Haas Co.* (CA9 Cal) 506 F2d 1261, 1974-2 CCH Trade Cases ¶ 75342.

Cross-examination of victim and her mother relating to sexual abuse of victim by current stepfather was properly limited since any relevance of evidence was outweighed by danger that it would confuse jury by raising issues of stepfather's alleged conduct instead of that of defendant. *State v Weymouth* (Me) 496 A2d 1053.

Footnote 86. *Hamling v United States*, 418 US 87, 41 L Ed 2d 590, 94 S Ct 2887, 1 Media L R 1479, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157.

Footnote 87. *Shepard v United States*, 290 US 96, 78 L Ed 196, 54 S Ct 22 (ovrld on other grounds by *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065) as stated in *Adamson v Ricketts* (CA9 Ariz) 758 F2d 441, 18 Fed Rules Evid Serv 346, op withdrawn, reh gr, en banc (CA9) 764 F2d 1343 and different results reached on reh, en banc (CA9 Ariz) 789 F2d 722, cert gr 479 US 812, 93 L Ed 2d 21, 107 S Ct 62, motion den 479 US 981, 93 L Ed 2d 571, 107 S Ct 566 and motion gr 479 US 1015, 93 L Ed 2d 717, 107 S Ct 664 and revd on other grounds 483 US 1, 97 L Ed 2d 1, 107 S Ct 2680, on remand, en banc (CA9 Ariz) 865 F2d 1011 (disapproved on other grounds by *Walton v Arizona*, 497 US 639, 111 L Ed 2d 511, 110 S Ct 3047) and cert den 497 US 1031, 111 L Ed 2d 795, 110 S Ct 3287 and (not followed on other grounds by *Beam v Paskett* (DC Idaho) 744 F Supp 958) and stay den (CA9 Ariz) 955 F2d 614, 92 CDOS 872, 92 Daily Journal DAR 1472, 21 FR Serv 3d 765, cert den (US) 120 L Ed 2d 888, 112 S Ct 3015 and (not followed on other grounds by *Williams v Clarke* (DC Neb) 823 F Supp 1486).

Footnote 88. *United States v Silverman* (CA11 Fla) 745 F2d 1386, 16 Fed Rules Evid Serv 1316 (in obstruction of justice prosecution, court excluded bad-check-restitution testimony which defendant sought to introduce while cross-examining his former client, in order to create inference that defendant told truth when he said that his conversations with client about paying sum of money dealt with paying restitution and not bribe).

In prosecution for bankruptcy fraud and tax evasion, exclusion of defendant's prior testimony in bankruptcy proceeding to prove substance of his allegedly false statements was not abuse of discretion where probative value was far outweighed by potential to

confuse jury with facts of collateral dispute. *United States v Defazio* (CA7 Ill) 899 F2d 626, 90-1 USTC ¶ 50204, 30 Fed Rules Evid Serv 190, 65 AFTR 2d 90-1010.

Footnote 89. *Laney v Celotex Corp.* (CA6 Mich) 901 F2d 1319, 30 Fed Rules Evid Serv 152.

Footnote 90. § 349.

§ 348 --Evidence excludible because of danger of confusion of issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence which has been excluded on the ground that its potential for confusion of the issues far outweighed its probative value has included:

- Testimony by a witness that the government had attempted to influence him to testify against the defendants, where the witness was not a witness to any of the crimes charged, where the testimony would open the door for the government to get in evidence which the court had earlier excluded, where the defense had questioned several other witnesses about possible government intimidation, and where the testimony would divert the jury's attention to collateral issues 91
- Evidence, in a RICO prosecution of a former municipal judge, of details of the underlying state cases in which the judge had allegedly taken bribes 92
- Evidence, in a criminal prosecution, of a defendant's inability to raise bond, and that he filed a pauper's affidavit 93
- Evidence, in a criminal prosecution, that a government witness lied to authorities concerning dates of her birth and marriage 94
- Evidence, in a prosecution of border patrol officers for coercing sexual favors and sexually abusing illegal aliens, of illegal aliens' prior sexual activities, including prostitution 95
- Evidence that defendant had previously been convicted of state crimes relating to vandalism of a synagogue which was charged in a federal indictment 96
- Cross-examination of an FBI agent for the purpose of establishing the agent's bias through questions about his conversations during an investigation into alleged racketeering and corruption, in particular whether the agent had offered witnesses immunity from prosecution for accepting payoffs if they would testify against the defendant and other members of a county board 97
- Testimony that an FBI agent was aware that a witness had failed certain polygraph examinations relating to his allegedly procured testimony against the defendant 98

- Testimony tending to corroborate a defendant's claim in defense that he had been unwittingly duped into transporting contraband, specifically, that several months earlier the defendant's cousin had duped a stranger 99
- A series of exhibits and accompanying testimony offered by the defendant in support of his argument that there had been no fraudulent intent with regard to a misapplication of bank funds 1
- Comparative statistical data indicating that a discharged insurance agent had a disproportionately higher number of policy holders who had been issued a protective device discount than was the case in other areas of state 2
- Statistical evidence concerning promotions offered by an age discrimination defendant 3
- Cross-examination by a defendant of a government witness concerning her assertion that the defendant had made improper sexual advances toward her, where the defendant's sexual behavior was not an issue in the case, the witness's allegations of sexual harassment by the defendant had been made without the jury present, and the trial judge determined that evidence on this point would have diverted the jury's attention from material issues 4
- Evidence of prior accidents, where it was not established that such prior accidents occurred under conditions substantially similar to those prevailing at the time of the subject occurrence 5
- Evidence relating to a criminal defendant's contention that his indictment was a political instrument to be used coercively against him 6
- Evidence of a witness's poor financial situation offered to impeach his testimony that he gave the defendant a check as a bribe rather than as a loan repayment, in a prosecution for failure to report income on tax returns 7
- Evidence of a guilty plea and a manslaughter charge arising out of the same accident, in a wrongful death action against an automobile manufacturer alleging negligent car design 8
- Tape recordings of conversations between an undercover informant and the defendant's wife concerning a separate and subsequent narcotics transaction, in a prosecution for conspiracy to distribute heroin 9
- Legal references and citations 10

Where evidence is excluded in a criminal case on the ground of confusion of the issues and misleading the jury and it is found that the exclusion was an abuse of discretion that substantially prejudiced the defendant, a new trial may be ordered. For example, it has been held an abuse of discretion to exclude testimony of defendants' witnesses tending to link circumstantially to persons other than the defendants unexplained clues and pieces of evidence introduced at trial and thus to blunt the probative force of the government's circumstantial evidence. 11

◆ Practice guide: Where material offered in evidence may lead to jury confusion, expert testimony, presented under the watchful eye of an experienced trial court, can reduce confusion to a minimum. 12 In addition, expert testimony can avoid the possibility of a jury attempting to include in its award its own uninformed allowance for inapplicable factors, such as income taxes in a personal injury award. 13

◆ Caution: Nevertheless, expert testimony may also be excluded if it leads to confusion of issues or misleading the jury. 14

◆ Observation: It has been noted that confusion of the issues, as a prejudice rule consideration, speaks appropriately to the doctrine of limited admissibility, denoting evidence admitted for one use and not for another, and to the use of evidence from, or the result of, other trials. In these situations, where the jury often is asked to consider evidence for purposes other than the natural ones, the jury is most likely to make a good-faith error. Thus, confusion of the issues is not always the same as prejudice, and the offered testimony may be noninflammatory, encouraging not so much an irrational or emotional result as simply an incorrect one. 15

§ 348 --Evidence excludible because of danger of confusion of issues [SUPPLEMENT]

Case authorities:

On retrial of charge of conspiracy to money launder, district court did not err in excluding evidence relating to underlying transaction of laundering drug money through sale of apartments, of which defendant had been acquitted, given danger of unfair prejudice, confusion of issues, or misleading jury; government never offered instruction that might have aided jury in distinguishing between substantive act and conspiracy. *United States v Morris* (1996, CA5 Miss) 79 F3d 409.

In prosecution arising out of cross burnings, district court properly excluded evidence of government witness' prior state misdemeanor conviction for unlawful use of weapon as having low probative value, great prejudicial impact, and potential to confuse and mislead jury; although witness was facing one-year prison term for violating state supervision term, he faced 18 years in jail for his role in cross burnings had he not cooperated, defendants had opportunity to cross-examine witness about deal he made with government and about his testimony that he was prejudiced against black people. *United States v Hayward* (1993, CA7 Ill) 6 F3d 1241, petition for certiorari filed (Jan 3, 1994).

Exclusion of evidence that occurred prior to § 1983 plaintiff's arrest on grounds that its prejudicial effect outweighed its slight probative value was not abuse of discretion since, although probative of plaintiff's claim that his confession to attempted rape was coerced, trial could quickly have become focused on whether plaintiff was guilty or innocent of attempted rape instead of on alleged constitutional rights violations by arresting officers. *West v Carson* (1995, CA8 Mo) 49 F3d 433, 41 Fed Rules Evid Serv 599.

District court in employment discrimination lawsuit did not err in excluding determination letter issued by EEOC's Washington, DC, office on grounds that danger of confusing issues substantially outweighed admittedly probative value of letter, since

district court was properly concerned that admitting letter would shift jury's focus away from determining whether employer discriminated against plaintiff in terminating her and toward resolving conflicting findings of that letter and one issued by EEOC's Miami office. *Walker v NationsBank N.A.* (1995, CA11 Fla) 53 F3d 1548, 9 FLW Fed C 157, 68 BNA FEP Cas 314.

Footnotes

Footnote 91. *United States v Cole* (CA5 Ga) 670 F2d 35, 10 Fed Rules Evid Serv 46.

Footnote 92. *United States v Glecier* (CA7 Ill) 923 F2d 496, 31 Fed Rules Evid Serv 1517, reh den, en banc (CA7) 1991 US App LEXIS 1460 and cert den (US) 116 L Ed 2d 31, 112 S Ct 54.

Footnote 93. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558.

Footnote 94. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558.

Footnote 95. *United States v Davila* (CA5 Tex) 704 F2d 749, 12 Fed Rules Evid Serv 1775.

Footnote 96. *United States v Greer* (CA5 Tex) 939 F2d 1076, 36 Fed Rules Evid Serv 168, reh, en banc, gr (CA5 Tex) 948 F2d 934 and reinstated, in part, on reh, en banc (CA5 Tex) 968 F2d 433, reh den (CA5) 1992 US App LEXIS 23160 and cert den (US) 122 L Ed 2d 764, 113 S Ct 1390 (holding such evidence was properly excluded since it was neither probative as to why certain other skinheads testified against defendant and was likely to confuse jury as to why it was being asked to render verdict against defendant in light of fact that he had already pleaded guilty to vandalizing temple; evidence could have hampered government unfairly by suggesting that defendant had been convicted and punished for his unlawful conduct).

Footnote 97. *United States v Renfro* (CA5 Miss) 620 F2d 497, 6 Fed Rules Evid Serv 383, cert den 449 US 921, 66 L Ed 2d 149, 101 S Ct 321 (the court noting that if the evidence were admitted, the trial might have devolved into a lengthy dispute about the racketeering charges and the FBI investigation into the defendant and other parties, wasting valuable time and judicial resources and confusing and misleading the jury).

Footnote 98. *United States v Thevis* (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025, reh den (CA5 Ga) 671 F2d 1379 and reh den (CA5 Ga) 671 F2d 1379 and cert den 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and cert den 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and cert den 459 US 825, 74 L Ed 2d 61, 103 S Ct 57.

Footnote 99. *United States v Aboumoussallem* (CA2 NY) 726 F2d 906, 14 Fed Rules Evid Serv 1403 (the court stating that the issue was somewhat close but that trial judges have considerable discretion in balancing FRE Rule 403 factors and that there was no abuse of that discretion in the case).

Footnote 1. *United States v Williams* (CA5 La) 639 F2d 1311, 7 Fed Rules Evid Serv

1518, reh den (CA5 La) 644 F2d 34 and amd 454 US 1096, 70 L Ed 2d 637, 102 S Ct 668 and revd on other grounds 458 US 279, 73 L Ed 2d 767, 102 S Ct 3088, 34 UCCRS 385, on remand (CA5 La) 686 F2d 261.

Footnote 2. *Turner v Allstate Ins. Co.* (CA6 Mich) 902 F2d 1208, 5 BNA IER Cas 722, 115 CCH LC ¶ 56307, 30 Fed Rules Evid Serv 290, reh den, en banc (CA6) 1990 US App LEXIS 10123.

Footnote 3. *Wingfield v United Technologies Corp.* (DC Conn) 678 F Supp 973, 53 BNA FEP Cas 347, 49 CCH EPD ¶ 38707, 24 Fed Rules Evid Serv 1174 (finding that without expert analysis of standard deviation, such evidence is meaningless, confusing, and irrelevant.

In an age discrimination suit, district judge did not abuse its discretion in excluding employer's statistical evidence for the company's Mid-Atlantic region as a whole, while allowing the employer to present statistical evidence concerning employees who were terminated at a branch for a period of 18 months before and 18 months after the dismissal of plaintiff, since it was reasonable to conclude that region-wide statistics would be of limited probative value in determining whether discrimination took place in a particular branch, and court had to take precautions to ensure against juror confusion. *Herold v Hajoca Corp.* (CA4 Va) 864 F2d 317, 48 BNA FEP Cas 972, 48 CCH EPD ¶ 38527, cert den 490 US 1107, 104 L Ed 2d 1022, 109 S Ct 3159, 49 BNA FEP Cas 1896, 50 CCH EPD ¶ 39199.

Footnote 4. *United States v Marvin* (CA8 Mo) 720 F2d 12, 14 Fed Rules Evid Serv 610.

Footnote 5. *Roundtree v Seaboard C. L. R. Co.* (MD Fla) 418 F Supp 220, 1 Fed Rules Evid Serv 561.

Footnote 6. *United States v Johnson* (CA7 Ind) 605 F2d 1025, 4 Fed Rules Evid Serv 1288, cert den 444 US 1033, 62 L Ed 2d 670, 100 S Ct 706.

Footnote 7. *United States v Clavey* (CA7 Ill) 565 F2d 111, on reh, en banc (CA7) 578 F2d 1219, cert den 439 US 954, 58 L Ed 2d 345, 99 S Ct 351.

Footnote 8. *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871.

Footnote 9. *United States v Lyles* (CA2 NY) 593 F2d 182, 3 Fed Rules Evid Serv 928, cert den 440 US 972, 59 L Ed 2d 789, 99 S Ct 1537 and cert den 440 US 975, 59 L Ed 2d 794, 99 S Ct 1545 and cert den 444 US 847, 62 L Ed 2d 61, 100 S Ct 94.

Footnote 10. *United States v Bernhardt* (CA8 Neb) 642 F2d 251, 81-1 USTC ¶ 9301, 7 Fed Rules Evid Serv 1222, 47 AFTR 2d 81-959.

Footnote 11. *United States v Larson* (CA8 Minn) 596 F2d 759.

Footnote 12. *Hooks v Washington Sheraton Corp.*, 188 US App DC 71, 578 F2d 313, appeal after remand (App DC) 30 FR Serv 2d 626.

Footnote 13. *Hooks v Washington Sheraton Corp.*, 188 US App DC 71, 578 F2d 313, appeal after remand (App DC) 30 FR Serv 2d 626.

Footnote 14. § 351.

Footnote 15. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 So Cal L Rev 220, 240-241 (1976).

§ 349 Danger of misleading the jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of misleading the jury. 16 This rule applies to expert 17 and documentary evidence. 18 The courts frequently fail to make a distinction between the danger of confusion 19 and the danger of misleading the jury, and will exclude testimony on the ground that it is both confusing and misleading. 20

◆ Observation: It has been noted that misleading the jury is not synonymous with confusing the issues, and that while it is true that evidence which confuses the issues is likely to mislead as well, the reverse is not always true. 21

§ 349 ----Danger of misleading the jury [SUPPLEMENT]

Case authorities:

In strict products liability case against stove manufacturer, court will allow and disallow certain evidence of victim's alcohol use under FRE 403, where evidence consists of testimony that victim drank 2 vodka tonics before dinner, and that serum alcohol test performed after stove fire erupted and burned victim later in evening showed that alcohol level was 0.075 about 11 p.m., because evidence that victim drank 2 cocktails will not confuse or distract jury, but admitting evidence of her serum alcohol would necessitate minitrial on issue of validity, extrapolation, conversion, and contextual meaning of level, given complications caused by burn injuries and their treatment, and such conjectural evidence would be highly prejudicial to victim and only serve to confuse and distract jury from pivotal issue of failure to provide warnings on stove. *Kempe v Dometic Corp.* (1994, DC Del) 866 F Supp 817.

Footnotes

Footnote 16. FRE Rule 403; Uniform Rules of Evidence Rule 403.

Footnote 17. § 351.

Footnote 18. § 352.

Footnote 19. § 347.

Footnote 20. *United States v Durrani* (DC Conn) 659 F Supp 1183, 22 Fed Rules Evid Serv 1828, *affd* (CA2 Conn) 835 F2d 410, 24 Fed Rules Evid Serv 535; *United States v Renfro* (CA5 Miss) 620 F2d 497, 6 Fed Rules Evid Serv 383, *cert den* 449 US 921, 66 L Ed 2d 149, 101 S Ct 321; *United States v Larson* (CA8 Minn) 596 F2d 759; *State v Wright* (Fla App D1) 473 So 2d 268, 10 FLW 1806, *review den* (Fla) 484 So 2d 10; *Buzzell v Bliss* (Minn App) 358 NW2d 695, CCH Prod Liab Rep ¶ 10359; *State v Miller* (Utah) 709 P2d 350.

In sexual battery prosecution, where defense claimed that rapes as described by 14-year-old victim were unlikely, if not impossible, because of large size of defendant's penis, trial court did not abuse discretion in refusing to admit photographs and models of defendant's penis and in refusing to allow defendant to display his penis to the jury, as evidence was of dubious probative value and was potentially confusing and misleading. *State v Wright* (Fla App D1) 473 So 2d 268, 10 FLW 1806, *review den* (Fla) 484 So 2d 10.

See *State v Risdal* (Iowa) 404 NW2d 130, affirming a defendant's conviction of sexual abuse of two minor boys, holding that evidence offered to show that child victims who described the sexual incidents did not lack the background from which to fabricate the occurrence would not have been admissible, since the evidence of prior sexual activity was of marginal probative value and was certainly outweighed by the substantial danger of unfair prejudice, confusion of issues, misleading of the jury, and the invasion of the victims' privacy, which the rape shield laws were designed to prevent.

Footnote 21. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 Southern Cal L Rev 220, 241-242 (1976).

§ 350 --Evidence excludible because of danger of misleading the jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Among the types of evidence which have been excluded on grounds that the danger of misleading the jury substantially outweighed its probative value are:

- Portions of an engine overhaul report not pertaining to the mechanical parts allegedly improperly installed, in a negligence action arising from an airplane crash 22
- A certified copy of a driver's guilty plea to manslaughter charges arising out of a collision, in a tort action alleging negligent design of a vehicle's fuel tank as the cause of death of a passenger 23
- Evidence of canceled checks cashed by a defendant accused of cashing bribery checks from another company, in an extortion and bribery trial 24

- Testimony consisting of an ambiguous answer by a physician in response to an extremely complicated cross-examination question, in a deposition taken for a workers' compensation case 25
- Testimony of two associates of a defendant convicted for federal tax evasion to the effect that one of the associates was known to have the character trait of being "closed mouthed," the defendant's theory being that a government agent had given certain information to the associate as part of an effort to "frame" the defendant and that the associate had been particularly selected for the frameup because the associate was known to be "closed mouthed" and thus unlikely to discuss the matter with anyone, including the defendant 26
- Testimony that an FBI agent was aware that a witness had failed certain polygraph examinations relating to his allegedly procured testimony against the defendant, the court stating that the probative value of the evidence was slight while the risk of jury confusion was high 27
- Testimony concerning two murders which occurred in the prison wherein the defendants, charged with attempting to escape, were incarcerated, the defendants attempting to link the murders with their fear of harm and resulting compulsion to flee the prison 28
- Circumstantial evidence to show that the defendant did not receive large sums of money that a government witness claimed he had received, including an attempt to show that the defendant was unable to raise a bond fund and filed pauper's affidavit, in a conspiracy prosecution 29
- Evidence, in a slip and fall case, of the subsequent condition of a store's floors since its probative value was quite low and might have misled the jury 30
- Evidence, in products liability case, of post-accident revision of an aircraft shop manual, since it could have been construed by the jury as an admission that instructions for the aircraft that crashed were defective and thereby divert the jury from issue whether product was defective at the relevant time 31
- Evidence of a drug courier profile, in a prosecution for trying to board a plane carrying a firearm, in the absence of evidence linking the defendant to the drug trade, because of the risk of misleading the jury to focus on drug crimes 32

Photographic evidence may be excluded where it may tend to mislead the jury. 33

- ◆ Caution: Evidence of experiments creates a danger of misleading members of the jury who may attach exaggerated significance to the test. An experiment which purports to simulate the circumstances of an event, but which does not do so, is likely to be misunderstood by the jury and given exaggerated weight when the evidence is of no probative value. 34

§ 350 --Evidence excludible because of danger of misleading the jury
[SUPPLEMENT]

Case authorities:

District court did not abuse its discretion in excluding from government's case-in-chief in prosecution for violations of Export Administration Act 13 exhibits consisting of records of meetings of industry working group, newspaper clippings discussing Indian government's missile program, defendants' registrations and renewal applications filed with State Department, and Indian Defense Laboratory's request for proposals for carbon/carbon processing facility for which defendant submitted winning bid, since, although exhibits had some relevance to issue of whether defendants knew that control panel for hot isostatic press required individual license, district court had every reason to be concerned that exhibits would be unfairly prejudicial as tending to suggest that defendants knew they were aiding project to develop missile technology for Indian government and that use of exhibits could divert jury's attention from whether commodity is listed and known to be and whether it is to be used for military purposes. *United States v Lachman* (1995, CA1 Mass) 48 F3d 586, 41 Fed Rules Evid Serv 339.

District court did not abuse its discretion in refusing to allow defendant to reopen case to present testimony of alibi witness where court had granted additional time for witnesses to appear and ordered closing arguments to begin when witnesses did not appear by end of that time period; allowing testimony of witness after closing arguments would possibly have provided defendant with unfair advantage and quite possibly confused jury. *United States v Wilson* (1994, CA6 Ohio) 27 F3d 1126, 1994 FED App 226P, reh, en banc, den (1994, CA6 Ohio) 1994 US App LEXIS 23935 and cert den (1994, US) 1994 US LEXIS 7763.

Footnotes

Footnote 22. *Benna v Reeder Flying Service, Inc.* (CA9 Alaska) 578 F2d 269, 3 Fed Rules Evid Serv 396.

Footnote 23. *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871.

Footnote 24. *United States v Hathaway* (CA1 Mass) 534 F2d 386, cert den 429 US 819, 50 L Ed 2d 79, 97 S Ct 64.

Footnote 25. *Wright v Hartford Acci. & Indem. Co.* (CA5 Tex) 580 F2d 809, 3 Fed Rules Evid Serv 870.

Footnote 26. *United States v Klein* (SD NY) 474 F Supp 1243, 5 Fed Rules Evid Serv 61, affd without op (CA2 NY) 614 F2d 1292, cert den 447 US 905, 64 L Ed 2d 853, 100 S Ct 2985.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 27. *United States v Thevis* (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025,

reh den (CA5 Ga) 671 F2d 1379 and reh den (CA5 Ga) 671 F2d 1379 and cert den 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and cert den 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and cert den 459 US 825, 74 L Ed 2d 61, 103 S Ct 57.

Footnote 28. *United States v Garza* (CA7 Ill) 664 F2d 135, cert den 455 US 993, 71 L Ed 2d 854, 102 S Ct 1620 (noting that the significant delay between the murders and the escape suggested the limited probative value of the murder evidence and that such evidence would have necessitated a trial within a trial just to prove certain inmates had harmed others and now sought to harm the defendants, other defense witnesses having already established that the defendants were in danger).

Footnote 29. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558.

Footnote 30. *Le Boeuf v K-Mart Corp.* (CA5 La) 888 F2d 330, 28 Fed Rules Evid Serv 959.

Footnote 31. *Mills v Beech Aircraft Corp.* (CA5 Miss) 886 F2d 758, 28 Fed Rules Evid Serv 1231, 15 FR Serv 3d 342.

Footnote 32. *United States v Simpson* (CA4 Va) 910 F2d 154, 30 Fed Rules Evid Serv 1219.

Footnote 33. *King v Ford Motor Co.* (CA5 Ala) 597 F2d 436, 4 Fed Rules Evid Serv 512 (photographs of allegedly malfunctioning motor vehicle chassis, taken after it was manufactured into a truck, in action for injuries allegedly suffered as result of such malfunction); *United States v Akers*, 226 US App DC 408, 702 F2d 1145, 12 Fed Rules Evid Serv 1304 (photographs offered to support claim that police officers were unable to see occurrences to which they testified, court observing that photographs did not depict view police officers had).

Where accident occurred at night, evidence of photographs taken at the scene of the accident during daylight hours would be excluded as misleading, since they distorted the accident scene with respect to contours, terrain, and distances involved. *Featherly v Continental Ins. Co.*, 73 Wis 2d 273, 243 NW2d 806.

Footnote 34. *Barnes v General Motors Corp.* (CA5 Miss) 547 F2d 275.

§ 351 Expert testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The possibility of confusion of the issues or misleading the jury can lead to the exclusion of expert testimony, 35 including that presented by the defendant. 36 A false aura of scientific infallibility, coupled with low probative value of the evidence, increases courts' resistance to admitting some expert evidence, since it multiplies the hazards of

misleading a jury. 37 Moreover, expert testimony may be excluded 38 where it is cumulative in nature and will foster a battle of the experts. 39 Thus, expert testimony of a clinical psychologist about characteristics of "typical" child sexual offender has been excluded. 40 Furthermore, where a psychologist who did not interview the victim of alleged sexual abuse would have testified that interview techniques used on victim were professionally disfavored, exclusion on ground of danger of confusion was proper so as to avoid a "trial within trial" as to the adequacy of the investigation. 41

Exclusion of expert witnesses' testimony on the meaning of a taped conversation on money laundering, on basis of confusion was not erroneous where the court did permit the participants in the conversations to testify and the expert's testimony represented a third party's appraisal of events in which he was not involved. 42 But when defendant raises "reverse-sting" defense, expert psychological testimony should be admissible on issue of whether the mental condition of defendant rendered him incapable of forming the requisite intent. 43

§ 351 ----Expert testimony [SUPPLEMENT]

Practice Aids: Admissibility of expert psychological evidence in the federal courts, 27 Ariz St LJ 4:1315 (1996).

Footnotes

Footnote 35. *Rogers v Raymark Industries, Inc.* (CA9 Cal) 922 F2d 1426, 91 CDOS 319, 91 Daily Journal DAR 380, 31 Fed Rules Evid Serv 1231 (exclusion of expert testimony in asbestos case brought by widow of shipyard welder where expert's description of shipyard insulation techniques would have been relevant only to that portion of deceased's work experience which put him in close proximity to insulators, and jury might have been confused into equating expert's description of life as insulator with life as welder).

Court need not permit calling an expert witness who would change the theory of the case at the eleventh hour. *Goldberg v National Life Ins. Co.* (CA2 NY) 774 F2d 559, 19 Fed Rules Evid Serv 567.

Footnote 36. *United States v MacDonald* (CA4 NC) 688 F2d 224, 11 Fed Rules Evid Serv 474, cert den 459 US 1103, 74 L Ed 2d 951, 103 S Ct 726, habeas corpus proceeding (ED NC) 640 F Supp 286, later proceeding (ED NC) 607 F Supp 1183 and affd (CA4 NC) 779 F2d 962, 19 Fed Rules Evid Serv 1151, cert den 479 US 813, 93 L Ed 2d 22, 107 S Ct 63, habeas corpus den (ED NC) 778 F Supp 1342, affd (CA4 NC) 966 F2d 854, cert den (US) 121 L Ed 2d 542, 113 S Ct 606 (no error in exclusion of testimony of forensic psychiatrist who would state opinion that defendant had personality configuration inconsistent with outrageous and senseless murders with which he was charged).

Generally, as to grounds for limiting expert opinion, see 75 Am Jur 2d, Trial § 342.

Annotation: Evidence offered by defendant at federal criminal trial as inadmissible,

under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 37. Re "Agent Orange" Product Liability Litigation (ED NY) 611 F Supp 1223.

Footnote 38. Under FRE Rule 403.

Footnote 39. United States v MacDonald (CA4 NC) 688 F2d 224, 11 Fed Rules Evid Serv 474, cert den 459 US 1103, 74 L Ed 2d 951, 103 S Ct 726; United States v Schmidt (CA5 Tex) 711 F2d 595, 13 Fed Rules Evid Serv 1415, reh den (CA5 Tex) 716 F2d 901 and cert den 464 US 1041, 79 L Ed 2d 169, 104 S Ct 705 (no error in exclusion of testimony by linguistics expert that allegedly would have supported defense that falsehoods which might have been stated by defendant were not knowingly and willingly uttered; United States v Thevis (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025, reh den (CA5 Ga) 671 F2d 1379 and reh den (CA5 Ga) 671 F2d 1379 and cert den 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and cert den 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and cert den 459 US 825, 74 L Ed 2d 61, 103 S Ct 57 (court excluded testimony of polygraph examiner offered by defendant).

Footnote 40. State v Miller (Utah) 709 P2d 350.

Footnote 41. State v Russell (Me) 571 A2d 229.

Footnote 42. United States v Allibhai (CA5 Tex) 939 F2d 244, 33 Fed Rules Evid Serv 1030, cert den (US) 117 L Ed 2d 133, 112 S Ct 967.

Footnote 43. United States v Roberts (CA5 Tex) 887 F2d 534, 28 Fed Rules Evid Serv 1523.

§ 352 Documentary evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Documentary evidence may be excluded where its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury, either alone or in conjunction with other factors. 44 Among the types of documentary evidence which have been excluded on grounds that the danger of confusion of issues or misleading the jury substantially outweighed its probative value are:

- The President's Special Review Board report on the Iran/Contra affair (the Tower Report), which a businessman charged with violations of the Arms Export Control Act claimed constituted a factual finding that there was a widespread scheme by the United States to ship missile parts to Iran in exchange for hostages in Lebanon 45
- Classified documents pertaining to foreign intelligence activities of a defendant where

the evidence did not prove defendant's claim that he was innocent of swindling investors because the CIA had instructed him to spend investor money, where the evidence may have confused the jury and delayed the trial, the government's witnesses testified about defendant's CIA contacts and the defendant introduced evidence that the CIA knew of the expenditures 46

- Over 200 pages of official documents relating to the bankruptcy of a government witness offered by defendants convicted of securities fraud, mail fraud, wire fraud, and conspiracy, where no specific part of the documents were pointed out to court or jury as being inconsistent with the testimony of the government witness and only a relatively small number of excerpts bore at all on relevant subject 47
- An affidavit by the wife of a government operative probative of the operative's receipt of a kickback, and other affidavits from the defendant's trial counsel and one of his associates, supporting defendant's claim that this newly discovered evidence would enable him to prove that the operative had received kickbacks, where the probative weight of the evidence was substantially outweighed by the dangers of confusion and delay 48
- A medical publication offered in an action against a drug manufacturer for harm caused to a patient by the drug 49
- Tax returns sought to be introduced by defendant to show that he was in the upholstery business at the time of claimed drug offenses and thus had no need to look to drug trafficking for income 50
- Documentary evidence proving the validity of debts owed to a defendant 51
- Exhibits involving fuel tests, in an action arising from a plane crash, which were allegedly conducted so as to give false readings as to the amount of unusable fuel in cells, resulting in the pilot receiving misleading data, where there was no evidence that the pilot relied upon any misrepresentation and where exhibits did not mention auxiliary cells which were ones referred to as defective in the answers to interrogatories and in the pretrial order 52
- Hospital records containing technical medical terminology and depicting results of an electrocardiogram, and not accompanied by direct medical testimony 53
- Bills for medical expenses incurred by a railroad employee in an FELA action where the bills had been paid by an insurance company under a policy for which the railroad, not the employee, paid premiums, since the employee could not recover expenses reflected in the bills, they bore little relevance to case and jury might have been confused and possibly awarded double recovery 54

§ 352 ----Documentary evidence [SUPPLEMENT]

Case authorities:

In suit against union for breach of duty of fair representation, trial court did not err in excluding evidence that NLRB elected not to issue complaint in case since documents did not provide factual basis for NLRB's conclusion of insufficient evidence and jury was

likely to have assigned greater value to decision than it was worth. *Black v Ryder/P.I.E. Nationwide* (1994, CA6 Tenn) 15 F3d 573, 145 BNA LRRM 2387, 127 CCH LC ¶ 11008, 1994 FED App 31P.

Footnotes

Footnote 44. Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 ALR Fed 700.

Footnote 45. *United States v Durrani* (DC Conn) 659 F Supp 1183, 22 Fed Rules Evid Serv 1828, *affd* (CA2 Conn) 835 F2d 410, 24 Fed Rules Evid Serv 535 (the court noting that to the extent that certain portions of the report were relevant, the businessman failed to show that the probative value of the entire report outweighed the danger of confusing the issues, misleading the jury, and delaying the trial unduly).

Footnote 46. *United States v Rewald* (CA9 Hawaii) 889 F2d 836, 29 Fed Rules Evid Serv 145, 103 ALR Fed 159, *amd* (CA9) 902 F2d 18 and *cert den* 498 US 819, 112 L Ed 2d 39, 111 S Ct 64.

Footnote 47. *United States v King* (CA2 NY) 560 F2d 122, 2 Fed Rules Evid Serv 1121, *cert den* 434 US 925, 54 L Ed 2d 283, 98 S Ct 404.

Footnote 48. *United States v Thompson* (CA2 NY) 710 F2d 915, 13 Fed Rules Evid Serv 584, *cert den* 464 US 1039, 79 L Ed 2d 167, 104 S Ct 702.

Footnote 49. *Apicella v McNeil Laboratories, Inc.* (ED NY) 66 FRD 78, 19 FR Serv 2d 1360.

Footnote 50. *United States v Williams* (CA5 Ga) 613 F2d 560; *United States v Tidwell* (CA5 Fla) 559 F2d 262, 2 Fed Rules Evid Serv 185, *reh den* (CA5 Fla) 564 F2d 98 and *cert den* 435 US 942, 55 L Ed 2d 538, 98 S Ct 1520.

Footnote 51. *United States v Miller* (CA8 SD) 725 F2d 462, 14 Fed Rules Evid Serv 1656 (court noting that defendants' attempt to characterize transaction as good-faith and legitimate debt collection attempt was misleading and diverted attention from crimes for which they were charged).

Footnote 52. *Rigby v Beech Aircraft Co.* (CA10 Utah) 548 F2d 288.

Footnote 53. *McDougall v Thomas* (DC Dist Col) 17 Fed Rules Evid Serv 353.

Footnote 54. *Varhol v National R. Passenger Corp.* (CA7 Ill) 909 F2d 1557, 30 Fed Rules Evid Serv 1152, 17 FR Serv 3d 1.

4. Undue Delay or Waste of Time [353, 354]

§ 353 General principles

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 403 provides for discretionary exclusion of relevant evidence where its probative value is substantially outweighed by considerations of undue delay or waste of time. 55 The danger of waste of time increases when the proffered evidence is of low probative value and is confusing to the jury. 56 In complex and protracted litigation, waste of the factfinder's time is a particularly telling factor. 57

In a number of cases, relevant evidence has been excluded on such grounds, by—

—denying inquiry on cross-examination into the contents of the defendant's diaries, on the collateral issue of credibility, in a suit against a stockbroker alleging churning of accounts. 58

—refusing, in a products liability suit, to admit evidence about the collapse of another wheel manufactured by the defendant because otherwise it would be necessary to present a considerable amount of extrinsic evidence to determine whether the incidents were sufficiently similar. 59

—excluding evidence of victim's altercation with police officer three years earlier, in a case charging a Secret Service Agent with the use of excessive force, since the potential delay from allowing a mini-trial on plaintiff's conduct outweighed any likely probative value such inquiry would yield upon the question whether the agent used excessive force upon the plaintiff. 60

—excluding classified documents relating to a claim that the CIA required defendant to spend investor money where the evidence would have considerably delayed an already lengthy trial. 61

—limiting a line of inquiry relating to an Internal Revenue Service agent's suspicions of being monitored, where the questioning was bordering on the marginally relevant, in a prosecution for electronic eavesdropping on Internal Revenue Service agents. 62

—precluding introduction of evidence of a transaction in which a criminal defendant took no part, the evidence being of limited probative value, in a prosecution for failure to report income tax. 63

—excluding evidence of government offers of leniency to defendants in exchange for their cooperation, which was of doubtful relevancy to the issue of guilt or innocence, in a prosecution for kidnapping. 64

—excluding expert testimony as to community standards in effect more than four years prior to defendant's obscenity trial. 65

However, evidence should not be excluded on the ground of delay or waste of time when the proffered evidence is of central importance to the case. 66 And in a criminal

prosecution, it has been held that the court cannot permit the prosecution to present its case and then deny defendant's motion to present his defense on the ground that it would be too time-consuming. 67

◆ Practice guide: Although a trial court has inherent power to ensure that cases proceed before it in a timely fashion, 68 it has been suggested that in a protracted case of several months' duration, the purpose of FRE Rule 403 can best be achieved by considering time in the aggregate and leaving to counsel the initial responsibility for making individual selections as to the relative degree of probative value for the mass of evidence available. In accomplishing this purpose, it is appropriate for the court to establish an absolute limit on the number of days available for a party to conclude presentation of its case, in light of the progress of the case to that point. 69 But there is contrary authority to the effect that a judge may not set strict time limits for a trial. 70

Footnotes

Footnote 55. FRE Rule 403; Uniform Rules of Evidence, Rule 403.

Footnote 56. Re "Agent Orange" Product Liability Litigation (ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144.

Annotation: Propriety under Rule 403 of the Federal Rules of Evidence, permitting exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, of attack on credibility of witness for party, 48 ALR Fed 390.

Footnote 57. Re "Agent Orange" Product Liability Litigation (ED NY) 611 F Supp 1223, 18 Fed Rules Evid Serv 144.

Footnote 58. Van Alen v Dominick & Dominick, Inc. (CA2 NY) 560 F2d 547, CCH Fed Secur L Rep ¶ 96136, 2 Fed Rules Evid Serv 168.

Footnote 59. Wilson v Bicycle South, Inc. (CA11 Ga) 915 F2d 1503, 31 Fed Rules Evid Serv 682.

Footnote 60. United States v Schatzle (CA2 NY) 901 F2d 252, 29 Fed Rules Evid Serv 1246.

Footnote 61. United States v Rewald (CA9 Hawaii) 889 F2d 836, 29 Fed Rules Evid Serv 145, 103 ALR Fed 159, and (CA9) 902 F2d 18 and cert den 498 US 819, 112 L Ed 2d 39, 111 S Ct 64 (noting that defendant had introduced other evidence that CIA required him to travel abroad).

Footnote 62. United States v Duncan (CA4 NC) 598 F2d 839, 4 Fed Rules Evid Serv 848, cert den 444 US 871, 62 L Ed 2d 96, 100 S Ct 148.

Footnote 63. United States v Clavey (CA7 Ill) 565 F2d 111, on reh, en banc (CA7) 578 F2d 1219, cert den 439 US 954, 58 L Ed 2d 345, 99 S Ct 351.

Footnote 64. United States v Callahan (DC Minn) 442 F Supp 1213, 2 Fed Rules Evid

Serv 890, later proceeding (DC Minn) 455 F Supp 524, revd on other grounds (CA8 Minn) 596 F2d 759.

Footnote 65. State v Loshin (Hamilton Co) 34 Ohio App 3d 62, 517 NE2d 229, motion overr (on ground that such evidence would cause undue delay or was needlessly cumulative).

Footnote 66. Busby v Orlando (CA11 Fla) 931 F2d 764, 55 BNA FEP Cas 1466, 56 CCH EPD ¶ 40860, 33 Fed Rules Evid Serv 760 (superseded by statute as stated in Wilson v Gillis Advertising Co. (ND Ala) 61 CCH EPD ¶ 42245).

It was error to exclude evidence plainly relevant to the issue of damages, where trial court seemed to have been prompted chiefly, if not solely, by court's impatience about the length of the trial. Bower v O'Hara (CA3 VI) 759 F2d 1117.

Footnote 67. State v Elliott (App) 96 NM 798, 635 P2d 1001.

Confusion or delay resulting from admission of testimony tending to show bias of a prosecution's sole identification witness would have to be overwhelming to satisfy the balancing test of FRE Rule 403. United States v Harvey (CA2 NY) 547 F2d 720, 1 Fed Rules Evid Serv 449.

Footnote 68. 75 Am Jur 2d, Trial § 182.

Footnote 69. SCM Corp. v Xerox Corp. (DC Conn) 77 FRD 10, 1978-2 CCH Trade Cases ¶ 62399, 2 Fed Rules Evid Serv 485, 25 FR Serv 2d 22.

Footnote 70. See Johnson v Ashby (CA8 Neb) 808 F2d 676, 22 Fed Rules Evid Serv 533, where the court disapproved a ruling that each party would have three days to divide between opening statement, direct and cross-examination, and closing argument, but did not reverse since appellant failed to make timely objection and offer of proof.

And see Flaminio v Honda Motor Co. (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968, criticizing the trial court for allocating 18 hours to plaintiff and 15 hours to defendant since the effect was to "engender an unhealthy preoccupation with the clock," and noting that the discussion of the precise method of time-keeping resulted in "a method that made the computation almost as complicated as in a professional football game."

§ 354 Effect of "surprise"

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While a few jurisdictions list "surprise" or "harmful surprise" as a ground for exclusion of evidence similar to undue delay, 71 neither the Federal or Uniform version of Rule 403 makes any reference to surprise. 72 The same is true of the California and New Jersey evidence codes. 73

◆ Practice guide: Continuance may be a more appropriate remedy for surprise rather than total exclusion of the evidence. 74 Nevertheless, the actions of trial courts rejecting requests for continuances based on surprise have generally been upheld. 75 And in a Uniform Rule state it has been held that testimony which results in surprise may be excluded if surprise would require a continuance causing undue delay. 76

Footnotes

Footnote 71. See Oklahoma version of Rule 403, cited in 13A Uniform Laws Annotated, Rules of Evidence, Note to Rule 403. See also Kansas and Utah statutes cited in Louisell and Mueller, Federal Evidence (Rev. 1985) § 130.

Footnote 72.

◆ Comment: The Advisory Committee Notes to FRE Rule 403 point out that the rule does not enumerate surprise as a ground for exclusion.

Footnote 73. See Louisell and Mueller, Federal Evidence (Rev. 1985) § 130.

Footnote 74. Shelak v White Motor Co. (CA5 Tex) 581 F2d 1155, 26 FR Serv 2d 355, appeal after remand (CA5 Tex) 636 F2d 1069; Le Maire v United States (CA10 Colo) 826 F2d 949, 23 Fed Rules Evid Serv 938.

Footnote 75. Conway v Chemical Leaman Tank Lines, Inc. (CA5 Tex) 687 F2d 108, 11 Fed Rules Evid Serv 1895, 34 FR Serv 2d 1485, reh den (CA5 Tex) 693 F2d 133; United States v Nakaladski (CA5 Fla) 481 F2d 289, cert den 414 US 1064, 38 L Ed 2d 469, 94 S Ct 570 and cert den 414 US 1064, 38 L Ed 2d 469, 94 S Ct 570.

Footnote 76. Lease America Corp. v Insurance Co. of North America, 88 Wis 2d 395, 276 NW2d 767.

5. Cumulative Evidence [355, 356]

§ 355 General rule as to admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Relevant evidence may be excluded if it will result in needless presentation of cumulative evidence. 77 This is a codification of the common-law rule that even though proffered evidence is otherwise relevant to the issues in a case, it will not be considered relevant and material, and therefore admissible, where it is merely surplusage 78 or cumulative.

79

The court has considerable latitude in exercising its discretion to exclude relevant but cumulative evidence, 80 although it would be error to exclude a witness's relevant noncumulative testimony. 81 Clearly, allegedly cumulative evidence may be admitted if more probative than prejudicial. 82 Photographs have frequently been held admissible even though clearly cumulative of other evidence. 83

In a criminal case, exclusion of impeachment testimony sought to be introduced by a defendant on the basis of cumulative evidence is only proper where the exclusion is weighed against the Sixth Amendment right to have compulsory process for obtaining witnesses in the defendant's favor. 84

◆ Practice guide: Exclusion of needlessly cumulative evidence may be made either during the presentation of the case in chief or during rebuttal. 85

§ 355 ----General rule as to admissibility [SUPPLEMENT]

Case authorities:

In a hearing to determine whether a sexually abused child should be allowed supervised visitation with his parents and whether he should be moved from Durham to Cumberland County, the trial court did not err in refusing to allow the child's therapist to testify concerning her therapy session with the child following the child's in-court revelation of an incident of sexual abuse at his group home in Durham, since that testimony would have been cumulative. *In re Chasse* (1994) 116 NC App 52, 446 SE2d 855.

The trial court in a personal injury action did not err in excluding affidavits by plaintiff, the investigating officer, and the clerk of court, since plaintiff's affidavit was merely cumulative; the other two affidavits simply stated the offense of which defendant was convicted; and the offense of which defendant was eventually convicted had no bearing on the issue of plaintiff's contributory negligence at the time of the accident. *Goodman v Connor* (1994) 117 NC App 113, 450 SE2d 5, review den 338 NC 668, 453 SE2d 177.

Footnotes

Footnote 77. FRE Rule 403; Uniform Rules of Evidence, Rule 403.

As to a trial judge's right to exclude evidence as cumulative, see 75 Am Jur 2d, Trial §§ 337-340.

Footnote 78. *Layton v Campbell*, 155 Ala 220, 46 So 775.

Footnote 79. *Edmonds v State*, 163 Neb 323, 79 NW2d 453.

Footnote 80. *United States v Hearst* (CA9 Cal) 563 F2d 1331, 2 Fed Rules Evid Serv 1149, reh den (CA9 Cal) 573 F2d 579 and cert den 435 US 1000, 56 L Ed 2d 90, 98 S Ct 1656.

See also, as to the exclusion of cumulative evidence, 75 Am Jur 2d, Trial §§ 337-340.

Footnote 81. *International Halliwell Mines, Ltd. v Continental Copper & Steel Industries, Inc.* (CA2 NY) 544 F2d 105.

Evidence of defendant's criminal conviction for mail and wire fraud was not cumulative of other evidence that he had committed fraud as to be inadmissible, rather it served to confirm what other evidence merely suggested, that is, that defendant in fact orchestrated the very loan bond scheme for which plaintiffs were seeking money damages. *Veranda Beach Club Ltd. Partnership v Western Surety Co.* (CA1 Mass) 936 F2d 1364, 33 Fed Rules Evid Serv 809, 20 FR Serv 3d 409.

Footnote 82. Evidence of telephone orders placed by defendant were admissible in his trial for wire fraud despite allegation that it was cumulative of previous testimony and therefore prejudicial, since, in light of scheme charged, repetition of evidence was itself distinctly probative. *United States v Santagata* (CA1 RI) 924 F2d 391, 32 Fed Rules Evid Serv 219.

Footnote 83. *Fairchild v State*, 284 Ark 289, 681 SW2d 380, cert den 471 US 1111, 85 L Ed 2d 862, 105 S Ct 2346, post-conviction proceeding 286 Ark 191, 690 SW2d 355, habeas corpus den (ED Ark) 675 F Supp 469, affd (CA8 Ark) 857 F2d 1204, cert den 488 US 1051, 102 L Ed 2d 1007, 109 S Ct 884, habeas corpus den (ED Ark) 744 F Supp 1429, affd (CA8 Ark) 900 F2d 1292, reh den, stay den, en banc (CA8) 1990 US App LEXIS 10967, habeas corpus proceeding (CA8 Ark) 912 F2d 269, motion den (US) 1990 US LEXIS 5576 and stay den, cert den 497 US 1052, 111 L Ed 2d 834, 111 S Ct 21 and appeal after remand (CA8 Ark) 979 F2d 636, reh, en banc, den (CA8) 1992 US App LEXIS 33831 and cert den (US) 125 L Ed 2d 735, 113 S Ct 3051, reh den (US) 125 L Ed 2d 778, 114 S Ct 27, motion den (CA8 Ark) 5 F3d 1124 and stay den.

A photograph of that portion of a murder victim's body showing the wounds inflicted was properly admissible even though it was cumulative and there was no dispute as to the location of the wound. *Robinson v State* (Ala App) 342 So 2d 1331.

Footnote 84. *United States v Davis* (CA5 Ga) 639 F2d 239, 7 Fed Rules Evid Serv 1510.

Footnote 85. *Bowman v General Motors Corp.* (ED Pa) 427 F Supp 234.

§ 356 Cumulative evidence found excludible

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The courts have held or recognized that relevant evidence may be excluded as constituting needless presentation of cumulative evidence where:

- A defendant wished to call additional character witnesses 86
- The evidence consisted of a tire manufacturer's internal memorandum setting forth the rate of defects in tires manufactured in a particular year, the company quality control

engineer having already testified as to the contents of the memorandum and the meaning of the statistics in it 87

- Evidence is offered on an uncontested fact, and the probative value of such evidence is relatively slight 88
- Proffered rebuttal testimony will simply rehash a party's basic theory of the case 89
- The testimony of several witnesses would be the same, and one witness's testimony would be sufficient 90
- The testimony would add little to statistical evidence already before the court 91
- Evidence of additional similar accidents in a products liability case, although relevant to dangerousness of product, would result in a parade of accident victims which carries the risk of unfair prejudice 92

Where a party seeks to present extensive evidence, such as a lengthy tape recording, a denial of a request to present such evidence in its entirety is no abuse of discretion, where the adverse party is not precluded from presenting pertinent portions, and the party makes no showing that the more selective and less time-consuming approach would be inadequate for his purposes, particularly where witnesses are permitted to testify freely and at length about what is contained in such evidence. 93

§ 356 ----Cumulative evidence found excludible [SUPPLEMENT]

Case authorities:

There was no prejudicial error in a first-degree murder prosecution where a psychologist was not allowed to testify that a person with the deceased's blood alcohol level would be more irritable and more prone to act on emotions where there was testimony that the deceased was a violent man and wild when drinking. Defendant was able to present stronger evidence of the deceased's violent nature than the testimony of the psychologist. *State v Bunning* (1994) 338 NC 483, 450 SE2d 462.

In a capital prosecution for first- degree murder, the trial court was correct in not allowing questions about family history and mental illness without a foundation establishing whether defendant's mental illness was hereditary; no prejudice resulted from disallowing a witness' testimony about defendant's background and character where the same or similar evidence was admitted through other witnesses; and no determination of whether exclusion of evidence constituted error could be made where no offer of proof was made. *State v Lynch* (1995) 340 NC 435, 459 SE2d 679.

In a hearing to determine whether a sexually abused child should be allowed supervised visitation with his parents and whether he should be moved from Durham to Cumberland County, the trial court did not err in refusing to allow the child's therapist to testify concerning her therapy session with the child following the child's in-court revelation of an incident of sexual abuse at his group home in Durham, since that testimony would have been cumulative. *In re Chasse* (1994) 116 NC App 52, 446 SE2d 855.

Footnotes

Footnote 86. *United States v Garrett* (CA5 Tex) 716 F2d 257, 14 Fed Rules Evid Serv 366, reh den (CA5 Tex) 720 F2d 1291 and cert den 466 US 937, 80 L Ed 2d 459, 104 S Ct 1910 (defendant had already called 8 character witnesses and wanted to call 10 additional ones); *United States v Edwards* (CA5 Tex) 702 F2d 529, 12 Fed Rules Evid Serv 1313 (defendant who had already presented 5 character witnesses moved for a continuance to present 25 additional character witnesses who would testify as to his reputation).

Annotation: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327.

Footnote 87. *Baker v Firestone Tire & Rubber Co.* (CA11 Fla) 793 F2d 1196, 21 Fed Rules Evid Serv 79.

Footnote 88. *United States v Hearst* (CA9 Cal) 563 F2d 1331, 2 Fed Rules Evid Serv 1149, reh den (CA9 Cal) 573 F2d 579 and cert den 435 US 1000, 56 L Ed 2d 90, 98 S Ct 1656.

Footnote 89. *Bowman v General Motors Corp.* (ED Pa) 427 F Supp 234.

Footnote 90. *United States v Stirling* (CA2 NY) 571 F2d 708, CCH Fed Secur L Rep ¶ 96308, 2 Fed Rules Evid Serv 1257, cert den 439 US 824, 58 L Ed 2d 116, 99 S Ct 93; *United States v Haynes* (CA5 Fla) 554 F2d 231, 2 Fed Rules Evid Serv 333.

Footnote 91. *Sledge v J. P. Stevens & Co.* (CA4 NC) 585 F2d 625, 18 BNA FEP Cas 261, 18 CCH EPD ¶ 8657, 27 FR Serv 2d 137, cert den 440 US 981, 60 L Ed 2d 241, 99 S Ct 1789, 19 BNA FEP Cas 467, 19 CCH EPD ¶ 9059.

Footnote 92. *Melton v Deere & Co.* (CA5 Miss) 887 F2d 1241, CCH Prod Liab Rep ¶ 12302, 29 Fed Rules Evid Serv 224.

Footnote 93. *United States v Hearst* (CA9 Cal) 563 F2d 1331, 2 Fed Rules Evid Serv 1149, reh den (CA9 Cal) 573 F2d 579 and cert den 435 US 1000, 56 L Ed 2d 90, 98 S Ct 1656.

C. Admissibility as Affected by Evidence of Other Party (Rule 106) [357-362]

Research References

FRE Rule 106

ALR Digests: Evidence §§ 1134-1413

ALR Index: Character and Reputation; Demonstrative and Real Evidence; Description and Identification; Documentary Evidence; Entrapment; Evidence; Evidence Rules; Experiments or Tests; Hypothetical Questions; Impeachment of Witnesses; Offer of Proof; Rebuttal; Same or Similar Acts or Matters; Witnesses

Louisell & Mueller, Federal Evidence § 49

§ 357 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, the introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side. 94 Nor does the mere fact that a witness goes beyond the purport of a question asked him, or volunteers statements, open up the issues for testimony of like character by the adversary. 95 In many situations, however, a party becomes entitled to introduce evidence, otherwise inadmissible, by reason of similar or related evidence which has been tendered by his opponent, 96 and a party may not complain on appeal about the improper admission of evidence which he himself has introduced or elicited. 97 Thus, where parts of a conversation or writing are proved, other connected statements may be received. 98 Generally, also, testimony which is irrelevant if offered by one party in the first instance may become pertinent in rebuttal or explanation of evidence offered by the adversary. 99

When evidence is elicited on cross-examination from which an inference as to a fact favorable to a party may be drawn, subsequent evidence of other facts or circumstances showing that the inference sought to be drawn is not warranted becomes competent and material. 1 However, a party on cross-examination is not permitted to bring out improper and immaterial matter and then show its falsity, 2 except that where a plaintiff's witness has been allowed to answer a question of doubtful competency, it is error to refuse to allow the defendant's witness to answer practically the same question. 3

§ 357 ----Generally [SUPPLEMENT]

Case authorities:

In a murder prosecution wherein two teenage girls testified that defendant was one of the two shooters, testimony that, prior to the shooting, Corey Best had threatened to kick the girls if he found them again in the vicinity where the shooting occurred was not inadmissible hearsay because it was not offered to show that the declarant was going to hurt the girls but to explain why the girls had left the scene before the shooting and thus could not identify defendant as one of the shooters. Therefore, the trial court erred by excluding this testimony, but the error was not prejudicial where defendant was allowed to present this evidence through the testimony of other witnesses that the two girls were not at the scene during the shooting because of an argument with Corey Best. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

Footnotes

Footnote 94. *Philadelphia & T. R. Co. v Stimpson*, 39 US 448, 14 Pet 448, 10 L Ed 535; *Stringer v Young*, 28 US 320, 3 Pet 320, 7 L Ed 693; *San Diego Land & Town Co. v Neale*, 78 Cal 63, 20 P 372; *State v Fortin*, 106 Me 382, 76 A 896; *Baltimore & S. R. R.*

Co. v Woodruff, 4 Md 242; Schenley v Commonwealth, 36 Pa 29.

Footnote 95. Jeddeloh v Hockenhull, 219 Minn 541, 18 NW2d 582; Seattle v Smythe, 97 Wash 351, 166 P 1150.

Footnote 96. O'Quinn v Alston, 213 Ala 346, 104 So 653, 39 ALR 1263; Brindle v Harter, 138 Ind App 692, 211 NE2d 513, appeal after remand 145 Ind App 411, 251 NE2d 590; Lyon v Aetna Life Ins. Co., 112 Ind App 573, 44 NE2d 186; Evans v Holsinger, 242 Iowa 990, 48 NW2d 250, 28 ALR2d 1434; Commonwealth Life Ins. Co. v Pendleton, 231 Ky 591, 21 SW2d 985, 66 ALR 1526.

Where inadmissible, immaterial or irrelevant evidence has been admitted in behalf of one party, similar evidence may be admitted to rebut it. State v Crissman (Columbiana Co) 31 Ohio App 2d 170, 60 Ohio Ops 2d 279, 287 NE2d 642.

If, notwithstanding that the pleadings in an action for conversion of furnishings of an apartment house do not present any issue concerning the real property, the plaintiff introduces in evidence a deed showing the conveyance of the apartment to himself, the defendant should be permitted to inquire into the consideration for the deed if it is apparently a part of a transaction whereby the parties thereto engaged in its fraudulent transfer. Mattechek v Pugh, 153 Or 1, 55 P2d 730, 168 ALR 725.

In an action to set aside a deed where testimony has been given on behalf of the plaintiff that at the time of executing the deed he was under an insane delusion that his financial condition was bad and that he had suffered a similar mental breakdown some years before and had sacrificed property to turn his attention to another business, it is proper to inquire whether he made a success of such business. Ferguson Seed Farms, Inc. v McMillan (Tex Com App) 18 SW2d 595, 63 ALR 1009.

Footnote 97. 5 Am Jur 2d, Appeal and Error § 717.

Footnote 98. § 358.

Footnote 99. 75 Am Jur 2d, Trial §§ 365 et seq.

Footnote 1. People v Cassidy, 213 NY 388, 107 NE 713.

Footnote 2. State v Boston, 234 Iowa 1047, 14 NW2d 676.

Footnote 3. Brazil Block Coal Co. v Gibson, 160 Ind 319, 66 NE 882 (holding that a witness who, on the cross-examination of a witness, inquired of the size, shape, and capacity of a bucket and the material of which it was made, cannot complain because his adversary, on reexamination, inquired into like matters).

§ 358 Where other party introduced only part of conversation or statement

[View Entire Section](#)

When part of a conversation, transaction, or writing is introduced in evidence by one party, the opposing party may require him to introduce at that time, or he himself may introduce at a later time, the remainder of the conversation, transaction, or writing. 4 Thus, when a statement forming part of a conversation is given in evidence by one party, whatever was said in the same conversation tending to explain or qualify that statement may be given in evidence by the other party. 5

◆ Caution: By their terms, both Federal and Uniform Rule 106 speak only in terms of "writing or recorded statement," 6 and the Advisory Committee Notes state that "for practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." 7 But a number of states adopting the Uniform Rules have included the word "conversation" in their version of Rule 106. Consequently, the rule continues to apply to evidence of conversations in a number of such jurisdictions. 8

The general rule that where part of a conversation has been shown in testimony, the remainder of that conversation may be brought out by the opposing party, is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items which have been introduced, 9 and if questions, on re-examination, are not connected with the statements elicited on cross-examination or are remote, 10 they should be excluded. 11 In other words, no more of the remainder of a conversation should be admitted than that which explains or qualifies the part already received. 12 Similarly, where one puts into evidence the admissions of his opponent, all of what was said at the same time upon the same subject may be given in evidence although it would not otherwise be admissible. 13

The rule that where a part of a conversation, statement, or admission is put into evidence the adverse party is entitled to prove the remainder of such conversation, statement, or admission, is subject to the limitation that detached and independent statements in no way connected with the statement given in evidence are not admissible, whether made in conversation by a party to the suit or by third persons. 14 The proof should be confined to those matters only which are the subject matter of inquiry or investigation. 15

◆ Observation: If the rule was otherwise, the court and the jury might be compelled to listen to a long recital of matters not at all connected with any matter or thing in controversy between the parties.

Footnotes

Footnote 4. *Crawford v United States*, 212 US 183, 53 L Ed 465, 29 S Ct 260; *United States v Rubin* (CA2 NY) 609 F2d 51, 5 Fed Rules Evid Serv 202, *affd* 449 US 424, 66 L Ed 2d 633, 101 S Ct 698, CCH Fed Secur L Rep ¶ 97818 (not followed by *Paskel v Heckler* (CA3 Pa) 768 F2d 540); *United States v Jones* (CA5 Ga) 663 F2d 567, 9 Fed Rules Evid Serv 750; *United States v Paquet* (CA5 Tex) 484 F2d 208; *United States v Baron* (CA7 Ill) 602 F2d 1248, 4 Fed Rules Evid Serv 1215, *cert den* 444 US 967, 62 L Ed 2d 380, 100 S Ct 456; *United States v Greene* (CA7 Ill) 497 F2d 1068, *cert den* 420 US 909, 42 L Ed 2d 839, 95 S Ct 829 and (superseded by statute on other grounds as stated in *United States v Teller* (CA7 Wis) 762 F2d 569); *State v Roberts* (App) 144 Ariz

572, 698 P2d 1291; *Mulford v State* (Fla App D4) 416 So 2d 1199; *State v Hubbard*, 126 Kan 129, 266 P 939, 58 ALR 327.

As to the Rule 106 applying to written or recorded statements only, see § 359.

Footnote 5. *Long v California-Western States Life Ins. Co.*, 43 Cal 2d 871, 279 P2d 43; *Wilder v People*, 86 Colo 35, 278 P 594, 65 ALR 1260; *Ohio & M. R. Co. v Stein*, 133 Ind 243, 31 NE 180, reh overr 133 Ind 256, 32 NE 831; *Pierce v Heusinkveld*, 234 Iowa 1348, 14 NW2d 275; *Lanning v Goldsberry*, 177 Kan 419, 280 P2d 954; *Commonwealth v Trefethen*, 157 Mass 180, 31 NE 961; *People v Cahill*, 193 NY 232, 86 NE 39.

As to proof of entire confession, see § 712.

Footnote 6. For the provisions of Rule 106 see § 359.

Footnote 7. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 106.

Footnote 8. *State v Roberts* (App) 144 Ariz 572, 698 P2d 1291; *State v Johnson* (Me) 479 A2d 1284; *State v Coffman*, 227 Neb 149, 416 NW2d 243 (by implication).

Exclusion of exculpatory portion of defendant's conversation with the officer who arrested him for car theft was improper where the officer testified as to other parts of the conversation, but omitted defendant's explanation of his possession of recently stolen property. *Guerrero v State* (Fla App D3) 532 So 2d 75, 13 FLW 2357.

Footnote 9. *People v King* (1st Dist) 240 Cal App 2d 389, 49 Cal Rptr 562, 21 ALR3d 706, cert den 385 US 923, 17 L Ed 2d 146, 87 S Ct 236.

Irrelevant evidence should not be admitted simply because it is part of a conversation already received. *State v Wye*, 123 Or 595, 263 P 60.

Footnote 10. Generally, as to effect of remote nature of evidence, see § 319.

Footnote 11. *People v Baker*, 290 Ill 349, 125 NE 263.

Footnote 12. *United States v Rubin* (CA2 NY) 609 F2d 51, 5 Fed Rules Evid Serv 202, affd 449 US 424, 66 L Ed 2d 633, 101 S Ct 698, CCH Fed Secur L Rep ¶ 97818 (not followed on other grounds by *Paskel v Heckler* (CA3 Pa) 768 F2d 540); *United States v Walker* (CA7 Ill) 652 F2d 708, 8 Fed Rules Evid Serv 1312.

The "completeness" doctrine, which requires that a statement be admitted in its entirety when that is necessary to explain the admitted portion, to place it in context, or to avoid misleading the jury, does not require introduction of portions of a statement that are neither explanatory of, nor relevant to, the admitted portion. *United States v Marin* (CA2 NY) 669 F2d 73, 9 Fed Rules Evid Serv 1659.

Where defense counsel on cross-examination quoted a part of witness's prior statement and the omitted portion of the statement was not explanatory of the part referred to on cross-examination, it was error to admit the entire statement, since not only was the remainder of the prior statement unrelated to the issue of defendant's use of profane language which was raised on cross-examination, but the witness fully explained the reason for omitting profane words in her written statement when she testified. *George v*

State, 270 Ark 335, 604 SW2d 940.

Footnote 13. § 759.

Footnote 14. *United States v Apuzzo* (CA2 NY) 245 F2d 416, 57-2 USTC ¶ 9700, 52 AFTR 369, cert den 355 US 831, 2 L Ed 2d 43, 78 S Ct 45; *Wilder v People*, 86 Colo 35, 278 P 594, 65 ALR 1260; *Jeddeloh v Hockenhull*, 219 Minn 541, 18 NW2d 582; *State v Collett*, 118 Mont 473, 167 P2d 584; *Rouse v Whited*, 25 NY 170.

The doctrine of curative admissibility will not be extended to include cases where the extrajudicial statements were not mere continuations of a single conversation partially admitted, and where they came from non-party witnesses who were available at the trial. *Jefferson v Biggar* (Mo) 416 SW2d 933.

Footnote 15. *State v Then*, 118 NJL 31, 190 A 495, affd 119 NJL 429, 196 A 740 and affd 119 NJL 429, 197 A 5.

Defense counsel's inadvertent reading of a small portion of a report about the testing of marijuana seeds did not make the entire report admissible where the report contained extensive material that had no relevance to any parts purportedly admitted. *United States v Pendas-Martinez* (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142.

§ 359 --Rule as to writings or recorded statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 106 provides that when a writing or recorded statement or part of it is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. 16 Rule 106 has been said to be an expression of the rule of completeness, 17 which permits the introduction into evidence of an entire statement when only a portion of it has been used by an opponent, 18 and is manifested as to depositions in the Federal Rules of Civil Procedure, 19 of which FRE Rule 106 is substantially a restatement. 20

FRE Rule 106 only encompasses writings or recorded statements introduced into evidence, and does not apply to conversations, 21 or to the oral testimony of an individual even though such individual's recollection may be memorialized in a writing. 22 FRE Rule 106 is not intended as a vehicle for the introduction of substantive evidence in the form of prior nonrecorded testimony of a person to explain the underlying circumstances prevailing at the time of a statement of another person, which statement is recorded and introduced in evidence, where the unrecorded testimony does nothing to clarify the recorded statement and where the recorded statement is admitted in evidence in toto, is internally complete and unambiguous, and is not out of context. 23

FRE Rule 106 justifies the admission into evidence of written statements of persons other

than a party. 24

The purpose of FRE Rule 106 is to permit the contemporaneous introduction of writings or recorded statements that place in context 25 other writings or recorded statements admitted into evidence which, viewed alone, may be misleading. 26 For example, a second writing may need to be read into evidence if it is necessary to explain the admitted portion, or to insure a fair and impartial understanding. 27 However, the completeness doctrine does not require introduction of portions of a statement that are neither relevant to, nor explanatory of, the admitted passages. 28

◆ **Observation:** In addition to the misleading impression which may be created by taking matters out of context, FRE Rule 106 is also based on the consideration of the inadequacy of "repair work" when a writing or a recorded statement or a part thereof is introduced into evidence, but another part or any other writing or recorded statement which ought to be considered with the previously introduced statement is delayed to a point later in the trial. 29

§ 359 --Rule as to writings or recorded statements [SUPPLEMENT]

Case authorities:

Defendant's pretrial statement, redacted to protect codefendant's confrontation right, did not offend rule of completeness since redacted version conveyed substance and context of statement of whole. *United States v Mussaleen* (1994, CA2 NY) 35 F3d 692.

Footnotes

Footnote 16. FRE Rule 106; Uniform Rules of Evidence, Rule 106.

Practice References *Louisell & Mueller, Federal Evidence* §§ 49-52.

Footnote 17. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 106.

Rule 106 constitutes a partial codification of common-law doctrine of completeness, which addresses the concerns that a court not be misled because portions of a statement are taken out of context and that such a statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

Annotation: Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 ALR Fed 892.

Footnote 18. *United States v Cochran* (CA5 Fla) 499 F2d 380, reh den (CA5 Fla) 502 F2d 1168 and cert den 419 US 1124, 42 L Ed 2d 825, 95 S Ct 810.

Footnote 19. FR Civ P, Rule 32(a)(4), generally discussed in 23 Am Jur 2d, Depositions

and Discovery § 188.

Footnote 20. *Mattocks v Daylin, Inc.* (WD Pa) 78 FRD 663, 3 Fed Rules Evid Serv 880, later proceeding (WD Pa) 452 F Supp 512, affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 770 and affd without op (CA3 Pa) 614 F2d 771 and later proceeding (CA3 Pa) 611 F2d 30, CCH Prod Liab Rep ¶ 8640 (the defendant was entitled under FR Civ P, Rule 32(a)(4), as well as under FRE Rule 106, to have additional portions of the deposition read into the record where the plaintiff chose to read a certain portion of a deposition into the trial record).

Footnote 21. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 106.

As to the applicability of a modified Rule 106 to conversations in some jurisdictions, see § 358.

Footnote 22. *United States v Brown* (CA9 Cal) 501 F2d 146, revd on other grounds 422 US 225, 45 L Ed 2d 141, 95 S Ct 2160, 20 FR Serv 2d 547 (discussing proposed FRE Rule 106 which is identical to the Rule as enacted).

Footnote 23. *United States v Jamar* (CA4 Va) 561 F2d 1103, 1 Fed Rules Evid Serv 1040.

Footnote 24. *Mattocks v Daylin, Inc.* (WD Pa) 78 FRD 663, 3 Fed Rules Evid Serv 880, later proceeding (WD Pa) 452 F Supp 512, affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 769 and affd without op (CA3 Pa) 614 F2d 770 and affd without op (CA3 Pa) 614 F2d 771 and later proceeding (CA3 Pa) 611 F2d 30, CCH Prod Liab Rep ¶ 8640; *Huddleston v Herman & MacLean* (CA5 Tex) 640 F2d 534, CCH Fed Secur L Rep ¶ 97919, 8 Fed Rules Evid Serv 61, affd in part and revd in part on other grounds 459 US 375, 74 L Ed 2d 548, 103 S Ct 683, CCH Fed Secur L Rep ¶ 99058, on remand (CA5 Tex) 705 F2d 775, CCH Fed Secur L Rep ¶ 99219; *Beard v Mitchell* (CA7 Ill) 604 F2d 485, 4 Fed Rules Evid Serv 1234, later proceeding (CA7 Ill) 728 F2d 894, cert den 469 US 825, 83 L Ed 2d 48, 105 S Ct 104.

Once a statement of a child sexual assault victim is admitted into evidence under a statutory hearsay exception, the proponent of the statement has "opened the door" to other statements made at the same time, under the same circumstances, and concerning the same event. *People v Hise* (Colo App) 738 P2d 13.

Annotation: Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 ALR Fed 892.

Footnote 25. *United States v Cuthbertson* (DC NJ) 511 F Supp 375, 7 Media L R 1172, 7 Fed Rules Evid Serv 1610, revd, remanded on other grounds (CA3 NJ) 651 F2d 189, 7 Media L R 1377, 8 Fed Rules Evid Serv 458, cert den 454 US 1056, 70 L Ed 2d 594, 102 S Ct 604 and affd without op (CA3 NJ) 770 F2d 1076.

Footnote 26. *United States v Marin* (CA2 NY) 669 F2d 73, 9 Fed Rules Evid Serv 1659;

United States v Weisman (CA2 NY) 624 F2d 1118, 5 Fed Rules Evid Serv 1338, cert den 449 US 871, 66 L Ed 2d 91, 101 S Ct 209; United States v Soures (CA3 NJ) 736 F2d 87, 116 BNA LRRM 2761, 101 CCH LC ¶ 11067, 15 Fed Rules Evid Serv 1456, cert den 469 US 1161, 83 L Ed 2d 927, 105 S Ct 914; United States v Jamar (CA4 Va) 561 F2d 1103, 1 Fed Rules Evid Serv 1040; United States v LeFevour (CA7 Ill) 798 F2d 977, 21 Fed Rules Evid Serv 391.

Where a defendant used portions of a memorandum of a witness in an attempt to impeach the witness, the remainder of the memorandum, which was generally consistent with the witness's testimony, was admissible under FRE Rule 106, since in such circumstances it would have been unfair and extremely confusing to the jury to exclude the memorandum. United States v Baron (CA7 Ill) 602 F2d 1248, 4 Fed Rules Evid Serv 1215, cert den 444 US 967, 62 L Ed 2d 380, 100 S Ct 456.

A jury finding from a prior action was not required to be introduced pursuant to FRE Rule 106 simply because other jury findings were introduced, where no misleading impression was created by failing to introduce the prior finding. Minnesota Farm Bureau Marketing Corp. v North Dakota Agricultural Marketing Asso. (CA8 ND) 563 F2d 906.

Footnote 27. United States v Marin (CA2 NY) 669 F2d 73, 9 Fed Rules Evid Serv 1659; United States v Soures (CA3 NJ) 736 F2d 87, 116 BNA LRRM 2761, 101 CCH LC ¶ 11067, 15 Fed Rules Evid Serv 1456, cert den 469 US 1161, 83 L Ed 2d 927, 105 S Ct 914 (appellant alleged that the trial judge's failure to admit the remaining portions of his first day of grand jury testimony forced him to take the stand to testify at trial in violation of his Fifth Amendment right against self-incrimination); United States v Sweiss (CA7 Ill) 800 F2d 684, 21 Fed Rules Evid Serv 866, reh gr (CA7 Ill) 812 F2d 1023 and vacated on other grounds (CA7 Ill) 814 F2d 1208, 22 Fed Rules Evid Serv 931; Brewer v Jeep Corp. (CA8 Ark) 724 F2d 653, CCH Prod Liab Rep ¶ 9881, 75 ALR Fed 883 (a film containing Jeep rollovers could only be admitted upon the condition that the written study explaining those graphic scenes also be offered); United States v Dorrell (CA9 Cal) 758 F2d 427, 17 Fed Rules Evid Serv 1293 (there was no violation of the rule of completeness where the redacted statement was a confession because the edited version neither distorted the meaning of the statement nor excluded information substantially exculpatory of the defendant).

A trial judge properly applied FRE Rule 106 when he ruled that all four channels recorded by a crash-resistant tape recorder, recording the last 30 minutes of conversation in the cockpit area, were admissible on the basis that the channels sought to be excluded were an integral part of the tape. Re Air Crash Disaster at John F. Kennedy International Airport (CA2 NY) 635 F2d 67, 7 Fed Rules Evid Serv 21, later proceeding (CA2 NY) 682 F2d 406.

Footnote 28. United States v Marin (CA2 NY) 669 F2d 73, 9 Fed Rules Evid Serv 1659; United States v Garrett (CA5 Tex) 716 F2d 257, 14 Fed Rules Evid Serv 366, reh den (CA5 Tex) 720 F2d 1291 and cert den 466 US 937, 80 L Ed 2d 459, 104 S Ct 1910; United States v Crosby (CA5 La) 713 F2d 1066, 13 Fed Rules Evid Serv 1829, 71 ALR Fed 665, cert den 464 US 1001, 78 L Ed 2d 696, 104 S Ct 506 and (superseded by statute on other grounds as stated in United States v Sneezzer (CA9 Ariz) 983 F2d 920, 92 CDOS 10442, 92 Daily Journal DAR 17566, 37 Fed Rules Evid Serv 383); United States v Sweiss (CA7 Ill) 800 F2d 684, 21 Fed Rules Evid Serv 866, reh gr (CA7 Ill) 812 F2d 1023 and vacated on other grounds (CA7 Ill) 814 F2d 1208, 22 Fed Rules Evid Serv 931; United States v Burrenson (CA9 Cal) 643 F2d 1344, CCH Fed Secur L Rep ¶ 97982, 7

Fed Rules Evid Serv 1357, cert den 454 US 830, 70 L Ed 2d 106, 102 S Ct 125 and cert den 454 US 847, 70 L Ed 2d 135, 102 S Ct 165; *United States v Pendas-Martinez* (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142.

Promises of immunity made in hostage situation may be excluded as irrelevant to the issue of defendant's guilt or innocence. *United States v Crosby* (CA5 La) 713 F2d 1066, 13 Fed Rules Evid Serv 1829, 71 ALR Fed 665, cert den 464 US 1001, 78 L Ed 2d 696, 104 S Ct 506 and (superseded by statute as stated in *United States v Sneezer* (CA9 Ariz) 983 F2d 920, 92 CDOS 10442, 92 Daily Journal DAR 17566, 37 Fed Rules Evid Serv 383).

Footnote 29. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 106.

§ 360 --Discretion as to admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The qualifying words, "ought in fairness" 30 show that the duty to place "any other part" of the recorded statement or any other "recorded statement" in evidence is not absolute. 31 In other words, the completeness rule does not mandate the inclusion of related evidence. 32 Rather, a trial judge has discretion in admitting evidence under Rule 106, 33 but this discretion may be abused if the trial judge refuses to admit evidence necessary to present a complete picture of the dispute in question. 34

Footnotes

Footnote 30. Rule 106 provides that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which "ought in fairness" to be considered contemporaneously with it. § 359.

Footnote 31. *United States v LeFevour* (CA7 Ill) 798 F2d 977, 21 Fed Rules Evid Serv 391.

Footnote 32. *Cline v Durden*, 246 Mont 154, 803 P2d 1077.

The terms of a state rule providing that when a writing or part thereof is introduced by a party, the adverse party may at that time introduce any other part of the writing which ought in fairness to be considered contemporaneously with it, are not mandatory; thus, the trial court's failure to admit defendant's handwritten judicial confession in its entirety contemporaneously with the admission of the state's exhibit of a copy of that confession with two portions deleted did not harm or otherwise prejudice defendant where the state later withdrew its objection to the exhibit consisting of the entire confession and such exhibit was admitted for all purposes. *Gilmore v State* (Tex App Dallas) 744 SW2d 630, petition for discretionary review ref (Dec 21, 1988).

Footnote 33. *United States v Maccini* (CA1 Mass) 721 F2d 840, 14 Fed Rules Evid Serv 810; *Re Air Crash Disaster at John F. Kennedy International Airport* (CA2 NY) 635 F2d 67, 7 Fed Rules Evid Serv 21, later proceeding (CA2 NY) 682 F2d 406; *United States v Weisman* (CA2 NY) 624 F2d 1118, 5 Fed Rules Evid Serv 1338, cert den 449 US 871, 66 L Ed 2d 91, 101 S Ct 209; *United States v Soures* (CA3 NJ) 736 F2d 87, 116 BNA LRRM 2761, 101 CCH LC ¶ 11067, 15 Fed Rules Evid Serv 1456, cert den 469 US 1161, 83 L Ed 2d 927, 105 S Ct 914; *United States v Crosby* (CA5 La) 713 F2d 1066, 13 Fed Rules Evid Serv 1829, 71 ALR Fed 665, cert den 464 US 1001, 78 L Ed 2d 696, 104 S Ct 506 and (superseded by statute on other grounds as stated in *United States v Sneezer* (CA9 Ariz) 983 F2d 920, 92 CDOS 10442, 92 Daily Journal DAR 17566, 37 Fed Rules Evid Serv 383); *United States v Jones* (CA5 Ga) 663 F2d 567, 9 Fed Rules Evid Serv 750; *United States v Walker* (CA7 Ill) 652 F2d 708, 8 Fed Rules Evid Serv 1312; *Brewer v Jeep Corp.* (CA8 Ark) 724 F2d 653, CCH Prod Liab Rep ¶ 9881, 75 ALR Fed 883; *United States v Kaminski* (CA8 Minn) 692 F2d 505; *United States v Gold* (CA11 Fla) 743 F2d 800, 17 Fed Rules Evid Serv 669, cert den 469 US 1217, 84 L Ed 2d 341, 105 S Ct 1196 (recognizing rule).

Under rule that when part of act, declaration, conversation or writing is given in evidence by one party, the whole of the same subject may be inquired into by the opposing party, admission of evidence is not matter of right but rests with sound discretion of court. *State v Coffman*, 227 Neb 149, 416 NW2d 243 (recognizing rule).

Footnote 34. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531 (holding that in product liability action stemming from airplane crash, in which disputed question is whether pilot error or an equipment malfunction caused the crash, trial court abuses its discretion in restricting scope of plaintiff's cross-examination, by refusing to permit plaintiff—who has admitted on direct examination as an adverse witness that he made certain statements in a letter written some months after the crash arguably implicating pilot error as the cause of the crash—to present a more complete picture of what the plaintiff wrote by answering his counsel's question whether plaintiff also stated in the letter that the most probable primary cause of the crash was loss of engine power; common-law rule of completeness, which underlies FRE Rule 106, was designed to prevent prejudicial impression initially received by the jury that the plaintiff did not believe in a theory of power failure and developed it only later for purposes of litigation).

§ 361 --Effect of Rule 106 on otherwise inadmissible evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There are conflicting Court of Appeals decisions on whether FRE Rule 106 makes admissible parts of a document that otherwise would be inadmissible under the Federal Rules of Evidence. Some courts take the position that the Rule only regulates the order of proof question, 35 and does not render admissible evidence that is otherwise inadmissible. 36 By contrast, other courts have said that the structure of the Federal Rules of Evidence indicates that FRE Rule 106 is concerned with more than merely the

order of proof and makes admissible what would otherwise be inadmissible. 37 One court has stated that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under FRE Rules 401 and 402. 38

Under the view that otherwise inadmissible evidence may be admitted under FRE Rule 106, one court has reasoned that the Rule can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. 39 A contrary construction would raise the specter of distorted and misleading trials, and would create difficulties for both litigants and the trial court. 40 A court taking the contrary view has reasoned that FRE Rule 106 was not intended to override every privilege and other exclusionary rule of evidence, and accordingly there must be cases where if an excerpt is misleading then the cure is to exclude it rather than to put in the other excerpts. 41

◆ Observation: It has been noted that FRE Rule 106 deviates from the common-law rule of completeness only in the respect that the party seeking admission under FRE Rule 106 is now entitled to compel the admission at the time the opposing party offers the partial evidence instead of waiting until a later stage of trial. 42

Footnotes

Footnote 35. *United States v Terry* (CA2 NY) 702 F2d 299, 12 Fed Rules Evid Serv 951, cert den 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095, later proceeding (CA2 NY) 731 F2d 138, cert den 469 US 1188, 83 L Ed 2d 963, 105 S Ct 956, later proceeding (SD NY) 741 F Supp 409, later proceeding (SD NY) 1990 US Dist LEXIS 6362 and reconsideration den (SD NY) 1990 US Dist LEXIS 7095 and affd without op (CA2 NY) 930 F2d 910 and cert den 464 US 992, 78 L Ed 2d 680, 104 S Ct 482; *United States v Costner* (CA6 Tenn) 684 F2d 370, 11 Fed Rules Evid Serv 497; *United States v Burreson* (CA9 Cal) 643 F2d 1344, CCH Fed Secur L Rep ¶ 97982, 7 Fed Rules Evid Serv 1357, cert den 454 US 830, 70 L Ed 2d 106, 102 S Ct 125 and cert den 454 US 847, 70 L Ed 2d 135, 102 S Ct 165 (the remainder of the testimony was excluded by the court as inadmissible hearsay).

Annotation: Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 ALR Fed 892.

Footnote 36. *United States v Terry* (CA2 NY) 702 F2d 299, 12 Fed Rules Evid Serv 951, cert den 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095, later proceeding (CA2 NY) 731 F2d 138, cert den 469 US 1188, 83 L Ed 2d 963, 105 S Ct 956, later proceeding (SD NY) 741 F Supp 409, later proceeding (SD NY) 1990 US Dist LEXIS 6362 and reconsideration den (SD NY) 1990 US Dist LEXIS 7095 and affd without op (CA2 NY) 930 F2d 910 and cert den 464 US 992, 78 L Ed 2d 680, 104 S Ct 482.

Footnote 37. *United States v Sutton*, 255 US App DC 307, 801 F2d 1346, 21 Fed Rules Evid Serv 305.

Footnote 38. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

Footnote 39. *United States v Sutton*, 255 US App DC 307, 801 F2d 1346, 21 Fed Rules Evid Serv 305.

Footnote 40. *United States v Sutton*, 255 US App DC 307, 801 F2d 1346, 21 Fed Rules Evid Serv 305.

◆ Observation: The court found support for its conclusion in the fact that FRE Rule 106 is not found in FRE Rule 611, governing the "Mode and Order of Interrogation and Presentation," but in Article I, containing rules that generally restrict the manner of applying the exclusionary rules. Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, "except as otherwise provided by these rules" (FRE Rules 402, 501, 602, 613(b), 704, 802, 806, 901(b)(10), and 1002) whereas there is no such proviso in FRE Rule 106, which indicates that FRE Rule 106 should not be so restrictively construed. *United States v Sutton*, 255 US App DC 307, 801 F2d 1346, 21 Fed Rules Evid Serv 305.

Footnote 41. *United States v LeFevour* (CA7 Ill) 798 F2d 977, 21 Fed Rules Evid Serv 391.

Footnote 42. *United States v Walker* (CA7 Ill) 652 F2d 708, 8 Fed Rules Evid Serv 1312.

§ 362 --Procedural matters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In order to lay a sufficient foundation at trial for a rule of completeness claim under FRE Rule 106 and similar state rules, the offeror need only specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted. 43 This minimal burden can be met without unreasonable specificity. 44 Accordingly, it was held that defense counsel failed to lay a sufficient foundation for admission of taped conversations under FRE Rule 106 where counsel did not state what portions of the earlier tape explained the later tape, did not mention FRE Rule 106 nor state any of the substance of the Rule, and did not precisely delineate the relevant portions of the tape that counsel wished the jury to hear. 45 And in a trial for criminal contempt for defendant's failure to testify at the murder trial of his codefendant, it was not error for the trial court to refuse to grant the defendant's request (following the state's introduction of portions of the transcript of the murder trial) that other portions of the transcript be read to the jury, absent any allegation that the refused portions of the transcript were relevant. 46

◆ Caution: Counsel should be aware that failure to accept a trial judge's invitation to

have a greater portion of an item of evidence admitted pursuant to FRE Rule 106 may thwart a later assertion that the admitted evidence was unrepresentative or taken out of context. 47

◆ Observation: It has been suggested that although FRE Rule 106 addresses only the problem of requiring the proponent to introduce evidence of a written or recorded statement in its entirety, and is silent on the question whether the adversary should be allowed to introduce the remainder of a statement if the proponent has introduced only an incomplete part, the Rule should be read as allowing the adversary to later introduce the remainder of a statement. 48 Since the Advisory Committee's Note clearly recognizes that the Rule does not circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case, 49 there was clearly no intent for the Rule to require the adversary to insist that the whole of a statement come in at once on pain of a waiver of the right of an adversary to later introduce the remainder of the statement. However, FRE Rule 106 must be read in light of FRE Rule 403, which authorizes the trial judge to exclude evidence whose prejudicial effect outweighs its probative value, since offers of the remainder of a statement will often give rise to the balancing task which FRE Rule 403 contemplates. In addition, it appears implicit in FRE Rule 106 and borne out by pre-Rules decisions that the remainder of a written statement which is relevant and important to a proper understanding of a portion of an admissible statement is itself admissible even though the remainder is otherwise irrelevant to the issues in the case or otherwise inadmissible under exclusionary principles, such as hearsay; however, FRE Rule 106 and the general principle of completeness would justify the introduction in evidence only of such remaining parts of the written or recorded statements as bear upon the portion already received. 50

Footnotes

Footnote 43. *United States v Sweiss* (CA7 Ill) 800 F2d 684, 21 Fed Rules Evid Serv 866, reh gr (CA7 Ill) 812 F2d 1023 and vacated on other grounds (CA7 Ill) 814 F2d 1208, 22 Fed Rules Evid Serv 931.

Footnote 44. *United States v Sweiss* (CA7 Ill) 800 F2d 684, 21 Fed Rules Evid Serv 866, reh gr (CA7 Ill) 812 F2d 1023 and vacated on other grounds (CA7 Ill) 814 F2d 1208, 22 Fed Rules Evid Serv 931.

Footnote 45. *United States v Sweiss* (CA7 Ill) 800 F2d 684, 21 Fed Rules Evid Serv 866, reh gr (CA7 Ill) 812 F2d 1023 and vacated on other grounds (CA7 Ill) 814 F2d 1208, 22 Fed Rules Evid Serv 931.

Footnote 46. *State v Case* (App) 103 NM 574, 711 P2d 19.

Footnote 47. *United States v Williams* (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296, cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355, post-conviction proceeding (ND Ill) 1987 US Dist LEXIS 3222, affd (CA7 Ill) 828 F2d 22, post-conviction proceeding (ND Ill) 1988 US Dist LEXIS 1550, post-conviction proceeding (CA7 Ill) 865 F2d 155, cert den 491 US 905, 105 L Ed 2d 695, 109 S Ct 3186, reh den 492 US 932, 106 L Ed 2d 627, 110 S Ct 12, later proceeding (ND Ill) 1990 US Dist LEXIS 17215, affd (CA7) 1992 US App LEXIS 3461, reh, en banc, den (CA7) 1992 US App LEXIS 10282.

Footnote 48. Louisell & Mueller, Federal Evidence § 49.

Footnote 49. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 106.

Footnote 50. Louisell & Mueller, Federal Evidence § 49.

D. Admissibility of Particular Evidentiary Matters [363-588]

Research References

FRE 401, 404-407, 409, 411, 412

Uniform Rules of Evidence, Rules 401, 404-407, 409, 411, 412

8 USCS § 1324; 18 USCS §§ 242, 245, 2314, 2314, ; 26 USCS § 7201; 42 USCS § 1983

ALR Digests: Evidence §§ 1134-1413

ALR Index: Character and Reputation; Demonstrative and Real Evidence; Description and Identification; Documentary Evidence; Entrapment; Evidence; Evidence Rules; Experiments or Tests; Hypothetical Questions; Impeachment of Witnesses; Offer of Proof; Rebuttal; Same or Similar Acts or Matters; Witnesses

1A Federal Procedural Forms, L Ed, Actions in District Court §§ 1:3623, 1:3624; 7

Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:646, 20:647

9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 18; 23A Am Jur Pl & Pr Forms (Rev), Trial, Forms 93, 94

3 Am Jur Proof of Facts 379, Conversations; 10 Am Jur Proof of Facts 295, Repairs; 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession; 21 Am Jur Proof of Facts 764, Sidewalk Defects; 2 Am Jur POF2d 545, Reliability of Scientific Devices—Telephone Calling Line Identification; 12 Am Jur POF2d 237, Entrapment to Commit Narcotics Offense; 15 Am Jur POF2d 167, Alleged Victim's Commission of Prior Acts of and Reputation for Violence; 32 Am Jur POF2d 253, Admission by Conduct or Silence; 36 Am Jur POF2d 605, Foundation for Telephone Conversation; 36 Am Jur POF2d 747, Impeachment of Witness by Prior Criminal Conviction; 49 Am Jur POF2d 649, General Reputation of Person in Community; 7 Am Jur POF3d 523, Habit of Person; 8 Am Jur POF3d 749, Foundation for DNA Fingerprint Evidence

1 Am Jur Trials 602, Locating and Preserving Evidence in Criminal Cases; 7 Am Jur Trials 377, Elevator Accident Cases § 7; 11 Am Jur Trials 265, Stairway Fall Suits § 39; 13 Am Jur Trials 465, Defending Minor Felony Cases; 18 Am Jur Trials 341, Handling the Defense in a Rape Prosecution; 25 Am Jur Trials 69, Plea Bargaining Techniques; 30 Am Jur Trials 711, Trial Court Restrictions on Evidence of Defendant's Wealth
Hunter, Federal Trial Handbook 2d §§ 37.4, 37.6, 37.12, 73.19

Louisell and Mueller, Federal Evidence §§ 140, 157-159, 163, 165, 177, 179, 192, 193

1. Character and Reputation (Rule 404(a)) [363-389]

a. Character Evidence, Generally [363-374]

§ 363 General rule of exclusion

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Subject to certain major exceptions, 51 it has long been the rule that the character or reputation of a party is regarded as legally irrelevant in determining a controversy, so that evidence relating thereto is not admissible. 52 This rule has been codified in the Federal and Uniform Rules of Evidence 53 which provide that evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except for:

(1) evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same; 54

(2) evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; 55 or

(3) evidence of the character of a witness. 56

◆ **Observation:** It has been noted that prior mental history is not excluded by the rule excluding character evidence since prior mental history is not character evidence, but is evidence of behavior. 57

Even when character evidence is admissible under one of the exceptions to the rule, the trial judge may, in his discretion, impose a reasonable limitation upon the number of character witnesses that may be utilized, 58 especially where additional witnesses would result in a needless presentation of cumulative evidence within the meaning of FRE 403. 59 This power has been regarded as essential to the efficient administration of justice and to avoid prolonging trials unnecessarily by the introduction of cumulative evidence. 60

A trial court's rulings on character evidence will not be disturbed on appeal absent a showing of an abuse of discretion. 61

§ 363 ----General rule of exclusion [SUPPLEMENT]

Practice Aids: Evidence of prior bad acts allowed in civil case, 141 Chi Daily L Bull 7:6 (1995).

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like. 18 ALR5th 804.

Case authorities:

Sexual harassment plaintiff properly suffers mistrial and payment of jury costs, where she called as witnesses 2 former employees who had filed EEOC complaints against

employer, after court's in limine rulings barring testimony concerning these witnesses' sexual harassment claims as inadmissible character evidence under FRE 404(a), because plaintiff's attorneys persisted in asking questions designed to elicit prohibited testimony despite evidentiary rulings and court's repeated admonitions during trial. *Janopoulos v Harvey L. Walner & Assocs.* (1994, ND Ill) 866 F Supp 1086.

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by allowing a witness to testify that he contacted law enforcement officers after seeing on television that defendant had been charged with another murder to say that he had seen defendant dancing with the victim on the night she disappeared at the same club from which the other victim had disappeared. The testimony was relevant to explain why the witness did not contact the police until three months after the murder and to explain why he ultimately recognized defendant, rather than for the improper purpose of demonstrating defendant's character. The evidence was not unfairly prejudicial in that extensive evidence of the other murder was admitted and there was considerable additional evidence linking defendant to this victim. G.S. § 8C-1, Rules 404 and 403. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not err in a noncapital first-degree murder prosecution by sustaining the State's objection to cross-examination of a prosecution witness concerning the character of the deceased where there was no showing that defendant had knowledge of the witness's opinion of the victim's dangerousness and, although it was error not to permit the jury to hear evidence regarding the victim's violent character because the jury was instructed on self-defense and was required to determine the aggressor, the error was harmless because the trial court gave defendant wide latitude in cross-examining the witness and defendant was able to elicit extensive testimony concerning the victim's reputation for violence. Moreover, there was no offer of proof and the significance of the evidence sought to be elicited could not be assessed. *State v Watson* (1994) 338 NC 168, 449 SE2d 694, reconsideration den, stay den 338 NC 523.

The trial court erred in a second-degree murder prosecution by allowing the State to cross-examine defendant under GS § 8C-1, Rule 404(b) regarding domestic violence by defendant against his wife, who was not the victim in this case. Defendant's past violent behavior toward his wife was not relevant to prove his character in relation to motive, opportunity, intent, etc. Furthermore, there was prejudice in that the case was close, the questions alone were inflammatory and damaging, and, because defendant admitted to some violent action toward his wife, it cannot be said that the jury did not consider the evidence for the purpose of concluding that defendant had a violent disposition. *State v Brooks* (1994) 113 NC App 451, 439 SE2d 234.

Footnotes

Footnote 51. See the discussion in §§ 364-367.

Footnote 52. *Thompson v Bowie*, 71 US 463, 4 Wall 463, 18 L Ed 423; *Baggett v State*, 250 Ala 413, 34 So 2d 688; *De Weese v People*, 61 Colo 140, 156 P 594; *Gilbert v Georgia R. & B. Co.*, 104 Ga 412, 30 SE 673; *Cummins v Crawford*, 88 Ill 312; *Christianson v Kramer*, 255 Iowa 239, 122 NW2d 283, appeal after remand 257 Iowa 974, 135 NW2d 644; *Colvin v Wilson*, 100 Kan 247, 164 P 284, 6 ALR 859; *Knights of*

MacCabees v Shields, 156 Ky 270, 160 SW 1043, reh overr 157 Ky 35, 162 SW 778; Pattangall v Mooers, 113 Me 412, 94 A 561; Pennsylvania Steel Co. v Nace, 113 Md 460, 77 A 1121; Stearns v Long, 215 Mass 152, 102 NE 326; Fahey v Crotty, 63 Mich 383, 29 NW 876; Millers Mutual Fire Ins. Co. v King, 232 Miss 260, 98 So 2d 662; Graves v Johnson, 179 Miss 465, 176 So 256; Davenport v Silvey, 265 Mo 543, 178 SW 168; Morningstar v Lafayette Hotel Co., 211 NY 465, 105 NE 656; Wilson Lumber & Milling Co. v Atkinson, 162 NC 298, 78 SE 212; State v Magill, 19 ND 131, 122 NW 330; Lakes v Buckeye State Mut. Ins. Ass'n (Jackson Co) 110 Ohio App 115, 12 Ohio Ops 2d 384, 168 NE2d 895; Hammett v State, 42 Okla 384, 141 P 419; Cooper v Phipps, 24 Or 357, 33 P 985; Weamer v Juart, 29 Pa 257; Benson v Fowler, 43 Tenn App 147, 306 SW2d 49; Askey v New York Life Ins. Co., 102 Wash 27, 172 P 887.

Evidence of one's reputation as an intelligent and expert civil engineer, under whose supervision a railroad culvert was built, is incompetent and inadmissible on the trial of an issue as to whether the culvert was constructed in a specific manner. Emery v Raleigh & G. R. Co., 102 NC 209, 9 SE 139.

Footnote 53. FRE 404(a); Uniform Rules of Evidence, Rule 404(a).

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence, 49 ALR Fed 478.

Practice References Louisell and Mueller, Federal Evidence § 135.

Footnote 54. As to what is a "pertinent trait" of the accused, see § 368.

Footnote 55. As to what is a "pertinent trait" of the victim, see § 373.

Footnote 56. For rules governing impeachment of the character of witnesses, see 81 Am Jur 2d, Witnesses §§ 895 et seq.

Footnote 57. Re Meistrell, 47 Wash App 100, 733 P2d 1004.

Footnote 58. United States v Zane (CA2 NY) 495 F2d 683, CCH Fed Secur L Rep ¶ 94517, cert den 419 US 895, 42 L Ed 2d 139, 95 S Ct 174 and cert den 419 US 895, 42 L Ed 2d 139, 95 S Ct 174; United States v Sullivan (CA3 Pa) 803 F2d 87, 21 Fed Rules Evid Serv 1081, cert den 479 US 1036, 93 L Ed 2d 841, 107 S Ct 889; United States v Escamilla (CA4 Va) 467 F2d 341; United States v Gray (CA5 La) 507 F2d 1013, 75-1 USTC ¶ 9231, 35 AFTR 2d 75-781, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38; People v Eli, 66 Cal 2d 63, 56 Cal Rptr 916, 424 P2d 356, cert den 389 US 888, 19 L Ed 2d 188, 88 S Ct 136; Julian v State, 134 Ga App 592, 215 SE2d 496; Summerlin v State, 256 Ind 652, 271 NE2d 411; State v Edwards (La) 420 So 2d 663; State v Demaree (Mo) 362 SW2d 500, 17 ALR3d 312; State v Mucci, 25 NJ 423, 136 A2d 761; State v Ramey, 318 NC 457, 349 SE2d 566; State v McCray, 312 NC 519, 324 SE2d 606; State v Marlow, 310 NC 507, 313 SE2d 532 (limited to four); State v Stegmann, 286 NC 638, 213 SE2d 262, vacated, in part 428 US 902, 49 L Ed 2d 1205, 96 S Ct 3203; State v Lambert (Tenn Crim) 741 SW2d 127; State v Reynolds (Tenn Crim) 666 SW2d 476 (limited to three); Commonwealth ex rel. Davis v Malbon, 195 Va 368, 78 SE2d 683;

State v Brown, 179 W Va 681, 371 SE2d 609.

See contra: Jones v State (Ala App) 497 So 2d 215 (in prosecution for receiving stolen property, trial court erred in limiting number of character witnesses that defendant could call, even though defendant had called 18 witnesses who had testified as to his good reputation).

Annotation: Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 ALR3d 327.

Footnote 59. United States v Greenlee (CA3 Pa) 517 F2d 899, 75-1 USTC ¶ 9488, 36 AFTR 2d 75-5048, cert den 423 US 985, 46 L Ed 2d 301, 96 S Ct 391; United States v Squella-Avendano (CA5 Fla) 478 F2d 433 (ovrld on other grounds by United States v Bell (CA5 Fla) 678 F2d 547); United States v Koessel (CA8 Mo) 706 F2d 271, 13 Fed Rules Evid Serv 787; United States v Koessel (CA8 Mo) 706 F2d 271, 13 Fed Rules Evid Serv 787.

There was no abuse of discretion in District Court's denying defendant's motion for continuance to present 25 additional character witnesses, when defendant had already presented 5 witnesses, government was not offering any rebuttal evidence to character witnesses, and ordinarily District Court allowed no more than 3 character witnesses); United States v Edwards (CA5 Tex) 702 F2d 529, 12 Fed Rules Evid Serv 1313.

Annotation: 17 ALR3d 327.

Footnote 60. People v Burke, 18 Cal App 72, 122 P 435; State v Mucci, 25 NJ 423, 136 A2d 761.

Too many witnesses as to character unnecessarily prolong the trial and tend to turn the case into a popularity contest, which is contrary to the impartial administration of justice. Commonwealth ex rel. Davis v Malbon, 195 Va 368, 78 SE2d 683.

Footnote 61. United States v Edwards (CA5 Tex) 702 F2d 529, 12 Fed Rules Evid Serv 1313; United States v Solomon (CA11 Fla) 686 F2d 863, 11 Fed Rules Evid Serv 717.

But in prosecution for unlawful purchase of food stamps, the trial court did not abuse its discretion in granting the prosecution's motion to reduce the number of character witnesses for defendant from ten to five, where the only significance of defendant's character was that his testimony contradicted the prosecution's evidence, defendant admitted he could properly present character evidence with six witnesses, and defendant never explained what the sixth witness would have added to his case. United States v Benefield (CA11 Ala) 889 F2d 1061.

Trial court's exclusion of five out of six witnesses offered by the defense on the issue of a government witness' truthfulness was reversible error, where, although trial court has discretion to limit the number of character witnesses that a party may call, four witnesses were excluded, not as an exercise of discretion, but because the trial court was mistaken regarding the necessity for a foundation. United States v Watson (CA11 Fla) 669 F2d 1374, 10 Fed Rules Evid Serv 31.

Where the accused, who was charged with rape, was precluded from offering the

testimony of a second character witness, the limitation to one character witness was improper. *Washington v State* (Fla App D1) 247 So 2d 743, quashed on other grounds (Fla) 268 So 2d 901.

§ 364 When character or reputation is in issue in civil cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The general rule in civil cases excluding evidence bearing upon the character or reputation of the parties to the action is subject to an important exception in cases where, because of the nature of the action, the character or reputation of a party becomes a matter in issue; in such cases evidence with reference to such party's character or reputation is admissible. 62 Moreover, when the nature of the litigation is such as to put directly in issue the character of one of the parties, such party may introduce evidence in support of his character, even though his adversary has not sought to impeach it. 63

Federal Rules of Evidence 404(a) is applicable to civil cases where the issue in the case is analogous to those raised by a criminal trial. 64 However, while character evidence is admissible as substantive evidence when character is in issue, testimony concerning a civil plaintiff's good character which is relevant only as circumstantial evidence is irrelevant and properly excluded. 65

The reputation of a party for intemperance may be admitted in evidence when his intemperance is pertinent to the issues involved. 66 Thus, evidence of the general reputation for intemperance of an employee is admissible upon the question of the negligence of the employer in hiring or retaining such employee. 67 If the wealth or financial standing of a party to the action is relevant to the issues involved, the fact may be proved by the general reputation which he bears. 68 Evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency. 69

Usually in actions for assault and battery, evidence of the character or reputation of either the plaintiff or the defendant is admissible; 70 however there is also authority holding that Rule 404(a) applies only to criminal cases; therefore, in a civil action for assault, it is error to admit evidence of plaintiff's peaceful character. 71 Similarly, in actions for slander or libel, there is authority that the plaintiff's general character is involved in the issue, thus making competent evidence relative thereto. 72 But evidence of one's general good character for truth, veracity, honesty, and fair dealing is generally inadmissible by way of defense in a civil action in which a party is charged with a specific fraud. 73

Evidence of policyholder's pimping, pandering, and drug charges in a fire insurance case in which the insurance company claimed that the policyholder committed arson, should not have been admitted because charges, none of which led to convictions, may well have had unfair influence on the jury's deliberations, due to their socially offensive nature. 74

Under the Federal Rules, it has been held that when character evidence is offered because it is at issue, the evidence is not within the scope of Federal Rules of Evidence 404, which covers evidence introduced for the purpose of showing that a person acted in conformity with a particular character trait. 75 As to such evidence, the only issue is the allowable methods of proof, which are discussed in Federal Rules of Evidence 405. 76

§ 364 ----When character or reputation is in issue in civil cases [SUPPLEMENT]

Practice Aids: Use of FRE 404(a) character evidence in civil cases, 23 Colo Law 8:1801 (1994).

Rules:

(FRE, Rule 412), amended in 1994, now applies to civil as well as criminal proceedings to exclude evidence of an alleged victim's past sexual behavior or alleged sexual predisposition, with certain exceptions. (FRE, Rule 412(b)(2) provides that in a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

Case authorities:

In an action to demote a captain to a sergeant based upon complaints of sexual harassment brought by 6 female correctional officers who worked under the captain's supervision, the court of common pleas properly refused to consider the exclusion of character evidence of the complaining witnesses (victims) by the board, where such evidence was not admissible under Evid R 404(A)(2) since this was not a criminal prosecution, and it was not admissible under Evid R 404(A)(3) because the evidence did not concern credibility of the witnesses. *Kennedy v Marion Correctional Inst.*, 69 OS3d 20, 630 NE2d 324, 64 BNA FEP Cas 1436.

Footnotes

Footnote 62. *Thompson v Bowie*, 71 US 463, 4 Wall 463, 18 L Ed 423; *Baggett v State*, 250 Ala 413, 34 So 2d 688; *Rosencranz v Tidrington*, 193 Ind 472, 141 NE 58, 28 ALR 1136; *Koonts v Farmers Mut. Ins. Ass'n*, 235 Iowa 87, 16 NW2d 20; *Gore v Curtis*, 81 Me 403, 17 A 314; *Colburn v Marble*, 196 Mass 376, 82 NE 28; *Davenport v Silvey*, 265 Mo 543, 178 SW 168; *O'Brien v Frasier*, 47 NJL 349, 1 A 465; *Norris v Stewart's Heirs*, 105 NC 455, 10 SE 912; *Sloneker v Van Ausdall*, 106 Ohio St 320, 1 Ohio L Abs 134, 140 NE 121, 28 ALR 759; *Askey v New York Life Ins. Co.*, 102 Wash 27, 172 P 887.

In a contest between parents over the custody of a child of the marriage, evidence touching the character, conduct, and reputation of either of the parties, or any other evidence tending to throw light on their fitness to be custodian of the child, is admissible. *Milner v Gatlin*, 143 Ga 816, 85 SE 1045.

Evidence of the previous reputation of an attorney for honesty, probity, and good moral

character is admissible in evidence in a proceeding to disbar him for an alleged attempt to secure business by getting possession of an injured infant through false representations and having a guardian appointed for him without the parent's knowledge or consent. *Lenihan v Commonwealth*, 165 Ky 93, 176 SW 948.

Footnote 63. *Lenihan v Commonwealth*, 165 Ky 93, 176 SW 948.

Footnote 64. *Crumpton v Confederation Life Ins. Co.* (CA5 Tex) 672 F2d 1248, 10 Fed Rules Evid Serv 321, reh den (CA5 Tex) 679 F2d 250; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 65. *Blake v Cich* (DC Minn) 79 FRD 398, 3 Fed Rules Evid Serv 661.

As to evidence of the accused's good character, see § 367.

Footnote 66. *Locke v Brown* (Fla App D2) 194 So 2d 45 (evidence of plaintiff's antecedent intemperate habits was admissible to corroborate defendant's other proof as to plaintiff's intoxication); *Guy v Lanark Fuel Co.*, 72 W Va 728, 79 SE 941.

Footnote 67. *Smith v Prudential Ins. Co.*, 83 NJL 719, 85 A 190.

Evidence of the general reputation for drunkenness of a physician selected by an employer to treat his employees, in the community in which he practices, is admissible as tending to prove that the employer knew, or by proper diligence should have known, of it. *Guy v Lanark Fuel Co.*, 72 W Va 728, 79 SE 941.

Footnote 68. *Chellis v Chapman*, 125 NY 214, 26 NE 308.

Practice References Trial court restrictions on evidence of defendant's wealth. 30 Am Jur Trials 711.

Footnote 69. *Ellis v State*, 138 Wis 513, 119 NW 1110.

Footnote 70. 6 Am Jur 2d, Assault and Battery §§ 103-106.

Footnote 71. *Gibson v Gunsch* (App) 148 Ariz 416, 714 P2d 1311.

Footnote 72. 50 Am Jur 2d, Libel and Slander § 469.

Footnote 73. 37 Am Jur 2d, Fraud and Deceit § 458.

Footnote 74. *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360.

Footnote 75. *Crumpton v Confederation Life Ins. Co.* (CA5 Tex) 672 F2d 1248, 10 Fed Rules Evid Serv 321, reh den (CA5 Tex) 679 F2d 250 (evidence that insured had raped neighbor admissible to show that insured should have anticipated neighbor's violent reaction to being raped and that insured's death was therefore not accidental).

Footnote 76. §§ 375 et seq.

§ 365 Bad character of accused in criminal case

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Even though evidence of bad character and reputation may be logically relevant and of probative value, the courts, for sound reasons of policy, hold that it is legally irrelevant. 77 If such evidence was admissible, the deep tendency of human nature to punish, not because the accused is guilty, but because he is a bad man and may as well be condemned now that he is caught, would operate with the jury. 78 The accused might be overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the specific offense with which he is charged. 79 Consequently, the character of a person accused of a crime is generally held not a fact in issue in a prosecution for such a crime, and the prosecution cannot, in its evidence in chief, for the purpose of inducing belief in the accused's guilt, introduce evidence tending to show his bad character or reputation, 80 or that he has a tendency or disposition to commit the crime with which he is charged, 81 unless the accused chooses to make his character an issue. 82 In other words, the prosecution may not offer evidence of the accused's character unless and until the accused has raised the issue by offering evidence of his good character. 83

Where the accused undertakes to strengthen his case by proof of good character, he opens the door to evidence by the prosecution that his character or reputation is, in fact, bad. 84 Consequently, the prosecution may introduce evidence attacking the character or reputation of the accused where he first puts his good character in issue by introducing evidence to sustain his good character or reputation. 85 However, where the accused has not previously submitted evidence of his good character, an error in admitting evidence on behalf of the prosecution as to the bad character of the accused is not cured by his submission of evidence in rebuttal. 86

Federal Rules of Evidence 404(a)(1) requires that the government's rebuttal evidence focus on the pertinent trait placed in issue by the defendant; for example, does he in fact have a good reputation in the community or does he in fact have a reputation in his community for honesty? The government is not permitted to respond to the defendant's evidence that he is not the type of person who would embezzle checks from the United States mail by introducing evidence of the defendant's possession and use of small amounts of marijuana, since the latter evidence has absolutely no bearing on the defendant's propensity to engage in theft. 87

A defendant does not put his character in issue by merely taking the stand as a witness; 88 but certain evidence of bad character becomes admissible in order to attack a defendant's credibility as a witness, 89 and once a defendant offers evidence as to a pertinent character trait, under Federal Rules of Evidence 404(a)(1), the prosecution may offer evidence in rebuttal. 90

§ 365 ----Bad character of accused in criminal case [SUPPLEMENT]

Practice Aids: First and fifth amendments – the freedom to associate and due process clause – a state may not introduce at capital sentencing evidence of associational preferences if such evidence proves nothing more than mere abstract beliefs – *Dawson v. Delaware* [117 LE2d 309 (1992), 3 Seton Hall Const LJ 259 (1993)].

Case authorities:

In murder prosecution, trial court did not err in excluding evidence that, on date several months before murder, third person had broken into victim's home and stolen various items; present case was devoid of any evidence of theft or burglary, and no evidence as to violent nature of third person was proffered. *Larimore v State* (1994) 317 Ark 111, 877 SW2d 570.

The trial court erred by admitting testimony that a defendant on trial for possession of marijuana and cocaine with the intent to sell and deliver had a reputation in the community as a drug dealer when defendant had not offered character evidence, but this error was not prejudicial where defendant's guilt of the offenses charged could be found from his own testimony that he owned the bags of marijuana that he dropped on the ground and individually wrapped pieces of crack cocaine that he spit out of his mouth, and that although had sold drugs before, he didn't know whether he was going to sell the drugs seized from his possession or use them himself. *State v Taylor* (1995) 117 NC App 644, 453 SE2d 225.

In prosecution for voluntary manslaughter, trial court erred in allowing defendant's wife to answer question as to whether defendant was possessive and jealous since defendant had not placed his character in issue; however, admission did not prejudice defendant where other evidence showing possessive and jealous tendencies was properly admitted. *Richardson v State* (1993, Tex App Fort Worth) 860 SW2d 214.

Footnotes

Footnote 77. *State v Gress*, 250 Minn 337, 84 NW2d 616; *State v Garceau*, 122 Vt 303, 170 A2d 623.

Footnote 78. *State v Gress*, 250 Minn 337, 84 NW2d 616.

Footnote 79. *Topeka v Harvey*, 188 Kan 841, 365 P2d 1109; *State v Garceau*, 122 Vt 303, 170 A2d 623.

Footnote 80. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213 (superseded by statute on other grounds as stated in *United States v Solomon* (CA11 Fla) 686 F2d 863, 11 Fed Rules Evid Serv 717); *Williams v United States*, 168 US 382, 42 L Ed 509, 18 S Ct 92; *Hurst v United States* (CA5 Ga) 337 F2d 678; *Jordan v State*, 107 Fla 333, 144 So 669; *Bennett v State*, 86 Ga 401, 12 SE 806; *Topeka v Harvey*, 188 Kan 841, 365 P2d 1109; *Grigsby v Commonwealth*, 299 Ky 721, 187 SW2d 259, 159 ALR 196; *State v Beckner*, 194 Mo 281, 91 SW 892; *Bullock v State*, 65 NJL 557, 47 A 62; *People v Lingley*, 207 NY 396, 101 NE 170, reh den 208 NY 597, 102 NE 1109; *State v Markowitz*, 138 Ohio St 106, 20 Ohio Ops 63, 33 NE2d 1.

Elicitation by the prosecuting attorney of evidence having no tendency to prove the issue being tried, but serving only to show the cruel and evil nature of the accused, has been held particularly subject to condemnation in a prosecution for murder. *People v Gougas*, 410 Ill 235, 102 NE2d 152, 28 ALR2d 852.

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence, 49 ALR Fed 478.

Footnote 81. *State v Brady*, 100 Iowa 191, 69 NW 290; *State v Lapage*, 57 NH 245; *People v Sharp*, 107 NY 427, 14 NE 319.

But see *United States v McMahon* (CA1 NH) 938 F2d 1501, 34 Fed Rules Evid Serv 516, holding that evidence that an extortion defendant needed to take advances on his salary and had taken a second mortgage on his house was properly admitted as probative of present motive for acquiring money, not introduced to show that defendant was sort of person who would do anything for money.

Footnote 82. *Greer v United States*, 245 US 559, 62 L Ed 469, 38 S Ct 209.

Character is never an issue in criminal proceedings unless and until the accused makes it so at the trial; until the defense opens the door, the issue is foreclosed. *State v Jost*, 127 Vt 120, 241 A2d 316.

Footnote 83. *United States v Modern Reed & Rattan Co.* (CA2 NY) 159 F2d 656, 12 CCH LC ¶ 63530, cert den 331 US 831, 91 L Ed 1845, 67 S Ct 1510; *Post v State* (Fla App D2) 315 So 2d 230; *State v McCorvey*, 262 Minn 361, 114 NW2d 703; *Hamilton v State* (Miss) 197 So 2d 469; *State v Bush*, 211 SC 455, 45 SE2d 847; *State v Shuttle*, 126 Vt 379, 230 A2d 794; *State v Riggle*, 76 Wyo 1, 298 P2d 349, reh den 76 Wyo 63, 300 P2d 567 and cert den 352 US 981, 1 L Ed 2d 366, 77 S Ct 384.

Testimony of a police officer that he had known the defendant's wife for a number of years and that she had come to work at the defendant's hotel before she and the defendant were married was not objectionable as an attack upon the reputation of the defendant. *State v Graham*, 237 SC 278, 117 SE2d 147.

It is not that the accused's character is irrelevant to the question of guilt or innocence, but policy forbids an attack on his character until the accused has elected to make it an issue. *State v Shuttle*, 126 Vt 379, 230 A2d 794.

Footnote 84. *Greer v United States*, 245 US 559, 62 L Ed 469, 38 S Ct 209; *West v State*, 265 Ark 52, 576 SW2d 718; *Jordan v State*, 107 Fla 333, 144 So 669; *Kelly v People*, 229 Ill 81, 82 NE 198; *State v Bowers*, 218 Kan 736, 545 P2d 303; *Owens v Commonwealth*, 188 Ky 698, 222 SW 524; *State v Williams*, 337 Mo 884, 87 SW2d 175, 100 ALR 1503; *People v Lingley*, 207 NY 396, 101 NE 170, reh den 208 NY 597, 102 NE 1109.

In a prosecution for murder, defendant's testimony that he was incapable of committing violent acts and wanted a well-rounded relationship with the female victim, in addition to

testimony by defendant's doctor that defendant's intoxicated state rendered him incapable of the premeditation and deliberation necessary for first degree murder, opened the door and permitted the cross-examination of defendant regarding his propensity for violence generally and while he was intoxicated, and his attitude toward women. *State v Sullivan*, 131 NH 209, 551 A2d 519.

Footnote 85. As to the accused's right to introduce evidence of good character, see § 367.

Footnote 86. *State v Beckner*, 194 Mo 281, 91 SW 892.

The prosecutor in a robbery trial committed reversible error where, in his opening statement to the jury, he attacked the defendant's character by referring to a prior robbery conviction; the fact that defendant later took the witness stand and testified in his own behalf, admitting the prior conviction, did not render the error harmless, since such testimony may well have been a defense tactic to counter the initial taint resulting from the prosecutor's opening statement. *Post v State* (Fla App D2) 315 So 2d 230.

Footnote 87. *United States v Reed* (CA11 Ala) 700 F2d 638, 12 Fed Rules Evid Serv 1436.

Footnote 88. *United States v Masino* (CA2 NY) 275 F2d 129; *State v Linder*, 170 NJ Super 548, 407 A2d 830; *People v Nuzzo*, 294 NY 227, 62 NE2d 47.

Footnote 89. FRE 608, 609, discussed in 81 Am Jur 2d, Witnesses §§ 895 et seq.

Footnote 90. *United States v Petsas* (CA9 Cal) 592 F2d 525, 4 Fed Rules Evid Serv 207, cert den 442 US 910, 61 L Ed 2d 276, 99 S Ct 2824.

§ 366 --Under particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The courts frequently deal with the question of whether an accused's character has been placed into issue. The determination of whether the content of a particular statement has resulted in a defendant's character being placed into issue, is of an essentially subjective nature. Thus, where a defendant accused of a violent crime has testified as to his or her own peaceful nature, some courts have found that those statements have placed the defendant's character into issue. 91

The other courts have ruled that character was not placed into issue by a defendant's testimony with regard to his or her peaceful nature on direct examination. 92

The principle that a defendant must have placed his or her character into issue before the prosecution can introduce evidence of character has also been applied to other traits and offenses. For example, where defendants who were charged with assault, theft, and sexual offenses introduced testimony bearing on their characters for truthfulness, those

defendants were found to have placed their characters for truth in issue. 93 A rape defendant's introduction of evidence that he was trusted was found to have placed his character into issue, 94 and where one accused of a sexual offense introduced the testimony of a witness who alluded to the defendant's prior involvement in improper sexual conduct, the defendant's character for obedience to the law was sufficiently placed into issue. 95 In the case of an arson defendant, his presentation of evidence of his personal history, including financial and employment background, was found to sufficiently place character into issue. 96 A murder defendant's testimony that he had an aversion to killing, coupled with testimony of another defense witness, sufficiently placed his character for peacefulness in issue and thereby rendered admissible state's rebuttal evidence that defendant had fired deadly weapons at persons other than the victim. 97 Where defendant in a murder trial testified that he was peace-loving and nonviolent, his character for peacefulness was placed in issue so that testimony regarding his prior assaults on his former wife was properly admitted in rebuttal. 98

But the defendant does not put his character in issue by testifying in chief as to his place of birth, education, residence, or some other matter of personal history; 99 by his reply that he had been in court once before as a witness when asked if he had ever been in court before; 1 by denying the charges; 2 by his denial that he was a "queer;" 3 or by his statement that he did not remember other persons with whom similar offenses had been committed. 4 And a court has refused to find that the character of a defendant charged with physically abusing a child had been placed into issue by the prosecution's introduction of psychological "profile" evidence before the defendant had placed his character into issue. 5

§ 366 --Under particular circumstances [SUPPLEMENT]

Practice Aids: Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like. 18 ALR5th 804.

Footnotes

Footnote 91. *Squires v State* (Fla) 450 So 2d 208, cert den 469 US 892, 83 L Ed 2d 204, 105 S Ct 268, post-conviction proceeding (Fla) 513 So 2d 138, 12 FLW 512, appeal after remand (Fla) 558 So 2d 401, 15 FLW S 49, habeas corpus proceeding (Fla) 564 So 2d 1074, 15 FLW S 381, post-conviction proceeding (Fla) 565 So 2d 318, 15 FLW S 382, habeas corpus den (MD Fla) 794 F Supp 1568, 6 FLW Fed D 183, reh den, motion den (MD Fla) 818 F Supp 1485, 7 FLW Fed D 123; *State v Stroud*, 210 Mont 58, 683 P2d 459.

Murder defendant's testimony that he had, at risk to his own life, previously saved the lives of others, constituted an offer of his character for peacefulness, thereby entitling the prosecutor to present rebuttal testimony demonstrating the defendant's propensity for violence. *Brodent v State* (Okla Crim) 700 P2d 1021.

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

Footnote 92. *Dixon v State* (Fla App D2) 426 So 2d 1258 (statement that defendant had never hurt or robbed anyone); *State v Sobocinski* (Minn App) 395 NW2d 128; *State v Parks*, 71 Or App 630, 693 P2d 657, later proceeding 89 Or App 647, 750 P2d 526 and appeal after remand 90 Or App 170, 751 P2d 1115; *Kwallek v State* (Wyo) 596 P2d 1372 (defendant's assertion that he acted in self-defense).

Footnote 93. *State v Miller* (App) 128 Ariz 112, 624 P2d 309 (prosecution for theft by false pretenses and perjury); *State v Anderson*, 211 Mont 272, 686 P2d 193 (prosecution for sexual assault).

Footnote 94. *State v Workman* (Cuyahoga Co) 14 Ohio App 3d 385, 14 Ohio BR 490, 471 NE2d 853, post-conviction proceeding 40 Ohio St 3d 712, 534 NE2d 843, later proceeding (Ohio App, Cuyahoga Co) 1989 Ohio App LEXIS 4967.

Footnote 95. *State v D.B.S.*, 216 Mont 234, 700 P2d 630 (charged of incest).

Footnote 96. *State v Brush*, 32 Wash App 445, 648 P2d 897, review den 98 Wash 2d 1017.

Footnote 97. *Squires v State* (Fla) 450 So 2d 208, cert den 469 US 892, 83 L Ed 2d 204, 105 S Ct 268, post-conviction proceeding (Fla) 513 So 2d 138, 12 FLW 512, appeal after remand (Fla) 558 So 2d 401, 15 FLW S 49, habeas corpus proceeding (Fla) 564 So 2d 1074, 15 FLW S 381, post-conviction proceeding (Fla) 565 So 2d 318, 15 FLW S 382, habeas corpus den (MD Fla) 794 F Supp 1568, 6 FLW Fed D 183, reh den, motion den (MD Fla) 818 F Supp 1485, 7 FLW Fed D 123.

Footnote 98. *State v Stroud*, 210 Mont 58, 683 P2d 459.

Footnote 99. *Martin v People*, 114 Colo 120, 162 P2d 597.

Footnote 1. *Rose v Commonwealth*, 286 Ky 53, 149 SW2d 772.

Footnote 2. In a prosecution for first-degree murder and attempted robbery, the trial court reversibly erred in permitting the state to ask defendant about his numerous prior unrelated arrests since it was doubtful that defendant could be said to have placed his character in issue by stating, "I did not do it. I've never hurt nobody in my life. I don't know nothing about it. I don't know the man." *Dixon v State* (Fla App D2) 426 So 2d 1258 (noting that even if he placed his character in issue, the state should have sought to prove his bad character through testimony about his reputation, not by cross-examination about prior arrests).

Footnote 3. *Martin v People*, 114 Colo 120, 162 P2d 597.

Footnote 4. *State v Ewing*, 174 Or 487, 149 P2d 765.

Footnote 5. *State v Loebach* (Minn) 310 NW2d 58 (expert testified that child allegedly killed by defendant-father had characteristics of battered children).

Annotation: Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

§ 367 Evidence of accused's good character

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is generally held that evidence of the good character and reputation of an accused is admissible in a criminal prosecution, 6 insofar as such evidence has reference to a trait which is pertinent and relevant to the offense with which he is charged. 7 This rule applies to all criminal cases where the object of the prosecution is to punish the offender for crime, whether the crime charged is a felony or misdemeanor, 8 and wherever a criminal intent is necessary to constitute the offense. 9

◆ Practice guide: The defendant need not testify as a witness before offering character evidence on his own behalf. He may call a witness for that purpose although he does not himself testify as a witness. 10

Evidence of the good character and reputation of the accused in a criminal prosecution has the purpose and effect of strengthening the presumption of innocence, 11 and where good character and reputation are established, an inference or presumption arises that the accused did not commit the crime charged. 12 This view proceeds upon the theory that a person of good character and high reputation is not likely to have committed the act charged against him. 13

Under Rule 404(a)(1), in a criminal case, an accused may introduce evidence of his or her own good character in order to suggest the inference that someone with such a character would not have committed the crime with which the accused is charged. 14

◆ Practice guide: The offering of character evidence is a privilege of the defendant, and the prosecution cannot comment on the failure of the defendant to produce such evidence. 15

An accused may advance more than one character trait as evidence so long as each trait is germane to some issue in the trial. 16 Evidence that the defendant is a law-abiding person is relevant, and exclusion of such evidence may constitute reversible error, since evidence of good character may in itself raise a reasonable doubt as to the defendant's guilt. 17 Thus, an accused has been permitted to advance one or more of his character traits germane to the issues on trial as evidence of his innocence, 18 and to present general evidence of good character as tending to show that he would not commit a crime involving moral turpitude. 19

Character evidence of reputation for veracity constitutes substantive evidence which under certain circumstances can raise a reasonable doubt as to the defendant's guilt even though it does not relate to the specific criminal act of which he is accused, so long as the accused's credibility as a witness versus the main prosecution witness is the crux of the case. 20 However, an accused has not been permitted to present evidence of his reputation for truth and veracity in a criminal prosecution where such evidence is not

relevant to whether the accused committed the crime in question, and where the accused's credibility as a witness is not challenged, 21 and ordinarily a defendant may not prove his good character by evidence of specific instances of good conduct. 22

◆ Observation: It is proper for a trial court to deny permission to defendant to testify that he had never been arrested before since absence of arrests is especially weak character evidence, the court noting that a clever criminal may never be caught. 23

§ 367 ----Evidence of accused's good character [SUPPLEMENT]

Case authorities:

Former postal employee's failure to steal three "test letters" from mail was properly excluded since it was not relevant to intent to embezzle check five months earlier and was classic character evidence offered to prove that defendant had good character and acted in conformity therewith. *United States v Hill* (1994, CA7 Ill) 40 F3d 164.

Although court did not abuse its discretion in refusing to allow pastor to testify in view of defendant's offer of proof that pastor would testify about how long he had known defendant, and in what capacity defendant had been involved in church, on remand, testimony of defendant's good and peaceful character would be admissible since it was directly related to whether he would have sexually assaulted young girl. *State v Iosefa* (1994) 77 Hawaii 177, 880 P2d 1224, cert gr 76 Hawaii 453, 879 P2d 558.

Footnotes

Footnote 6. *Amos v State*, 209 Ark 55, 189 SW2d 611; *Slavens v State*, 1 Ark App 245, 614 SW2d 529; *State v Blake*, 157 Conn 99, 249 A2d 232; *State v Goetz*, 83 Conn 437, 76 A 1000; *Daniels v State*, 18 Del 586, 2 Penne 586, 48 A 196; *Norman v State* (Fla App D3) 156 So 2d 186, cert den (Fla) 165 So 2d 463 and cert den (Fla) 165 So 2d 463; *State v Dowell*, 47 Idaho 457, 276 P 39, 68 ALR 1061; *Carr v State*, 135 Ind 1, 34 NE 533; *State v Northrup*, 48 Iowa 583; *Commonwealth v Ashcraft*, 224 Ky 203, 5 SW2d 1067; *People v Lane*, 304 Mich 29, 7 NW2d 210; *Sinclair v State*, 87 Miss 330, 39 So 522; *State v Nienaber*, 347 Mo 615, 148 SW2d 537; *State v Quinn*, 344 Mo 1072, 130 SW2d 511; *State v Porter*, 143 Mont 528, 391 P2d 704; *Latimer v State*, 55 Neb 609, 76 NW 207; *State v Lang*, 87 NJL 508, 94 A 631, 10 ALR 4; *State v Costa*, 139 NJ Super 588, 354 A2d 691; *People v Sharp*, 107 NY 427, 14 NE 319; *Commonwealth v Cleary*, 135 Pa 64, 19 A 1017; *Morrison v State*, 217 Tenn 374, 397 SW2d 826, reh den 217 Tenn 387, 400 SW2d 237; *State v Hedding*, 114 Vt 212, 42 A2d 438; *State v Hedding*, 114 Vt 212, 42 A2d 438; *State v Moyer*, 58 W Va 146, 52 SE 30.

Footnote 7. § 369.

Footnote 8. *Balkum v State*, 115 Ala 117, 22 So 532; *Bailey v People*, 54 Colo 337, 130 P 832; *Kelly v People*, 229 Ill 81, 82 NE 198; *Commonwealth v Tircinski*, 189 Mass 257, 75 NE 261; *State v Lockerby*, 50 Minn 363, 52 NW 958; *State v Feeley*, 194 Mo 300, 92 SW 663; *State v Lang*, 87 NJL 508, 94 A 631, 10 ALR 4; *Territory v Lobato*, 17 NM 666, 134 P 222, affd 242 US 199, 61 L Ed 244, 37 S Ct 107; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *State v Foster*, 130 NC 666, 41 SE 284; *State v Magill*, 19 ND

131, 122 NW 330; *State v Roderick*, 77 Ohio St 301, 82 NE 1082; *Kirby v State*, 25 Okla Crim 330, 220 P 74, 33 ALR 1212; *Commonwealth v Harmon*, 199 Pa 521, 49 A 217; *Durham v State*, 128 Tenn 636, 163 SW 447; *Evers v State*, 31 Tex Crim 318, 20 SW 744; *State v Hosey*, 54 Wash 309, 103 P 12; *Ellis v State*, 138 Wis 513, 119 NW 1110.

Footnote 9. *Lincecum v State*, 29 Tex App 328, 15 SW 818; *Lann v State*, 25 Tex App 495, 8 SW 650.

Footnote 10. *Hennington v State*, 141 Tex Crim 449, 149 SW2d 587.

Footnote 11. *Daniels v State*, 18 Del 586, 2 Penne 586, 48 A 196; *State v Northrup*, 48 Iowa 583; *Strader v State*, 208 Tenn 192, 344 SW2d 546, 87 ALR2d 963; *State v Padgett*, 93 W Va 623, 117 SE 493; *State v Moyer*, 58 W Va 146, 52 SE 30.

Footnote 12. *State v Lee*, 22 Minn 407; *Latimer v State*, 55 Neb 609, 76 NW 207; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718.

Footnote 13. *Lenihan v Commonwealth*, 165 Ky 93, 176 SW 948; *Latimer v State*, 55 Neb 609, 76 NW 207; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *Kirby v State*, 25 Okla Crim 330, 220 P 74, 33 ALR 1212.

Footnote 14. *Government of Virgin Islands v Grant* (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620.

Footnote 15. *State v Markowitz*, 138 Ohio St 106, 20 Ohio Ops 63, 33 NE2d 1.

Footnote 16. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

Footnote 17. *United States v Angelini* (CA1 Mass) 678 F2d 380, 10 Fed Rules Evid Serv 876, on remand (DC Mass) 553 F Supp 367.

Footnote 18. *United States v Lechoco*, 177 US App DC 9, 542 F2d 84, 1 Fed Rules Evid Serv 338.

Footnote 19. *United States v Cylkouski* (CA6 Ky) 556 F2d 799, 1 Fed Rules Evid Serv 990 (prosecution for a gambling offense).

Footnote 20. *United States v Logan* (CA3 Pa) 717 F2d 84, 13 Fed Rules Evid Serv 1576.

Good character is a substantive fact to be considered by the jury in determining the ultimate issue of the defendant's guilt or innocence, but it is not a defense as such to the commission of a crime. *State v Demaree* (Mo) 362 SW2d 500, 17 ALR3d 312.

Footnote 21. *United States v Jackson* (CA5 Ala) 588 F2d 1046, 4 Fed Rules Evid Serv 245, 49 ALR Fed 461, reh den (CA5 Ala) 591 F2d 1343 and cert den 442 US 941, 61 L Ed 2d 310, 99 S Ct 2882 (prosecution for federal narcotics laws violation).

As to what is a pertinent character trait, see § 368, and as to the relationship of character trait to offense charged, see § 369.

Footnote 22. § 381.

Footnote 23. *Government of Virgin Islands v Grant* (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620.

§ 368 What is a "pertinent" character trait

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To be relevant, it is necessary that evidence of character, good or bad, be confined to a particular trait of character, the existence or nonexistence of which would be involved in the commission or noncommission of the crime charged. 24 The exceptions provided by Rule 404(a) authorize an offer of evidence of a "pertinent trait" of the character of an accused or a victim of a crime. The word "pertinent" as used in Federal Rules of Evidence 404(a)(1) has been held to mean the same as "relevant," which is defined in Federal Rules of Evidence 401; 25 therefore, the basic issue is whether the character trait in question would make any fact of consequence to the determination of the case more or less probable than it would be without evidence of that trait. 26 Evidence which is not pertinent is inadmissible because Federal Rule of Evidence 404 forbids its introduction as circumstantial evidence of innocence of a charged offense. 27

§ 368 ----What is a "pertinent" character trait [SUPPLEMENT]

Case authorities:

Where the State had presented evidence that defendant's brother asked him to swear on his mother's grave that he did not commit a robbery-murder but defendant stated only that he had tried to borrow money from the brother right before the crime occurred, the trial court erred by excluding as hearsay testimony by defendant's former wife that defendant loved his mother dearly and, in her opinion, would never swear or profane his mother's grave, since the testimony was not hearsay but was relevant character evidence admissible under Rule 404(a)(1) to rebut the implication in the State's evidence that defendant declined to swear to his innocence because he knew he was guilty. However, the exclusion of this testimony was not prejudicial error because the testimony could not have affected the jury's verdict in light of all of the other evidence, including a partial confession and eyewitness identification of defendant at the scene near the time of the crime. GS § 8C-1, Rule 404(a)(1). *State v Powell* (1995) 340 NC 674, 459 SE2d 219.

Footnotes

Footnote 24. *Darland v United States* (CA5 Ala) 626 F2d 1235, 7 Fed Rules Evid Serv 89, appeal after remand (CA5 Ala) 659 F2d 70, 9 Fed Rules Evid Serv 194, cert den 454 US 1157, 71 L Ed 2d 315, 102 S Ct 1032; *Norman v State* (Fla App D3) 156 So 2d 186, cert den (Fla) 165 So 2d 463 and cert den (Fla) 165 So 2d 463; *State v Ralph*, 217 Kan

457, 537 P2d 200 (addiction to narcotics is not a trait of character); State v Cavallo, 88 NJ 508, 443 A2d 1020, 42 ALR4th 919.

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence, 49 ALR Fed 478.

Footnote 25. United States v Angelini (CA1 Mass) 678 F2d 380, 10 Fed Rules Evid Serv 876, on remand (DC Mass) 553 F Supp 367; United States v Hewitt (CA5 La) 634 F2d 277, 7 Fed Rules Evid Serv 899; United States v Staggs (CA7 Ill) 553 F2d 1073, 1 Fed Rules Evid Serv 970.

For a discussion of what constitutes "relevant evidence", see §§ 307 et seq.

Annotation: 56 ALR4th 402; 149 ALR Fed 478.

Footnote 26. United States v Angelini (CA1 Mass) 678 F2d 380, 10 Fed Rules Evid Serv 876, on remand (DC Mass) 553 F Supp 367.

As to evidence tending to make probable the existence of a fact, see § 309.

Footnote 27. United States v Jackson (CA5 Ala) 588 F2d 1046, 4 Fed Rules Evid Serv 245, 49 ALR Fed 461, reh den (CA5 Ala) 591 F2d 1343 and cert den 442 US 941, 61 L Ed 2d 310, 99 S Ct 2882.

§ 369 Relationship of character trait to offense charged

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In determining the admissibility of evidence of an accused's character under Rule 404(a)(1), an initial consideration is the relationship of the trait to the offense with which the defendant was charged. While it has been held under the Federal Rules that a defendant has the right to establish the character trait of being a law-abiding citizen in every case, not only where he takes the stand or where dishonesty is an element of the crime involved, 28 other courts have circumscribed the rule, limiting it to situations where there is a clear relationship between the trait and the offense charged. It is generally held that insofar as evidence of the character or reputation of a party is admissible, such evidence must bear reference to the nature of the charge against him or the matter in issue. 29 Where the accused in a criminal case has put his character in issue, testimony as to his reputation must be confined to the particular traits which are relevant to the offense charged 30 Thus, a defendant's violence or peacefulness has been accepted as pertinent where he or she was charged with a violent crime, on the rationale that the existence of that trait bears strongly on the probability that the defendant committed or did not commit the alleged offense. 31 A defendant's

obedience to the law has been regarded as a trait pertinent to a charge of homicide. 32 But Rule 404(a) does not permit introduction of evidence of a person's violent nature in order to establish that such person committed a violent crime. 33

Courts have regarded as pertinent evidence of sexual morality where the defendant has been accused of a sexual offense, 34 although defendant's moral decency was held not pertinent to whether he committed the crimes of indecent liberties or incest; the court reasoned that since sexual activity is normally an intimate, private affair not known to the community, the defendant's reputation for sexual activity or the lack thereof could have no correlation to his actual sexual conduct. 35

Evidence of honesty or truthfulness has been regarded as pertinent where the defendant has been charged with robbery, burglary, or theft, 36 or in a prosecution for bookmaking. 37 Evidence of the use of alcohol or drugs has been held pertinent where the defendant was on trial for driving while intoxicated 38 or smuggling drugs into a prison. 39 In a suit on a fire insurance policy, evidence of the insureds' good character was admissible where the insurance company's defense on the policy accused the insureds of arson and fraud. 40

◆ Practice guide: Resemblance to a psychological profile for a particular personality type may be pertinent expert testimony in cases dealing with the personality of a defendant charged with homicide 41 and one charged with sexual abuse. 42

§ 369 ----Relationship of character trait to offense charged [SUPPLEMENT]

Case authorities:

In prosecution of male defendant for sexual abuse of male victim, trial court erred in admitting evidence of defendant's homosexual or bisexual orientation, even if evidence was logically relevant, as evidence was impermissible character evidence. *Blakeney v State* (1995, Tex App Austin) 911 SW2d 508.

Footnotes

Footnote 28. *United States v Hewitt* (CA5 La) 634 F2d 277, 7 Fed Rules Evid Serv 899.

Footnote 29. *Smith v United States*, 161 US 85, 40 L Ed 626, 16 S Ct 483; *Wiggins v Utah*, 93 US 465, 3 Otto 465, 23 L Ed 941; *Clark v United States*, 57 App DC 335, 23 F2d 756; *People v Peterson*, 120 Cal App 197, 7 P2d 366; *State v Goetz*, 83 Conn 437, 76 A 1000; *Norman v State* (Fla App D3) 156 So 2d 186, cert den (Fla) 165 So 2d 463 and cert den (Fla) 165 So 2d 463; *Carr v State*, 135 Ind 1, 34 NE 533; *State v Howland*, 157 Kan 11, 138 P2d 424; *State v Quinn*, 344 Mo 1072, 130 SW2d 511; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *State v Thompson*, 58 Utah 291, 199 P 161, 38 ALR 697; *Johnson v State*, 129 Wis 146, 108 NW 55.

Footnote 30. *Amos v State*, 209 Ark 55, 189 SW2d 611; *State v Blake*, 157 Conn 99, 249 A2d 232; *Stacey v Commonwealth*, 189 Ky 402, 225 SW 37, 25 ALR 490; *State v Quinn*, 344 Mo 1072, 130 SW2d 511; *State v Williams*, 337 Mo 884, 87 SW2d 175, 100

ALR 1503; *State v Cochrane*, 151 Ohio St 128, 38 Ohio Ops 575, 84 NE2d 742; *Couch v State*, 93 Tex Crim 27, 245 SW 692, 25 ALR 1359, appeal after remand 103 Tex Crim 188, 279 SW 821.

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

Footnote 31. *Darland v United States* (CA5 Ala) 626 F2d 1235, 7 Fed Rules Evid Serv 89, appeal after remand (CA5 Ala) 659 F2d 70, 9 Fed Rules Evid Serv 194, cert den 454 US 1157, 71 L Ed 2d 315, 102 S Ct 1032; *United States v Webb* (CA5 Ga) 625 F2d 709, 6 Fed Rules Evid Serv 1271 (prosecution for shooting at passing aircraft); *United States v Staggs* (CA7 Ill) 553 F2d 1073, 1 Fed Rules Evid Serv 970 (prosecution for assaulting federal officer with deadly weapon); *Shelton v State*, 287 Ark 322, 699 SW2d 728, 56 ALR4th 383; *State v Hodges* (Minn App) 384 NW2d 175, mod on other grounds, en banc (Minn) 386 NW2d 709.

Evidence of the general reputation of the accused for peace and quietude is permissible in a prosecution for murder, although the murder may have been committed by poisoning. *Carr v State*, 135 Ind 1, 34 NE 533.

Although the peacefulness of a defendant on trial for attempted murder was a pertinent trait admissible under Rule 404(a)(1), the court rejected a psychologist's testimony, which the defendant asserted would establish his character for peacefulness, because that testimony did not bear on the defendant's reputation for peacefulness. *State v Arnold* (Me) 421 A2d 932.

On the trial of an indictment for assault and carnal abuse upon a female child of the age of 14 years, where the state's proof had included a ravishment of the complaining witness by the defendant by force and threats, it was held that the reputation of the defendant as a quiet, peaceful, law-abiding citizen would indicate a disposition contrary to the committing of the acts charged, and the rejection of such evidence was error. *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207.

Annotation: When is evidence of trait of accused's character "pertinent" for purposes of admissibility under Rule 404(a)(1) of the Federal Rules of Evidence, 49 ALR Fed 478.

Footnote 32. *Shelton v State*, 287 Ark 322, 699 SW2d 728, 56 ALR4th 383.

Footnote 33. *State v Rankovich*, 159 Ariz 116, 765 P2d 518, 18 Ariz Adv Rep 9 (in prosecution for murder, trial court erred in admitting evidence of defendant's ethnic origin and dislike of United States, offered by prosecutor to show that defendant was basically an angry man who had shot victim out of anger).

Proffered testimony of psychologist that security guard who allegedly shot customer had propensity for violence was inadmissible since it was offered to prove that security guard acted in conformity with such propensity. *Morin v E.M. Loews Theatres, Inc.* (Me) 498 A2d 594.

Footnote 34. *State v Anderson*, 211 Mont 272, 686 P2d 193.

See *State v Miller* (Utah) 709 P2d 350, agreeing with the defendant's argument that evidence of his sexual morality would be admissible under Rule 404 in a prosecution for sexual abuse of a child, but holding that defendant's failure to show his character for sexual morality by reputation or opinion evidence rendered that evidence inadmissible.

Evidence of reputation of one accused of a sex crime must be confined to reputation for sex morality. *State v Thompson*, 58 Utah 291, 199 P 161, 38 ALR 697.

Footnote 35. *State v Jackson*, 46 Wash App 360, 730 P2d 1361.

As to the proof of character by evidence of reputation, see § 375.

Footnote 36. *Darland v United States* (CA5 Ala) 626 F2d 1235, 7 Fed Rules Evid Serv 89, appeal after remand (CA5 Ala) 659 F2d 70, 9 Fed Rules Evid Serv 194, cert den 454 US 1157, 71 L Ed 2d 315, 102 S Ct 1032; *State v Kramp*, 200 Mont 383, 651 P2d 614; *State v Hortman*, 207 Neb 393, 299 NW2d 187.

Footnote 37. *State v Micci*, 46 NJ Super 454, 134 A2d 805.

Footnote 38. *Quinto v Juneau* (Alaska App) 664 P2d 630, revd on other grounds (Alaska) 684 P2d 127.

Footnote 39. *State v Rabe*, 5 Hawaii App 251, 687 P2d 554.

Footnote 40. *Commonwealth Lloyd's Ins. Co. v Thomas* (Tex App Fort Worth) 678 SW2d 278, writ ref n r e (Mar 27, 1985) and later proceeding (Tex App Dallas) 825 SW2d 135, motion gr, writ granted, motion overr, set aside, cause remanded (Tex) 843 SW2d 486.

Footnote 41. *State v Kelly*, 33 Wash App 541, 655 P2d 1202, review gr 100 Was 2d 1001 and revd on other grounds 102 Wash 2d 188, 685 P2d 564 (fact that defendant accused of killing her husband suffered from the "learned helplessness" characteristic of battered women was a pertinent trait of her character under Rule 404(a)(1) where expert witness testified that the defendant's relationship with her husband fit the pattern of "battered woman syndrome").

But see *State v Loebach* (Minn) 310 NW2d 58, where defendant was charged with killing his child; prosecution's introduction of evidence that defendant's personality was similar to psychological profile of battering parents was not admissible since defendant had not place his character in issue; state's interest in admitting "profile" evidence to assure conviction of persons who batter children was overridden by defendant's interest in fair trial since such evidence unfairly requires accused to disprove and explain his or her personality traits or prior actions and open possibility that jury will overvalue "profile" evidence in assessing defendant's guilt.

Annotation: Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Footnote 42. *State v Miller* (Utah) 709 P2d 350 (psychologist's testimony describing the personality profile for persons who sexually abuse young children, along with the defendant's testimony that he did not possess any of the characteristics described in the

profile would have established a pertinent trait of the defendant's character, e.g., the incongruity of his personality traits with those of individuals likely to commit sexual offenses against children; therefore, such testimony was admissible under Rule 404(a)(1)).

◆ Caution: However, it was held in *State v Miller* (Utah) 709 P2d 350, supra, that the evidence warranted exclusion under Rule 403 because it could have led the jury to believe that the state's burden was to show that the defendant fit the characteristics of the psychological profile rather than to prove the elements of the offense of sexual abuse of a child.

See *United States v Gillespie* (CA9 Cal) 852 F2d 475, 26 Fed Rules Evid Serv 558, holding it error to admit expert testimony by clinical psychologist on "characteristics common to child molesters."

§ 370 --Where relationship is not clear

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In situations where the defendant's trait does not have a clear relationship to the alleged offense, the court must determine how the presence of a particular trait impacts on the probability that the defendant committed the crime charged. The obvious reason for the exclusion of proof of the possession or nonpossession of traits other than those involved in the crime charged is that it does not tend to enlighten a reasoning mind as to the probability of the conduct of that person. 43 For example, courts have refused to acknowledge the pertinence of a defendant's truthfulness in prosecutions for attempted homicide, 44 statutory rape, 45 assault, 46 robbery, 47 kidnapping and false imprisonment, 48 or conspiracy to distribute heroin 49 on the rationale that the presence of truthfulness has so slight a relationship to the offense that its presence or absence would have little or no bearing on whether the defendant committed that offense. So too, where the issue is one of honesty, evidence of sobriety and industrious habits is not pertinent. 50 And, where the accused has not taken the stand as a witness in his own behalf, 51 evidence of his reputation for truth and veracity is not admissible except where the trait of truthfulness is pertinent to the criminal charge. 52 While some courts have regarded a defendant's truthfulness as pertinent in a prosecution for sexual offenses, apparently reasoning that the defendant's truthfulness was closely related to his general morality, which in turn related to his propensity to commit crimes of a sexual nature, 53 other courts have held that the character trait of honesty was not involved in the offense of sexual assault, and it was thus not a "pertinent trait" under Rule 404(a)(1). 54

Courts have refused to treat as pertinent a defendant's devotion to his family in rape and burglary prosecutions, 55 and in a prosecution for transporting illegal aliens. 56 It would not be relevant to show the defendant's reputation for good military conduct in a rape prosecution; 57 nor was evidence of a police officer's commendations deemed pertinent to the charged crime of stealing civil service exams. 58 A defendant's trustworthiness was found not pertinent in prosecutions for assault; 59 his reliability in business was not pertinent in a prosecution for the malicious destruction of property, 60

and a defendant's abstinence from alcohol while at work was not pertinent in an assault prosecution. 61

◆ Observation: In such cases, the connection between the alleged offenses and the likelihood that the defendant's possession of the trait in question would influence him or her to not commit that offense are considered too tenuous.

Footnotes

Footnote 43. State v Quinn, 344 Mo 1072, 130 SW2d 511.

Footnote 44. State v Arnold (Me) 421 A2d 932; Reis v State, 130 Tex Crim 541, 95 SW2d 700.

Footnote 45. State v Howland, 157 Kan 11, 138 P2d 424; State v Jackson, 46 Wash App 360, 730 P2d 1361.

Footnote 46. State v Hortman, 207 Neb 393, 299 NW2d 187.

Footnote 47. People v Kendall, 357 Ill 448, 192 NE 378.

Footnote 48. State v Gonzales (App) 140 Ariz 369, 681 P2d 1388, vacated on other grounds 140 Ariz 349, 681 P2d 1368.

Footnote 49. United States v Jackson (CA5 Ala) 588 F2d 1046, 4 Fed Rules Evid Serv 245, 49 ALR Fed 461, reh den (CA5 Ala) 591 F2d 1343 and cert den 442 US 941, 61 L Ed 2d 310, 99 S Ct 2882.

Footnote 50. State v Moyer, 58 W Va 146, 52 SE 30.

Footnote 51. For principles applicable where accused is a witness, see § 372.

Footnote 52. Whaley v State, 157 Fla 593, 26 So 2d 656.

Where one is charged with the crimes of burglary and larceny, evidence of his reputation for truth and veracity is admissible, since truth and veracity are traits which accompany an honest man and not a thief or robber. Commonwealth v Pressel, 194 Pa Super 367, 168 A2d 779.

Footnote 53. People v Whitfield, 425 Mich 116, 388 NW2d 206; State v Anderson, 211 Mont 272, 686 P2d 193.

Footnote 54. State v Gonzales (App) 140 Ariz 369, 681 P2d 1388, vacated on other grounds 140 Ariz 349, 681 P2d 1368; Wiggins v State (Tex App Dallas) 778 SW2d 877, petition for discretionary review ref, motion for rehearing on PDR denied (Jan 17, 1990).

Defendant's character trait for truthfulness was not a pertinent trait under Rule 404(a)(1) to the charge of indecent liberties; the only traits pertinent to the charge were sexual morality and decency. State v Harper, 35 Wash App 855, 670 P2d 296, review den 100 Wash 2d 1035 and (criticized on other grounds by State v Jackson, 46 Wash App 360,

730 P2d 1361).

Footnote 55. Kellensworth v State, 275 Ark 252, 631 SW2d 1.

Footnote 56. United States v Santana-Camacho (CA1 Puerto Rico) 931 F2d 966, 32 Fed Rules Evid Serv 1229.

Footnote 57. State v Sbrilli, 136 NJL 66, 54 A2d 221.

Footnote 58. United States v Nazzaro (CA1 Mass) 889 F2d 1158, 29 Fed Rules Evid Serv 201, post-conviction proceeding (CA1 Mass) 1993 US App LEXIS 11653.

Footnote 59. State v Wells (Me) 423 A2d 221.

Footnote 60. People v Sturch, 321 Ill App (abstract) 306, 52 NE2d 831, affd 389 Ill 82, 58 NE2d 873.

Footnote 61. State v Bragg (Me) 516 A2d 556 (where there was no testimony that defendant appeared to be drinking at time of fight giving rise to prosecution).

§ 371 Character of witness; generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Federal Rules of Evidence 404(a)(3) provides that the admissibility of evidence of the character of a witness is governed by Federal Rules of Evidence 607 (permitting the credibility of a witness to be attacked by any party), Federal Rules of Evidence 608 (permitting the credibility of a witness to be supported or attacked by evidence in the form of reputation, opinion, or by specific instances of conduct), and Federal Rules of Evidence 609 (permitting impeachment of a witness by evidence of conviction of a crime). 62

While evidence of the character or reputation of a party to a civil action is not generally admissible, 63 where he testifies as a witness in his own behalf, evidence of his bad general reputation for truth and veracity may be introduced for the purpose of impeaching his credibility as a witness. 64 He may then, in turn, introduce evidence of his general reputation for truth and veracity for the purpose of enhancing his credibility as a witness. 65 However, he may not introduce such evidence for the purpose of supporting his testimony as a witness where his character or reputation has not been attacked. 66

Evidence concerning a witness' loans and debts is not admissible under Federal Rules of Evidence 404(a) to show that the witness is the type of individual who borrows money but does not repay it and hence that he was likely to have acted similarly with regard to his financial relationship with the defendant. 67

§ 371 ----Character of witness; generally [SUPPLEMENT]

Case authorities:

In prosecution for aggravated assault on police officer, trial court did not err in excluding reports based on complaints by citizens that officer had used excessive or unnecessary force in past where (1) reports consisted of recitations of specific instances of officer's conduct and not opinion or reputation testimony, (2) state had not raised issue of officer's character, and (3) justification theory of self- defense did not inquire into, as essential element, character of victim. *Evans v State* (1994, Tex App Texarkana) 876 SW2d 459.

Footnotes

Footnote 62. The grounds and bases for impeachment under these rules is generally discussed in 81 Am Jur 2d, Witnesses §§ 868 et seq.

Footnote 63. § 364.

Footnote 64. 81 Am Jur 2d, Witnesses §§ 895 et seq.

Footnote 65. 81 Am Jur 2d, Witnesses § 1006.

Footnote 66. 81 Am Jur 2d, Witnesses § 1007.

Footnote 67. *United States v Lanza* (CA2 NY) 790 F2d 1015, 20 Fed Rules Evid Serv 1180, cert den 479 US 861, 93 L Ed 2d 141, 107 S Ct 211.

§ 372 --Where accused is a witness

<p>View Entire Section Go to Parallel Reference Table</p>

The rule that the prosecution in a criminal proceeding cannot, for the purpose of inducing belief in the guilt of the accused, introduce evidence tending to show his bad character or reputation, 68 is not permitted to be violated by the prosecution, even when the accused offers himself as a witness. 69 This is true even though the accused offering himself as a witness is subject to impeachment the same as any other witness so far as his status and character as a witness, rather than as an accused on trial, are concerned. 70 In other words, as a defendant, the character of the accused cannot be attacked by the prosecution, 71 but as a witness he puts his credibility at issue like any other witness 72 and cannot claim immunity from that attack on the ground that he has not put his character in issue. 73

The fact that the accused voluntarily takes the stand to testify in his own behalf does not put in issue his general character or propensities; it opens up only the issue of credibility. 74 The accused as a witness in his own behalf, while subject to legitimate

cross-examination, just as is any other witness, does not lose his status or character as a defendant on trial, whose character or reputation the prosecution is not permitted to attack under the guise of a pretended questioning on cross-examination, the principal effect of which is calculated to be an attack on the character or reputation of the accused as such, so as to induce a more ready belief that he is guilty of the charge on which he is being tried. 75

Where the character for truth and veracity of the accused as a witness is attacked, he is then entitled to introduce evidence of his good character and reputation for the purpose of giving weight to his testimony, that is, to enhance his credibility as a witness. 76 He may not ordinarily introduce such evidence for the purpose of supporting his testimony as a witness where he has not been impeached or his character has not been assailed. 77 However, there is authority to the effect that the mere fact that one stands accused of a crime and the jury is bound to consider his interest in the outcome of the case is sufficient to justify evidence of good character in support of any testimony that he might give. 78

Footnotes

Footnote 68. § 365.

Footnote 69. *Jordan v State*, 107 Fla 333, 144 So 669.

Footnote 70. *Jordan v State*, 107 Fla 333, 144 So 669.

Footnote 71. *Jordan v State*, 107 Fla 333, 144 So 669; *Kirby v State*, 25 Okla Crim 330, 220 P 74, 33 ALR 1212; *State v Jones*, 73 Wyo 122, 276 P2d 445.

Footnote 72. 81 Am Jur 2d, Witnesses §§ 895 et seq.

Footnote 73. *Huling v State*, 38 Ala App 598, 92 So 2d 47, cert dismd 265 Ala 697, 92 So 2d 50; *State v Gelinas*, 160 Conn 366, 279 A2d 552; *People v Miller*, 13 Ill 2d 84, 148 NE2d 455, cert den 357 US 943, 2 L Ed 2d 1556, 78 S Ct 1394, reh den 358 US 859, 3 L Ed 2d 94, 79 S Ct 18 and cert den 363 US 846, 4 L Ed 2d 1729, 80 S Ct 1618; *State v Tolson*, 248 Iowa 733, 82 NW2d 105; *State v Cushinberry*, 180 Kan 448, 304 P2d 561; *Canter v Commonwealth*, 274 Ky 508, 119 SW2d 864; *People v Nuzzo*, 294 NY 227, 62 NE2d 47.

The defendant may also put his character in issue through the cross-examination of witnesses for the prosecution. *Adams v District of Columbia (Mun Ct App Dist Col)* 134 A2d 645.

Footnote 74. *State v Gress*, 250 Minn 337, 84 NW2d 616.

Footnote 75. *Jordan v State*, 107 Fla 333, 144 So 669.

Footnote 76. 81 Am Jur 2d, Witnesses § 1006.

Footnote 77. 81 Am Jur 2d, Witnesses § 1007.

Footnote 78. *Sutherland v United States (CA4 Va)* 92 F2d 305.

§ 373 Character of victim or complaining witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Traditionally, it was held that evidence of the good character and reputation of the complaining witness was not admissible in a criminal prosecution, at least insofar as the accused has made no attack upon such character or reputation. 79 However, evidence of the character and reputation of the complaining witness is admissible for the purpose of rebutting charges made by the defendant which, if unanswered, would besmirch the character of the complaining witness. 80

◆ **Observation:** In a prosecution for rape, testimony of the general reputation for chastity of the person who claims to have been raped was long held admissible as tending to show that the act of which she complains may not have been against her will, but rape shield laws have been enacted in many jurisdictions which bar the admissibility of the reputation of an alleged rape victim, except under certain limited circumstances. 81

Rule 404(a)(2) permits the admission of evidence of a pertinent trait of character of the victim of the crime offered by an accused; evidence of a pertinent trait of character of a victim of the crime offered by the prosecution to rebut character evidence of the victim offered by the accused; and evidence of a character trait of peacefulness of a homicide victim offered by the prosecution to rebut evidence that the victim was the first aggressor. 82 The victim's character may be at issue even when the defendant is charged with supposedly victimless crimes, where the indictment and the presentation of evidence by the government focus on the illegal deprivation of human life. 83

◆ **Caution:** It has been held that evidence of the victim's peaceful nature should not be admitted under Rule 404(a)(2) where the defendant had not introduced evidence of the victim's violent temperament. 84

The violent or peaceful character of a victim of a violent crime such as murder or assault has been generally recognized as pertinent, 85 but where the connection between the alleged offense and the victim's trait has not been as apparent as the pertinence of violence or peacefulness to a violent crime, such as where a defendant failed to demonstrate how a victim's obsession with sexuality bore on his propensity to commit homosexual rape, admissibility was denied. 86

◆ **Observation:** Certain characteristics exhibited by victims, such as religious dedication and the tendency to provide help to those in need may be admissible, but as habits rather than as pertinent character traits. 87

Where a victim's propensity toward homosexuality created a situation that could have prompted the victim to initiate the use of violence, those traits have been accepted as

pertinent. 88 However, evidence of a victim's homosexuality may be rebutted. 89 A victim's possession of a gun was found not to be a pertinent trait because the victim's mere ownership of a weapon did not indicate that his overall character was violent, 90 and a victim's membership in a gang has been excluded from evidence on the ground that it did not evince a trait, but rather showed prior instances of the victim's conduct. 91

Some courts have conditioned the admissibility of evidence of a violent crime victim's own character for violence on the defendant's awareness of that aspect of the victim's character at the time of the alleged offense. Thus, where defendants were aware of the victims' violence at the time of the offenses, evidence of the victims' characters has been admitted, 92 but where defendants had no knowledge of their victims' propensities toward violence, evidence of those propensities has been excluded. 93 And in some jurisdictions, it may be necessary to show that the victim committed an overt act against the defendant of such a character that it could have created in a reasonable person the belief that he was in immediate danger. The showing of an overt act entitles the defendant to show the victim's dangerous character, as well as specific acts which affected the defendant's state of mind. 94

◆ Practice guide: Although the literal language of the exceptions to Federal Rules of Evidence 404(a) applies only to criminal cases, when the central issue involved in a civil case is in its nature criminal, the defendant may invoke the exceptions to Federal Rules of Evidence 404(a). 95 For example, in a civil rights suit 96 in which the plaintiff alleges that the defendant deprived the plaintiff's decedent of his civil rights by killing him unjustifiably, the defendant, like a criminal defendant, stands in a position of great peril and should have the same opportunity to present a defense that a criminal defendant could present. Accordingly, the defendant is entitled to present evidence of the plaintiff's character from which the jury can infer that the plaintiff was the aggressor in the incident. 97

§ 373 ----Character of victim or complaining witness [SUPPLEMENT]

Case authorities:

Where the defendant in a murder, kidnapping, rape and sexual offense trial testified not only that the victim was the instigator of consensual sexual acts but also that the victim stated that she wanted to cheat on her husband, defendant's attack on the victim's character for marital fidelity went beyond what was necessary for his consent defense and opened the door to the admission of the State's rebuttal evidence about the victim's general good moral character, devotion to family, and reputation for marital fidelity. G.S. § 8C-1, Rule 404(a). *State v Sexton* (1994) 336 NC 321, 444 SE2d 879.

In a prosecution of defendant inmates for the murder of a fellow inmate wherein defendants contended that another inmate killed the victim because he was afraid the victim would kill him, and the other inmate testified to this effect, evidence that the victim had twice been convicted of murder was not admissible under Rule 404(a)(2) as a pertinent character trait of the victim since neither defendant relied on self-defense or any other justifiable homicide which would have made the victim's character pertinent; and evidence that the victim had been convicted of two murders, in support of defendants' theory that another inmate killed the victim, would be more prejudicial than probative after the other inmate testified that he committed the murder but did not contend that he

killed in self-defense. *State v Leazer* (1994) 337 NC 454, 446 SE2d 54.

The trial court in a murder prosecution did not err by denying defendant's motion to permit defendant to introduce, pursuant to Rule 404(b), prior convictions of the victim for assault with a deadly weapon and burglary, forensic evaluation records from Dorothea Dix Hospital pertaining to the assault conviction, and prison records of the victim's disciplinary infractions where there was no evidence that defendant was aware of the victim's criminal past at the time of the killing, and defendant's stated purpose for offering the evidence was to show that the victim had a propensity for violence and was the aggressor in the affray which led to the fatal shooting, since Rule 404(b) expressly prohibits admission of evidence for this purpose. G.S. § 8C-1, Rule 404(b). *State v Smith* (1994) 337 NC 658, 447 SE2d 376.

There was no prejudicial error in a noncapital first-degree murder prosecution in admitting evidence of the victim's character for peacefulness. Assuming that admission of the evidence that the victim was not known to be a violent person or to carry a gun was error, defendant cannot show prejudice because the other challenged evidence, that the victim was not in any of the altercations at the Soul Train Lounge the night of the murder and that neither defendant nor his friends were armed, was relevant to premeditation and deliberation and to motive and was properly admitted. Moreover, defendant waived his right to raise these objections on appeal because, for each item objected to under this assignment of error, virtually the same evidence was admitted without objection at other times during the trial. *State v Alford* (1995) 339 NC 562, 453 SE2d 512.

There was no error in a first- degree murder prosecution in the exclusion of testimony as to the victim's reputation for violence where defendant contended that the killing resulted from an accident. It was held in *State v. Winfrey*, 298 NC 260, and *State v. McCray*, 312 NC 519, that evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised. Although the Evidence Code subsequently provided in GS § 8C-1, Rule 404 that evidence of a pertinent trait of character of the victim is admissible, "pertinent" was not defined and left intact the rule which holds that the deceased's character is not pertinent in this case. *State v Goodson* (1995) 341 NC 619, 461 SE2d 740.

There was no error in a first- degree murder prosecution in not allowing testimony concerning the victim's arrest for driving while impaired approximately two weeks before she was killed. Defendant offered this evidence to rebut the State's evidence that there was ill will between himself and his wife and was allowed to testify that he procured his wife's release and brought her home. This was the crucial testimony; the details were peripheral to what he was trying to prove. *State v Goodson* (1995) 341 NC 619, 461 SE2d 740.

Footnotes

Footnote 79. *State v Magill*, 19 ND 131, 122 NW 330; *Commonwealth v Weatherwax*, 166 Pa Super 586, 73 A2d 427.

See *Burnett v People*, 204 Ill 208, 68 NE 505, holding that upon the trial of a man for persuading a woman with whom he had been criminally intimate to commit suicide, evidence as to her reputation for chastity is not admissible on behalf of the state, where

her character in that respect had not been attacked by the accused.

Footnote 80. *Commonwealth v Weatherwax*, 166 Pa Super 586, 73 A2d 427.

Footnote 81. The applicable federal rule, FRE 412, is discussed in §§ 496-506.

Annotation: Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 ALR4th 1076.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 ALR4th 283.

Footnote 82. FRE 404(a)(2); Uniform Rules of Evidence, Rule 404(a)(2).

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

Practice References Alleged victim's commission of prior acts of and reputation for violence. 15 Am Jur POF2d 167.

General reputation of person in community. 49 Am Jur POF2d 649.

Footnote 83. *United States v Perez-Casillas* (DC Puerto Rico) 607 F Supp 88 (in prosecution for perjury and conspiracy arising from alleged conspiracy to conceal homicide by police officers, court allowed evidence of victim's reputation for violence).

Footnote 84. *Dyer v State* (Alaska App) 666 P2d 438.

Footnote 85. *Ewing v Winans* (CA10 NM) 749 F2d 607, 17 Fed Rules Evid Serv 470 (criticized on other grounds by *Martinez v Sullivan* (CA10 NM) 881 F2d 921, 28 Fed Rules Evid Serv 921) as stated in *Myatt v Hannigan* (CA10 Kan) 910 F2d 680, 30 Fed Rules Evid Serv 1185; *Williamson v State* (Alaska App) 692 P2d 965; *State v Zamora* (App) 140 Ariz 338, 681 P2d 921 (aggravated assault); *Halfacre v State*, 277 Ark 168, 639 SW2d 734; *People v Lucero* (Colo App) 714 P2d 498; *Sanchez v State* (Fla App D3) 445 So 2d 1; *State v Estrada*, 69 Hawaii 204, 738 P2d 812, appeal after remand 71 Hawaii 260, 787 P2d 692, reconsideration den 71 Hawaii 665, 833 P2d 899; *People v Anderson*, 147 Mich App 789, 383 NW2d 186 (felony-murder, assault, felony-firearm); *State v Bland* (Minn) 337 NW2d 378; *State v Weinberger*, 204 Mont 278, 665 P2d 202 (deliberate homicide); *State v Ewing*, 97 NM 235, 638 P2d 1080, on remand on other grounds (App) 97 NM 484, 641 P2d 515, habeas corpus proceeding (CA10 NM) 749 F2d 607, 17 Fed Rules Evid Serv 470 (criticized on other grounds by *Martinez v Sullivan* (CA10 NM) 881 F2d 921, 28 Fed Rules Evid Serv 921) as stated in *Myatt v Hannigan* (CA10 Kan) 910 F2d 680, 30 Fed Rules Evid Serv 1185; *State v Shoemaker*, 80 NC App 95, 341 SE2d 603, writ den, stay den 316 NC 556, 344 SE2d 3 and app dismd, review den 317 NC 340, 346 SE2d 145 (voluntary manslaughter, assault with deadly weapon); *State v Smith* (Franklin Co) 10 Ohio App 3d 99, 10 Ohio BR 122, 460 NE2d 693; *State v Boykins* (App) 119 Wis 2d 272, 350 NW2d 710 (attempted murder).

Evidence of murder victims' violent characters should have been admitted pursuant to Rule 404(a)(2), because this evidence was relevant to the issue of who was the initial aggressor and whether the defendant reasonably believed that the victims were about to

inflict unlawful deadly physical force on him. *Smith v State*, 273 Ark 47, 616 SW2d 14.

In prosecution for murder and assault with deadly weapon, testimony of trooper that victims had bad reputation as violent people who were prone to fight, especially when drunk, was permissible under Rule of Evidence 404(a)(2). *State v Shoemaker*, 80 NC App 95, 341 SE2d 603, writ den, stay den 316 NC 556, 344 SE2d 3 and app dismd, review den 317 NC 340, 346 SE2d 145.

Annotation: 56 ALR4th 402 § 16.

Footnote 86. *Page v State* (Alaska App) 657 P2d 850.

Footnote 87. *Derring v State*, 273 Ark 347, 619 SW2d 644.

Footnote 88. *Williamson v State* (Alaska App) 692 P2d 965 (evidence that a victim had previously engaged in homosexual behavior similar to that which immediately preceded his murder constituted relevant character trait evidence under Rule 404(a)(2)).

Footnote 89. In prosecution for murder in which defendant offered evidence that victim attempted a homosexual attack, testimony of prosecution witnesses rebutting the evidence of the victim's alleged homosexual character was in response to character evidence forwarded by the defense and therefore was admissible under Rule of Evidence 404(a)(2). *State v Rivera*, 152 Ariz 507, 733 P2d 1090.

Footnote 90. *State v Zamora* (App) 140 Ariz 338, 681 P2d 921.

Footnote 91. *State v Zamora* (App) 140 Ariz 338, 681 P2d 921.

Footnote 92. *State v Zamora* (App) 140 Ariz 338, 681 P2d 921; *Halfacre v State*, 277 Ark 168, 639 SW2d 734; *State v Smith* (Franklin Co) 10 Ohio App 3d 99, 10 Ohio BR 122, 460 NE2d 693; *State v Boykins* (App) 119 Wis 2d 272, 350 NW2d 710.

See *Sanchez v State* (Fla App D3) 445 So 2d 1, stating that in a homicide prosecution where the defendant asserted self-defense, the victim's specific prior acts of violence which were known to the defendant were admissible under Rule 404(a)(2).

Footnote 93. *State v Zamora* (App) 140 Ariz 338, 681 P2d 921 (exclusion of evidence of the victim's general reputation for carrying a gun because the record contained no indication that the defendant knew of this aspect of the victim's reputation); *People v Jones* (Colo) 675 P2d 9; *People v Nichols*, 125 Mich App 216, 335 NW2d 665; *State v Bland* (Minn) 337 NW2d 378; *State v Ewing*, 97 NM 235, 638 P2d 1080, on remand on other grounds (App) 97 NM 484, 641 P2d 515, habeas corpus proceeding (CA10 NM) 749 F2d 607, 17 Fed Rules Evid Serv 470 (criticized on other grounds by *Martinez v Sullivan* (CA10 NM) 881 F2d 921, 28 Fed Rules Evid Serv 921) as stated in *Myatt v Hannigan* (CA10 Kan) 910 F2d 680, 30 Fed Rules Evid Serv 1185.

Footnote 94. *State v Gantt* (La App 2d Cir) 616 So 2d 1300, cert den (La) 623 So 2d 1302 (error in not allowing the defendant to present such evidence was harmless, however, since the evidence was cumulative).

Footnote 95. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv

1564.

Footnote 96. Under 42 USCS § 1983.

Footnote 97. Perrin v Anderson (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Annotation: Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence, 56 ALR4th 402.

§ 374 Character of other persons (coconspirators)

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The exclusionary principle embodied in Rule 404(a) is broad enough to bar evidence, offered by the prosecution, tending to show misconduct by a third person associated with the accused, where the effect is to invite the jury to convict the defendant on the principle of guilt by association. 98 The government's introduction of evidence of nontestifying coconspirator's prior conviction to impeach a testifying coconspirator is erroneous, since a conviction of one other than that the witness himself is not admissible on the issue of the witness' credibility. 99

Footnotes

Footnote 98. United States v Roenigk (CA8 Ark) 810 F2d 809, 22 Fed Rules Evid Serv 673 (prosecution of defendant I for alleged perjury in drug conspiracy trial of G; error to admit prejudicial and irrelevant evidence of G's crimes since the evidence was calculated that the defendant I the instant case, by his association with a convicted drug dealer, was more likely to be guilty of perjury).

Footnote 99. United States v Eason (CA11 Ga) 920 F2d 731, 32 Fed Rules Evid Serv 45 (criticized on other grounds by United States v Sarin (CA4 Md) 10 F3d 224).

b. Proving Character (Rule 405(a)) [375-385]

§ 375 Testimony as to reputation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Proof may be made by testimony as to reputation in all cases in which evidence of

character or a trait of character is admissible. 1

The generally prevailing rule is that testimony to prove the good or bad character of a party to a civil action or of the defendant in a criminal prosecution must relate and be confined to the general reputation which such person sustains in the community. 2 Reputation is not what a few persons say or may think about the party in question; it is what the community generally believes. 3 It follows that evidence of mere rumors of ill repute concerning the party whose character is in issue is not admissible as proof of reputation; 4 mere rumors are not tantamount to reputation, inasmuch as reputation involves a notion of the general estimate of a person by the community as a whole. 5

◆ Caution: A good reputation for "moral decency" may not avail defendant in a prosecution for sexual assault or similar crimes. In one case it was held that the defendant's reputation for sexual activity or the lack thereof was not pertinent to whether he committed the crimes of indecent liberties or incest; the court reasoned that since sexual activity is normally an intimate, private affair not known to the community, the defendant's reputation for moral decency could have no correlation to his actual sexual conduct. 6

Footnotes

Footnote 1. FRE 405(a); Uniform Rules of Evidence, Rule 405(a).

Footnote 2. *Henson v State*, 239 Ark 727, 393 SW2d 856, appeal after remand 255 Ark 600, 501 SW2d 619; *McDonough v Goodcell*, 13 Cal 2d 741, 91 P2d 1035, 123 ALR 1205; *Halligan v Lone Tree Farmers Exchange*, 230 Iowa 1277, 300 NW 551; *Colburn v Marble*, 196 Mass 376, 82 NE 28; *State v Turner*, 246 Mo 598, 152 SW 313; *State v Forshner*, 43 NH 89; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *Nance v Fike*, 244 NC 368, 93 SE2d 443; *State v Ellis*, 243 NC 142, 90 SE2d 225; *State v Fitzsimon*, 18 RI 236, 27 A 446; *Re Monaghan*, 126 Vt 53, 222 A2d 665.

General good reputation as a peaceable and law-abiding citizen of one charged with crime is not established by testimony to the effect that he has always been respected by almost everyone who has known him. *Cahill v People*, 111 Colo 29, 137 P2d 673, 148 ALR 536.

As to what constitutes the "community", see § 377.

Practice References Proof of general reputation in community, or in place of employment, business, or profession. 3 Am Jur Proof of Facts 175, Character and Reputation, Proof 1.

Footnote 3. *Moore v United States* (CA5 Ga) 123 F2d 207; *Halligan v Lone Tree Farmers Exchange*, 230 Iowa 1277, 300 NW 551.

It is not enough that such testimony be based upon what some or a few others have said regarding the reputation of the party in question, but the witness must be able to state what is generally said of him. *State v Ellis*, 243 NC 142, 90 SE2d 225.

See *State v Doherty* (Me) 437 A2d 876, stating that while a defendant's reputation for

nonviolence is pertinent under Rule 404(a)(1) in an assault prosecution because proof of that trait tends to reduce the likelihood that the defendant intended an unprovoked assault, the court would refuse to admit evidence of the defendant's nonviolence on the ground that he presented too few witnesses to establish his general reputation in the community.

Footnote 4. *Pattangall v Mooers*, 113 Me 412, 94 A 561.

Footnote 5. *Moore v United States* (CA5 Ga) 123 F2d 207.

Footnote 6. *State v Jackson*, 46 Wash App 360, 730 P2d 1361.

§ 376 --Foundation for testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An adequate foundation must be laid for the introduction of reputation evidence, ⁷ through a showing that the character witness is sufficiently familiar with the defendant's reputation and is competent to speak for the community. ⁸

◆ Observation: In some jurisdictions, the rule includes language requiring substantial familiarity with the accused's reputation. This plainly sets a requirement that before a witness may give his opinion of the accused's character based on the witness' knowledge of the accused's reputation, he must have been substantially familiar with that reputation and the familiarity must have existed prior to the date of the offense. ⁹

In cases in which it is held or recognized that testimony is admissible on the issue of reputation, it is presupposed that the witness has properly qualified by testifying that he knows what the general reputation of the party was in the community. ¹⁰ In other words, the witness must profess to know the general reputation of the party in question before he can be heard to speak of his own opinion or of the opinions of others of such reputation. ¹¹

Generally speaking, the assumption upon which the admissibility of evidence as to character or reputation rests and upon which its value depends is that such evidence originates from the experience of those who have come directly in contact with the person in question and who have the means of knowing his general character or what that general reputation is. ¹² Ordinarily, the members of the community in which the person whose reputation is in question resides are the only proper witnesses to testify to such character. ¹³ A witness is clearly qualified to testify to the reputation of another where he has been in such a position with reference to the latter's residence or community that he can speak with an authoritative opinion, ¹⁴ though there is authority that it is not always essential that a witness to the reputation of another have resided in the same community with him. ¹⁵

Testimony of a character witness is properly excluded where he does not possess the

necessary testimonial qualifications on the fact issue of the general reputation of the party in question. 16 In a number of cases it has been held that one hired for the specific purpose of investigating another's general reputation is not qualified to testify based upon knowledge so acquired, usually on the ground that if one's reputation may be attacked through the process of hiring an investigator, gross abuses would result. 17 However, in other cases it has been held that one who investigates the general reputation of another may be competent to testify as to the reputation of that person. 18 In support of the latter result, it has been said that an investigation and inquiry made for the specific purpose of discovering one's general reputation may extend over sufficient time, be broad enough in scope, and be otherwise conducted in such a manner as to enable the investigator reasonably to arrive at a probatively valuable conclusion as to the manner in which a community regards such person. 19

§ 376 --Foundation for testimony [SUPPLEMENT]

Case authorities:

In prosecution of defendant for murder of his boss, testimony of co-workers regarding victim's pertinent character trait of abusing his employees was properly excluded where there was no act of aggression by victim that such character evidence tended to explain; there was no evidence that victim made any overt aggressive act. *Campbell v State* (1994, Tex App El Paso) 885 SW2d 528.

Footnotes

Footnote 7. *United States v Torbert* (CA9 Cal) 496 F2d 154, cert den 419 US 857, 42 L Ed 2d 91, 95 S Ct 105.

Footnote 8. *United States v Kahan* (CA2 NY) 479 F2d 290, revd on other grounds 415 US 239, 39 L Ed 2d 297, 94 S Ct 1179 (person must be acquainted with person, community, and person's circle of acquaintances); *United States v Torbert* (CA9 Cal) 496 F2d 154, cert den 419 US 857, 42 L Ed 2d 91, 95 S Ct 105.

Annotation: Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Practice References General reputation of person in community. 49 Am Jur POF2d 649.

Handling the defense in a rape prosecution. 18 Am Jur Trials 341.

Footnote 9. *Hernandez v State* (Tex Crim) 800 SW2d 523 (witnesses who were relying on what they had heard from others and who had not discussed defendant's reputation with those who knew it, but had only discussed defendant's prior bad acts when called upon in their official capacities, were not competent to testify as to defendant's reputation.

Footnote 10. *Prevatt v State*, 82 Fla 284, 89 So 807; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718.

Generally, as to the competency of witnesses, see 81 Am Jur 2d, Witnesses §§ 163 et seq.

Footnote 11. A sustaining or impeaching character witness must first qualify himself by indicating whether he knows the general reputation or character of the person, and when thus qualified, the character witness may then indicate, of his own accord or by prompting from counsel, what that general reputation is. *State v Stegmann*, 286 NC 638, 213 SE2d 262, vacated, in part on other grounds 428 US 902, 49 L Ed 2d 1205, 96 S Ct 3203.

Footnote 12. *Roberts v Commonwealth (Ky)* 350 SW2d 626; *Pattangall v Mooers*, 113 Me 412, 94 A 561; *State v Steen*, 185 NC 768, 117 SE 793; *Schwimmer v State*, 84 Tex Crim 227, 206 SW 521.

Footnote 13. *State v Nelson*, 166 Minn 371, 208 NW 129.

Footnote 14. *State v De Shon*, 334 Mo 862, 68 SW2d 805 (ovrld on other grounds by *State v Williams*, 337 Mo 884, 87 SW2d 175, 100 ALR 1503); *People v Van Gaasbeck*, 189 NY 408, 82 NE 718.

Footnote 15. *State v Lambert*, 104 Me 394, 71 A 1092.

Footnote 16. *State v Cross (Mo)* 343 SW2d 20.

Footnote 17. *Minkow v United States (CA4 SC)* 5 F2d 319; *Young v Corrigan (DC Ohio)* 208 F 431; *Commonwealth v Baxter*, 267 Mass 591, 166 NE 742.

Trial judge properly excluded testimony of private investigator who was merely going to testify as to conversations he had with one of defendant's co-workers, with minister of defendant's church, and with laundry proprietor. *United States v Perry (CA2 NY)* 643 F2d 38, 7 Fed Rules Evid Serv 1224, cert den 454 US 835, 70 L Ed 2d 115, 102 S Ct 138, habeas corpus proceeding (CA2 Conn) 753 F2d 253.

One does not qualify as a character witness to the reputation of another by information he has gained in the course of a short-time investigation conducted after the occasion calling for such an inquiry. *Holliday v State (Ala App)* 346 So 2d 26.

Footnote 18. *State v Steen*, 185 NC 768, 117 SE 793.

Footnote 19. *State v Cross (Mo)* 343 SW2d 20, wherein the court noted, however, that usually it would be safer practice to adhere to the usual and generally approved procedure in adducing general reputation testimony.

§ 377 --Definition of "community"

[View Entire Section](#)

Geographically, testimony as to reputation has been held to be limited to the community in which the person lives, 20 the circles in which he has been employed, 21 or the community in which he spends a substantial portion of his time. 22

The term "community" or "neighborhood" is not susceptible of exact geographical definition, but means, in a general way, where the person is well known and has established a reputation, so that the inquiry is not necessarily confined to the domicile or residence of the party whose reputation is in question, but may extend to any community or society in which he has a well-known or established reputation. 23

The place of reputation or character, as regards employment or occupation, may be coextensive with the general community in which the person resides; certain circumstances may justify or require the admission of evidence of general reputation or character as exhibited in the place where the one in question works or carries on his business. 24 In several other cases, however, it has been held that evidence of character or reputation, as exhibited in the place of the person's employment or occupation, was not admissible, generally because of the circumstances involved, as not being evidence as to his reputation or character in the "community" or "neighborhood" or "general," in the required sense. 25

◆ Observation: It has been noted that in late twentieth-century America, it has become more difficult to define for any person the "community in which he has lived and the circles in which he has moved" 26 than it was less mobile days. It may therefore not be necessary to draw reputation from a particular "neighborhood"; it may come instead from the workplace, social and organizational settings, and other circles in which the person is known. 27

Footnotes

Footnote 20. *Cauley v State*, 92 Ala 71, 9 So 456; *Florida E. C. R. Co. v Hunt* (Fla App D3) 322 So 2d 68, 82 ALR3d 520, cert den (Fla) 336 So 2d 600; *Halley v Tichenor*, 120 Iowa 164, 94 NW 472; *State v Thoemke*, 11 ND 386, 92 NW 480.

Practice References Proof of general reputation in community, or in place of employment, business, or profession. 3 Am Jur Proof of Facts 175, Character and Reputation Proof 1.

General reputation of person in community. 49 Am Jur POF2d 649.

Footnote 21. *United States v Parker* (CA7 Ill) 447 F2d 826; *United States v Oliver* (CA8 Mo) 492 F2d 943, appeal after remand (CA8 Mo) 525 F2d 731, cert den 424 US 973, 47 L Ed 2d 743, 96 S Ct 1477.

Trial court erred in ruling that reputation testimony must originate in the community where victim resided, and in excluding testimony of witness as to victim's reputation, in the trucking industry, for violence. *Mullins v State* (Miss) 493 So 2d 971 (holding the error harmless in view of abundance of evidence as to victim's violent nature already

admitted).

Annotation: Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Footnote 22. *United States v Augello* (CA2 NY) 452 F2d 1135, cert den 406 US 922, 32 L Ed 2d 122, 92 S Ct 1787 and cert den 409 US 859, 34 L Ed 2d 105, 93 S Ct 145.

Louisiana statute providing that character depends on general reputation among neighbors includes reputation established in any substantial community of people among whom person is well known, including group with whom person works, does business or goes to school. *State v Clark* (La) 402 So 2d 684.

Annotation: Admissibility of evidence of accused's membership in gang, 39 ALR4th 775.

Footnote 23. *Craven v State*, 22 Ala App 39, 111 So 767; *State v McEachern*, 283 NC 57, 194 SE2d 787.

Footnote 24. *Maxwell v State*, 220 Ala 419, 125 So 682; *People v Schmidt*, 79 Cal App 413, 249 P 832, hear den by sup ct as reported in 79 Cal App 421, 250 P 1104; *Atlantic & B. R. Co. v Reynolds*, 117 Ga 47, 43 SE 456; *Fugate v Commonwealth*, 211 Ky 700, 277 SW 1029; *State v Cavett*, 171 Minn 222, 213 NW 920; *People v Colantone*, 243 NY 134, 152 NE 700; *Brotherhood of R. Trainmen v Vickers*, 121 Va 311, 93 SE 577.

The court in a prosecution for aggravated robbery properly permitted the accused to call his employer as a character witness, notwithstanding that the employer's opinion as to the accused's reputation was derived from comments made by people who knew the accused only through his job, where the accused lived and worked in a large city and where the favorable comments regarding the accused's reputation for honesty came from a fairly representative number of the accused's co-workers. *State v Buckner* (Iowa) 214 NW2d 164.

Footnote 25. *Sacrini v United States*, 38 App DC 371; *People v Pauli*, 58 Cal App 594, 209 P 88; *State v Brady*, 71 NJL 360, 59 A 6.

Unless there is a showing of an unavailability of reputation witnesses from the community or neighborhood in which the defendant lives and a further showing that the defendant is well-known among the people with whom he works, a defendant's co-workers may not testify as to his reputation for truth and veracity, particularly where there are close ties between the reputation witnesses and the matter in controversy. *Florida E. C. R. Co. v Hunt* (Fla App D3) 322 So 2d 68, 82 ALR3d 520, cert den (Fla) 336 So 2d 600.

Footnote 26. The quoted language is from *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213.

Footnote 27. *Louisell and Mueller*, Federal Evidence § 149.

See *United States v Parker* (CA7 Ill) 447 F2d 826 where it was held error to exclude evidence of defendant's reputation among his co-workers which may well be more

significant than his reputation among neighbors, particularly if they are apartment dwellers.

While the traditional requirement about "neighbor" reputation may have been appropriate to the conditions of the time, the reputation of a person living in an urban center is now often better known where that person works than where he resides. *State v Buckner* (Iowa) 214 NW2d 164.

§ 378 Time to which proof must relate

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the character or reputation of a party to a civil or criminal case should relate and be confined to a time not too remote from the time of the act in question. 28 In the case of a criminal defendant, reputation as to the party's character must relate to the time when the crime was committed 29 or to the period prior to then. 30

The exact length of time which will render evidence of reputation inadmissible cannot be fixed and, of necessity, the facts and circumstances of each case must dictate the appropriate result. 31 Whether given evidence of reputation is too remote is a matter left to the discretion of the trial judge, and his action will not be disturbed unless it constitutes an abuse of such discretion. 32

◆ Caution: Evidence to prove the good character or reputation of an adult should be confined, at least, to evidence of his character or reputation while an adult, and should not relate to his character or reputation as a youth. 33

Generally speaking, it is the reputation up to the time of the act in question only which is admissible, 34 and evidence of one's reputation subsequent to that time is generally not admissible, 35 although there is some authority that the reputation as to the accused's character may also relate to the time when the commission of the crime was first discovered. 36

Footnotes

Footnote 28. *People v Hardenbrook*, 48 Cal 2d 345, 309 P2d 424; *Lutz v People*, 133 Colo 229, 293 P2d 646; *People v Willy*, 301 Ill 307, 133 NE 859; *People v Willy*, 301 Ill 307, 133 NE 859; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *Mannix v Portland Telegram*, 144 Or 172, 23 P2d 138, 90 ALR 55; *Commonwealth v Luther*, 317 Pa Super 41, 463 A2d 1073; *Strader v State*, 208 Tenn 192, 344 SW2d 546, 87 ALR2d 963; *Mohler v Commonwealth*, 132 Va 713, 111 SE 454; *State v Riggs*, 32 Wash 2d 281, 201 P2d 219; *State v Barr*, 11 Wash 481, 39 P 1080.

Remoteness, if not too great, goes to the weight, rather than to the admissibility of evidence of good reputation of the accused. *Strader v State*, 208 Tenn 192, 344 SW2d

546, 87 ALR2d 963.

Annotation: Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 ALR2d 968.

Footnote 29. *People v Hardenbrook*, 48 Cal 2d 345, 309 P2d 424; *Lutz v People*, 133 Colo 229, 293 P2d 646; *People v Willy*, 301 Ill 307, 133 NE 859; *State v Jackson (Mo)* 373 SW2d 4; *Strader v State*, 208 Tenn 192, 344 SW2d 546, 87 ALR2d 963; *State v Riggs*, 32 Wash 2d 281, 201 P2d 219.

Annotation: 87 ALR2d 968.

Footnote 30. *Thomas v State*, 271 Ala 700, 122 So 2d 736; *State v Jackson (Mo)* 373 SW2d 4.

Footnote 31. *Strickland v State*, 37 Ariz 368, 294 P 617; *Wilder v People*, 86 Colo 35, 278 P 594, 65 ALR 1260; *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *State v Barr*, 11 Wash 481, 39 P 1080.

Footnote 32. *Strickland v State*, 37 Ariz 368, 294 P 617; *People v Green*, 217 Cal 176, 17 P2d 730; *Lutz v People*, 133 Colo 229, 293 P2d 646; *Strader v State*, 208 Tenn 192, 344 SW2d 546, 87 ALR2d 963; *State v Riggs*, 32 Wash 2d 281, 201 P2d 219.

Footnote 33. *State v Barr*, 11 Wash 481, 39 P 1080.

See *McAdoo v United States (Dist Col App)* 515 A2d 412, holding that defendant's juvenile adjudications may not be used to impeach his character witness.

Footnote 34. *Allen v Commonwealth*, 134 Ky 110, 119 SW 795; *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207.

Footnote 35. *Hallman v State*, 35 Ala App 534, 50 So 2d 6; *State v Hobbs (Iowa)* 172 NW2d 268; *State v Williams*, 16 NJ Super 372, 84 A2d 756; *State v Van Osten*, 68 RI 175, 26 A2d 858; *Moore v State*, 96 Tenn 209, 33 SW 1046.

Footnote 36. *Combs v Commonwealth*, 160 Ky 386, 169 SW 879.

Also see *Greenfield v State (Fla App D4)* 336 So 2d 1205, a prosecution for arson, holding that the state could properly ask defense witnesses testifying as to defendant's reputation for truth and veracity if they had heard of the arrest of defendant, for a different charge, after the date of the offense for which the defendant was on trial.

§ 379 --Specific time periods

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of reputation was held admissible where the character witnesses knew the

accused for 15 or 16 years, even though they knew nothing of his character after he moved away from the community about six years prior to the time of trial. 37 Where the accused had lived for 35 years in the community where the crime was committed, but had been away from that community for a period of five years and had returned only about 2 months prior to the alleged commission of the offense, evidence of his reputation prior to the five-year period was held admissible. 38

On the other hand, evidence of reputation was held inadmissible on the ground of remoteness where the character witness knew of the accused up to a time some seven years prior to the time of trial; 39 where the character witness knew of the accused up to a time some three years, 40 or four to five years, 41 prior to the time of the crime; or where the character witness knew of the accused only during a particular year which was some six years prior to the time of the crime. 42

◆ Observation: It would appear, that in order for character evidence to be probative, the witness must have known the defendant for an adequate period of time. 43

Footnotes

Footnote 37. State v Fry, 96 Tenn 467, 35 SW 883.

Footnote 38. Strader v State, 208 Tenn 192, 344 SW2d 546, 87 ALR2d 963.

Footnote 39. People v Hardenbrook, 48 Cal 2d 345, 309 P2d 424.

Footnote 40. State v Van Winkle, 106 Ariz 481, 478 P2d 105 (trial judge did not abuse his discretion in excluding character testimony of out-of-state employer where the accused had lived three years prior to trial and of minister at accused's church two years prior to the trial).

Footnote 41. Strickland v State, 37 Ariz 368, 294 P 617; Lutz v People, 133 Colo 229, 293 P2d 646; Potts v People, 114 Colo 253, 158 P2d 739, 159 ALR 1410.

Footnote 42. People v Green, 217 Cal 176, 17 P2d 730.

Footnote 43. Testimony of vice-president and general manager of company where defendant worked as to defendant's reputation at his place of employment was properly excluded where witness knew defendant for only a year, and witness' only knowledge of his reputation was through defendant's work record and the limited personal contact with defendant at work. Foster v State, 170 Ga App 222, 316 SE2d 828.

§ 380 Testimony in form of opinion

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Rules, proof may be made by testimony in the form of an opinion in all cases in which evidence of character or a trait of character of a person is admissible. 44 However, some particular state versions of the Uniform Rules omit this provision. 45

A defendant whose community reputation is bad may produce opinion evidence based on the witness' close association with the defendant and his personal observation that the defendant's character is good. 46 Under Federal Rules of Evidence 405(a), an expert witness, such as a psychologist, can testify as to character traits which may be substantially relevant. 47

◆ Caution: If such testimony is likely to lead to a battle of experts with sharply divergent views, it may be found excludible 48 on the ground that its probative value is substantially outweighed by confusion of the jury. 49

Federal Rules of Evidence 405 does not authorize a defendant to introduce the testimony of his probation officer to testify as to his good behavior on parole. 50

Under a statute which authorizes the admission of evidence of the defendant's prior criminal record, his general reputation and his character, opinion testimony is admissible at the punishment phase as a form of character evidence. 51

The Federal and Uniform Rules depart from the long-recognized principle that when character or reputation is properly made the subject of proof in the courts, only evidence of the esteem or lack of esteem in which the party is held by the community is admissible, and the personal knowledge or opinion of witnesses as to his character or reputation is not admissible. 52 In other words, a character witness could not testify that his own acquaintance, observation, and knowledge of the party in question lead to his own independent opinion that such party possesses a good or bad general or specific character. 53 Such evidence was held to be objectionable because the only means of testing its truth is by cross-examination as to the particular facts on which the opinion of the witness is based. 54 However, a character witness was allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. 55

◆ Comment: In recognizing opinion as a means of proving character, Rule 405 departs from the contemporary practice (at the time of the adoption of the Rules) in favor of that of an earlier day. As Wigmore points out, the earlier practice permitted opinion since such evidence was based on personal knowledge and belief as contrasted with the "secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." 56

In a few states it was held, even before the adoption of the Rules, that a witness testifying as to the character or reputation of a party may base his testimony on his personal knowledge of such character or reputation. 57 It was said, in support of this view, that there was no reason why evidence of general repute is any better or more satisfactory evidence of a person's character than the testimony of one who knows, from his own personal observation, what that character is. 58

Footnotes

Footnote 44. FRE 405(a); Uniform Rules of Evidence, Rule 405(a).

Footnote 45. See 13A ULA, Uniform Rules of Evidence, Rule 405, Variations from Official Text.

Footnote 46. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

Annotation: Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Footnote 47. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

An expert witness can testify as to the defendant's unusual susceptibility to suggestion, which is relevant to an entrapment defense. *United States v Hill* (CA3 Pa) 655 F2d 512, 8 Fed Rules Evid Serv 1021, on remand (ED Pa) 550 F Supp 983, 11 Fed Rules Evid Serv 1943, affd without op (CA3 Pa) 716 F2d 893, cert den 464 US 1039, 79 L Ed 2d 165, 104 S Ct 699.

Footnote 48. Under FRE 403, discussed in §§ 324 et seq.

Footnote 49. *United States v MacDonald* (CA4 NC) 688 F2d 224, 11 Fed Rules Evid Serv 474, cert den 459 US 1103, 74 L Ed 2d 951, 103 S Ct 726, habeas corpus proceeding (ED NC) 640 F Supp 286, later proceeding (ED NC) 607 F Supp 1183 and affd (CA4 NC) 779 F2d 962, 19 Fed Rules Evid Serv 1151, cert den 479 US 813, 93 L Ed 2d 22, 107 S Ct 63, habeas corpus den (ED NC) 778 F Supp 1342, affd (CA4 NC) 966 F2d 854, cert den (US) 121 L Ed 2d 542, 113 S Ct 606.

Footnote 50. *United States v Koessel* (CA8 Mo) 706 F2d 271, 13 Fed Rules Evid Serv 787.

Footnote 51. *Hedicke v State* (Tex Crim) 779 SW2d 837, cert den 493 US 1044, 107 L Ed 2d 836, 110 S Ct 840.

Footnote 52. *Spalitto v United States* (CA8 Mo) 39 F2d 782; *Deschenes v United States* (CA10 Kan) 224 F2d 688; *Clark v United States*, 57 App DC 335, 23 F2d 756; *Holmes v State*, 88 Ala 26, 7 So 193; *People v Ah Lee Doon*, 97 Cal 171, 31 P 933; *People v Belcastro*, 356 Ill 144, 190 NE 301, 92 ALR 1223; *State v Lambert*, 104 Me 394, 71 A 1092; *People v Albers*, 137 Mich 678, 100 NW 908; *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207; *State v Magill*, 19 ND 131, 122 NW 330; *Commonwealth v Gaines*, 167 Pa Super 485, 75 A2d 617; *Williams v State* (Tex App Amarillo) 649 SW2d 693.

See *United States v Morgan* (CA2 NY) 554 F2d 31, 1 Fed Rules Evid Serv 961, cert den 434 US 965, 54 L Ed 2d 450, 98 S Ct 504 noting that prior to the enactment of FRE

405, a character witness was not permitted to give his own opinion of the defendant's character.

Footnote 53. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213.

Footnote 54. *People v Van Gaasbeck*, 189 NY 408, 82 NE 718.

Footnote 55. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213.

Footnote 56. Advisory Committee Notes to Federal Rules of Evidence, FRE 405.

Footnote 57. *State v Richards*, 126 Iowa 497, 102 NW 439; *State v Lee*, 22 Minn 407; *State v Sedillo*, 24 NM 549, 174 P 985; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *State v Hosey*, 54 Wash 309, 103 P 12.

Footnote 58. *State v Lee*, 22 Minn 407.

§ 381 Evidence of specific conduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 405 permits proof or inquiry into specific instances of conduct of a person:

(1) in cases in which character or a trait of character is in issue, that is, where it is an essential element of a charge, claim, or defense; 59 or

(2) on cross-examination of a character witness. 60

Testimony as to specific instances of conduct of a person is not generally permissible on direct examination of an ordinary opinion witness to character. 61 Similarly, Federal Rules of Evidence 405(a) does not permit an accused to seek to prove his good character by evidence of specific acts. 62 Testimony as to an absence of prior arrests or other testimony as to the lack of prior bad acts is in essence testimony as to multiple instances of good conduct and is not admissible under Federal Rules of Evidence 405(a). 63 Similarly, a defendant charged with involuntary manslaughter by intoxicated driving who claims that the accident was not caused by his intoxication but by a fight which took place in the automobile cannot elicit testimony from witnesses to prove that on at least one prior occasion one of the occupants of the car beat another of the occupants severely. 64

To similar effect, under pre-Rule law, evidence of specific acts or of conduct of the party in question upon particular occasions, bearing upon his character, was usually held to be inadmissible as evidence of reputation. 65

The rule that evidence of specific acts or conduct of a person is not admissible upon the question of his character or reputation, but that such evidence must be confined to his

general reputation in the community, is applicable to evidence in rebuttal as well as to original testimony. 66 In some cases the rule was laid down that specific reputation concerning a crime charged is relevant and admissible, as well as evidence of general reputation of a disposition contrary to the crime charged. 67 Similarly, in civil cases the view has been expressed that specific acts of misconduct committed by a party to a suit may be shown in that class of cases where the act has some relation to, or some bearing upon, the issue involved in the case. 68

Where evidence of bad general reputation is admissible, the reasons for such reputation are immaterial. 69

§ 381 ----Evidence of specific conduct [SUPPLEMENT]

Case authorities:

In prisoner's civil rights suit alleging unreasonable use of force by guards, prisoner's disciplinary records should not have been admitted into evidence since key disputed issue was who initiated physical altercations underlying suit, and evidence was offered to show prisoner's aggressive character and thus that it was more likely that he was aggressor. *Hynes v Coughlin* (1996, CA2 NY) 79 F3d 285.

Footnotes

Footnote 59. FRE 405(b); Uniform Rules of Evidence, Rule 405(b).

Annotation: Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules, 13 ALR4th 796.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 ALR Fed 440.

Practice References Impeachment of witness by prior criminal conviction. 36 Am Jur POF2d 747.

Alleged victim's commission of prior acts of and reputation for violence. 15 Am Jur POF2d 167.

Footnote 60. FRE 405(a); Uniform Rules of Evidence, Rule 405(a), discussed in § 386.

Footnote 61. *United States v Dillon* (CA10 NM) 566 F2d 702, 78-1 USTC ¶ 9175, 41 AFTR 2d 78-366, cert den 435 US 971, 56 L Ed 2d 63, 98 S Ct 1613.

Advisory Committee Notes to Federal Rules of Evidence, FRE 405.

Footnote 62. *Government of Virgin Islands v Grant* (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620.

Exclusion of the defendant's prison record showing that he had a favorable work record and was making progress toward rehabilitation is proper in a prosecution for escaping from federal custody even though the defendant's theory for admitting such record is consistent with his defense of coercion. *United States v Davis* (CA5 Ga) 546 F2d 583, 2 Fed Rules Evid Serv 268, cert den 431 US 906, 52 L Ed 2d 391, 97 S Ct 1701.

Footnote 63. *Government of Virgin Islands v Grant* (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620.

Footnote 64. *United States v Kills Ree* (CA8 SD) 691 F2d 412, 11 Fed Rules Evid Serv 1368.

Footnote 65. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213; *Lester v Gay*, 217 Ala 585, 117 So 211, 59 ALR 1561; *Henson v State*, 239 Ark 727, 393 SW2d 856, appeal after remand 255 Ark 600, 501 SW2d 619; *State v Goetz*, 83 Conn 437, 76 A 1000; *Halligan v Lone Tree Farmers Exchange*, 230 Iowa 1277, 300 NW 551; *Pattangall v Mooers*, 113 Me 412, 94 A 561; *State v Dobbs*, 148 Md 34, 129 A 275; *State v Beckner*, 194 Mo 281, 91 SW 892; *Nance v Fike*, 244 NC 368, 93 SE2d 443; *State v Cochrane*, 151 Ohio St 128, 38 Ohio Ops 575, 84 NE2d 742; *Drakos v Jones*, 189 Okla 593, 118 P2d 388.

Footnote 66. *Dupree v State*, 33 Ala 380; *Clark v State*, 135 Ark 569, 205 SW 975; *McCarty v People*, 51 Ill 231; *Engleman v State*, 2 Ind 91; *Commonwealth v O'Brien*, 119 Mass 342; *State v Lapage*, 57 NH 245; *Bullock v State*, 65 NJL 557, 47 A 62; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *Commonwealth v Cleary*, 135 Pa 64, 19 A 1017; *De Grate v State* (Tex Crim) 518 SW2d 821.

Footnote 67. *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207.

Footnote 68. *Rosencranz v Tidrington*, 193 Ind 472, 141 NE 58, 28 ALR 1136; *Kolb v Union R. Co.*, 23 RI 72, 49 A 392.

Footnote 69. *McDonough v Goodcell*, 13 Cal 2d 741, 91 P2d 1035, 123 ALR 1205.

§ 382 --Where character is in issue

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Proof or inquiry into specific instances of conduct of a person is allowable in cases in which character or a trait of character is in issue, that is, where it is an essential element of a charge, claim, or defense. 70 Evidence of specific instances of past conduct of homicide victims may be introduced when a defense of self-defense is raised. 71

When evidence of a violent disposition is offered to prove that a person was the aggressor in a fight, this is an example of the circumstantial use of character evidence. When a plaintiff brings a civil rights action ⁷² alleging that the defendants deprived the plaintiff's decedent of his civil rights when they shot and killed him unjustifiably, the defendants can introduce reputation or opinion evidence of the plaintiff's decedent's violent and aggressive character but not evidence of specific violent incidents involving the plaintiff's decedent. ⁷³ Character is not necessarily at issue in determining who was the aggressor in a fight. Character is in issue only when the existence of the character trait itself will affect the rights of the parties. ⁷⁴ The plaintiffs in a civil rights action against police officers are not permitted by Federal Rules of Evidence 405 to introduce evidence of their lack of a criminal record, since their character is not put in issue by testimony that they attacked the defendant police officers. ⁷⁵

An illustration of when character would be an essential element of a claim, charge, or defense, thus making evidence of character admissible under Federal Rules of Evidence 405(b), would be a defamation case where the plaintiff's claim is that the defendant's defamatory statements harmed his reputation for good character. ⁷⁶

◆ **Comment:** When character is used circumstantially, proof may be made only by reputation and opinion, but when character is in issue (being an essential element of a charge, claim, or defense), proof may be made by specific instances of conduct as well as by reputation and opinion. ⁷⁷

Footnotes

Footnote 70. FRE 405(b); Uniform Rules of Evidence, Rule 405(b).

Annotation: Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Footnote 71. *United States v Perez-Casillas* (DC Puerto Rico) 607 F Supp 88.

Footnote 72. Under 42 USCS § 1983.

Footnote 73. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 74. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 75. *Blake v Cich* (DC Minn) 79 FRD 398, 3 Fed Rules Evid Serv 661.

Footnote 76. *Government of Virgin Islands v Grant* (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 77. Advisory Committee Notes to Federal Rules of Evidence, FRE 405.

§ 383 Negative evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The testimony of a witness to the effect that he has never heard anything against the character or reputation of a person is admissible to prove the good character of such person, provided the witness is shown to have been in such position that he would have heard anything that was said concerning the person's character or reputation. 78 Reputation may be manifested in other ways than by words, and one who is otherwise qualified and who has been in such a position that he probably would have heard comment had there been such may testify to the reputation of another in the neighborhood, even though he has heard nothing said. 79

Negative evidence is viewed as cogent evidence of a person's good character and reputation, because in the absence of any discussion about character, it may reasonably be presumed that the person's reputation is good. 80 When it is said of a person by those acquainted with him that they never heard his reputation as to truth and morals discussed, denied, or doubted, it is equivalent to passing upon him the highest praise. 81

◆ Caution: Under the modern rules, it has been held that defendant in a criminal trial was not entitled to establish that he had never been convicted of a crime as evidence of his good character, in that the absence of prior criminal convictions is not among the methods of proving character authorized by Rule 405, which limits such evidence to testimony about a person's reputation or proof of specific instances of his conduct. 82

Footnotes

Footnote 78. *United States v Webb* (CA5 Ga) 625 F2d 709, 6 Fed Rules Evid Serv 1271; *Hinson v State*, 59 Fla 20, 52 So 194; *State v Hobbs* (Iowa) 172 NW2d 268; *State v McClellan*, 79 Kan 11, 98 P 209; *State v Lambert*, 104 Me 394, 71 A 1092; *State v Lee*, 22 Minn 407; *Sinclair v State*, 87 Miss 330, 39 So 522; *State v Cavener*, 356 Mo 602, 202 SW2d 869; *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207; *People v Van Gaasbeck*, 189 NY 408, 82 NE 718; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *Commonwealth v Gaines*, 167 Pa Super 485, 75 A2d 617; *State v Hosey*, 54 Wash 309, 103 P 12; *Spencer v State*, 132 Wis 509, 112 NW 462.

Generally as to the admissibility of negative evidence, see § 318.

Footnote 79. *State v Baldanzo*, 106 NJL 498, 148 A 725, 67 ALR 1207.

Footnote 80. *State v McClellan*, 79 Kan 11, 98 P 209; *People v Woods*, 206 Mich 11, 172 NW 384; *State v Lee*, 22 Minn 407; *State v Cavener*, 356 Mo 602, 202 SW2d 869.

Footnote 81. *United States v Webb* (CA5 Ga) 625 F2d 709, 6 Fed Rules Evid Serv 1271; *Moulton v State*, 88 Ala 116, 6 So 758; *State v McClellan*, 79 Kan 11, 98 P 209; *Sinclair v State*, 87 Miss 330, 39 So 522; *State v Brandenburg*, 118 Mo 181, 23 SW 1080; *People*

v Van Gaasbeck, 189 NY 408, 82 NE 718; State v Hosey, 54 Wash 309, 103 P 12.

Footnote 82. Wrobel v State (Fla App D5) 410 So 2d 950, petition den (Fla) 419 So 2d 1201.

§ 384 Military record or discharge; in civil cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the basic rule excluding the admissibility in a civil action of evidence of a party's character or reputation where his character or reputation is not in issue, 83 evidence as to a party's military service record, 84 of his lack or evasion of military service, 85 is not ordinarily admissible, at least where the other party properly objects to the introduction of such evidence. 86

The reasons usually given for holding such evidence inadmissible is that in the particular case it has no relevancy to any material issue and would inject into the case a collateral issue which would tend to mislead or arouse the sympathy of the jury. 87 However, such evidence is admissible where the military service is put in issue 88 or is relevant to a material issue. 89 Thus, evidence of an honorable discharge, where not too remote, may be admissible in a personal injury action to show the physical condition of the injured person before the accident. 90

◆ Observation: Reference to military service, even though improper, is frequently held to be harmless. 91

Footnotes

Footnote 83. § 364

Footnote 84. Andrews v State (Fla App D1) 172 So 2d 505; Quinn v Louisville & N. R. Co., 144 Miss 505, 110 So 436; Peck v Bez, 129 W Va 247, 40 SE2d 1.

Footnote 85. Hockaday v Red Line, Inc., 85 US App DC 1, 174 F2d 154, 9 ALR2d 601.

Footnote 86. The failure to object to the introduction of evidence as to a party's military service may constitute, in effect, a waiver of such objection. McCown v Jennings (Tex Civ App) 209 SW2d 408.

Generally as to failure to object to admission of improper evidence, see 75 Am Jur 2d, Trial §§ 405 et seq.

Annotation: Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606.

Footnote 87. *Seismic Explorations, Inc. v Dobray* (Tex Civ App) 169 SW2d 739, writ ref w o m.

Footnote 88. *Alexander Trust Estate v Lindsey Drug Co.* (Tex Civ App) 214 SW2d 475, writ ref n r e.

In *Church v Larned*, 206 Mich 77, 172 NW 551, remarks by counsel for the plaintiff in a personal injury action that the plaintiff had a son who at the time of the accident was a soldier in active service was held not to constitute reversible error, where the fact that the plaintiff had a son in the service was brought out by the defendant's counsel upon cross-examination.

Footnote 89. *Re New England Transp. Co.*, 320 Mass 331, 69 NE2d 479.

In an action for malicious prosecution evidence of the plaintiff's honorable discharge from the Army was held admissible to show that his reputation was such as to render it unlikely that he would commit a crime of the nature charged by the defendant, the court saying that the matters and things stated in the certificate of discharge were relative and pertinent upon that question, and that there was no way other than by the certificate itself by which such matters could be proved. *Timmins v Hale*, 122 Or 24, 256 P 770.

Footnote 90. *Re New England Transp. Co.*, 320 Mass 331, 69 NE2d 479; *Girratono v Kansas City Public Service Co.* (Mo App) 243 SW2d 539, affd 363 Mo 359, 251 SW2d 59.

On the other hand, in an action under the Federal Employers' Liability Act, the admission in evidence of an honorable discharge of the plaintiff from the Army for the purpose of showing that at the time of his induction he was an able-bodied man was held error, since the certificate was an ex parte document, and tended to prove the good character of the plaintiff when that question was not in issue. *Vicksburg, S. & P. R. Co. v Godwin* (CA5 La) 14 F2d 114.

In a personal injury action, evidence of the military record of the plaintiff could be introduced to show his sound health prior to the accident. *Girratono v Kansas City Public Service Co.* (Mo App) 243 SW2d 539, affd 363 Mo 359, 251 SW2d 59.

Footnote 91. *Poulin v Zartman* (Alaska) 542 P2d 251, on reh (Alaska) 548 P2d 1299 and (ovrld on other grounds by *State v Alex* (Alaska) 646 P2d 203) as stated in *Snyder v Foote* (Alaska) 1991 Alas LEXIS 143, corrected, remanded (Alaska) 822 P2d 1353 (medical malpractice action for injury to child resulting in blindness and mental retardation).

Interrogation by plaintiff's counsel of plaintiff concerning military service in Vietnam did not require new trial, where tour of duty was mentioned only briefly and in trial on damages, no emphasis was placed on military service, and plaintiff's counsel did not attempt to use fact of military service to prejudice the jury. *Fields v Volkswagen of America, Inc.* (Okla) 555 P2d 48, 84 ALR3d 1199.

§ 385 --Criminal cases

Although proof of good character may generally be offered by an accused in a criminal proceeding to lessen the probability of guilt, 92 in establishing the character of the defendant, it is said to be immaterial that he was in the military service, 93 that he was wounded while in the service, 94 that he received medals for his service, 95 or that he had a commendable service record. 96

It cannot generally be shown that the defendant received an honorable 97 or dishonorable 98 discharge from the military service. Furthermore, evidence of an accused's lack of military service, or evasion of service, has been held inadmissible in a criminal proceeding, 99 as has evidence of specific acts of a defendant while in the military service which tend to discredit him. 1

◆ Observation: An honorable discharge may be admissible for some purposes other than as character evidence. 2

As reasons for excluding such evidence, it has been said that a certificate of honorable discharge is not an official record or document, but is merely an extrajudicial statement of a third person which is inadmissible as hearsay, 3 that it does not disclose the defendant's character as to a trait relevant to the crime charged; 4 that under the circumstances of the particular case the honorable discharge or military record of the accused was immaterial and irrelevant, 5 or was not evidence of the accused's reputation in the community in which he lived as respects the trait or character involved in the crime charged. 6

Evidence of a dishonorable discharge of an accused in a criminal proceeding has been held inadmissible for the same reason that honorable discharges have been excluded. 7 Likewise, evidence of specific acts or conduct of an accused while in the military service which tend to discredit him have been generally considered inadmissible. 8

On the other hand, there is authority holding or recognizing that evidence of the military record or honorable discharge of the accused may be admissible for certain purposes, 9 or that with regard to certain kinds of crimes or defenses, such evidence may be relevant to the issues in the case. 10 And when a defendant introduces evidence of his honorable discharge from the Armed Forces, the prosecution may be permitted to show in cross-examination that entries on the certificate reflect unfavorably on the accused. 11

◆ Practice guide: Comment by a prosecuting attorney as to a defendant's lack of military service, or his evasion of service, designed to inflame the jury against the defendant, is obviously improper, 12 but the attempt to introduce improper acts of the defendant while in the military service, or improper comment by the prosecuting attorney as to the defendant's lack of military service, has often been regarded as cured by the trial judge's instruction to the jury to disregard such evidence or comment. 13 Furthermore, comment by a trial judge as to the military service of a defendant may also be prejudicial. 14

Footnotes

Footnote 92. § 367.

Footnote 93. *Shewbart v State* (Ala App) 32 So 2d 241; *People v McGill*, 82 Cal App 98, 255 P 261; *People v Ervin*, 342 Ill 421, 174 NE 529.

But see *Bennett v United States* (Dist Col App) 375 A2d 499 (in prosecution for murder, defendant was not prejudiced by prosecutor's remarks in closing argument suggesting that life meant almost nothing to defendant because he had been in military service and had served in Vietnam).

Footnote 94. *People v Hauke*, 335 Ill 217, 167 NE 1; *State v Hardimon* (Minn) 310 NW2d 564 (defendant was not allowed to show, in prosecution for murder, that he was victim of post-traumatic stress disorder and Vietnam War flashbacks); *State v Rose* (Mo) 249 SW2d 324 (evidence of shell shock excluded where defendant refused to raise issue of insanity).

Footnote 95. *French v United States* (CA5 La) 232 F2d 736, cert den 352 US 851, 1 L Ed 2d 62, 77 S Ct 73; *State v Sbrilli*, 136 NJL 66, 54 A2d 221; *Commonwealth v Steinberg*, 189 Pa Super 381, 150 A2d 131; *Patty v State* (Tenn Crim) 556 SW2d 776.

Evidence as to defendant's gallantry as officer and pilot in Vietnam was inadmissible except that, upon conviction, it may be considered in mitigation of sentence. *United States v Goldfarb* (CA6 Mich) 643 F2d 422, cert den 454 US 827, 70 L Ed 2d 101, 102 S Ct 117, 102 S Ct 118.

Following testimony by defendant concerning his military record, trial court did not err in not allowing defendant to read military citations into record where recitations of accomplishments contained in citations were not material or relevant as to whether defendant committed crimes of kidnapping and bank robbery or on issue of insanity. *Patty v State* (Tenn Crim) 556 SW2d 776.

See *People v Jones* (2d Dept) 121 App Div 2d 398, 503 NYS2d 109, app gr 68 NY2d 813 (criminal prosecution in which defendant testified about his exemplary military record, including awards and citations; trial court correctly ruled that defendant had put his character in issue, and permitted prosecutor to inquire whether defendant had ever been convicted of crime).

Footnote 96. *French v United States* (CA5 La) 232 F2d 736, cert den 352 US 851, 1 L Ed 2d 62, 77 S Ct 73.

Footnote 97. *Mixon v State*, 57 Ala App 643, 331 So 2d 399; *Ridgell v United States* (Mun Ct App Dist Col) 54 A2d 679; *Ray v State*, 159 Fla 101, 31 So 2d 156, 172 ALR 726; *Ray v State*, 159 Fla 101, 31 So 2d 156, 172 ALR 726; *Allison v State*, 203 Md 1, 98 A2d 273; *State v Sbrilli*, 136 NJL 66, 54 A2d 221; *Frey v State*, 171 Tex Crim 100, 345 SW2d 416, cert den 368 US 865, 7 L Ed 2d 62, 82 S Ct 113; *Gary v State*, 150 Tex Crim 397, 201 SW2d 820; *State v Stoller*, 107 Utah 429, 154 P2d 649.

Annotation: Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606.

Footnote 98. *Johnson v United States* (Dist Col App) 366 A2d 429; *People v Robinson*, 386 Mich 551, 194 NW2d 709, appeal after remand 48 Mich App 253, 210 NW2d 372; *Price v State* (Okla Crim) 546 P2d 632.

Where the defendant was charged with sodomy, the prosecution could not establish on cross-examination that he had been dishonorably discharged from military service because of homosexuality, where the defendant had not put his good character in issue. *Andrews v State* (Fla App D1) 172 So 2d 505.

See *State v Ho'o* (App) 99 NM 140, 654 P2d 1040, cert den 99 NM 148, 655 P2d 160 (in prosecution for murder, admission of evidence of defendant's other-than-honorable discharge from military service was harmless error, where there was overwhelming evidence that defendant shot two victims during altercation).

Footnote 99. *State v Fitch*, 65 Nev 668, 200 P2d 991 (ovrld on other grounds by *Graves v State*, 82 Nev 137, 413 P2d 503).

See *State v Wright*, 12 Wash App 585, 530 P2d 704, review den 85 Wash 2d 1006, holding that prosecutor's implication in cross-examination that defendant was a draft evader was not so prejudicial as to require mistrial.

Footnote 1. *People v Wilson*, 400 Ill 461, 81 NE2d 211; *Powell v Commonwealth*, 308 Ky 467, 214 SW2d 1002; *State v McClure* (Mo App) 504 SW2d 664; *People v Perez*, 36 NY2d 848, 370 NYS2d 914, 331 NE2d 691; *Gooden v State* (Okla Crim) 617 P2d 248 (in prosecution for burglary, prosecutor's conduct constituted prejudicial error where he repeatedly questioned defendant as to whether he had ever been arrested for being A.W.O.L. from the army); *State v Massey*, 34 Or App 95, 577 P2d 1364.

In a prosecution for willful attempt to evade or defeat the federal income tax, it was prejudicial error to admit a 16-year-old military conviction for larceny where there were no exceptional circumstances justifying use of the prior conviction, since defendant's credibility had already been well impeached by the government's cross-examination. *United States v Cathey* (CA5 Fla) 591 F2d 268, 4 Fed Rules Evid Serv 8.

But a question by the solicitor on cross-examination of the accused as to whether the accused had been guilty of violating a regulation against being away from his base without a pass was held not objectionable as prejudicial, since such evidence was simply part of the story of the night on which the offense occurred and was a possible explanation of statements of the accused as to being on the base. *State v Bass*, 93 NH 172, 37 A2d 7.

Footnote 2. *State v Bowers*, 218 Kan 736, 545 P2d 303 (evidence of defendant's military service and honorable discharge should be considered as part of his background information and biographical data and not as evidence of good character opening door to attack on cross-examination); *Allison v State*, 203 Md 1, 98 A2d 273 (discharge record should not be excluded as hearsay as it was an official record, but it should still be excluded as evidence of character); *Commonwealth v Steele*, 362 Pa 427, 66 A2d 825 (prosecution may introduce defendant's discharge, showing him to be a qualified rifle marksman, as relevant to whether the shooting by him was accidental).

Footnote 3. *Ridgell v United States* (Mun Ct App Dist Col) 54 A2d 679; *People v*

English, 68 Cal App 2d 670, 157 P2d 429; Ray v State, 159 Fla 101, 31 So 2d 156, 172 ALR 726; Commonwealth v Steele, 362 Pa 427, 66 A2d 825.

But see Allison v State, 203 Md 1, 98 A2d 273, referring to discharge record as an official record.

Footnote 4. State v Stoller, 107 Utah 429, 154 P2d 649.

Footnote 5. Culbreath v State, 22 Ala App 143, 113 So 465; Lee v State, 20 Ala App 334, 101 So 907, cert den 212 Ala 135, 101 So 909; People v McGill, 82 Cal App 98, 255 P 261 (evidence of a defendant's military service not material in a prosecution for burglary and grand larceny); State v Reeves, 150 La 950, 91 So 403.

Footnote 6. State v Taylor, 293 Mo 210, 238 SW 489; State v Sbrilli, 136 NJL 66, 54 A2d 221 (exclusion of evidence of an honorable discharge of a defendant in a prosecution for rape was not error).

Footnote 7. Andrews v State (Fla App D1) 172 So 2d 505; Harold v Commonwealth, 147 Va 617, 136 SE 658.

Footnote 8. Grigsby v Commonwealth, 299 Ky 721, 187 SW2d 259, 159 ALR 196.

Testimony elicited from a witness in a prosecution for murder that the defendant stated to her that when he was in the Army he offered one of his companions \$500 to shoot him in the foot so that he would not have to go "up front" was highly objectionable. People v Wilson, 400 Ill 461, 81 NE2d 211.

Footnote 9. Where, in a prosecution for assault, the defendant testified without objection, in support of his reputation for peacefulness, that he expected an honorable discharge from the Air Force, evidence showing his premature separation from the Air Force because of unsuitability characterized by disobedience of orders was admissible to impeach his evidence of the expected honorable discharge. State v Porter, 143 Mont 528, 391 P2d 704.

The admission of testimony of an officer of the Marine Corps in a murder trial showing that prior to the homicide the accused, who appeared in the courtroom dressed in a marine uniform bearing the chevrons of a corporal, had been reduced in rank to private, was not harmful error, since the testimony was apparently offered for the sole purpose of showing that the accused was not in fact a corporal as he represented. Coggins v State (Fla App D3) 101 So 2d 400.

Defendant was not prejudiced by a prosecutor's question to defendant's wife as to whether defendant had received a dishonorable discharge from the armed forces, to which she answered no, even though defendant had received only an undesirable discharge. Beard v State (Ind) 428 NE2d 772.

In murder prosecution it was not reversible error to cross-examine defendant regarding his desertion from the Salvadoran army. Guzmon v State (Tex Crim) 697 SW2d 404, cert den 475 US 1090, 89 L Ed 2d 734, 106 S Ct 1479, habeas corpus proceeding, en banc (Tex Crim) 730 SW2d 724.

◆ Comment: The admissibility of military records in criminal proceedings on behalf of the accused to prove good character was strongly advocated by Wigmore on the basis that a discharge certificate from the Army or Navy is virtually a summary of the man's entire conduct in the service, as a man and a soldier, where he is under an environment where all the weaknesses and excesses have an opportunity to betray themselves, and he is carefully observed by his superiors, more carefully than any person in the ordinary civil community; and all delinquencies and merits are systematically noted in his "service record," which serves as a basis for his discharge certificate. See *Timmins v Hale*, 122 Or 24, 256 P 770, a civil proceeding, expressing approval of this view.

Footnote 10. To show the defendant's experience with weapons and thereby minimize the possibility that the shooting of his wife was accidental, the Commonwealth was allowed to introduce the defendant's discharge, showing him to be a qualified rifle marksman. *Commonwealth v Steele*, 362 Pa 427, 66 A2d 825.

The exclusion of evidence as to wounds sustained while in military service by a defendant in a criminal prosecution, was held not error where there was no defense of lack of mental capacity or impairment from injury. *People v Hauke*, 335 Ill 217, 167 NE 1.

Evidence that the accused had Navy service, including several battles, as a result of which he became shellshocked, was properly excluded where the accused refused to enter an affirmative defense of insanity. *State v Rose (Mo)* 249 SW2d 324.

Footnote 11. *People v Houser*, 85 Cal App 2d 686, 193 P2d 937; *Sherwood v State (Fla App D3)* 271 So 2d 21; *State v Zgodava (Minn App)* 384 NW2d 522.

Footnote 12. *People v Jackymiak*, 381 Ill 528, 46 NE2d 50; *Webb v Commonwealth (Ky)* 451 SW2d 397 (but the error was not prejudicial); *Blackwell v State*, 82 Okla Crim 390, 171 P2d 634; *State v Wright*, 12 Wash App 585, 530 P2d 704, review den 85 Wash 2d 1006.

Footnote 13. *Martin v State (Ala App)* 343 So 2d 810, cert den (Ala) 343 So 2d 815; *Strode v Commonwealth*, 301 Ky 676, 192 SW2d 963; *State v McLean*, 294 NC 623, 242 SE2d 814.

In a robbery prosecution, prosecutor's comment in closing argument that the defendant was a "bad apple" unwanted by the Army was improper, but could be cured by the court's instruction that the jury disregard the comment. *United States v Mostella (CA9 Cal)* 802 F2d 358, 21 Fed Rules Evid Serv 1334.

Footnote 14. 75 Am Jur 2d, Trial § 298.

c. Cross-Examination of Character Witness [386-389]

§ 386 Generally

The Rules provide that proof may be made by testimony as to reputation in all cases in which evidence of character or a trait of character is admissible, 15 and that on cross-examination of a character witness, inquiry is allowable into relevant specific instances of conduct. 16 Consequently, specific instances of a criminal defendant's conduct can be used on cross-examination to refute opinion evidence previously elicited by the defendant. 17

Specifically, once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to determine the witness' credibility by asking that witness whether he or she has heard of prior misconduct on the part of the defendant inconsistent with the witness' direct testimony. 18

The purpose of an inquiry into specific instances of the defendant's conduct is to test the witness' credibility and, in the case of a reputation witness, his or her qualifications to express the community opinion. 19 If the witness has never heard of the instances in question, the jury may doubt that the witness is capable of giving reliable testimony as to the defendant's character or reputation. 20

The inquiry can properly be made in the form of "have you heard" questions 21 and the "are you aware" form is not objectionable. 22

◆ Practice guide: Careful instructions to the jury as to the appropriate use of such cross-examination is required. 23

◆ Observation: Federal Rules of Evidence 405 impliedly replaced any reading of the *Michelson* case 24 which would limit the form of questions regarding other acts or offenses to the "have you heard" form traditionally appropriate to test reputation witnesses. 25

Footnotes

Footnote 15. § 381.

Footnote 16. FRE 405(a); Uniform Rules of Evidence, Rule 405(a).

Footnote 17. *Government of Virgin Islands v Roldan* (CA3 VI) 612 F2d 775, 5 Fed Rules Evid Serv 606, cert den 446 US 920, 64 L Ed 2d 275, 100 S Ct 1857; *United States v Evans* (CA4 NC) 569 F2d 209, 2 Fed Rules Evid Serv 889, cert den 435 US 975, 56 L Ed 2d 69, 98 S Ct 1624; *United States v Manos* (CA7 Ill) 848 F2d 1427, 26 Fed Rules Evid Serv 352; *United States v Payne* (CA7 Ind) 635 F2d 643, 7 Fed Rules Evid Serv 559, cert den 451 US 972, 68 L Ed 2d 351, 101 S Ct 2050, later proceeding (CA7 Ind) 741 F2d 887, 39 FR Serv 2d 858; *United States v Grady* (CA8 Mo) 665 F2d 831, 9 Fed Rules Evid Serv 860, later proceeding (ED Mo) 559 F Supp 30, affd (CA8 Mo) 715 F2d 402; *United States v Tempesta* (CA8 Minn) 587 F2d 931, 78-2 USTC ¶ 9844, 3 Fed Rules Evid Serv 1658, 42 AFTR 2d 78-6340, cert den 441 US 910, 60 L Ed 2d 380, 99 S Ct 2005 (in prosecution for filing false income tax returns, government witness whom defendant had called as his own character witness could be cross-examined as to whether defendant had any felony convictions); *United States v Burgard* (CA8 Mo) 551 F2d 190,

1 Fed Rules Evid Serv 802; United States v Mariscal (CA9 Ariz) 6 Fed Rules Evid Serv 976.

See United States v Watson (CA7 Ill) 587 F2d 365, 4 Fed Rules Evid Serv 241, cert den 439 US 1132, 59 L Ed 2d 95, 99 S Ct 1055 (in prosecution for robbery of savings and loan association, government's proposed cross-examination of defendant's witness concerning defendant's arrest during period of witness' acquaintance with defendant would have been permissible if defendant had not withdrawn character evidence given by witness on direct).

See also, as to proper inquiry into rumors or reports of specific incidents, 81 Am Jur 2d, Witnesses §§ 841 et seq.

Footnote 18. United States v Edwards (CA5 Fla) 549 F2d 362, 1 Fed Rules Evid Serv 844, cert den 434 US 828, 54 L Ed 2d 87, 98 S Ct 107, reh den 434 US 960, 54 L Ed 2d 321, 98 S Ct 494; United States v Collins (CA11 Fla) 779 F2d 1520, 20 Fed Rules Evid Serv 78; United States v Glass (CA11 Ga) 709 F2d 669, 13 Fed Rules Evid Serv 1283, reh den (CA11 Ga) 717 F2d 1401.

Footnote 19. Government of Virgin Islands v Grant (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620; United States v Apfelbaum (CA3 Pa) 621 F2d 62, 5 Fed Rules Evid Serv 1273; United States v Edwards (CA5 Fla) 549 F2d 362, 1 Fed Rules Evid Serv 844, cert den 434 US 828, 54 L Ed 2d 87, 98 S Ct 107, reh den 434 US 960, 54 L Ed 2d 321, 98 S Ct 494; United States v Collins (CA11 Fla) 779 F2d 1520, 20 Fed Rules Evid Serv 78; United States v Glass (CA11 Ga) 709 F2d 669, 13 Fed Rules Evid Serv 1283, reh den (CA11 Ga) 717 F2d 1401.

Footnote 20. Government of Virgin Islands v Grant (CA3 VI) 775 F2d 508, 19 Fed Rules Evid Serv 620.

Annotation: Cross-examination of character witness for accused with reference to particular acts or crimes—Modern state rules, 13 ALR4th 796.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 ALR Fed 440.

Practice References Impeachment of witness by prior criminal conviction. 36 Am Jur POF2d 747.

Alleged victim's commission of prior acts of and reputation for violence. 15 Am Jur POF2d 167.

Footnote 21. United States v Collins (CA11 Fla) 779 F2d 1520, 20 Fed Rules Evid Serv 78.

Footnote 22. *Government of Virgin Islands v Roldan* (CA3 VI) 612 F2d 775, 5 Fed Rules Evid Serv 606, cert den 446 US 920, 64 L Ed 2d 275, 100 S Ct 1857.

Footnote 23. *United States v Apfelbaum* (CA3 Pa) 621 F2d 62, 5 Fed Rules Evid Serv 1273.

Footnote 24. *Michelson v United States*, 335 US 469, 93 L Ed 168, 69 S Ct 213.

Footnote 25. *Government of Virgin Islands v Roldan* (CA3 VI) 612 F2d 775, 5 Fed Rules Evid Serv 606, cert den 446 US 920, 64 L Ed 2d 275, 100 S Ct 1857.

§ 387 Matters about which witness can be asked

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A plea of nolo contendere may be inquired into under Federal Rule of Evidence 405 if relevant to defendant's reputation. 26 Furthermore, instances of misconduct which can be inquired into under Federal Rules of Evidence 405(a) are not limited to convictions but also include arrests 27 and administrative orders. 28 In fact, the prosecution may inquire as to the witness' knowledge of negative rumors which may be circulating about the defendant, if in fact such rumors do exist, even if they are not based on fact. 29 Counsel may inquire into the witness' familiarity with a newspaper article concerning allegations made against the defendant and the defendant's denial of those allegations. 30 However, the government is not permitted to ask the witness to assume the defendant's guilt of the offenses for which he is then on trial. 31 And testimony involving an accused's membership in a religious order which advocates nonviolence is inadmissible. 32

§ 387 ----Matters about which witness can be asked [SUPPLEMENT]

Case authorities:

District court did not err in permitting prosecution to cross-examine narcotics conspiracy defendant's character witnesses as to defendant's rape arrest, assault charges, and positive cocaine usage test since defendant opened door to such testimony by virtue of his questioning witnesses on direct examination regarding defendant's reputation for honesty and law abidingness. *United States v Wellons* (1994, CA4 W Va) 32 F3d 117.

Footnotes

Footnote 26. *United States v Mariscal* (CA9 Ariz) 6 Fed Rules Evid Serv 976.

Annotation: Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules, 13 ALR4th 796.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 ALR Fed 440.

Practice References Impeachment of witness by prior criminal conviction. 36 Am Jur POF2d 747.

Alleged victim's commission of prior acts of and reputation for violence. 15 Am Jur POF2d 167 §§ 1-19.

Footnote 27. *United States v Edwards* (CA5 Fla) 549 F2d 362, 1 Fed Rules Evid Serv 844, cert den 434 US 828, 54 L Ed 2d 87, 98 S Ct 107, reh den 434 US 960, 54 L Ed 2d 321, 98 S Ct 494.

Footnote 28. *United States v Mariscal* (CA9 Ariz) 6 Fed Rules Evid Serv 976 (Securities Exchange Commission cease and desist order entered against defendant for unlawful sale of securities).

Footnote 29. *United States v McGuire* (CA6 Ky) 744 F2d 1197, 16 Fed Rules Evid Serv 707, cert den 471 US 1004, 85 L Ed 2d 159, 105 S Ct 1866 (not citing FRE 405).

Footnote 30. *United States v Apfelbaum* (CA3 Pa) 621 F2d 62, 5 Fed Rules Evid Serv 1273.

Footnote 31. *United States v McGuire* (CA6 Ky) 744 F2d 1197, 16 Fed Rules Evid Serv 707, cert den 471 US 1004, 85 L Ed 2d 159, 105 S Ct 1866.

Footnote 32. *Government of Virgin Islands v Petersen* (CA3 VI) 553 F2d 324, 1 Fed Rules Evid Serv 936.

§ 388 Limitations on cross-examination

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The court's discretion in admitting inquiries as to a defendant's prior misconduct is subject to certain limitations:

(1) the prosecutor asking the questions must have a good-faith factual basis for the incidents inquired about; 33

(2) the incidents inquired about must be relevant to the character traits involved at trial;
34 and

(3) a defendant's character testimony cannot be rebutted with extrinsic evidence of specific bad acts. 35 Relevancy to the pertinent character trait means, for example, that impeachment of a witness who testified as to reputation for nonviolence should not open the door to cross-examination about specific instances of lying. Moreover, evidence of the defendant's reputation reasonably contemporaneous with the acts charged is relevant, but reputation after the criminal charge under consideration is not. 36 Furthermore, the fact that defense testimony goes beyond that which is authorized by Federal Rules of Evidence 405(a), such as by improper reference to specific good acts on the part of the defendant, does not justify the government's improper use of testimony concerning the defendant's bad acts, 37 either in its direct case or in rebuttal. 38

Where a defense witness is not introduced as a character witness, the government is not permitted to convert the witness into a character witness by asking him what kind of man the defendant is and then to pursue that line of inquiry to bootstrap into the case evidence of the defendant's prior criminal convictions which the government is prohibited from using in its case in chief. 39 However, when the defense, in substance, puts personality traits before the trier, arguably tending to decrease the probability of guilt, though the specific term "character" is not employed, background inquiries about the accused are opened up during cross-examination of the character witness. 40

The reference in the rule to cross-examination on relevant specific instances of conduct is to instances of conduct relevant to the type of testimony offered on direct examination. Thus an opinion witness can be cross-examined only on matters bearing on his own opinion while a reputation witness can be examined only on matters reasonably proximate to the time of the alleged offense and likely to have been known to the relevant community at that time. 41

In a case where an entrapment defense has been raised and the only issue to be decided by the jury is the defendant's predisposition to commit the offense, the defendant's community reputation as a peaceful and law-abiding citizen is more clearly relevant than most uses of character evidence, and improper impeaching cross-examination should in such circumstances ordinarily be considered grounds for a new trial. 42

§ 388 ----Limitations on cross- examination [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder sentencing hearing by admitting the testimony of the Chief of the Farmville Police Department regarding defendant's criminal misconduct where defendant, by eliciting testimony from his mother regarding his character for nonviolence, opened the door to rebuttal testimony from the State regarding this character trait, even if such evidence would have been inadmissible in the State's case in chief. *State v Williams* (1994) 339 NC 1, 452 SE2d 245.

Footnotes

Footnote 33. *United States v Edwards* (CA5 Fla) 549 F2d 362, 1 Fed Rules Evid Serv 844, cert den 434 US 828, 54 L Ed 2d 87, 98 S Ct 107, reh den 434 US 960, 54 L Ed 2d 321, 98 S Ct 494; *United States v Glass* (CA11 Ga) 709 F2d 669, 13 Fed Rules Evid Serv 1283, reh den (CA11 Ga) 717 F2d 1401.

Footnote 34. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379; *United States v Edwards* (CA5 Fla) 549 F2d 362, 1 Fed Rules Evid Serv 844, cert den 434 US 828, 54 L Ed 2d 87, 98 S Ct 107, reh den 434 US 960, 54 L Ed 2d 321, 98 S Ct 494; *United States v Glass* (CA11 Ga) 709 F2d 669, 13 Fed Rules Evid Serv 1283, reh den (CA11 Ga) 717 F2d 1401.

Annotation: Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules, 13 ALR4th 796.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 ALR Fed 440.

Practice References Impeachment of witness by prior criminal conviction. 36 Am Jur POF2d 747.

Alleged victim's commission of prior acts of and reputation for violence. 15 Am Jur POF2d 167 §§ 1-19.

Footnote 35. *United States v Benedetto* (CA2 NY) 571 F2d 1246, 2 Fed Rules Evid Serv 1299.

Footnote 36. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

Footnote 37. *United States v Benedetto* (CA2 NY) 571 F2d 1246, 2 Fed Rules Evid Serv 1299; *United States v Herman* (CA3 Pa) 589 F2d 1191, 3 Fed Rules Evid Serv 1605, cert den 441 US 913, 60 L Ed 2d 386, 99 S Ct 2014.

Footnote 38. *United States v Benedetto* (CA2 NY) 571 F2d 1246, 2 Fed Rules Evid Serv 1299.

Footnote 39. *United States v Gilliland* (CA10 Okla) 586 F2d 1384, 3 Fed Rules Evid Serv 1614.

Footnote 40. Where, during cross-examination of a government witness, defense counsel questions the defendant's social habits, the attempt to paint the defendant's character as benign makes the witness a defense character witness and permits the prosecution, on redirect, to perform the functional equivalent of "cross-examination" of the witness, and

further permits a relevant rebuttal to the witness' opinion of the defendant, within the scope of FRE 405. *Government of Virgin Islands v Roldan* (CA3 VI) 612 F2d 775, 5 Fed Rules Evid Serv 606, cert den 446 US 920, 64 L Ed 2d 275, 100 S Ct 1857.

Footnote 41. If in a case where an entrapment defense is raised the defendant produces an examining psychiatrist's opinion evidence of unusual susceptibility to suggestion, cross-examination of the witness cannot inquire into those factors bearing on his reputation in the community among lay persons. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

Footnote 42. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

§ 389 Use of hypothetical questions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a defense witness has expressed no opinion as to the defendant's character, it is error for the government to elicit opinion evidence of the defendant's character during cross-examination by the use of hypothetical questions based on the specific facts in issue. 43 Even where the defense witness has testified as to his opinion on the defendant's character, the practice of cross-examination by way of hypothetical questions based on the specific facts in issue has been held to be error 44 or has not been enthusiastically approved. 45

◆ Practice guide: Insofar as nonexpert character witnesses are concerned, the probative value of a hypothetical question is negligible and should not be asked, as the jury is in as good a position as the nonexpert witness to draw proper inferences concerning the defendant's character from its own resolution of the issues. 46

Footnotes

Footnote 43. *United States v Polsinelli* (CA10 Kan) 649 F2d 793, 8 Fed Rules Evid Serv 412.

Annotation: Cross-examination of character witness for accused with reference to particular acts or crimes—Modern state rules, 13 ALR4th 796.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence, 64 ALR Fed 244.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence, 52 ALR Fed 440.

Footnote 44. *United States v Curtis* (CA3 Pa) 644 F2d 263, 7 Fed Rules Evid Serv 1554, 64 ALR Fed 227, appeal after remand (CA3 Pa) 683 F2d 769, cert den 459 US 1018, 74 L Ed 2d 512, 103 S Ct 379.

Footnote 45. *United States v Morgan* (CA2 NY) 554 F2d 31, 1 Fed Rules Evid Serv 961, cert den 434 US 965, 54 L Ed 2d 450, 98 S Ct 504 (not prejudicially improper for government during cross-examination of one of defendant's character witnesses to ask hypothetical question as to whether witness' favorable opinion of defendant's character would change if defendant knew that corporation whose stock he was charged with mishandling was in receivership and did not disclose that fact to his customers; *Lopez v Smith* (SD NY) 515 F Supp 753, 8 Fed Rules Evid Serv 694 (prosecution on cross-examination asked witness if he would change his opinion of the defendant if the defendant had shot someone in cold blood, court stating that while it might be that prosecution's question should not have been allowed to veer from witness' knowledge of defendant's reputation to his opinion of defendant's character, in light of defense counsel's freewheeling questioning of witness it was not error to allow prosecution to attempt to impeach his opinion).

Footnote 46. *United States v Morgan* (CA2 NY) 554 F2d 31, 1 Fed Rules Evid Serv 961, cert den 434 US 965, 54 L Ed 2d 450, 98 S Ct 504.

2. Habit or Routine Practice (Rule 406) [390-403]

a. General Rules [390-395]

§ 390 Admissibility, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. 47 Rule 406 is a codification of the common-law rule of evidence which existed before the adoption of the rules. 48 But FRE Rule 406 specifically rejects any requirements of corroboration or eyewitnesses as conditions precedent to admissibility. Such factors are deemed to relate to sufficiency of the evidence rather than to admissibility. 49 In states adopting the Rule, the phrase "whether corroborated or not" has been said to eliminate the common-law requirement that there be evidence that the person acted in conformity with the habit or routine practice on the particular occasion in suit. 50 In a jurisdiction which has not adopted

Rules of Evidence, it has been similarly held that because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again, evidence of habit is admissible to prove conformity on specified occasions. 51

◆ **Observation:** The modern rule is contrary to the long-established rule, which may still be in effect in some states, that evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion. 52

Evidence of habit is generally agreed to be highly persuasive proof of conduct on a particular occasion. 53 Moreover, evidence of habit is highly probative for the purpose of showing that a person acted in conformity with that habit on a particular occasion. 54 The use of habit evidence is often mandated by the unavailability or lack of recollection of the person whose conduct is in question, 55 and is especially helpful when a witness cannot recall his own actions on a particular day, but can testify to his usual custom in a particular situation. 56 But evidence of habit is not to be lightly established; evidence of examples for the purpose of establishing such habit is to be carefully scrutinized before admission. 57

◆ **Caution:** There must be proper alignment between the habit or routine practice testified to and the incident in suit, that is, the circumstances must be the same so that the situation provoking the habitual or routine response was present in the incident in suit. 58 In other words, evidence of habit, to be admissible, must have a clear relation to the subject of the action in which it is sought to be introduced; in short, it must be relevant. 59

§ 390 ----Admissibility, generally [SUPPLEMENT]

Practice Aids: Rule 406: Admissibility of evidence of habit or routine practice, 23 Colo Law 12:2747 (1995).

Defending "pattern and practice" evidence in punitive damages cases, 61 Def Couns J 3:403 (1994).

Case authorities:

Evidence of limestone seller's routine practice of loading its trucks should have been admitted in buyer's suit for refund of money based on alleged short-loading where buyer provided invoices for over 3400 of seller's loads of limestones from third-party suppliers, introduced evidence to show that seller routinely loaded its trucks in same manner and to same level when seller obtained limestone from third-party seller, provided weight scale tickets showing that seller typically loaded either 14-ton or 25-ton loads at third-party suppliers, and that third-party loads always held less than 14 yards or 24 yards; district court failed to apply rule properly and, on remand, would be ordered to consider buyer's evidence under rule and determine, in light of all evidence, whether buyer established seller's routine practice for loading its trucks and, if so, what implications that creates for ultimate fact issue. *Mobil Exploration & Producing U.S. v Cajun Constr. Servs.* (1995, CA5 La) 45 F3d 96.

Footnotes

Footnote 47. FRE Rule 406; Uniform Rules of Evidence, Rule 406(a).

Annotation: Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Practice References 7 Am Jur POF3d 523, Habit of Person.

Louisell and Mueller, Federal Evidence § 155.

Footnote 48. Meyer v United States (DC Colo) 464 F Supp 317, 3 Fed Rules Evid Serv 987, 53 ALR Fed 691, affd (CA10 Colo) 638 F2d 155, 6 Fed Rules Evid Serv 980.

Footnote 49. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

To the same effect, under the Uniform Rules, is French v Sorano, 74 Wis 2d 460, 247 NW2d 182.

Footnote 50. Eig v Insurance Co. of North America (Fla App D3) 447 So 2d 377; Nationwide Mut. Ins. Co. v Jones (Fla App D5) 414 So 2d 1169; French v Sorano, 74 Wis 2d 460, 247 NW2d 182.

But see Paulsen Lumber, Inc. v Anderson, 91 Wis 2d 692, 283 NW2d 580, where it was said the Wisconsin equivalent to Rule 406 merely sets a standard for admissibility of routine practice and does not purport to define whether the evidence is sufficient, and that where there is a lack of corroborating evidence of a business practice on the particular occasion, evidence of routine practice is not sufficient in itself.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Footnote 51. Halloran v Virginia Chemicals, Inc., 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991.

Footnote 52. Josephs v Briant, 115 Ark 538, 172 SW 1002; Petro v Hines, 299 Ill 236, 132 NE 462, 18 ALR 1106; Smith's Adm'x v Middleton, 112 Ky 588, 66 SW 388; Noonan v Luther, 206 NY 105, 99 NE 178; Green v Shaw, 136 SC 56, 134 SE 226, 48 ALR 243.

Footnote 53. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Footnote 54. Loughan v Firestone Tire & Rubber Co. (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243 (criticized on other grounds by Cornwall v U.S. Constr. Mfg., Inc. (CA FC) 800 F2d 250, 231 USPQ 64) and (disapproved on other grounds by Crawford Fitting Co. v J. T. Gibbons, Inc., 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494, 43 BNA FEP Cas 1775, 43 CCH EPD ¶ 37102, 1987-1 CCH Trade Cases ¶ 67596, 7 FR Serv 3d 1161) as stated in Goodwill Constr. Co. v Beers Constr. Co. (ND Ga) 824 F Supp 1044, 26 USPQ2d 1401, affd in part and revd in part on other grounds, remanded (CA FC) 991 F2d 751, 26 USPQ2d 1420, reh, en banc, den (CA FC) 1993 US App LEXIS 16231; Levin v United States, 119

US App DC 156, 338 F2d 265, cert den 379 US 999, 13 L Ed 2d 701, 85 S Ct 719 (but holding that there was no reversible error in excluding alibi evidence offered to prove that, in accordance with religious practices of defendant, he was at home on the Sabbath); McKinstry v Valley Obstetrics-Gynecology Clinic, P.C., 428 Mich 167, 405 NW2d 88.

Footnote 55. State v Mary (Iowa) 368 NW2d 166, appeal after remand (Iowa App) 401 NW2d 239.

Footnote 56. Shelton v United States (CA4 Va) 1 Fed Rules Evid Serv 481.

Footnote 57. Wilson v Volkswagen of America, Inc. (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368; Utility Control Corp. v Prince William Constr. Co. (CA4 Va) 558 F2d 716, 2 Fed Rules Evid Serv 123, 23 FR Serv 2d 910; Mathes v The Clipper Fleet (CA9 Cal) 774 F2d 980, 19 Fed Rules Evid Serv 577; Loughan v Firestone Tire & Rubber Co. (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Footnote 58. Ritchey v Murray, 274 Ark 388, 625 SW2d 476.

Footnote 59. See Mosser v Fruehauf Corp. (CA4 Va) 940 F2d 77, CCH Prod Liab Rep ¶ 12864, 33 Fed Rules Evid Serv 680 (in products liability action against tractor-trailer manufacturer, deceased worker's personnel file showing that he had received speeding citations was properly excluded despite manufacturer's argument that it was admissible as evidence of habit, since it was unrelated to incident in question).

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

§ 391 Character evidence distinguished

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of character and habit must be distinguished because the admissibility of character evidence is specifically governed by FRE Rule 404 and methods of proving character is governed by FRE Rule 405, whereas admissibility of habit or routine practice is governed by FRE Rule 406 and methods of proving habit or routine are not limited to those specified by FRE Rule 405, or under the Uniform Rules of Evidence, Rule 406(b).
60

Whereas the hallmarks of habit are specificity and repetition, 61 character is more general than habit, amounting to a description of "disposition" respecting such traits as honesty, peaceability, and so forth. 62 Habit evidence is considered superior to character evidence because the uniformity of an individual's response to habit is far greater than the consistency with which his or her conduct conforms to character or disposition. 63

The chief difficulty in determining admissibility under FRE Rule 406 is attempting to draw the line between inadmissible character evidence and admissible habit evidence. 64 However, even where evidence of habit appears to be admissible under FRE Rule 406, a habit of committing a particular crime will not fall within the rubric of the rule, because evidence of such habits is identical to the kind of character evidence that is a target of and excluded by FRE Rule 404. 65

◆ Observation: It has been noted that the courts are not always careful to make clear or to preserve the distinction between character and habit, and that the terms can and do appear to overlap at times. 66

§ 391 ----Character evidence distinguished [SUPPLEMENT]

Case authorities:

Admission of evidence that truckdriver had two million miles of safe driving and had received awards from National Safety Council should not have been admitted as evidence of habit or routine practice, since it was character evidence, and therefore inadmissible. Stapleton v Great Lakes Chem. Corp. (1993, La) 627 So 2d 1358.

Footnotes

Footnote 60. Perrin v Anderson (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

As to methods of proving habit, see § 402.

Practice References Definitions of habit and character distinguished. 7 Am Jur POF3d 523, Habit of Person § 3.

Footnote 61. § 393.

Footnote 62. Reyes v Missouri P. R. Co. (CA5 Tex) 589 F2d 791, 3 Fed Rules Evid Serv 864; Boswell v Phoenix Newspapers, Inc. (App) 152 Ariz 1, 730 P2d 178, approved as supplemented, en banc 152 Ariz 9, 730 P2d 186, 13 Media L R 1785, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1954 and (criticized on other grounds by Bryant v Continental Conveyor & Equip. Co., 156 Ariz 193, 751 P2d 509, 2 Ariz Adv Rep 8, CCH Prod Liab Rep ¶ 11683) as stated in Estate of Hernandez by Hernandez-Wheeler v Arizona Bd. of Regents (App) 172 Ariz 522, 838 P2d 1283, 101 Ariz Adv Rep 87, vacated, remanded on other grounds (Ariz) 156 Ariz Adv Rep 43 (habit describes one's regular response to a repeated specific situation, while character refers to a generalized description of one's disposition).

See Charmley v Lewis, 302 Or 324, 729 P2d 567, 64 ALR4th 549, where the court said that a habit must be specific and that the specificity requirement is the primary tool for weeding out character evidence when it is offered as habit evidence.

Footnote 63. Reyes v Missouri P. R. Co. (CA5 Tex) 589 F2d 791, 3 Fed Rules Evid Serv

864; *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Footnote 64. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Footnote 65. *United States v Mascio* (CA7 Ill) 774 F2d 219, 18 Fed Rules Evid Serv 1349.

See, however, § 398 for a discussion of habits found admissible in criminal prosecutions.

Footnote 66. *Hart v State*, 75 Wis 2d 371, 249 NW2d 810 (ovrld on other grounds by *Re Estate of Safran*, 102 Wis 2d 79, 306 NW2d 27, 25 ALR4th 766).

See *Soper v State* (Alaska App) 731 P2d 587, a prosecution of a father for sexual abuse of his youngest daughter, where the court ruled admissible evidence of the father's seduction of two older daughters, as "a striking pattern of behavior" that seems to occupy the middle ground between evidence of character and habit.

See *Chambliss v White Motor Corp.* (Fla App D1) 481 So 2d 6, 10 FLW 2566, review den (Fla) 491 So 2d 278, an action against a truck manufacturer by a garbage collector who was injured when the garbage truck in which he was riding as a passenger skidded and overturned killing the driver and breaking plaintiff's neck, holding the admission of evidence relating to the driving characteristics and habits of the deceased driver would have been improper if it amounted to mere character evidence; however, plaintiff failed to demonstrate reversible prejudicial error, where three witnesses testified that the driving characteristics and habits of an operator affect brake wear and deterioration, and where the evidence was not so prejudicial that it overwhelmed any and all other theories of defendant's nonliability established by other evidence at trial.

§ 392 Habit: definitions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 406 does not define "habit" 67 or "routine practice." 68 Although some courts have quoted a lay dictionary definition of habit as an acquired or developed mode of behavior or function that has become nearly or completely involuntary, 69 it would appear that the concept of habit or routine practice for Rule 406 purposes is different from the everyday concept. Habit has been defined as a person's regular practice of meeting a particular kind of situation with a specific kind of conduct, 70 or as a reflex behavior in a specific set of circumstances. 71 Habit has also been said to refer to a type of nonvolitional activity that occurs with invariable regularity. 72 In other words, habit is a regular response to a repeated specific situation which may become semiautomatic; 73 it may be said to be an acquired or developed mode of behavior or function that has become nearly or completely involuntary. 74

◆ Practice guide: In order to be admissible as evidence of habit, the proffered

testimony must generally meet the three elements of regularity, specificity, and an involuntary or semiautomatic response. 75

Footnotes

Footnote 67.

◆ Comment: However, the Advisory Committee notes with approval the definition of McCormick that habit, "in modern usage, both lay and psychological, is more specific [than character]. It describes one's regular response to a repeated specific situation. A habit . . . is the person's regular practice of meeting a particular situation with a specific type of conduct The doing of habitual acts may become semi-automatic." Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Footnote 68. § 394.

Footnote 69. See, for example, *Ritchey v Murray*, 274 Ark 388, 625 SW2d 476.

In *Meyer v United States* (DC Colo) 464 F Supp 317, 3 Fed Rules Evid Serv 987, 53 ALR Fed 691, *affd* (CA10 Colo) 638 F2d 155, 6 Fed Rules Evid Serv 980, the court quoted a dictionary definition of habit as "a tendency to act in a certain way or to do a certain thing; usual way of acting; custom; practice."

Footnote 70. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Practice References Definition of habit. 7 Am Jur POF3d 523, Habit of Person § 2.

Footnote 71. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 72. *Weil v Seltzer*, 277 US App DC 196, 873 F2d 1453, 28 Fed Rules Evid Serv 180.

Footnote 73. *Henry v Cline*, 275 Ark 44, 626 SW2d 958; *State v Bragg* (Me) 516 A2d 556.

Footnote 74. *Henry v Cline*, 275 Ark 44, 626 SW2d 958.

Footnote 75. § 393.

§ 393 --Elements

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In the context of Rule 406, habit may be said to consist of three elements: (1) regularity,

(2) specificity, and (3) an involuntary or semiautomatic response.

In regard to the first element, habit has been defined as one's regular response to a repeated situation. 76 Regularity has two sub-elements: frequency and consistency. 77 Conduct is not a habit or routine practice unless it is frequently engaged in. 78 In regard to the consistency requirement, it has been held that conduct is not a habit unless it is a person's invariable or at least frequent response to a particular situation; 79 a standard not met, for example, by the person's engaging in the "habitual" conduct only about half the time. 80 To support a finding of admissibility as habit under FRE Rule 406, it is necessary to critically examine the ratio of reactions to the situations 81 and to show regularity of conduct by comparing the number of instances in which any such conduct occurs with the number in which no such conduct takes place. 82

The second element, specificity, is the quality that distinguishes admissible evidence of habit or routine practice from inadmissible character evidence, which is a generalized description of one's disposition. 83 The third element is that the conduct be an involuntary or semiautomatic response to a specific situation. 84

§ 393 --Elements [SUPPLEMENT]

Case authorities:

In malpractice action against orthopedic surgeon in connection with excision arthroplasty of trapezium and trapezium metacarpal joint with gelfoam implant, trial court properly issued protective order, based in part on Uniform Evidence Rule 406, excluding from use at trial confidential documents relating to earlier peer review of surgeon's performance where plaintiff had no evidence of complaints concerning other excision arthroplasties of trapezium metacarpal joint with gelfoam implant performed by surgeon and, in fact, there could be no such evidence as surgeon had never done operation before; surgeon's singular performance of procedure necessarily prevented his conduct from rising to level of habit performance. *Young v Saldanha* (1993, W Va) 431 SE2d 669.

Footnotes

Footnote 76. *Wilson v Volkswagen of America, Inc.* (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368; *Weil v Seltzer*, 277 US App DC 196, 873 F2d 1453, 28 Fed Rules Evid Serv 180; *Boswell v Phoenix Newspapers, Inc.* (App) 152 Ariz 1, 730 P2d 178, approved as supplemented, en banc 152 Ariz 9, 730 P2d 186, 13 Media L R 1785, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1954 and (criticized on other grounds by *Bryant v Continental Conveyor & Equip. Co.*, 156 Ariz 193, 751 P2d 509, 2 Ariz Adv Rep 8, CCH Prod Liab Rep ¶ 11683) as stated in *Estate of Hernandez by Hernandez-Wheeler v Arizona Bd. of Regents* (App) 172 Ariz 522, 838 P2d 1283, 101 Ariz Adv Rep 87, vacated, remanded on other grounds (Ariz) 156 Ariz Adv Rep 43; *Henry v Cline*, 275 Ark 44, 626 SW2d 958; *State v Bragg* (Me) 516 A2d 556; *Mydlarz v Palmer/Duncan Constr. Co.*, 209 Mont 325, 682 P2d 695; *Reaves v Mandell*, 209 NJ Super 465, 507 A2d 807; *Ohlson v Kent Nowlin Constr. Co.* (App) 99 NM 539, 660 P2d 1021, cert den 99 NM 477, 660 P2d 119; *South v National Railroad Passenger Corp. (AMTRAK)* (ND) 290 NW2d 819; *Cannell v Rhodes* (Cuyahoga Co) 31

Ohio App 3d 183, 31 Ohio BR 349, 509 NE2d 963; Charmley v Lewis, 302 Or 324, 729 P2d 567, 64 ALR4th 549; Norris v State, 46 Wash App 822, 733 P2d 231; Hart v State, 75 Wis 2d 371, 249 NW2d 810 (ovrld on other grounds by Re Estate of Safran, 102 Wis 2d 79, 306 NW2d 27, 25 ALR4th 766).

Evidence of habit or routine must show that the person or organization engaged in the behavior regularly enough to make it probable that he or they behaved that way on the occasion in question. Cannell v Rhodes (Cuyahoga Co) 31 Ohio App 3d 183, 31 Ohio BR 349, 509 NE2d 963.

Practice References 7 Am Jur POF3d 523, Habit of Person.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Footnote 77. To meet the requirement that conduct be the regular practice of a person responding to a particular kind of situation, it must be both frequent and invariable or at least consistent. Charmley v Lewis, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

Footnote 78. Wilson v Volkswagen of America, Inc. (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368; Mathes v The Clipper Fleet (CA9 Cal) 774 F2d 980, 19 Fed Rules Evid Serv 577; Loughan v Firestone Tire & Rubber Co. (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243; South v National Railroad Passenger Corp. (AMTRAK) (ND) 290 NW2d 819; Charmley v Lewis, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

Evidence that a railroad had a habit of not blowing a warning whistle at a particular crossing is admissible in a grade-crossing collision case where one witness testified, when asked the number of times the train did not blow a warning whistle, "I couldn't put a number on it because I so frequently seen it," and another testified that "a lot of times they missed that, I know that." South v National Railroad Passenger Corp. (AMTRAK) (ND) 290 NW2d 819.

As to what constitutes sufficient frequency, see § 403.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Footnote 79. Charmley v Lewis, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

In breach of contract case, evidence relating to other breaches was excluded where defendant failed to indicate actual number of contracts on which it relied, making it impossible for court to determine whether examples were numerous enough to infer systematic conduct. Simplex, Inc. v Diversified Energy Systems, Inc. (CA7 Ill) 847 F2d 1290, 25 Fed Rules Evid Serv 1133.

Footnote 80. Henry v Cline, 275 Ark 44, 626 SW2d 958 (testimony that the witness had

seen a minor drive on a road a dozen times and that he was speeding half of those times, offered to prove the minor's driving habits on a road where he rounded a turn and collided head-on with another vehicle, was inadmissible under Rule 406 since the proffered testimony of the minor's driving fast on the particular road half of the time was insufficient to establish a mode of behavior that had become nearly or completely involuntary).

Footnote 81. *Wilson v Volkswagen of America, Inc.* (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368; *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Ordinarily five incidents would be insufficient to establish the existence of a habit; however, where defendants make an offer of proof of testimony from eight witnesses concerning numerous different incidents and the court permitted only four of these witnesses to testify to prevent undue prejudice to the plaintiff, evidence of habit is properly admitted under FRE Rule 406. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 82. *Wilson v Volkswagen of America, Inc.* (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368.

Testimony that defendant had routine practice of breaching contracts because defendant breached five contracts with witness and breached contracts with other contractors, when considered in light of the defendant's contractual dealings with thousands of small subcontractors and the significant differences between the types of contracts involved, falls far short of the required adequacy of sampling and uniformity of response. *G.M. Brod & Co. v U.S. Home Corp.* (CA11 Fla) 759 F2d 1526, 18 Fed Rules Evid Serv 100.

Footnote 83. *Reyes v Missouri P. R. Co.* (CA5 Tex) 589 F2d 791, 3 Fed Rules Evid Serv 864; *Charmley v Lewis*, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

As to the specificity of particular conduct, see §§ 396 et seq.

Annotation: Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Footnote 84. *State v Munguia* (App) 137 Ariz 69, 668 P2d 912; *Henry v Cline*, 275 Ark 44, 626 SW2d 958; *State v Bragg* (Me) 516 A2d 556; *Ohlson v Kent Nowlin Constr. Co.* (App) 99 NM 539, 660 P2d 1021, cert den 99 NM 477, 660 P2d 119; *Charmley v Lewis*, 302 Or 324, 729 P2d 567, 64 ALR4th 549; *Norris v State*, 46 Wash App 822, 733 P2d 231.

Where evidence of a habit is offered on the issue of negligence, it must be limited to conduct constituting a person's regular practice of meeting a particular situation with specific conduct, thus showing that a doing of such act and the person's conduct in meeting a certain situation is practically automatic. *Glatt v Feist* (ND) 156 NW2d 819, 28 ALR3d 1278.

§ 394 Routine practice of organization

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Routine practice of an organization is behavior on the part of a group which is equivalent to habit of a person; 85 that is, an organization's practice of handling a particular kind of situation with a specific type of conduct. 86 This concept contemplates a certain threshold ratio of the proved instances to the total conduct claimed to be habitual or routine. 87 That ratio in turn depends on the nature of the routine practice at issue. 88 Thus an organization's regularity of action is within the purview of the Rule. 89

Organizational routine also describes something often repeated, which tends to be semiautomatic in the sense that it tends to be ministerial and is carried on from day-to-day without the need for managerial decisions. Although many instances of organizational routine deal with business customs, FRE Rule 406 does not require a business setting and the routine of charitable, religious, educational, governmental, or even political organizations is clearly within the literal terms of the rule. 90

◆ **Caution:** While statements as to routine practice of an organization could be used to show what was done in given situation was in conformity with routine practice, such routine practice could not contradict evidence of what was actually done in a given situation. 91

Footnotes

Footnote 85. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Footnote 86. *Meyer v United States* (DC Colo) 464 F Supp 317, 3 Fed Rules Evid Serv 987, 53 ALR Fed 691, *affd* (CA10 Colo) 638 F2d 155, 6 Fed Rules Evid Serv 980.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Footnote 87. *Wetherill v University of Chicago* (ND Ill) 570 F Supp 1124, 15 Fed Rules Evid Serv 768.

Footnote 88. *Wetherill v University of Chicago* (ND Ill) 570 F Supp 1124, 15 Fed Rules Evid Serv 768.

Footnote 89. *Meyer v United States* (DC Colo) 464 F Supp 317, 3 Fed Rules Evid Serv 987, 53 ALR Fed 691, *affd* (CA10 Colo) 638 F2d 155, 6 Fed Rules Evid Serv 980.

Footnote 90. Louisell and Mueller, Federal Evidence § 159.

Footnote 91. *Park Club, Inc. v Resolution Trust Co.* (SD Tex) 742 F Supp 395, *affd in part and revd in part on other grounds* (CA5 Tex) 967 F2d 1053, 23 FR Serv 3d 490, *reh, en banc, den* (CA5 Tex) 976 F2d 732.

§ 395 Industry customs and standards

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In negligence case, evidence of industry custom or standard, that is, evidence of "routine practice" in the industry, is received as a kind of circumstantial proof to show that the conduct in the litigated case conformed, or did not conform, to what others do in similar situations. While such proof is not affected by Rule 406, it is closely related thereto. 92

It has been said that what is ordinarily and usually done by those who are engaged in the same business, occupation, or undertaking, has some relevancy to the inquiry as to what an ordinarily prudent person would do under the same circumstances. 93 Thus, it is generally held that in cases where the method used which resulted in an injury is not clearly and inherently negligent or dangerous, evidence is admissible of the general custom of others engaged in the same kind of business, occupation, or undertaking, as to the particular method under investigation, for the consideration of the jury for whatever light it might throw upon the question whether the method used was or was not negligent under the circumstances of the particular case before the court. 94 Safety codes and official regulations governing various industries have frequently been admitted as evidence of industry standards. 95 Conformity with custom is some proof of due care, and nonconformity some proof of negligence, 96 and it is not essential to the admissibility of such evidence that a contractual relationship exist between the parties to the action. 97

Nor is it essential to the admissibility of evidence of general practice or usage to show that it constituted a "custom" in the legal technical sense, for the purpose of such evidence is simply to show the ordinary practice. 98 Thus, it is not necessary to prove that the practice or usage was universal, or that it had been in existence for the length of time peculiar to a common-law custom. 99 However, evidence of the general custom of one company or a single individual or small group with respect to the act in question is usually held inadmissible because such custom may not conform to the usual or customary rule in the industry. 1

Whether testimony of a custom or practice followed by a certain third person is admissible in evidence on the issue of negligence should be dealt with according to the evidentiary value of the testimony in the particular case. 2 The view has been taken that in order to assist the jury in determining whether an employer exercised reasonable care in providing and maintaining machinery of the sort used in his establishment, proof may be received as to what other kinds of machinery or appliances were used elsewhere. 3 However, in various cases, evidence of the practices followed by particular third

persons has been excluded on the ground that such evidence does not show the existence of a general custom or usage. 4

§ 395 ----Industry customs and standards [SUPPLEMENT]

Practice Aids: OSHA compliance or non-compliance: Admissible in federal products liability actions to prove a machine's safety or defect? 25 Ariz St LJ 659 (1993).

OSHA evidence in federal court products liability actions: Too prejudicial to be admissible to prove a machine's safety or defect, or simply additional evidence for the fact finder? 10 Touro LR 239 (1993).

Footnotes

Footnote 92. Louisell and Mueller, Federal Evidence § 158.

◆ Observation: Whether such proof should be admitted raises a question of relevancy under Rule 401.

Footnote 93. Mitchell v Knight (Alaska) 394 P2d 892.

As to custom or usage as affecting standard of care, see 57A Am Jur 2d, Negligence §§ 173 et seq.

Footnote 94. Virginia Electric & Power Co. v Carolina Peanut Co. (CA4 NC) 186 F2d 816, 32 ALR2d 234; Denning Warehouse Co. v Widener (CA10 NM) 172 F2d 910, 13 ALR2d 669; Brigham Young University v Lillywhite (CA10 Utah) 118 F2d 836, 137 ALR 598, cert den 314 US 638, 86 L Ed 512, 62 S Ct 73; Holland v Tennessee C., I. & R. Co., 91 Ala 444, 8 So 524; Peterson v Permanente S.S. Corp., 129 Cal App 2d 579, 277 P2d 495, cert den 349 US 953, 99 L Ed 1278, 75 S Ct 882; Hazard Powder Co. v Somersville Mfg. Co., 78 Conn 171, 61 A 519; Sea Board A. L. R. Co. v Watson, 94 Fla 571, 113 So 716; William Laurie Co. v McCullough, 174 Ind 477, 90 NE 1014, reh overr 174 Ind 490, 92 NE 337; Gibson v Shelby County Fair Ass'n, 246 Iowa 147, 65 NW2d 433; Magay v Claflin Sumner Coal Co., 257 Mass 244, 153 NE 534, 53 ALR 928; Albertson v Chicago, M., S. P. & P. R. Co., 242 Minn 50, 64 NW2d 175, 42 ALR2d 1044; Martin v First Nat. Bank, 358 Mo 1199, 219 SW2d 312, 8 ALR2d 435; Prosser v Montana C. R. Co., 17 Mont 372, 43 P 81; Brackman v Brackman, 169 Neb 650, 100 NW2d 774; Schmitt v Northern Improv. Co. (ND) 115 NW2d 713; Schwer v New York, C. & S. L. R. Co., 161 Ohio St 15, 52 Ohio Ops 469, 117 NE2d 696, 43 ALR2d 606; Ault v Hall, 119 Ohio St 422, 7 Ohio L Abs 44, 164 NE 518, 60 ALR 128; Davis v Whitsett (Okla) 435 P2d 592, 27 OGR 734; Jemison v Pfeifer, 397 Pa 81, 152 A2d 697.

In suit against farm arising out of death of migrant worker, it was error to exclude the testimony of an expert who would have described the practice of reasonable contract farmers in issuing safety standards. Linkstrom v Golden T. Farms (CA3 Pa) 883 F2d 269, 28 Fed Rules Evid Serv 860.

Industry standards were properly introduced for the purpose of illustrating the availability of safety guards at the time a punch press was manufactured, as it relates directly to the

issue of the feasibility of defendant providing proper guarding in a personal injury action. *Murphy v L & J Press Corp.* (CA8 Mo) 558 F2d 407, 2 Fed Rules Evid Serv 675, on remand (ED Mo) 76 FRD 468, mod on other grounds (CA8 Mo) 577 F2d 27, 25 FR Serv 2d 1155 and cert den 434 US 1025, 54 L Ed 2d 772, 98 S Ct 751.

Evidence is admissible, in an action against an ambulance company for injury to a sick person falling off a wheel stretcher in a hospital corridor, of a custom in the hospital to fasten, around persons being transported on wheel stretchers, a canvas belt attached to the stretcher to prevent their falling off. *Hollander v Smith & Smith*, 10 NJ Super 82, 76 A2d 697, 21 ALR2d 902, cert den 6 NJ 399, 79 A2d 108.

Footnote 95. *Josephs v Harris Corp.* (CA3 Pa) 677 F2d 985, CCH Prod Liab Rep ¶ 9287, 10 Fed Rules Evid Serv 612, 34 FR Serv 2d 28; *Banko v Continental Motors Corp.* (CA4 Va) 373 F2d 314; *Frazier v Continental Oil Co.* (CA5 Miss) 568 F2d 378, 2 Fed Rules Evid Serv 1032.

Footnote 96. *Langner v Caviness*, 238 Iowa 774, 28 NW2d 421, 172 ALR 1135.

Industry standards or trade customs were admissible as indicators of reasonableness of conduct introduced to show that the absence of a safety device does not render certain mechanical equipment defective, although such evidence may not be used to prove due care or intervening negligent conduct. *Christner v E. W. Bliss Co.* (MD Pa) 524 F Supp 1122.

Footnote 97. *Miller v Midway Fishing Tool Co.*, 106 Cal App 2d 612, 235 P2d 630.

Footnote 98. *Silver Falls Timber Co. v Eastern & Western Lumber Co.*, 149 Or 126, 40 P2d 703; *Fritz v Western Union Tel. Co.*, 25 Utah 263, 71 P 209.

Footnote 99. *Silver Falls Timber Co. v Eastern & Western Lumber Co.*, 149 Or 126, 40 P2d 703.

Footnote 1. *Norfolk S. R. Co. v Davis Frozen Foods, Inc.* (CA4 NC) 195 F2d 662; *Jones v Malvern Lumber Co.*, 58 Ark 125, 23 SW 679; *Hercules Powder Co. v Automatic Sprinkler Corp.* (1st Dist) 151 Cal App 2d 387, 311 P2d 907; *Sea Board A. L. R. Co. v Watson*, 94 Fla 571, 113 So 716; *Jackson v Chicago, M., S. P. & P. R. Co.*, 238 Iowa 1253, 30 NW2d 97; *Davis v Gatewood* (Mo) 299 SW2d 504; *De Weese v J. C. Penney Co.*, 5 Utah 2d 116, 297 P2d 898, 65 ALR2d 399; *Clinchfield Coal Co. v Wheeler's Adm'r*, 108 Va 448, 62 SE 269.

Footnote 2. *Brigham Young University v Lillywhite* (CA10 Utah) 118 F2d 836, 137 ALR 598, cert den 314 US 638, 86 L Ed 512, 62 S Ct 73.

Footnote 3. *Belleville Stone Co. v Comben*, 61 NJL 353, 39 A 641, affd 62 NJL 449, 45 A 1090.

Footnote 4. *Garthe v Ruppert*, 264 NY 290, 190 NE 643, reh den 265 NY 502, 193 NE 291; *Southern R. Co. v Mauzy*, 98 Va 692, 37 SE 285.

b. Specific Types of Conduct [396-401]

§ 396 Negligence or care

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under pre-Rule law, still applicable in some states that have not adopted the Uniform Rules, the courts, in actions for negligence, generally denied the admissibility of evidence of the defendant's habits of negligence, or his habitual negligent conduct upon the issue of his negligence at the time of the injury, 5 especially where there were eyewitnesses who testified to the actual facts concerning the accident or injury. 6 Nor, as a general rule, was evidence of the habit or reputation of the injured party for negligent or reckless conduct admissible. 7 Conversely, the defendant could not show his own habits or reputation 8 for prudence, skill, or care, upon the issue of his care or negligence upon a particular occasion. 9 Similarly, evidence of the careful habit of one injured by another's negligence was not admissible to show care on his part at the time of the injury, 10 particularly where there are witnesses who testify as to how the accident occurred. 11

In a non-Rule state, where the issue of negligence involved proof of deliberate and repetitive practice, it was said that a party should be able, by introducing evidence of such habit or regular usage, to allow inference of its persistence, and hence negligence on a particular occasion. 12

◆ Observation: It has been pointed out that pre-Rule authority approving as evidence of habit proof of a person's care in driving, his practice of driving under the speed limit, and his regard to the rules of the road 13 is of dubious stature today, and such proof should not be allowed in light of the description of the distinction between character and habit adopted by the Advisory Committee. 14 It was further noted that the degree of specificity which should be required is hard to determine in such instances, but that evidence should be specific enough to qualify for admission as proof of habit under FRE Rule 406 if it shows that a person regularly travels a particular route, and that he always (or on all or almost all observed occasions) signals a particular turn, or drives slowly (or too fast) on a particular stretch on the route, or stops (or fails to stop) at a particular intersection where the specific location is also the one involved in the accident in litigation. 15

Under the Uniform Rules, driving carelessly or recklessly has been held not a habit under Rule 406, 16 nor has conduct in consistently driving over the center line. 17 In a prosecution for reckless homicide, testimony of defendant's employer as to defendant's driving habits is inadmissible in evidence for determining defendant's manner of driving on a specific occasion where defendant had consumed intoxicating liquor. 18 However, a motorist's consistently following a certain route in a certain direction when driving home from work has been held to be a habit, 19 as has a motorist's giving a hand signal for a left turn. 20

Evidence that a railroad had a habit of not blowing a warning whistle at a particular crossing is admissible in a grade-crossing collision case involving a train and a pickup

truck at that crossing. 21

With respect to walking, it has been held a habit that an individual consistently followed a certain route on his almost daily walk from his home to a store 22 or that he habitually crossed the street carefully. 23

◆ Observation: Evidence of a party's habit of negligence, acquired after an accident, is not admissible to prove negligence prior to its acquisition. 24

§ 396 ----Negligence or care [SUPPLEMENT]

Case authorities:

In negligence action arising from auto accident between plaintiffs and on-duty police officer, evidence of officer's past driving record and police department's assessment of that record were not admissible as habit of person, relevant to prove that person's conduct was in conformity with that habit, where records showing, during six-year period, three low speed accidents "under apparently low risk conditions," did not demonstrate habit as contemplated by rule of evidence. *Waldon v Longview* (1993, Tex App Tyler) 855 SW2d 875.

Footnotes

Footnote 5. *United States v Compania Cubana De Aviacion, S. A.* (CA5 Fla) 224 F2d 811; *Poole v Evergreen Livestock Co.*, 262 Ala 131, 77 So 2d 475; *Holtzman v Hoy*, 118 Ill 534, 8 NE 832; *Walkowski v Penokee & G. Consol. Mines*, 115 Mich 629, 73 NW 895; *Murphy v Burney (Miss)* 27 So 2d 773; *Hays v Millar*, 77 Pa 238; *Konold v Rio Grande W. R. Co.*, 21 Utah 379, 60 P 1021; *Jackson v Chesapeake & O. R. Co.*, 179 Va 642, 20 SE2d 489.

As to the admissibility of habit evidence in motor vehicle accident litigation, generally, see 8 Am Jur 2d, *Automobiles and Highway Traffic* §§ 1026-1028.

Annotation: Admissibility of evidence of habit, customary behavior, or reputation as to care of motor vehicle driver or occupant, on question of his care at time of occurrence giving rise to his injury or death, 29 ALR3d 791.

Footnote 6. *Weaver v Scofield* (Mo App) 198 SW2d 240.

Footnote 7. *Murphy v Burney (Miss)* 27 So 2d 773.

Footnote 8. Generally, as to evidence of reputation, see §§ 363 et seq.

Footnote 9. *Poole v Evergreen Livestock Co.*, 262 Ala 131, 77 So 2d 475; *Holtzman v Hoy*, 118 Ill 534, 8 NE 832; *Smith's Adm'x v Middleton*, 112 Ky 588, 66 SW 388; *Thomas v Kimsey (Mo)* 322 SW2d 754; *Green v Shaw*, 136 SC 56, 134 SE 226, 48 ALR 243.

In a prosecution for reckless homicide, evidence on defendant's usual careful manner of

driving was not admissible for the purpose of attempting to prove defendant's manner of driving after a party during which he had consumed intoxicating liquor. *State v Warner (Me)* 237 A2d 150.

Footnote 10. *Atchison, T. & S. F. R. Co. v Gants*, 38 Kan 608, 17 P 54.

Footnote 11. *Illinois C. R. Co. v Borders*, 61 Ill App 55.

Footnote 12. *Halloran v Virginia Chemicals, Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991.

Footnote 13. *Frase v Henry (CA10 Kan)* 444 F2d 1228.

Footnote 14. As to such distinctions, see § 391.

Footnote 15. *Louisell and Mueller*, Federal Evidence § 157.

Footnote 16. *Hart v State*, 75 Wis 2d 371, 249 NW2d 810 (ovrld on other grounds by *Re Estate of Safran*, 102 Wis 2d 79, 306 NW2d 27, 25 ALR4th 766).

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Footnote 17. *Ritchey v Murray*, 274 Ark 388, 625 SW2d 476.

Footnote 18. *State v Warner (Me)* 237 A2d 150.

Footnote 19. *Walton v Elftman*, 64 Ohio Misc 45, 18 Ohio Ops 3d 232, 410 NE2d 1282.

Footnote 20. *Ritchey v Murray*, 274 Ark 388, 625 SW2d 476; *Ohlson v Kent Nowlin Constr. Co. (App)* 99 NM 539, 660 P2d 1021, cert den 99 NM 477, 660 P2d 119.

Footnote 21. *South v National Railroad Passenger Corp. (AMTRAK) (ND)* 290 NW2d 819.

Footnote 22. *Charmley v Lewis*, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

Footnote 23. *Gardner v Geraghty (1st Dist)* 98 Ill App 3d 10, 53 Ill Dec 517, 423 NE2d 1321.

Annotation: Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 ALR3d 1293.

Footnote 24. *Weaver v Scofield (Mo App)* 198 SW2d 240.

§ 397 Alcohol-related conduct

[View Entire Section](#)

The Notes of the Advisory Committee to FRE Rule 406 state that evidence of intemperate behavior is generally excluded when offered in accident cases as proof of drunkenness because of failure to achieve the status of habit. 25 However, according to one court, this statement of the Advisory Committee is at odds with the probability theory of habit seemingly adopted elsewhere in the Notes to FRE Rule 406. 26 Consequently, the court admitted evidence of the witness's regular practice of drinking a six-pack of beer four nights a week to prove that the conduct of the witness on the occasion of the accident giving rise to the action was in conformity with the habit. 27 And in an action by a mechanic against a manufacturer alleging defective design, it was proper to admit evidence of plaintiff's habit of drinking on the job since plaintiff's mental and physical capabilities were relevant to the defense of assumption of risk and to the apportionment of liability under the state's comparative negligence standard. 28

Under state equivalents of Rule 406, there is authority that one cannot introduce, as habit evidence, evidence of an individual's intemperance or sobriety, such as evidence that the individual never drank while working. 29 Nor is it a habit that an individual was aggressive or violent when drunk. 30 A bartender's testimony that the victim of an ice-pick stabbing incident often bummed drinks was inadmissible on the ground that cadging drinks is not of the semi-automatic and regular character contemplated by the rule. 31 But evidence of the prior intemperate habits of a person has been held relevant to, and may be given as corroborating evidence on, the question of whether he was intoxicated at any given time and place, when such intoxication is a material issue in the cause. 32

◆ Observation: Clearly, where the gist of the action involves the defendant's habits, such as where a divorce is sought on the ground of habitual drunkenness, evidence of the habit is admissible. 33

◆ Caution: Evidence of drinking habits may be inadmissible on the basis of remoteness. 34

§ 397 ----Alcohol-related conduct [SUPPLEMENT]

Case authorities:

In proceeding to terminate parental rights of mother in her children, court did not abuse its discretion in admitting evidence of mother's treatment at alcohol treatment center where state statute prohibited disclosure of any alcohol treatment records protected under federal law, where federal statute allowed disclosure for good cause, with good cause being determined by weighing public interest and need for disclosure against injury to patient, to physician-patient relationship, and to treatment services, where federal regulation stated that courts may authorize disclosure if it is necessary to protect against child abuse and neglect, where critical issue in case at hand was whether mother had achieved certain degree of "personal rehabilitation" and her active alcoholism was key element, where federal regulations also allowed disclosure when patient offers testimony or other evidence pertaining to content of confidential communications, where issue of

mother's mental health had been raised by her, where state's general mental health treatment confidentiality statute did not apply in that exception existed for cases in which patient introduces his or her mental state as defense or claim, and where best interest of child requires that when mental health of parent in termination case is at issue, privilege between psychiatrist and patient give way once it is shown that communications and records are relevant to issues in case. *Re Romance M.* (1993) 30 Conn App 839, 622 A2d 1047, app gr, in part 226 Conn 916, 628 A2d 988.

Footnotes

Footnote 25. *Keltner v Ford Motor Co.* (CA8 Ark) 748 F2d 1265, CCH Prod Liab Rep ¶ 10291, 16 Fed Rules Evid Serv 1260.

Footnote 26. *Keltner v Ford Motor Co.* (CA8 Ark) 748 F2d 1265, CCH Prod Liab Rep ¶ 10291, 16 Fed Rules Evid Serv 1260.

Footnote 27. *Keltner v Ford Motor Co.* (CA8 Ark) 748 F2d 1265, CCH Prod Liab Rep ¶ 10291, 16 Fed Rules Evid Serv 1260 (the witness himself in his original brief characterized his pattern of drinking as a habit and acknowledged that it was possible he could have been drinking the night of the accident).

Footnote 28. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243 (criticized on other grounds by *Cornwall v U.S. Constr. Mfg., Inc.* (CA FC) 800 F2d 250, 231 USPQ 64) and (disapproved on other grounds by *Crawford Fitting Co. v J. T. Gibbons, Inc.*, 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494, 43 BNA FEP Cas 1775, 43 CCH EPD ¶ 37102, 1987-1 CCH Trade Cases ¶ 67596, 7 FR Serv 3d 1161) as stated in *Goodwall Constr. Co. v Beers Constr. Co.* (ND Ga) 824 F Supp 1044, 26 USPQ2d 1401, affd in part and revd in part, remanded on other grounds (CA FC) 991 F2d 751, 26 USPQ2d 1420, reh, en banc, den (CA FC) 1993 US App LEXIS 16231.

Footnote 29. *State v Bragg* (Me) 516 A2d 556.

Footnote 30. *State v Williams* (App) 141 Ariz 127, 685 P2d 764.

Footnote 31. *State v Munguia* (App) 137 Ariz 69, 668 P2d 912.

Footnote 32. *State v Wadsworth* (Fla) 210 So 2d 4.

Testimony that it was decedent's habit to chain-smoke while drinking and that he had often passed out under such circumstances while holding a lighted cigarette was admissible in suit alleging negligence on the part of the decedent in starting a fire. *Sams v Gay*, 161 Ga App 31, 288 SE2d 822.

Footnote 33. 24 Am Jur 2d, Divorce and Separation §§ 373, 388.

Footnote 34. *Stouffer v State* (Okla Crim) 738 P2d 1349, mod, in part, reh den, in part (Okla Crim) 742 P2d 562 and cert den 484 US 1036, 98 L Ed 2d 779, 108 S Ct 763, post-conviction proceeding (Okla Crim) 817 P2d 1275, motion gr (US) 117 L Ed 2d 402, 112 S Ct 1153 and cert den (US) 118 L Ed 2d 217, 112 S Ct 1573 (ex-wife's knowledge

of victim's drinking habits excluded where she had not lived with victim for 15 months).

§ 398 Criminal conduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A habit of committing a particular crime is not admissible on the ground that evidence of such habits is identical to the kind of character evidence that is a target of and excluded by FRE Rule 404. 35 But there appears to be a conflict on the question whether violence against other persons may be viewed as habitual, with some courts concluding that it can be, 36 while other conclude that it cannot. 37

Evidence of a pattern of child sex abuse has been held admissible under Rule 406, 38 as has evidence of father's excessive discipline of his foster daughter, 39 and a landlord's repeated sexual harassment of female tenants. 40

Carrying a knife or a gun has been held a habit under Rule 406, 41 but a man's conduct of beating women companions has been held not a habit or routine practice so as to be admissible under Rule 406. 42

Evidence admissible to show habit includes evidence of a defendant's failure to timely file tax returns for a number of years subsequent to the years involved in a prosecution for failure to file tax returns. 43

§ 398 ----Criminal conduct [SUPPLEMENT]

Case authorities:

Evidence of witness' pattern of drug use, with effect of undermining witness' memory, is admissible, regardless of whether witness was using drugs at time of events testified to. *State v Peckham* (1994) 255 Kan 310, 875 P2d 257.

Footnotes

Footnote 35. *United States v Mascio* (CA7 Ill) 774 F2d 219, 18 Fed Rules Evid Serv 1349.

As to the distinctions between habit and character evidence, see § 391.

Footnote 36. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564 (civil rights suit alleging wrongful death arising out of attempt by police officers to investigate automobile accident; evidence that decedent had been involved in eight prior violent encounters with law enforcement officers was admissible).

Footnote 37. *United States v Holman* (CA11 Fla) 680 F2d 1340, 11 Fed Rules Evid Serv 209, reh den (CA11 Fla) 691 F2d 512; *State v Gardner* (App) 91 NM 302, 573 P2d 236, cert den 91 NM 249, 572 P2d 1257.

Footnote 38. *Soper v State* (Alaska App) 731 P2d 587 (prosecution of father for sexual abuse of his youngest daughter, where the court ruled admissible, as "a striking pattern of behavior" that seems to occupy the middle ground between evidence of character and habit, the father's seduction of two older daughters when they approached puberty, as he had seduced his youngest daughter).

Footnote 39. *State v Murray*, 228 Mont 125, 741 P2d 759 (prosecution for beating foster daughter to death).

Footnote 40. *Chomicki v Wittekind* (App) 128 Wis 2d 188, 381 NW2d 561.

Footnote 41. *State v Platz*, 33 Wash App 345, 655 P2d 710, review den 99 Wash 2d 1012.

But see *State v Williams* (App) 141 Ariz 127, 685 P2d 764, holding that evidence of a homicide victim's prior armed assaults, offered to show that it was the victim's consistent habit to carry a gun when intoxicated, was properly excluded since this was inadmissible character evidence rather than admissible habit evidence.

Footnote 42. *State v Gardner* (App) 91 NM 302, 573 P2d 236, cert den 91 NM 249, 572 P2d 1257.

Footnote 43. *United States v Luttrell* (CA8 Ark) 612 F2d 396, 80-1 USTC ¶ 9150, 5 Fed Rules Evid Serv 582, 45 AFTR 2d 80-555.

§ 399 Business and professional routines, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Many business and professional practices have been held to be routine practices under Uniform Rule 406 so as to make admissible evidence of such practices. 44 Among them are a storekeeper's habits and routines, 45 office procedures such as processing and mailing securities transactions confirmations, 46 and releasing only authorized documents. 47 Evidence that an employer's office manager, in briefing new sales representatives, did not explain the company's policy of nonentitlement to commissions after termination, has been held admissible as evidence of a routine practice under Rule 406, 48 as has evidence that insurance company waived certain conditions but then asserted them by way of defense. 49

Evidence that a newspaper reporter consistently obtained the correct spelling of names at the beginning of an interview has been admitted, 50 as has evidence that a liquor licensee engaged in a routine practice of serving alcoholic beverages to inebriated

persons. 51

Under the federal rules, evidence recognized as relevant routine practice includes:

- Evidence of past wildcat strikes in the coal industry, on the question of damages against a union for breach of contract 52
- Evidence of routine sanitation procedures in a food processing plant 53
- Evidence to establish a routine process on the part of an employer which used nonunion employees, of paying off union officials for the sake of expediency and not out of fear as probative that the conduct of the employer on a particular occasion was in conformity therewith 54
- Evidence of discrimination which predated a federal civil rights statute, 55 or occurred prior to the period of time for which relief is available under the statute of limitations, 56 since it supports the inference that the discrimination continued, particularly where there had been little change in the decisionmaking process
- Evidence of arrest records of other department stores recording the race of arrestees, since it was relevant evidence which provided an alternative explanation for recording the race of arrestees, viz., that the department store was merely following industry custom, and served to rebut plaintiff's attempt to have the jury infer that maintenance of records of race of arrestees showed that the store discriminated against minorities 57
- Evidence of asking employees to take polygraph examinations 58

On the other hand, in an action against a company and its treasurer, evidence that the treasurer had guaranteed a contract between the company and another on one prior occasion was not relevant as evidence of habit, 59 nor was evidence admissible to show that, on a few occasions, a lawyer did not explain his fees to clients during the client's first interview. 60

§ 399 ----Business and professional routines, generally [SUPPLEMENT]

Case authorities:

In action against drug company to recover for personal and professional injuries physician suffered when his patient had adverse reaction to drug he had prescribed, that is, theophylline, alleging that drug company had failed to warn him of risks associated with theophylline, trial court did not err in excluding testimony of drug company's sales representative, offered pursuant to Rule of Evidence 406, that it was his habit to discuss dangers of theophylline and particular study that included information about risks of theophylline when he visited physicians, and that, therefore, he must discuss those risks with physician. Although sales representative's notes indicated that physician was "Impressed with Furukawa study . . .," he also stated there was merely "some reference" in that study to viral illnesses and problems with theophylline toxicity, and he admitted he did not have copy of study to give to physician at that time. Accordingly, trial court did not abuse its discretion in holding that sales representative's conduct did not reach level of habit. *Washington State Physicians Ins. Exch. & Ass'n v Fisons Corp.* (1993) 122 Wash 2d 299, 858 P2d 1054, CCH Prod Liab Rep ¶ 13675.

Insurance adjuster's testimony regarding his procedures when presented with double claim (insurer covering both parties to dispute) was admissible as habit evidence under Rule 406. *Heigis v Cepeda* (1993) 71 Wash App 626, 862 P2d 129, amd (Wash App) 1993 Wash App LEXIS 410.

Footnotes

Footnote 44. Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Footnote 45. *Brewer v State*, 271 Ark 254, 608 SW2d 363.

Footnote 46. *Swink & Co. v Carroll McEntee & McGinley, Inc.*, 266 Ark 279, 584 SW2d 393, 27 UCCRS 239.

Footnote 47. *Oberly v Howard Hughes Medical Inst.* (Del Ch) 472 A2d 366 (criticized on other grounds by *Staats v Lawrence* (Del Super) 1990 Del Super LEXIS 365).

Footnote 48. *Micke v Jack Walters & Sons Corp.*, 70 Wis 2d 388, 234 NW2d 347.

Footnote 49. *Rosenburg v Lincoln American Life Ins. Co.* (CA7 Ill) 883 F2d 1328, 28 Fed Rules Evid Serv 980, 14 FR Serv 3d 682 (where agents were "trained" to give oral assertions that coverage was effective immediately despite written conditions to the contrary).

Footnote 50. *Boswell v Phoenix Newspapers, Inc.* (App) 152 Ariz 1, 730 P2d 178, approved as supplemented, en banc 152 Ariz 9, 730 P2d 186, 13 Media L R 1785, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1954 and (criticized on other grounds by *Bryant v Continental Conveyor & Equip. Co.*, 156 Ariz 193, 751 P2d 509, 2 Ariz Adv Rep 8, CCH Prod Liab Rep ¶ 11683) as stated in *Estate of Hernandez* by *Hernandez-Wheeler v Arizona Bd. of Regents* (App) 172 Ariz 522, 838 P2d 1283, 101 Ariz Adv Rep 87, vacated, remanded on other grounds (Ariz) 156 Ariz Adv Rep 43.

Footnote 51. *Tommy's Elbow Room, Inc. v Kavorkian* (Alaska) 727 P2d 1038.

Footnote 52. *United States Steel Corp. v United Mine Workers* (CA5 Ala) 519 F2d 1249, 90 BNA LRRM 2548, 77 CCH LC ¶ 11088, reh den (CA5 Ala) 526 F2d 377, 91 BNA LRRM 2306, 78 CCH LC ¶ 11330.

Annotation: Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Footnote 53. *United States v General Foods Corp.* (ND NY) 446 F Supp 740, affd without op (CA2 NY) 591 F2d 1332.

Footnote 54. *United States v Callahan* (CA6 Ohio) 551 F2d 733, 94 BNA LRRM 3248, 81 CCH LC ¶ 13130, 1 Fed Rules Evid Serv 881, appeal after remand (CA6 Ohio) 579 F2d 398.

Footnote 55. *Williams v Anderson* (CA8 Ark) 562 F2d 1081, 17 BNA FEP Cas 1772, 14 CCH EPD ¶ 7812, 2 Fed Rules Evid Serv 724, at footnote 7.

Footnote 56. *Donnell v General Motors Corp.* (CA8 Mo) 576 F2d 1292, 17 BNA FEP Cas 712, 16 CCH EPD ¶ 8315, 3 Fed Rules Evid Serv 118, on remand (ED Mo) 500 F Supp 176, 24 BNA FEP Cas 278, 25 CCH EPD ¶ 31582, affd without op (CA8 Mo) 676 F2d 705, 28 BNA FEP Cas 1818, 30 CCH EPD ¶ 33034 and affd without op (CA8 Mo) 676 F2d 705, 28 BNA FEP Cas 1818, 30 CCH EPD ¶ 33034 and affd without op (CA8 Mo) 676 F2d 705, 28 BNA FEP Cas 1818, 30 CCH EPD ¶ 33034, cert den 459 US 844, 74 L Ed 2d 88, 103 S Ct 97, 29 BNA FEP Cas 1560, 30 CCH EPD ¶ 33097, later proceeding (ED Mo) 665 F Supp 748, 44 BNA FEP Cas 691, affd without op (CA8 Mo) 873 F2d 1445, 50 BNA FEP Cas 152, cert den 493 US 838, 107 L Ed 2d 82, 110 S Ct 120 (Title VII case).

Footnote 57. *Rojas v Alexander's Dept. Store, Inc.* (CA2 NY) 924 F2d 406, 31 Fed Rules Evid Serv 627, cert den (US) 116 L Ed 2d 30, 112 S Ct 52, reh den (US) 116 L Ed 2d 644, 112 S Ct 622 (Hispanic customer's 42 USCS § 1983 action against department store for arrest without probable cause).

Footnote 58. *O'Brien v Papa Gino's of America, Inc.* (CA1 NH) 780 F2d 1067, 1 BNA IER Cas 458, 121 BNA LRRM 2321, 39 CCH EPD ¶ 36034, 104 CCH LC ¶ 55547, 20 Fed Rules Evid Serv 448.

Footnote 59. *Utility Control Corp. v Prince William Constr. Co.* (CA4 Va) 558 F2d 716, 2 Fed Rules Evid Serv 123, 23 FR Serv 2d 910.

Footnote 60. *Cannell v Rhodes* (Cuyahoga Co) 31 Ohio App 3d 183, 31 Ohio BR 349, 509 NE2d 963.

§ 400 Routine or habit of health providers

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the regular procedures of a health provider have been admitted into evidence on the ground that they constitute either the habit of an individual or the routine practice of a medical or similar office. Thus evidence has been admitted to show that a doctor or other provider consistently presented information to patients about the risks associated with certain procedures, 61 and that a physician had a pattern of referring patients to other doctors. 62 Also admissible is evidence of how blood samples were regularly processed in a medical examiner's office and laboratory, 63 and how hospital patients are admitted. 64

On the other hand, emphasizing that habit refers to a type of nonvolitional activity that occurs with invariable regularity, it was held error to admit, as habit evidence, testimony indicating that a physician had prescribed steroids to other allergy patients representing the drugs to be antihistamines or decongestants. 65

The testimony of emergency room nurses concerning their customary procedures in examining patients is admissible as circumstantial evidence of fixed and uniform habits, 66 but nurses' testimony regarding a physician's alleged proclivity to extubate patients prematurely was not admissible to show that the physician had a habit of prematurely extubating patients. 67 Nor could a nurse's testimony regarding the usual procedure followed by a physician when using a particular anesthetic be admitted where the doctor's usual procedure may have been different from the procedure used in the instant case. 68

Footnotes

Footnote 61. *Meyer v United States* (CA10 Colo) 638 F2d 155, 6 Fed Rules Evid Serv 980 (risk of extracting impacted wisdom tooth); *Bloskas v Murray* (Colo) 646 P2d 907, 42 ALR4th 527 (risk of infection and loosening of implanted devices); *Reaves v Mandell*, 209 NJ Super 465, 507 A2d 807 (risks associated with a hysterectomy where physician had developed a routine over a period of 15 years and had performed approximately 1,000 hysterectomies); *Rigie v Goldman* (2d Dept) 148 App Div 2d 23, 543 NYS2d 983 (risk of extracting impacted wisdom tooth explained by dentist before patient signed consent form).

Evidence that other university physicians routinely followed the practice of explaining the experimental nature of the DES study and securing the maternity patient's consent before proceeding with the study was admissible to prove the two treating physicians acted in conformity with that routine practice before exposing plaintiff-mothers to DES. *Wetherill v University of Chicago* (ND Ill) 570 F Supp 1124, 15 Fed Rules Evid Serv 768.

See *Re Swine Flu Immunization Products Liability Litigation* (DC Colo) 533 F Supp 567 (disapproved on other grounds by *Unthank v United States* (CA10 Utah) 732 F2d 1517), where evidence was admitted to establish the routine practice of a county health department to give each person being vaccinated a consent form and information concerning the vaccine to show that on the day the plaintiff received the vaccine, the health center acted in conformity with custom in advising the plaintiff of the potential adverse affects of the vaccine.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 ALR4th 1243.

Footnote 62. *Hake v DeLane*, 117 Idaho 1058, 793 P2d 1230.

Footnote 63. *Zyskowski v Habelmann*, 150 Mich App 230, 388 NW2d 315, app gr, in part, app den, in part 426 Mich 865, vacated on other grounds 429 Mich 873, 414 NW2d 886, amd 1987 A Mich 12 and on remand 169 Mich App 98, 425 NW2d 711, later proceeding (Mich) 1989 Mich LEXIS 474 and app den 436 Mich 865.

Footnote 64. *McKinstry v Valley Obstetrics-Gynecology Clinic, P.C.*, 428 Mich 167, 405 NW2d 88.

Footnote 65. *Weil v Seltzer*, 277 US App DC 196, 873 F2d 1453, 28 Fed Rules Evid Serv 180 (wrongful death action based on a claim that physician had prescribed steroids for plaintiff while telling him that they were antihistamines).

Footnote 66. *Thomas v Newnan Hospital*, 185 Ga App 764, 365 SE2d 859.

Footnote 67. *Fincke v Peeples* (Fla App D4) 476 So 2d 1319, 10 FLW 2173, review den (Fla) 486 So 2d 596 and review den (Fla) 486 So 2d 598 (holding such testimony to amount to opinions rather than facts).

Footnote 68. *Vuletich v Bolgla* (1st Dist) 85 Ill App 3d 810, 41 Ill Dec 68, 407 NE2d 566, 10 ALR4th 1233.

Annotation: Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 ALR4th 1243.

§ 401 Routine of law enforcement agencies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Police routines have been held provable under Rule 406, including how an officer issued parking tickets, 69 and how an undercover police officer handled drugs received in a drug buy. 70

Evidence of routine procedures in an immigration office was admissible to show that an alien had received a particular notice required by law, 71 or that a warrant was properly served. 72

Footnotes

Footnote 69. *State v Bloss*, 3 Hawaii App 274, 649 P2d 1176.

Footnote 70. *State v Van Sickle* (Me) 434 A2d 31.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Footnote 71. *United States v Floulis* (WD Pa) 457 F Supp 1350.

Footnote 72. *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659, reh den, en banc (CA5 Tex) 758 F2d 651.

c. Proving Habit or Routine [402, 403]

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules contains no specific provision regarding proof of habit or routine. The Advisory Committee stated that permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. 73 The Uniform Rules of Evidence specifically contain a proposed provision that "Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." 74 However, this provision has been adopted in only a few states; most states, in adopting the Uniform Rules, purposefully omitted this provision. 75

Absent such a provision, it has been held that the method of proof of habit or routine practice should be left to the courts on a case-by-case basis. 76 Testimony about the habit or routine practice may be given by the person with the habit or who followed the routine practice. 77 If the individual has no recollection of the particular incident in suit, he may still testify as to his or her habit or routine practice. 78 While it has been said that testimony may be given by another person, but only if the person testifying about the habit or routine practice has personal knowledge of it, 79 it has also been held that FRE Rule 406 does not limit proof of specific instances to testimony by witnesses with personal knowledge; 80 it also permits resort to circumstantial evidence, documents, or even opinion testimony. 81

◆ **Comment:** Opinion evidence must be rationally based on the perception of the witness and helpful under the provisions of FRE Rule 701. 82

◆ **Practice guide:** The burden of establishing the habitual nature of the evidence rests on the proponent of the evidence; admissibility of habit evidence under Rule 406 does not hinge on the ability of a party seeking exclusion of evidence to disprove habitual character of evidence. 83

The question whether conduct is a habit or routine practice is a question for the court, 84 to be decided out of the jury's presence where the proffered evidence of habit or routine practice is highly prejudicial, 85 and the decision as to admissibility is a matter resting within the trial court's discretion. 86 Once admitted, evidence of habit or routine is to be weighed and considered by the trier of facts in the same manner as any other type of direct or circumstantial evidence. 87

◆ **Caution:** Even if the habit or routine practice evidence is properly offered, it must not be objectionable on other grounds, such as that its probative value is substantially outweighed 88 by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 89

Footnotes

Footnote 73. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Practice References Louisell and Mueller, Federal Evidence § 156.

Annotation: Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence, 53 ALR Fed 703.

Footnote 74. Uniform Rules of Evidence, Rule 406(b).

Footnote 75. See 13A Uniform Laws Annotated, Rules of Evidence, Notes to Rule 406.

Footnote 76. *Oberly v Howard Hughes Medical Inst.* (Del Ch) 472 A2d 366 (criticized on other grounds by *Staats v Lawrence* (Del Super) 1990 Del Super LEXIS 365); *Bolan v Adams* (Geauga Co) 19 Ohio App 3d 206, 19 Ohio BR 349, 483 NE2d 1187, motion overr.

Annotation: Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567 § 22.

Practice References Methods of proof. 7 Am Jur POF3d 523, Habit of Person § 4.

Footnote 77. *Oberly v Howard Hughes Medical Inst.* (Del Ch) 472 A2d 366 (criticized on other grounds by *Staats v Lawrence* (Del Super) 1990 Del Super LEXIS 365).

Footnote 78. *Charmley v Lewis*, 302 Or 324, 729 P2d 567, 64 ALR4th 549.

Footnote 79. *Eig v Insurance Co. of North America* (Fla App D3) 447 So 2d 377; *Laszko v Cooper Laboratories, Inc.*, 114 Mich App 253, 318 NW2d 639; *Weisenberger v Senger* (ND) 381 NW2d 187; *Bolan v Adams* (Geauga Co) 19 Ohio App 3d 206, 19 Ohio BR 349, 483 NE2d 1187, motion overr.

Annotation: 64 ALR4th 567 § 24[b].

Footnote 80. *Wetherill v University of Chicago* (ND Ill) 570 F Supp 1124, 15 Fed Rules Evid Serv 768.

Footnote 81. *Wetherill v University of Chicago* (ND Ill) 570 F Supp 1124, 15 Fed Rules Evid Serv 768 (university could substantiate doctors' routine adherence to protocol requiring patient's consent before participation in research through documentary evidence).

Footnote 82. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 406.

Footnote 83. *Weil v Seltzer*, 277 US App DC 196, 873 F2d 1453, 28 Fed Rules Evid Serv 180.

Footnote 84. *Oberly v Howard Hughes Medical Inst.* (Del Ch) 472 A2d 366 (criticized by *Staats v Lawrence* (Del Super) 1990 Del Super LEXIS 365).

Footnote 85. *R. v Sullivan* (Alaska) 631 P2d 91.

Footnote 86. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243; *State v Mary* (Iowa) 368 NW2d 166, appeal after remand (Iowa App) 401 NW2d 239; *Weisenberger v Senger* (ND) 381 NW2d 187; *Cannell v Rhodes* (Cuyahoga Co) 31 Ohio App 3d 183, 31 Ohio BR 349, 509 NE2d 963; *Norris v State*, 46 Wash App 822, 733 P2d 231.

Annotation: 64 ALR4th 567 § 23[c].

53 ALR Fed 703.

Footnote 87. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Rule 406 does not purport to assign a particular weight to the evidence it would admit. *Paulsen Lumber, Inc. v Anderson*, 91 Wis 2d 692, 283 NW2d 580.

Footnote 88. See §§ 324 et seq. as to circumstances under which probative value is substantially outweighed.

Footnote 89. *Ohlson v Kent Nowlin Constr. Co.* (App) 99 NM 539, 660 P2d 1021, cert den 99 NM 477, 660 P2d 119; *Weisenberger v Senger* (ND) 381 NW2d 187.

§ 403 Sufficiency of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Only when the examples offered to establish the pattern of conduct are numerous enough to base an inference of systematic conduct and to establish a regular response to a repeated specific situation are they admissible to establish pattern or habit; 90 and, although a precise formula cannot be proposed for determining when behavior may become so consistent as to rise to the level of habit or routine, adequacy of sampling and uniformity of response are controlling considerations. 91 In a non-Rule state, it was held that in order to justify introduction of evidence of habit or regular usage, a party must be able to show on voir dire to the satisfaction of the trial judge that he expects to prove a sufficient number of instances of the conduct in question. 92

◆ Practice guide: Where an employee testifies as to the conduct of the employer on a particular occasion, on cross-examination counsel should be allowed to elicit information on any past occurrences in which the witness has been involved in similar circumstances; such evidence might well establish a routine practice on the part of the employer. 93

Footnotes

Footnote 90. *Wilson v Volkswagen of America, Inc.* (CA4 Va) 561 F2d 494, 2 Fed Rules Evid Serv 697, 23 FR Serv 2d 1534, cert den 434 US 1020, 54 L Ed 2d 768, 98 S Ct 744 and on remand (ED Va) 445 F Supp 1368; *Mathes v The Clipper Fleet* (CA9 Cal) 774 F2d 980, 19 Fed Rules Evid Serv 577.

Evidence that 3 or 4 times over 20 years, the NFL disregarded antitrust advice was properly excluded as being hardly sufficient to prove a pattern of behavior which might amount to habit under Rule 406. *United States Football League v National Football League* (CA2 NY) 842 F2d 1335, 1988-1 CCH Trade Cases ¶ 67930, 25 Fed Rules Evid Serv 182, later proceeding (SD NY) 704 F Supp 474, 1989-1 CCH Trade Cases ¶ 68407, affd (CA2 NY) 887 F2d 408, 1989-2 CCH Trade Cases ¶ 68810, later proceeding (SD NY) 1990-1 CCH Trade Cases ¶ 68891 and cert den 493 US 1071, 107 L Ed 2d 1022, 110 S Ct 1116.

In a suit by a supplier against a purchaser alleging anticipatory and actual breach of various contracts, evidence regarding other contracts involving the supplier was properly excluded where there had been the mere conclusory assertion that numerous examples of other instances of lateness and defective performance on similar contracts existed, since no allegation of any specific, repetitive conduct that might approach evidence of habit was presented. *Simplex, Inc. v Diversified Energy Systems, Inc.* (CA7 Ill) 847 F2d 1290, 25 Fed Rules Evid Serv 1133.

Four instances of conduct while intoxicated over a period of eight years during which time defendant, by his own assertion, was frequently drunk was insufficient to establish habit. *United States v Pinto* (CA10 NM) 755 F2d 150, 17 Fed Rules Evid Serv 690.

In a personal injury action brought by a plaintiff who suffered an eye injury when, during a racketball match, he was struck by a ball hit by defendant, evidence that defendant had lost his temper in 2 or 3 previous games was not admissible; to prove habit, plaintiff needed to show that defendant's specific response to the repeated situation of falling behind or losing important racketball points was to strike balls no longer in play, or otherwise to play outside rules so as to endanger his opponents. *Lapierre v Sawyer*, 131 NH 609, 557 A2d 640.

Footnote 91. *Reyes v Missouri P. R. Co.* (CA5 Tex) 589 F2d 791, 3 Fed Rules Evid Serv 864; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564; *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243.

Footnote 92. *Halloran v Virginia Chemicals, Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991.

Footnote 93. *United States v Callahan* (CA6 Ohio) 551 F2d 733, 94 BNA LRRM 3248, 81 CCH LC ¶ 13130, 1 Fed Rules Evid Serv 881, appeal after remand (CA6 Ohio) 579 F2d 398.

3. Evidence of Other Crimes, Wrongs or Acts (Rule 404(b)) [404-462]

a. General Rules [404-412]

§ 404 Admissibility and exclusion, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Rules provide that while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith, such evidence may be admissible for other purposes, 94 such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, 95 provided that upon request by the accused, the prosecution in a criminal case must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. 96

Although the language of the Rule appears to be primarily exclusionary, the federal courts, in view of the frequent use of evidence of other acts and crimes, generally regard Rule 404(b) as a rule of inclusion, 97 which admits evidence of other crimes or acts relevant 98 to a trial issue except where such evidence tends to prove only criminal disposition or a propensity to commit criminal acts. 99 The rule is specifically exclusionary only as to evidence admitted to establish bad character as such; it unequivocally and very broadly sets out recognition of the admissibility of prior crimes for other purposes. 1

State courts, under the identically-worded Uniform Rule, also recognize the admissibility of such evidence, 2 with a similar limitation if the evidence tends to prove only disposition or bad character. 3

The exclusion of bad acts evidence is founded not on a belief that the evidence is irrelevant but rather on a fear that the jury will tend to give it excessive weight and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds. Juries treat prior convictions as highly probative, and such reliance by the trier of fact offends the longstanding tradition that protects a criminal defendant from guilt by reputation and from unnecessary prejudice. Evidence of a prior crime diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character. 4

◆ Observation: It has been stated that the true problem in administering the inclusionary principle is not to find a pigeonhole in which the proof might fit, but to determine whether the prior act tends to prove something other than propensity and, if so, to determine whether its particular relevancy outweighs the risk of prejudice—that is, that the jury will either draw the forbidden and deadly 3-step inference (from bad act to bad person, to guilt) or give way to an unthinking and emotional impulse to punish. 5

§ 404 ----Admissibility and exclusion, generally [SUPPLEMENT]

Practice Aids: Some thoughts on the sexual misconduct amendments to the Federal Rules of Evidence, 22 Fordham Urb LJ 2:355 (1995).

The new Federal Rules of Evidence on prior acts of accused sex offenders: A poorly drafted version of a very bad idea, 157 FRD 2:95 (1994).

Rules:

Federal Rules of Evidence, Rule 413, added by Congress in 1994, provides that in a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant. The government must disclose its intention to offer such evidence, and disclose the evidence to the defendant as specified. (Federal Rules of Evidence, Rule 414), provides similar provisions for child molestation prosecutions, and (Rule 415) provides for the admission of evidence of similar acts in civil cases concerning sexual assault or child molestation.

Case authorities:

In order to trigger government's responsibility to disclose Rule 404(b) evidence as precondition to its use at trial, defense at minimum must present timely request sufficiently clear and particular in objective sense to fairly alert prosecution that defense is invoking its specific right to pretrial notification of general nature of all Rule 404(b) evidence prosecution intends to introduce at trial; overbroad pretrial request, e.g., for all confessions, admissions, and statements that in any way exculpate, inculpate, or refer to defendant, is insufficiently specific, if not misleading. *United States v Tuesta-Toro* (1994, CA1 Puerto Rico) 29 F3d 771.

Defendant was not entitled to notice of specifics of prior bad acts, where government intended to use prior bad acts as evidence at trial, because under FRE 404(b) prosecution was only required to give notice of general nature of extrinsic acts to be introduced. *United States v Richardson* (1993, SD NY) 837 F Supp 570, motion den (SD NY) 1993 US Dist LEXIS 16904.

Drug conspiracy defendant's prior conviction for misprision of felony was properly admitted to prove preparation, knowledge of drug dealing, and absence of mistake or accident regarding present drug conspiracy since, although defendant pled guilty to misprision of felony, she was actually charged with conspiracy to distribute cocaine; therefore, conviction was connected to her involvement in that drug offense. *United States v Francisco* (1994, CA4 NC) 35 F3d 116.

Defendant's two prior convictions for possessing cocaine were highly relevant to issues of knowledge and intent, which were elements of constructive possession which was critical issue since drugs were found on defendant's companion. *United States v Willis* (1993, CA5 Tex) 6 F3d 257, reh, en banc, den (CA5 Tex) 1993 US App LEXIS 33419.

In prosecution of former Congressman on RICO charges, government was properly

permitted to question defendant regarding his failure to report or pay taxes on certain income and his solicitation of unrelated bribe, despite not having first disclosed it to defense, since it was using evidence to impeach defendant; therefore, Rule 404(b) did not apply. *United States v Bustamante* (1995, CA5 Tex) 45 F3d 933, reh, en banc, den (1995, CA5 Tex) 1995 US App LEXIS 9594.

Defendant's prior conviction for food stamp fraud was admissible since, at minimum, it provided motive for setting up sham sale of his business to obtain its authorization to participate in food stamp program, which formed basis of charges against him. *United States v Hebeke* (1994, CA6 Ohio) 25 F3d 287.

Defendant's four prior felony convictions for aggravated battery, robbery, and attempted robbery were admissible to impeach him in prosecution for being felon in possession of firearm given centrality of credibility issue; prior felony need not have involved "inherent dishonesty" to be probative and admissible under rule. *United States v Nururdin* (1993, CA7 Ill) 8 F3d 1187, cert den (US) slip op.

District court did not abuse its discretion in permitting evidence of defendant's prior conviction for being felon in possession of firearm for impeachment purposes since defendant in his first trial contradicted almost all of police officers' testimony so court determined his credibility would be important in second trial as well, conviction occurred less than six months before second trial, defendant did not need to testify since several other witnesses reiterated his testimony, and court limited government's use of conviction to fact and date. *United States v Causey* (1993, CA7 Ill) 9 F3d 1341, petition for certiorari filed (Feb 22, 1994).

Court would join Second and Ninth Circuits in holding that other crimes evidence may not be introduced when defense is that defendant did not do act since intent, to which evidence might be probative, is not placed in issue. *United States v Jenkins* (1993, CA8 SD) 7 F3d 803, 38 Fed Rules Evid Serv 1, reh, en banc, den (CA8) 1994 US App LEXIS 71.

In prosecution for wire and mail fraud arising out of false insurance claim scheme, evidence of farm truck found with parts and license plate of truck that defendant had reported stolen was not other acts evidence, but direct evidence of crime charged. *United States v Ballew* (1994, CA8 Mo) 40 F3d 936, reh, en banc, den (1994, CA8 Mo) 1994 US App LEXIS 36526.

Defendant's constitutional right to present defense in his prosecution for assault was not violated by exclusion of evidence of victim's prior conduct in order to prove self- defense where defendant had opportunity to argue self- defense and cross-examine victim and bring out facts showing victim's propensity for violence. *United States v Talamante* (1992, CA10 NM) 981 F2d 1153, petition for certiorari filed (Mar 17, 1993).

Evidence of December drug transaction was properly admitted as part of conspiracy charged as running from December through January 10, and not as other acts evidence. *United States v DeLuna* (1993, CA10 Colo) 10 F3d 1529.

District court did not abuse its discretion in admitting evidence of bank robbery defendant's prior convictions for robbery and burglary to attack his credibility given defendant's duress defense and importance of his credibility. *United States v Smith* (1993, CA10 Okla) 10 F3d 724.

Accused cocaine distributor's motion to exclude evidence of prior conviction for aggravated assault is granted, where distributor denies involvement in crack distribution, distributor's credibility is directly at issue, distributor is accused of using gun in distribution scheme, prior conviction involved assault with knife, prior assault is 9 years old, and prior conviction is 8 years old, because prior conviction deals with crime of violence, not crime of deception, and therefore has little bearing on distributor's credibility, and prejudicial effect outweighs its credibility value. *United States v Grove* (1994, DC Utah) 844 F Supp 1495.

Evidence of other "land flip" transactions in which defendants were involved were intrinsic to charges of conducting continuing scheme to defraud, characterized by land flip transactions, inflated appraisals, buyer- rebates, and fraudulent loan applications, hence not subject to Rule 404(b) analysis. *United States v Muscatell* (1995, CA11 Fla) 42 F3d 627.

Trial court in homicide prosecution properly admitted evidence of defendant's affiliation with street gang where (1) such evidence established that defendant and victims had been members of rival gangs, (2) gang of which defendant had been member considered certain park to be its "territory," and (3) victims had been shot in that park. *People v Sandoval* (1992) 4 Cal 4th 155, 14 Cal Rptr 2d 342, 841 P2d 862, 92 CDOS 10012, 92 Daily Journal DAR 16700, mod 4 Cal 4th 928a, 93 CDOS 1031 and reh den (Feb 10, 1993) and petition for certiorari filed (Jun 10, 1993).

In prosecution for child molestation and sodomy, evidence of defendant's prior plea of guilty to charge of child molestation in Indiana would be admissible as evidence of similar transaction, pursuant to special exception applicable to sexual abuse of young children, provided sufficient showing was made to establish defendant's identity as perpetrator of prior offense, and sufficient similarity between two acts so that proof of one would tend to prove the other. *Adams v State* (1993) 208 Ga App 29, 430 SE2d 35, 93 Fulton County D R 923, cert den (Ga) 1993 Ga LEXIS 599.

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b). *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

There was no plain error in a first- degree murder prosecution where the trial court allowed the prosecution to present the testimony of the victim of a prior robbery when defendant had already admitted committing the robbery during his testimony and had indicated a willingness to stipulate the existence of the robbery conviction. *State v Buckner* (1995) 342 NC 198, 464 SE2d 414.

The trial court in a first-degree rape and second-degree kidnapping case did not err in admitting evidence that one month prior to the alleged rape, defendant failed to return the victim's car, stole some money, broke into her home, and was arrested, since the evidence was admissible to show the chain of events and the termination of the relationship. *State v Jenkins* (1994) 115 NC App 520, 445 SE2d 622, stay gr 336 NC 784, 447 SE2d 435 and review den (NC) 1994 NC LEXIS 604.

The trial court did not abuse its discretion in admitting evidence regarding defendant's

prior acts in engaging in excessive conduct with other co-employees and his reputation created thereby in an action for damages from an injury suffered during a movie stunt where plaintiff alleged willful and wanton, negligent and reckless conduct by defendant. The evidence was probative of defendant's motive, intent and the absence of mistake and was admissible under N.C.G.S. § 8C-1, Rule 404(b). *Pinckney v Van Damme* (1994) 116 NC App 139, 447 SE2d 825.

An officer's testimony that a defendant charged with drug offenses had fled from him on an earlier occasion was not evidence of other crimes, wrongs or acts within the purview of GS § 8C-1, Rule 404(b). Even if defendant's flight from the officer was a prior bad act under Rule 404(b), this testimony was admissible to show that the officer was able to identify defendant. *State v Taylor* (1995) 117 NC App 644, 453 SE2d 225.

Evidence of other crimes is inadmissible to prove character of person in order to show that he acted in conformity therewith, but if evidence of other crimes is substantially relevant to some other purpose, and is offered for that purpose, it is admissible (Stats § 904.04(2)). *State v Anderson* (1993, App) 176 Wis 2d 196, 500 NW2d 328.

Footnotes

Footnote 94. The list of "other purposes" for which such evidence may be admissible is not exhaustive. See § 418.

Footnote 95. FRE Rule 404(b); Uniform Rules of Evidence, Rule 404(b).

Purposes listed in FRE Rule 404(b) for which evidence of other crimes, wrongs, or acts may be admissible are discussed in §§ 435 et seq.

Law Reviews: Reed, Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence. 53 U Cin LR 113 (1984).

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Practice References Defending minor felony cases. 13 Am Jur Trials 465.

Forms: Allegation–Error of law–In refusing to allow introduction of relevant evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3623.

Allegation–Error of law–In admitting inadmissible evidence. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:3624.

Motion–To exclude evidence of prior conviction–Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion–To exclude evidence of other crimes–Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 96. For a discussion of this notice provision, see § 459.

Footnote 97. *United States v Castiello* (CA1 Mass) 915 F2d 1, 31 Fed Rules Evid Serv 413, cert den 498 US 1068, 112 L Ed 2d 849, 111 S Ct 787; *Ismail v Cohen* (CA2 NY) 899 F2d 183, 29 Fed Rules Evid Serv 1414, costs/fees proceeding (SD NY) 1991 US Dist LEXIS 14919; *United States v Halper* (CA2 NY) 590 F2d 422, 79-1 USTC ¶ 9127, 3 Fed Rules Evid Serv 1639, 42 AFTR 2d 78-6371; *United States v Scarfo* (CA3 Pa) 850 F2d 1015, 26 Fed Rules Evid Serv 30, 93 ALR Fed 111, cert den 488 US 910, 102 L Ed 2d 251, 109 S Ct 263; *United States v Shaw* (CA5 Miss) 701 F2d 367, 12 Fed Rules Evid Serv 1566, reh den (CA5 Miss) 714 F2d 544, 14 Fed Rules Evid Serv 130, cert den 465 US 1067, 79 L Ed 2d 744, 104 S Ct 1419 and (among conflicting authorities noted in *Murphy v Holland* (CA4 W Va) 776 F2d 470) and (disapproved on other grounds by *Greer v Miller*, 483 US 756, 97 L Ed 2d 618, 107 S Ct 3102) as stated in *United States v Stubbs* (CA11 Fla) 944 F2d 828, 34 Fed Rules Evid Serv 294; *United States v Daniels* (CA6 Ohio) 948 F2d 1033, 34 Fed Rules Evid Serv 483, cert den (US) 117 L Ed 2d 504, 112 S Ct 1279; *United States v Acosta-Cazares* (CA6 Ky) 878 F2d 945, 28 Fed Rules Evid Serv 154, cert den 493 US 899, 107 L Ed 2d 204, 110 S Ct 255, post-conviction proceeding (CA6) 1993 US App LEXIS 4992 and (criticized on other grounds by *United States v Torres-Medina* (CA9 Cal) 935 F2d 1047, 91 CDOS 4355, 91 Daily Journal DAR 6671) and (criticized on other grounds by *United States v Dunnigan* (CA4 W Va) 944 F2d 178); *United States v Vance* (CA6 Ky) 871 F2d 572, 27 Fed Rules Evid Serv 903, cert den 493 US 933, 107 L Ed 2d 313, 110 S Ct 323; *United States v Blankenship* (CA6 Ohio) 775 F2d 735, 19 Fed Rules Evid Serv 63; *United States v Stringer* (CA8 Mo) 902 F2d 1335, 30 Fed Rules Evid Serv 340; *United States v Johnson* (CA8 Mo) 892 F2d 707, 29 Fed Rules Evid Serv 746, reh den, en banc (CA8) 1990 US App LEXIS 2042; *United States v Simon* (CA8 Minn) 767 F2d 524, 18 Fed Rules Evid Serv 990, cert den 474 US 1013, 88 L Ed 2d 474, 106 S Ct 545; *United States v Naranjo* (CA10 Colo) 710 F2d 1465, 13 Fed Rules Evid Serv 1260; *United States v Cohen* (CA11 Ga) 888 F2d 770, 29 Fed Rules Evid Serv 182.

The most striking aspect of Rule 404(b) is its inclusive rather than exclusionary nature; should the evidence prove relevant in any other way than to show propensity, it is admissible, subject only to the rarely invoked limitations of Rule 403. *United States v Zeuli* (CA1 Mass) 725 F2d 813, 14 Fed Rules Evid Serv 1768.

◆ Observation: In *United States v Tisdale* (CA10 NM) 647 F2d 91, 7 Fed Rules Evid Serv 1490, cert den 454 US 817, 70 L Ed 2d 86, 102 S Ct 95, the court commented that FRE Rule 404 introduced a significant change "from the starting position of exclusion 'unless' to admission 'unless.'"

◆ Comment: The discretionary word "may" used with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion in the trial judge, but it is anticipated that with respect to permissible uses of such evidence, the trial judge may exclude it only on the basis of those considerations set forth in FRE Rule 403. Senate Judiciary Committee Report No. 93-1277 (1974) pp 24, 25.

Footnote 98. See *United States v Hodges* (CA9 Cal) 770 F2d 1475, 19 Fed Rules Evid Serv 364 (disapproved on other grounds by *Richardson v United States*, 468 US 317, 82 L Ed 2d 242, 104 S Ct 3081) as stated in *United States v Anderson* (CA7 Ill) 896 F2d 1076, reh den (CA7) 1990 US App LEXIS 11629, later proceeding (CA7 Ill) 972 F2d 351, reported in full (CA7 Ill) 1992 US App LEXIS 19245 and (criticized by *United*

States v Sassi (CA7 Ill) 966 F2d 283), stating that although FRE Rule 404(b) creates a rule of inclusion, evidence of prior acts may not be introduced unless the government establishes its relevance to an actual issue in the case.

Evidence of criminal activity not charged is admissible if relevant to an issue of material fact but if irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity toward crime thus demonstrated as evidence of guilt of the crime charged. *Straight v State* (Fla) 397 So 2d 903, cert den 454 US 1022, 70 L Ed 2d 418, 102 S Ct 556, reh den 454 US 1165, 71 L Ed 2d 323, 102 S Ct 1043, later proceeding (Fla) 422 So 2d 827, stay den (Fla) 491 So 2d 281 and later proceeding, stay den (Fla) 488 So 2d 530, 11 FLW 227, cert den 476 US 1130, 90 L Ed 2d 683, 106 S Ct 2003 and habeas corpus proceeding (CA11 Fla) 772 F2d 674, reh den, en banc (CA11 Fla) 776 F2d 1057 and cert den 475 US 1099, 89 L Ed 2d 903, 106 S Ct 1502 and (criticized on other grounds by *Hargrave v Dugger* (CA11 Fla) 832 F2d 1528).

Footnote 99. *United States v Boyd* (CA3 Pa) 595 F2d 120, 3 Fed Rules Evid Serv 1401; *United States v Boykin* (CA8 Mo) 679 F2d 1240, 10 Fed Rules Evid Serv 1258 (disapproved on other grounds by *Batson v Kentucky*, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712); *United States v Brown* (CA9 Wash) 562 F2d 1144, 2 Fed Rules Evid Serv 741.

In prosecution for assaulting a flight attendant who was performing her duty as a crew member, court erred in admitting evidence of defendant's conviction for robbery under Rule 404(b) where evidence of prior conviction had no relevance to charges except to establish propensity to violence. *United States v Cortijo-Diaz* (CA1 Puerto Rico) 875 F2d 13, 28 Fed Rules Evid Serv 138.

Testimony of defendant's daughters, in prosecution for aggravated sexual abuse of children, that defendant had sexually abused them as children and impregnated one of them at age of 15, was inadmissible since testimony did not show unique method also present in charged offenses that tended to establish defendant as perpetrator and was relevant only insofar as it tended to show propensity to commit such acts. *United States v Fawbush* (CA8 SD) 900 F2d 150, 29 Fed Rules Evid Serv 1281, appeal after remand (CA8 SD) 946 F2d 584, appeal after remand (CA8 SD) 978 F2d 1264, reported in full (CA8) 1992 US App LEXIS 29011.

Footnote 1. *United States v Shaw* (CA5 Miss) 701 F2d 367, 12 Fed Rules Evid Serv 1566, reh den (CA5 Miss) 714 F2d 544, 14 Fed Rules Evid Serv 130, cert den 465 US 1067, 79 L Ed 2d 744, 104 S Ct 1419 and (among conflicting authorities noted in *Murphy v Holland* (CA4 W Va) 776 F2d 470) and (disapproved on other grounds by *Greer v Miller*, 483 US 756, 97 L Ed 2d 618, 107 S Ct 3102) as stated in *United States v Stubbs* (CA11 Fla) 944 F2d 828, 34 Fed Rules Evid Serv 294; *United States v Waldron* (CA10 Okla) 568 F2d 185, 2 Fed Rules Evid Serv 878, cert den 434 US 1080, 55 L Ed 2d 788, 98 S Ct 1276.

Footnote 2. *State v Huey*, 145 Ariz 59, 699 P2d 1290; *Pierce v State* (Me) 463 A2d 756; *People v Engelman*, 434 Mich 204, 453 NW2d 656; *State v Black* (Minn) 291 NW2d 208; *State v Nielsen*, 203 Neb 847, 280 NW2d 904, post-conviction proceeding 243 Neb 202, 498 NW2d 527; *State v Bockman*, 37 Wash App 474, 682 P2d 925, review den 102 Wash 2d 1002.

Footnote 3. *Straight v State* (Fla) 397 So 2d 903, cert den 454 US 1022, 70 L Ed 2d 418,

102 S Ct 556, reh den 454 US 1165, 71 L Ed 2d 323, 102 S Ct 1043, later proceeding (Fla) 422 So 2d 827, stay den (Fla) 491 So 2d 281 and later proceeding, stay den (Fla) 488 So 2d 530, 11 FLW 227, cert den 476 US 1130, 90 L Ed 2d 683, 106 S Ct 2003 and habeas corpus proceeding (CA11 Fla) 772 F2d 674, reh den, en banc (CA11 Fla) 776 F2d 1057 and cert den 475 US 1099, 89 L Ed 2d 903, 106 S Ct 1502 and (criticized by Hargrave v Dugger (CA11 Fla) 832 F2d 1528); State v Clark (La) 338 So 2d 690 (in prosecution for the sale of illegal drugs, the admission of other drug transactions was reversible error where identity, intent, and guilty knowledge were not in issue and where the evidence merely put the defendant's bad character before the jury).

Footnote 4. United States v Daniels, 248 US App DC 198, 770 F2d 1111, 18 Fed Rules Evid Serv 1113.

Generally, as to prejudice outweighing probative value, see § 419.

Footnote 5. Bradbury v Phillips Petroleum Co. (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73, quoting Louisell and Mueller, Federal Evidence § 140.

§ 405 --Common-law rule; non-Rule jurisdictions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While it has been said that Rule 404(b) is consistent with the common-law rule, 6 the emphasis at common law, and in states that have not adopted the Rules, is somewhat different. Rather than emphasizing that the thrust of the "other crimes" rule is "inclusive," 7 it has been stressed that if there is any doubt whether such evidence is properly admissible, the evidence should be excluded. 8

It was said to be a well-established common-law rule that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. 9 The purpose of the common-law rule is to forbid and prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes he was more liable to commit the crime for which he is indicted and being tried. 10 In other words, it is not competent to prove that the accused committed other crimes of a like nature, for the purpose of showing that he would be likely to commit the crime charged in the indictment, 11 for ordinarily such proof will not shed any light upon the crime with which he stands charged. 12

◆ Observation: This rule has been said to be one of the distinguishing features of our common-law jurisprudence, 13 differing from that prevailing in civil law jurisdictions, 14 and arising out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. 15

To admit indiscriminately proof of crimes other than and in no way connected with the

particular one with which the accused is charged would inevitably lead to the inference that the depravity which motivated the previous crimes continued and was the basis for the commission of the particular crime for which the accused must stand trial. 16 Furthermore, evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the prosecution in chief, violates the rule which forbids the prosecution initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and such evidence is therefore inadmissible for that purpose. 17

It is not to be inferred, however, from the rule regarding the inadmissibility in criminal prosecutions of evidence of other crimes or offenses, that such evidence must be excluded in all cases and under all circumstances; rather, there are a number of well-recognized exceptions to and limitations upon the general rule. 18 Indeed, it has been said that there are so many exceptions to the rule that it is difficult to determine which is more extensive—the rule or its acknowledged exceptions. 19 These exceptions, which have generally been incorporated into Rule 404(b), 20 make competent and admissible evidence of other criminal acts to prove the accused's identity, 21 knowledge, 22 intent, 23 and motive, 24 to show a common criminal scheme or plan, 25 and to negate the likelihood that the crime was committed as a result of inadvertence, accident, or mistake. 26 Evidence is admissible for such purposes on the theory that the other crimes are so connected with the offense charged as to throw light upon it. 27 In other words, in a prosecution for one crime, proof of another distinct substantive crime is not admissible unless there is some legal connection between the two, upon which it can be said that one tends to establish the other or some essential fact in issue. 28 The courts stress the importance of this requisite because of the nature and prejudicial character of such evidence. 29

Footnotes

Footnote 6. *United States v Calvert* (CA8 Mo) 523 F2d 895, 1 Fed Rules Evid Serv 41, cert den 424 US 911, 47 L Ed 2d 314, 96 S Ct 1106.

♦ Observation: In the leading pre-Rule case on the subject, *People v Molineux*, 168 NY 264, 61 NE 286, the court laid down the general rule of exclusion of evidence of other crimes, but also held that evidence of other crimes is admissible when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial. These exceptions to the exclusionary rule are basically the same as those listed in Rule 404(b), as discussed in § 404.

Footnote 7. § 404.

Footnote 8. *People v Perry* (2nd Dist) 166 Cal App 3d 924, 212 Cal Rptr 793 (holding that, in deciding whether other crimes evidence is properly admissible, trial court must determine whether such evidence is material to a fact in dispute, whether it has a tendency to prove such material fact, and whether other evidentiary rules, including the rules against unduly cumulative or prejudicial evidence bar admission).

Footnote 9. *Faust v United States*, 163 US 452, 41 L Ed 224, 16 S Ct 1112; *Mason v State*, 259 Ala 438, 66 So 2d 557, 42 ALR2d 847; *State v Harris*, 147 Conn 589, 164 A2d 399, 83 ALR2d 783; *West v State*, 140 Fla 421, 191 So 771; *State v Carvelo*, 45 Hawaii 16, 361 P2d 45; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *State v King*, 111 Kan 140, 206 P 883, 22 ALR 1006; *Gadd v Commonwealth*, 305 Ky 318, 204 SW2d 215; *Nesbit v Cumberland Contracting Co.*, 196 Md 36, 75 A2d 339, 20 ALR2d 1212; *Commonwealth v Hanley*, 337 Mass 384, 149 NE2d 608, 66 ALR2d 222, cert den 358 US 850, 3 L Ed 2d 85, 79 S Ct 79; *State v Holmes (Mo)* 389 SW2d 30; *State v Knox*, 119 Mont 449, 175 P2d 774; *State v Marchand*, 31 NJ 223, 156 A2d 245, 87 ALR2d 883; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Molineux*, 168 NY 264, 61 NE 286; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894; *Fleenor v Commonwealth*, 200 Va 270, 105 SE2d 160.

Footnote 10. *People v Lapin (2nd Dist)* 138 Cal App 2d 251, 291 P2d 575; *Territory v Caminos*, 38 Hawaii 628; *Douglas v Commonwealth*, 307 Ky 391, 211 SW2d 156.

Footnote 11. *Hall v United States*, 150 US 76, 37 L Ed 1003, 14 S Ct 22; *People v Cione*, 293 Ill 321, 127 NE 646, 12 ALR 267.

Footnote 12. *People v Cione*, 293 Ill 321, 127 NE 646, 12 ALR 267; *Riley v State*, 254 Miss 86, 180 So 2d 321.

Footnote 13. *People v Grutz*, 212 NY 72, 105 NE 843; *Webster v State*, 1 Tenn Crim 1, 425 SW2d 799.

Footnote 14. *People v Shea*, 147 NY 78, 41 NE 505.

Footnote 15. *Lovely v United States (CA4 SC)* 169 F2d 386, appeal after remand (CA4 SC) 175 F2d 312, 44 BNA LRRM 2674, cert den 338 US 834, 94 L Ed 508, 70 S Ct 38.

Footnote 16. *State v Hyde*, 234 Mo 200, 136 SW 316; *People v Molineux*, 168 NY 264, 61 NE 286; *Shaffner v Commonwealth*, 72 Pa 60; *Fleenor v Commonwealth*, 200 Va 270, 105 SE2d 160.

Footnote 17. *State v Fisher*, 206 SC 220, 33 SE2d 495.

As to the inadmissibility of evidence of bad character, generally, see § 365.

Footnote 18. *Mason v State*, 259 Ala 438, 66 So 2d 557, 42 ALR2d 847; *State v Harris*, 147 Conn 589, 164 A2d 399, 83 ALR2d 783; *Cooper v State*, 182 Ga 42, 184 SE 716, 104 ALR 1309; *State v Simpson*, 243 Iowa 65, 50 NW2d 601; *State v Scown (Mo)* 312 SW2d 782; *People v Grutz*, 212 NY 72, 105 NE 843; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894; *Webster v State*, 1 Tenn Crim 1, 425 SW2d 799.

Evidence that a defendant committed other crimes than those for which the defendant is then being tried is barred by state evidence code if it is offered to prove the defendant's criminal disposition, but not if it is offered to prove a material disputed issue such as motive or intent. *People v Hayes*, 52 Cal 3d 577, 276 Cal Rptr 874, 802 P2d 376, 91 CDOS 174, 91 Daily Journal DAR 220, cert den (US) 116 L Ed 2d 440, 112 S Ct 420.

Footnote 19. *Fairbanks v United States*, 96 US App DC 345, 226 F2d 251.

Footnote 20. § 404.

Footnote 21. § 452.

Footnote 22. § 443.

Footnote 23. § 439.

Footnote 24. § 435.

Footnote 25. § 448.

Footnote 26. § 447.

Footnote 27. *State v Choate*, 228 NC 491, 46 SE2d 476.

Footnote 28. *Mason v State*, 259 Ala 438, 66 So 2d 557, 42 ALR2d 847; *People v Sindici*, 54 Cal App 193, 201 P 975; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *Young v State*, 152 Md 89, 136 A 46; *People v Molineux*, 168 NY 264, 61 NE 286; *Shaffner v Commonwealth*, 72 Pa 60.

Footnote 29. *People v Molineux*, 168 NY 264, 61 NE 286; *State v Choate*, 228 NC 491, 46 SE2d 476.

Generally, as to the prejudicial nature of such evidence, see § 419.

§ 406 Applicability of Rule to civil cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

FRE Rule 404(b) applies to civil trials as well as criminal proceedings, 30 so that evidence of crimes or wrongs are admissible under the conditions that apply in criminal proceedings. 31 Although the provisions of the Uniform Rule are identical to the Federal Rule, 32 resulting in a similar rule, that is, that evidence of crimes or wrongs may be admissible in civil cases, 33 some states that have adopted the Rules nevertheless appear to have adhered to the older common-law rule 34 that a conviction is not admissible in a civil action as evidence of the facts on which it is based, 35 and in at least one jurisdiction, the rule is that evidence of a defendant's conviction in a criminal case for the very acts which constitute the basis of the liability sought to be established in the civil suit is not admissible unless the conviction was based on a plea of guilty. 36

As in criminal cases, evidence is excludible under Rule 404(b), where its only purpose would be to show that a party acted in accordance with a bad character 37 or to imply a propensity to commit an alleged wrong, 38 or where the probative value of the evidence

is otherwise outweighed by its prejudicial effect. 39 Evidence of other misconduct must be excluded when its only effect would be to prejudice the jury to find willful unlawfulness on the part of the defendant and thus to award punitive damages. 40

Where a case involves a claim for insurance proceeds met by a defense of arson, the essential issue is the difference between an accident and an intentional act, and evidence of similar wrongful conduct is particularly relevant to probe the questions of intent and plan to burn insured properties. 41 However, evidence of prior fires is not relevant unless it is shown that the insured actually participated in the prior arson or at least that the fire was of incendiary origin, or unless the evidence is probative of the insurer's familiarity with insurance claims and recovery. Absent such factors, the probative value of such evidence is outweighed by its potential for prejudice, which is substantial. 42 Evidence of fires occurring at other property of the plaintiff has been admitted on the issue of the plaintiff's motive or intent to commit the arson alleged in the instant case where the other properties were insured and experts testified that the fires there were intentionally set, and where the insured was present at all of the fires. 43 And evidence of an insurer's late payments of compensation checks to its clients was admissible to demonstrate an ongoing pattern of purposeful delays and to prove the insurer's motive in causing the delays. 44

§ 406 ----Applicability of Rule to civil cases [SUPPLEMENT]

Case authorities:

In a personal injury suit by an employee under the Federal Employers' Liability Act, the Court of Appeals rejected the employer's contention that the trial court abused its discretion in admitting prejudicial testimony, where the testimony of a previously injured employee rebutted the employer's claim that the employee would have been hired in a management capacity if he had taken mandatory vocational tests because R Ev 404(b) provided that evidence of prior acts was not admissible to prove the character of the party but could be admissible for other purposes such as proof of opportunity, intent, plan, or the absence of mistake. *Missouri Pac. R.R. Co. v Roberts* (1993, Tex App Eastland) 849 SW2d 367, writ den (Jun 3, 1993).

Footnotes

Footnote 30. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289); *Dial v Travelers Indem. Co.* (CA5 Miss) 780 F2d 520, 20 Fed Rules Evid Serv 125; *Herandez*, 860 F2d 260; *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Footnote 31. § 404.

Footnote 32. Some states have adopted modified versions of the Uniform Act provisions. See 13A, *Uniform Laws Annotated*, Notes to Rules of Evidence, Rule 404.

Footnote 33. *Durham v Farabee* (Ala) 481 So 2d 885, 73 ALR4th 687; *Scott v Robertson* (Alaska) 583 P2d 188; *Re Marquardt*, 161 Ariz 206, 778 P2d 241, 39 Ariz Adv Rep 27, supp op (Ariz) 1989 Ariz LEXIS 237; *State v Gonsalves*, 5 Hawaii App 659, 706 P2d 1333 (disapproved on other grounds by *State v Kelekolio*, 74 Hawaii 479, 849 P2d 58); *James v General Motors of Canada, Ltd.*, 101 Or App 138, 790 P2d 8, review den 310 Or 243, 796 P2d 360; *McCormick v Texas Commerce Bank Nat. Asso.* (Tex App Houston (14th Dist)) 751 SW2d 887, writ den (Nov 23, 1988) and reh'g of writ of error overr (Jan 25, 1989) and cert den 491 US 910, 105 L Ed 2d 706, 109 S Ct 3199.

Annotation: Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287 § 3.

Footnote 34. § 407.

Footnote 35. *Estate of Wallace v Fisher* (Fla App D5) 567 So 2d 505, 15 FLW D 2374, citing pre-rule Florida cases.

In action to recover for an assault, it was error to permit plaintiff and a police officer to testify that defendant was convicted in district court of assaulting plaintiff, since evidence of a person's conviction in a criminal prosecution for the very act which constitutes the basis of liability in a civil action for damages is not admissible in the civil action. *Carawan v Tate*, 53 NC App 161, 280 SE2d 528, mod on other grounds 304 NC 696, 286 SE2d 99.

Footnote 36. *Fowler-Barham Ford, Inc. v Indiana Lumbermens Mut. Ins. Co.*, 45 NC App 625, 263 SE2d 825.

Footnote 37. *Outley v New York* (CA2 NY) 837 F2d 587, 25 Fed Rules Evid Serv 418, 10 FR Serv 3d 128 (in civil rights action brought against city and individual city police officers, District Court erred in admitting evidence of previous lawsuits filed by arrestee against city and police department for purpose of showing that arrestee was biased against officers since evidence introduced to show that he bore a grudge against police and that he acted consistently with that grudge in filing claims in issue went to character rather than bias).

To the same effect is *James v General Motors of Canada, Ltd.*, 101 Or App 138, 790 P2d 8, review den 310 Or 243, 796 P2d 360.

Footnote 38. *Tigges v Cataldo* (CA1 Mass) 611 F2d 936, 5 Fed Rules Evid Serv 425 (court did not err in disallowing effort to cross-examine defendant to establish that defendant had misleadingly answered "not applicable" to question on pretrial interrogatory concerning disciplinary action by police department against him); *Cohn v Papke* (CA9 Cal) 655 F2d 191, 8 Fed Rules Evid Serv 1362 (reversible error to introduce testimony and psychiatric report concerning plaintiff's prior sexual experiences and sexual preferences in civil rights action against police officers who arrested plaintiff on charge of soliciting one of them to engage in homosexual act).

Footnote 39. *Avila v Knight* (SD NY) 475 F Supp 1054, 5 Fed Rules Evid Serv 65 (plaintiff's prior criminal and institutional records not admissible in action against corrections officer who allegedly assaulted plaintiff and subjected him to inhuman

conditions in punitive segregation); Warner v Transamerica Ins. Co. (CA8 Mo) 739 F2d 1347, 16 Fed Rules Evid Serv 1338.

For a general discussion of balancing prejudice against probative value in regard to other acts evidence, see § 419.

Footnote 40. Brown v Miller (CA5 Miss) 631 F2d 408, 7 Fed Rules Evid Serv 533.

Footnote 41. United States v Jenkins (CA5 Tex) 780 F2d 518, 86-1 USTC ¶ 9181, 57 AFTR 2d 86-599; Glados, Inc. v Reliance Ins. Co. (CA11 Fla) 888 F2d 1309, 28 Fed Rules Evid Serv 1536, cert den 497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273.

Footnote 42. Garcia v Aetna Casualty & Surety Co. (CA5 Fla) 657 F2d 652, 9 Fed Rules Evid Serv 49; Smith v State Farm Fire & Casualty Co. (CA5 Ga) 633 F2d 401, 7 Fed Rules Evid Serv 895, 31 FR Serv 2d 322 (no abuse of discretion in excluding such evidence); Warner v Transamerica Ins. Co. (CA8 Mo) 739 F2d 1347, 16 Fed Rules Evid Serv 1338.

Footnote 43. Dial v Travelers Indem. Co. (CA5 Miss) 780 F2d 520, 20 Fed Rules Evid Serv 125.

Footnote 44. Southerland v Argonaut Ins. Co. (Colo App) 794 P2d 1102.

§ 407 --Common-law rule; non-Rule jurisdictions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It has long been the traditional rule that a judgment of conviction in a criminal prosecution is not admissible, in a civil case, as evidence of the facts upon which it was based. 45

◆ Observation: This rule has been frequently applied in actions involving the negligent operation of motor vehicles in which attempts were made to introduce evidence of prior criminal convictions for the same acts. 46

In regard to the rule that a conviction is not admissible, it has been held, as a foundation for the rule, that there is a dissimilarity in objects, 47 issues, 48 results, 49 procedures, 50 and parties in the two actions, 51 as well as a lack of mutuality. 52 Moreover, it has been frequently pointed out that different rules of evidence apply, not only as to elements of proof, 53 degree of proof, 54 and weight of evidence, 55 but also to the competency of witnesses. 56

Even before the general adoption of the Rules, as well as in non-Rule jurisdictions, the reasoning upon which the rule of exclusion was founded was subject to criticism and a trend in favor of the admission of such evidence evolved. 57 Generally, where admitted, the prior conviction has been regarded as prima facie evidence of the issue involved, 58 although in some instances the judgment has been regarded as

conclusive as to the facts adjudicated. 59 Some decisions indicate a tendency to limit the admissibility of previous convictions to the situation where the criminal is attempting to enforce a right arising from the crime. 60 In some situations statutes have provided for the admission of criminal convictions as evidence of guilt in subsequent civil actions involving the same facts. 61

In some jurisdictions a distinction has been made between the admissibility in civil cases of the record of conviction of relatively minor matters such as traffic violations, lesser misdemeanors, and matters of like import, and the admissibility in civil cases of major criminal convictions. 62 Convictions of the former type have been held not admissible since expediency and convenience, rather than guilt, often control the defendant's trial technique, whereas convictions of the latter class have been held admissible since it would be unreasonable to assume that a defendant would present less than his best defense, knowing that his failure would result in the loss of substantial property, or even liberty. 63

The courts are agreed that convictions which are being appealed have no tendency to support the truth of the facts upon which they are based and are therefore inadmissible as evidence of the truth of such facts in a civil action. 64

◆ Observation: The mere fact of arrest has no probative value and is inadmissible in a civil action involving the same facts. 65

Footnotes

Footnote 45. *American Fire Protection Service v Williams* (1st Dist) 171 Cal App 2d 397, 340 P2d 644 (conviction in contempt proceeding which was criminal in nature); *Brown v Moyle*, 133 Colo 29, 290 P2d 1105; *Eggers v Phillips Hardware Co.* (Fla) 88 So 2d 507; *Consolidated Management Services, Inc. v Halligan*, 186 Ga App 621, 368 SE2d 148, affd 258 Ga 471, 369 SE2d 745; *Jones v Talbot*, 87 Idaho 498, 394 P2d 316 (noting statute to this effect); *Dimmick v Follis*, 123 Ind App 701, 111 NE2d 486; *Reid-Elliott Motors, Inc. v Lee* (La App 1st Cir) 94 So 2d 160; *Lipman Bros., Inc. v Hartford Acci. & Indem. Co.*, 149 Me 199, 100 A2d 246; *Blackman v Coffin*, 300 Mass 432, 15 NE2d 469; *Stover v Yoakum* (App, Clark Co) 69 Ohio L Abs 51, 109 NE2d 877, motion overr; *Dover v Smith* (Okla) 385 P2d 287; *Nowak v Orange*, 349 Pa 217, 36 A2d 781; *Green v Boney*, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370; *Smith v Phillips*, 43 Tenn App 364, 309 SW2d 382; *State v Benavidez* (Tex) 365 SW2d 638; *Smith v New Dixie Lines, Inc.*, 201 Va 466, 111 SE2d 434; *Forney v Morrison*, 144 W Va 722, 110 SE2d 840; *Friesen v Schmelzel*, 78 Wyo 1, 318 P2d 368.

Where, in an action for breach of warranty of title to an automobile, plaintiff alleged that the automobile which he had purchased from defendant was stolen, it was error to admit, over timely objections, evidence that a third party had been convicted in a Federal District Court of transporting a similar vehicle across state lines. *Crawford v Sumerau*, 100 Ga App 499, 111 SE2d 746.

Annotation: Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287 § 2.

Footnote 46. 8 Am Jur 2d, Automobiles and Highway Traffic § 1030.

Footnote 47. *Interstate Dry Goods Stores v Williamson*, 91 W Va 156, 112 SE 301, 31 ALR 258.

Footnote 48. *Montgomery v Crum*, 199 Ind 660, 161 NE 251.

Footnote 49. *Frierson v Jenkins*, 72 SC 341, 51 SE 862.

Footnote 50. *Terrill v Terrill (App)* 98 Wis 2d 213, 295 NW2d 809.

Footnote 51. *Interstate Dry Goods Stores v Williamson*, 91 W Va 156, 112 SE 301, 31 ALR 258.

Footnote 52. *Interstate Dry Goods Stores v Williamson*, 91 W Va 156, 112 SE 301, 31 ALR 258.

Footnote 53. *Seaboard A. L. R. Co. v O'Quin*, 124 Ga 357, 52 SE 427.

Footnote 54. *Stone v United States*, 167 US 178, 42 L Ed 127, 17 S Ct 778.

Footnote 55. *Seaboard A. L. R. Co. v O'Quin*, 124 Ga 357, 52 SE 427.

Footnote 56. *Seaboard A. L. R. Co. v O'Quin*, 124 Ga 357, 52 SE 427.

Footnote 57. *Emich Motors Corp. v General Motors Corp.*, 340 US 558, 95 L Ed 534, 71 S Ct 408, reh den 341 US 906, 95 L Ed 1345, 71 S Ct 610; *Harper v Blasi*, 112 Colo 518, 151 P2d 760; *Smith v Andrews (2d Dist)* 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210; *Prudential Property & Casualty Ins. Co. v Kollar*, 243 NJ Super 150, 578 A2d 1238; *Chism v New York City Transit Authority (2d Dept)* 145 App Div 2d 400, 535 NYS2d 730; *Folino v Young*, 368 Pa Super 220, 533 A2d 1034, app gr 520 Pa 575, 549 A2d 135 and app gr 520 Pa 578, 549 A2d 138 and affd 523 Pa 532, 568 A2d 171; *Eagle, Star & British Dominions Ins. Co. v Heller*, 149 Va 82, 140 SE 314, 57 ALR 490.

Annotation: 18 ALR2d 1287 § 3.

Footnote 58. *Smith v Andrews (2d Dist)* 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210.

Annotation: 18 ALR2d 1287 § 3.

Footnote 59. *Eagle, Star & British Dominions Ins. Co. v Heller*, 149 Va 82, 140 SE 314, 57 ALR 490.

Conviction of the president of the plaintiff corporation, its alter ego, of robbery on which an insurance claim was based, was conclusive against the insured's claim under a robbery policy; the doctrine of collateral estoppel applied notwithstanding the lack of mutuality of estoppel. *Teitelbaum Furs, Inc. v Dominion Ins. Co.*, 58 Cal 2d 601, 25 Cal Rptr 559, 375 P2d 439, cert den 372 US 966, 10 L Ed 2d 130, 83 S Ct 1091.

Footnote 60. *Connecticut Fire Ins. Co. v Ferrara* (CA8 Mo) 277 F2d 388, cert den 364 US 903, 5 L Ed 2d 195, 81 S Ct 231 (applying Missouri law and holding that an affirmed conviction of the insured for arson in regard to destruction of the insured premises may be considered as bearing upon the merits of his claim against his fire insurer); *Taylor v Taylor*, 257 NC 130, 125 SE2d 373 (decision limited to factual situation where party is seeking to profit from criminal conduct for which he has been prosecuted and convicted).

Annotation: 18 ALR2d 1287 § 3.

Footnote 61. *Emich Motors Corp. v General Motors Corp.*, 340 US 558, 95 L Ed 534, 71 S Ct 408, reh den 341 US 906, 95 L Ed 1345, 71 S Ct 610.

By statute, where the same fire is the basis for a criminal conviction and a suit for civil damages, the conviction is admissible in the civil action not only on behalf of the prosecuting witness in the criminal case, but also on behalf of any other person suffering damage from the same fire. *Cecil v Headley*, 237 Ark 400, 373 SW2d 136.

Footnote 62. *Burns v Rodriguez* (Iowa App) 448 NW2d 673; *Hurt v Stirone*, 416 Pa 493, 206 A2d 624, 51 CCH LC ¶ 51252, cert den 381 US 925, 14 L Ed 2d 684, 85 S Ct 1561.

Although evidence of convictions in criminal proceedings generally may be admissible in subsequent civil litigation, evidence of convictions of traffic offenses is in a different category and should be excluded. *Montalvo v Morales* (2d Dept) 18 App Div 2d 20, 239 NYS2d 72.

Footnote 63. *Hurt v Stirone*, 416 Pa 493, 206 A2d 624, 51 CCH LC ¶ 51252, cert den 381 US 925, 14 L Ed 2d 684, 85 S Ct 1561.

Footnote 64. *Stinson v Richardson*, 239 Ala 161, 194 So 508; *In re L.S.* (5th Dist) 189 Cal App 3d 407, 234 Cal Rptr 508; *Pendleton v Norfolk & W. R. Co.*, 82 W Va 270, 95 SE 941, 16 ALR 761.

Footnote 65. *Franco v Zingarelli* (1st Dept) 72 App Div 2d 211, 424 NYS2d 185 (holding that the arrest of an operator of a vehicle may not serve as the basis for an inference of negligence, and the absence of arrest may not serve as the basis for an inference of no negligence).

§ 408 Other crimes, wrongs, or acts covered

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under FRE Rule 404(b) and similar state rules, evidence of other crimes, wrongs, or acts may include any conduct which may bear adversely on the jury's judgment of the character of a person, 66 and it is not limited to other crimes. 67 It is not the

character of the criminal act as being a crime which renders evidence of the act relevant at trial for an associated crime; rather, it is the acts of the defendant constituting that crime, as might any other acts of his which for some special reason tend to identify him as the actor in a related crime, which allows admission of such prior bad acts under FRE Rule 404(b). 68

A conviction in a foreign country, if relevant and material to the charges and issues raised in the federal prosecution, is also considered evidence of other crimes or wrongs. 69

Evidence of prior arrests or the lodging of charges should not be admitted under Rule 404(b) since neither is considered sufficiently probative of the basic question whether the underlying act occurred. 70

§ 408 ----Other crimes, wrongs, or acts covered [SUPPLEMENT]

Practice Aids: Reading Gaol revisited: Admission of uncharged misconduct evidence in sex offender cases. 21 Am J Crim L 127 (1993).

Rules:

As to rules allowing evidence of prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413-415), added by Congress in 1994, see § 404.

Case authorities:

Evidence of defendant's parole status should be considered evidence of other crimes for purposes of Rule 404(b). *United States v Manarite* (1995, CA9 Nev) 44 F3d 1407, 95 CDOS 198, 95 Daily Journal DAR 350, amd, reh den, remanded (1995, CA9 Nev) 95 CDOS 1935, 95 Daily Journal DAR 3319.

Evidence of seven other bank robberies was properly admitted to prove common plan or scheme since all eight had many common characteristics which would tend to show that defendant was involved in one charged and that it was part of larger scheme. *United States v McGuire* (1994, CA10 Kan) 27 F3d 457.

Evidence that drug conspiracy defendant regained possession of automobile from testifying coconspirator at gunpoint was not "other" act within Rule 404(b), since it demonstrated defendant's organizational role and his use of violence as tool against underlings and others. *United States v Molina* (1996, CA10 Okla) 75 F3d 600, cert den (1996, US) 64 USLW 3821.

Evidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue. *Pittman v State* (1994, Fla) 646 So 2d 167, 19 FLW S 489, petition for certiorari filed (Mar 20, 1995).

In prosecution for rape, aggravated sodomy, armed robbery and false imprisonment, evidence of two similar crimes committed by defendant were admissible where state demonstrated that defendant was perpetrator of prior crimes and that they were remarkably similar to charged crimes: one crime occurred in 1982 and other occurred less than one month before defendant committed charged crimes; victims were young women,

like victim in charged crimes; they, too, were kidnapped by defendant at knife-point and driven to desolate locations (in one case, an abandoned residence) where they were raped (and in one case sodomized); they, too, were abducted from, or as they approached, their cars (in one case, modus operandi was identical to charged crimes—defendant bumped victim and when she got out of her car to inspect damage, defendant assaulted her); they, too, were asked about their children; and they were bound and gagged (albeit, in one case, only temporarily). Prior crimes shed light on defendant's identity, motive, plan, scheme, bent of mind and course of conduct, and relevance of evidence outweighed any prejudice. *Mozier v State* (1993) 207 Ga App 264, 427 SE2d 551, 93 Fulton County D R 360, cert den (Ga) 1993 Ga LEXIS 420.

In prosecution of correctional officer for rape and other offenses against 19-year-old woman whose husband was inmate, trial court properly admitted evidence of uncharged incident involving 22-year-old woman whose brother was inmate, where evidence was admitted for purpose of showing common scheme of using authority and position to initiate sexual relationships. *Martin v State* (1995) 219 Ga App 277, 464 SE2d 872, 95 Fulton County D R 3846.

In trial of teacher for second and third degree sexual abuse arising from allegations made by 13-year-old student, court committed reversible error in admitting testimony of prior consensual sexual relationship between teacher and 17-year-old student, since testimony was not relevant to any issue in case other than showing teacher's propensity to commit crime charged. *People v Peters* (1992, 3d Dept) 187 AD2d 883, 590 NYS2d 916, app den 81 NY2d 891, 597 NYS2d 952, 613 NE2d 984.

The trial court did not err in a noncapital first-degree murder prosecution by allowing a prosecution witness to testify concerning other alleged acts of violence and threats of violence by defendant where the testimony was corroborative of other testimony, was corroborated by other testimony, and tended to show malice, an essential element of first-degree murder. The evidence was thus relevant to an issue other than defendant's character. GS § 8C-1, Rule 404(b). *State v Bryant* (1994) 337 NC 298, 446 SE2d 71.

In prosecution for statutory rape and incest based on charges that defendant had engaged in sexual intercourse with his 13-year-old stepdaughter on specified date, trial court erred in allowing victim to testify regarding prior sexual incidents with defendant since she was about 7 years old, on grounds testimony was for purposes of corroboration, where Tennessee would not adopt "sex crimes" exception to general rule prohibiting admission of evidence of other crimes or bad acts as irrelevant and prejudicial when defendant is on trial for act of same character, except in cases of indictment that is not time specific and evidence relates to sex crimes that allegedly occurred during same time period as charged in indictment, and providing prosecution elects at close of its proof-in-chief which particular incident is to be basis for conviction. *State v Rickman* (1994, Tenn) 876 SW2d 824.

Footnotes

Footnote 66. *United States v Cooper* (CA6 Tenn) 577 F2d 1079, 3 Fed Rules Evid Serv 969, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule

404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Footnote 67. United States v Devin (CA1 Mass) 918 F2d 280, 31 Fed Rules Evid Serv 1329; United States v Senak (CA7 Ind) 527 F2d 129, cert den 425 US 907, 47 L Ed 2d 758, 96 S Ct 1500; United States v Kendall (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848.

Evidence that defendant had made numerous threats in month before fire concerning his intention to get even with his employer's security personnel was properly admitted in trial for arson of building where defendant was employed. United States v Henson (CA8 Mo) 939 F2d 584.

Footnote 68. Smith v Wainwright (CA5 Fla) 568 F2d 362, 4 Fed Rules Evid Serv 395.

Footnote 69. United States v Rodarte (CA5 Tex) 596 F2d 141, 4 Fed Rules Evid Serv 982; United States v McPartlin (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65 (evidence of a similar act in a foreign country, in a prosecution for bribing a local official); United States v Nolan (CA10 Kan) 551 F2d 266, 1 Fed Rules Evid Serv 784, cert den 434 US 904, 54 L Ed 2d 191, 98 S Ct 302.

Law Reviews: The collateral use of foreign convictions in American criminal trials. 47 U Chi LR 82 (1979).

Footnote 70. United States v Flores Perez (CA1 Puerto Rico) 849 F2d 1, 25 Fed Rules Evid Serv 1247.

See Michelson v United States, 335 US 469, 93 L Ed 168, 69 S Ct 213 (superseded by statute on other grounds as stated in United States v Solomon (CA11 Fla) 686 F2d 863, 11 Fed Rules Evid Serv 717) and (superseded by statute on other grounds as stated in United States v Lutz (CGCMR) 18 MJ 763) and (not followed on other grounds by Mannix v United States (CA4 Md) 140 F2d 250) as stated in United States v Dennis (CA4) 1990 US App LEXIS 21076 and (not followed on other grounds by United States v Pujana-Mena (CA2 NY) 949 F2d 24), stating that arrest, without more, does not impeach the integrity or impair the credibility of a witness.

§ 409 --Offense related to charged offense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence which concerns an uncharged offense arising out of the same transaction or series of transactions as the charged offense, 71 which is inextricably intertwined with the evidence of the charged offense, or which is necessary to complete the story of

the charged offense, 72 or which forms part of the *res gestae*, 73 is not evidence of an extrinsic offense within the meaning of FRE Rule 404(b) and is thus admissible without an analysis under that rule. 74 Under this view, evidence not part of the crime charged but pertaining to the chain of events explaining the context, motive, and setup of the crime is properly admitted if linked in time and circumstances with the charged crime or if it forms an integral and natural part of an account of the crime or is necessary to complete the story of the crime for the jury. 75 However, when several offenses are committed in a single criminal episode and the defendant is indicted for fewer than all of those offenses, the offenses for which he is not indicted become "other offenses" for the purposes of FRE Rule 404(b). 76

Under pre-Rule and non-Rule law, it has been recognized that insofar as evidence of the commission of other crimes or offenses is relevant and admissible in the prosecution of one accused of a crime, the fact that such evidence proves or tends to prove that the accused committed other crimes does not render it inadmissible. 77 Such evidence will be considered strictly upon the ground of its relevancy to the purpose for which it is sought to be introduced, regardless of the fact that it may incidentally show the commission of some other offense. 78

§ 409 --Offense related to charged offense [SUPPLEMENT]

Case authorities:

Evidence that tax evasion defendant was aware of his payroll tax liability when it arose was inextricably intertwined with crime charged and therefore "intrinsic" evidence that did not fall within meaning of Rule 404(b). *United States v Clements* (1996, CA5 La) 73 F3d 1330, 43 Fed Rules Evid Serv 936, 77 AFTR 2d 96-648.

Evidence that defendant, charged with drug offenses, had told former cellmate that, on day of his arrest, he was expecting package to make up for shortage in prior drug shipment, was not other crimes evidence which triggered notice requirement, since there was direct connection between earlier short shipment and receipt of one for which defendant was charged, and therefore intrinsic to charged offense. *United States v Barnes* (1995, CA6 Ky) 49 F3d 1144.

Evidence that defendant, while under grand jury investigation for failure to report taxable income, had destroyed records of fee payments and invented sources of nontaxable income was not other crimes evidence subject to Rule 404(b) analysis, since it was clearly intertwined with charged conspiracy to provide false testimony to grand jury. *United States v Lahey* (1995, CA7 Ind) 55 F3d 1289, 75 AFTR 2d 95-2665, 95 TNT 115-33, reh den (1995, CA7 Ind) 1995 US App LEXIS 15815.

Testimony that defendant paid witness with heroin in exchange for certain construction work related to heroin distribution conspiracy charged in indictment and was therefore not Rule 404(b) evidence. *United States v Karam* (1994, CA8 Minn) 37 F3d 1280, reh, en banc, den (1994, CA8 Minn) 1994 US App LEXIS 32999.

In a prosecution of defendant for assault which occurred when defendants allegedly threw a brick from their car into the victims' car, the trial court did not err in admitting the testimony of one of defendant's passengers that defendant had allegedly committed a prior bad act by throwing a bottle into another vehicle earlier in the evening, since the

incident was similar in means and execution and occurred the same evening as the brick throwing incident. *State v Poe* (1995) 119 NC App 266, 458 SE2d 242, stay gr 340 NC 571, 459 SE2d 515, petition den (NC) 1995 NC LEXIS 522.

Footnotes

Footnote 71. *United States v Randall* (CA5 La) 887 F2d 1262, reh den (CA5) 1990 US App LEXIS 6398, post-conviction proceeding (ED La) 1993 US Dist LEXIS 3086; *United States v Simpson* (CA5 Tex) 709 F2d 903, 13 Fed Rules Evid Serv 892, cert den 464 US 942, 78 L Ed 2d 322, 104 S Ct 360; *United States v Bardsley* (CA7 Ind) 884 F2d 1024, 28 Fed Rules Evid Serv 1122; *United States v Williford* (CA11 Ga) 764 F2d 1493, 18 Fed Rules Evid Serv 1151; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894.

Evidence of armed bank robbery defendant's participation in prior uncharged bank robbery was properly admitted since it was recent and involved many similarities to charged robbery and was highly probative on issues of identity, absence of mistake or accident, and similarity in plan. *United States v Morgan* (CA10 Okla) 936 F2d 1561, 33 Fed Rules Evid Serv 583, cert den (US) 117 L Ed 2d 431, 112 S Ct 1190.

If a defendant is charged with murder, it is permissible to show that he did the killing while engaged in the commission of another crime. *People v Sullivan*, 173 NY 122, 65 NE 989; *State v Beam*, 184 NC 730, 115 SE 176.

Practice References Hunter, *Federal Trial Handbook* 2d § 37.12.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, *Criminal Procedure* § 20:646.

Footnote 72. *United States v Collins* (CA11 Fla) 779 F2d 1520, 20 Fed Rules Evid Serv 78; *United States v Williford* (CA11 Ga) 764 F2d 1493, 18 Fed Rules Evid Serv 1151; *United States v Chilcote* (CA11 Fla) 724 F2d 1498, 15 Fed Rules Evid Serv 33, cert den 467 US 1218, 81 L Ed 2d 370, 104 S Ct 2665; *United States v Weeks* (CA11 Ga) 716 F2d 830, 14 Fed Rules Evid Serv 604; *Hill v State*, 161 Ga 188, 129 SE 647; *People v Scheck*, 356 Ill 56, 190 NE 108, 91 ALR 1472; *Townsend v State*, 147 Ind 624, 47 NE 19; *State v Garrison*, 342 Mo 453, 116 SW2d 23; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Molineux*, 168 NY 264, 61 NE 286.

Evidence in narcotics conspiracy trial of attempted murder of co-conspirator was properly admitted where indictment cited attempted murder as overt act furtherance of conspiracy, and evidence was relevant to establish existence of conspiracy, to explain relationship of conspirators to each other and conspiracy, and to demonstrate methods by which conspiracy operated. *United States v Terzado-Madruga* (CA11 Ga) 897 F2d 1099, 30 Fed Rules Evid Serv 662.

Footnote 73. *Kennedy v State*, 140 Fla 124, 191 So 193; *People v Quimby*, 134 Mich 625, 96 NW 1061; *Compton v Commonwealth*, 190 Va 48, 55 SE2d 446; *State v Brown*, 31 Wash 2d 475, 197 P2d 590, adhered to 31 Wash 2d 505, 202 P2d 461; *State v Burton*, 27 Wash 528, 67 P 1097.

For the purpose of proving a defendant guilty of the larceny of one article, it is proper to prove that he stole other articles on the same expedition. *Burnett v State*, 83 Tex Crim 97, 201 SW 409; *State v Kelley*, 65 Vt 531, 27 A 203.

Footnote 74. *United States v Posner* (CA5 Tex) 865 F2d 654.

In a case arising out of unauthorized and fraudulent exchanges of airline tickets, evidence concerning other travel agencies was not other crimes evidence beyond scope of indictment where defendant himself had admitted that his scheme involved a number of travel agencies, indictment alleged that he exchanged tickets with travel agents in United States, so that evidence was inextricably intertwined with and part of the same transaction as conduct alleged in the indictment. *United States v Mundi* (CA9 Cal) 892 F2d 817, 29 Fed Rules Evid Serv 323, cert den 498 US 1119, 112 L Ed 2d 1178, 111 S Ct 1072, post-conviction proceeding (CA9) 1992 US App LEXIS 14177.

Footnote 75. *United States v Williford* (CA11 Ga) 764 F2d 1493, 18 Fed Rules Evid Serv 1151.

Footnote 76. *United States v Aleman* (CA5 Tex) 592 F2d 881, 4 Fed Rules Evid Serv 540.

Footnote 77. *Snead v State*, 243 Ala 23, 8 So 2d 269; *People v Peete*, 28 Cal 2d 306, 169 P2d 924, cert den 329 US 790, 91 L Ed 677, 67 S Ct 356, reh den 329 US 832, 91 L Ed 705, 67 S Ct 490 and cert den 331 US 783, 91 L Ed 1815, 67 S Ct 1185; *State v Harris*, 147 Conn 589, 164 A2d 399, 83 ALR2d 783; *People v Scheck*, 356 Ill 56, 190 NE 108, 91 ALR 1472; *State v King*, 111 Kan 140, 206 P 883, 22 ALR 1006; *Thomas v Commonwealth*, 185 Ky 226, 214 SW 929; *State v Sudduth*, 331 Mo 728, 55 SW2d 962; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894; *Commonwealth v Major*, 198 Pa 290, 47 A 741; *State v Shumpert*, 195 SC 387, 11 SE2d 523; *Warren v State*, 178 Tenn 157, 156 SW2d 416; *Day v Commonwealth*, 196 Va 907, 86 SE2d 23.

Footnote 78. *Wilkins v State*, 29 Ala App 349, 197 So 75, cert den 240 Ala 52, 197 So 81.

§ 410 Effect of dismissal or acquittal as to prior offense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under both the Rules and prior law, it is generally recognized that evidence of other crimes, wrongs, or acts may include other alleged crimes, even though the charges were dismissed before trial, 79 the records of the defendant's prior offense had been expunged or erased, 80 or the defendant was acquitted of the charges in question. 81 This rule is particularly applicable where the other offense and the offense charged are so nearly concurrent and the facts are so intimately related that proof of one cannot well be made without a showing of the facts tending to establish the other. 82 The reasoning

in some cases has been that acquittal alone, though it may lessen the probative value of evidence of another offense, does not render it inadmissible since acquittal establishes only that a jury did not find the defendant to have been proved guilty beyond a reasonable doubt of the offense charged, while to be admissible, evidence of other conduct need not be established beyond a reasonable doubt. 83

On the other hand, there is authority that evidence of an alleged crime can never be admitted if the defendant has been acquitted of such charge. 84 But even in a jurisdiction which excludes evidence of a collateral crime of which the defendant has been acquitted, it has been held that similar fact evidence of defendant's participation in a collateral offense which had been nolle prossed was admissible as relevant to the issue of defendant's identity, since unlike an acquittal which is usually based on the merits of the case, the decision to nolle pros may be based on circumstances unrelated to the strength of the evidence against a defendant. 85

In carrying out the balancing of prejudice and probative value which is required before FRE Rule 404(b) evidence is admitted, 86 the court may take into consideration the fact of any prior acquittal or dismissal. 87 However, in some jurisdictions, it is recognized that the probative value of evidence of an offense is necessarily outweighed by its prejudicial impact where there has been an acquittal of the other offense, and, accordingly, such evidence is never to be admitted. 88

Evidence of another crime as to which a defendant has been acquitted may be excludible on collateral estoppel grounds where the evidence is introduced on an issue previously decided in the defendant's favor by the prior acquittal. 89 But it has frequently been recognized that evidence of another crime or wrong is admissible where the jury could have acquitted on another basis. 90 Where it cannot be determined what evidence was the basis of the jury's decision to acquit in the previous prosecution, evidence used at the first trial may be introduced at a second trial dealing with a different, but related charge, and a defendant has the burden of showing that the issues he seeks to foreclose in the instant prosecution were necessarily determined in his favor in the prior case resulting in the defendant's acquittal. 91

The United States Supreme Court has held that the collateral estoppel component of the double jeopardy clause of the Federal Constitution's Fifth Amendment does not, in all circumstances, exclude relevant and probative evidence that is otherwise admissible under the Federal Rules of Evidence simply because that evidence relates to alleged criminal conduct for which a defendant has been acquitted. 92

♦ Observation: The court also concluded that receipt of such evidence does not violate the notion of "fundamental fairness" underlying due process, reasoning that the jury remains free to assess testimony such as that offered by the witness, and that the defense has "the opportunity to refute it." Any risk that the jury will convict defendant on the basis of "inferences drawn from the acquitted conduct" could be adequately addressed by the power of the court under the Federal Rules of Evidence "to exclude potentially prejudicial evidence." 93

§ 410 ----Effect of dismissal or acquittal as to prior offense [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder prosecution by admitting testimony by the victim's twelve year old son that he had awakened at 5:00 a.m. on a morning prior to the day of the murder when he heard an intruder in the house, he had recognized defendant as the intruder, had climbed out a window and gone to the home of a neighbor, who called the police, and defendant had been charged with felonious breaking or entering, but a district court judge found no probable cause. Defendant has not been acquitted of the crime for which he was previously charged, the State may proceed against him on that charge, and he is not entitled to the protection provided by State v Scott, 331 N.C. 39. State v Lynch (1994) 337 NC 415, 445 SE2d 581.

The trial court did not err in a prosecution for attempted first- degree statutory rape and attempted first-degree sexual offense in allowing the victim to testify that defendant threatened her by saying that if she told anyone what he was going to do, he was going to hurt her like he hurt Koda. Defendant was under indictment and on pretrial release for the murder of Koda Smith at the time of these offenses and was acquitted before this trial. The trial court had previously granted a motion in limine to prohibit mention of defendant's arrest, indictment, and trial for the murder, but had denied defendant's motion to prohibit reference to the name Koda Smith. The probative value of defendant's statement was to show that the victim was scared of defendant as well as why she did not scream or make any noise and does not depend on the proposition that defendant in fact hurt Koda. The statement formed an integral and natural part of the victim's account of the crime and was necessary to complete the story of the crime for the jury. GS § 8C-1, Rule 403. State v Robertson (1994) 115 NC App 249, 444 SE2d 643.

Footnotes

Footnote 79. United States v Juarez (CA7 Ind) 561 F2d 65, 2 Fed Rules Evid Serv 398; State v Morowitz, 200 Conn 440, 512 A2d 175, 82 ALR4th 899.

Dismissal, at the preliminary hearing, of a charge of forgery of a check was held, in a prosecution for forging two other checks, not to render erroneous the admission of the first-mentioned check in evidence, the court relying upon cases which held that a verdict of acquittal of a crime does not render evidence of that crime inadmissible on another charge where the evidence of the first crime is offered to show guilty knowledge. People v Lewis, 105 Cal App 2d 208, 233 P2d 30.

Footnote 80. People v Bell, 49 Cal 3d 502, 262 Cal Rptr 1, 778 P2d 129, reh den, stay gr (Cal) 1990 Cal LEXIS 1400 and cert den 495 US 963, 109 L Ed 2d 757, 110 S Ct 2576 and stay gr (Cal) 1990 Cal LEXIS 2379 (evidence of an offense, the record of which was expunged on honorable discharge from the federal youth authority, was admissible to prove a prior offense in a prosecution in which a prior offense is an element of the crime charged); State v Morowitz, 200 Conn 440, 512 A2d 175, 82 ALR4th 899.

Annotation: Admissibility of evidence of other offense where record has been expunged or erased, 82 ALR4th 913.

Footnote 81. Dowling v United States, 493 US 342, 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1; King v Brewer (CA8 Iowa) 577 F2d 435, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1238; United States v Addington (CA10 Kan) 471 F2d 560;

Holt v United States (CA10 Okla) 404 F2d 914, cert den 393 US 1086, 21 L Ed 2d 779, 89 S Ct 872, reh den 394 US 967, 22 L Ed 2d 570, 89 S Ct 1303; Ex parte Bayne (Ala) 375 So 2d 1239, on remand (Ala App) 375 So 2d 1244; People v Oliphant, 399 Mich 472, 250 NW2d 443 (prosecution for rape; State v Cooksey (Mo) 499 SW2d 485 (recognizing rule); State v Zarinsky, 143 NJ Super 35, 362 A2d 611, affd 75 NJ 101, 380 A2d 685; State v Smith, 271 Or 294, 532 P2d 9; Commonwealth v Manuszak, 155 Pa Super 309, 38 A2d 355; Taylor v Commonwealth, 186 Va 587, 43 SE2d 906; State v Tarman, 27 Wash App 645, 621 P2d 737.

Annotation: Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Footnote 82. State v Varner (Mo) 329 SW2d 623, cert den 365 US 803, 5 L Ed 2d 460, 81 S Ct 468.

Footnote 83. State v Smith, 271 Or 294, 532 P2d 9.

Footnote 84. State v Perkins (Fla) 349 So 2d 161; State v Wakefield (Minn) 278 NW2d 307; State v Holman (Tenn) 611 SW2d 411, 25 ALR4th 928.

In prosecution for recklessly engaging in conduct placing others in danger of death and serious bodily injury, admission of testimony that defendant stuck pistol into stomach of one complainant was error where defendant had been acquitted of that charge at earlier trial. State v Kerwin, 133 Vt 391, 340 A2d 45.

Footnote 85. Holland v State (Fla) 466 So 2d 207, 10 FLW 71 (prosecution for armed robbery).

Footnote 86. § 419.

Footnote 87. United States v Martinez (CA10 Colo) 744 F2d 76, 16 Fed Rules Evid Serv 797, later proceeding (CA10 Colo) 771 F2d 424, mod, in part on other grounds, reh den, in part (CA10 Colo) 778 F2d 553, vacated on other grounds 475 US 1138, 90 L Ed 2d 333, 106 S Ct 1787, on remand (CA10 Colo) 800 F2d 230.

Footnote 88. State v Little, 87 Ariz 295, 350 P2d 756, 86 ALR2d 1120.

Footnote 89. United States v Gonzalez-Sanchez (CA1 Puerto Rico) 825 F2d 572, 23 Fed Rules Evid Serv 641, cert den 484 US 989, 98 L Ed 2d 508, 108 S Ct 510, later proceeding (CA1 Puerto Rico) 840 F2d 1022, 25 Fed Rules Evid Serv 75; United States v Castro (CA7 Ill) 629 F2d 456 (criticized on other grounds by United States v Gonzalez-Sanchez (CA1 Puerto Rico) 825 F2d 572, 23 Fed Rules Evid Serv 641); State v Little, 87 Ariz 295, 350 P2d 756, 86 ALR2d 1120; Moore v State, 254 Ga 674, 333 SE2d 605, on remand 176 Ga App 314, 336 SE2d 619; State v Irons, 230 Kan 138, 630 P2d 1116 (prosecution for aggravated robbery); People v Acevedo, 69 NY2d 478, 515 NYS2d 753, 508 NE2d 665; Dedrick v State (Tex Crim) 623 SW2d 332, reh den (Nov 25, 1981) (prosecution for robbery); Dedrick v State (Tex Crim) 623 SW2d 332, reh den (Nov 25, 1981) (prosecution for robbery).

In an armed robbery prosecution, admission of evidence of defendant's previous participation in another armed robbery, of which defendant had been acquitted, was

barred by collateral estoppel where acquittal was based on determination that defendant was not perpetrator, and where it could not be said that evidence of prior offense did not contribute to conviction. *Moore v State*, 254 Ga 674, 333 SE2d 605, on remand 176 Ga App 314, 336 SE2d 619.

Annotation: Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Footnote 90. *United States v King* (CA2 NY) 563 F2d 559, 77-2 USTC ¶ 9717, 40 AFTR 2d 77-5924, cert den 435 US 918, 55 L Ed 2d 510, 98 S Ct 1476; *United States v Ballard* (CA5 Fla) 586 F2d 1060; *United States v Gonzalez* (CA5 Tex) 548 F2d 1185; *Oliphant v Koehler* (CA6 Mich) 594 F2d 547, cert den 444 US 877, 62 L Ed 2d 105, 100 S Ct 162 (prosecution for rape); *People v Kennedy* (4th Dist) 60 Ill App 3d 947, 18 Ill Dec 345, 377 NE2d 830; *State v Garcia*, 74 Or App 649, 704 P2d 544, review den 300 Or 180, 708 P2d 1146; *Rhodes v Commonwealth*, 223 Va 743, 292 SE2d 373.

Annotation: Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Footnote 91. *United States v King* (CA2 NY) 563 F2d 559, 77-2 USTC ¶ 9717, 40 AFTR 2d 77-5924, cert den 435 US 918, 55 L Ed 2d 510, 98 S Ct 1476.

Footnote 92. *Dowling v United States*, 493 US 342, 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1, holding that in trial of a defendant who was accused of robbing a Virgin Islands bank while wearing a ski mask and carrying a small handgun, the admission of testimony by a witness who stated that a man later revealed to be the defendant had entered her home two weeks after the bank robbery, wearing a different-colored knitted mask and carrying a small handgun and accompanied by another man who had allegedly been involved in the bank robbery, was not barred even though the defendant had been acquitted of charges arising from that intrusion since: (1) the prior acquittal did not determine an ultimate issue in the case at hand; (2) even assuming that the acquittal established that there was reasonable doubt that the defendant had in fact been the masked man who entered the witness's home, the prosecution did not have to establish this fact beyond a reasonable doubt in order to make such evidence of prior acts relevant under Rule 404(b); and (3) even if the lower burden of proof with regard to the admission of the testimony at the instant trial did not avoid the application of the collateral estoppel, the defendant had not sustained his burden of demonstrating that his acquittal in the other trial represented a jury determination that he had not been one of the men who entered the witness's house.

Footnote 93. *Dowling v United States*, 493 US 342, 107 L Ed 2d 708, 110 S Ct 668, 29 Fed Rules Evid Serv 1.

§ 411 --Admissibility in civil case

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A prior acquittal in a criminal prosecution is not generally admissible in evidence in a civil action, to establish the truth of the facts upon which it was based. 94 Since an acquittal might merely mean that the offense was not proved beyond all reasonable doubt, the acquittal is of no relevance in a civil proceeding where the facts need only be proved by the greater weight of the evidence. 95

§ 411 --Admissibility in civil case [SUPPLEMENT]

Case authorities:

In personal injury action by patron of nightclub against security guard who shot him in altercation after patron was ejected from club, trial court committed reversible error in admitting evidence that patron had been convicted of simple assault arising out of same incident, where patron's conviction of intentionally engaging in assaultive behavior did not concern propriety of guard's use of deadly force as alleged in personal injury action, which was basis of civil action. *Godbolt v Brawley* (1995) 250 Va 467, 463 SE2d 657.

Footnotes

Footnote 94. *Rutherford v State of California* (4th Dist) 188 Cal App 3d 1267, 233 Cal Rptr 781; *State v Lugg*, 144 Conn 21, 127 A2d 52; *Smith v Goodwin*, 103 Ga App 248, 119 SE2d 35; *McCottrell v Benson* (4th Dist) 32 Ill App 2d 367, 178 NE2d 144; *Shatz v American Surety Co. (Ky)* 295 SW2d 809; *Pennsylvania Turnpike Com. v United States Fidelity & Guaranty Co.*, 412 Pa 222, 194 A2d 423; *Smith v New Dixie Lines, Inc.*, 201 Va 466, 111 SE2d 434.

Annotation: Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287 § 6.

Footnote 95. *Smith v Andrews* (2d Dist) 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210.

§ 412 Persons covered

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Since Rule 404(b) provides that evidence of other crimes is not admissible to prove the character of "a person," while Rule 404(a) makes reference to an "accused," a "victim," and a "witness," Congress must have intended "a person" to have a different meaning from "an accused." Therefore, the rule applies to evidence of other crimes, wrongs, or acts of a third party. 96 A "person" includes a government informant. 97 However,

there is some authority that the word "person" in FRE Rule 404(b) refers only to the accused and not to a victim or witness. 98

FRE Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant. 99 Accordingly, criminal acts by a coconspirator, if committed as part of or in furtherance of the general conspiracy, are not "other act" evidence and are properly admissible to demonstrate the scope of the conspiracy. 1 However, a defendant may not introduce evidence of wrongdoing by another person in order to establish his own innocence. 2

♦ Observation: A "person" can apparently include a child. 3

Footnotes

Footnote 96. *United States v McCourt* (CA9 Cal) 925 F2d 1229, 91 CDOS 1368, 91 Daily Journal DAR 2195, 32 Fed Rules Evid Serv 358, cert den (US) 116 L Ed 2d 89, 112 S Ct 121.

Footnote 97. Although FRE Rule 404(b) is normally used by the government to justify admission of evidence of prior similar offenses committed by the defendant, in which case strict standards for admissibility protect the defendant from prejudice, a defendant can offer evidence, relevant to prove his lack of intent and to impeach a witness, of acts by a government informant, which are necessary as part of a vigorous defense. *United States v McClure* (CA5 Fla) 546 F2d 670, 2 Fed Rules Evid Serv 288, appeal after remand (CA5 Fla) 577 F2d 1021.

In a narcotics prosecution, FBI agent's testimony that an informant had come to FBI's attention during the investigation of several murders and that the informant had given detailed statements admitting his own participation in the murders was admissible since the prosecution needed to get damaging evidence about the informant in front of the jury on direct rather than on cross-examination and the testimony did not implicate the defendant in the murders and was only tangentially related to him. *United States v Rodriguez-Cardona* (CA1 Puerto Rico) 924 F2d 1148, 32 Fed Rules Evid Serv 241, cert den (US) 116 L Ed 2d 31, 112 S Ct 54.

Footnote 98. *United States v Kelley* (CA8 Mo) 545 F2d 619, 94 BNA LRRM 2550, 81 CCH LC ¶ 13124, 1 Fed Rules Evid Serv 469, cert den 430 US 933, 51 L Ed 2d 777, 97 S Ct 1555, 94 BNA LRRM 2962, 81 CCH LC ¶ 13128.

Footnote 99. *United States v Gonzalez-Sanchez* (CA1 Puerto Rico) 825 F2d 572, 23 Fed Rules Evid Serv 641, cert den 484 US 989, 98 L Ed 2d 508, 108 S Ct 510, later proceeding (CA1 Puerto Rico) 840 F2d 1022, 25 Fed Rules Evid Serv 75 (evidence concerning attorney's counseling of gang members properly admitted, since testimony did not directly implicate defendant in any crime but at most suggested that he had knowledge of prior crimes of other persons).

Footnote 1. *United States v Collins* (CA11 Fla) 779 F2d 1520, 20 Fed Rules Evid Serv 78; *United States v Meester* (CA11 Ga) 762 F2d 867, 17 Fed Rules Evid Serv 1518, reh den, en banc (CA11 Ga) 768 F2d 1353 and cert den 474 US 1024, 88 L Ed 2d 562, 106 S Ct 579.

Footnote 2. *United States v Puckett* (CA10 Okla) 692 F2d 663, 10 Fed Rules Evid Serv 1348, cert den 459 US 1091, 74 L Ed 2d 939, 103 S Ct 579 and cert den 460 US 1024, 75 L Ed 2d 497, 103 S Ct 1276.

Footnote 3. In a prosecution for first-degree murder arising from the burning of a house, and resulting in a sentence of death, it was proper to allow cross-examination of the defendant regarding a previous arson committed when he was 10 years old, where it was the defendant who first mentioned burning the house as a child in an effort to explain his previous testimony that he did not set the fire in the present case. *Toole v State* (Fla) 479 So 2d 731, 10 FLW 617, 51 ALR4th 1231.

b. Determination of and Prerequisites to Admissibility [413-426]

§ 413 General requisites

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In 1988, the United States Supreme Court in the *Huddleston* case stated that a defendant's protection against unduly prejudicial similar-acts evidence emanates from four sources in the Federal Rules:

- (1) the requirement of Rule 404(b) that the similar-acts evidence be offered for a proper purpose;
- (2) the relevancy requirement of Rule 402;
- (3) the assessment which a District Court must make under Rule 403 to determine whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and
- (4) the provision of Rule 105 that a trial court shall, upon request, instruct the jury that similar-acts evidence is to be considered only for the proper purpose for which it was admitted. 4

Following the court's analysis in *Huddleston*, many courts described the balancing process required by FRE Rule 404 as a four-part test in which the trial court:

- (1) determines whether the evidence is offered for a proper purpose;
- (2) decides whether it is relevant;
- (3) decides whether probative value is outweighed by the risk of unfair prejudice; and
- (4) gives a limiting instruction on request. 5

Other courts, often citing *Huddleston*, describe a variant four-part test in which the trial court decides whether other crimes evidence:

- (1) relates to a matter in issue other than general propensity;
- (2) proves an act that is similar enough and close enough in time to be relevant;
- (3) suffices to support a jury finding that the act happened and that defendant committed it; and
- (4) possesses probative value that is not outweighed by the risk of unfair prejudice. 6

Still other courts refer to a simpler two-part test, that asks whether:

- (1) the evidence is relevant to some point other than general propensity; and
- (2) prejudicial impact substantially outweighs probative worth. 7

This last test is basically the same test articulated by many courts prior to the *Huddleston* decision. In these earlier cases it was generally stated that under Rule 404(b), the trial court must perform a two-step analysis of the evidence of other crimes prior to admitting such evidence:

- (1) determining whether the evidence is relevant to some issue at trial other than to prove the character of the person for the purpose of showing that he acted in conformity therewith; and
- (2) if the evidence is relevant, determining under FRE Rule 403 whether its probative value is substantially outweighed by the danger of unfair prejudice. 8

◆ Observation: It has been noted that the construction and interpretation placed by federal authorities on Rule 404(b) is entitled to appreciable weight in interpreting a similar state rule. 9

§ 413 ----General requisites [SUPPLEMENT]

Rules:

As to rules allowing evidence of prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413-415), added by Congress in 1994, see § 404.

Case authorities:

New trial is denied parents bringing products liability case against cigarette lighter manufacturer, even though it was error for court to overrule objection to landlady's testimony about prior incident of parental absence, which was offered to raise inference that parents left child alone for protracted period on morning of fire—precisely that which FRE 404(b) forbids, because it is highly probable, in context of whole trial, that erroneous admission of that testimony did not contribute to judgment. *Griggs v BIC*

Corp. (1994, MD Pa) 844 F Supp 190.

On charges of conspiracy to misuse official positions by awarding publicly funded sham contracts to political consultants, evidence of consulting contract issued by one defendant was simply further direct evidence relating to unindicted acts of conspiracy, not "other acts" evidence. *United States v Moeller* (1996, CA5 Tex) 80 F3d 1053.

Clandestine videotape of conversation among defendant, confidential informant, and undercover agent was properly admitted, not as Rule 404(b) evidence, but as statements in furtherance of conspiracy and relevant to jury's overall understanding of otherwise admissible incriminating conversation; conversation indicated that defendant was using past relationship with confidential informant's confederate to further deal in question. *United States v Landers* (1994, CA6 Tenn) 39 F3d 643, 1994 FED App 368P, reh, en banc, den (1994, CA6 Tenn) 1994 US App LEXIS 36111.

Trial court in marijuana manufacturing conspiracy committed harmless error in admitting evidence of marijuana growing on defendant's aunt's property as prior acts evidence since police officer's testimony demonstrating any lack of evidence linking defendant with aunt's property and marijuana growing there virtually eliminated any prejudice, and evidence of defendant's guilt of charged offense was overwhelming. *United States v Mihm* (1994, CA8 Minn) 13 F3d 1200.

"Mere presence" defense denies existence of state of mind that is element of offense of possession with intent to distribute cocaine, thus making evidence of prior bad acts admissible. *United States v Thomas* (1995, CA8 Ark) 58 F3d 1318.

Evidence of defendant's corporate tax returns were inextricably intertwined in his larger scheme to evade his personal income taxes, therefore not other acts evidence and admissible; corporate and individual tax returns were prepared by same accountant and corporate returns showed corporate losses and reported no salary paid to defendant, so government had to establish falsity of those returns before it could establish corporation as source of defendant's allegedly unreported personal income. *United States v Kallin* (1995, CA9 Ariz) 50 F3d 689, 95 CDOS 1985, 95 Daily Journal DAR 3422, 95-1 USTC ¶ 50162, amd, motion den (1995, CA9 Ariz) 95 CDOS 4193, 95 Daily Journal DAR 7246.

In prosecution for child molestation involving defendant's stepdaughter, child under age of 14, trial court properly admitted evidence of defendant's prior abuse of his brother, cousin, two nephews, and two nieces, that during their childhoods defendant had fondled them or, in some cases, engaged them in sexual intercourse and/or sodomy, where evidence was sufficiently similar and where written notice of prosecution's intent to present similar transaction evidence was timely served on defendant. *Ramsey v State* (1994) 214 Ga App 743, 448 SE2d 790, 94 Fulton County D R 3307.

In prosecution for defendant's molestation of his daughter, trial court's erroneous admission, over defendant's objection, of testimony of defendant's other two daughters regarding prior uncharged acts of molestation, required reversal, where judicial temperance presumption applicable to bench trial did not apply since evidence was used for improper purpose—under depraved sexual impulse exception, evidence was admissible at time of trial, evidence was admitted over special objection, and there was no other overwhelming evidence of guilt. *Shanks v State* (1994, Ind App) 640 NE2d 734.

In prosecution for aggravated sodomy in connection with defendant's molestation of 9-year-old girl, evidence of one instance of defendant's prior sexual touching of victim was not admissible, since it was only other evidence of defendant's sexual contact with victim and was not sufficient to establish relationship or continuing course of conduct between parties. *State v Lavery* (1993) 19 Kan App 2d 673, 877 P2d 443.

Other acts evidence may be admitted if it is offered for a proper purpose under MRE 404(b), it is relevant under MRE 402 as enforced through MRE 104(b), and its probative value is not substantially outweighed by unfair prejudice; upon request, a trial court may provide a limiting instruction. *People v Basinger* (1994) 203 Mich App 603, 513 NW2d 828.

There was no plain error in a first-degree murder prosecution where the trial court allowed the prosecution to present the testimony of the victim of a prior robbery when defendant had already admitted committing the robbery during his testimony and had indicated a willingness to stipulate the existence of the robbery conviction. *State v Buckner* (1995) 342 NC 198, 464 SE2d 414.

The trial court did not err in a caveat proceeding by excluding evidence regarding the behavior of the primary beneficiary after the execution of the will. *In re Will of Jones* (1994) 114 NC App 782, 443 SE2d 363.

Footnotes

Footnote 4. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 5. *United States v Bakke* (CA6 Mich) 942 F2d 977, 34 Fed Rules Evid Serv 749, post-conviction proceeding (CA6 Mich) 1993 US App LEXIS 17682, motion den (CA6 Mich) 1993 US App LEXIS 32551; *United States v Murphy* (CA7 Ill) 935 F2d 899, 33 Fed Rules Evid Serv 423; *United States v Morgan* (CA10 Okla) 936 F2d 1561, 33 Fed Rules Evid Serv 583, cert den (US) 117 L Ed 2d 431, 112 S Ct 1190; *United States v Poole* (CA10 Kan) 929 F2d 1476, 32 Fed Rules Evid Serv 981; *United States v Jefferson* (CA10 Wyo) 925 F2d 1242, 32 Fed Rules Evid Serv 916, supp op (CA10 Wyo) 931 F2d 1396, cert den (US) 116 L Ed 2d 194, 112 S Ct 238, 112 S Ct 239.

Forms: Instruction to jury—Consideration of evidence admitted for limited purpose. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 18.

Footnote 6. *Government of Virgin Islands v Edwards* (CA3 VI) 903 F2d 267, 30 Fed Rules Evid Serv 610 (four slightly different factors); *United States v Wright* (CA7 Ill) 943 F2d 748, 34 Fed Rules Evid Serv 540; *United States v Stevenson* (CA7 Ill) 942 F2d 1111, 33 Fed Rules Evid Serv 1250, cert den (US) 116 L Ed 2d 620, 112 S Ct 596; *United States v Scop* (CA7 Ill) 940 F2d 1004, CCH Fed Secur L Rep ¶ 96212, 33 Fed Rules Evid Serv 1245; *United States v Brownlee* (CA7 Ill) 937 F2d 1248, 33 Fed Rules Evid Serv 1488; *United States v Elizondo* (CA7 Wis) 920 F2d 1308; *United States v Sullivan* (CA7 Ind) 911 F2d 2, 31 Fed Rules Evid Serv 106; *United States v Brown* (CA8 Mo) 948 F2d 1076, 34 Fed Rules Evid Serv 462; *United States v Crook* (CA8 Ark) 936 F2d 1012, 33 Fed Rules Evid Serv 555, reh, en banc, den (CA8) 1991 US App LEXIS

18377 and cert den (US) 117 L Ed 2d 138, 112 S Ct 974; *United States v Crump* (CA8 Mo) 934 F2d 947, 33 Fed Rules Evid Serv 83, reh den (CA8) 1991 US App LEXIS 15599; *United States v Longbehn* (CA8 Minn) 898 F2d 635, 29 Fed Rules Evid Serv 1349, cert den 495 US 952, 109 L Ed 2d 542, 110 S Ct 2217 and cert den 498 US 877, 112 L Ed 2d 168, 111 S Ct 208; *United States v Adams* (CA8 Minn) 898 F2d 1310; *United States v Rubio-Villareal* (CA9 Cal) 927 F2d 1495, 91 CDOS 1783, 91 Daily Journal DAR 2901, 32 Fed Rules Evid Serv 621, reh, en banc, gr (CA9) 943 F2d 1161, 91 CDOS 7384, 91 Daily Journal DAR 11235 and vacated, in part, op replaced, in part, on reh, en banc, remanded (CA9 Cal) 967 F2d 294, 92 CDOS 4873, 92 Daily Journal DAR 7797, later proceeding (CA9 Cal) 977 F2d 594, reported in full (CA9) 1992 US App LEXIS 26361; *United States v Bibo-Rodriguez* (CA9 Cal) 922 F2d 1398, 91 CDOS 238, 91 Daily Journal DAR 185, 32 Fed Rules Evid Serv 145, cert den (US) 115 L Ed 2d 1028, 111 S Ct 2861; *United States v Boise* (CA9 Or) 916 F2d 497, 31 Fed Rules Evid Serv 904, cert den (US) 114 L Ed 2d 462, 111 S Ct 2057.

See *United States v Houser* (CA9 Mont) 929 F2d 1369, 91 CDOS 2481, 91 Daily Journal DAR 3941, 32 Fed Rules Evid Serv 15 (there must be sufficient evidence of the prior crime; it must not be too remote; it must be similar to the acts charged; the evidence must prove an essential element). To the same effect is *United States v Kindred* (CA9 Nev) 931 F2d 609, 91 CDOS 3047, 91 Daily Journal DAR 4895, 32 Fed Rules Evid Serv 1255.

Footnote 7. *United States v Desmarais* (CA1 NH) 938 F2d 347, 33 Fed Rules Evid Serv 717; *United States v Shenker* (CA1 Mass) 933 F2d 61, 32 Fed Rules Evid Serv 1275; *United States v Latorre* (CA1 Puerto Rico) 922 F2d 1, 31 Fed Rules Evid Serv 1066, cert den (US) 116 L Ed 2d 175, 112 S Ct 217; *United States v Gonzalez-Lira* (CA5 Tex) 936 F2d 184, 33 Fed Rules Evid Serv 1505; *United States v Brookins* (CA5 Miss) 919 F2d 281, 31 Fed Rules Evid Serv 616; *United States v Paulino* (CA6 Ky) 935 F2d 739, 33 Fed Rules Evid Serv 488, cert den (US) 116 L Ed 2d 257, 112 S Ct 315 and cert den (US) 116 L Ed 2d 264, 112 S Ct 323 and cert den (US) 116 L Ed 2d 751, 112 S Ct 660 and cert den (US) 116 L Ed 2d 787, 112 S Ct 883; *United States v Feinman* (CA6 Ohio) 930 F2d 495, 32 Fed Rules Evid Serv 831.

Footnote 8. *United States v Di Geronimo* (CA2 NY) 598 F2d 746, 4 Fed Rules Evid Serv 796, cert den 444 US 886, 62 L Ed 2d 117, 100 S Ct 180; *United States v Aleman* (CA5 Tex) 592 F2d 881, 4 Fed Rules Evid Serv 540; *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

The court must identify the exception to inadmissibility that applies to the evidence in question and evaluate whether the evidence, although relevant and within the exception, is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or on the basis of an inference created through blackening of the defendant's character. *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263.

The decision whether to admit or exclude evidence of extraneous offenses can only be made after logical analysis and should never be made automatically or mechanistically. *Crossman v State* (Tex App Corpus Christi) 797 SW2d 321.

Footnote 9. *State v Forsland* (ND) 326 NW2d 688.

§ 414 --Checklist of conditions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In view of the varying tests prescribed by the courts, 10 the following conditions must generally be satisfied before evidence of other crimes, wrongs, or acts may be admitted under FRE Rule 404(b):

- Proof of other similar crimes must be such that the jury could find by a preponderance of the evidence that the defendant committed the other act, wrong, or crime in question 11
- The other crimes must not be too remote in time from the charged offense 12
- The evidence must be admitted for a purpose allowed under Rule 404(b) 13
- The evidence must relate to a material issue in the case 14
- There must be substantial need for the probative value of the evidence, 15 although where the government's need for evidence is marginal, it is admissible where relevant if the threat of unfair prejudice to the defendant is even smaller 16
- The evidence must have real probative value, not just possible worth 17
- The probative value of the evidence of other crimes must not be substantially outweighed by prejudice to the defendant 18

§ 414 --Checklist of conditions [SUPPLEMENT]

Case authorities:

In prosecution on various charges arising from murder of witness before grand jury which had indicted codefendant for illegal gambling, evidence of robberies in which defendant and testifying conspirator had been involved was intrinsic evidence inextricably intertwined with crime charged since they explained circumstances of witness's murder, clarified relationship among defendants and testifying conspirator, explained why defendant would trust testifying conspirator with knowledge of witness's murder, and why codefendant would discuss that murder with defendant in testifying conspirator's presence. *United States v McGuire* (1995, CA8 Mo) 45 F3d 1177, reh den (1995, CA8 Mo) 1995 US App LEXIS 2497.

Footnotes

Footnote 10. § 413.

Footnote 11. § 417.

Footnote 12. § 416.

Footnote 13. *Carson v Polley* (CA5 Tex) 689 F2d 562, 11 Fed Rules Evid Serv 1259, 35 FR Serv 2d 152, 64 ALR Fed 613; *United States v Myers* (CA5 Fla) 550 F2d 1036, 1 Fed Rules Evid Serv 1389, 42 ALR Fed 855, appeal after remand (CA5 Fla) 572 F2d 506, cert den 439 US 847, 58 L Ed 2d 149, 99 S Ct 147; *United States v Hogue* (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85; *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848; *United States v Jackson* (CA11 Ga) 761 F2d 1541, 18 Fed Rules Evid Serv 425.

Footnote 14. *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847; *United States v Wormick* (CA7 Ill) 709 F2d 454, 12 Fed Rules Evid Serv 2008 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Gonzalez-Lira* (CA5 Tex) 936 F2d 184, 33 Fed Rules Evid Serv 1505; *United States v Horvath* (CA8 Minn) 731 F2d 557, 84-1 USTC ¶ 9482, 15 Fed Rules Evid Serv 1048, 53 AFTR 2d 84-1138; *United States v Marshall* (CA8 Ark) 683 F2d 1212, 11 Fed Rules Evid Serv 416; *United States v Vik* (CA8 Mo) 655 F2d 878, 8 Fed Rules Evid Serv 1256; *United States v Hodges* (CA9 Cal) 770 F2d 1475, 19 Fed Rules Evid Serv 364.

Evidence of defendant's possession of a hypodermic needle at the time of his arrest should not have been admitted in his prosecution for burglary of a building where there was no suggestion or indication that defendant burglarized the building to obtain money or property to support a drug habit and nothing to show any relevance to the context of the offense or to any other issue in the case. *Couret v State* (Tex Crim) 792 SW2d 106.

Footnote 15. *United States v Fosher* (CA1 Mass) 568 F2d 207, 3 Fed Rules Evid Serv 537, appeal after remand (CA1 Mass) 590 F2d 381, 3 Fed Rules Evid Serv 552 (criticized on other grounds by *United States v Downing* (CA3 Pa) 753 F2d 1224, 17 Fed Rules Evid Serv 1) and (criticized on other grounds by *United States v Moore* (CA5 Tex) 786 F2d 1308, 20 Fed Rules Evid Serv 671); *United States v Griffin* (CA4 Va) 13 Fed Rules Evid Serv 1990; *United States v Silva* (CA5 Tex) 580 F2d 144, 3 Fed Rules Evid Serv 599, appeal after remand (CA5 Tex) 611 F2d 78.

Footnote 16. *United States v Childs*, 194 US App DC 250, 598 F2d 169.

Footnote 17. *United States v Hogue* (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85.

Footnote 18. § 419.

§ 415 Timing of other crimes, wrongs, or acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under FRE Rule 404(b), evidence of other crimes, wrongs, or acts may include acts committed prior to, 19 simultaneous to, 20 or after 21 the charged offense, so long as the event occurred at a reasonably closely related time. 22 However, it has been suggested that evidence of a subsequent extrinsic offense bears substantially less on predisposition than would a prior extrinsic offense. 23

§ 415 ----Timing of other crimes, wrongs, or acts [SUPPLEMENT]

Case authorities:

Testimony by robbery victim identifying bank robbery defendants was properly admitted as relevant to intent to conspire since it occurred only 17 days after bank robbery, both robberies were committed by three stocking- masked males, and in both robberies larger male carried black short-barrelled shotgun and smaller vaulted over relatively high obstacle. *United States v Kern* (1993, CA8 Neb) 12 F3d 122.

In prosecution for molestation of his two granddaughters, evidence of defendant's molestation of his two daughters was admissible, even though prior acts occurred during time period up to 11 years before trial, where evidence showed defendant's almost continuous course of identical conduct over 27- year period preceding molestation of his granddaughters, and where obviously many years were going to elapse between time such acts occurred with his daughters and time such acts occurred with children of one of those daughters. *Snow v State* (1994) 213 Ga App 571, 445 SE2d 353, 94 Fulton County D R 2263.

Footnotes

Footnote 19. *United States v Viruet* (CA2 NY) 539 F2d 295, 1 Fed Rules Evid Serv 299; *United States v Sinclair* (DC Del) 433 F Supp 1180; *United States v McClure* (CA5 Fla) 546 F2d 670, 2 Fed Rules Evid Serv 288, appeal after remand (CA5 Fla) 577 F2d 1021; *United States v Wixom* (CA8 Minn) 529 F2d 217.

Annotation: Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 ALR3d 545.

Footnote 20. *United States v Viserto* (CA2 NY) 596 F2d 531, cert den 444 US 841, 62 L Ed 2d 52, 100 S Ct 80; *United States v Parkison* (ED Wis) 417 F Supp 730, 1 Fed Rules Evid Serv 1175.

Evidence that defendants were in possession of marijuana at time of their arrest was properly admitted in their prosecution for cocaine distribution conspiracy given relevance to charged conduct and occurrence close in time. *United States v Arboleda* (CA1 NH) 929 F2d 858, 32 Fed Rules Evid Serv 1164.

Footnote 21. *United States v Ramirez* (CA2 Conn) 894 F2d 565, 29 Fed Rules Evid Serv 1400; *United States v Di Giovanni* (CA2 NY) 544 F2d 642, 1 Fed Rules Evid Serv 417;

United States v Whaley (CA4 Va) 786 F2d 1229, 20 Fed Rules Evid Serv 668; United States v Osum (CA5 La) 943 F2d 1394, 34 Fed Rules Evid Serv 1126; United States v McClure (CA5 Fla) 546 F2d 670, 2 Fed Rules Evid Serv 288, appeal after remand (CA5 Fla) 577 F2d 1021; United States v Brown (CA8 Mo) 923 F2d 109, 32 Fed Rules Evid Serv 37, cert den (US) 116 L Ed 2d 80, 112 S Ct 110; United States v Matlock (CA8 Ark) 558 F2d 1328, 2 Fed Rules Evid Serv 380, cert den 434 US 872, 54 L Ed 2d 152, 98 S Ct 218; United States v Ayers (CA9 Cal) 924 F2d 1468, 91 CDOS 763, 91 Daily Journal DAR 1198, 32 Fed Rules Evid Serv 742, amd, reh den (CA9) 1991 US App LEXIS 5313 and amd, reh den (CA9 Cal) 91 CDOS 2427, 91 Daily Journal DAR 3797 and (among conflicting authorities noted in United States v Harvey (CA9) 1992 US App LEXIS 18641); United States v Hogue (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85; United States v Hurley (CA11 Ala) 755 F2d 788, 17 Fed Rules Evid Serv 1426; United States v Watson, 282 US App DC 305, 894 F2d 1345, 29 Fed Rules Evid Serv 1201.

Evidence that defendant failed to pay taxes during years both prior to and following the years charged in the information was properly received under FRE Rule 404(b) as proof of pattern or plan, and as proof of absence of accident, negligence, or inadvertence. United States v Ausmus (CA6 Ky) 774 F2d 722, 85-2 USTC ¶ 9742, 19 Fed Rules Evid Serv 761, 56 AFTR 2d 85-6179.

In a robbery prosecution in which robber wore yellow pants and used a small blue gun, testimony that defendant was in a store wearing yellow pants and carrying a small blue gun six days after the robbery was admissible to rebut the defendant's contention that his yellow pants had been stolen before the robbery even though the identification might give rise to an inference of a subsequent, extraneous offense. State v Hatter (La) 338 So 2d 100.

But see Prior v State (Tex Crim) 647 SW2d 956, a prosecution for indecency with a child, holding that trial court erred in admitting, over objection, two extraneous offenses involving defendant's exposing himself which occurred after the alleged offense, where all elements of the offense charge were clearly proven and undisputed prior to the introduction to the evidence as extraneous offenses subject to the objection, there was no defense offered, and the testimony was not undermined by defense cross-examination.

Footnote 22. § 416.

Footnote 23. United States v Jimenez (CA5 Tex) 613 F2d 1373, 5 Fed Rules Evid Serv 1002.

§ 416 --Remoteness in time

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In order for evidence of other crimes, wrongs, or acts to be admitted, the other crimes must not be too remote in time from the charged offense. 24 But there is no

absolute rule regarding the time that can separate the extraneous acts from the charged offense; rather, the court applies a reasonableness standard and examines the facts and circumstances of each case. 25 Remoteness decisions are said to be so fact-specific that a generally applicable litmus test would be of dubious value. 26

◆ Observation: It has been suggested that the time factor–recency versus remoteness—is often mentioned as bearing on the probative worth of previous offenses, but that this factor seldom seems determinative. 27

Although the more remote the extrinsic offense, the less probative it is, 28 the court must examine the overall similarity of the charged offense and of the extrinsic offense to determine its probative value and its admissibility. 29

The trial court has broad discretion in determining if an extrinsic offense is too remote to be probative. Remoteness must be looked at in light of the similarity between the charged and the extrinsic offense; where the offenses are very similar, the probative value of the extrinsic offense is not so reduced by its remoteness to the charged offense. 30

To be admissible, evidence of an extrinsic offense committed after the charged offense may have to be closer in time to the charged offense than a prior extrinsic offense. 31

§ 416 --Remoteness in time [SUPPLEMENT]

Case authorities:

Evidence that defendant had previously taken animal of protected species was admissible other acts evidence since it involved same act with which he was charged, i.e., illegal possession of protected species of wildlife, three-year time span was sufficiently close, and fact that species were different was irrelevant. *United States v Kuipers* (1995, CA7 Ill) 49 F3d 1254.

Black employee's first-hand experience of having received racial threat from coworker fifteen years earlier was too tenuously related to alleged discriminatory actions by supervisors many years later who had not even been employed at plant during earlier incident to create genuine issue of fact concerning existence of racial motive for those actions. *Russell v Acme-Evans Co.* (1995, CA7 Ind) 51 F3d 64, 67 BNA FEP Cas 559, reh, en banc, den (1995, CA7 Ind) 1995 US App LEXIS 8988.

Evidence of defendant's 1978 drug conviction should not have been introduced since it was remote, involved single sale of cocaine to undercover agents while charged crime involved large scale, ongoing distribution conspiracy, and was more prejudicial than probative since there was other, overwhelming evidence of defendant's knowledge and intent. *United States v Mejia-Urbe* (1996, CA8 Mo) 75 F3d 395, 43 Fed Rules Evid Serv 775, reh, en banc, den (1996, CA8) 1996 US App LEXIS 5003.

Evidence of biases held by professor who chaired university's appointments committee were not remote acts and therefore excludible in discrimination suit by candidate rejected for position since evidence was of consistent pattern of behavior and one manifestation of alleged discriminatory attitude occurred only few months before search in question. *Lam v University of Hawaii* (1994, CA9 Hawaii) 40 F3d 1551.

In trial on charges arising out of extensive fraud scheme at loan brokerage firm, evidence of defendant's employment at different brokerage company whose clients were defrauded in similar manner and fact that his coworkers there were convicted of fraud offenses was admissible to show that defendant had knowledge about type of loan scheme he was involved with at brokerage firm in question and that it had potentially criminal consequences; five-year gap between prior acts and present scheme was not so large as to make evidence less probative, given specialized knowledge required to set up extensive scheme. *United States v Massey* (1995, CA10 Okla) 48 F3d 1560, cert den (1995, US) 1995 US LEXIS 4414.

In prosecution for child molestation based on defendant's exposure of his penis to 4-year-old child, trial court properly admitted evidence of defendant's prior conviction of public indecency, based on his exposure to 7- year-old child, where underlying acts were strikingly similar, although conviction was not for child molestation. *Hathcock v State* (1994) 214 Ga App 188, 447 SE2d 104, 94 Fulton County D R 2677, reconsideration den (Jul 28, 1994).

In prosecution for defendant's alleged 1992 rape of his daughter- in-law, trial court properly admitted evidence of defendant's similar rape of his daughter, which occurred during 1963-1964 school year, since alleged similar offense was less than judicially-declared maximum of 31 years old. *Painter v State* (1995) 219 Ga App 290, 465 SE2d 290, 95 Fulton County D R 3926.

In child molestation prosecution, evidence that, at least 23 years earlier, defendant had molested his daughter was inadmissible as too remote in time. *Fisher v State* (1994, Ind App) 641 NE2d 105.

In prosecution of physician for sexual assault arising from manner in which physician conducted medical examinations of female patients, evidence that, 11 years before allegedly criminal conduct, physician had conducted, in improper manner, authorized gynecological examination of physician's second cousin was admissible, and length of time between that conduct and allegedly criminal conduct was factor going to weight of evidence. *State v Poole* (1993, Minn) 499 NW2d 31.

In sodomy prosecution, evidence of prior uncharged sexual crimes that allegedly occurred 10 or 11 years earlier was not too remote to be material; remoteness goes to weight of such testimony, not to its admissibility. *State v Coleman* (1993, Mo App) 857 SW2d 363.

In prosecution for solicitation for sexual assault, evidence that, 16 to 18 years earlier, defendant had assaulted another female minor was inadmissible as too remote in time. *State v Ray* (1994, Mont) 882 P2d 1013.

In prosecution for sexual assault and solicitation of sexual assault, trial court committed reversible error in admitting testimony by another victim that defendant had sexually assaulted her approximately 16 to 18 years earlier, where those prior acts, without evidence of other intervening acts which would show continuous course of conduct were simply too remote in time, and where evidence of those prior acts was prejudicial in light of high probability that jury could have penalized defendant simply for his past bad character. *State v Ray* (1994, Mont) 882 P2d 1013.

In prosecution for sexual assault of acquaintance of defendant, trial court erred in admitting evidence of prior sexual assault committed by defendant 5 years earlier and defendant was entitled to new trial on sexual assault convictions, where although state argued that evidence was admissible to show defendant's plan and thereby rebut his claim of consent in this case, 5- year-old sexual assault committed in somewhat similar manner on another person did not constitute evidence of plan to commit assault on victim here, and while evidence might have shown propensity or predisposition to commit same offense, that was precise purpose for which evidence might not be used. *State v Whittaker* (1994) 138 NH 524, 642 A2d 936.

In civil sexual assault action, extraneous misconduct evidence, that 26 months earlier appellant had assaulted another woman under similar circumstances, was properly admitted, where consideration of testimony was limited to contested issue of intent, as appellant claimed act of sexual intercourse was consensual. *McLellan v Benson* (1994, Tex App Houston (1st Dist)) 877 SW2d 454.

In action for damages resulting from injuries sustained when 2- year-old fell from apartment window, evidence consisting of pictures and evidence of witnesses showing condition of apartment complex, including later maintenance, was properly excluded where court permitted testimony regarding condition of other window screens in complex on day after accident, and evidence of later time would not make existence of fact sought to be proved more or less probable. *Fisher v River Oaks, Inc.* (1994, La App 5th Cir) 635 So 2d 1209, cert den (La) 637 So 2d 503.

Footnotes

Footnote 24. *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847; *United States v Silva* (CA5 Tex) 580 F2d 144, 3 Fed Rules Evid Serv 599, appeal after remand (CA5 Tex) 611 F2d 78; *United States v Wormick* (CA7 Ill) 709 F2d 454, 12 Fed Rules Evid Serv 2008 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1); *United States v Horvath* (CA8 Minn) 731 F2d 557, 84-1 USTC ¶ 9482, 15 Fed Rules Evid Serv 1048, 53 AFTR 2d 84-1138; *United States v Marshall* (CA8 Ark) 683 F2d 1212, 11 Fed Rules Evid Serv 416; *United States v Vik* (CA8 Mo) 655 F2d 878, 8 Fed Rules Evid Serv 1256; *United States v Bronco* (CA9 Cal) 597 F2d 1300, 5 Fed Rules Evid Serv 79; *United States v Hogue* (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85; *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848; *State v Simmons*, 175 W Va 656, 337 SE2d 314.

In a personal injury action brought by a plaintiff shot by defendant, court properly refused to admit evidence of defendant's prior conviction of a shooting incident 43 years earlier, where defendant had been pardoned 8 years after his conviction, and there was no evidence that defendant had since been involved in criminal activity. *Echizenya v Armenio* (La App 4th Cir) 354 So 2d 682, cert den (La) 356 So 2d 1006.

Footnote 25. *United States v Hadaway* (CA4 Md) 681 F2d 214, 10 Fed Rules Evid Serv 985; *United States v Burkett* (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802; *United States v Marshall* (CA8 Ark) 683 F2d 1212, 11 Fed Rules Evid Serv 416; *United States v Franklin* (CA10 Utah) 704 F2d 1183, 12 Fed Rules Evid Serv 1752, cert den

464 US 845, 78 L Ed 2d 137, 104 S Ct 146.

Failure to file return and evasion of taxes are substantially similar for purposes of Rule 404, and acts taking place in 1969, 1970, and 1971, fell within the timeliness requirement where the offense charged was alleged to have started in 1977. *United States v Jenkins* (CA6 Mich) 871 F2d 598, 89-2 USTC ¶ 9572, 27 Fed Rules Evid Serv 1226, 64 AFTR 2d 89-5157.

A prior conviction 12 years earlier is admissible on the issue of intent, because no authority supports the proposition that a bad act loses all probative value after a given period of time. *United States v McCollum* (CA9 Cal) 732 F2d 1419, 15 Fed Rules Evid Serv 1033, cert den 469 US 920, 83 L Ed 2d 236, 105 S Ct 301.

Annotation: Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 ALR3d 545.

Footnote 26. *United States v Pollock* (CA11 Ga) 926 F2d 1044, 32 Fed Rules Evid Serv 577, cert den (US) 116 L Ed 2d 617, 112 S Ct 593 (five-year-old conviction for drug dealing held not too remote when offered to show intent in drug conspiracy prosecution; court noting decisions tolerating lapses of about five years, and even "closely similar" offenses 10-13 years earlier).

Footnote 27. *Louisell and Mueller*, Federal Evidence § 140.

While similar acts, to be admissible, must have occurred reasonably near the offense in question, both in time and place, the key to probative value lies in its peculiar character, rather than its proximity to the event at issue. *State v De Pina* (Medina Co) 21 Ohio App 3d 91, 21 Ohio BR 97, 486 NE2d 1155, motion overr.

Footnote 28. *United States v Beechum* (CA5 Tex) 582 F2d 898, 3 Fed Rules Evid Serv 1185, cert den 440 US 920, 59 L Ed 2d 472, 99 S Ct 1244; *United States v Hearst* (ND Cal) 412 F Supp 880; *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

In a prosecution for second-degree murder arising from a stabbing, District Court erred in admitting evidence of an incident six years earlier in which the defendant threatened his aunt with a knife while intoxicated, for purpose of establishing state of mind or intent, since the prior act was remote in time, unconnected to events surrounding the crime for which defendant was charged, and the issue was defendant's state of mind at the time of the charged offense. *United States v Johnson* (CA8 SD) 879 F2d 331, 28 Fed Rules Evid Serv 538.

Footnote 29. *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

Evidence of criminal assaults on children, perpetrated more than 15 years earlier, were properly admitted where all victims were male members of same family who were befriended by defendant at an early age and were molested between ages of 5 and 11 while in defendant's care. *Adrian v People* (Colo) 770 P2d 1243.

Footnote 30. *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid

Serv 1800.

Footnote 31. *United States v Jimenez* (CA5 Tex) 613 F2d 1373, 5 Fed Rules Evid Serv 1002 (evidence of an alleged offense involving cocaine which took place one year after heroin distribution with which defendant was charged; such "considerable time" depleted evidence of any relevance which could have outweighed the peril of prejudice).

Court erred in admitting evidence that defendant had possessed 99 milligrams of cocaine 19 months after termination of alleged conspiracy to import illegal drugs, since prejudice outweighed probative value where defendant's alleged participation in conspiracy had been to loan funds for purchase of airplane used in the drug importation scheme and defendant denied any knowledge of intended illegal use. *United States v Garcia-Rosa* (CA1 Puerto Rico) 876 F2d 209, 28 Fed Rules Evid Serv 445, cert den 493 US 1030, 107 L Ed 2d 760, 110 S Ct 742 and vacated on other grounds 498 US 954, 112 L Ed 2d 391, 111 S Ct 377, on remand (CA1 Puerto Rico) 930 F2d 951 (among conflicting authorities noted in *United States v O'Connor* (CA7 Wis) 953 F2d 338) and cert den (US) 118 L Ed 2d 394, 112 S Ct 1676 and appeal after remand (CA1 Puerto Rico) 958 F2d 473, and (CA1 Puerto Rico) slip op and cert den (US) 121 L Ed 2d 159, 113 S Ct 221.

Evidence concerning transaction between defendant and rental car agency occurring three months after fraudulent loan application was filed was admissible on issue of intent. *United States v Whaley* (CA4 Va) 786 F2d 1229, 20 Fed Rules Evid Serv 668.

Evidence of bank robbery five weeks after robbery for which defendants are prosecuted is admissible. *United States v Gutierrez* (CA10 Colo) 696 F2d 753, 11 Fed Rules Evid Serv 1837, cert den 461 US 909, 76 L Ed 2d 813, 103 S Ct 1884 and cert den 461 US 910, 76 L Ed 2d 814, 103 S Ct 1885.

§ 417 What proof of other acts is a sufficient prerequisite to admitting evidence of them

[View Entire Section](#)
[Go to Parallel Reference Table](#)

FRE Rule 104(b) is applicable to the admission of evidence of other crimes, wrongs, or acts under FRE Rule 404(b). 32 FRE Rule 104(b) provides that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court must admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition. 33 In determining whether in a criminal case the government has introduced sufficient evidence to meet this requirement, the trial court is not required to weigh credibility or make a finding that the government has proved the conditional fact by a preponderance of the evidence; the court examines all of the evidence in the case and decides whether the jury could reasonably find by a preponderance of the evidence that the defendant committed the act in question. 34 The trial court may decide to allow the government to introduce evidence concerning a similar act and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. 35 If the proponent has failed to meet the minimal standard of proof, the trial court must instruct the jury to disregard

the evidence. 36 The strength of the evidence which establishes the similar act is one of the factors which the trial court may consider when balancing probative value against prejudice, 37 but a preliminary determination by the court that a preponderance of the evidence supports a finding that the defendant committed the similar act is not a prerequisite for concluding that the prejudicial effect of the evidence does not substantially outweigh its probative value. 38

When the trial judge determines whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense, a witness's uncontroverted testimony is sufficient proof for the jury to find that the extrinsic offense occurred. 39 Moreover, the uncorroborated testimony of an accomplice may be sufficient proof of other acts. 40

The Supreme Court has rejected the cases applying the clear and convincing standard for admissibility of evidence under FRE Rule 404(b). 41 A trial court need not make a preliminary finding that the government has proved the "other act" even by preponderance of evidence, much less by clear and convincing evidence, before submitting the evidence to the jury; rather, the emphasis is on admissibility. 42 But the proffered evidence cannot be of a vague and uncertain character, and that the prior conduct cannot be equally consistent with an innocent explanation. 43 Moreover, a vague description of other acts on the part of a defendant makes it more likely that the probative value of the evidence will be outweighed by its prejudice and that it will be excluded. 44 Where identification evidence linking the defendant to a prior crime is weak, evidence of the crime should not be admitted. 45

The government may not place before the jury a litany of potentially prejudicial similar acts that have been established or connected to a defendant only by unsubstantiated innuendo, since extrinsic acts evidence that might adversely reflect on the actor's character is admissible under FRE Rule 404(b) only if the evidence is relevant, and such evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. 46

◆ Practice guide: It is not the responsibility of the trial judge sua sponte to insure that foundation evidence is offered sufficient to support a finding of the fulfillment of a condition of fact under FRE Rule 104(b); rather, the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition. 47

Footnotes

Footnote 32. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Admission of prior bad acts under Rule 404(b) always must be evaluated by judge under conditional relevancy test of Rule 104(b). *United States v Hudson* (CA7 Wis) 884 F2d 1016, 28 Fed Rules Evid Serv 1451, reh den, en banc (CA7) 1990 US App LEXIS 1528 and cert den 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Practice References Hunter, Federal Trial Handbook 2d § 37.1.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 33. FRE Rule 104(b).

Footnote 34. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 35. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 36. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 37. Under FRE Rule 403, discussed in this connection in § 419.

Footnote 38. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 39. *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

Footnote 40. *United States v Evans* (CA8 Mo) 697 F2d 240, 12 Fed Rules Evid Serv 529, cert den 460 US 1086, 76 L Ed 2d 350, 103 S Ct 1779 (decided under "clear and convincing" standard; point valid also under Supreme Court's preponderance of the evidence standard).

Footnote 41. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

But see *Kemp v State* (Tex Crim) 846 SW2d 289 (holding that it is a longstanding principle that before a trial court can admit extraneous offense evidence, the state must clearly prove that the offense was committed and that the accused was its perpetrator).

Footnote 42. *United States v Manso-Portes* (CA7 Ill) 867 F2d 422, 27 Fed Rules Evid Serv 956, post-conviction proceeding (ND Ill) 1992 US Dist LEXIS 5507, later proceeding (CA7) 1992 US App LEXIS 30807 (in prosecution for conspiracy to distribute cocaine District Court did not err in admitting testimony concerning two stops of automobile containing cocaine since jurors needed only to reasonably believe that two

prior stops actually had occurred and that cocaine or money had been hidden in stopped car).

Footnote 43. *United States v Gustafson* (CA8 Minn) 728 F2d 1078, 15 Fed Rules Evid Serv 351, cert den 469 US 979, 83 L Ed 2d 315, 105 S Ct 380 and (criticized on other grounds by *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Callaway* (CA8 Ark) 33 Fed Rules Evid Serv 743 and (criticized on other grounds by *United States v Aranda* (CA8 Iowa) 963 F2d 211, 35 Fed Rules Evid Serv 1002).

Footnote 44. *United States v Melia* (CA4 NC) 691 F2d 672, 11 Fed Rules Evid Serv 1226, appeal after remand (CA4 NC) 741 F2d 70, cert den 471 US 1135, 86 L Ed 2d 693, 105 S Ct 2674.

Footnote 45. *United States v Horvath* (CA8 Minn) 731 F2d 557, 84-1 USTC ¶ 9482, 15 Fed Rules Evid Serv 1048, 53 AFTR 2d 84-1138.

Footnote 46. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

Footnote 47. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

§ 418 Purpose as affecting admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

FRE Rule 404(b) specifically authorizes admission of evidence of other crimes, wrongs, or acts for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 48 The categories of "other purposes" listed in FRE Rule 404(b) are not exhaustive. 49 Other permissible purposes include—

—to show the existence of a common scheme or plan embracing two or more crimes so interrelated that proof of one tends to establish the other. 50

—to corroborate crucial accomplice testimony. 51

—to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. 52

—to show a party's reasonable fear of imminent bodily injury. 53

But where the prosecutor made no effort to explain the probative purpose or connection of defendants' earlier conduct to the case, and at various points the trial judge found that the evidence was unnecessary, irrelevant, and prejudicial, the admission of such evidence on the prosecutor's assertion that it was relevant because it was part of the history of a conspiracy was erroneous. 54

§ 418 ----Purpose as affecting admissibility [SUPPLEMENT]**Case authorities:**

In prosecution for importing with intent to sell endangered iguanas, prosecutor's cross-examination of witness designed to implicate witness as large-scale buyer or distributor of marijuana was not proper, although cross-examination regarding extent of witness's personal use of marijuana may have been proper given witness's single statement regarding his past occasional marijuana use. *United States v Crutchfield* (1994, CA11 Fla) 26 F3d 1098, 8 FLW Fed C 445.

The trial court in a first-degree murder prosecution did not err by the admission of evidence of the killing of a member of defendant's "family" called the Pimps where it is clear that such killing, if not the principal reason for the killing of the victim in the present case, was a central and critical fact in the explanation of the sequence of events and motive for the murder in the present case. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

There was no error in a prosecution for first-degree murder, burglary, robbery, and attempted rape in the admission of testimony that an expert had compared a fingerprint from the crime scene with a fingerprint card from defendant on file before his arrest. Defendant's use of the fingerprint expert's report opened the door and created confusion which the State could clear up by introducing evidence that the report was based on a ten-print card that was on file prior to defendant's arrest for this crime. *State v Montgomery* (1995) 341 NC 553, 461 SE2d 732.

Footnotes

Footnote 48. FRE Rule 404(b).

Footnote 49. *United States v Williams* (CA2 NY) 577 F2d 188, 3 Fed Rules Evid Serv 921, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196; *Government of Virgin Islands v Carino* (CA3 VI) 631 F2d 226, 6 Fed Rules Evid Serv 967; *United States v Masters* (CA4 SC) 622 F2d 83, 6 Fed Rules Evid Serv 63; *United States v Masters* (CA4 SC) 622 F2d 83, 6 Fed Rules Evid Serv 63.

Footnote 50. *United States v Weaver* (CA8 Ark) 565 F2d 129, 2 Fed Rules Evid Serv 765, cert den 434 US 1074, 55 L Ed 2d 780, 98 S Ct 1263; *United States v Burkley*, 192 US App DC 294, 591 F2d 903, 3 Fed Rules Evid Serv 1649, cert den 440 US 966, 59 L Ed 2d 782, 99 S Ct 1516.

Footnote 51. *United States v Williams* (CA2 NY) 577 F2d 188, 3 Fed Rules Evid Serv

921, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

Footnote 52. *United States v Masters* (CA4 SC) 622 F2d 83, 6 Fed Rules Evid Serv 63; *United States v Williford* (CA11 Ga) 764 F2d 1493, 18 Fed Rules Evid Serv 1151; *United States v Weeks* (CA11 Ga) 716 F2d 830, 14 Fed Rules Evid Serv 604.

Footnote 53. *Government of Virgin Islands v Carino* (CA3 VI) 631 F2d 226, 6 Fed Rules Evid Serv 967.

In a check forgery prosecution, a witness's testimony regarding knowledge of defendant's prior criminal record was admissible to lend credence to the witness's claim that she feared for her safety if she did not comply with defendant's demands for bogus checks. *United States v Miller*, 283 US App DC 9, 895 F2d 1431, 29 Fed Rules Evid Serv 1152, cert den 498 US 825, 112 L Ed 2d 52, 111 S Ct 79.

Footnote 54. *United States v Sullivan* (CA10 Okla) 919 F2d 1403, 31 Fed Rules Evid Serv 1414, post-conviction proceeding (CA10 Okla) 967 F2d 370, cert den (US) 121 L Ed 2d 211, 113 S Ct 285 and cert den (US) 122 L Ed 2d 161, 113 S Ct 1013.

§ 419 Balancing prejudice against probative value

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Admission of evidence of other crimes, wrongs, or acts of the defendant is subject to the provision of Rule 403 55 that such relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. 56 Even when evidence of other acts is offered for a proper purpose, 57 the evidence may be admitted only if that rule is satisfied. 58 Testimony directly connecting an accused with a prior crime may be prejudicial on the issue of guilt, but it is only *unfair* prejudice that triggers the balancing requirement. 59 But if evidence of criminal activity not charged is irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity toward crime thus demonstrated as evidence of guilt of the crime charged. 60

The language of the rule tilts toward the admission of evidence in close cases. In determining whether probative value is substantially outweighed by the danger of unfair prejudice, the balance should generally be struck in favor of admission when the evidence indicates a close relationship between the other acts, crimes, or wrongs and the offense charged in the present case. 61 When a trial court performs the balancing test prescribed by FRE Rule 403 with respect to another act, crime, or wrong of a criminal defendant, there is no requirement that the trial court first find that the prejudicial potential of the evidence substantially outweighs its probative value unless the court concludes by a preponderance of the evidence that the defendant committed the similar act, although the strength of the evidence establishing the other crime, wrong, or act is one of the factors which the trial court may consider when conducting the FRE Rule 403 balancing. 62

◆ Observation: In a non-Rule state, it has been said that where evidence of past criminality is probative of an issue, its admissibility will depend on the balance between its probative value and its potential for prejudice. 63

The probative value of FRE Rule 404(b) evidence depends upon various factors, including the availability of other evidence to serve the same purpose, 64 the similarity between the extrinsic acts and the charged offenses, 65 the degree of proximity in time between extrinsic and charged offenses, 66 and the posture of the case at the time the extrinsic evidence is offered—in particular, whether the issue to which the extrinsic evidence relates is actually disputed. 67

◆ Practice guide: When moving for a mistrial because of prejudice to the defendant resulting from particular similar crimes testimony, counsel should make clear to the trial judge the exact nature of the claimed prejudice. 68 But there is no requirement that the Rule 403 principle must be explicitly argued and preserved for appeal where an objection under Rule 404(b) to the admission of evidence of other acts has been raised. 69

§ 419 ----Balancing prejudice against probative value [SUPPLEMENT]

Case authorities:

Admitting book on methamphetamine manufacture found in defendant's house did not unduly prejudice defendant since it had probative value and defendant did not articulate what exceptional circumstances warranted its exclusion, beyond assertion that it "tipped scales." *United States v Ford* (1994, CA1 Mass) 22 F3d 374, cert den (1994, US) 1994 US LEXIS 6727.

Trial court abused its discretion when it permitted government to reject defendants' proffered generic stipulations and instead introduce stipulation which specified nature of each defendant's prior felony to prove element of being felon in possession of firearm; even though ruling occurred prior to appellate decision requiring that trial court identify special circumstances showing that relevance of such evidence outweighs any prejudicial effect, record here indicated that court would not have made such finding since it established that court felt bound to permit government to introduce evidence of nature of defendants' prior felonies and rejected government's attempts to introduce them under Rule 404(b) because their prejudice outweighed any possible relevance. *United States v Melvin* (1994, CA1 Mass) 27 F3d 703, 39 Fed Rules Evid Serv 647, clarified, mod (1994, CA1 Mass) 27 F3d 710.

District court did not err in admitting defendant's videotaped statements that defendants followed one car and attempted to carjack another, since evidence was intrinsic and did not implicate Fed. R.Evid. 404(b); further, it helped to place entire evening in context, assisted government in establishing elements of charged crimes, and was probative and helpful to jury. *United States v Coleman* (1996, CA5 Tex) 78 F3d 154.

Connection between defendant's prior gambling activity and his identity as drug trafficker was attenuated, and there was no evidence of unusual modus operandi in both cases to permit evidence of gambling crime committed by occupant of apartment in

which drugs were later found to be admitted, government's case on identification of defendant as resident of apartment was strong without evidence of prior illegal gambling activity, but admission of evidence was harmless given overwhelming evidence against defendant. *United States v Jones* (1994, CA11 Ga) 28 F3d 1574, 8 FLW Fed C 511.

Testimony that defendant and his friends threatened the State's principal witness and warned him not to testify and that defendant on one occasion shot the witness in the thigh was relevant to show defendant's awareness of his guilt, and the trial court did not err by finding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. G.S. § 8C-1, Rule 403. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

A witness's testimony which described acts of prostitution between the witness and defendant and her finding a metal pipe under defendant's pillow a month before the death of the victim, a known prostitute, was properly admitted in defendant's murder trial to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death where other evidence tended to show that the victim was killed by a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. Furthermore, the trial court did not err by finding that this testimony was more probative than prejudicial under the balancing test of Rule 403. N.C.G.S. § 8C-1, Rules 403 and 404(b). *State v Weathers* (1994) 339 NC 441, 451 SE2d 266.

The trial court did not err in a first-degree murder prosecution involving poisoning by allowing the State to introduce testimony from a registered nurse who had cared for the victim during his final illness concerning medical techniques and medical equipment used to treat the victim. Although defendant contended that the sole purpose of the testimony was to generate sympathy for the victim's family, the testimony was probative to show that defendant had access to the victim in the hospital, that a correlation existed between defendant's feeding the victim and the onset of his symptoms, that the victim manifested symptoms associated with multiple system failure incident to arsenic poisoning, that the victim could swallow food notwithstanding the tubes, that arsenic could have been introduced into the victim's body via the feeding tubes, and that the victim suffered inordinate pain over an extended period of time. The probative value of the testimony outweighed any unfair prejudice to defendant; furthermore, the record discloses that similar evidence from other witnesses was admitted without objection. *State v Moore* (1994) 335 NC 567, 440 SE2d 797.

There was no prejudicial error in a noncapital prosecution for first-degree murder, armed robbery, first-degree burglary, and second-degree arson where defendant's teacher testified on direct examination that there was an odor of feces about defendant in the classroom two days after the crime and that she thought he had had a bowel movement, which he did when under stress, and testified on cross-examination that this had happened to defendant fifteen or twenty a times in the past. The testimony had little probative value but did not have a tendency to prejudice defendant. *State v Beamer* (1994) 339 NC 477, 451 SE2d 190.

Footnotes

Footnote 55. FRE Rule 403, generally discussed in §§ 324 et seq.

Footnote 56. *Veranda Beach Club Ltd. Partnership v Western Surety Co.* (CA1 Mass) 936 F2d 1364, 33 Fed Rules Evid Serv 809, 20 FR Serv 3d 409; *United States v Williams* (CA2 NY) 596 F2d 44, 4 Fed Rules Evid Serv 57, cert den 442 US 946, 61 L Ed 2d 317, 99 S Ct 2893; *United States v Herman* (CA3 Pa) 589 F2d 1191, 3 Fed Rules Evid Serv 1605, cert den 441 US 913, 60 L Ed 2d 386, 99 S Ct 2014; *Carson v Polley* (CA5 Tex) 689 F2d 562, 11 Fed Rules Evid Serv 1259, 35 FR Serv 2d 152, 64 ALR Fed 613; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300; *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800; *State v Richardson* (Iowa App) 400 NW2d 70.

Statements by a coconspirator relating to discussions about murders by members of racketeering enterprise and a decision to commit murder may not be admitted under Rule 403 where no evidence linked defendant to those acts; under these circumstances, prejudicial value outweighs probative value. *United States v Flynn* (CA8 Mo) 852 F2d 1045, 26 Fed Rules Evid Serv 797, cert den 488 US 974, 102 L Ed 2d 546, 109 S Ct 511 and (disapproved on other grounds by *NOW v Scheidler* (US) 127 L Ed 2d 99, 94 CDOS 472, 94 Daily Journal DAR 810).

Forms: Motion–To exclude evidence of prior conviction–Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Footnote 57. *United States v Nadler* (CA9 Cal) 698 F2d 995, 12 Fed Rules Evid Serv 908.

Footnote 58. *United States v Padilla* (CA8 Mo) 869 F2d 372, cert den 492 US 909, 106 L Ed 2d 572, 109 S Ct 3223, post-conviction proceeding (CA8 Mo) 942 F2d 498 (in prosecution for distribution of cocaine, while it was proper to admit testimony indicating that defendant drove through Georgia to deliver two bales of marijuana insofar as testimony indicated that defendant was in business of selling illegal drugs, evidence that marijuana was sold to Ku Klux Klan, created real danger of prejudicing jury with no countervailing probative value and should have been suppressed under Rule 403).

In a suit arising from injuries sustained while working as a sand blaster on an offshore drilling platform, the court properly excluded an arrest record which noted plaintiff's weight as substantially less than what he claimed he weighed at the time of the accident, for purposes of challenging the contention that plaintiff lost weight after the accident; unfair prejudice which contents of arrest record would have produced substantially outweighed probative value. *Williams v Chevron U.S.A., Inc.* (CA5 La) 875 F2d 501, 28 Fed Rules Evid Serv 296.

In a prosecution for possession of cocaine, cross-examination of the accused concerning a recent prior felony conviction for possession of marijuana exceeded permissible scope and constituted prejudicial error where the effect of the prosecutor's questions was to affirmatively invite the jury to infer that the accused was more likely to have committed the cocaine offense. *United States v Harding* (CA7 Ind) 525 F2d 84.

But see *State v Brown*, 111 Wash 2d 124, 761 P2d 588, op replaced 113 Wash 2d 520, 782 P2d 1013, 80 ALR4th 989, clarified, on reconsideration (Wash) 787 P2d 906, stating that convictions which involve dishonesty or false statement are admissible regardless of the severity of the punishment imposed, and that the trial court is not

required to engage in balancing their probative value against prejudicial effect.

Footnote 59. *United States v Day*, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 60. *Straight v State* (Fla) 397 So 2d 903, cert den 454 US 1022, 70 L Ed 2d 418, 102 S Ct 556, reh den 454 US 1165, 71 L Ed 2d 323, 102 S Ct 1043, later proceeding (Fla) 422 So 2d 827, stay den (Fla) 491 So 2d 281 and later proceeding, stay den (Fla) 488 So 2d 530, 11 FLW 227, cert den 476 US 1130, 90 L Ed 2d 683, 106 S Ct 2003 and habeas corpus proceeding (CA11 Fla) 772 F2d 674, reh den, en banc (CA11 Fla) 776 F2d 1057 and cert den 475 US 1099, 89 L Ed 2d 903, 106 S Ct 1502 and (criticized on other grounds by *Hargrave v Dugger* (CA11 Fla) 832 F2d 1528).

Footnote 61. *United States v Moore*, 235 US App DC 381, 732 F2d 983, 15 Fed Rules Evid Serv 1151.

Footnote 62. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 (not followed on other grounds by *Kemp v State* (Tex Crim) 846 SW2d 289).

See *United States v Manso-Portes* (CA7 Ill) 867 F2d 422, 27 Fed Rules Evid Serv 956, post-conviction proceeding (ND Ill) 1992 US Dist LEXIS 5507, later proceeding (CA7) 1992 US App LEXIS 30807, where defendant argued that other acts were irrelevant and that an objection based on prejudice was "implicitly included" in the test for admissibility set out in FRE Rule 404(b); reading *Huddleston* as rejecting any suggestion that a trial court must conclude that other acts are prejudicial unless it concludes that defendant committed them, court concluded that the balancing test of FRE Rule 403 has not been "subsumed into" the admissibility test, so that the plain error standard applies when defendant claims prejudice on appeal but failed to make an argument at trial under FRE Rule 403.

As to the proof of other acts required as a foundation for admitting evidence of them, see § 417.

Footnote 63. *People v Blanchard* (2d Dept) 83 App Div 2d 905, 442 NYS2d 140.

Footnote 64. *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

Footnote 65. *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847; *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

Footnote 66. *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847; *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800 (trial judge did not abuse his discretion in admitting evidence of extrinsic offense committed 15 months after charged offense).

Footnote 67. *United States v Colon* (CA2 NY) 880 F2d 650, 28 Fed Rules Evid Serv 800; *United States v McMahon* (CA5 Tex) 592 F2d 871, 4 Fed Rules Evid Serv 526, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

Footnote 68. *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65.

Footnote 69. *United States v Manso-Portes* (CA7 Ill) 867 F2d 422, 27 Fed Rules Evid Serv 956, post-conviction proceeding (ND Ill) 1992 US Dist LEXIS 5507, later proceeding (CA7) 1992 US App LEXIS 30807.

§ 420 --Effect of offer to stipulate

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, a trial court is not required to accept an offer to stipulate as to evidence of other crimes, wrongs, or acts sought to be admitted under FRE Rule 404(b), since such a stipulation can rob the evidence of much of its fair and legitimate weight. 70

However, this principle is subject to the provision 71 that where the probative value of relevant evidence is substantially outweighed by its potential for unfair prejudice it should be excluded, so that exclusion may be ordered after a stipulation by the opponent. 72

Where a prior conviction is part of an offense and the defendant offers to stipulate to the prior conviction, it may constitute an abuse of discretion to allow the nature of the offense to be admitted. 73

§ 420 --Effect of offer to stipulate [SUPPLEMENT]

Practice Aids: Stipulations by the defense to remove other act evidence, 9 Criminal Justice 4:35 (1995).

Footnotes

Footnote 70. *United States v Grassi* (CA5 Fla) 602 F2d 1192, 4 Fed Rules Evid Serv 992, reh den (CA5 Fla) 606 F2d 321 and vacated on other grounds 448 US 902, 65 L Ed 2d 1131, 100 S Ct 3041, on remand (CA5 Fla) 626 F2d 444, cert den 450 US 956, 67 L Ed 2d 381, 101 S Ct 1415.

The court did not abuse its discretion in admitting government evidence that defendant was the occupant of a motor home stopped by police in Oregon and that defendant fled the scene, turning to fire at a state trooper, where defendant offered to stipulate to his presence in Oregon and to fact that he was in flight but did not indicate willingness to stipulate to any details of flight, such a stipulation being one which would deny the government most of the probative value of the admissible flight evidence as tending to show consciousness of guilt of murders. *United States v Peltier* (CA8 ND) 585 F2d 314, 3 Fed Rules Evid Serv 45, cert den 440 US 945, 59 L Ed 2d 634, 99 S Ct 1422, later proceeding (DC ND) 553 F Supp 886, post-conviction proceeding (DC ND) 553 F Supp 890, affd in part and remanded in part on other grounds (CA8 ND) 731 F2d 550, on

remand (DC ND) 609 F Supp 1143, affd (CA8 ND) 800 F2d 772, 21 Fed Rules Evid Serv 1017, cert den 484 US 822, 98 L Ed 2d 46, 108 S Ct 84, post-conviction proceeding, motion gr (DC Kan) 1991 US Dist LEXIS 2644, affd (CA8 SD) 997 F2d 461, reh, en banc, den (CA8) 1993 US App LEXIS 20526.

Footnote 71. FRE Rule 403, generally discussed in §§ 324 et seq.

Footnote 72. *Silva v Showcase Cinemas Concessions, Inc.* (CA1 RI) 736 F2d 810, 15 Fed Rules Evid Serv 1827, cert den 469 US 883, 83 L Ed 2d 189, 105 S Ct 251 (court properly excluded evidence, in negligence action brought against movie theater by parents of theater patron who was stabbed and killed in theater's parking lot, that patron's assailant was convicted of manslaughter, notwithstanding theater's contention that evidence was relevant to issue of foreseeability, where plaintiffs offered to stipulate that stabbing was criminal act); *United States v Spletzer* (CA5 Tex) 535 F2d 950, 2 Fed Rules Evid Serv 218 (defendant's stipulation to prior conviction renders admission of evidence regarding conviction unfairly prejudicial in trial for completely different offense); *Rocky Mountain Helicopters, Inc. v Bell Helicopters Textron, Div. of Textron, Inc.* (CA10 Utah) 805 F2d 907, 22 Fed Rules Evid Serv 86 (in suit against manufacturer arising out of helicopter accident, evidence that pilot had propensity for carrying heavy loads properly excluded since parties had agreed to such fact and further testimony on matter would be irrelevant and possibly prejudicial under FRE Rule 403); *United States v Lowe* (CA10 NM) 569 F2d 1113, cert den 435 US 932, 55 L Ed 2d 529, 98 S Ct 1507; *United States v O'Shea* (CA11 Ga) 724 F2d 1514, 14 Fed Rules Evid Serv 1548.

Practice References Hunter, *Federal Trial Handbook* 2d §§ 32.1 et seq.

Footnote 73. *United States v O'Shea* (CA11 Ga) 724 F2d 1514, 14 Fed Rules Evid Serv 1548 (no abuse of discretion in instant case, where court admitted evidence that defendant was convicted murderer after counsel for codefendant indicated that defendant's past conviction probably would be introduced into evidence as part of her client's case and also requested that certain conditions on scope of stipulation be imposed, and after government's attorney noted that government planned to call as witnesses several of defendant's associates and that it was likely that defendant's past conviction ultimately would be revealed).

§ 421 Similarity between charged offense and other crimes, wrongs, or acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although it has been held that evidence of other crimes, wrongs, or acts must be substantially similar to the offenses charged before it is admissible, ⁷⁴ the more generally applicable rule appears to be that evidence of other crimes, wrongs, or acts must involve crimes, wrongs, or acts similar to the offense charged only if similarity is the basis for the relevance of the evidence in question, but that no such similarity is required where the evidence of other crimes, wrongs, or acts is otherwise relevant. ⁷⁵ Thus, whether evidence of other acts must be similar to the charged offense to be

admissible is often held to depend upon the purpose for which the evidence is offered. 76

When evidence of prior misconduct is required to be substantially similar, it is generally required that it be near in time to the offense charged. 77 But there is no requirement that such other acts and the charged offense be virtually identical; 78 it is sufficient that such acts be similar enough and close enough in time to be relevant, 79 and have more probative value than prejudicial impact. 80

**§ 421 ----Similarity between charged offense and other crimes, wrongs, or acts
[SUPPLEMENT]**

Rules:

As to rules allowing evidence of prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413-415), added by Congress in 1994:, see § 404.

Case authorities:

Evidence of defendant's seven-year-old conviction for obstruction of justice was admissible since it was very similar to conduct charged, with differences that could be explained to jury, and remoteness did not appreciably lessen its overall probative value. *United States v Frankhauser* (1996, CA1 Mass) 80 F3d 641.

Testimony of witness concerning separate marijuana trafficking deals with defendant related conduct by defendant that was very similar to allegations of trafficking scheme underlying case and properly admitted. *United States v Gonzalez* (1996, CA5 Tex) 74 F3d 620, op withdrawn, substituted op, remanded (1996, CA5 Tex) 76 F3d 1339.

In prosecution for sexual offenses involving two step-daughters, admission of evidence of similar offenses committed with daughter 7 to 9 years before was not abuse of discretion where testimony demonstrated defendant's unnatural sexual passion for his female children, who were young, vulnerable, and subject to his authority. *Register v State* (1993, Ala App) 640 So 2d 3, affd (Ala) 640 So 2d 12.

In prosecution for child sexual abuse, evidence of uncharged acts by defendant that occurred as much as 10 years prior to charged acts was admissible, since conduct was similar, in that it involved defendant's touching victims' breasts and genitalia while victims were close to defendant. *State v McAnulty* (1995, App) 184 Ariz 399, 909 P2d 466, 199 Ariz Adv Rep 30.

In prosecution for rape of daughter-in-law, trial court properly admitted evidence of similar transaction involving rape of defendant's daughter, where daughter's testimony was restricted to explaining why she failed to report rape. *Painter v State* (1995) 219 Ga App 290, 465 SE2d 290, 95 Fulton County D R 3926.

In prosecution for two counts of sexual assault on a child, based on assaults committed against same child during two different time periods, trial court properly permitted evidence originally admitted as direct evidence on count one to stand as similar-transactions evidence in support of count two after prosecution dismissed count one and elected to proceed only on count two. *Cordova v People* (1994, Colo) 880 P2d 1216.

Trial court in murder prosecution properly admitted evidence that defendant had committed second homicide after charged offense, where both homicides arose from defendant's drug dealing and occurred less than one month apart, since evidence of proximate subsequent offenses is admissible to show plan, intent, or motive. *Malcolm v State* (1993) 263 Ga 369, 434 SE2d 479, 93 Fulton County D R 3395.

State did not meet threshold requirement for admission of evidence of prior robbery by failing to show that offenses were substantially similar or that defendant was perpetrator of prior offense but erroneous admission did not require reversal, where there was overwhelming evidence of defendant's guilt of offense charged, including eyewitness testimony of 15-year acquaintance and defendant's voluntary confession. *Dixon v State* (1994) 214 Ga App 374, 448 SE2d 40, 94 Fulton County D R 2838.

In prosecution for child molestation and aggravated sodomy involving defendant's 8-year-old stepdaughter, trial court properly admitted evidence of defendant's prior statutory rape offense in which defendant had confessed that he and two others had engaged in sexual intercourse with 13-year-old girl, where there was logical connection between prior statutory rape and charged offenses in light of defendant's statement that 8-year-old victim had consented to sex acts and that she was "a hot little girl to be only 8 years old." *Hamm v State* (1994) 214 Ga App 705, 448 SE2d 773.

In prosecution for child molestation of 13-year-old adopted daughter, trial court properly allowed prosecutor to introduce similar transaction evidence which consisted of victim's account of acts involving defendant's rubbing his penis against victim's vagina and placing his mouth on her breasts—which took place 2 weeks before first incident charged in indictment—where state filed written notice of intent to introduce evidence more than 10 days prior to trial and, prior to jury selection, prosecutor presented summary of similar transaction evidence. *Gilstrap v State* (1994) 215 Ga App 180, 450 SE2d 436, 94 Fulton County D R 3629.

In prosecution for sexual intercourse with 15-year-old girl without consent, defendant was entitled to new trial based on fact that other-crimes evidence admitted at trial was not sufficiently similar to charged offense, where crime of supplying alcohol to underage girls and prior acts enticing two girls to pose naked for photographs did not tend to prove whether girl in this case consented to sexual intercourse. *State v Garn* (1994) 264 Mont 296, 871 P2d 878.

In a prosecution of defendant for assault which occurred when defendants allegedly threw a brick from their car into the victims' car, the trial court did not err in admitting the testimony of one of defendant's passengers that defendant had allegedly committed a prior bad act by throwing a bottle into another vehicle earlier in the evening, since the incident was similar in means and execution and occurred the same evening as the brick throwing incident. *State v Poe* (1995) 119 NC App 266, 458 SE2d 242, stay gr 340 NC 571, 459 SE2d 515, petition den (NC) 1995 NC LEXIS 522.

Trial court in rape prosecution properly admitted evidence of defendant's prior uncharged sexual assaults of his niece, occurring since she was 10 years old, where prior assaults occurred under similar circumstances and were clearly of same type and, thus, were admissible as part of history of event on trial or part of natural development of facts. *Commonwealth v Stansbury* (1994, Pa Super) 640 A2d 1368, digest op at (Pa Super) 17 PLW 324.

In prosecution for sexual misconduct with 8-year-old granddaughter, testimony of two other girls that defendant sexually abused them was admissible, where all three girls were approximately same age at time of alleged abuse, each was subjected to requests both for performance of cunnilingus and fellatio, all of alleged activities took place in defendant's house or vehicle, and in each instance, defendant took advantage of his relationship with victim for his sexual gratification. *State v Blanton* (1994, SC App) 446 SE2d 438, op withdrawn, substituted op, reh den (SC App) 1994 SC App LEXIS 95 and substituted op (SC App) 1994 SC App LEXIS 94.

Trial court in multiple capital murder prosecution properly exercised its discretion to exclude proffered evidence of other similar assaults in same area, in which young women were assaulted in ground-floor apartments, where defendant had no alibi for one event and other crimes were insufficiently similar to charged crimes to support inference that someone other than defendant had committed all crimes. *State v Russell* (1994, Wash) 882 P2d 747, petition for certiorari filed (Feb 9, 1995).

Footnotes

Footnote 74. *United States v Bloom* (CA5 Tex) 538 F2d 704, 2 Fed Rules Evid Serv 226, cert den 429 US 1074, 50 L Ed 2d 792, 97 S Ct 814; *United States v Jerkins* (CA6 Mich) 871 F2d 598, 89-2 USTC ¶ 9572, 27 Fed Rules Evid Serv 1226, 64 AFTR 2d 89-5157 (failure to file return and evasion of taxes are substantially similar); *United States v McFadyen-Snider* (CA6 Tenn) 552 F2d 1178, 1 Fed Rules Evid Serv 939; *United States v Bledsoe* (CA8 Ark) 531 F2d 888, 1 Fed Rules Evid Serv 1115.

Evidence of tape-recorded conversation indicating that defendant was wholesale drug dealer was inadmissible in prosecution for selling narcotics to undercover agents on street since drug dealings were dissimilar. *United States v Wright* (CA7 Ill) 901 F2d 68, 30 Fed Rules Evid Serv 99.

Evidence of defendant's prior marijuana use was irrelevant to show that purchase for which he was indicted was not for his personal use since type of marijuana was different. *United States v Binkley* (CA7 Ill) 903 F2d 1130, 30 Fed Rules Evid Serv 543.

The court must look behind the label describing the kind of similarity or relation between the uncharged offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the uncharged offense and the charged offense is reasonably strong; if the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded. *People v Scott* (1st Dist) 113 Cal App 3d 190, 169 Cal Rptr 669.

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Footnote 75. *United States v Czarnecki* (CA6 Mich) 552 F2d 698, 1 Fed Rules Evid Serv 1348, 41 ALR Fed 487, cert den 431 US 939, 53 L Ed 2d 257, 97 S Ct 2652; *United States v Connelly* (CA7 Ill) 874 F2d 412, 27 Fed Rules Evid Serv 1442; *United States v*

Hearst (CA9 Cal) 563 F2d 1331, 2 Fed Rules Evid Serv 1149, reh den (CA9 Cal) 573 F2d 579 and cert den 435 US 1000, 56 L Ed 2d 90, 98 S Ct 1656 and (criticized on other grounds by United States v Melanson (CA1 Mass) 691 F2d 579) and (criticized on other grounds by United States v Dominguez-Mestas (CA9 Cal) 929 F2d 1379, 91 CDOS 770, 91 Daily Journal DAR 1193).

Evidence of defendant's prior marijuana transactions was admissible in an income tax evasion case as directly relating to the question of defendant's likely sources of taxable income, which was an element of the government's case. United States v Blandina (CA7 Ind) 895 F2d 293, 89-2 USTC ¶ 9478, 71a AFTR 2d 93-3218, 29 Fed Rules Evid Serv 536.

Footnote 76. §§ 422 et seq.

Footnote 77. United States v Largent (CA6 Mich) 545 F2d 1039, 1 Fed Rules Evid Serv 1239, cert den 429 US 1098, 51 L Ed 2d 546, 97 S Ct 1117.

Generally, as to nearness or remoteness of similar act, see § 416.

Footnote 78. United States v Trevino (CA5 Tex) 565 F2d 1317, 2 Fed Rules Evid Serv 897, cert den 435 US 971, 56 L Ed 2d 63, 98 S Ct 1613; United States v McPartlin (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65.

Footnote 79. United States v McPartlin (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65.

Footnote 80. United States v Largent (CA6 Mich) 545 F2d 1039, 1 Fed Rules Evid Serv 1239, cert den 429 US 1098, 51 L Ed 2d 546, 97 S Ct 1117.

§ 422 --To prove substantive element of charged offense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To prove a substantive element of the offense charged, evidence of other crimes, wrongs, or acts is admissible without regard to its similarity to the offense, 81 except where the evidence of other acts, wrongs, or crimes relates to a substantive count by establishing a required mental ingredient of the offense, 82 such as intent. 83

§ 422 --To prove substantive element of charged offense [SUPPLEMENT]

Case authorities:

Evidence of defendant's subsequent arrest for transporting large quantity of marijuana was properly admitted since it was similar to charged offense which involved

arrangements between defendant and others to transport large quantities of marijuana, manner in which marijuana was packaged was similar, and although defendant was driver in subsequent act, he arranged for transportation of marijuana on his employer's trucks in charged offense. *United States v Olivo* (1996, CA10 Okla) 80 F3d 1466.

Evidence that defendant, who was charged with attempting to sexually molest his 13-year-old niece, had raped 19-year-old woman 18 years ago under vastly different circumstances was inadmissible. *State v Salazar* (1994, Ariz App) 887 P2d 617, 173 Ariz Adv Rep 3.

Evidence that defendant shot two people while hiding from authorities in another state following murder for which defendant was being tried was admissible, since shootings were part of sequence of events starting with charged murder. *Commonwealth v Gooding* (1994, Pa Super) 649 A2d 722.

Footnotes

Footnote 81. *United States v De Vincent* (CA1 Mass) 546 F2d 452, 1 Fed Rules Evid Serv 1237, cert den 431 US 903, 52 L Ed 2d 387, 97 S Ct 1694, post-conviction proceeding (DC Mass) 461 F Supp 1181, revd on other grounds (CA1 Mass) 602 F2d 1006, appeal after remand (CA1 Mass) 632 F2d 145, cert den 449 US 1038, 66 L Ed 2d 501, 101 S Ct 618.

In an action by purchaser against seller for breach of warranty of merchantability, evidence of product failures involving manufacturer's materials sold by others should have been admitted as similar occurrence evidence to prove purchaser's claim of latent manufacturing defects which made the material unmerchantable. *Davidson Oil Country Supply Co. v Klockner, Inc.* (CA5 Tex) 908 F2d 1238, CCH Prod Liab Rep ¶ 12551, 30 Fed Rules Evid Serv 1230, 17 FR Serv 3d 473, 12 UCCRS2d 664, later proceeding (CA5 Tex) 908 F2d 1249 and corrected on other grounds, reh den, in part (CA5 Tex) 917 F2d 185.

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Footnote 82. *United States v Levine* (CA5 Fla) 546 F2d 658, 2 Media L R 1971, 2 Fed Rules Evid Serv 655, reh den (CA5 Fla) 551 F2d 687 and (disapproved on other grounds by *United States v Lane*, 474 US 438, 88 L Ed 2d 814, 106 S Ct 725, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507.

Footnote 83. § 424.

§ 423 --To show identity or modus operandi

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When evidence of defendant's other crimes, acts, or wrongs is offered to identify the defendant as the perpetrator of the charged offense through a demonstration that both this offense and the "other crimes" show the "modus operandi," "handiwork," or "signature" of the defendant, evidence of such "other crimes" must bear a high degree of similarity to the charged offense, 84 or to an event so closely related to the charged offense that the similarity between such evidence and the related event serves to identify the defendant as the person who committed the charged offense. 85

To show a unique design or plan that would help indirectly to establish that the defendant committed the crime charged, the extrinsic acts must have borne a singularly strong resemblance to the pattern of the offense charged; only when the other acts share truly distinctive features with the crime with which the defendant is charged can they support the inference that the defendant probably committed the crime. 86 The defendant cannot be identified as the perpetrator of the charged act simply because he has at other times committed the same commonplace variety of criminal act. 87 However, to be admissible under Rule 404(b) on the issue of identity, the other act need not be an exact duplicate of the act charged. The court must make a reasoned determination as to whether the characteristics relied upon are sufficiently idiosyncratic to permit an inference of pattern for purposes of proof. Where the acts are comparable in several important ways, discrepancies, though not unimportant, go to the weight of the challenged evidence and not to its admissibility. Disparities must be weighed evenhandedly against similarities, giving due measure to the number of each and to the distinctiveness of the attributes. Generally, where evidence of other acts is admitted, the comparison involves the conjunction of several identifying characteristics with the presence of some highly distinctive quality. The more distinctive the identifiers, the fewer of them need be present to demonstrate the requisite signature. 88

§ 423 --To show identity or modus operandi [SUPPLEMENT]

Case authorities:

Admission of evidence of defendant's prior armed robbery conviction as similar transaction was not error, where although defendant argued that there was not sufficient similarity between earlier offense and offenses presently at issue, in both cases two or more people were involved in planning of armed robberies, perpetrators in both cases were similarly dressed and in both cases threatened managers of small grocery stores with guns, both armed robberies occurred in early morning hours, and while some differences between two armed robberies existed, there was no requirement that armed robberies be identical in every aspect. *Murphy v State* (1994) 212 Ga App 153, 442 SE2d 2, 94 Fulton County D R 452, reconsideration dismd (Feb 23, 1994).

In prosecution for child molestation of 10-year-old girl, trial court properly admitted prior conviction for sodomy involving 16-year-old male victim, where male victim was mentally impaired, and functioned at mental age of five to seven. *Tidwell v State* (1995) 219 Ga App 233, 464 SE2d 834, 95 Fulton County D R 3558.

The prosecutor's argument to the jury in a prosecution for the murder of a child, "Now, who acts with malice, who bends arms, who hits, who chokes, who acts with malice?"

There he sits," was not an improper misstatement of law that jurors could infer defendant's identity as the perpetrator from his malicious character but was a proper reference to the fact that the jury could consider evidence of defendant's prior acts on the issue of identity. *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

Evidence of defendant's participation in a robbery an hour before the robbery and two murders for which defendant was on trial was admissible under Rule 404(b) to show defendant's identity as a perpetrator of the murders where, in both the prior robbery and the crimes against the murder victims, there were at least two individuals involved who incapacitated the victims by pulling their clothing down around their elbows and hands, and at least one person was robbed during both events. The evidence tended to show that defendant punched the prior robbery victim in the face and that the male murder victim had "areas of abrasion and bruising on his face"; and the similar acts and close proximity in time thus tend to indicate that the same person was involved in both the prior robbery and the murders. Furthermore, the probative value of defendant's involvement in the prior robbery outweighs any potential for unfair prejudice. GS § 8C-1, Rules 404(b), 403. *State v Goode* (1995) 341 NC 513, 461 SE2d 631.

Footnotes

Footnote 84. *United States v Foutz* (CA4 Md) 540 F2d 733; *United States v Myers* (CA5 Fla) 550 F2d 1036, 1 Fed Rules Evid Serv 1389, 42 ALR Fed 855, appeal after remand (CA5 Fla) 572 F2d 506, cert den 439 US 847, 58 L Ed 2d 149, 99 S Ct 147; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300; *Hirst v Gertzen* (CA9 Mont) 676 F2d 1252, 10 Fed Rules Evid Serv 1506 (disapproved on other grounds by *Daniels v Williams*, 474 US 327, 58 L Ed 2d 662, 106 S Ct 662) as stated in *Escamilla v Santa Ana* (CA9 Cal) 796 F2d 266 and (criticized on other grounds by *Committee of United States Citizens Living in Nicaragua v Reagan* (App DC) 859 F2d 929).

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Practice References Hunter, *Federal Trial Handbook* 2d § 37.7.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 85. *United States v Dansker* (CA3 NJ) 537 F2d 40, 2 Fed Rules Evid Serv 577, cert den 429 US 1038, 50 L Ed 2d 748, 97 S Ct 732 and appeal after remand (CA3 NJ) 561 F2d 485 and appeal after remand (CA3 NJ) 565 F2d 1262, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905 (testimony that defendants had embezzled large sums of money from corporation of which they were officers was admissible as helping establish defendants' modus operandi in alleged bribery to obtain zoning variance, because according to the witness defendants were to raise funds necessary for one of bribes

through this same device); *United States v Koessel* (CA8 Mo) 706 F2d 271, 13 Fed Rules Evid Serv 787 (evidence of prior conviction for possession of cocaine admissible in trial for possession with intent to distribute to show similarity of operation).

Footnote 86. *United States v Shackleford* (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Manganelis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

Evidence of an aggravated robbery committed by defendant almost eight years prior to the instant offense was properly admitted for the purpose of establishing identity and modus operandi in a prosecution for murder and assault in connection with an armed robbery where both robberies were committed by two gunmen at the same time of day in the same area of the city, and where similar threats were made to the victims. *State v Norris* (Minn) 428 NW2d 61.

Footnote 87. *United States v Shackleford* (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Manganelis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

The fact that all three stores that defendant was charged with robbing were similar did not make evidence concerning all robberies admissible where the method used was not unique. *State v Hernandez*, 58 Wash App 793, 794 P2d 1327, review pending (Wash) 807 P2d 883 and (disapproved on other grounds by *State v Kjorsvik*, 117 Wash 2d 93, 812 P2d 86) and review den 117 Wash 2d 1011, 816 P2d 1223.

Footnote 88. *United States v Ingraham* (CA1 Me) 832 F2d 229, 24 Fed Rules Evid Serv 259, cert den 486 US 1009, 100 L Ed 2d 202, 108 S Ct 1738 (evidence of previous threatening letters written by defendant admissible in prosecution for making threatening telephone call in interstate commerce).

§ 424 --To show intent or absence of mistake or accident, or to rebut entrapment or duress defense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, similarity between the evidence of other acts sought to be admitted and the charged offense is required when evidence is offered to prove absence of mistake or accident⁸⁹ or intent.⁹⁰ Similarly, evidence of prior crimes to rebut a defense of entrapment is not relevant unless it tends to prove that the defendant was engaged in illegal operations in some way similar to those charged in the indictment.⁹¹

When admitted for the purpose of showing intent, prior acts need not be duplicates of the charged crime but must be sufficiently similar to support an inference of criminal intent.⁹² The fact that a prior or subsequent similar act sought to be admitted involves the

purchase of drugs rather than a sale of drugs as charged in the instant case does not make the evidence inadmissible where the announced reason for the purchase was to sell the drugs subsequently, and therefore both transactions in essence involve distribution. Furthermore, the fact that the drug involved in the other act has a legitimate medical use while that involved in the instant case has no such use does not affect admissibility where both transactions are patently illegal; the relevant factor is the type of activity undertaken, not the identity of the drugs. 93

Where the defense is that the defendant acted under duress, the relevance of the evidence does not necessarily depend upon the similarity of the other acts or crimes but rather on the circumstances surrounding the occurrence of the other crimes, and in this situation, similarity of the other acts or crimes may therefore not be a requirement. 94

§ 424 --To show intent or absence of mistake or accident, or to rebut entrapment or duress defense [SUPPLEMENT]

Case authorities:

Evidence of cocaine possession defendant's prior arrest for cocaine possession was improperly admitted since it established nothing more than fact of arrest which, standing alone, does not establish conduct that sheds any light on defendant's intent or absence of mistake with respect to offense charged. *United States v McCarthur* (1993, CA7 Ill) 6 F3d 1270.

Defendant's prior sale of crack cocaine to undercover agent was admissible to refute defendant's claim that he thought he was only delivering car and did not know that container in it contained crack. *United States v Rackstraw* (1993, CA10 Colo) 7 F3d 1476.

Footnotes

Footnote 89. *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300; *Melvin v State* (Okla Crim) 706 P2d 163, cert den 475 US 1027, 89 L Ed 2d 335, 106 S Ct 1225.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Practice References Hunter, *Federal Trial Handbook* 2d § 37.6.

Footnote 90. *United States v Viruet* (CA2 NY) 539 F2d 295, 1 Fed Rules Evid Serv 299; *United States v Russo* (CA11 Fla) 717 F2d 545, 14 Fed Rules Evid Serv 585, reh den (CA11 Fla) 720 F2d 1294 and reh den (CA11 Fla) 720 F2d 1294 and (criticized on other grounds by *United States v Jenkins* (CA8 SD) 7 F3d 803, 38 Fed Rules Evid Serv 1).

Footnote 91. *United States v Parrish* (CA5 La) 736 F2d 152, 15 Fed Rules Evid Serv

1834; United States v Blankenship (CA6 Ohio) 775 F2d 735, 19 Fed Rules Evid Serv 63 (evidence of defendant's earlier thefts of property and his proposal for burglarizing houses not admissible in prosecution for firearms offenses); United States v Moschiano (CA7 Ill) 695 F2d 236, 12 Fed Rules Evid Serv 124, cert den 464 US 831, 78 L Ed 2d 111, 104 S Ct 110; United States v Lego (CA8 Minn) 855 F2d 542, 26 Fed Rules Evid Serv 624; United States v Segovia (CA9 Ariz) 576 F2d 251, 3 Fed Rules Evid Serv 401.

Narcotics defendant's statements to government informer regarding his previous drug arrest and possession were properly admitted in rebuttal of his entrapment defense since they indicated that he held himself out to be an experienced drug dealer and demonstrated that he wanted to engage in an illegal transaction. United States v Ventura (CA11 Fla) 936 F2d 1228, 33 Fed Rules Evid Serv 875.

Annotation: Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 ALR3d 293.

Practice References Evidence in rebuttal of claim of entrapment. 12 Am Jur POF2d 237, Entrapment to Commit Narcotics Offense § 8.

Footnote 92. United States v Burkett (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802.

Evidence of prior acceptance of bribes and payoffs relating to bootlegging was sufficiently similar to acceptance of protection money for drug dealing to support inference of criminal intent. United States v Benton (CA6 Ky) 852 F2d 1456, 26 Fed Rules Evid Serv 502, cert den 488 US 993, 102 L Ed 2d 582, 109 S Ct 555 and (among conflicting authorities noted in United States v Lyles (CA4 NC) 1993 US App LEXIS 14259) and (among conflicting authorities noted in United States v Thomas (CA11 Ga) 8 F3d 1552, 7 FLW Fed C 1000).

Footnote 93. United States v Moschiano (CA7 Ill) 695 F2d 236, 12 Fed Rules Evid Serv 124, cert den 464 US 831, 78 L Ed 2d 111, 104 S Ct 110.

See United States v Ono (CA9 Cal) 918 F2d 1462, 90 CDOS 8472, 31 Fed Rules Evid Serv 1146, appeal after remand (CA9 Cal) 997 F2d 647, 93 CDOS 5038, 93 Daily Journal DAR 8543, cert den (US) 126 L Ed 2d 701, 114 S Ct 738 (to prove intent and knowledge, in prosecution for making drugs, court properly admitted prior conviction for possession with intent to distribute; while use-related offenses may be too unlike sale-related offenses to prove intent, distributing and making controlled substances are "essentially commercial" activities that may differ "in their particulars" while being "part of the same illegal commercial enterprise" in which quest for profit is the "common denominator").

Footnote 94. United States v Hearst (CA9 Cal) 563 F2d 1331, 2 Fed Rules Evid Serv 1149, reh den (CA9 Cal) 573 F2d 579 and cert den 435 US 1000, 56 L Ed 2d 90, 98 S Ct 1656 (evidence of defendant's participation in subsequent criminal activity at sporting good store and with kidnapping and theft admissible on issue whether defendant participated in charged bank robbery under duress).

§ 425 --To show motive, knowledge, preparation, context, or background

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To prove motive, evidence of a defendant's other crimes, wrongs, or acts may not have to be similar to the offense with which the accused is charged in order to be admissible. 95 If the purpose of the evidence is to show that the defendant's prior criminal conduct provided knowledge or preparation, it may be necessary that the prior conduct be similar to the offense charged. 96 To show the background, res gestae, or context of the case, evidence of defendant's other crimes, wrongs, or acts which are not similar to the offense charged is admissible. 97

**§ 425 --To show motive, knowledge, preparation, context, or background
[SUPPLEMENT]**

Case authorities:

Evidence of corporate payments to defendant's wife and employees and their contributions to political campaign were relevant to defendant's knowledge that statements contained in tax returns were false, hence admissible; events took place within same two-day period and each payment matched exactly campaign contributions made by those involved. *United States v Owen* (1994, CA10) 15 F3d 1528.

Defendant's possession of weapons 6 days before his arrest on drugs and firearms charges was admissible to establish that he had knowledge of guns on his property on day of his arrest. *United States v Mills* (1994, CA10 Wyo) 29 F3d 545.

Footnotes

Footnote 95. *United States v Johnson* (CA2 NY) 525 F2d 999, cert den 424 US 920, 47 L Ed 2d 327, 96 S Ct 1127; *United States v Johnson* (CA5 La) 542 F2d 230, 2 Fed Rules Evid Serv 241; *United States v Byrd* (CA7 Ill) 771 F2d 215, 19 Fed Rules Evid Serv 46 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Hudson* (CA7 Wis) 884 F2d 1016, 28 Fed Rules Evid Serv 1451, reh den, en banc (CA7) 1990 US App LEXIS 1528 and cert den 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300 (similarity "may or may not be" required).

In cases where "bad acts" evidence is introduced to show defendant's motive for committing charged offense, similarity is not an appropriate requirement. *United States v Shriver* (CA7 Wis) 842 F2d 968, 25 Fed Rules Evid Serv 384.

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Practice References Hunter, Federal Trial Handbook 2d § 37.4.

Footnote 96. United States v Bailleaux (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300.

Footnote 97. United States v Dansker (CA3 NJ) 537 F2d 40, 2 Fed Rules Evid Serv 577, cert den 429 US 1038, 50 L Ed 2d 748, 97 S Ct 732 and appeal after remand (CA3 NJ) 561 F2d 485 and appeal after remand (CA3 NJ) 565 F2d 1262, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905; Carter v United States (CA8 Ark) 549 F2d 77, 1 Fed Rules Evid Serv 644 (res gestae).

§ 426 --To show opportunity, or common scheme or plan

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where the other acts or crimes sought to be admitted under FRE Rule 404(b) form part of the common scheme or plan which includes the charged offense, 98 or where evidence of "other crimes" is offered to show opportunity to commit the offense charged, 99 evidence of the defendant's "other crimes" may not have to be similar to the offense with which the accused is charged in order to be admissible.

§ 426 --To show opportunity, or common scheme or plan [SUPPLEMENT]

Case authorities:

In prosecution for conspiracy to commit armed robberies arising out of defendants' gun sales, evidence of defendant's earlier illegal gun sales to indicted persons was admissible since it showed that he had opportunity because he possessed large number of uninventoried guns that could be sold to felons without being traced or detected, and showed his common scheme to sell firearms to prohibited persons. United States v Crouch (1995, CA8 Mo) 46 F3d 871, reh den (1995, CA8 Mo) 1995 US App LEXIS 5393 and reh, en banc, den sub nom United States v Mandacina (1995, CA8) 1995 US App LEXIS 6328.

The trial court did not err in a first-degree murder prosecution involving poisoning by allowing the State to introduce testimony from a registered nurse who had cared for the victim during his final illness concerning medical techniques and medical equipment used to treat the victim. Although defendant contended that the sole purpose of the testimony was to generate sympathy for the victim's family, the testimony was probative to show that defendant had access to the victim in the hospital, that a correlation existed between defendant's feeding the victim and the onset of his symptoms, that the victim manifested symptoms associated with multiple system failure incident to arsenic poisoning, that the victim could swallow food notwithstanding the tubes, that arsenic could have been introduced into the victim's body via the feeding tubes, and that the victim suffered inordinate pain over an extended period of time. The probative value of

the testimony outweighed any unfair prejudice to defendant; furthermore, the record discloses that similar evidence from other witnesses was admitted without objection. *State v Moore* (1994) 335 NC 567, 440 SE2d 797.

In a prosecution of defendant for first- degree statutory rape of his daughter, the trial court did not err in denying defendant's motion to suppress evidence of defendant's molestation of another daughter several years earlier, since the daughter's testimony was sufficiently similar to that recounted by the victim concerning the manner of abuse to show a common plan or scheme, and remoteness in time did not make the daughter's testimony inadmissible because it was due to defendant's having almost no access to the daughters of his first marriage following his divorce. *State v Jacob* (1994) 113 NC App 605, 439 SE2d 812.

Footnotes

Footnote 98. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154.

Annotation: Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 ALR Fed 781.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Practice References Hunter, *Federal Trial Handbook* 2d § 37.8.

Footnote 99. *United States v Robinson* (CA2 NY) 560 F2d 507, 1 Fed Rules Evid Serv 752, cert den 435 US 905, 55 L Ed 2d 496, 98 S Ct 1451; *United States v Goichman* (CA3 Pa) 547 F2d 778, 77-1 USTC ¶ 9115, 1 Fed Rules Evid Serv 459, 39 AFTR 2d 77-470, later proceeding TC Memo 1987-489, PH TCM ¶ 87489, 54 CCH TCM 679; *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300 (similarity "may or may not be" required).

c. Admissibility for Particular Purposes [427-457]

(1). In General [427-434]

§ 427 Generally; focus on particular purpose

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Many cases admitting evidence under the terms of Rule 404(b) recapitulate all, or

several, of the purposes listed in the rule as the basis for such ruling, 1 and a trial court's failure specifically to identify the purpose for which evidence of prior bad acts was offered and admitted is not necessarily reversible error. 2 But the preferred method, especially in the federal courts, is for the prosecution, which bears the burden of showing how the proffered evidence is relevant to one or more issues in the case, to articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts, 3 and for the trial court to specifically identify the purpose for which such evidence is admitted, rather than merely to provide a broad statement invoking or restating Federal Rules of Evidence 404(b). 4

◆ Practice guide: A specific articulation of the relevant purpose and specific inferences to be drawn from each proffer of evidence of other acts will enable the trial court to more accurately make an informed decision and weigh the probative value of such evidence against the risks of prejudice specified in Federal Rules of Evidence 403. In addition, specific and clear reasoning and findings in the trial record will greatly aid an appellate court in its review of these evidentiary issues. 5

§ 427 ----Generally; focus on particular purpose [SUPPLEMENT]

Rules:

As to rules allowing evidence of prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413-415), added by Congress in 1994:, see § 404.

Case authorities:

Evidence that defendant had committed shootings elsewhere as to which charges were pending and had prior experience with guns as well, elicited on cross- examination and rebuttal to impeach defendant's testimony that he had no significant familiarity with guns and had never possessed any elsewhere, was properly admitted. *United States v Beverly* (1993, CA2 NY) 5 F3d 633, 38 Fed Rules Evid Serv 94.

Evidence of pushboat crew's prior convictions and instances of drug and alcohol use were properly admitted in suit arising out of collision between barges being pushed and rocks protecting natural gas pipeline to show that vessel owner was negligent in hiring crew. *Brunet v United Gas Pipeline Co.* (1994, CA5 La) 15 F3d 500.

District court did not err in refusing request for instruction limiting use of extrinsic offense evidence for purposes of impeachment since it was substantially covered in charge given which instructed jury on weighing testimony of witnesses and that defendant was not on trial for any act or conduct not alleged in indictment. *United States v Jensen* (1994, CA5 Tex) 41 F3d 946, reh, en banc, den (1995, CA5 Tex) 1995 US App LEXIS 1414.

Prosecutor was not required to give notice of his intention to use other-acts evidence to impeach defendant charged with various bribery and extortion offenses since prosecution's cross-examination questions concerning alleged FEC investigation of defendant's involvement in political candidate's campaign, alleged hiring of lawyer to pay off foreign officials, FBI investigation of alleged bankruptcy fraud, and whether defendant had skimmed money from his bankrupt restaurant and fled from Texas to

Florida were probative of defendant's character for truthfulness and permissible under Rule 608(b). *United States v Tomblin* (1994, CA5 Tex) 42 F3d 263, op withdrawn, substituted op, reh, en banc, den (1995, CA5 Tex) 46 F3d 1369.

In FDIC's lawsuit against defunct bank's fidelity bond insurer for recovery in connection with chief loan officer's fraud in connection with loan transactions, evidence of loan which officer made while president of another bank, which was used to catch up on loan for which he and another person were personally liable, was properly admitted "other acts" evidence of intent, plan, knowledge, and absence of mistake. *FDIC v Fidelity & Deposit Co.* (1995, CA5 La) 45 F3d 969, reh den (1995, CA5 La) 1995 US App LEXIS 7924.

Evidence of defendant's prior court proceedings establishing that he was aware that he no longer had title to two farms which he had lost through foreclosure, though he claimed ownership of them on his tax returns, was admissible in trial on charges of filing false tax returns since they were inextricably tied to elements of filing false tax returns, hence did not have to be analyzed as other acts evidence. *United States v Hilgeford* (1993, CA7 Ind) 7 F3d 1340.

Evidence that defendant charged with various firearms offenses possessed shotgun on numerous dates before date charged in indictment bore directly on question of his possession of gun on date charged, particularly in light of defense theory that defendant only momentarily possessed gun on that date for purpose of turning it over to police officer. *United States v Elder* (1994, CA7 Ill) 16 F3d 733.

Evidence of narcotics defendant's previous arrest and conviction for possession of cocaine was relevant to establish defendant's state of mind, which was at issue during trial. *United States v Hazelett* (1996, CA8 Mo) 80 F3d 280, reh, en banc, den (1996, CA8) 1996 US App LEXIS 15402.

Defendant's two previous convictions for battery on law enforcement officer should not have been admitted since government failed to articulate specific evidentiary purpose, but admission was harmless in light of substantial evidence of defendant's guilt of assault on federal officer and possession of firearm during violent crime. *United States v Birch* (1994, CA10 Kan) 39 F3d 1089.

Evidence that senior associate attorney fired from law firm allegedly because of difficulty in meeting deadlines and getting along with fellow employees had had similar problems in law firm in which she had been previously employed was not admissible under Rule 404 because it was admitted for purpose specifically prohibited by that rule, i.e., to prove that plaintiff acted in conformity therewith, nor was it admissible as impeachment evidence under Rule 608 since it was irrelevant to her character for truthfulness or untruthfulness, though admission was harmless since defendant law firm produced substantial evidence that her discharge was for legitimate reasons and plaintiff's evidence was insufficient to demonstrate that it was pretext for sex discrimination. *Neuren v Adduci, Mastriani, Meeks & Schill* (1995, App DC) 43 F3d 1507, 66 BNA FEP Cas 1533, 41 Fed Rules Evid Serv 1.

In prosecution for molestation of 11- year-old child, who was 15 years old at time of trial, trial court did not err in refusing to admit evidence concerning prior victimization of victim and third girl, proffered by defendant to impeach their credibility concerning his acts against them. Trial court did not abuse its discretion in ruling that evidence that

victim had been previously molested was not relevant to present molestation charge. Defendant did not show that it tended to undermine credibility, the purpose for which it was offered. Witness was not child of tender years who might be confused and base her testimony on what she learned from prior acts upon her by someone else. Probability of witness in present case confusing two events, considering her age, would be far weaker; conversely, probability of her having general knowledge of such matters, not based on prior incident, would be far greater. Thus evidence of prior molestation did not fall within exception of inadmissibility as matter of law. *Wilson v Sate* (1993) 210 Ga App 705, 436 SE2d 732, 93 Fulton County D R 3685, reconsideration den (Oct 29, 1993).

People did not improperly introduce evidence of prior uncharged crime through testimony by rape victim relating comment made by codefendant to defendant and other, telling them not to "start at it again" and that he did not want them "to start shooting again," since comment, to extent it was reference to actual gun shooting incident, was relevant on issue of forcible compulsion inasmuch as victim could have feared that defendants were armed. *People v Richardson* (1992, 2d Dept) 182 AD2d 721, 582 NYS2d 450, app gr 79 NY2d 1053, 584 NYS2d 1021, 596 NE2d 419 and affd 81 NY2d 303, 598 NYS2d 167, 614 NE2d 730.

An F.B.I. agent's testimony about the circumstances surrounding a murder committed by defendant in Alabama, and his testimony about the circumstances surrounding a kidnapping by defendant in Oregon as related to him by the victim, was relevant to sentencing defendant for two murders in this state and was properly admitted in this capital sentencing proceeding to support the prior conviction of a violent felony aggravating circumstance, notwithstanding the State had offered certified copies of court documents to establish defendant's convictions for those crimes, defendant had not presented evidence of his good character, and the testimony about the kidnapping was hearsay. *State v Rose* (1994) 339 NC 172, 451 SE2d 211.

In a murder prosecution, a witness was properly permitted to testify that the defendant attempted to rape her several hours after the murder and that he told her that she would get the same thing the murder victim got if she opened her mouth, notwithstanding that the testimony implicated the defendant in an uncharged crime, since the testimony completed the story of the murder by demonstrating the history and natural development of the facts surrounding the defendant's movements on the day of the murder. *Commonwealth v Simmons* (1995, Pa) 662 A2d 621, application gr (Pa) 1995 Pa LEXIS 1336 and petition for certiorari filed (Dec 14, 1995).

In a murder prosecution, the court properly permitted the introduction of testimony by a witness that the defendant stated that he had just gotten out of jail and was going to kill the first white man he saw since such testimony was admissible as part of the natural sequence of events which occurred shortly before the murder which formed the history of the case. *Commonwealth v Williams* (1995, Pa) 660 A2d 1316, cert den (US) 1996 US LEXIS 135.

Footnotes

Footnote 1. *United States v Percy* (CA4 Va) 765 F2d 1199, 18 Fed Rules Evid Serv 602 (knowledge, intent, and absence of accident or mistake); *United States v Derring* (CA8 Ark) 592 F2d 1003, 4 Fed Rules Evid Serv 160; *United States v Cobb* (CA8 Mo) 588

F2d 607, cert den 440 US 947, 59 L Ed 2d 636, 99 S Ct 1426; *Hawkins v Allstate Ins. Co.*, 152 Ariz 490, 733 P2d 1073, cert den 484 US 874, 98 L Ed 2d 177, 108 S Ct 212, reh den 484 US 972, 98 L Ed 2d 414, 108 S Ct 477 (motive and intent); *State v Rupp* (Minn App) 393 NW2d 496, 1986-2 CCH Trade Cases ¶ 67284 (intent, common scheme, plan, or modus operandi); *Howard v State* (Tex App Fort Worth) 713 SW2d 414, petition for discretionary review gr (Oct 14, 1987) and petition for discretionary review ref (Tex Crim) 789 SW2d 280, reh den (Tex Crim) 1990 Tex Crim App LEXIS 86 (intent and knowledge).

Forged marriage certificate, lease agreement and military discharge forms were admissible as proof of motive, intent, preparation, plan, or knowledge in trial for conspiracy to make and sell false citizenship documents. *United States v Martinez* (CA5 Tex) 894 F2d 1445, reh den, en banc (CA5 Tex) 901 F2d 1110 and cert den 498 US 942, 112 L Ed 2d 315, 111 S Ct 351.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Footnote 2. *United States v Rawle* (CA4 SC) 845 F2d 1244, 25 Fed Rules Evid Serv 689.

In prosecution for conspiracy to file false income tax returns, District Court did not err in admitting testimony relating to a tax refund scheme alleged to have occurred prior to that for which defendant was prosecuted, notwithstanding that the court did not articulate on the record the Rule 404(b) grounds it was employing, since the purpose for admitting other acts testimony was apparent from the record to explain how the conspiracy started and established identity and interest, as well as intent and motive. *United States v Orr* (CA10 Okla) 864 F2d 1505, 89-1 USTC ¶ 9220, 27 Fed Rules Evid Serv 385, 63 AFTR 2d 89-518.

Footnote 3. *United States v Hogue* (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85; *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848.

Footnote 4. *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848.

A trial court should not admit evidence of other acts under FRE 404(b) based on a general recitation of this rule, that is, on the issue of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," without specifying the purposes for which the evidence is admitted. The jury should not be left to decide what these various terms might mean in the context of the case and whether the evidence fits into any such category, since in order to accomplish this assignment properly, the jury would have to study an evidence test. *United States v Shackleford* (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

Footnote 5. *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848.

§ 428 To prove or rebut substantive issue

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of prior acts is admissible if, entirely apart from the matter of "propensity," it has a tendency to make the existence of an element of the crime charged more probable than it would be without such evidence. 6 Such evidence may also be admissible as relevant to the elements of the offense, irrespective of the analysis under Rule 404(b). 7

Evidence of other crimes, wrongs, or acts held admissible to prove an essential element of the offense charged has included—

—evidence that defendant sold narcotics to an undercover agent less than two months prior to the instant act, as probative of defendant's possession of a controlled substance with intent to distribute. 8

—evidence of cocaine paraphernalia to prove defendant's continued involvement in a conspiracy. 9

—evidence of defendant's postindictment attempt to make an illegal purchase of drugs, to prove predisposition in a prosecution for conspiracy to distribute heroin. 10

—evidence of prior convictions for distribution of narcotics in a prosecution for distribution of cocaine, even though the acts involved different drugs, since the fact that they all involved distribution made them relevant to issue of predisposition. 11

—evidence of drugs, guns, cash and other items seized outside the time frame of the conspiracy alleged in an indictment, as relevant to existence of and defendants' participation in the conspiracy charged. 12

—evidence of a motorist's intoxication, since it was highly probative of the cause of the motorist's loss of control of the vehicle, even though the case was a product liability case against an automobile manufacturer and the evidence had potential prejudicial effect. 13

—defendant's recorded statement to an undercover officer that he falsified a receipt in order to conceal his ownership and possession of a fully automatic machinegun in 1984, which had been the subject of a state court prosecution for illegally possessing a machinegun, as probative of the issue of possession of a firearm. 14

—testimony as to a defendant's income from bookmaking and chicken sales offered not to prove the defendant's character, but rather to prove that he received income he was required to report but did not report, 15 a requisite to his conviction under the Internal Revenue Code. 16

—evidence of prior acts of misconduct to rebut a union official's claim that he never

received labor movement funds for purposes other than labor movement activity, in a prosecution for embezzlement. 17

—a criminal transcript containing information of a prior felony conviction in a case charging that the defendant falsely signed a statement with knowledge of the felony conviction. 18

—testimony as to the defendant's confession to stealing weapons, as necessary to prove receipt, an essential element of the crime charged. 19

—evidence of defendant's membership in a street gang, in a prosecution for knowing possession of a firearm by a convicted felon, since hostility between street gangs explained defendant's actions and the presence of guns in his car. 20

—testimony of other passengers in an airplane passenger's suit for injuries suffered during emergency evacuation procedures, as relevant in that it served to confirm the correctness of plaintiff's impression about the flight attendant's propensity to push her. 21

—testimony that a witness observed a knife in the defendant's possession on earlier occasions, in a prosecution for possessing a knife in prison. 22

—payroll records showing that contrary to his testimony, a witness did not work with the defendant at the time he claimed to have seen the defendant engage in a prior criminal act, as indicative of whether a fact in issue did or did not exist. 23

In a prosecution for possession of an unregistered firearm, evidence of the defendant's prior conviction is inadmissible where the fact of the conviction does not make the defendant guilty of a separate crime, but merely subjects the defendant to an enhanced penalty. 24

§ 428 ----To prove or rebut substantive issue [SUPPLEMENT]

Practice Aids: The Crime Bill of 1994 and the law of character evidence: Congress was right about consent defense cases, 22 Fordham Urb LJ 2:271 (1995).

Case authorities:

Evidence of defendant's prior firearm conviction was properly admitted to rebut his direct testimony that he did not have firearm on night in question and had never had gun in all his life, even if it was not admissible under Rule 609 to impeach his character for truthfulness, since it was not offered for that purpose. *United States v Norton* (1994, CA1 Mass) 26 F3d 240.

Evidence of prior robbery was properly admitted in order to establish ownership of defaced firearm recovered during armed postal robbery presently charged. *United States v Gelzer* (1995, CA2 NY) 50 F3d 1133, 41 Fed Rules Evid Serv 1038.

Rule barred admission of taped conversations between defendant and other persons involved in drug conspiracy not charged in case since defendant's defense did not assert lack of opportunity, preparation and plan were not in issue, nor were knowledge and absence of mistake and evidence did not suggest such issues; only identity and intent

were arguably proper purposes, and since defendant did not concede that he was party to taped conversation, playing tape was most unfairly prejudicial means of proving identity, and was likewise unfairly prejudicial to prove intent. *United States v Merriweather* (1996, CA6 Ohio) 78 F3d 1070, 43 Fed Rules Evid Serv 789.

Evidence of disciplinary actions employer took against two other employees who were guilty of arguably similar misconduct to plaintiff's was relevant to plaintiff's claim that employer breached its duty to progressively discipline him before termination and to discipline similarly situated employees uniformly. *Gomez v Martin Marietta Corp.* (1995, CA10 Colo) 50 F3d 1511, 67 BNA FEP Cas 537.

In prosecution for child molestation of ice-cream-truck driver who paid two 9-year-old girls to let him photograph them in their underwear, trial court properly admitted evidence that defendant had previously molested his stepdaughter, where, in crimes involving sexual deviancy, proof of similar acts near in time to offense charged may be admitted as evidence of accused's propensity to commit such acts, and particular acts involved in molestation of stepdaughter and of two girls were very similar. *State v Varela* (1993, App) 178 Ariz 319, 873 P2d 657, 149 Ariz Adv Rep 22.

Trial court in murder prosecution did not err in admitting evidence of defendant's escape where, at time of escape, defendant had been charged only with theft by receiving; theft by receiving charge was linked to murder charge, and escape from incarceration was admissible as circumstantial evidence of guilt. *Clay v State* (1994) 318 Ark 122, 883 SW2d 822.

In prosecution for assault of prison inmate by other inmates, evidence that defendant was lieutenant in prison gang was admissible to show why other inmates participated in attack and to contradict defendant's assertion that he was not involved in attack. *State v Darden* (1995, Conn App) 666 A2d 831, app gr, in part 236 Conn 905, 670 A2d 1306.

The trial court did not abuse its discretion when trying defendant for the first-degree murder of his wife by allowing the prosecutor to question defendant about his failure to provide financial support to his children following his wife's death where the State sought on cross-examination to rebut the defendant's testimony regarding his loving relationship with his wife and children. Evidence tending to show that the defendant did not support his children and did not send them gifts following his wife's death tended to shed light upon the circumstances surrounding the shooting and was relevant and admissible; furthermore, defendant was not unfairly prejudiced by the introduction of the evidence and similar evidence was already before the jury without objection in the form of testimony that defendant failed to act responsibly to support his family prior to the shooting. GS § 8C-1, Rules 401, 403. *State v Collins* (1994) 335 NC 729, 440 SE2d 559.

The trial court in a murder prosecution did not err in admitting evidence that defendant was arrested for carrying a concealed weapon in connection with the seizure of the handgun used to commit the murder, since the evidence was relevant to show defendant's possession of the murder weapon and the circumstances under which the police obtained this weapon. *State v Williams* (1995) 341 NC 1, 459 SE2d 208.

In prosecution for sexual assault on child under age 13, based on defendant's acts of sexual penetration of his daughter when she was between 11 and 13 years of age, trial court did not err in admitting testimony as to uncharged sexual crimes committed by defendant against his daughter beginning at approximately age 4, where evidence clearly fit

exception for uncharged sexual misconduct to show lustful disposition or sexual propensity pertinent to proof of prior incestuous relations, and acts were interwoven with charged acts. *State v Toole* (1994, RI) 640 A2d 965, summary op at (RI) 15 R.I.L.W. 95.

Footnotes

Footnote 6. *United States v Williams* (CA3 Pa) 612 F2d 735, cert den 445 US 934, 63 L Ed 2d 770, 100 S Ct 1328 (defendant's prior felony convictions, in prosecution for violating statute prohibiting convicted felon from receiving firearms shipped in interstate commerce); *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65; *United States v Brinklow* (CA10 Colo) 560 F2d 1003, cert den 434 US 1047, 54 L Ed 2d 798, 98 S Ct 893 (defendant's prior felony convictions, in prosecution for interstate transportation of explosives by convicted felon).

As to evidence admitted under FRE 404(b) to show intent, see §§ 437 et seq.

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 7. See *United States v Hudson* (CA7 Wis) 843 F2d 1062, 25 Fed Rules Evid Serv 839, appeal after remand (CA7 Wis) 884 F2d 1016, 28 Fed Rules Evid Serv 1451, reh den, en banc (CA7) 1990 US App LEXIS 1528 and cert den 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221, a prosecution for entering federally-insured credit union with intent to commit larceny, where the conduct of defendants in allegedly "casing" a credit union 2 days before the larceny charged was viewed as part and parcel of the crime with which defendants were charged; such admissibility is determined by standard Rule 401 relevancy analysis and should not have been determined under Rule 404.

Footnote 8. *United States v McKinnell* (CA10 Kan) 888 F2d 669, 28 Fed Rules Evid Serv 1309, post-conviction proceeding (CA10) 1991 US App LEXIS 10651.

Footnote 9. *United States v Walton* (CA6 Mich) 908 F2d 1289, 30 Fed Rules Evid Serv 918, cert den 498 US 906, 112 L Ed 2d 229, 111 S Ct 273 and cert den 498 US 989, 112 L Ed 2d 541, 111 S Ct 530 and cert den 498 US 990, 112 L Ed 2d 542, 111 S Ct 532, post-conviction proceeding (CA6) 1994 US App LEXIS 1371.

Footnote 10. *United States v Moschiano* (CA7 Ill) 695 F2d 236, 12 Fed Rules Evid Serv 124, cert den 464 US 831, 78 L Ed 2d 111, 104 S Ct 110.

Footnote 11. *United States v Simtob* (CA9 Mont) 901 F2d 799, 30 Fed Rules Evid Serv 1243.

Footnote 12. *United States v Stephenson* (CA8 Mo) 924 F2d 753, 32 Fed Rules Evid Serv 939, reh den (CA8 Mo) 1991 US App LEXIS 3687 and reh den, en banc (CA8) 1991 US App LEXIS 4766, cert den (US) 116 L Ed 2d 39, 112 S Ct 63 and cert den (US) 116 L Ed 2d 262, 112 S Ct 321.

Footnote 13. *Swajian v General Motors Corp.* (CA1 RI) 916 F2d 31, 31 Fed Rules Evid Serv 328.

Footnote 14. *United States v Kandiel* (CA8 Minn) 865 F2d 967, 27 Fed Rules Evid Serv 670, post-conviction proceeding (CA8 Minn) 964 F2d 794.

Footnote 15. *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922.

Footnote 16. 26 USCS § 7201.

Footnote 17. *United States v Walsh* (CA1 Mass) 928 F2d 7, 136 BNA LRRM 2913, 32 Fed Rules Evid Serv 532.

Footnote 18. *United States v Bledsoe* (CA8 Ark) 531 F2d 888, 1 Fed Rules Evid Serv 1115.

Footnote 19. *United States v Powers* (CA8 Mo) 572 F2d 146, 3 Fed Rules Evid Serv 231.

Footnote 20. *United States v Lewis* (CA7 Ill) 910 F2d 1367, 30 Fed Rules Evid Serv 1165.

Footnote 21. *Seidman v American Airlines, Inc.* (CA5 La) 923 F2d 1134, 32 Fed Rules Evid Serv 258, 19 FR Serv 3d 775, reh den (CA5) 1991 US App LEXIS 5956.

Footnote 22. *United States v Dixon* (CA7 Wis) 596 F2d 178, 4 Fed Rules Evid Serv 790.

Footnote 23. *United States v Opager* (CA5 Fla) 589 F2d 799, 3 Fed Rules Evid Serv 1013.

Footnote 24. *Government of Virgin Islands v Castillo* (CA3 VI) 550 F2d 850.

§ 429 --Issue of reasonable force, in civil rights actions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A plaintiff's record of past criminal offenses may be relevant and admissible in an action for damages based on alleged excessive force used by police officers in the course of the plaintiff's arrest ²⁵ or by prison officers against an inmate ²⁶ since such evidence is relevant to the reasonableness of the defendants' response to the situation in question. ²⁷

Not all courts admit such evidence, however, some finding that its prejudicial effect tends to outweigh its probative value. 28 Furthermore, such evidence is not admissible to show a general propensity toward violent behavior on the part of the plaintiff which led the defendants to act abusively toward the plaintiff. 29

In a civil rights action 30 alleging unreasonable force in arresting the plaintiff, extrinsic evidence of other acts may also be admissible on the issue of the defendant's intent in exercising force against the plaintiff. 31

In civil rights suits alleging that police supervisors did not exert proper supervisory control over officers, evidence of civilian complaints against a particular police officer is admissible, where such evidence was admitted not against the police officer, but rather for the purpose of establishing supervisory liability. 32 But it has also been stated, in a civil rights action against police officers and a municipality, that permitting the jury to consider complaints and accounts of misconduct contained in the personnel files of the defendant officers presents a grave danger of unfair prejudice and is forbidden by Federal Rules of Evidence 404(b), even when admitted only for the purpose of establishing a pattern or practice by the municipality of permitting such conduct. 33 And prior complaints against a police officer must be excluded in an arrestee's civil rights suits where the officer had been exonerated on all charges in prior complaints except one involving abusive language and there was no pattern to connect varied conduct alleged in complaints to allegations of physical abuse and intimidation made by the plaintiff. 34

Footnotes

Footnote 25. *Bowden v McKenna* (CA1 Mass) 600 F2d 282, cert den 444 US 899, 62 L Ed 2d 135, 100 S Ct 208 (evidence that plaintiff's decedent had committed robbery and therefore had motive to resist arresting officers); *Palmerin v Riverside* (CA9 Cal) 794 F2d 1409, 21 Fed Rules Evid Serv 1 (evidence of plaintiffs' guilty pleas to obstructing police officer and disturbing the peace); *Lewis v District of Columbia*, 253 US App DC 290, 793 F2d 361, 20 Fed Rules Evid Serv 1101 (evidence of plaintiff's drug use and arrest admissible to determine whether plaintiff's flight from police officer was because he did not know person approaching him was a police officer or rather because he intended to avoid arrest).

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Footnote 26. *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263 (general questions about plaintiff inmate's prior assaults in prison admissible to show his intent to provoke prison officer and start fight and to rebut his contention that he grabbed chain out of officer's hand by reflex and pointed his finger in an officer's face by accident); *West v Love* (CA7 Ill) 776 F2d 170, 19 Fed Rules Evid Serv 815; *Williams v Mensey* (CA8 Mo) 785 F2d 631, 20 Fed Rules Evid Serv 557; *Palmerin v Riverside* (CA9 Cal) 794 F2d 1409, 21 Fed Rules Evid Serv 1.

Footnote 27. *Palmerin v Riverside* (CA9 Cal) 794 F2d 1409, 21 Fed Rules Evid Serv 1 (evidence of plaintiffs' guilty pleas to obstructing police officer and disturbing the peace).

Footnote 28. *Avila v Knight* (SD NY) 475 F Supp 1054, 5 Fed Rules Evid Serv 65 (plaintiff's prior criminal and institutional records not admissible).

Footnote 29. *Lataille v Ponte* (CA1 Mass) 754 F2d 33, 17 Fed Rules Evid Serv 562 (judgment for defendants reversed where plaintiff's prison disciplinary record was introduced to justify defendants' actions on grounds that plaintiff was violent and aggressive person); *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263.

Footnote 30. Under 42 USCS § 1983.

Footnote 31. *Carson v Polley* (CA5 Tex) 689 F2d 562, 11 Fed Rules Evid Serv 1259, 35 FR Serv 2d 152, 64 ALR Fed 613 (departmental performance rating commenting that deputy sheriff needed to work on controlling temper and personal feelings because he tended to get into arguments with inmates, and let his temper flare up too quickly was admissible on issue of defendant deputy sheriff's intent); *Ismail v Cohen* (CA2 NY) 899 F2d 183, 29 Fed Rules Evid Serv 1414, costs/fees proceeding (SD NY) 1991 US Dist LEXIS 14919 (evidence that officer had repeatedly punched citizen and arrested him without cause admissible in case where plaintiff claimed that officer had struck and handcuffed him in dispute over parking ticket).

Footnote 32. *Gutierrez-Rodriguez v Cartagena* (CA1 Puerto Rico) 882 F2d 553, 28 Fed Rules Evid Serv 1317.

Footnote 33. *Carter v District of Columbia*, 254 US App DC 71, 795 F2d 116, 21 Fed Rules Evid Serv 139 (stating that the court should permit only brief, neutral summaries to be read to the witness being questioned about the complaints, with questions properly limited in scope, and counsel should be instructed not to identify the officers named in the allegations when those officers are also defendants in the case).

Footnote 34. *Berkovich v Hicks* (CA2 NY) 922 F2d 1018, 32 Fed Rules Evid Serv 199.

§ 430 To corroborate prosecution witnesses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of a defendant's other crimes, wrongs, or acts may be admissible to corroborate the testimony of prosecution witnesses. 35 Such evidence is admissible to corroborate crucial prosecution testimony, assuming that the probative value of the evidence is not outweighed by unfair prejudice. However, to avoid potential prosecutorial abuse, the proponent of the evidence must demonstrate a close relationship between the proffered evidence and the evidence to be corroborated. 36

Other crimes evidence is admissible only for corroborative purposes if the corroboration is direct and the matter corroborated is significant. 37 Significant corroborating evidence is usually understood to mean important—as distinct from trivial—evidence in a trial, such as where the evidence reinforces the testimony of the key government witness.

38 In addition, the probative value of the evidence may not be substantially outweighed by the danger of unfair prejudice. 39

Footnotes

Footnote 35. *United States v Currier* (CA1 Me) 836 F2d 11, 24 Fed Rules Evid Serv 630; *United States v Everett* (CA2 NY) 825 F2d 658, 23 Fed Rules Evid Serv 629, cert den 484 US 1069, 98 L Ed 2d 999, 108 S Ct 1035.

Footnote 36. *United States v Everett* (CA2 NY) 825 F2d 658, 23 Fed Rules Evid Serv 629, cert den 484 US 1069, 98 L Ed 2d 999, 108 S Ct 1035 (admitting testimony of bank teller describing man who earlier robbed same bank as that defendant was charged with robbing in instant case, in corroboration of testimony of unindicted coconspirator).

Evidence of IOU witnessed by narcotics conspiracy defendant was admissible since it corroborated testimony that defendant assisted coconspirator in obtaining IOU to ensure that money from drug sale would be received and indicated substantial nexus between drug conspiracy and defendant. *United States v Williams* (CA10 Okla) 923 F2d 1397, 31 Fed Rules Evid Serv 1481, cert den (US) 114 L Ed 2d 118, 111 S Ct 2033.

Forms: Motion–To exclude evidence of other crimes–Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 37. *United States v Everett* (CA2 NY) 825 F2d 658, 23 Fed Rules Evid Serv 629, cert den 484 US 1069, 98 L Ed 2d 999, 108 S Ct 1035.

Footnote 38. *United States v Everett* (CA2 NY) 825 F2d 658, 23 Fed Rules Evid Serv 629, cert den 484 US 1069, 98 L Ed 2d 999, 108 S Ct 1035.

Footnote 39. *United States v Everett* (CA2 NY) 825 F2d 658, 23 Fed Rules Evid Serv 629, cert den 484 US 1069, 98 L Ed 2d 999, 108 S Ct 1035; *United States v Kammoma* (CA8 Minn) 905 F2d 1205, cert den 498 US 948, 112 L Ed 2d 328, 111 S Ct 365.

§ 431 To rebut character defense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where a defendant in a criminal case by his or her own testimony and that of others has deliberately sought as the primary means of defense to depict himself or herself as one whose essential philosophy and habitual conduct in life is completely at odds with the possession of a state of mind requisite to guilt of the offense charged, the defendant may be considered in effect to have forfeited the protection of the first sentence of Rule 404(b), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity

therewith, 40 and to have opened the door to evidence of other crimes, wrongs or acts. 41 Under such circumstances, rebuttal testimony showing prior crimes may well be the only effective way to rebut evidence designed generally to plant in the jury's mind a reasonable doubt that a person such as the defendant could have possessed the culpability of mind requisite to commit the crime charged. 42 But it has been held that even if the testimony of one accused of sexual abuse that he had no prior criminal convictions, that he was a Christian and that he had a long and happy marriage, opened the general issue of his character in the same way as if he had called a character witness, it did not justify admitting extrinsic evidence of specific instances of prior misconduct, on the bases that the particular defendant had not testified on direct that he had never touched other children, and bad character was not a significant element of the offense charged. 43

§ 431 ----To rebut character defense [SUPPLEMENT]

Case authorities:

Fact that defendant had stipulated to fact of predicate conviction for felon in possession of firearm offense did not render parole supervisor's testimony inadmissible where government carefully tailored testimony to avoid any impermissible reference to predicate offense, as well as to avoid any information which related to defendant's character or propensity toward criminal behavior. *United States v Palmer* (1994, CA5 Tex) 37 F3d 1080.

The trial court did not err in a first- degree murder sentencing hearing by admitting testimony from defendant's probation officer that defendant was a fair probationer but consistently denied having a drug or alcohol problem despite the offer of assistance in making drug treatment available, and testimony that in the past defendant had punched his girlfriend and hit her with brass knuckles, cursed and spit on his girlfriend and the mother of his children and fought with officers who came to arrest him, and refused to enter a room and haggled with a courtroom deputy while in custody. This evidence was admissible to counter defendant's evidence of his good character traits, to rebut the mitigating circumstances submitted regarding defendant's age, his being a loving father and his good adaption to prison life, and to rebut the mitigating circumstance relating to defendant's "misuse or abuse" of drugs. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Footnotes

Footnote 40. FRE 404(b); Uniform Rules of Evidence, Rule 404(b).

Footnote 41. *United States v Billups* (CA4 Va) 692 F2d 320, 111 BNA LRRM 2962, 95 CCH LC ¶ 13831, 11 Fed Rules Evid Serv 1198, corrected (CA4 Va) 112 BNA LRRM 3352, 97 CCH LC ¶ 10012 and cert den 464 US 820, 78 L Ed 2d 93, 104 S Ct 84, 114 BNA LRRM 2568, 98 CCH LC ¶ 10449 (following testimony in defendant's case in chief by 14 waterfront employers that defendant had never solicited gratuities or payoffs from them in return for his services as union leader, testimony by president of union local that defendant solicited payoffs from him over long period of time ruled admissible); *United States v Johnson* (CA4 Va) 634 F2d 735, 80-2 USTC ¶ 9783, 7 Fed Rules Evid Serv 84, 47 AFTR 2d 81-377, cert den 451 US 907, 68 L Ed 2d 295, 101 S Ct 1974 (prosecution

for federal income tax evasion in which seven witnesses testified as to defendant's truthfulness, honesty, and compassion and to busy nature of her practice, testimony as to dependent's overbilling for Medicaid services held admissible).

For a discussion of the admissibility under FRE 405(b) of specific instances of conduct relevant to character, see §§ 381 et seq.

Footnote 42. *United States v Johnson* (CA4 Va) 634 F2d 735, 80-2 USTC ¶ 9783, 7 Fed Rules Evid Serv 84, 47 AFTR 2d 81-377, cert den 451 US 907, 68 L Ed 2d 295, 101 S Ct 1974; *State v Reneau* (App) 111 NM 217, 804 P2d 408; *Phillips v State* (Okla Crim) 756 P2d 604.

Footnote 43. *State v Fader* (Minn) 358 NW2d 42.

§ 432 To rebut entrapment defense; claim of self-defense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of similar unlawful acts of defendant, other than acts for which defendant is on trial, is ordinarily admissible to rebut the defense of entrapment, 44 though there is some authority to the contrary. 45 A defense of entrapment may be countered by evidence of other crimes and wrongs in order to show the defendant's predisposition to commit the offense or offenses charged. 46 Such evidence of other offenses may be admitted as part of prosecution's case in chief, if it appears that defendant will rely on a claim of entrapment. 47 The use of such evidence to show predisposition is permitted only when the other crimes are of the same nature as those charged. 48 This method is often used in drug prosecutions. 49 However, such evidence is not admissible to prove a predisposition to commit criminal acts generally, since that would be proof of bad character for the purpose of showing that the defendant acted in accordance with such general criminal propensity in committing the charged offenses. 50

A court properly excluded evidence that codefendant had engaged in extortionate activities in unrelated incidents where it was irrelevant to defendants' defense of entrapment, since entrapment is concerned with the particular defendant's intent. 51

Defendant's prior practice of carrying a knife was admissible in a homicide prosecution where defendant claimed self-defense. 52

§ 432 ----To rebut entrapment defense; claim of self-defense [SUPPLEMENT]

Case authorities:

In prosecution for, inter alia, aggravated robbery, trial court properly admitted evidence of defendant's participation in aggravated robbery two weeks before charged offenses,

where evidence was relevant to rebut defendant's claim of self-defense. *State v Smith* (1996, Minn) 541 NW2d 584.

Footnotes

Footnote 44. *Osborn v United States*, 385 US 323, 17 L Ed 2d 394, 87 S Ct 429, reh den 386 US 938, 17 L Ed 2d 813, 87 S Ct 951; *United States v Mazza* (CA1 Mass) 792 F2d 1210, 20 Fed Rules Evid Serv 1225, cert den 479 US 1086, 94 L Ed 2d 147, 107 S Ct 1290, later proceeding (CA1 Mass) 821 F2d 39; *United States v Posner* (CA5 Tex) 865 F2d 654; *United States v Manzella* (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457; *United States v Parkin* (CA7 Ill) 917 F2d 313, 31 Fed Rules Evid Serv 1394; *United States v Crump* (CA8 Mo) 934 F2d 947, 33 Fed Rules Evid Serv 83, reh den (CA8) 1991 US App LEXIS 15599; *United States v Stringer* (CA8 Mo) 902 F2d 1335, 30 Fed Rules Evid Serv 340, (evidence tended to rebut entrapment even though it related to a time after the events generating the present charges); *United States v Padilla* (CA8 Mo) 869 F2d 372, cert den 492 US 909, 106 L Ed 2d 572, 109 S Ct 3223, post-conviction proceeding (CA8 Mo) 942 F2d 498; *United States v Simtob* (CA9 Mont) 901 F2d 799, 30 Fed Rules Evid Serv 1243; *United States v Roper* (CA11 Ala) 874 F2d 782, cert den 493 US 867, 107 L Ed 2d 144, 110 S Ct 189 and cert den 493 US 955, 107 L Ed 2d 355, 110 S Ct 369; *United States v Moore*, 235 US App DC 381, 732 F2d 983, 15 Fed Rules Evid Serv 1151; *Brown v State* (Ala App) 392 So 2d 1248, cert den (Ala) 392 So 2d 1266; *State v Burciaga* (App) 146 Ariz 333, 705 P2d 1384; *State v Whitney*, 157 Conn 133, 249 A2d 238; *Drayton v State* (Fla App D3) 292 So 2d 395, cert den (Fla) 300 So 2d 900; *People v Price* (4th Dist) 17 Ill App 3d 911, 309 NE2d 56; *State v Reichenberger*, 209 Kan 210, 495 P2d 919; *Commonwealth v Miller*, 361 Mass 644, 282 NE2d 394; *State v Lynard* (Minn) 294 NW2d 322; *State v Van Regenmorter* (Mo) 465 SW2d 613; *People v Mann*, 31 NY2d 253, 336 NYS2d 633, 288 NE2d 595, 61 ALR3d 286; *Wooten v State* (Tex App Texarkana) 735 SW2d 574; *Aller v State* (Wis) 214 NW2d 431.

Annotation: Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 ALR3d 293.

Practice References Evidence in rebuttal of claim of entrapment. 12 Am Jur POF2d 237, Entrapment to Commit Narcotics Offense § 8.

Footnote 45. *People v Benford*, 53 Cal 2d 1, 345 P2d 928; *State v Klauer* (Iowa) 226 NW2d 803; *State v Nelsen*, 89 SD 1, 228 NW2d 143.

Footnote 46. *United States v Blankenship* (CA6 Ohio) 775 F2d 735, 19 Fed Rules Evid Serv 63; *United States v Moschiano* (CA7 Ill) 695 F2d 236, 12 Fed Rules Evid Serv 124, cert den 464 US 831, 78 L Ed 2d 111, 104 S Ct 110; *United States v Crump* (CA8 Mo) 934 F2d 947, 33 Fed Rules Evid Serv 83, reh den (CA8) 1991 US App LEXIS 15599.

Competent proof of an accused's criminal disposition and prior convictions is admissible as part of the state's case in chief, where it is clear that the defense of entrapment will be invoked. *People v Mann*, 31 NY2d 253, 336 NYS2d 633, 288 NE2d 595, 61 ALR3d 286.

Footnote 47. *United States v Cohen* (CA2 NY) 489 F2d 945; *State v Perkins*, 19 Utah 2d 421, 432 P2d 50.

Footnote 48. *United States v Blankenship* (CA6 Ohio) 775 F2d 735, 19 Fed Rules Evid Serv 63.

Footnote 49. *United States v Parkin* (CA7 Ill) 917 F2d 313, 31 Fed Rules Evid Serv 1394; *United States v Richardson* (CA11 Fla) 764 F2d 1514, 18 Fed Rules Evid Serv 1161, cert den 474 US 952, 88 L Ed 2d 303, 106 S Ct 320 (alleged narcotics conspiracy; *United States v Richardson* (CA11 Fla) 764 F2d 1514, 18 Fed Rules Evid Serv 1161, cert den 474 US 952, 88 L Ed 2d 303, 106 S Ct 320 (alleged narcotics conspiracy; *United States v Capo* (CA11 Fla) 693 F2d 1330, 11 Fed Rules Evid Serv 1915, cert den 460 US 1092, 76 L Ed 2d 359, 103 S Ct 1793 and on reh (CA11 Fla) 716 F2d 1355; *United States v Moore*, 235 US App DC 381, 732 F2d 983, 15 Fed Rules Evid Serv 1151.

Footnote 50. *United States v Blankenship* (CA6 Ohio) 775 F2d 735, 19 Fed Rules Evid Serv 63; *State v Mullen* (Iowa) 216 NW2d 375.

Footnote 51. *United States v Reeves* (CA5 La) 892 F2d 1223, 29 Fed Rules Evid Serv 1425, reh den, en banc (CA5 La) 899 F2d 11.

Footnote 52. *United States v Weddell* (CA8 SD) 890 F2d 106, 29 Fed Rules Evid Serv 56.

§ 433 To rebut insanity defense

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When a defendant relies on an insanity defense, evidence of prior similar criminal acts may be relevant to an evaluation of that defense by the trier of fact. 53 Previous and subsequent bad acts of almost any character are admissible to rebut such a defense if they are probative of the defendant's mental ability to organize and orchestrate and of the defendant's awareness of the world surrounding him. 54

§ 433 ----To rebut insanity defense [SUPPLEMENT]

Case authorities:

Marijuana distribution conspirator's statements about his prior involvement in marijuana smuggling operation were properly admitted to rebut his entrapment defense or his theory that he was acting solely as Spanish interpreter for another defendant. *United States v Williams* (1994, CA7 Ill) 31 F3d 522.

Footnotes

Footnote 53. *United States v Ruster* (CA9 Cal) 712 F2d 409, 13 Fed Rules Evid Serv 1498 (evidence of previous false claims and break-ins admissible in prosecution for filing false and fraudulent applications for Supplemental Security Income).

The testimony of the defendant upon a former trial for the same offense may be introduced in evidence in rebuttal of the defense of insanity. *State v Speyer*, 207 Mo 540, 106 SW 505.

Footnote 54. *United States v Brown* (CA7 Wis) 785 F2d 587, 20 Fed Rules Evid Serv 400 (evidence of a fraud perpetrated by defendant on two trucking companies committed after date of sentencing hearing admissible in prosecution for failure to appear at sentencing).

§ 434 To show bias or interest of witness

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In criminal cases, evidence may be admissible under Federal Rules of Evidence 404(b) to show the bias or interest of a witness so long as the bias is not a collateral issue and so long as the evidence does not become inadmissible evidence of the witness' character. The court must carefully balance probative value against prejudicial effect, and may use a voir dire procedure to substantiate allegations before allowing possible prejudicial material to be brought before the jury. 55 Evidence of extrinsic acts cannot be admitted against a party to show bias for a purpose other than impeachment; for example, it cannot be admitted to show party's "bias" against authority, since this is analogous to an inference that the party acted in conformity with prior bad acts. 56

§ 434 ----To show bias or interest of witness [SUPPLEMENT]

Case authorities:

There was no error in a first- degree murder prosecution arising from an armed robbery in the exclusion of evidence that an accomplice who testified against defendant had held the gun in a previous robbery. Although defendant contended that this evidence was admissible to show bias, if the witness had shot the victim in this case, defendant would be guilty of felony murder, the crime of which he was convicted. *State v Grace* (1995) 341 NC 640, 461 SE2d 330.

Footnotes

Footnote 55. *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263.

Allowing prosecution to cross-examine alibi witness regarding his prior drug dealings with defendant on issue of bias was not prejudicial, given fact that testimony indicated involvement with a minor marijuana transaction 18 years earlier and government's strong evidence of defendant's involvement in a 43,000 pound load of marijuana. *United States v Arnold* (CA6 Mich) 890 F2d 825, 29 Fed Rules Evid Serv 482.

Footnote 56. *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263.

(2). To Establish Motive [435, 436]

§ 435 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It has long been recognized that evidence is admissible in a criminal prosecution of other criminal acts committed by the accused which shows or tends to show his motive for the commission of the offense charged. 57 It has also been admitted in certain other litigation, such as between a fire insurance company and a policyholder where such evidence would provide a motive for the insured to set fire to his own property. 58

Evidence of other crimes, wrongs, or acts which has been ruled admissible on the issue of motive also includes—

—evidence of drug use or transactions. 59

—evidence of the payment of bribes not included in the indictment for bribery, as probative of defendant's purpose in accepting money from writ servers. 60

—evidence of plaintiff's and other union members' mistreatment by other locals, in a union member's suit alleging that a union local unlawfully delayed his transfer into that local and mistreated him once he became a member. 61

—evidence of a 17-year-old felony conviction and an outstanding arrest warrant, in a prosecution for pointing a gun at FBI agents in an effort to escape, to show that accused could not afford to be caught with a gun in his possession. 62

—evidence of the defendant's fraudulent activities with one company, in a prosecution for fraudulent activities with another company. 63

—evidence that defendant had overdrawn bank account, since proof that he is living beyond his means has probative value in case involving a crime resulting in financial gain. 64

—evidence of sexual assault upon a female victim during the period of abduction to show the kidnapper's motive and intent. 65

—evidence of the defendant's participation in prior homicides, where the defendant was charged with murdering a fellow inmate to keep him from implicating the defendant with involvement in the prior homicides. 66

Under Rule 404, prior wrongful acts must establish motive to commit the particular crime charged and not simply a propensity to engage in criminal activity. 67 Evidence of other bad acts is not automatically admissible simply because defendant argues at trial that there was no motive to commit the crime. 68 Hence, it is an insufficient argument for the prosecution to say that, because the defendant successfully committed a similar act earlier, he was motivated or encouraged to have committed the act charged in the instant case, since this is an argument that relies on propensity, an impermissible basis for admitting extrinsic evidence. 69 A mere showing that a defendant entered into bankruptcy two years previous to a charged crime is irrelevant to a showing that he had a motivation to steal or embezzle. 70

§ 435 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

Case authorities:

Evidence that defendant charged with fraud was incarcerated at time he met with witness and convinced witness to place defendant's son on his payroll as "no-show" employee so that son would have health insurance, was admissible to prove defendant's motive in securing health insurance for his son because of his incarceration. *United States v Mauro* (1996, CA2 NY) 80 F3d 73.

Testimony of witness whom extortion defendant had previously attempted to extort was properly admitted to prove motive, intent and plan. *United States v Bengali* (1993, CA4 Va) 11 F3d 1207, petition for certiorari filed (Mar 25, 1994).

In prosecution of coowners of savings and loan association for various offenses in connection with S&L, evidence that defendants had received consulting fee two years prior to offenses alleged was properly admitted to impeach one defendant's direct testimony that he had never improperly profited from any financial transactions involving S&L and as prior bad act evidence of defendant's motive and intent with respect to crimes charged. *United States v Holley* (1994, CA5 Tex) 23 F3d 902, reh, en banc, den (1994, CA5 Tex) 1994 US App LEXIS 19842.

Bank robbery defendant's prior drug use was not admissible to prove motive; motive was not material issue, facts were not also relevant to identity which is indisputably in issue in robbery case, rather government simply asked jury to draw raw inference about defendant's motive from fact that he used drugs. *United States v Sutton* (1994, CA8 Minn) 41 F3d 1257.

Evidence regarding prison gang was admissible on issue of motive since it was necessary

to explain why defendant would kill stranger, i.e., to be accepted into gang, and to show how and why other inmates assisted him in obtaining weapon. *United States v Santiago* (1995, CA9 Cal) 46 F3d 885, 95 CDOS 598, 95 Daily Journal DAR 1084.

Evidence of outstanding judgments against defendant convicted of bank fraud and making false statements on loan application was admissible as probative of defendant's motive to lie about his identity because people against whom large and still enforceable judgments are outstanding are unlikely to be extended credit. *United States v Key* (1996, CA11 Ga) 76 F3d 350, 9 FLW Fed C 902.

Evidence of defendant's prior sexual misconduct involving his natural daughter, committed 7 to 9 years before charged offenses, was admissible in prosecution for sexual abuse involving defendant's two stepdaughters, to prove motive, and where there was resemblance in manner of abuse. *Ex parte Register* (1994, Ala) 640 So 2d 12.

Trial court in murder prosecution properly admitted evidence that defendant was member of youth gang, where status as gang member was relevant to motive for apparently unprovoked homicide, and where trial court instructed jury to consider evidence of gang membership only as to motive. *State v Toney* (1993) 253 Kan 651, 862 P2d 350.

Evidence of prior uncharged acts of sexual misconduct involving child victim was admissible in prosecution for sexual abuse, to show defendant's motive for committing charged acts, that is, satisfaction of sexual desire for victim. *State v Dudley* (1994, Mo App) 880 SW2d 580.

The trial court in a first-degree murder prosecution did not err by the admission of evidence of the killing of a member of defendant's "family" called the Pimps where it is clear that such killing, if not the principal reason for the killing of the victim in the present case, was a central and critical fact in the explanation of the sequence of events and motive for the murder in the present case. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by admitting the testimony of defendant's ex-wife that defendant had anally assaulted her during their marriage where, although there are dissimilarities, the similarities tend to support a reasonable inference that defendant committed the assaults on both women and the probative value of the similarities was sufficient to outweigh the risk of unfair prejudice to defendant. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by admitting testimony of defendant's prior sexual assault on another victim where the trial court found from the uncontradicted evidence that the attacks bore several similarities; there were sufficient similarities to support a reasonable inference that the same persons committed both acts; the occurrences were not so temporally remote as to diminish the probative value of the evidence; the admission of prior acts tending to show motive is clearly supported by G.S. § 8C-1, Rule 404(b) and our case law; and this testimony showed that defendant knew from his past experience that his crime would be reported and that he would suffer the consequences if he left his victim alive. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

Chain-of-events evidence about defendant's escape from an Alabama prison and thefts he committed after his escape and before he committed the two murders at issue was properly admitted to establish defendant's intent and motive for the murders, and the trial court did not abuse its discretion by finding this evidence more probative than prejudicial. G.S. § 8C-1, Rules 403 and 404(b). *State v Rose* (1994) 339 NC 172, 451 SE2d 211.

The trial court did not err in a first- degree murder prosecution in excluding expert testimony concerning the victim's mental condition. Although defendant contended that the excluded evidence consisted of expert testimony that the victim suffered from a manic-depressive illness which caused various problems, including irritability and hostility, that this was admissible to corroborate defendant's claim that he killed the victim after she resisted his effort to end their relationship and became assaultive, and that the excluded testimony was thus relevant to disprove premeditation and deliberation, the undisputed evidence, including evidence that the victim was attempting to withdraw from a confrontation with defendant at the time of the murder, shows premeditation and deliberation on the part of defendant regardless of the victim's mental condition. The victim's actions in this case, regardless of mental condition, did not constitute sufficient provocation to negate premeditation and deliberation on the part of defendant. *State v Hightower* (1995) 340 NC 735, 459 SE2d 739.

The trial court did not err in the prosecution of defendant for the noncapital first-degree murder of her four year old stepson by admitting evidence that her husband, an insurance agent, amended the victim's life insurance policy six days before his death to designate defendant as a co-beneficiary. Evidence of motive is relevant when it has a tendency to show that the defendant committed the crime at issue. The extent of defendant's knowledge about this insurance policy impacted only on the weight to be accorded the evidence. *State v White* (1995) 340 NC 264, 457 SE2d 841.

Testimony by a witness that defendant had mentioned robbing a bank to get rent money did not tend to show that defendant had actually robbed a bank or had committed any other crime or wrong, but even if it did, such testimony would have been admissible to show defendant's motive and intent to commit the crimes of robbery and murder of his landlord. GS § 8C-1, Rule 404(b). *State v Thibodeaux* (1995) 341 NC 53, 459 SE2d 501.

There was no prejudice in a first- degree murder prosecution where the trial court admitted court files relating to defendant's prior conviction for assault. The files were admitted for the nonhearsay purpose of showing motive, intent and plan and witnesses testified that defendant broke into the victim's home and attacked her, that the victim prosecuted the defendant for the assault and trespass, that the defendant harassed and threatened the victim, and that the victim believed that the defendant was going to kill her. The files added little, if anything, to the State's case. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentence arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup. *State v Ratliff* (1995) 341 NC 610, 461 SE2d 325.

The trial court did not abuse its discretion in admitting evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees and his reputation

created thereby in an action for damages from an injury suffered during a movie stunt where plaintiff alleged willful and wanton, negligent and reckless conduct by defendant. The evidence was probative of defendant's motive, intent and the absence of mistake and was admissible under N.C.G.S. § 8C-1, Rule 404(b). *Pinckney v Van Damme* (1994) 116 NC App 139, 447 SE2d 825.

In prosecution for sexual assault, trial court erred by admitting evidence of uncharged prior sexual assault of different victim, where although state contended that because defendant was motivated by sexual desire in assaulting prior victim, it was more probable that he was similarly motivated in present case, this contention was no more than impermissible propensity analysis and although state argued that evidence was admissible to show common scheme, state's theory foundered upon passage of over 4 years between two assaults. *State v Winter* (1994, Vt) 648 A2d 624.

Footnotes

Footnote 57. *People v Peete*, 28 Cal 2d 306, 169 P2d 924, cert den 329 US 790, 91 L Ed 677, 67 S Ct 356, reh den 329 US 832, 91 L Ed 705, 67 S Ct 490 and cert den 331 US 783, 91 L Ed 1815, 67 S Ct 1185; *Cooper v State*, 182 Ga 42, 184 SE 716, 104 ALR 1309; *People v Scheck*, 356 Ill 56, 190 NE 108, 91 ALR 1472; *State v Wilcox*, 90 Kan 80, 132 P 982, 9 ALR 1091; *State v Hyde*, 234 Mo 200, 136 SW 316; *State v Ehlers*, 98 NJL 236, 119 A 15, 25 ALR 999; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Molineux*, 168 NY 264, 61 NE 286; *State v Blackwell*, 220 SC 342, 67 SE2d 684.

Footnote 58. *Glados, Inc. v Reliance Ins. Co.* (CA11 Fla) 888 F2d 1309, 28 Fed Rules Evid Serv 1536, cert den 497 US 1025, 111 L Ed 2d 783, 110 S Ct 3273 (evidence of a pattern of fires in restaurants in which co-owner had an interest, admissible in light of insurer's defense that only plaintiff-co-owner had motive and plan for committing arson); *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360 (evidence of prior burglary charge admitted on the theory that the insured needed money to fund his criminal defense).

Footnote 59. § 436.

Footnote 60. *United States v Vignola* (ED Pa) 464 F Supp 1091, affd without op (CA3 Pa) 605 F2d 1199, cert den 444 US 1072, 62 L Ed 2d 753, 100 S Ct 1015.

Footnote 61. *Doty v Sewall* (CA1 Mass) 908 F2d 1053, 134 BNA LRRM 2746, 116 CCH LC ¶ 10250, 30 Fed Rules Evid Serv 777.

Footnote 62. *United States v Johnson* (CA5 La) 542 F2d 230, 2 Fed Rules Evid Serv 241.

Footnote 63. *United States v Cook* (CA5 Tex) 592 F2d 877, 4 Fed Rules Evid Serv 553, cert den 442 US 921, 61 L Ed 2d 289, 99 S Ct 2847.

Footnote 64. *United States v Feldman* (CA9 Cal) 788 F2d 544, 20 Fed Rules Evid Serv 545, later proceeding on other grounds (CA9) 788 F2d 625 and cert den 479 US 1067, 93 L Ed 2d 1003, 107 S Ct 955, reh den on other grounds 480 US 912, 94 L Ed 2d 531, 107 S Ct 1361, later proceeding on other grounds (CA9 Ariz) 815 F2d 1318.

Footnote 65. United States v Gibson (CA9 Nev) 625 F2d 887.

Footnote 66. United States v Benton (CA5 Ga) 637 F2d 1052, 7 Fed Rules Evid Serv 1173, reh den (CA5 Ga) 645 F2d 72.

Footnote 67. United States v Brown (CA9 Cal) 880 F2d 1012, post-conviction proceeding (CA9) 1993 US App LEXIS 17371 (motive is not element of the offense of first degree murder; contrasting the situation under the civil rights provisions of the criminal code, where racial motive is an element of the crime).

Trial court properly refused to allow cross-examination to show that witness had motive to lie about in events in question, since "motive" as used in rule does not refer to motive to testify falsely, but to motive for commission of crime charged. United States v Farmer (CA11 Ga) 923 F2d 1557, 33 Fed Rules Evid Serv 188.

Footnote 68. United States v Brown (CA9 Cal) 880 F2d 1012, post-conviction proceeding (CA9) 1993 US App LEXIS 17371 (in prosecution for first degree murder of postal employee evidence of two prior occasions on which defendant had shot gun should not have been admitted since case presented material issue whether defendant had specific intent required to commit first degree murder and prior wrongful acts of random shooting failed to show motive relevant to establishing intent).

Footnote 69. United States v Shackelford (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by Huddleston v United States, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in United States v Manganelis (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

Practice References Hunter, Federal Trial Handbook 2d § 37.4.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value, 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Footnote 70. United States v Reed (CA11 Ala) 700 F2d 638, 12 Fed Rules Evid Serv 1436.

§ 436 Evidence of drug-related crimes

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of defendant's past drug activities have often been held admissible on the issue of motive. 71 In particular, evidence that a defendant attempted to purchase heroin shortly after a robbery, 72 or that the defendant was addicted to drugs, 73 has been found admissible to show the defendant's motive in a prosecution for robbery. Similarly, evidence that defendant possessed illegal drugs at time of his arrest could establish a motive for possessing a weapon, for which he was being prosecuted. 74

But evidence of drug use or addiction is admissible to prove motive only when there exists some affirmative link between the crime and the use or addiction. To admit such testimony without showing some affirmative link between a crime and narcotics would show only that the accused was a criminal generally. 75 Hence, in a prosecution for theft, it was error to admit testimony as to the defendant's heroin addiction in an attempt by the prosecution to show a motive for a robbery, where there was an absence of any affirmative link between the robbery and the defendant's alleged heroin addiction. 76

§ 436 ----Evidence of drug-related crimes [SUPPLEMENT]

Case authorities:

Securities fraud defendant's Form 10-K annual report disclosing company's provision of terms of net 30 days for most products, extension to 90 days at discretion of management, and return for credit under certain circumstances was properly excluded as evidence of subsequent remedial measures since potential prejudice was great given hotly contested issue whether defendant granted unconditional right to return and extraordinary credit terms to its distributors. *Malone v Microdyne Corp.* (1994, CA4 Va) 26 F3d 471, CCH Fed Secur L Rep ¶ 98237.

Evidence of bank robbery defendant's drug use was erroneously admitted since there was no evidence of defendant's financial need to supply motive for bank robbery. *United States v Madden* (1994, CA4 Md) 38 F3d 747.

Evidence of defendant's personal marijuana and cocaine use was admissible as proof of his motive for participation in charged conspiracies to distribute marijuana. *United States v Boyd* (1995, CA4 Md) 53 F3d 631.

Evidence that defendant had previously been convicted for possessing small amount of cocaine and weapon was properly admitted to show potential motive for later cocaine distribution and to show that he used firearm during drug trafficking crime. *United States v Powell* (1994, CA8 Mo) 39 F3d 894.

Footnotes

Footnote 71. *United States v Martinez* (CA10 Colo) 890 F2d 1088, 29 Fed Rules Evid Serv 418, cert den 494 US 1059, 108 L Ed 2d 771, 110 S Ct 1532; *United States v Record* (CA10 Okla) 873 F2d 1363, 27 Fed Rules Evid Serv 1302; *United States v Jones* (CA11 Ga) 933 F2d 1541; *United States v Richardson* (CA11 Fla) 764 F2d 1514, 18 Fed Rules Evid Serv 1161, cert den 474 US 952, 88 L Ed 2d 303, 106 S Ct 320; *United States v Williford* (CA11 Ga) 764 F2d 1493, 18 Fed Rules Evid Serv 1151; *United States v Montes-Cardenas* (CA11 Fla) 746 F2d 771, 17 Fed Rules Evid Serv 155; *United States v Harrison*, 220 US App DC 124, 679 F2d 942, 10 Fed Rules Evid Serv 1137.

Evidence that defendant skimmed cocaine for his personal use from a large amount of the drug before the rest was sold was admissible to show motive in the alleged cocaine conspiracy. *United States v Troop* (CA7 Wis) 890 F2d 1393, 29 Fed Rules Evid Serv 864.

Annotation: Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Practice References 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession.

Footnote 72. United States v Cyphers (CA7 Ill) 553 F2d 1064, 1 Fed Rules Evid Serv 956, cert den 434 US 843, 54 L Ed 2d 107, 98 S Ct 142.

Footnote 73. United States v Saniti (CA9 Or) 604 F2d 603, 4 Fed Rules Evid Serv 1133, cert den 444 US 969, 62 L Ed 2d 384, 100 S Ct 461; United States v Parker (CA9 Cal) 549 F2d 1217, 1 Fed Rules Evid Serv 584, cert den 430 US 971, 52 L Ed 2d 365, 97 S Ct 1659.

Annotation: Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Footnote 74. United States v Rankin (CA8 Mo) 902 F2d 1344, 30 Fed Rules Evid Serv 445, reh den, en banc (CA8) 1990 US App LEXIS 10486 (cocaine).

Admission of drug paraphernalia seized at apartment where defendant was arrested for possession of sawed off shotgun was proper to show defendant's motive, given close and well-known connection between firearms and drugs. United States v Fuller (CA8 Mo) 887 F2d 144, 28 Fed Rules Evid Serv 1245, cert den 496 US 908, 110 L Ed 2d 273, 110 S Ct 2592.

Evidence that cocaine, nine pistols and a .30-caliber rifle, stereo and video equipment without serial numbers, and fur and leather jackets without labels were seized in the town house of a defendant charged with possession of an unregistered machine gun and unregistered silencer was admissible. United States v Taylor (CA7 Ill) 728 F2d 864, 14 Fed Rules Evid Serv 1900.

Footnote 75. United States v Harvey (CA8 Mo) 845 F2d 760, 25 Fed Rules Evid Serv 1030, appeal after remand (CA8 Mo) 900 F2d 1253, cert den 498 US 1047, 112 L Ed 2d 774, 111 S Ct 754, reh den (US) 115 L Ed 2d 990, 111 S Ct 2818 (in prosecution for alleged conspiracy to defraud government by nonpayment of taxes, error to admit evidence of prior drug crimes as proof of motive).

Footnote 76. Gould v State (Alaska) 579 P2d 535, 2 ALR4th 1288 (where the state's argument for relevance was based on the reasoning that because the defendant was unemployed and had a \$300 a day heroin habit he had to commit the robbery to support his habit).

(3). To Show Intent [437-442]

§ 437 Generally

Evidence of similar acts, wrongs, or crimes is frequently highly probative on issues of intent, 77 and evidence of a prior conviction for the same offense as that charged is clearly countenanced by Federal Rules of Evidence 404(b) as evidence admissible to show a defendant's intent. 78 When an extrinsic offense is offered to show that the defendant's intent was to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's possessing the same state of mind in the perpetration of both the extrinsic and charged offenses. 79

The courts have reasoned that if a criminal defendant acts similarly in similar situations, the defendant probably harbors the same intent in each instance, and that prior conduct may be relevant circumstantial evidence of the defendant's most recent intent. The inference to be drawn is not that the defendant is disposed to commit such acts; rather, the inference to be drawn is that, in light of the first event, the defendant, at the time of the second event, must have had the intent attributed to him or her by the prosecution. 80

Intent may be inferred from subsequent as well as prior acts. 81 That one has thought in a particular illegal way over a period of time is evidence that one's thought patterns had already been so developed and were so operating on another previous occasion. 82

The scope of the court's discretion under Rule 404(b) does not permit the introduction of every prior similar act that may contribute in some manner to a showing of intent. 83 It has long been the rule that where one is charged with a criminal act that may be innocent or guilty according to the intent with which it was done, the acts, conduct, or statements of the accused on other occasions may be proved in order to show such intent, but that such proof cannot be extended to acts, conduct, or statements of the accused that do not naturally or necessarily bear on the issue to be established. 84 In many instances where a prior criminal act has some relevance to the question of intent, evidence concerning the act must nevertheless be excluded because the probative value is substantially outweighed by unfair prejudice to the defendant resulting from the fact that the evidence tends to portray the defendant as a "bad" person and thus hinders the defendant's defense on other issues. Thus, for example, where there exists a genuinely disputed question concerning the identity of the person who committed the act charged, evidence of other criminal acts of the defendant cannot be introduced. Similarly, such evidence cannot be introduced to show intent if there is a substantial dispute concerning whether the event charged as a crime occurred at all. 85 In addition, other evidence of similar acts which is probative of intent or lack of accident solely because it supports an impermissible generalization about the defendant's violent disposition is inadmissible. 86

In addition to showing that probative value outweighs the potential for prejudice against the defendant, it must be shown that probative value is dependent on the existence of a close parallel between the crime charged and the prior acts. 87 A past crime is not relevant to intent unless it required the same form of intent that the government seeks to prove in the instant case. 88

A defendant in a criminal prosecution may introduce evidence of specific acts to demonstrate that he lacked the intent to commit the crime in question. 89

One court has summarized the rules of admissibility concerning similar acts by holding that evidence of similar acts may be admitted where:

- (1) there is substantial evidence that the defendant committed the similar act;
- (2) some special quality of the act tends to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan, or system, and opportunity, preparation, and knowledge;
- (3) one or more of these factors are material to the defendant's guilt of the charged offense; and
- (4) the probative value of the evidence substantially outweighs the danger of unfair prejudice. 90

§ 437 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

Case authorities:

Evidence, in trial of former judge on bribery, mail fraud, RICO, etc. charges, of his prior advice to client not to tell whole truth to bankruptcy court, as well as his subsequent disbarment, was so remarkably like advice judge gave to sheriff in instant case and admissible to show whether defendant "respected truth as he defined it." *United States v Grubb* (1993, CA4 W Va) 11 F3d 426, digest op at (CA4 W Va) RICO Bus Disp Guide (CCH) ¶ 8437.

Evidence of defendant's participation in prior drug transaction was admissible in drug conspiracy trial on issue of intent, motive, and plan since defendant claimed lack of knowledge or involvement in drug conspiracy and in both instances defendant supplied second individual, who actually sold cocaine and delivered money to defendant. *United States v Clemis* (1993, CA6 Ohio) 11 F3d 597, motion den, reh den (CA6 Mich) 1994 US App LEXIS 1616 and petition for certiorari filed (Mar 9, 1994).

Evidence of defendant's involvement in prior drug transactions were properly admitted since they were similar to charged offense and relevant to show defendant's knowledge and intent and not that he was some hapless fool mistakenly caught up in overzealous law enforcement action. *United States v Kreiser* (1994, CA7 Ill) 15 F3d 635.

Evidence of tax evasion defendant's conduct during earlier income tax audit was relevant to his actual subjective intent and his understanding of his income tax obligations to file and pay tax on earnings from employment, and its admission was not contrary to policy concerning settlement negotiations, since it was admissible not to show his civil tax liability in those earlier years, but for "another purpose," i.e., his intent. *United States v Hauert* (1994, CA7 Ill) 40 F3d 197, 94 TNT 232-12.

Evidence of dividends bank fraud defendants received from defrauded bank was relevant

to defendants' intent since they argued lack of intent to defraud because they had invested their own money in bank but evidence that they took dividends exceeding their original \$2 investment undermined this claim. *United States v Molinaro* (1993, CA9 Cal) 11 F3d 853, 93 CDOS 8488, 93 Daily Journal DAR 14490.

In a first-degree murder prosecution in which defendant admitted that he had previously been convicted of assaulting his girlfriend, the prosecutor's cross-examination of defendant as to whether he had choked his girlfriend was admissible under Rule 404(b) to show intent and was not precluded under Rule 609 where the murder was committed by choking the victim; the prior assault by choking had occurred less than a year before the murder and was thus not remote in time; defendant's defense to the murder charge was lack of a specific intent to kill; defendant testified that he could not recall choking either the assault or the murder victim; and evidence that defendant had recently choked another victim was relevant to show his intent. *State v Sexton* (1994) 336 NC 321, 444 SE2d 879.

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b). *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentence arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup. *State v Ratliff* (1995) 341 NC 610, 461 SE2d 325.

The trial court did not abuse its discretion in admitting evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees and his reputation created thereby in an action for damages from an injury suffered during a movie stunt where plaintiff alleged willful and wanton, negligent and reckless conduct by defendant. The evidence was probative of defendant's motive, intent and the absence of mistake and was admissible under N.C.G.S. § 8C-1, Rule 404(b). *Pinckney v Van Damme* (1994) 116 NC App 139, 447 SE2d 825.

Footnotes

Footnote 77. *United States v Chiarella* (CA2 NY) 588 F2d 1358, CCH Fed Secur L Rep ¶ 96608, 3 Fed Rules Evid Serv 1347, rev'd on other grounds 445 US 222, 63 L Ed 2d 348, 100 S Ct 1108, CCH Fed Secur L Rep ¶ 97309.

Footnote 78. *United States v De La Cruz* (CA1 Puerto Rico) 902 F2d 121, 30 Fed Rules Evid Serv 139 (conviction of "nearly identical felony"); *United States v Cobb* (CA8 Mo) 588 F2d 607, cert den 440 US 947, 59 L Ed 2d 636, 99 S Ct 1426.

Footnote 79. *United States v Terebecki* (CA11 Ala) 692 F2d 1345, 11 Fed Rules Evid Serv 1800.

In a prosecution for presenting false insurance claims to an agency of the United States,

extrinsic offense evidence was properly admitted since the extrinsic offenses were identical to the charged offenses and the evidence was needed since intent was hotly contested at trial. *United States v Marrero* (CA5 Tex) 904 F2d 251, 30 Fed Rules Evid Serv 562, reh den, en banc (CA5 Tex) 909 F2d 1479 and cert den 498 US 1000, 112 L Ed 2d 567, 111 S Ct 561.

Footnote 80. *People v Robbins*, 45 Cal 3d 867, 248 Cal Rptr 172, 755 P2d 355, stay gr (Cal) 1988 Cal LEXIS 1113 and cert den 488 US 1034, 102 L Ed 2d 981, 109 S Ct 849.

Footnote 81. *United States v Whaley* (CA4 Va) 786 F2d 1229, 20 Fed Rules Evid Serv 668; *Dial v Travelers Indem. Co.* (CA5 Miss) 780 F2d 520, 20 Fed Rules Evid Serv 125.

Footnote 82. *United States v Whaley* (CA4 Va) 786 F2d 1229, 20 Fed Rules Evid Serv 668 (evidence concerning transaction between defendant and rental car agency occurring three months after fraudulent loan application was filed admissible under FRE 404(b) on issue of intent).

Footnote 83. *United States v Corey* (CA2 NY) 566 F2d 429, 2 Fed Rules Evid Serv 836.

Footnote 84. *Williamson v United States*, 207 US 425, 52 L Ed 278, 28 S Ct 163; *Bulloch v State*, 10 Ga 47; *Commonwealth v Jeffries*, 89 Mass 548; *State v Rogers*, 19 NJ 218, 116 A2d 37; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537.

Footnote 85. *United States v McCollum* (CA9 Cal) 732 F2d 1419, 15 Fed Rules Evid Serv 1033, cert den 469 US 920, 83 L Ed 2d 236, 105 S Ct 301.

Footnote 86. *United States v Hogue* (CA10 NM) 827 F2d 660, 24 Fed Rules Evid Serv 85 (although evidence of the systematic abuse of a particular victim tends to negate a defense of accident because it shows that the defendant had strong feelings toward that individual that may have contributed to the formation of intent or motive, prior and subsequent assaults on other persons do not have any bearing on the question whether an assault on a different victim was accidental or intentional).

Annotation: Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 ALR2d 806.

Footnote 87. *United States v Corey* (CA2 NY) 566 F2d 429, 2 Fed Rules Evid Serv 836.

Footnote 88. *United States v McCollum* (CA9 Cal) 732 F2d 1419, 15 Fed Rules Evid Serv 1033, cert den 469 US 920, 83 L Ed 2d 236, 105 S Ct 301.

Footnote 89. *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920 (not followed by *United States v Gillespie* (ND Ind) 773 F Supp 1154) (evidence of specific instances of prior co-operation with law enforcement authorities admissible as evidence that his intent at the relevant times in the instant case was not to extort bribes, but to gather information that would enable him to turn the subjects over to the FBI for prosecution).

Footnote 90. *People v Mouat*, 194 Mich App 482, 487 NW2d 494, app den 441 Mich 875, 494 NW2d 749.

§ 438 Non-Rule states

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Even in jurisdictions which hold that evidence of other similar acts is generally inadmissible, such evidence is admissible to show a litigant's state of mind. 91

Evidence of similar acts committed in the past is relevant to prove intent or the absence of mistake. Thus, in an action for dental malpractice in which the plaintiff alleged that the defendant did unauthorized dental work, the plaintiff was allowed to get discovery concerning names and captions of other lawsuits brought against the defendant in which there were allegations of unauthorized work performed by the defendant. 92

Footnotes

Footnote 91. Sessions Co. v Turner (Ala) 493 So 2d 1387 (evidence admissible to show fraud, scheme, motive, or intent); Dillon v U.S. Steel Corp. (1st Dist) 159 Ill App 3d 186, 111 Ill Dec 54, 511 NE2d 1349, app den 117 Ill 2d 542, 115 Ill Dec 399, 517 NE2d 1085 (evidence admissible to show habit, state of mind, knowledge or intent).

In a plaintiff's suit to recover under a homeowner's insurance policy for loss occasioned by fire, the defendant insurance company may, in asserting an arson defense, properly seek admission of evidence relating to the history of other fires experienced by the claimant, if not too remote in time or dissimilar in circumstances; such evidence is admissible to show motive and intent on the part of the claimant. Galvan v Cameron Mut. Ins. (Mo App) 733 SW2d 771.

Footnote 92. Davis v Solondz (3d Dept) 122 App Div 2d 401, 504 NYS2d 804.

§ 439 Intent as issue or likely issue in case

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the crime charged requires proof of specific intent, because intent is a material element to be proved by the government, intent is necessarily in issue and the government may submit evidence of other acts in an attempt to establish the matter in its case in chief. 93 In other words, the government is allowed to anticipate a defense of lack of intent. 94

While it has been held that where a defendant denies participation in the act or acts that

constitute a specific-intent crime, intent is not a material issue for the purpose of applying Federal Rules of Evidence 404(b), 95 in other courts the government has been permitted to introduce evidence of other acts on this issue even where the defendant concedes the issue of intent. 96 Elsewhere the position has been taken that intent remains an issue in the case unless the defendant takes affirmative steps to remove the issue, such as by stipulation, 97 and that the defense of lack of involvement is insufficient to remove the issue of intent from the case. 98

◆ Observation: If the defendant's intent is clearly uncontested, then any nominal probative value of the extrinsic offense evidence will undoubtedly be outweighed by the danger of unfair prejudice, and the evidence will not be admitted. 99

When a crime requires only general criminal intent—that is, when intent is only a formal issue so that proof of the proscribed act gives rise to an inference of intent—evidence 1 of specific intent or knowledge may be unnecessary and inadmissible under Federal Rules of Evidence 404(b). 2 To allow intent automatically to become an issue in cases in which intent is inferable from the nature of the act charged would create an exception that would virtually swallow the rule against admission of evidence of prior misconduct. 3

§ 439 ----Intent as issue or likely issue in case [SUPPLEMENT]

Case authorities:

Government's motion in limine to introduce extrinsic-act evidence is denied after defendant agreed to stipulate intent in prosecution for possession of drugs with intent to distribute, but court's ruling made prior to stipulation indicated that introduction would be allowed, even where evidence would be in form of officer testimony about prior possession offense which resulted in conviction under youthful offender statute, because sentencing judge was unavailable to unseal record, since government lacked other evidence of intent and prejudicial effect would not outweigh probative value. *United States v Salery* (1993, MD Ala) 830 F Supp 596, later proceeding (MD Ala) 836 F Supp 812.

Footnotes

Footnote 93. *United States v Harrod* (CA7 Ill) 856 F2d 996, 26 Fed Rules Evid Serv 1370; *United States v Kovic* (CA7 Ill) 684 F2d 512, 11 Fed Rules Evid Serv 854, cert den 459 US 972, 74 L Ed 2d 284, 103 S Ct 304; *United States v Burkett* (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802.; *Mitchell v State*, 140 Ala 118, 37 So 76; *McKenzie v State*, 33 Ala App 7, 33 So 2d 484, affd 250 Ala 178, 33 So 2d 488; *People v Smith*, 18 Ill 2d 547, 165 NE2d 333, 78 ALR2d 1354; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *Nesbit v Cumberland Contracting Co.*, 196 Md 36, 75 A2d 339, 20 ALR2d 1212; *State v Watson* (Mo) 386 SW2d 24, cert den and app dismd 381 US 275, 14 L Ed 2d 431, 85 S Ct 1458; *People v Marino*, 271 NY 317, 3 NE2d 439, 105 ALR 1283; *People v Molineux*, 168 NY 264, 61 NE 286; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894; *McWhorter v Commonwealth*, 191 Va 857, 63 SE2d 20, 28 BNA LRRM 2087, 20 CCH LC ¶ 66359.

Footnote 94. *United States v Evans* (CA8 Mo) 697 F2d 240, 12 Fed Rules Evid Serv 529, cert den 460 US 1086, 76 L Ed 2d 350, 103 S Ct 1779.

Footnote 95. *United States v Colon* (CA2 NY) 880 F2d 650, 28 Fed Rules Evid Serv 800; *United States v Silva* (CA5 Tex) 580 F2d 144, 3 Fed Rules Evid Serv 599, appeal after remand (CA5 Tex) 611 F2d 78; *United States v Powell* (CA9 Cal) 587 F2d 443, 3 Fed Rules Evid Serv 1407, appeal after remand (CA9 Cal) 632 F2d 754.

Footnote 96. *United States v Mergist* (CA5 La) 738 F2d 645, 16 Fed Rules Evid Serv 381; *United States v Hudson* (CA7 Wis) 884 F2d 1016, 28 Fed Rules Evid Serv 1451, reh den, en banc (CA7) 1990 US App LEXIS 1528 and cert den 496 US 939, 110 L Ed 2d 668, 110 S Ct 3221; *United States v Chaimson* (CA7 Ill) 760 F2d 798, 17 Fed Rules Evid Serv 1391; *United States v Franklin* (CA10 Utah) 704 F2d 1183, 12 Fed Rules Evid Serv 1752, cert den 464 US 845, 78 L Ed 2d 137, 104 S Ct 146 (prosecution under 18 USCS § 245(b) for willfully injuring person because of his race).

Footnote 97. *United States v Russo* (CA11 Fla) 717 F2d 545, 14 Fed Rules Evid Serv 585, reh den (CA11 Fla) 720 F2d 1294 and reh den (CA11 Fla) 720 F2d 1294.

In a prosecution for violation of the antitrust laws and mail fraud, District Court did not err in admitting evidence, under FRE 404(b), of three separate alleged bid rigging attempts by the defendant on the basis that the evidence was relevant to defendants' intent, notwithstanding defendant's offer to stipulate as to intent where the stipulation was inadequate. *United States v Dynalectric Co.* (CA11 Ga) 859 F2d 1559, 1988-2 CCH Trade Cases ¶ 68347, 27 Fed Rules Evid Serv 1057, 109 ALR Fed 575, later proceeding 274 US App DC 71, 861 F2d 730, 1988-2 CCH Trade Cases ¶ 68332, 27 Fed Rules Evid Serv 104 and cert den 490 US 1006, 104 L Ed 2d 157, 109 S Ct 1641, 109 S Ct 1642.

Footnote 98. *United States v Franklin* (CA10 Utah) 704 F2d 1183, 12 Fed Rules Evid Serv 1752, cert den 464 US 845, 78 L Ed 2d 137, 104 S Ct 146 (prosecution under 18 USCS § 245(b) for willfully injuring person because of his race); *United States v Russo* (CA11 Fla) 717 F2d 545, 14 Fed Rules Evid Serv 585, reh den (CA11 Fla) 720 F2d 1294 and reh den (CA11 Fla) 720 F2d 1294.

Footnote 99. *United States v Russo* (CA11 Fla) 717 F2d 545, 14 Fed Rules Evid Serv 585, reh den (CA11 Fla) 720 F2d 1294 and reh den (CA11 Fla) 720 F2d 1294.

Footnote 1. *United States v Shackelford* (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

Footnote 2. *United States v Danzey* (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179; *United States v Johnson* (CA6 Ky) 697 F2d 735 (evidence of prior counterfeiting activities admissible where defendants asserted that they did not intend to counterfeit, but to co-operate with Secret Service); *United States v Phillips* (CA6 Ky) 599 F2d 134, 4 Fed Rules Evid Serv 984; *United States v Partyka* (CA8 Minn) 544 F2d 345, 1 Fed Rules Evid Serv 428, appeal after remand (CA8 Minn) 561 F2d 118, 2 Fed Rules Evid Serv 1126, cert den 434 US 1037, 54 L Ed 2d 785, 98 S Ct 773.

Footnote 3. United States v Shackleford (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by Huddleston v United States, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in United States v Manganellis (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

§ 440 Showing intent in drug cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In prosecutions for possession of drugs or engaging in illegal drug transactions, evidence of prior drug offenses is often admissible to show the defendant's intent to participate in the transactions charged in the instant case. 4 Thus, an alleged coconspirator's testimony that she had previously sold drugs to defendant was admissible as probative of defendant's intent where his defense was that he was only a user of drugs, since evidence indicating previous deals suggested that his intent was not merely to use it. 5 Evidence of defendant's later possession of drugs or drug paraphernalia may also be admissible on the issue of intent where the circumstances showed the offense sufficiently similar in kind and reasonably close in time to instant charge. 6

But under the following circumstances, other drug-related offenses or transactions have been held inadmissible: the defendant's postconspiracy purchase of an illegal drug ingredient; 7 the defendant's presence in a place where substantial quantities of heroin were found since it was not probative of an intent to distribute that substance 16 days earlier; 8 a prior conviction for possession of a large amount of narcotics obviously to be used for distribution, since it bore questionable relevance to possession of a substance without intent to distribute, and the prejudicial effect of the evidence outweighed its probative value; 9 and evidence in a narcotics case that 2 1/2 years earlier the defendant was in the company of another person who possessed drugs, such evidence not being sufficient to justify the conclusion that the defendant knowingly possessed drugs at that time. 10

If the defendant offers to stipulate that he had the requisite intent to distribute if the government proved possession, evidence of prior felony convictions may not be admissible. 11

§ 440 ----Showing intent in drug cases [SUPPLEMENT]

Case authorities:

Evidence of defendant's prior drug and weapons activities were relevant to his knowledge, intent, and plan to possess controlled substances with intent to manufacture methamphetamine, hence properly admitted. United States v Benbrook (1994, CA5 Tex) 40 F3d 88, reh den (1995, CA5 Tex) 1995 US App LEXIS 555.

Evidence that witness and defendant once had agreement that witness could sell cocaine

out of defendant's store was admissible to show that defendant's state of mind was conducive to allowing distribution of crack cocaine from his store and to conspiring to distributing cocaine from his store, and therefore admissible. *United States v Scott* (1995, CA5 Miss) 48 F3d 1389, reh, en banc, den (1995, CA5 Miss) 1995 US App LEXIS 14246.

In prosecution for possession with intent to distribute and unlawful importation of cocaine, district court did not err in permitting evidence of defendant's prior cocaine-related conviction on issue of intent since defendant offered neither stipulation, admission nor evidence which removed issue of intent from government's case. *United States v Zanabria* (1996, CA5 Tex) 74 F3d 590 (criticized in *United States v Thompson* (1996, CA9 Alaska) 82 F3d 849, 96 CDOS 2950, 96 Daily Journal DAR 4879).

Evidence of defendant's prior crack sales to witness resembled factual circumstances of offense with which he was charged and were admissible as relevant to his intent to distribute. *United States v Davis* (1994, CA6 Tenn) 15 F3d 526, 1994 FED App 10P.

Prior uncharged drug-selling conduct of defendant charged with conspiracy to distribute cocaine base was properly admitted as to defendant's intent to distribute and to establish defendant's plan to carry out conspiracy charged since it was similar and close in time to charged acts. *United States v Wright* (1994, CA6 Tenn) 16 F3d 1429, 1994 FED App 49P, cert den (US) 1994 US LEXIS 5027.

Evidence of defendant's two prior narcotics sales to confidential informant were admissible in trial for cocaine possession with intent to distribute since it was relevant to specific intent government was required to prove as element of crime charged. *United States v Johnson* (1994, CA6 Tenn) 27 F3d 1186, 1994 FED App 240p.

Evidence of defendant's prior drug dealing was properly admitted to prove intent since, despite defendant's decision to deny all charges rather than claim he made innocent mistakes, prosecution still needed to show that if he was hiding something it was more than just his poor judgment in picking his friends, but that it was in fact his own intent to buy drugs for eventual resale. *United States v Brown* (1994, CA7 Ill) 34 F3d 569.

Heroin distribution defendant's prior narcotics conviction was not admissible to prove intent since defendant did not dispute that he had requisite intent, but it was admissible to rebut his defense of entrapment. *United States v Bastanipour* (1994, CA7 Ill) 41 F3d 1178.

Evidence that cocaine distribution defendant had provided witness with narcotics in exchange for sexual favors and used drugs with witness was probative of defendant's intent because it helped establish that defendant knew that narcotics were stored at his house, that he was associating himself with their storage, distribution, and consumption, and that he was familiar with commercial possibilities of trading in cocaine. *United States v Gregory* (1996, CA7 Ill) 74 F3d 819, 43 Fed Rules Evid Serv 954.

Evidence that defendant charged with possession of cocaine with intent to distribute had previously been arrested for driving with suspended license, and that search incident to that arrest uncovered pager, cash, and baggies containing cocaine base, was admissible to disprove knowledge and intent issues raised by defense that defendant was caught in "wrong place at wrong time." *United States v Wiley* (1994, CA8 Minn) 29 F3d 345, reh, en banc, den (1994, CA8 Minn) 1994 US App LEXIS 21409.

Videotape documenting substantial indoor marijuana growing operation at defendants' prior residence in Maine was properly admitted in prosecution for marijuana-growing operation in new residence in Kansas for purposes of showing knowledge, intent, and common scheme or plan, and to show both defendants' participation. *United States v Fitzherbert* (1993, CA10 Kan) 13 F3d 340, cert den (US) 62 USLW 3705.

Evidence of defendant's prior cocaine sale to undercover officer, discovery of two kilograms of cocaine in van he was driving, and apparent attempt to take delivery of two kilograms of cocaine at hotel were relevant to his intent to distribute cocaine. *United States v Hardwell* (1996, CA10 Kan) 80 F3d 1471, on reh, reh den, in part, reh, en banc, den, remanded (1996, CA10) 1996 US App LEXIS 16617.

Evidence of uncharged drug offenses was admissible to prove intent, which defendant placed at issue by pleading not guilty to drug distribution conspiracy charges against him. *United States v Maxwell* (1994, CA11 Ala) 34 F3d 1006, 8 FLW Fed C 731.

Evidence that drug trafficking defendants had been involved in prior drug transactions was admissible as evidence of their intent to act distribute cocaine as charged. *United States v Clarke* (1994, App DC) 24 F3d 257.

Footnotes

Footnote 4. *United States v Hadfield* (CA1 Mass) 918 F2d 987, 31 Fed Rules Evid Serv 989, cert den (US) 114 L Ed 2d 466, 111 S Ct 2062, post-conviction proceeding (CA1) 1992 US App LEXIS 30539; *United States v Simon* (CA1 Puerto Rico) 842 F2d 552, 25 Fed Rules Evid Serv 364; *United States v Ward* (CA3 Pa) 793 F2d 551, 21 Fed Rules Evid Serv 44; *United States v King* (CA4 Va) 768 F2d 586; *United States v Percy* (CA4 Va) 765 F2d 1199, 18 Fed Rules Evid Serv 602; *United States v Black* (CA5 Ala) 595 F2d 1116, 4 Fed Rules Evid Serv 764; *United States v Bloom* (CA5 Tex) 538 F2d 704, 2 Fed Rules Evid Serv 226, cert den 429 US 1074, 50 L Ed 2d 792, 97 S Ct 814; *United States v Elkins* (CA6 Tenn) 732 F2d 1280, 15 Fed Rules Evid Serv 1023; *United States v Yerks* (CA8 Mo) 918 F2d 1371, 31 Fed Rules Evid Serv 885; *United States v Newton* (CA8 Mo) 912 F2d 212; *United States v Santana* (CA8 Ark) 877 F2d 709; *United States v Houser* (CA9 Mont) 929 F2d 1369, 91 CDOS 2481, 91 Daily Journal DAR 3941, 32 Fed Rules Evid Serv 15; *United States v Ono* (CA9 Cal) 918 F2d 1462, 90 CDOS 8472, 31 Fed Rules Evid Serv 1146, appeal after remand (CA9 Cal) 997 F2d 647, 93 CDOS 5038, 93 Daily Journal DAR 8543, cert den (US) 126 L Ed 2d 701, 114 S Ct 738; *United States v Hernandez* (CA11 Fla) 896 F2d 513, 29 Fed Rules Evid Serv 1293, cert den 498 US 858, 112 L Ed 2d 125, 111 S Ct 159; *United States v McDowell* (CA11 Ga) 705 F2d 426, 13 Fed Rules Evid Serv 127, reh den (CA11 Ga) 714 F2d 106; *United States v Glen-Archila* (CA11 Fla) 677 F2d 809, 10 Fed Rules Evid Serv 1236, cert den 459 US 874, 74 L Ed 2d 137, 103 S Ct 165; *United States v Moore*, 235 US App DC 381, 732 F2d 983, 15 Fed Rules Evid Serv 1151; *Duvall v State* (Okla Crim) 780 P2d 1178; *Cabanas v State* (Tex App Corpus Christi) 698 SW2d 405.

In a prosecution for possession with intent to distribute cocaine, evidence of prior drug smuggling activities was admissible, since the defendant gave an innocent explanation of pulling a boat up to a drug laden vessel, thus making intent the central issue in the case. *United States v Bennett* (CA11 Fla) 848 F2d 1134, 26 Fed Rules Evid Serv 312.

Practice References 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession.

Footnote 5. United States v Robison (CA6 Ohio) 904 F2d 365, 30 Fed Rules Evid Serv 521, cert den 498 US 946, 112 L Ed 2d 323, 111 S Ct 360, appeal after remand (CA6 Ohio) 933 F2d 1010, reported in full (CA6) 1991 US App LEXIS 11644.

Footnote 6. United States v Johnson (CA8 Mo) 934 F2d 936, 33 Fed Rules Evid Serv 161; United States v Brown (CA8 Mo) 923 F2d 109, 32 Fed Rules Evid Serv 37, cert den (US) 116 L Ed 2d 80, 112 S Ct 110 (later possession of cocaine admitted in trial for possession with intent to distribute crack cocaine).

Admission of tape recordings of drug transactions subsequent to those for which defendant was charged was proper since they were close in time and relevant to defendant's intent in previous transactions. United States v Fells (CA4 Va) 920 F2d 1179, 31 Fed Rules Evid Serv 1104.

Footnote 7. United States v Boyd (CA3 Pa) 595 F2d 120, 3 Fed Rules Evid Serv 1401.

Footnote 8. United States v James, 181 US App DC 55, 555 F2d 992, 1 Fed Rules Evid Serv 895.

Footnote 9. United States v Partyka (CA8 Minn) 544 F2d 345, 1 Fed Rules Evid Serv 428, appeal after remand (CA8 Minn) 561 F2d 118, 2 Fed Rules Evid Serv 1126, cert den 434 US 1037, 54 L Ed 2d 785, 98 S Ct 773.

Footnote 10. United States v Foskey, 204 US App DC 245, 636 F2d 517, 6 Fed Rules Evid Serv 934.

Footnote 11. United States v Yeagin (CA5 Tex) 927 F2d 798, 32 Fed Rules Evid Serv 453, corrected, reh den (CA5) 1991 US App LEXIS 4112.

As to the effect of an offer to stipulate as to intent, see § 439.

§ 441 Showing intent in other particular criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts may also be admissible as probative of intent in tax prosecutions, 12 in prosecutions for uttering forged instruments, 13 in prosecutions for fraud or counterfeiting, 14 in prosecution for making false entry in bank records and willfully misapplying bank funds, 15 and in prosecutions for receipt or sale of stolen goods, to demonstrate that the defendant was aware that the goods were stolen. 16

Where a case involves a claim for insurance proceeds met by a defense of arson and concealment, the essential issue is the difference between an accident and an intentional act, and evidence of similar wrongful conduct is particularly relevant to probe the questions of intent and plan to burn insured properties. 17

Other evidence of other crimes, wrongs, or acts which has been admitted to show intent includes—

—testimony regarding the defendant's assault upon an individual, accompanied by a warning as to what would happen to an informer, as probative of the defendant's intent and motivation when he told the witness to leave town and warned that it might be good for his health if he said nothing, where the crimes charged required proof of a specific intent to obstruct justice. 18

—evidence of defendant's participation in two previous escapes, in a prosecution for obtaining and possessing objects designed or intended to be used to facilitate escape from prison, notwithstanding that the method involved in each escape plan was different. 19

—testimony, in an age discrimination in employment case, by employees of plaintiff's employer as to alleged age discrimination against them, since testimony of other employees about their treatment by defendant is relevant to the issue of the employer's discriminatory intent. 20

—testimony, in a prosecution under the Mann Act, 21 by three young women that the defendant had beaten, raped, and forced them into prostitution in the same manner as charged in the instant case with regard to two other women. 22

—evidence that defendant had sodomized and sexually abused witnesses when they were children, which was sufficiently similar to the instant charges of sexual abuse and abusive sexual contact to be admitted on the issue of intent. 23

—evidence of a defendant's previous batteries of a victim, where the defendant takes the stand and testifies that a homicide was accidental and thus done without the requisite criminal intent. 24

—testimony tending to show that in instances other than that charged in an indictment under 18 USCS § 242 for depriving inmates of a state hospital of their federally protected right to personal security, the defendant had engaged in acts of misconduct toward the inmates. 25

—testimony relating to prior similar acts in a prosecution for conspiracy. 26

—a prior conviction for the same offense, offered to rebut an intoxication defense. 27

—evidence of defendant's prior misdemeanor convictions for driving while intoxicated as relevant to the issue of malice in a prosecution for second-degree murder arising out of an automobile accident that occurred while defendant was intoxicated. 28

—evidence of defendant's participation in the theft of a weapon, if evidence is admitted tending to show the use of a stolen weapon in the offense charged. 29

—evidence of possession of other firearms on the issue of knowledge and intent to

exercise control over firearms. 30

—a statement by defendant admitting participating in several other robberies with an associate, in a prosecution for felony murder and attempted second degree robbery, arising out of the shooting by defendant's associate of a taxi driver during an attempted robbery, where prior robberies were each perpetrated at the same location against potential drug purchasers. 31

—testimony of an admitted participant in the charged bank robbery as to a telephone conversation with the defendant following such robbery concerning the future commission of a bank robbery. 32

—evidence of a prior bank robbery committed by a defendant who claimed that he committed the robbery charged in the instant case while under hypnosis. 33

But in a prosecution for aiding and abetting a bank robbery, evidence of defendant's conviction for possession of stolen bank money, ten years earlier, was not admissible since, although a prior conviction showed defendant had knowingly possessed stolen bank money ten years earlier, it did not show that defendant intended that the bank be robbed or participated in the earlier robbery. 34

§ 441 ----Showing intent in other particular criminal cases [SUPPLEMENT]

Practice Aids: Admissibility of evidence of commission of similar crime by one other than accused. 22 ALR5th 1.

Case authorities:

Evidence of defendant's purchase and possession of two firearms was not admissible as proof of his intent to commit charged crimes of making interstate threats and extortionate demands, or as indicative of his plan or preparation, since government offered no evidence showing connection between defendant's possession of firearms and his intent to place telephone calls and say things he said, nor was there evidence linking his purchase of firearms in June with any planning or preparing to carry out threats of violence over month later. *United States v Himelwright* (1994, CA3) 42 F3d 777.

IRS special agent's testimony explaining how defendants' activities constituted concealment for purposes of money laundering was not impermissible since he gave no opinion on defendants' subject intent in pursuing particular activity, rather he gave opinion that objectively established conduct constituted concealment. *United States v Barber* (1996, CA4 Va) 80 F3d 964.

Evidence of Mann Act defendant's drug use and violent outbursts was admissible as relevant to how he controlled and transported women, since his intent in traveling from Texas to New Mexico was hotly disputed issue, and court gave strong jury instruction on limited use of such evidence. *United States v Campbell* (1995, CA5 Tex) 49 F3d 1079.

Sexually explicit descriptions of uncharged graphic interchange format files and videotapes were probative of defendants' scienter and pandering in connection with their operation of electronic bulletin board; defendants posted these graphic descriptions in public areas of computer bulletin board system as way of advertising for members.

United States v Thomas (1996, CA6 Tenn) 74 F3d 701, 96 CDOS 609, 43 Fed Rules Evid Serv 969, reh, en banc, den (1996, CA6 Tenn) 1996 US App LEXIS 4529.

In prosecution of defendant for arson resulting in death of his two children, evidence of defendant's prior conviction for sexual exploitation of child, for which he was on probation, was intricately related to arson charge and properly admitted to establish motive since government's theory was that defendant burned building where wife and children were sleeping to prevent them from reporting that he had been sexually abusing children, which would result in revocation of his probation; any prejudice was minimal because court instructed jury not to consider evidence for any purpose other than motive and intent. United States v Menzer (1994, CA7 Wis) 29 F3d 1223, cert den (1994, US) 63 USLW 3386.

In prosecution of bank officer for soliciting and accepting kickbacks, district court did not abuse its discretion in determining that probative value of evidence that defendant violated bank's code of conduct outweighed its prejudicial effect since, although it had slight tendency to show defendant's propensity to commit wrongs, its predominant effect pertained to legitimate purpose of proving intent. United States v Sinclair (1996, CA7 Ill) 74 F3d 753, 43 Fed Rules Evid Serv 743.

Evidence that accomplice of money laundering defendant was involved in narcotics trafficking and had exorbitant lifestyle was properly admitted as relevant to demonstrate defendant's intent to structure financial transaction to avoid currency reporting requirements and motive for doing so. United States v Mitchell (1994, CA8 Mo) 31 F3d 628.

In bribery prosecution against judge, evidence that codefendant attorney had given bribes to another, convicted, judge was properly admitted on issue of codefendant's intent since codefendant raised "rainmaking" defense, i.e., he conned other undercover informant and never tried to bribe judge. United States v Shields (1993, CA7 Ill) 999 F2d 1090, reh, en banc, den (CA7 Ill) 1993 US App LEXIS 21884 and petition for certiorari filed (Oct 18, 1993).

In prosecution for assault with intent to murder his wife, evidence of defendant's prior attacks on his wife were properly admitted on issue of intent; tangential differences were meaningless relative to essential identity remaining between victim, assailant, manner of assault and nature of harm involved. United States v Hinton (1994, CA9 Ariz) 31 F3d 817, 94 CDOS 5815, 94 Daily Journal DAR 10565.

Evidence of items with defendant's signature, though not specifically related to particular counts of indictment charging securities, wire, and bank fraud and money laundering stemming from investment scheme, were admissible to show defendant's intent, knowledge, and absence of mistake or accident regarding how monies from investment scheme were being transferred into accounts held by defendant and his wife and misused. United States v Kunzman (1995, CA10 Colo) 54 F3d 1522.

Evidence that defendant failed to pay federal taxes during period of check kiting was admissible to show defendant's intent to defraud bank and to rebut notion that he believed bank consented to his transactions with it. United States v Pless (1996, App DC) 79 F3d 1217.

In prosecution for child molestation based on various different incidents involving three

different children unrelated to defendant, evidence of uncharged incidents of molestation involving defendant's two daughters was properly admitted as evidence of common design or plan, where offenses shared sufficient common features, and where degree of similarity between offenses was sufficient to prove intent. *People v Carradus* (1994, 2nd Dist) 29 Cal App 4th 1, 34 Cal Rptr 2d 459, 94 CDOS 7874, 94 Daily Journal DAR 14514, review den, op withdrawn by order of ct (Cal) 95 CDOS 228.

In prosecution on several counts of lewd and lascivious acts involving defendant's touching of girls between ages of 7 and 14 whom he had encountered at beach, evidence of prior uncharged acts was admissible to (1) prove that defendant's grabbing of one victim's crotch was deliberate act rather than merely unintentional act while he was helping her in water, in light of similar circumstances of prior acts; and (2) establish disputed issue of defendant's identity as person who molested other victim, based on distinctive similarities in defendant's befriending of young girls at beach. *People v Dablon* (1994, 4th Dist) 29 Cal App 4th 454, 34 Cal Rptr 2d 761, 94 CDOS 8038, 94 Daily Journal DAR 14823, review gr (Cal) 95 CDOS 228.

In prosecution of husband for murder of wife, tape recording of argument between defendant and wife, which took place when he was jailed for prior battery of victim, was admissible to illustrate defendant's motive, intent, or bent of mind. *Sumpter v State* (1990) 260 Ga 683, 398 SE2d 12.

In prosecution for child molestation, tape of conversation between defendant and one of alleged victims was properly admitted as proof of similar crimes to show motive, intent, bent of mind, or lustful disposition, even though defendant was acquitted of charges against that particular victim. *McGee v State* (1992) 205 Ga App 722, 423 SE2d 666, 92 Fulton County D R 1899, cert den (Ga) 1993 Ga LEXIS 44.

Trial court in robbery prosecution properly admitted evidence that defendant committed similar robbery on day after charged crime, where court admitted evidence, and so advised jury, for limited purpose of showing defendant's knowledge and intent. *Hill v State* (1994) 212 Ga App 386, 441 SE2d 863, 94 Fulton County D R 936, corrected, reconsideration den (Ga App) 94 Fulton County D R 1182 and cert den (Ga) 1994 Ga LEXIS 662.

In a first-degree murder prosecution in which defendant admitted that he had previously been convicted of assaulting his girlfriend, the prosecutor's cross-examination of defendant as to whether he had choked his girlfriend was admissible under Rule 404(b) to show intent and was not precluded under Rule 609 where the murder was committed by choking the victim; the prior assault by choking had occurred less than a year before the murder and was thus not remote in time; defendant's defense to the murder charge was lack of a specific intent to kill; defendant testified that he could not recall choking either the assault or the murder victim; and evidence that defendant had recently choked another victim was relevant to show his intent. *State v Sexton* (1994) 336 NC 321, 444 SE2d 879.

In a murder prosecution, the court properly permitted the introduction of testimony by a witness that the defendant stated that he had just gotten out of jail and was going to kill the first white man he saw since such testimony was admissible as proof of the defendant's motive for the crime; the defendant's statement logically raised the inference that he perceived his previous incarceration to be the result of unexplained actions by white males for which he was seeking revenge. *Commonwealth v Williams* (1995, Pa)

There was no prejudice in a first- degree murder prosecution where the trial court admitted court files relating to defendant's prior conviction for assault. The files were admitted for the nonhearsay purpose of showing motive, intent and plan and witnesses testified that defendant broke into the victim's home and attacked her, that the victim prosecuted the defendant for the assault and trespass, that the defendant harassed and threatened the victim, and that the victim believed that the defendant was going to kill her. The files added little, if anything, to the State's case. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

In the prosecution of the defendant for the murder of a police officer, it was not error to admit into evidence the portion of the defendant's confession in which he stated that he had armed himself on the night of the crime with the intention of robbing drug dealers since that statement was relevant to rebut the defendant's claim that he did not possess the requisite specific intent to kill the officer because of alleged fear generated by the conduct of the officer which rendered the defendant's conduct not willful and premeditated. *Commonwealth v Bracey* (1995, Pa) 662 A2d 1062, application gr (Pa) 1995 Pa LEXIS 1254.

In a prosecution for 2 murders to which the defendant confessed after he was arrested in connection with a rape, the rape victim and others were properly permitted to testify about the rape incident in order to establish that the killings were intentional and that the defendant acted with malice in killing his victims. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

Footnotes

Footnote 12. *United States v Anderson* (CA4 W Va) 11 Fed Rules Evid Serv 442; *United States v Verkuilen* (CA7 Ill) 690 F2d 648, 82-2 USTC ¶ 9618, 11 Fed Rules Evid Serv 1417, 50 AFTR 2d 82-5937; *United States v Thompson* (CA8 Mo) 513 F2d 577, 75-1 USTC ¶ 9346, 35 AFTR 2d 75-1167 (tax returns for previous years in a prosecution for failure to file tax returns).

Footnote 13. *United States v Hardrich* (CA8 Neb) 707 F2d 992, 12 Fed Rules Evid Serv 2036, cert den 464 US 991, 78 L Ed 2d 679, 104 S Ct 481.

Footnote 14. *United States v Shenker* (CA1 Mass) 933 F2d 61, 32 Fed Rules Evid Serv 1275 (insurance broker license application forms containing false statements by defendant admissible as evidence of intent to defraud on theory that statements were part of coverup which prevented anyone from detecting defendant's fraud); *United States v Cardillo* (CA1 RI) 708 F2d 29, 13 Fed Rules Evid Serv 970, cert den 464 US 1010, 78 L Ed 2d 713, 104 S Ct 531 (evidence of other instances of attempts to sell counterfeit coins, in prosecution for possessing counterfeit coins with intent to defraud); *United States v Anderson* (CA5 Tex) 933 F2d 1261, 33 Fed Rules Evid Serv 170, reh den (CA5) 1991 US App LEXIS 16707, appeal after remand (CA5 Tex) 976 F2d 927, 36 Fed Rules Evid Serv 1488 (evidence of arson defendant's poor financial condition, as evidenced by civil judgments against him arising out of his failed furniture business pre-dating fire, to show motive in participating in scheme to defraud insurance company); *United States v Hopkins* (CA5 Tex) 916 F2d 207, 31 Fed Rules Evid Serv 540 (in prosecution of bank

officers for fraudulent acts to circumvent federal election laws, evidence that they told former bank officer to conceal bad loans); *United States v Sanders* (CA8 Neb) 563 F2d 379, 2 Fed Rules Evid Serv 497, cert den 434 US 1020, 54 L Ed 2d 767, 98 S Ct 744 (evidence that defendant had on prior occasions filed insurance claims for loss by theft, in prosecution for defrauding insurance companies); *United States v Matlock* (CA8 Ark) 558 F2d 1328, 2 Fed Rules Evid Serv 380, cert den 434 US 872, 54 L Ed 2d 152, 98 S Ct 218 (possession by defendant of large quantity of credit cards under different names in 1975, as tending to show that applications for credit cards in 1972-1973 were part of scheme and were made with intent to defraud, in prosecution for use of mails to defraud); *United States v Maestas* (CA8 Neb) 554 F2d 834, 1 Fed Rules Evid Serv 910, cert den 431 US 972, 53 L Ed 2d 1070, 97 S Ct 2936 (evidence of previous counterfeit checks cashed by defendant, as tending to prove that defendant cashed such checks as part of scheme rather than through inadvertence or mistake); *United States v Hooshmand* (CA11 Fla) 931 F2d 725, 32 Fed Rules Evid Serv 1281 (in mail fraud prosecution regarding Medicare claims, evidence of defendant's prior alterations of records admissible to prove intent to commit charged offense and defendant's ability and experience to execute fraudulent scheme).

In a prosecution for attempting to defraud an insurance company by arson and murder, evidence relating to defendant's first wife's murder and his subsequent collection of her life insurance proceeds was properly admitted on the issue of intent to defraud in the present case, involving the killing of defendant's business associate. *United States v York* (CA7 Ill) 933 F2d 1343, 33 Fed Rules Evid Serv 426, cert den (US) 116 L Ed 2d 262, 112 S Ct 321, reh den (US) 116 L Ed 2d 668, 112 S Ct 651, later proceeding (ND Ill) 1992 US Dist LEXIS 2212.

Footnote 15. *United States v Cordell* (CA5 Tex) 912 F2d 769, 31 Fed Rules Evid Serv 160 (evidence of alleged prior violations of lending limits admissible as relevant to show motive and intent).

Footnote 16. *United States v De Fillipo* (CA2 NY) 590 F2d 1228, 4 Fed Rules Evid Serv 110, cert den 442 US 920, 61 L Ed 2d 288, 99 S Ct 2844 (prior conviction for possession of stolen property); *United States v Larson* (CA8 Minn) 555 F2d 673, 2 Fed Rules Evid Serv 49 (evidence of defendant's possession of other stolen cars, in prosecution for transportation of stolen automobile); *United States v Tisdale* (CA10 NM) 647 F2d 91, 7 Fed Rules Evid Serv 1490, cert den 454 US 817, 70 L Ed 2d 86, 102 S Ct 95 (taped conversation wherein the defendants indicated they were prepared to sell stolen goods, in a prosecution for sale of stolen goods).

Evidence that defendant had previously purchased merchandise taken from trailers hijacked by same gang from which he purchased part of shipment stolen in instant case was admissible to prove that he had knowingly and intentionally participated in conspiracy to hijack. *United States v Latorre* (CA1 Puerto Rico) 922 F2d 1, 31 Fed Rules Evid Serv 1066, cert den (US) 116 L Ed 2d 175, 112 S Ct 217.

But see *United States v Reed* (CA6 Ohio) 647 F2d 678, cert den 454 US 837, 70 L Ed 2d 118, 102 S Ct 142 and cert den 454 US 1037, 70 L Ed 2d 483, 102 S Ct 580, holding that evidence of past criminal associations of a general nature by the defendant in a stolen property case was inadmissible where there was no testimony as to specific prior bad acts or their substantive or temporal relationship to the offense charged.

Annotation: Supreme Court's construction and application of National Stolen Property Act (18 USCS Sec. 2314), 87 L Ed 2d 768.

Footnote 17. *Dial v Travelers Indem. Co.* (CA5 Miss) 780 F2d 520, 20 Fed Rules Evid Serv 125.

Footnote 18. *United States v Carleo* (CA10 Colo) 576 F2d 846, cert den 439 US 850, 58 L Ed 2d 152, 99 S Ct 153.

Footnote 19. *United States v Archer* (CA7 Wis) 843 F2d 1019, 25 Fed Rules Evid Serv 404, cert den 488 US 837, 102 L Ed 2d 76, 109 S Ct 100.

Footnote 20. *Spulak v K Mart Corp.* (CA10 Colo) 894 F2d 1150, 51 BNA FEP Cas 1652, 52 CCH EPD ¶ 39584, 29 Fed Rules Evid Serv 1078.

Footnote 21. 18 USCS § 2421.

Footnote 22. *United States v Winters* (CA9 Cal) 729 F2d 602, 15 Fed Rules Evid Serv 516.

Annotation: Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offenses, 88 ALR3d 8.

Footnote 23. *United States v Hadley* (CA9 Ariz) 918 F2d 848, 31 Fed Rules Evid Serv 621, cert gr (US) 117 L Ed 2d 491, 112 S Ct 1261, argued (Nov 4, 1992) and motion gr (US) 118 L Ed 2d 205, 112 S Ct 1556 and cert dismd (US) 121 L Ed 2d 324, 113 S Ct 486, 92 Daily Journal DAR 15329, 6 FLW Fed S 753, reh den (US) 122 L Ed 2d 372, 113 S Ct 1068.

Footnote 24. *United States v Naranjo* (CA10 Colo) 710 F2d 1465, 13 Fed Rules Evid Serv 1260.

Footnote 25. *United States v Dise* (CA3 Pa) 763 F2d 586, cert den 474 US 982, 88 L Ed 2d 341, 106 S Ct 388.

Footnote 26. *United States v Kenney* (DC Me) 598 F Supp 883, 16 Fed Rules Evid Serv 1177; *United States v Moore* (CA9 Cal) 522 F2d 1068, 1 Fed Rules Evid Serv 147, cert den 423 US 1049, 46 L Ed 2d 637, 96 S Ct 775.

Annotation: Admissibility in federal conspiracy prosecution of evidence of defendant's similar prior criminal act, 20 ALR Fed 125.

Footnote 27. *United States v Kirk* (CA5 Tex) 528 F2d 1057.

Footnote 28. *United States v Loera* (CA9 Ariz) 923 F2d 725, 91 CDOS 479, 91 Daily Journal DAR 714, 32 Fed Rules Evid Serv 177, cert den (US) 116 L Ed 2d 128, 112 S Ct 164.

Footnote 29. *United States v Day*, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 30. *United States v Dudek* (CA6 Ohio) 560 F2d 1288, 2 Fed Rules Evid Serv 406, cert den 434 US 1037, 54 L Ed 2d 786, 98 S Ct 774, reh den 434 US 1089, 55 L Ed 2d 796, 98 S Ct 1288 (evidence of similar illegal transactions between burglars and coconspirators involved in firearms, as relevant to defendant's defense of lack of criminal intent and as probative of a wider criminal conspiracy among the same conspirators, in an action for conspiring to commit specified federal firearms offenses); *United States v Forbes* (CA9 Cal) 10 Fed Rules Evid Serv 1417.

Testimony of a witness that he accompanied defendant to locations where he observed trunks containing firearms addressed to another country and that he aided defendant in transporting firearms was admissible in a prosecution for conspiracy to violate the federal firearms law and for unlawful exportation of firearms without a permit. *United States v Grady* (CA2 NY) 544 F2d 598, 1 Fed Rules Evid Serv 408, 37 ALR Fed 819.

Footnote 31. *People v Denis* (2nd Dist) 224 Cal App 3d 563, 273 Cal Rptr 724, review den (Cal) 1991 Cal LEXIS 136.

Footnote 32. *United States v Di Giovanni* (CA2 NY) 544 F2d 642, 1 Fed Rules Evid Serv 417.

Footnote 33. *United States v McCollum* (CA9 Cal) 732 F2d 1419, 15 Fed Rules Evid Serv 1033, cert den 469 US 920, 83 L Ed 2d 236, 105 S Ct 301.

Footnote 34. *United States v Mothershed* (CA8 Iowa) 859 F2d 585, 27 Fed Rules Evid Serv 162.

§ 442 Showing intent in tort cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In civil negligence cases, evidence of other similar acts is generally inadmissible to show the defendant's intent or state of mind on a particular occasion, since the conduct typically at issue in civil cases represents much less a departure from an accepted norm than does conduct typically at issue in criminal cases, thus decreasing the probative worth of the other facts evidence to a point below the minimal standard of relevancy. 35

In a civil action in which punitive damages are sought, evidence of the defendants' alleged willful, wanton, and reckless acts committed after the alleged tortious act is not admissible to show that the defendants' actions at issue in the present case were similarly willful, wanton, and reckless. 36 But evidence of an insured's prior conspiracy to stage a fake slip and fall was admissible on the issue of intent where the insurer denied coverage on the basis of fraud. 37

§ 442 ----Showing intent in tort cases [SUPPLEMENT]

Case authorities:

Evidence of drugs and guns found in apartment co-owned by defendant and his spouse was properly admitted as relevant to defendant's state of mind when he went to apartment, since defense theory was that defendant was electrician who was living elsewhere with girlfriend and only went to apartment to visit his children. *United States v Rodriguez* (1995, CA2 NY) 53 F3d 545.

In franchisee's action against franchisor for fraud under various state laws, equitable fraud, and negligence, testimony of former franchisees regarding misrepresentations franchisor made to them was not admissible as evidence of intent because intent was not essential element of Consumer Fraud Act violation, nor admissible as evidence of common plan or scheme since they were not part of single series of events, nor as relevant to issues such as motive, identity or intent since they were not in dispute; district court in fact acknowledged admitting evidence to establish defendant's propensity to commit charged act. *J & R Ice Cream Corp. v California Smoothie Licensing Corp.* (1994, CA3 NJ) 31 F3d 1259, 40 Fed Rules Evid Serv 34.

Footnotes

Footnote 35. *Crawford v Yellow Cab Co.* (ND Ill) 572 F Supp 1205, 15 Fed Rules Evid Serv 669 (in action against taxicab company for negligent entrustment of taxicab to unfit driver, plaintiff not permitted to introduce summary of driving records of 4,400 past and present company drivers).

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Footnote 36. *R.E. Linder Steel Erection Co. v Wedemeyer, Cernik, Corrubia, Inc.* (DC Md) 585 F Supp 1530.

Footnote 37. *Turley v State Farm Mut. Auto. Ins. Co.* (CA10 Kan) 944 F2d 669, 33 Fed Rules Evid Serv 1266.

(4). To Show Knowledge [443-445]

§ 443 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

As a general rule, whenever guilty knowledge is an essential element of the offense charged, evidence is admissible of acts committed by the accused and his conduct at or about the time of the commission of the offense charged against him which tend to

establish his knowledge. 38 The Rules specifically provide that one purpose for which evidence of other crimes, wrongdoing, or acts may be admitted is knowledge; 39 this has been construed to mean proof of knowledge of the nature of one's acts or of the nature of items possessed. 40

◆ Observation: Although frequently linked by the courts to intent in cases where other crimes evidence is received, knowledge has been said to connote something less. The existence of the other act results in some sort of warning or knowledge which leads to knowledge in the case under consideration. 41

◆ Practice guide: The issue of knowledge may be raised by the defense. 42

§ 443 ----Generally [SUPPLEMENT]

Case authorities:

In defendant's prosecution for DUI and speeding, evidence of defendant's refusal to submit to breathalyzer test was properly admitted as "other crimes" evidence; it showed consciousness of guilt and, thus, possessed independent relevance bearing on issue of defendant's intoxication. *Spicer v State* (1990) 32 Ark App 209, 799 SW2d 562.

Footnotes

Footnote 38. *Heike v United States*, 227 US 131, 57 L Ed 450, 33 S Ct 226; *Moore v United States*, 150 US 57, 37 L Ed 996, 14 S Ct 26; *Mason v State*, 259 Ala 438, 66 So 2d 557, 42 ALR2d 847; *People v Peete*, 28 Cal 2d 306, 169 P2d 924, cert den 329 US 790, 91 L Ed 677, 67 S Ct 356, reh den 329 US 832, 91 L Ed 705, 67 S Ct 490 and cert den 331 US 783, 91 L Ed 1815, 67 S Ct 1185; *People v Mutchler*, 309 Ill 207, 140 NE 820, 35 ALR 339; *Wertheimer & Goldberg v State*, 201 Ind 572, 169 NE 40, 68 ALR 178; *State v Brady*, 100 Iowa 191, 69 NW 290; *State v Briggs*, 74 Kan 377, 86 P 447; *Osborne v Commonwealth*, 242 Ky 574, 46 SW2d 1066; *State v Ehlers*, 98 NJL 236, 119 A 15, 25 ALR 999; *People v Marino*, 271 NY 317, 3 NE2d 439, 105 ALR 1283.

Footnote 39. FRE 404(b); Uniform Rules of Evidence, Rule 404(b).

Footnote 40. *United States v Johnson* (CA8 Mo) 562 F2d 515, 2 Fed Rules Evid Serv 181.

Footnote 41. *Louisell and Mueller*, Federal Evidence § 140.

Footnote 42. Where the defendant's counsel raises lack of knowledge in his opening statement, it is proper for the prosecution to introduce evidence showing the defendant's knowledge before the defendant has testified as to his lack of knowledge. *United States v Olsen* (CA8 Neb) 589 F2d 351, cert den 440 US 917, 59 L Ed 2d 468, 99 S Ct 1237.

§ 444 In drug cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In prosecutions for possession of drugs or engaging in illegal drug transactions, evidence of prior drug offenses or transactions have frequently been held admissible to show knowledge. 43 Such evidence includes—

—evidence of prior sale of drugs by defendant. 44

—evidence of defendant's prior narcotics conviction. 45

—evidence of defendants' prior arrests for possession of cocaine as relevant to showing that they had both requisite knowledge and intent to distribute and served to counter their mere presence defense. 46

—evidence of guns and drugs seized in an earlier search of defendant's residence. 47

—evidence that defendant had previously pled guilty to two unrelated charges of illegally possessing cocaine and marijuana admissible in a prosecution for aiding and abetting possession of cocaine with the intent to distribute, on issue of knowledge, despite defendant's defense of mistaken identity. 48

—evidence of defendant's involvement in cocaine smuggling 17 days before the transaction for which he was arrested to establish that defendant had knowledge of that mode of smuggling cocaine. 49

—evidence of defendant's possession of 500 grams of cocaine on another occasion as relevant to countering his defense that he was merely present at an attempted sale and had no knowledge of cocaine or intent to aid and abet its distribution. 50

—evidence of purchase and use of ether and hydrochloric acid to show knowledge about the contents of a package containing cocaine base, since both chemicals are used to process cocaine base. 51

—testimony regarding a conversation between a police officer and the defendant concerning the possible purchase of other contraband, in a prosecution for knowingly and intentionally distributing cocaine. 52

—evidence of defendant's involvement in a prior shipment of marijuana as highly probative in evaluating his claim that he was unaware that the truck he was driving when arrested contained over 700 pounds of marijuana. 53

—evidence of a series of 19 mailings that were similar to the mailing referred to in an indictment for conspiracy to possess cocaine with intent to distribute, and use of mails to facilitate drug trafficking, as showing that defendant had knowledge of the package's contents and the intent to perpetrate the crimes charged. 54

—ten-year-old drug records bearing defendant's fingerprints and pertaining to transactions

unrelated to those charged to prove knowledge, where defendant denied knowingly possessing drugs. 55

—evidence that a narcotics defendant sold crack cocaine on a daily basis for at least one month prior to his arrest, where defendant denied knowledge of drugs found in the car he was driving. 56

—evidence of a prior unrelated drug transaction where a narcotics defendant denied knowledge of items seized from his residence. 57

—evidence of a prior smuggling attempt involving a truck previously owned by defendant, to prove his awareness that tractor-trailer rigs are used to smuggle large quantities of marijuana across the border and that his own tractor-trailer rig had been so used. 58

—evidence of prior acts tending to associate the defendant with illegal narcotics activities to rebut the defense that the defendant was unaware that her truck was being used to transport marijuana. 59

Evidence of involvement with drugs occurring after the offense charged may also be admissible on the issue of knowledge. Thus, evidence that defendant had subsequently imported marijuana was admissible on the issue of knowledge that another vehicle contained cocaine. 60 And evidence that defendant attempted to participate in a cocaine sale subsequent to his arrest was admissible as probative of his knowledge that narcotics were in a package in his possession when he was arrested. 61

On the other hand, in a prosecution for importing narcotics, evidence of numerous prior trips out of country is not admissible, absent any indication that prior trips were narcotics-related or were anything other than innocent travel, and those trips did not make it any more likely that defendant knew he carried narcotics at the time of the incident leading to his arrest. 62 And in a prosecution for importing marijuana with intent to distribute, evidence of defendant's prior drug use was not relevant to establish his knowledge of marijuana in his gas tank; such evidence was inadmissible because it is only probative of a defendant's character. 63

§ 444 ----In drug cases [SUPPLEMENT]

Case authorities:

Admission of drug paraphernalia seized from defendant's mother's house was intrinsic to charged crime of possession with intent to distribute cocaine and probative of his knowledge that bags in his briefcase contained cocaine and that he intended to distribute that cocaine. *United States v Manning* (1996, CA1 RI) 79 F3d 212.

Evidence that defendant charged with heroin conspiracy, importation, and possession with intent to distribute possessed small quantity of heroin with which he was not charged was properly admitted since defendant placed his knowledge in issue by claiming not to know that briefcase handed to him in airport contained heroin, and small quantity carried by defendant was packaged in manner more consistent with dealer's sample than personal use. *United States v Aminy* (1994, CA2 NY) 15 F3d 258.

Evidence that defendant charged with possession with intent to distribute heroin and

opium told witness that he needed to send \$20,000 to Amsterdam for heroin he had received on credit was highly probative and therefore admissible since defendant disclaimed lack of knowledge of drugs in his possession. *United States v Jaswal* (1995, CA2 NY) 47 F3d 539.

Evidence that defendant charged with manufacturing and distribution conspiracy involving methamphetamine had sold "speed" to witness several times was admissible after defendant testified and portrayed himself to be completely innocent of involvement or even knowledge of production and distribution of methamphetamine. *United States v Gibson* (1995, CA5 Tex) 55 F3d 173.

Marijuana and related paraphernalia discovered in defendants' home had little or no probative worth in establishing defendants' knowledge and intent vis a vis charged conspiracy that ended 18 months' earlier. *United States v Betts* (1994, CA7 Ill) 16 F3d 748, 38 Fed Rules Evid Serv 1070.

Evidence of prior drug dealing by cocaine distribution conspirators was admissible to establish their knowledge and intent during charged conspiracy; transactions were sufficiently similar and one conspirator placed her intent in issue by claiming that she was only another conspirator's girlfriend and did not know that her actions were assisting conspiracy. *United States v Mounts* (1994, CA7 Ill) 35 F3d 1208, reh den (1994, CA7 Ill) 1994 US App LEXIS 33070 and reh den (1994, CA7 Ill) 1994 US App LEXIS 33652.

Evidence of defendant's prior arrest for possession of one gram of cocaine was admissible for cocaine offense arising out of incident when he and codefendant were arrested after one of them pulled 165.4 grams of cocaine out from under driver's set of car in which they were riding and gave it to confidential informant, since defendant disclaimed knowingly participating in charged offense. *United States v Santa-Cruz* (1995, CA9 Wash) 48 F3d 1118, 95 CDOS 1469.

Evidence that defendant was present at various other methamphetamine "cooks" within several months prior to incident when he was arrested was admissible to show his knowledge of process of "cooking" methamphetamine and that he intended to be part of conspiracy, since he maintained he was innocently present at "cook." *United States v Deninno* (1994, CA10 Okla) 29 F3d 572, op withdrawn (Aug 2, 1994) and amd, reh, en banc, den (1994, CA10 Kan) 1994 US App LEXIS 25622.

Cocaine importation and distribution conspirator's prior drug convictions were admissible, notwithstanding his willingness to stipulate to his intent, since government sought to introduce them to also prove knowledge, motive, and absence of mistake or misapprehension. *United States v Taylor* (1994, CA11 Ga) 17 F3d 333, 8 FLW Fed C 53.

Evidence of forfeiture claimant's knowledge of illegal activities at property where claimant was found, along with numerous narcotics trafficking items, was relevant to claimant's knowledge of illegal activities that took place at defendant property, hence admissible; claimant's knowledge was only contested issue. *United States v Rural Route 1, Box 137-B* (1994, CA6 Ohio) 24 F3d 845, 1994 FED App 166P, mod and reh den (1994, CA6) 1994 US App LEXIS 17336.

Footnotes

Footnote 43. 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession.

Footnote 44. Howard v State (Tex App Fort Worth) 713 SW2d 414, petition for discretionary review gr (Oct 14, 1987) and petition for discretionary review ref (Tex Crim) 789 SW2d 280, reh den (Tex Crim) 1990 Tex Crim App LEXIS 86.

Evidence regarding prior cocaine sales by defendant was admissible to show that defendant knew of cocaine that was seized at restaurant and had intent to distribute it and because it suggested that defendant did have knowledge of cocaine sales being made at the restaurant and had participated in them. United States v Poole (CA10 Kan) 929 F2d 1476, 32 Fed Rules Evid Serv 981.

Footnote 45. United States v Rubio-Estrada (CA1 RI) 857 F2d 845, 26 Fed Rules Evid Serv 1229 (evidence was relevant on question of knowledge where defense was based on contention that defendant did not know of the presence of cocaine in his house); United States v Pollock (CA11 Ga) 926 F2d 1044, 32 Fed Rules Evid Serv 577, cert den (US) 116 L Ed 2d 617, 112 S Ct 593 (evidence of defendant's prior conviction for conspiracy to import marijuana on issue of defendant's knowledge of presence of cocaine in rented car).

Evidence of prior convictions was admitted on issue of knowledge where defendant claimed she was a homemaker and floral shop employee who played no part in her husband marijuana business. United States v Hadfield (CA1 Mass) 918 F2d 987, 31 Fed Rules Evid Serv 989, cert den (US) 114 L Ed 2d 466, 111 S Ct 2062, post-conviction proceeding (CA1) 1992 US App LEXIS 30539.

Footnote 46. United States v Dobynes (CA8 Mo) 905 F2d 1192, 30 Fed Rules Evid Serv 658, cert den 498 US 877, 112 L Ed 2d 167, 111 S Ct 206, post-conviction proceeding (CA8 Mo) 1993 US App LEXIS 8182.

Footnote 47. United States v Williams (CA8 Minn) 895 F2d 1202.

Footnote 48. United States v Ferrer-Cruz (CA1 Puerto Rico) 899 F2d 135, 29 Fed Rules Evid Serv 1445 (stating that mistaken identity defense did not by itself remove issues of knowledge or intent from case).

Footnote 49. United States v Foster (CA11 Ga) 889 F2d 1049, 29 Fed Rules Evid Serv 409.

Footnote 50. United States v Adams (CA8 Minn) 898 F2d 1310.

Footnote 51. United States v White (CA7 Wis) 888 F2d 490 (disapproved on other grounds by Stinson v United States (US) 123 L Ed 2d 598, 113 S Ct 1913, 93 CDOS 3203, 93 Daily Journal DAR 5458, 7 FLW Fed S 235).

Footnote 52. United States v Wallace (CA8 Mo) 597 F2d 641, 4 Fed Rules Evid Serv 636, cert den 444 US 856, 62 L Ed 2d 74, 100 S Ct 114.

Footnote 53. United States v Feinman (CA6 Ohio) 930 F2d 495, 32 Fed Rules Evid Serv 831.

Footnote 54. *United States v Williams* (CA5 La) 900 F2d 823, 30 Fed Rules Evid Serv 477.

Footnote 55. *United States v Chaidez* (CA7 Ill) 919 F2d 1193, reh, en banc, den (CA7) 1991 US App LEXIS 141 and cert den (US) 115 L Ed 2d 1028, 111 S Ct 2861 and cert den (US) 116 L Ed 2d 167, 112 S Ct 209.

Footnote 56. *United States v House* (CA8 Minn) 939 F2d 659.

Footnote 57. *United States v Crook* (CA8 Ark) 936 F2d 1012, 33 Fed Rules Evid Serv 555, reh, en banc, den (CA8) 1991 US App LEXIS 18377 and cert den (US) 117 L Ed 2d 138, 112 S Ct 974.

Footnote 58. *United States v Gonzalez-Lira* (CA5 Tex) 936 F2d 184, 33 Fed Rules Evid Serv 1505.

Footnote 59. *United States v Merryman* (CA10 NM) 630 F2d 780, 6 Fed Rules Evid Serv 1128.

Footnote 60. *United States v Bibo-Rodriguez* (CA9 Cal) 922 F2d 1398, 91 CDOS 238, 91 Daily Journal DAR 185, 32 Fed Rules Evid Serv 145, cert den (US) 115 L Ed 2d 1028, 111 S Ct 2861.

Footnote 61. *United States v Ramirez* (CA2 Conn) 894 F2d 565, 29 Fed Rules Evid Serv 1400.

Footnote 62. *United States v Afjehei* (CA2 NY) 869 F2d 670, 27 Fed Rules Evid Serv 1153.

Footnote 63. *United States v McDonald* (CA5 Tex) 905 F2d 871, 30 Fed Rules Evid Serv 636, cert den 498 US 1002, 112 L Ed 2d 572, 111 S Ct 566.

§ 445 In other particular cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts that have been ruled admissible on the issue of knowledge include—

—evidence that other goods were sold by the defendant at unreasonably low prices, in a federal prosecution for possessing and selling stolen goods (videocassette tapes) where one issue at trial was whether the defendant knew that the goods were stolen. 64

—evidence of prior incidents in which an airline's aircraft had been intercepted in Soviet airspace, as evidence of what the crew knew or should have known about the

consequences of their conduct and to rebut the airline's suggestion that misprogramming was impossible or correctable en route, in a suit arising out of the aircraft's being shot down over Soviet airspace. 65

—evidence that the defendants repeatedly paid for the transportation of aliens, knowing that they were illegal aliens, on the issue of knowledge as to the illegal status of the aliens alleged to have been transported illegally in the instant case. 66

—evidence of a conviction of a nearly identical felony as highly probative in a prosecution for unlawfully transporting undocumented aliens, given defendant's assertion that he lacked knowledge of the aliens' undocumented status. 67

—evidence of the defendant's role in six prior marriages involving aliens, in a prosecution involving a scheme whereby sham marriages with United States citizens were arranged for aliens so that they might defeat the immigration laws. 68

—testimony, in a prosecution for knowing receipt of a stolen front-end loader, by two witnesses that they had previously sold stolen goods to the defendant and that the defendant had also bought stolen goods from them after the date of the sale of the front-end loader. 69

—evidence of similar acts in prosecution for transportation in interstate commerce of vehicles knowing them to have been stolen. 70

—police reports pertaining to defendant's neighbor borrowing defendant's truck to carry stolen goods, to show defendant's knowledge, in a theft prosecution, that the goods were stolen. 71

—tape recorded conversations of an undercover agent and defendant's two coconspirators who had pled guilty in a prosecution for conspiracy to transport stolen aircraft, where the undercover agent testified that defendant acknowledged stealing the airplane referred to in tape recordings as bearing directly on whether defendant believed he was involved in a legitimate piloting job. 72

—evidence that a defendant charged with embezzlement had previously been convicted of falsifying bank records, to show that the defendant had a knowledge of banking and had the ability to plan an embezzlement of the sort claimed to have taken place. 73

—evidence that defendant had attempted to have his mother cash altered postal orders to show knowledge of a scheme to commit mail fraud. 74

—cross-examination of the defendant regarding prior instances in which he had been present in an automobile with a shotgun, where the defendant, charged with unlawful receipt of firearms and ammunition transported in interstate commerce, had testified that he would not have gotten into the car if he had known there was a gun in it. 75

—testimony that a witness observed a knife in the defendant's possession on earlier occasions, in a prosecution for possessing a knife in prison. 76

—evidence concerning a defendant's offer to sell machine guns and hand grenades, in a prosecution for possession of an unregistered firearm. 77

—accomplice's testimony that a year earlier he and defendant had participated in an armed robbery of another dice game in the same town, in a prosecution for knowingly transferring a firearm knowing it would be used to commit a crime of violence. 78

—evidence of defendant's participation in other similar businesses and money laundering to establish that he understood that the activity at the businesses in question was fraudulent. 79

—evidence that the defendant had previously committed acts in an effort to defraud purchasers of livestock, in a prosecution for defrauding farmers of money in connection with the sale of livestock. 80

—evidence that defendant had for years engaged in the routine killing of birds in a prosecution for killing migratory birds, where defense counsel placed defendant's knowledge at issue by portraying defendant as an absentee owner who had little knowledge of the daily operation of a fish farm or the number of birds killed. 81

—evidence that cocaine, nine pistols and a .30-caliber rifle, stereo and video equipment without serial numbers, and fur and leather jackets without labels were seized in the town house of a defendant charged with possession of an unregistered machine gun and unregistered silencer, the defendant having testified that he had no knowledge of the presence of the machine gun and silencer in his town house. 82

—defendant's statement to witness, a month or two after the charged conduct, that he was dumping chemicals, which was admissible on the issue of defendant's knowledge of the illegal character of his conduct in a prosecution for knowingly and willfully disposing of hazardous waste without obtaining a permit. 83

—evidence that historical documents found in defendant's residence had identifying marks removed, as admissible to prove defendant's knowledge that similar documents in the instant case were stolen. 84

—evidence of prior convictions for sexually molesting young girls in a trial for child pornography, to show that defendant had actual knowledge that the girl in the photographs was a minor. 85

—testimony of an indicted public official that defendant had, two weeks prior to the bribe offer forming the basis of the instant case, contacted him and offered to fix his trial, as relevant to defendant's knowledge in a case alleging a conspiracy to obstruct justice. 86

On the other hand, a court has ruled inadmissible as proof of knowledge testimony, in the trial for receipt of a firearm by a convicted felon of a defendant in whose car pistols had been found, that the defendant had been seen in possession of a different pistol some time a few years earlier, the evidence having no purpose other than to show that the defendant had a propensity to commit the crimes for which he was on trial. 87

§ 445 ----In other particular cases [SUPPLEMENT]

Case authorities:

At trial on charges of possessing or selling stolen motor vehicles, evidence of tools and

materials seized at defendant's home which were suitable for obliterating, altering, and replacing vehicle identification numbers, as well as small collection of license plates, was admissible since it was directly probative of his knowledge that vehicles he sold had been stolen, which he controverted. *United States v Tutiven* (1994, CA1 Mass) 40 F3d 1.

Evidence of nine stolen checks addressed to third party which had been fraudulently cashed or deposited was relevant to show defendant's knowledge that endorsements on two checks charged in indictment were fraudulent, since other evidence portrayed defendant as someone attempting to launder numerous stolen checks, expert testimony established that writing on nine matched that on one of indictment checks and that defendant's fingerprint appeared on one, and checks were relevant to conflicting testimony about how defendant came into possession of them. *United States v Rubin* (1994, CA2 NY) 37 F3d 49.

In prosecution for conspiring to possess and utter forged securities, evidence of defendants' prior convictions involving use of money orders in questions was admissible on issue of one defendant's knowledge and intent to deceive with respect to money orders, and to explain investigators' ability to connect other defendant with money orders without need to obtain handwriting exemplars from him. *United States v Thomas* (1995, CA2 NY) 54 F3d 73.

Notwithstanding mail fraud defendant's offer to stipulate that he possessed knowledge, intent, motive, opportunity or other fact sought to be established by other acts evidence, district court did not err in admitting evidence of defendant's involvement in prior similar schemes since defendant's offer was not sufficiently comprehensive to remove issues of knowledge and intent from case. *United States v Jemal* (1994, CA3 NJ) 26 F3d 1267.

Weapons seized from defendant's home were similar enough to seized weapons to be introduced as probative of defendant's knowledge of processes used to convert semi-automatic weapons into machine guns and to obliterate their manufacturer's serial numbers; weapons from home were originally manufactured to be semi-automatic but were either partially or fully converted to fire as machine guns, and manufacturer's serial numbers on some had been obliterated. *United States v Tylkowski* (1993, CA7 Ill) 9 F3d 1255.

In prosecution for Medicare fraud, videotape of promotional presentation for defendant's lost charge audit services that defendant made to prospective client was admissible other acts evidence because it tended to show that when she previously submitted false Medicare claims she knew they were false. *United States v DeSalvo* (1994, CA9 Cal) 41 F3d 505, 94 CDOS 9061, 94 Daily Journal DAR 16839.

In residents' suit against owner of waferboard manufacturing facility on negligence per se and common law nuisance theories, evidence of defendant's air quality violations at similar facility in another state were properly admitted for limited purpose of showing defendant's prior knowledge and notice of emissions, both content and quality, that would result from operation in question. *Orjias v Stevenson* (1994, CA10 Colo) 31 F3d 995, cert den (1994, US) 63 USLW 3386.

In prosecution for sexual abuse of six- year-old girl, testimony of grandmother regarding prior sexual conduct to show alternative source of knowledge was neither relevant nor probative where testimony of victim was simple, child-like recollections of unlawful touching which was probative without reference to any prior sexual experience or

knowledge of any sexual connotation in conduct attributed to defendant. *State v Sloan* (1995, Mo App) 912 SW2d 592.

In prosecution for burglary of credit union, trial court properly admitted audiotapes of codefendant's conversations with defendant over objection that portions of them contained inadmissible evidence of other crimes; those portions of tapes were probative of defendant's knowledge about dismantling alarm systems and about credit unions in general. *Witt v Commonwealth* (1992) 15 Va App 215, 422 SE2d 465.

Footnotes

Footnote 64. *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1.

Footnote 65. *Re Korean Air Lines Disaster*, 289 US App DC 391, 932 F2d 1475, 32 Fed Rules Evid Serv 1057, cert den (US) 116 L Ed 2d 638, 112 S Ct 616, later proceeding on other grounds (DC Dist Col) 798 F Supp 750, later proceeding on other grounds (ED NY) 798 F Supp 755 and on remand (SD NY) 807 F Supp 1073, motion den (SD NY) 1992 US Dist LEXIS 16841 and motion to modify den (SD NY) 36 Fed Rules Evid Serv 1528, later proceeding on other grounds (ED Mich) 814 F Supp 592, later proceeding (SD NY) 814 F Supp 599, later proceeding on other grounds (SD NY) 814 F Supp 605, motion gr (App DC) 1993 US App LEXIS 12479 and supp op (SD NY) 1993 US Dist LEXIS 4552, motion den (SD NY) 1993 US Dist LEXIS 5933, related proceeding (ED Mich) 836 F Supp 1340, and on remand (SD NY) 834 F Supp 65, motion gr, in part, motion den, in part (SD NY) 1994 US Dist LEXIS 1124.

Footnote 66. *United States v Saldivar* (CA11 Fla) 710 F2d 699, 13 Fed Rules Evid Serv 803, reh den (CA11 Fla) 717 F2d 1401.

Annotation: Validity, construction, and application of section 274(a) of Immigration and Nationality Act of 1952 (8 USCS § 1324(a)) making it unlawful to bring to United States any alien not duly admitted or entitled to enter or reside therein, or to conceal, harbor, or shield such alien or encourage or induce his entry, 21 ALR Fed 254 §§ 15, 17.

Footnote 67. *United States v De La Cruz* (CA1 Puerto Rico) 902 F2d 121, 30 Fed Rules Evid Serv 139.

Footnote 68. *United States v Bithoney* (CA1 Mass) 631 F2d 1, 6 Fed Rules Evid Serv 1281, cert den 449 US 1083, 66 L Ed 2d 808, 101 S Ct 869.

Footnote 69. *United States v Huffman* (CA4 NC) 13 Fed Rules Evid Serv 1229.

Footnote 70. *United States v Dooley* (CA5 Ga) 587 F2d 201, 3 Fed Rules Evid Serv 400, cert den 440 US 949, 59 L Ed 2d 639, 99 S Ct 1430.

Footnote 71. *State v Knapp* (Iowa App) 426 NW2d 169.

Footnote 72. *United States v Culver* (CA8 Mo) 929 F2d 389, 32 Fed Rules Evid Serv 654.

Footnote 73. *United States v Tate* (CA4 Va) 10 Fed Rules Evid Serv 360.

Footnote 74. *United States v Watford* (CA4 Md) 894 F2d 665, 29 Fed Rules Evid Serv 718, reh den, en banc (CA4) 1990 US App LEXIS 4497.

Footnote 75. *United States v Pelusio* (CA2 NY) 725 F2d 161, 14 Fed Rules Evid Serv 1418.

Footnote 76. *United States v Dixon* (CA7 Wis) 596 F2d 178, 4 Fed Rules Evid Serv 790.

Footnote 77. *United States v Johnson* (CA8 Mo) 562 F2d 515, 2 Fed Rules Evid Serv 181.

Footnote 78. *United States v Callaway* (CA8 Ark) 938 F2d 907.

Footnote 79. *United States v Lash* (CA6 Mich) 937 F2d 1077, 33 Fed Rules Evid Serv 473, reh, en banc, den (CA6) 1991 US App LEXIS 21148 and cert den (US) 116 L Ed 2d 347, 112 S Ct 397 and cert den (US) 117 L Ed 2d 113, 112 S Ct 943.

Footnote 80. *United States v Olsen* (CA8 Neb) 589 F2d 351, cert den 440 US 917, 59 L Ed 2d 468, 99 S Ct 1237.

Footnote 81. *United States v Carpenter* (CA9 Cal) 933 F2d 748, 91 CDOS 3547, 91 Daily Journal DAR 5633, 32 Fed Rules Evid Serv 1278, appeal after remand (CA9 Cal) 998 F2d 692, 93 CDOS 5217, 93 Daily Journal DAR 8773.

Footnote 82. *United States v Taylor* (CA7 Ill) 728 F2d 864, 14 Fed Rules Evid Serv 1900.

Footnote 83. *United States v Sellers* (CA5 Miss) 926 F2d 410, 32 Env't Rep Cas 1881, 32 Fed Rules Evid Serv 1089, 21 ELR 20787, reh den (CA5) 1991 US App LEXIS 5953.

Footnote 84. *United States v Mount* (CA1 Mass) 896 F2d 612, 29 Fed Rules Evid Serv 1026, post-conviction proceeding (CA1) 1991 US App LEXIS 20449, post-conviction proceeding (CA1) 1991 US App LEXIS 33036, later proceeding (CA1 Mass) 989 F2d 484, reported in full (CA1 Mass) 1993 US App LEXIS 4875, cert den (US) 123 L Ed 2d 173, 113 S Ct 1612, reh den (US) 124 L Ed 2d 305, 113 S Ct 2405, post-conviction proceeding, motion den (CA1) 1993 US App LEXIS 13429, post-conviction proceeding (CA1) 1993 US App LEXIS 16111 and cert den (US) 126 L Ed 2d 391, 114 S Ct 459 and cert den (US) 126 L Ed 2d 160, 114 S Ct 203 and motion den (CA1) 1993 US App LEXIS 32705.

Footnote 85. *United States v Thomas* (CA9 Cal) 893 F2d 1066, 29 Fed Rules Evid Serv 697, cert den 498 US 826, 112 L Ed 2d 53, 111 S Ct 80.

Footnote 86. *United States v Moree* (CA5 Miss) 897 F2d 1329, 30 Fed Rules Evid Serv 329, 114 ALR Fed 807, appeal after remand (CA5 Miss) 928 F2d 654.

Footnote 87. *United States v Tate* (CA4 SC) 715 F2d 864, 14 Fed Rules Evid Serv 150.

(5). To Show Opportunity and Absence of Mistake [446, 447]

§ 446 Showing opportunity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Use of evidence of other crimes to prove opportunity generally involves a showing that the defendant had the capacity or ability to commit the wrongful act with which he is charged; capacity or ability being generally used in the sense of wherewithal or organization. 88

Evidence that has been ruled admissible on the issue of opportunity to commit an offense includes—

—an alleged bank robber's possession of a gun similar to that used to commit the robbery. 89

—handguns found in the possession of defendants charged with using extortionate means to collect loans, the defendants' possession of the guns tending to show that their numerous threats to their victims were real and that they had the wherewithal to carry them out. 90

—facts establishing malice in a civil suit for assault and battery wherein punitive damages are sought, to rebut a theory of self-defense. 91

—evidence of defendants' prior involvement in drugs to show how they became involved in an alleged marijuana conspiracy. 92

—evidence that defendant had sold drugs in a house on one date, to show his ability to control drugs that were found in the same house at a later date. 93

—evidence tending to demonstrate an accused's possession of and proficiency with a weapon that could have been used in the commission of a violent crime, so long as there is evidence that such a crime has been committed and the accused is identified as having been at or near the scene of the crime, even where the weapon is not otherwise directly linked to the defendant at the time of the alleged offense. 94

—evidence in extortion trial that the defendant demanded illegal payments other than those for which he is on trial, the evidence tending to show that the defendant had the power to carry out his extortionate threats. 95

—evidence of large cash transactions tending to show the methods by which the bank's affairs were conducted and the locus of real management and control in a prosecution for misapplication of bank funds and participation in "loan kickback" schemes. 96

—evidence that a U.S. Customs officer had helped a friend smuggle gold statues by

driving him through a security checkpoint, in a prosecution for murder and robbery of a money courier by two customs officers, to show that defendant might have had the ability to surreptitiously escort the victim off the airport grounds. 97

§ 446 ----Showing opportunity [SUPPLEMENT]

Case authorities:

Evidence of earlier, uncharged drug sale was properly admitted to show opportunity, knowledge and plan in defendant's prosecution on cocaine base distribution charges since it set stage for charged transaction four days later in establishing buyer-seller relationship between undercover agent and defendant and showing that defendant was familiar with cocaine business and not innocent bystander. *United States v Wilson* (1994, CA7 Ill) 31 F3d 510.

Testimony concerning armed robbery, home invasion, and unlawful restraint was probative of defendant's opportunity to possess handgun, and its admission was not prejudicial since other evidence was sufficient for his conviction of being felon in possession of firearm; therefore, admission of challenged evidence did not produce jury verdict other than one that would have been rendered in its absence. *United States v Burrows* (1995, CA7 Ill) 48 F3d 1011, cert den (1995, US) 1995 US LEXIS 4445.

Evidence that past owner of airline company, charged with being person responsible for paying company's federal withholding taxes, controlled which bills were paid was not evidence of prior bad acts but evidence of opportunity to control which debts were paid, absence of mistake as to which debts were paid, and attention to which debts were paid. *Phillips v United States IRS* (1996, CA9 Hawaii) 73 F3d 939, 96 CDOS 243, 96 Daily Journal DAR 356, CCH Unemployment Ins Rep ¶ 15083B, 96-1 USTC ¶ 50057, 77 AFTR 2d 96-379.

In prosecution for lewd and lascivious act with daughter, trial court did not err when it allowed victim to testify about uncharged acts, where defendant opened door for evidence since he alleged that he never had opportunity to commit act because he was never alone with victim and victim's testimony that defendant was alone with her on many occasions—and performed other acts—refuted his allegation. *State v Drennon* (1994, Idaho App) 883 P2d 704.

The trial court did not err in a first-degree murder prosecution involving poisoning by allowing the State to introduce testimony from a registered nurse who had cared for the victim during his final illness concerning medical techniques and medical equipment used to treat the victim. Although defendant contended that the sole purpose of the testimony was to generate sympathy for the victim's family, the testimony was probative to show that defendant had access to the victim in the hospital, that a correlation existed between defendant's feeding the victim and the onset of his symptoms, that the victim manifested symptoms associated with multiple system failure incident to arsenic poisoning, that the victim could swallow food notwithstanding the tubes, that arsenic could have been introduced into the victim's body via the feeding tubes, and that the victim suffered inordinate pain over an extended period of time. The probative value of the testimony outweighed any unfair prejudice to defendant; furthermore, the record discloses that similar evidence from other witnesses was admitted without objection. *State v Moore* (1994) 335 NC 567, 440 SE2d 797.

The trial court did not err in a first-degree murder prosecution by admitting testimony concerning defendant's actions prior to and after the murder where the testimony tends to implicate defendant in the theft of quarters missing from the victim's bedroom and therefore in the murder, and tends to show that defendant had the opportunity to carry out his threats to kill the victim on the night of the murder. Although defendant argued that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, the defendant did not demonstrate any abuse of discretion. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Footnotes

Footnote 88. *United States v Provenzano* (CA3 NJ) 620 F2d 985, 6 Fed Rules Evid Serv 566, cert den 449 US 899, 66 L Ed 2d 129, 101 S Ct 267; *United States v Gilley* (CA9 Cal) 836 F2d 1206, 24 Fed Rules Evid Serv 912.

Footnote 89. *United States v Robinson* (CA2 NY) 560 F2d 507, 1 Fed Rules Evid Serv 752, cert den 435 US 905, 55 L Ed 2d 496, 98 S Ct 1451.

Footnote 90. *United States v Gilley* (CA9 Cal) 836 F2d 1206, 24 Fed Rules Evid Serv 912.

Footnote 91. *Squyres v Hilliary* (CA10 Okla) 599 F2d 918, 4 Fed Rules Evid Serv 1227.

Footnote 92. *United States v Penson* (CA7 Ill) 896 F2d 1087, 29 Fed Rules Evid Serv 978.

Footnote 93. *United States v Holm* (CA8 Minn) 836 F2d 1119, 24 Fed Rules Evid Serv 822 (prosecution for constructive possession of drugs).

Footnote 94. *United States v Hearst* (ND Cal) 412 F Supp 877.

Footnote 95. *United States v Lena* (WD Pa) 497 F Supp 1352, 7 Fed Rules Evid Serv 1566, affd without op (CA3 Pa) 649 F2d 861.

Footnote 96. *United States v Harenberg* (CA10 NM) 732 F2d 1507, 15 Fed Rules Evid Serv 1502.

Footnote 97. *United States v Maravilla* (CA1 Puerto Rico) 907 F2d 216, 30 Fed Rules Evid Serv 600, appeal after remand (CA1) 951 F2d 412, cert den (US) 118 L Ed 2d 562, 112 S Ct 1960 (where victim was last known to be alive at airport customs).

§ 447 Showing absence of mistake or accident

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of other acts, crimes, or wrongs, such as evidence of a prior conviction for the same offense as that charged, is admissible to show an absence of mistake or accident in the charged acts, and to negate the likelihood that the crime was committed as a result of inadvertence. 98 Admissible prior bad acts introduced to show intent where the defendant raises the defense of mistake need not show incidents identical to the events charged, so long as they are closely related to the offense and tend to rebut the defense of mistake. 99 Thus, in a tax evasion case, evidence that defendant submitted a false W-4 Form and did not file an income tax return for one year was relevant to show willfulness and absence of mistake in filing forms containing false information. 1 Evidence of subsequent acts may also be admissible. 2

In child abuse prosecutions, where there are usually no eyewitnesses to identify the source of the injuries and often the defendant challenges the circumstantial evidence of the crime by arguing that the child's injuries were caused accidentally, Rule 404(b) can permit the admission of evidence of other crimes, wrongs, or acts, such as the defendant's abuse of other children, or previous abuse of the same child, to show the absence of mistake or accident in the instant case. 3

But in a prosecution for first degree murder, evidence of two prior acts of a defendant involving recovery of property at gunpoint and shooting into another's home should not have been admitted, since such evidence did not rebut the defenses of accident or mistake, and the prior acts did not tend to show that it was unlikely that defendant could have mistaken the victim for his recent assailant. 4

§ 447 ----Showing absence of mistake or accident [SUPPLEMENT]

Case authorities:

In prosecution for making false statement in matter within jurisdiction of federal agency, defendant's prior conviction for making false statements to Labor Department investigator was properly admitted since it was relevant to defendant's state of mind in making allegedly false statements to U.S. Probation Office which he put in issue by claiming there was innocent explanation for his conduct. *United States v Inserra* (1994, CA2 NY) 34 F3d 83.

Evidence of defendant's prior similar acts in transporting cocaine was properly admitted as probative of part of concerted activity and in furtherance of scheme to transport cocaine, and not mere coincidence, accident, or mistake. *United States v Montoya-Ortiz* (1993, CA5 Tex) 7 F3d 1171, reh den (CA5) 1993 US App LEXIS 34648.

In prosecution for fraudulent sale of lottery device distributorships, district court properly permitted government to introduce evidence that defendant owed \$2 million in unpaid taxes since relevance of amount made it more probable that defendant, whose defense was that he never willfully evaded any of his obligations, willfully evaded his tax obligation, rather than its being result of simple mistake. *United States v Roberts* (1994, CA7 Ind) 22 F3d 744, 94 TNT 96-22, reh, en banc, den (1994, CA7 Ind) 1994 US App LEXIS 16671.

Testimony that witness and defendant had grown marijuana in same location where defendant was arrested was properly admitted to show absence of mistake or accident since defendant claimed that he wandered into marijuana garden while hunting for deer and stated that he had never before been there. *United States v Huels* (1994, CA7 Ill) 31 F3d 476.

Evidence that past owner of airline company, charged with being person responsible for paying company's federal withholding taxes, controlled which bills were paid was not evidence of prior bad acts but evidence of opportunity to control which debts were paid, absence of mistake as to which debts were paid, and attention to which debts were paid. *Phillips v United States IRS* (1996, CA9 Hawaii) 73 F3d 939, 96 CDOS 243, 96 Daily Journal DAR 356, CCH Unemployment Ins Rep ¶ 15083B, 96-1 USTC ¶ 50057, 77 AFTR 2d 96-379.

In professional athlete's suit against defendants for, inter alia, fraud, in their representation of plaintiff as agent and financial advisor, testimony of other professional athletes concerning investment transactions between themselves and defendants during same time period was relevant for purpose of attempting to prove continuity element of alleged RICO violation since fraud was strikingly similar to that perpetrated on other investors; it was also admissible to demonstrate motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Jones v Childers* (1994, CA11 Fla) 18 F3d 899, RICO Bus Disp Guide (CCH) ¶ 8529, 8 FLW Fed C 89.

The trial court did not abuse its discretion in admitting evidence regarding defendant's prior acts in engaging in excessive conduct with other co-employees and his reputation created thereby in an action for damages from an injury suffered during a movie stunt where plaintiff alleged willful and wanton, negligent and reckless conduct by defendant. The evidence was probative of defendant's motive, intent and the absence of mistake and was admissible under N.C.G.S. § 8C-1, Rule 404(b). *Pinckney v Van Damme* (1994) 116 NC App 139, 447 SE2d 825.

Footnotes

Footnote 98. *United States v Murphy* (CA7 Ill) 935 F2d 899, 33 Fed Rules Evid Serv 423; *United States v Ball* (CA8 SD) 868 F2d 984, 27 Fed Rules Evid Serv 769, reh den (CA8) 1989 US App LEXIS 5216; *United States v Cobb* (CA8 Mo) 588 F2d 607, cert den 440 US 947, 59 L Ed 2d 636, 99 S Ct 1426; *United States v Ross* (CA9 Wash) 886 F2d 264, cert den 494 US 1083, 108 L Ed 2d 947, 110 S Ct 1818; *United States v Gomez* (CA11 Fla) 927 F2d 1530, 32 Fed Rules Evid Serv 931; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *State v Taylor*, 198 Kan 290, 424 P2d 612; *State v Shilkett*, 356 Mo 1081, 204 SW2d 920; *People v Molineux*, 168 NY 264, 61 NE 286; *Melvin v State* (Okla Crim) 706 P2d 163, cert den 475 US 1027, 89 L Ed 2d 335, 106 S Ct 1225.

Postal inspector's testimony about a nonexistent return address on express mail packages delivered to a narcotics defendant was admissible to establish that receipt of second marijuana-laden package was not due to accident or mistake, but existence of plan. *United States v Desmarais* (CA1 NH) 938 F2d 347, 33 Fed Rules Evid Serv 717.

In a prosecution for possession with intent to distribute crack, evidence concerning

defendant's prior arrest for distributing crack was admissible to rebut defendant's argument that he had merely picked up someone else's gym bag by mistake. *United States v Rogers*, 287 US App DC 1, 918 F2d 207, 31 Fed Rules Evid Serv 1343.

In a homicide case in which the victim's body, defendant's wife, had not been found, evidence of defendant's history of violence toward his wife and statement that he would kill her were properly admitted as probative of defendant's intent, preparation, and development of crime charged, as well as to establish that his wife's death was not accidental or suicidal. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Practice References Hunter, *Federal Trial Handbook* 2d § 37.6.

Forms: Motion—To exclude evidence of prior conviction—Prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:646.

Motion—To exclude evidence of other crimes—Connection to charged offense tenuous; prejudicial effect outweighs probative value. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:647.

Footnote 99. *United States v De Loach*, 210 US App DC 48, 654 F2d 763, 7 Fed Rules Evid Serv 1192, cert den 450 US 933, 67 L Ed 2d 366, 101 S Ct 1395 and cert den 450 US 1004, 68 L Ed 2d 209, 101 S Ct 1717.

Footnote 1. *United States v Johnson* (CA1 NH) 893 F2d 451, 90-1 USTC ¶ 50066, 29 Fed Rules Evid Serv 761, 71A AFTR 2d 93-3389.

Footnote 2. *United States v Butcher* (CA9 Cal) 926 F2d 811, 91 CDOS 1049, 91 Daily Journal DAR 1593, 32 Fed Rules Evid Serv 19, cert den (US) 114 L Ed 2d 724, 111 S Ct 2273 (in prosecution for being felon in possession of firearm, evidence of other guns and narcotics found after defendant's arrest was admissible to prove absence of mistake or accident and that defendant knowingly possessed gun which formed basis of charge).

In civil rights case alleging police misconduct, evidence that police officer participated in a similar incident shortly after the one in issue was admissible to show pattern, intent, and absence of mistake. *Ismail v Cohen* (CA2 NY) 899 F2d 183, 29 Fed Rules Evid Serv 1414, costs/fees proceeding (SD NY) 1991 US Dist LEXIS 14919.

Footnote 3. *United States v Leight* (CA7 Ill) 818 F2d 1297, 23 Fed Rules Evid Serv 555, cert den 484 US 958, 98 L Ed 2d 381, 108 S Ct 356 and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1); *Woodard v State* (Tex App Dallas) 696 SW2d 622.

In a prosecution for murdering a 6-week-old infant, evidence of the baby's prior injuries was admissible as probative of malice and the absence of accident. *United States v Boise* (CA9 Or) 916 F2d 497, 31 Fed Rules Evid Serv 904, cert den (US) 114 L Ed 2d 462, 111 S Ct 2057.

Footnote 4. *United States v Brown* (CA9 Cal) 873 F2d 1265, 27 Fed Rules Evid Serv 1025, amd, reported at (CA9 Cal) 880 F2d 1012, post-conviction proceeding (CA9) 1993 US App LEXIS 17371.

(6). To Show Preparation or Plan [448-451]

§ 448 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of the defendant's other crimes or acts is generally admitted to prove "plan" or "preparation," as those terms are used in Rule 404(b), 5 where the other crimes or acts are so inextricably blended or intertwined with the charged offense that proof of the other crimes or acts tends to prove the charged offense or explain the circumstances of it, 6 or where the other similar crimes or acts are independent of the offense charged but demonstrate a continuing plan, scheme, or conspiracy including that offense. 7

In other words, the law permits proof of a plan or scheme to commit a series of crimes including the one for which the accused is being tried, and, as tending to show the existence of such plan or scheme, it allows testimony of the commission of crimes other than the one charged, but so related in character, time, and place of commission as to tend to support the conclusion that there was a plan or system that embraced both them and the crime that is charged. 8

Where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second. 9 Thus, testimony concerning an identical scheme involving the defendant prior to the period involved in the offense charged is admissible, 10 as is evidence to show that the crime charged consisted of several stages or continuous acts, all constituting one transaction. 11

But testimony connecting a defendant with several prior identical offenses, for the purpose of showing intent and plan, is not admissible where the only disputed issue is identity, 12 unless there is something distinctive about the unknown person or the manner in which such person committed such offenses. 13

◆ Observation: Some courts consider the defendant's "modus operandi" as part of, or closely related to a scheme or plan. 14 But more generally, the term "modus operandi" suggest that since the defendant acted in a similar and unusual or distinctive manner previously, it is more likely that he, rather than someone else, did the act on the occasion of the charged crime, so that the inference is from modus operandi to the "identity" of defendant as the culprit. 15

§ 448 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not err in an attempted rape and first-degree murder prosecution by admitting evidence of another rape to show identity on the theory of common scheme or plan. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Chain-of-events evidence about defendant's escape from an Alabama prison and thefts he committed after his escape and before he committed the two murders at issue was properly admitted to establish defendant's intent and motive for the murders, and the trial court did not abuse its discretion by finding this evidence more probative than prejudicial. G.S. § 8C-1, Rules 403 and 404(b). *State v Rose* (1994) 339 NC 172, 451 SE2d 211.

Evidence of defendant's shooting of his former girlfriend at the time of their breakup and his conviction and sentence arising out of that shooting was admissible to show the chain of events that led to defendant's murder of his former girlfriend's new boyfriend just three months after their breakup and ten days after defendant's release from jail for the events surrounding their breakup. *State v Ratliff* (1995) 341 NC 610, 461 SE2d 325.

Marijuana and rolling papers were properly admitted in defendant's trial for felonious possession of cocaine, even though defendant had been acquitted of misdemeanor possession of the marijuana and paraphernalia, since the finding of the marijuana and rolling papers was linked in time and circumstances with the chain of events leading to defendant's arrest and formed an integral and natural part of an account of the crime of cocaine possession. *State v Solomon* (1995) 117 NC App 701, 453 SE2d 201, review den (NC) 1995 NC LEXIS 185.

Footnotes

Footnote 5. FRE 404(b), Uniform Rules of Evidence Rule 404(b).

Footnote 6. *Heike v United States*, 227 US 131, 57 L Ed 450, 33 S Ct 226; *United States v Aleman* (CA5 Tex) 592 F2d 881, 4 Fed Rules Evid Serv 540; *United States v Dudek* (CA6 Ohio) 560 F2d 1288, 2 Fed Rules Evid Serv 406, cert den 434 US 1037, 54 L Ed 2d 786, 98 S Ct 774, reh den 434 US 1089, 55 L Ed 2d 796, 98 S Ct 1288; *United States v Weaver* (CA8 Ark) 565 F2d 129, 2 Fed Rules Evid Serv 765, cert den 434 US 1074, 55 L Ed 2d 780, 98 S Ct 1263; *United States v Brown* (CA9 Wash) 770 F2d 768, 19 Fed Rules Evid Serv 371, cert den 474 US 1036, 88 L Ed 2d 581, 106 S Ct 603 and cert den 474 US 1067, 88 L Ed 2d 795, 106 S Ct 822 and cert den 476 US 1172, 90 L Ed 2d 983, 106 S Ct 2896; *Witters v United States*, 70 App DC 316, 106 F2d 837, 125 ALR 1031; *State v Finley*, 85 Ariz 327, 338 P2d 790; *Cooper v State*, 182 Ga 42, 184 SE 716, 104 ALR 1309; *State v Carvelo*, 45 Hawaii 16, 361 P2d 45; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *State v Taylor*, 198 Kan 290, 424 P2d 612; *Gadd v Commonwealth*, 305 Ky 318, 204 SW2d 215; *State v Doughman* (Minn) 384 NW2d 450, appeal after remand (Minn App) 404 NW2d 867; *State v Adamson* (Mo) 346 SW2d 85; *State v Medina*, 245 Mont 25, 798 P2d 1032; *People v Molineux*, 168 NY 264, 61 NE 286; *Wages v State* (Tex App Houston (14th Dist)) 703 SW2d 736, petition for discretionary review gr (Feb 4, 1987) and petition for discretionary review dismd (Tex Crim) 770 SW2d 779.

Evidence of a murder defendant's assault upon the mother of his child shortly before he

shot his current lover was admissible as an integral part of the operative facts of the crime charged. *United States v Bettelyoun* (CA8 SD) 892 F2d 744, 29 Fed Rules Evid Serv 757.

Annotation: Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 ALR Fed 781.

Footnote 7. *United States v Angelilli* (CA2 NY) 660 F2d 23, 9 Fed Rules Evid Serv 83, cert den 455 US 910, 71 L Ed 2d 449, 102 S Ct 1258, reh den 456 US 951, 72 L Ed 2d 476, 102 S Ct 2024 and cert den 455 US 945, 71 L Ed 2d 657, 102 S Ct 1442, reh den 456 US 939, 72 L Ed 2d 460, 102 S Ct 1998 and reh den 456 US 939, 72 L Ed 2d 460, 102 S Ct 1999; *United States v Fraser* (CA6 Tenn) 709 F2d 1556, 13 Fed Rules Evid Serv 918; *United States v Weidman* (CA7 Ind) 572 F2d 1199, 3 Fed Rules Evid Serv 75, cert den 439 US 821, 58 L Ed 2d 113, 99 S Ct 87; *United States v Krohn* (CA7 Ill) 560 F2d 293, 2 Fed Rules Evid Serv 166, cert den 434 US 895, 54 L Ed 2d 182, 98 S Ct 275; *United States v Drew* (CA8 Mo) 894 F2d 965, 30 Fed Rules Evid Serv 244, cert den 494 US 1089, 108 L Ed 2d 959, 110 S Ct 1830; *United States v Miller* (CA8 SD) 725 F2d 462, 14 Fed Rules Evid Serv 1656; *State v Wilkinson*, 64 Ohio St 2d 308, 18 Ohio Ops 3d 482, 415 NE2d 261.

Annotation: Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 ALR Fed 781.

Footnote 8. *Moore v United States*, 150 US 57, 37 L Ed 996, 14 S Ct 26; *McHenry v United States*, 51 App DC 119, 276 F 761, 34 ALR 1109; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *State v Scown* (Mo) 312 SW2d 782; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Formato*, 286 App Div 357, 143 NYS2d 205, 64 ALR2d 812, affd 309 NY 979, 132 NE2d 894.

Footnote 9. *State v Sweeney*, 180 Minn 450, 231 NW 225, 73 ALR 380; *People v Molineux*, 168 NY 264, 61 NE 286; *Whiteman v State*, 119 Ohio St 285, 6 Ohio L Abs 695, 164 NE 51, 63 ALR 595.

Footnote 10. *United States v Albert* (CA5 Tex) 595 F2d 283, 4 Fed Rules Evid Serv 750, reh den (CA5 Tex) 599 F2d 449 and cert den 444 US 963, 62 L Ed 2d 375, 100 S Ct 448; *United States v Semaan* (CA8 Minn) 594 F2d 1215, 4 Fed Rules Evid Serv 561, cert den 441 US 965, 60 L Ed 2d 1070, 99 S Ct 2413.

Footnote 11. *Heike v United States*, 227 US 131, 57 L Ed 450, 33 S Ct 226; *Fish v United States* (CA1 Mass) 215 F 544; *State ex rel. Atty. Gen. v Hasty*, 184 Ala 121, 63 So 559; *State v O'Neil*, 51 Kan 651, 33 P 287; *People v Molineux*, 168 NY 264, 61 NE 286; *State v Case*, 93 NC 545; *State v Weldon*, 39 SC 318, 17 SE 688; *McWhorter v Commonwealth*, 191 Va 857, 63 SE2d 20, 28 BNA LRRM 2087, 20 CCH LC ¶ 66359.

Footnote 12. As to the admissibility of other crimes evidence to establish identity, see § 452.

Footnote 13. *United States v Phillips* (CA6 Ky) 599 F2d 134, 4 Fed Rules Evid Serv 984.

Footnote 14. See *United States v Castro* (CA9 Cal) 476 F2d 750, 20 ALR Fed 118 (in prosecution for bribery and related offenses concerning immigration documents, it was proper to receive evidence of "generally identical" prior similar act as bearing upon guilty knowledge, plan, scheme, and modus operandi).

Footnote 15. § 455.

§ 449 In drug cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In prosecutions for possession of drugs or engaging in illegal drug transactions, evidence of prior drug offenses have frequently been held admissible to show preparation or plan.

16 Such evidence includes—

—evidence of prior acts of defendant with respect to narcotic transactions with a government witness. 17

—evidence of defendant's prior dealings with an informant involving purchases of marijuana. 18

—testimony that a defendant charged with distribution of drugs accumulated large amounts of money from his drug dealings and attempted to conceal these assets by utilizing aliases, corporations, and "straw men" to purchase property, admissible as demonstrating the defendant's scheme to conceal the proceeds of his drug trafficking. 19

—testimony concerning numerous previous cocaine transactions or arrangements for such transactions, in a prosecution for conspiracy to distribute cocaine, distribution of cocaine, and interstate travel for such purposes. 20

—evidence of prescriptions written by a physician charged with illegally prescribing controlled substances, even though those prescriptions were not listed as part of the basis for the charge. 21

—testimony of a coconspirator that defendant had sold him drugs 15 or 20 times. 22

—evidence of a lapse of four days between the extraneous offense of selling one-half ounce of cocaine and the charged offense of delivery of a controlled substance in the amount of 400 grams or more. 23

—evidence that defendant had previously been aboard a vessel upon which marijuana had been found. 24

—testimony of an unindicted coconspirator concerning a meeting one year earlier during which defendant had bought cocaine for distribution and at which defendant stated that he intended to start his own drug organization, in a prosecution for operating a continuing narcotics operation. 25

On the other hand, evidence of other narcotic transactions has been held inadmissible where the defendant had pleaded guilty to a charge of possessing drugs after the time covered by the indictment. 26 And evidence that defendant had five years earlier used cocaine with another member of alleged conspiracy did not amount to evidence of a plan to possess with intent to distribute. 27

Footnotes

Footnote 16. *United States v Lokey* (CA5 Tex) 945 F2d 825, 34 Fed Rules Evid Serv 363, reh, en banc, den (CA5 Tex) 948 F2d 1287; *United States v Smith* (CA5 Tex) 726 F2d 183, 14 Fed Rules Evid Serv 1556; *United States v Renteria* (CA5 Tex) 625 F2d 1279, 6 Fed Rules Evid Serv 1148, reh den (CA5 Tex) 632 F2d 895; *United States v Drew* (CA8 Mo) 894 F2d 965, 30 Fed Rules Evid Serv 244, cert den 494 US 1089, 108 L Ed 2d 959, 110 S Ct 1830; *United States v Legendre* (CA8 Minn) 657 F2d 238, 8 Fed Rules Evid Serv 1408, cert den 454 US 1037, 70 L Ed 2d 483, 102 S Ct 580.

Annotation: Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 ALR Fed 781.

Practice References 13 Am Jur Proof of Facts 391, Criminal Drug Addition and Possession.

Footnote 17. *United States v Kenney* (DC Me) 598 F Supp 883, 16 Fed Rules Evid Serv 1177.

Testimony that one defendant offered to get a government agent "contraband" and marijuana was admissible in a prosecution for possession of narcotics with intent to distribute. *United States v Moreno-Nunez* (CA9 Ariz) 595 F2d 1186, 4 Fed Rules Evid Serv 793.

Footnote 18. *State v Goodroad* (SD) 442 NW2d 246.

Footnote 19. *United States v Towers* (CA7 Ind) 775 F2d 184, 19 Fed Rules Evid Serv 292, post-conviction proceeding (CA7 Ind) 815 F2d 708, post-conviction proceeding (CA7) 1990 US App LEXIS 7514.

Footnote 20. *United States v Percy* (CA4 Va) 765 F2d 1199, 18 Fed Rules Evid Serv 602.

Annotation: Admissibility in federal conspiracy prosecution of evidence of defendant's similar prior criminal act, 20 ALR Fed 125.

Footnote 21. *United States v Stump* (CA7 Ind) 735 F2d 273, 15 Fed Rules Evid Serv 865, cert den 469 US 864, 83 L Ed 2d 134, 105 S Ct 203.

Footnote 22. *United States v Viera* (CA5 Tex) 819 F2d 498, 23 Fed Rules Evid Serv 400, reh gr, en banc (CA5 Tex) 828 F2d 2 and reinstated, in part, en banc (CA5 Tex) 839 F2d 1113.

Footnote 23. *Cabanas v State* (Tex App Corpus Christi) 698 SW2d 405.

Footnote 24. *United States v Gonzalez* (CA11 Fla) 940 F2d 1413, 33 Fed Rules Evid Serv 1275, cert den (US) 116 L Ed 2d 810, 112 S Ct 910 and cert den (US) 117 L Ed 2d 435, 112 S Ct 1194 and cert den (US) 117 L Ed 2d 435, 112 S Ct 1194.

Footnote 25. *United States v Echeverri* (CA3 NJ) 854 F2d 638, 26 Fed Rules Evid Serv 692.

Footnote 26. *United States v Bakke* (CA6 Mich) 942 F2d 977, 34 Fed Rules Evid Serv 749, post-conviction proceeding (CA6 Mich) 1993 US App LEXIS 17682, motion den (CA6 Mich) 1993 US App LEXIS 32551.

Footnote 27. *United States v Hill* (CA9 Cal) 953 F2d 452, 91 CDOS 4866, 91 Daily Journal DAR 7462, 33 Fed Rules Evid Serv 317, 114 ALR Fed 867, amd (CA9 Cal) 91 Daily Journal DAR 15403.

§ 450 In sex crimes cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts which has been admitted to show preparation or plan in connection with sex crimes includes—

—evidence that defendant had previously assaulted the victim. 28

—evidence of sexual assaults on other members of the same family. 29

—evidence of similar offense committed against another, in prosecution for deviate sexual assault, where women in both instances were attacked on apartment house elevators, defendant in both cases stopped elevators as a means of keeping his victims from escaping, searched both women and their clothing, including their bras, for money, etc. 30

—evidence by the alleged victim of an uncharged rape, that defendant had offered to give her a ride, had beaten and raped her, in a prosecution also involving offering of ride, beating and rape. 31

—evidence that the defendant had sexual intercourse with the prosecuting witness subsequently to the offense charged, in prosecution for committing indecent liberties upon a minor. 32

—evidence that the defendant threatened to kill his wife and her child if they left him, since it allowed defendant to continue his sexual abuse of the child. 33

But in some instances, evidence of prior sexual assaults have been held inadmissible as

not showing a design or plan. 34 Thus, in some cases, evidence that a defendant indecently touched one victim on several occasions did not show a scheme or plan in relation to sexual intercourse and sodomy involving an entirely different individual. 35 And evidence of sexual acts or relations with a young female have been held not admissible in a prosecution involving fellatio of 15-year old boy. 36

§ 450 ----In sex crimes cases [SUPPLEMENT]

Rules:

(FRE, Rule 412(b)(1)(B)), amended in 1994, provides for evidence of past sexual behavior with the accused. As to rules allowing evidence of prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413- 415), added by Congress in 1994; see § 404.

Case authorities:

There was no prejudice in a first- degree murder prosecution where the trial court admitted court files relating to defendant's prior conviction for assault. The files were admitted for the nonhearsay purpose of showing motive, intent and plan and witnesses testified that defendant broke into the victim's home and attacked her, that the victim prosecuted the defendant for the assault and trespass, that the defendant harassed and threatened the victim, and that the victim believed that the defendant was going to kill her. The files added little, if anything, to the State's case. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

There was no error in a prosecution for multiple counts of first- degree sexual offense and taking indecent liberties with a child in allowing one victim to testify concerning defendant's use of marijuana just before the abuse. When evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened. Furthermore, defendant did not object to another witness testifying that defendant smoked marijuana on several occasions. *State v Parker* (1995) 119 NC App 328, 459 SE2d 9.

In prosecution for aggravated rape of defendant's younger daughter, testimony of defendant's older daughter that defendant molested her during same period was admissible to show systematic plan, opportunity, and motive. *State v Boudreaux* (1995, La App 5th Cir) 662 So 2d 22.

Footnotes

Footnote 28. *State v T.W.*, 220 Mont 280, 715 P2d 428.

Footnote 29. *People v Montoya* (Colo App) 703 P2d 606, affd, en banc (Colo) 740 P2d 992; *State v Erickson* (Minn App) 403 NW2d 281; *Salyers v State* (Okla Crim) 755 P2d 97 (evidence that defendant had fondled or touched breasts and genitalia of her daughters, in prosecution of woman for indecent or lewd acts with child under 16); *State v Friedrich*, 135 Wis 2d 1, 398 NW2d 763.

Evidence pertaining to the seduction of a girl's mother was admissible in a prosecution for carnal knowledge of an underage girl, where the same method of persuasion was used, the two were played against one another by the defendant, and the incidents were closely interrelated. *United States v Gano* (CA10 Kan) 560 F2d 990, 2 Fed Rules Evid Serv 692, later proceeding (DC Kan) 597 F Supp 1325.

Footnote 30. *People v Houseton* (1st Dist) 141 Ill App 3d 987, 96 Ill Dec 149, 490 NE2d 1354.

Footnote 31. *Jackson v State* (Fla App D5) 538 So 2d 533, 14 FLW 476.

Footnote 32. *State v Johnson*, 60 Wash 2d 21, 371 P2d 611.

Footnote 33. *Jones v State* (Okla Crim) 781 P2d 326.

Footnote 34. *State v Bowen*, 48 Wash App 187, 738 P2d 316.

Footnote 35. *Ali v United States* (Dist Col App) 520 A2d 306 (a prosecution for carnal knowledge, sodomy with a child, indecent liberties, and enticement for purpose of taking immoral, improper, or indecent liberties or committing lewd or lascivious act, in which it was said that evidence of sexual abuse committed by defendant against the younger sister of the complaining witness should not have been admitted for the purpose of showing a common scheme or plan, where the evidence that defendant touched the younger sister on several occasions did not show a scheme or plan in relation to sexual intercourse and sodomy involving an entirely different individual).

Footnote 36. *People v Engelman*, 434 Mich 204, 453 NW2d 656.

§ 451 In other particular cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts which has been admitted to show preparation or plan in connection with various offenses charged includes—

—evidence of uncharged robberies involving similar plan of operation. 37

—testimony by an accomplice in a prosecution for bank robbery as to prior trips to other states with the defendant for the purpose of bank robberies that were not carried out. 38

—testimony by a police officer that a defendant in a bank robbery prosecution, when questioned concerning the source of funds for the defendant's purchase of an automobile shortly after the robbery, stated that he bought it with the proceeds from gambling and stealing. 39

—a forged marriage certificate, lease agreement, and military discharge forms as proof of

motive, intent, preparation, plan, or knowledge in a trial for conspiracy to make and sell false documents of citizenship. 40

—evidence of an illegal transporting incident four years prior to the charged offense, in a prosecution for conspiracy and aiding and abetting the smuggling of illegal aliens, in order to show defendant's common plan, preparation, and intent to transport aliens. 41

—a mask, wig, and rubber gloves found in defendant's van, as was relevant to show defendant's plan and preparation with respect to crimes involving using disguises. 42

—testimony, in a prosecution for commercial bribery, that while the defendant was fraudulently endorsing checks for the purpose of the bribery charged in the instant case, he was authorizing his salespeople to bribe other traffic managers by the same illegal method, and thus that the defendant masterminded an extensive scheme of commercial bribery of which the bribery charged in the instant case was a part. 43

—tape recordings of defendant's telephone calls, admissible in a prosecution for making threatening telephone calls, to demonstrate a continuing pattern of threatening calls. 44

—testimony, in an action by an independent insurance agency against an insurance company alleging breach of an oral agreement and tortious misconduct, by a former insurance agent, that one year after the plaintiff was terminated, the defendant terminated the agent for the purpose of diverting business that had gone through that agent to the defendant's affiliate, the evidence being introduced to show a general plan to close out unaffiliated agents for the purpose of channeling business through the defendant's own affiliate. 45

—testimony as to a witness' past collection activities for the defendants, very similar to those charged, to show a consistent pattern of conduct over the entire time. 46

—testimony by the defendant's confederate as to how the defendant and a third person stole, cashed, and split the proceeds of government checks, in a prosecution for possession of stolen checks. 47

—evidence of the defendant's theft of timber, in a prosecution for tax evasion, to show the plan by which the taxes were evaded. 48

—testimony that defendant had indicated a desire to insure their lives, as part of a fraud and conspiracy in which a "front man" would create a partnership with a businessman, obtain key man and accidental death insurance on the businessman, and then cause the businessman's death to collect the insurance. 49

—evidence concerning defendant's poisoning of four other individuals and defendant's forging and uttering forged checks, in a prosecution for poisoning a man with whom she lived, to show that a continuing plan or scheme existed whereby defendant used the proceeds of her forgeries to support her drug addiction, and then murdered her victims when the forgeries were discovered or she feared discovery. 50

But in a prosecution for criminal possession of stolen property, where defendant came into possession of an automobile a very short time after it was stolen, evidence concerning thefts of other stolen vehicles allegedly committed by persons other than defendant should not have been admitted, since, despite strong similarities among the

thefts relating to time, place, and circumstance, there was no proof that the common plan or scheme, if one existed, included the defendant. 51

§ 451 ----In other particular cases [SUPPLEMENT]

Case authorities:

There was no prejudice in a first- degree murder prosecution where the trial court admitted court files relating to defendant's prior conviction for assault. The files were admitted for the nonhearsay purpose of showing motive, intent and plan and witnesses testified that defendant broke into the victim's home and attacked her, that the victim prosecuted the defendant for the assault and trespass, that the defendant harassed and threatened the victim, and that the victim believed that the defendant was going to kill her. The files added little, if anything, to the State's case. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

In a prosecution for 2 murders in which a rape victim and others were permitted to testify about the rape incident for the limited purpose of establishing a common scheme, plan or design, the fact that the 3 attacks were spread over a 5 year period did not render the rape too remote to show a common scheme, plan or design given the striking similarity of the 3 incidents. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

In a prosecution for 2 murders in which a rape victim and others were permitted to testify about the rape incident for the limited purpose of establishing a common scheme, plan or design, the court would reject the contention that the testimony about the rape had no probative value and only served to inflame the jury against him as he did not deny the killings and only challenged the degree of murder since a review of the record showed that the defendant pleaded not guilty and challenged the voluntariness of all statements in which he admitted to committing the crimes. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

In a prosecution for 2 murders in which a rape victim and others were permitted to testify about the rape incident for the limited purpose of establishing a common scheme, plan or design, the prosecution properly restricted its references to the rape to the issue of common scheme and only mentioned the rape incident 5 times in a 14 page closing argument, again properly limiting those references to comparison between the crimes to establish a common scheme. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

In a prosecution for 2 murders in which a rape victim and others were permitted to testify about the rape incident for the limited purpose of establishing a common scheme, plan or design, the court took proper precautions during both the guilt phase and the penalty phase of trial to limit the prejudicial impact of the evidence where the court gave limiting instructions both prior to the rape victim's testimony and in the jury charge that the evidence was only to be considered by the jury for the limited purpose of establishing common scheme, plan or design and also ruled that the evidence was inadmissible in the sentencing phase. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

In a prosecution for 2 murders in which a rape victim and others were permitted to testify

about the rape incident for the limited purpose of establishing a common scheme, plan or design, the mother of one of the victims was properly permitted to testify that the victim was tall and had always been a little heavy and that she was 8 1/2 months pregnant at the time she disappeared since the pregnancy helped to establish a physical characteristic shared by the murder victims and the rape victim, i.e., that they were all tall, heavy black women. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

In a prosecution for 2 murders to which the defendant confessed after he was arrested in connection with a rape, the rape victim and others were properly permitted to testify about the rape incident for the limited purpose of establishing a common scheme, plan or design and, thus, to establish that the defendant was the person who committed the murders and to establish that he had the requisite mental state to commit first degree murder. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

While remoteness in time is a factor to be considered in determining the probative value of other crimes evidence where the prosecution seeks to show a common scheme, plan or design, the importance of the time period is inversely proportional to the similarity of the crimes at issue. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

Footnotes

Footnote 37. *State v Rosthenhausler* (App) 147 Ariz 486, 711 P2d 625; *Price v State* (Fla App D3) 538 So 2d 486, 14 FLW 297, later proceeding (Fla App D3) 602 So 2d 994, 17 FLW D 1895.

Footnote 38. *United States v Moss* (CA8 Mo) 544 F2d 954, 1 Fed Rules Evid Serv 430, cert den 429 US 1077, 50 L Ed 2d 797, 97 S Ct 822.

Annotation: Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan, 47 ALR Fed 781.

Footnote 39. *United States v Moss* (CA8 Mo) 544 F2d 954, 1 Fed Rules Evid Serv 430, cert den 429 US 1077, 50 L Ed 2d 797, 97 S Ct 822.

Footnote 40. *United States v Martinez* (CA5 Tex) 894 F2d 1445, reh den, en banc (CA5 Tex) 901 F2d 1110 and cert den 498 US 942, 112 L Ed 2d 315, 111 S Ct 351.

Footnote 41. *United States v Temple* (CA10 NM) 862 F2d 821, 27 Fed Rules Evid Serv 426, later proceeding (CA10 NM) 918 F2d 134.

Footnote 42. *United States v Lopez* (CA9 Cal) 803 F2d 969, cert den 481 US 1030, 95 L Ed 2d 530, 107 S Ct 1958, reh den 483 US 1012, 97 L Ed 2d 750, 107 S Ct 3246, post-conviction proceeding (CA9) 1993 US App LEXIS 4653.

Footnote 43. *United States v Hill* (DC Del) 629 F Supp 493, 20 Fed Rules Evid Serv 505.

Footnote 44. *United States v Khorrami* (CA7 Ind) 895 F2d 1186, 29 Fed Rules Evid Serv 669, reh den, en banc (CA7) 1990 US App LEXIS 9549 and cert den 498 US 986, 112 L Ed 2d 533, 111 S Ct 522.

Footnote 45. *J. Yanan & Associates, Inc. v Integrity Ins. Co.* (CA7 Ind) 771 F2d 1025, 18 Fed Rules Evid Serv 1182.

Footnote 46. *United States v Largent* (CA6 Mich) 545 F2d 1039, 1 Fed Rules Evid Serv 1239, cert den 429 US 1098, 51 L Ed 2d 546, 97 S Ct 1117.

Footnote 47. *United States v Reece* (CA8 Ark) 547 F2d 432, 1 Fed Rules Evid Serv 612.

Footnote 48. *United States v Watkins* (CA9 Or) 600 F2d 201, 79-2 USTC ¶ 9548, 44 AFTR 2d 79-5222, cert den 444 US 871, 62 L Ed 2d 96, 100 S Ct 148.

Footnote 49. *United States v Calvert* (CA8 Mo) 523 F2d 895, 1 Fed Rules Evid Serv 41, cert den 424 US 911, 47 L Ed 2d 314, 96 S Ct 1106.

Footnote 50. *State v Barfield*, 298 NC 306, 259 SE2d 510, cert den 448 US 907, 65 L Ed 2d 1137, 100 S Ct 3050, reh den 448 US 918, 65 L Ed 2d 1181, 101 S Ct 41, later proceeding 454 US 957, 70 L Ed 2d 261, 102 S Ct 494, reh den 454 US 1117, 70 L Ed 2d 655, 102 S Ct 693, habeas corpus proceeding (ED NC) 540 F Supp 451, affd (CA4 NC) 719 F2d 58, cert den 467 US 1210, 81 L Ed 2d 357, 104 S Ct 2401, stay gr 468 US 1203, 82 L Ed 2d 870, 104 S Ct 3570 and reh den 468 US 1227, 82 L Ed 2d 920, 105 S Ct 28, habeas corpus proceeding (CA4 NC) 748 F2d 844 and (ovrld on other grounds by *State v Johnson*, 317 NC 193, 344 SE2d 775).

Footnote 51. *People v Weston* (3d Dept) 92 App Div 2d 945, 460 NYS2d 633; *People v Dellarocco* (3d Dept) 86 App Div 2d 720, 446 NYS2d 567, appeal after remand (3d Dept) 115 App Div 2d 904, 496 NYS2d 801.

(7). To Establish Identity or "Modus Operandi" [452-457]

§ 452 Showing identity, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Rules, evidence of other crimes, wrongs, or acts may be admissible for the purpose of proving identity. 52

◆ Observation: It has been noted that although "identity" is expressly listed in Rule 404(b), it would seem that "identity" can mean little more than the logical conclusion which flows from other crimes evidence advanced in proof of plan, design, scheme or modus operandi. 53

The federal and uniform rule conforms to the long-established practice of admitting evidence of other crimes where the sole purpose of such evidence is to establish identity and the evidence is relevant to that issue. 54 The probative value of evidence of other crimes, wrongs, or acts where the issue is identity depends upon the extent to which it raises the inference that the perpetrator of the other offenses was the perpetrator of the charged offense. 55 According to some authorities, for evidence of other crimes to be admissible on the issue of the identity of the person who committed the charged offense, the evidence must be so unusual and distinctive as to be like a signature. 56 But there is contrary authority to the effect that it is not required that evidence constitute a "signature" or otherwise demonstrate a particular, identical "modus operandi" in order to be admissible under Rule 404(b). 57 The inference of identity need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together. 58 On the other hand, if characteristics of both a prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise. 59

Evidence of the commission of another crime is not properly admitted simply for the purpose of identifying the accused unless it is absolutely necessary to establish identification as an element of the crime, 60 although it has also been held that unless the defendant's identity is conclusively established, evidence of other crimes is admissible to prove identity. 61

Identity is not in issue so as to justify admission of other crimes evidence where a victim does not testify that he is the victim of a crime committed by somebody and that he believes that the defendant was the perpetrator, but rather where the matter in issue is whether the defendant did the acts complained of by the victim at all. 62 Generally speaking, it is only where the identity of the accused is not definitely connected with the offense on trial that other offenses may be introduced to connect and identify him with the case on trial. 63 If the identity of the accused is established by other evidence and is therefore no longer an issue, it is improper to admit evidence of other crimes on the theory of proving identity. 64

§ 452 ----Showing identity, generally [SUPPLEMENT]

Practice Aids: The mark of a killer: Use of other crimes evidence to prove identity in *State v. Johnson* [832 P.2d 443 (Or. 1992)], 29 Will LR 927 (1993).

Case authorities:

Evidence of two subsequent bank robberies was improperly admitted to prove identity of defendants in bank robberies charged since common features of each were largely generic and although government promise that evidence would reveal that all robberies were characterized by neat, two-man division of labor, robberies involved different numbers of perpetrators. *United States v Luna* (1994, CA9 Cal) 21 F3d 874, 94 CDOS 2393, 94 Daily Journal DAR 4546, amd (CA9 Cal) 94 CDOS 3187, 94 Daily Journal DAR 6061.

In prosecution for kidnapping and burglary, trial court did not abuse its discretion in admitting evidence of 1983 sexual-abuse incident involving defendant resulting in

defendant's conviction of burglary, where evidence was relevant to establish defendant's identity, and similarities between 1983 incident and present incident were sufficiently distinctive to support admission of evidence. *State v Ripperger* (1994, Iowa App) 514 NW2d 740.

The trial court did not err in a murder and assault prosecution where defendant Cureton contended that he was unfairly prejudiced by the amount of time the State devoted to developing a prior shooting incident, but the State questioned only one eyewitness to the prior shooting and the other testimony was to describe the chain of custody and examination of the casings found at the scene. The evidence was admissible for identification and its purpose was not to show defendant Cureton's character. *State v Abraham* (1994) 338 NC 315, 451 SE2d 131.

The trial court did not err in a prosecution for a first-degree murder committed in 1989 by admitting evidence of an assault committed by defendant in 1981, when he was thirteen, where there were unusual facts and strikingly similar acts in both crimes so as to permit admission of the 1981 assault for purposes of proving identity. Because the prior crime here is offered to show to show identity rather than common plan or scheme, the passage of time in this case affects the weight of the evidence rather than its admissibility. The probative value of the evidence outweighs any potential for unfair prejudice because the identity of the perpetrator was a critical issue at trial. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

The trial court did not err in a first- degree murder prosecution by allowing evidence of a prior shooting involving defendants where the evidence was offered under G.S. § 8C-1, Rule 404(b) to prove the identity of the assailants in this shooting. Defendant conceded that the two months between the prior act and the current offenses meets the temporal proximity test, but contended that the acts were not sufficiently similar; however, the casings recovered from the shootings matched and witnesses on both occasions identified defendants in a blue Cadillac on a Charlotte Street before they began the respective assaults. The similarities were sufficient to be probative on the issue of the identity of the assailants in the instant case. *State v Abraham* (1994) 338 NC 315, 451 SE2d 131.

There was no error in a first- degree murder and attempted rape prosecution where the court admitted evidence of a prior assault and defendant contended that the court improperly instructed the jury as to the purpose of the evidence by failing to specify the charged offense for which the evidence could be considered. The prior crime was relevant on the issue of the identity of the assailant as to both offenses. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

An officer's testimony that a defendant charged with drug offenses had fled from him on an earlier occasion was not evidence of other crimes, wrongs or acts within the purview of GS § 8C-1, Rule 404(b). Even if defendant's flight from the officer was a prior bad act under Rule 404(b), this testimony was admissible to show that the officer was able to identify defendant. *State v Taylor* (1995) 117 NC App 644, 453 SE2d 225.

Footnotes

Footnote 52. FRE 404(b); Uniform Rules of Evidence, Rule 404(b).

Footnote 53. *Louisell and Mueller*, Federal Evidence § 140.

As to other crimes evidence to show "plan," see §§ 448 et seq.; as to other crimes evidence to show "modus operandi," see § 455.

Footnote 54. *Boyd v United States*, 142 US 450, 35 L Ed 1077, 12 S Ct 292; *Parker v United States* (CA9 Cal) 400 F2d 248, cert den 393 US 1097, 21 L Ed 2d 789, 89 S Ct 892; *Johnson v State*, 242 Ala 278, 5 So 2d 632, cert den 316 US 693, 86 L Ed 1763, 62 S Ct 1299, reh den 316 US 713, 86 L Ed 1778, 62 S Ct 1310 and reh den 317 US 705, 87 L Ed 563, 63 S Ct 25; *People v Haston*, 69 Cal 2d 233, 70 Cal Rptr 419, 444 P2d 91; *Ruffin v State* (Fla) 397 So 2d 277, cert den 454 US 882, 70 L Ed 2d 194, 102 S Ct 368, post-conviction proceeding (Fla) 420 So 2d 591, habeas corpus den (Fla) 461 So 2d 109, 10 FLW 20, habeas corpus granted, in part (CA11 Fla) 848 F2d 1512, reh den, en banc (CA11 Fla) 858 F2d 746, later proceeding (Fla App D5) 589 So 2d 403, 16 FLW D 2863, appeal after remand, remanded (Fla App D5) 617 So 2d 868, 18 FLW D 1195 and cert den 488 US 1047, 102 L Ed 2d 1001, 109 S Ct 879 and cert den 488 US 1044, 102 L Ed 2d 995, 109 S Ct 872; *Cooper v State*, 182 Ga 42, 184 SE 716, 104 ALR 1309; *People v Jennings*, 252 Ill 534, 96 NE 1077; *Dotterrer v State*, 172 Ind 357, 88 NE 689; *State v Taylor*, 198 Kan 290, 424 P2d 612; *Douglas v Commonwealth*, 307 Ky 391, 211 SW2d 156; *Wethington v State*, 3 Md App 237, 238 A2d 581; *State v Taylor* (Mo) 324 SW2d 643, 76 ALR2d 671; *People v Thau*, 219 NY 39, 113 NE 556, 3 ALR 1537; *People v Battles* (4th Dept) 83 App Div 2d 164, 443 NYS2d 932; *State v Walden*, 306 NC 466, 293 SE2d 780; *Commonwealth v Burger*, 195 Pa Super 175, 171 A2d 599.

In a prosecution for capital murder and sexual assault on a minor, the trial court properly admitted the state's evidence of a sexual assault on another minor victim, where numerous similarities as to the age, complexion, sex, and build of the victims, and as to the manner and place of committing the two crimes, established a sufficiently unique pattern of criminal activity to justify the admission of collateral crime evidence on a disputed and material issue of identity. *Rivera v State* (Fla) 561 So 2d 536, 15 FLW S 235, ALR4th 3678.

Annotation: Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged, 41 ALR Fed 497.

Footnote 55. *United States v Powell* (CA9 Cal) 587 F2d 443, 3 Fed Rules Evid Serv 1407, appeal after remand (CA9 Cal) 632 F2d 754.

Footnote 56. *People v Alvarez* (2nd Dist) 44 Cal App 3d 375, 118 Cal Rptr 602.

The fact that a criminal defendant previously participated in a series of the same crimes with a particular confederate may, in some instances, raise a fair inference identifying a defendant as the confederate's unknown partner; however, there must be something distinctive about the unknown partner or the manner of carrying out such crimes. *United States v Phillips* (CA6 Ky) 599 F2d 134, 4 Fed Rules Evid Serv 984.

Footnote 57. *United States v Evans* (CA5 La) 848 F2d 1352, 26 Fed Rules Evid Serv 73, mod and reh den, en banc (CA5 La) 854 F2d 56.

As to other crimes evidence to show signature or "modus operandi," see § 455.

Footnote 58. *People v Miller*, 50 Cal 3d 954, 269 Cal Rptr 492, 790 P2d 1289, reh den (Cal) 1990 Cal LEXIS 3039 and cert den 498 US 1041, 112 L Ed 2d 702, 111 S Ct 713.

Footnote 59. *United States v Powell* (CA9 Cal) 587 F2d 443, 3 Fed Rules Evid Serv 1407, appeal after remand (CA9 Cal) 632 F2d 754.

Footnote 60. *Commonwealth v Burger*, 195 Pa Super 175, 171 A2d 599.

Footnote 61. *People v Condon*, 26 NY2d 139, 309 NYS2d 152, 257 NE2d 615.

Footnote 62. *United States v Shackelford* (CA7 Ill) 738 F2d 776, 15 Fed Rules Evid Serv 1550 (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Manganelis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063.

Footnote 63. *State v Holmes* (Mo) 389 SW2d 30.

Footnote 64. *Dabney v State*, 82 Miss 252, 33 So 973; *State v Holmes* (Mo) 389 SW2d 30; *State v Griffin* (Mo) 336 SW2d 364.

Where a witness has stated the length of time he has known defendant, and has pointed him out in court, there is no need for further testimony by the witness as to offenses that occurred during their acquaintance, and admission of such testimony is improper. *United States v Rice* (CA5 Fla) 550 F2d 1364, 1 Fed Rules Evid Serv 703, reh den (CA5 Fla) 554 F2d 476 and cert den 434 US 954, 54 L Ed 2d 312, 98 S Ct 478, 98 S Ct 479.

Where the defendant put on no evidence and raised no defensive theories, and where there were numerous positive identifications of the defendant that remained unimpeached after cross-examination, the admission during the cross-examination of another witness that she could not positively identify the defendant is not sufficient to raise an issue of identity, in which case a trial court erred in admitting evidence of extraneous offenses. *Redd v State* (Tex Crim) 522 SW2d 890.

§ 453 --In particular cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts which has been held admissible on the issue of identity includes—

—evidence of counterfeiting activities by defendant on other occasions. 65

—evidence of additional forged instruments, similar in most respects to those charged in an indictment and containing the defendant's fingerprint, to rebut a defense that the defendant was framed. 66

—testimony by a gun store employee that he was able to identify and recall the physical appearance of the defendant because of previous police inquiries into her purchases, in a prosecution for furnishing false information in connection with the acquisition of ammunition. 67

—testimony by an FBI agent that only two out of 1,800 bank robberies in the Los Angeles area involved persons wearing bandannas, since the fact that very few robberies involved such clothing made it more likely that the same person committed both robberies. 68

—evidence that a gun stolen during a robbery and burglary was used by defendant in a break-in at another location some eight days later. 69

—testimony by a bank teller at a bank that was robbed the same morning as the robbery charged in the instant case, identifying the defendants in the instant case as the men who robbed her bank and giving descriptions of the general appearance and clothing worn by the robbers of that bank that matched the descriptions given of the men who committed the bank robbery charged in the instant case. 70

—evidence of an extraneous aggravated robbery committed 11 days before the offense charged in the indictment where both offenses were committed in restaurants located on the same freeway, where both offenses took place at night but during business hours, and where the accused was positively identified as one of the co-actors in each offense and was described as having facial hair, wearing a cap, and brandishing a pistol in his right hand which he kept in the left side of his belt or pants waistband. 71

—evidence of defendant's expertise with burglar alarms, in a prosecution for sale of the fruits of theft, where identification was the main issue and knowledge of bypassing burglar alarm systems was a distinctive feature of the burglary evidence, which corroborated testimony of two witnesses whose credibility the defendant had attacked. 72

—evidence as to the defendant's prior entries into a business premises, in a prosecution for unlawfully attempting to rescue property on the premises seized by the Internal Revenue Service. 73

—a photograph of defendant holding a pistol, in a prosecution for using or carrying a firearm during and in relation to drug trafficking where one of the issues to be determined at trial was the connection between guns seized at various apartments and the defendant. 74

—evidence that the government's chief witness had been hired by the defendant to commit other crimes in addition to the charged offense of extortion, as probative of the identity of the witness' employer when the witness was hired for extortion collection. 75

—a tape recording of a prior telephone bomb threat in the defendant's voice, in a prosecution for making a false bomb threat. 76

—evidence of threatening letters written by defendant, in a prosecution for making a threatening phone call, since the letters and call concerned the same obscure litigation and threatened the same four public officials. 77

—evidence of one defendant's participation in hijackings, in a prosecution of four

defendants arising from a hijacking, where the prior hijacking occurred at the same place, and the stolen goods were disposed of in the same location, as in the offense charged. 78

—evidence that the defendant took out a driver's license using a false name, to show that it was the defendant who used that name in making telephone calls as part of an alleged conspiracy. 79

—a tool, found in the defendant's home, which was commonly used to start stolen cars, the defendants having escaped from the charged bank robbery in a stolen car that had been started using such a tool. 80

—evidence that defendant sold an ounce of cocaine to an undercover government agent before the charged conspiracy began, where defendant responded to a particular beeper number which a coconspirator paged during the course of the conspiracy. 81

—evidence that defendant spent nearly \$1 million after his niece's death as tending to show that he, rather than someone else, received and disbursed virtually all the proceeds from life insurance policies on his niece and that he was responsible for incomplete and inaccurate answers that riddled insurance applications for policies he purchased. 82

—evidence of subsequent sex related crimes where the pattern of the other offenses was similar to the offense with which the defendant was charged. 83

On the other hand, where the alleged similarities between the offense charged and previous offenses sought to be introduced in evidence are common to a substantial portion of the population of child molesters, including the use of charm or deception, transportation to places of privacy, and violence, and there was no peculiar pattern in defendant's past conduct that established his identity as a kidnapper and killer by setting him apart from the general class of violent sex offenders against children, it was error to admit such evidence on the question of the identity of a girl's abductor and killer. 84

§ 453 --In particular cases [SUPPLEMENT]

Case authorities:

There was no error in a first- degree murder prosecution where the trial court admitted evidence that defendant had bought forty to forty-five dollars' worth of crack cocaine with quarters, dimes and nickels where the victim's mother had testified that the victim worked at a restaurant and received a large quantity of change from tips, that the victim had over one hundred dollars in quarters in a jar in her bedroom the night before her death, and that the jar was empty when she found the victim. The testimony was strong circumstantial evidence tending to show that defendant murdered the victim and stole her tip money from the jar in the bedroom and was relevant, admissible, and clearly not introduced for the purpose of showing that the defendant was a drug user. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

The prosecutor's argument to the jury in a prosecution for the murder of a child, "Now, who acts with malice, who bends arms, who hits, who chokes, who acts with malice? There he sits," was not an improper misstatement of law that jurors could infer defendant's identity as the perpetrator from his malicious character but was a proper reference to the fact that the jury could consider evidence of defendant's prior acts on the

issue of identity. *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

In a prosecution of defendant for the first-degree murder of a four-month-old child, testimony by the child's mother and by others concerning defendant's misconduct toward the mother by choking her, bruising various parts of her body with his hands and fingers, and bending her hands behind her back to make her say and do whatever he wanted was admissible under Rule 404(b) to show defendant's identity as the perpetrator of the crime charged where the evidence showed that, at the time of her death, the child victim was covered with bruises similar to those inflicted by defendant upon the mother, including bruises in the shape of fingerprints on the cheek and handprints on the neck; the child suffered fractures in both legs caused by the knees being bent forward; the child suffered fractures in both shoulders inflicted by the arms being bent backward; and the unusual injuries inflicted on the victim were thus particularly similar to those inflicted by defendant upon the mother and the unusual acts which would have caused the victim's injuries were particularly similar to those acts defendant committed against the mother. The probative value of this testimony outweighed any potential for unfair prejudice against defendant. Furthermore, assuming that testimony concerning defendant's threats to kill the mother for infidelity and his pointing of a gun at her was not competent to show identity, the admission of this testimony was harmless error in light of other competent evidence tending to show that defendant was the perpetrator of the murder. GS § 8C-1, Rule 404(b). *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

There was no error in a first- degree murder prosecution arising from an armed robbery where the court admitted testimony that a crowd gathered at a club eleven days after the murder, one of the crowd became belligerent, defendant approached the crowd and asked who was causing the trouble, the belligerent individual advanced on defendant, defendant fired several shots over his head, the crowd dispersed, defendant dropped the pistol as he was running from the scene, and the gun was recovered and identified as having been used in the murder. Defendant concedes that his having dropped the pistol which was possibly used as the murder weapon was admissible, but contends that the evidence that he fired over a person's head was irrelevant. This was not prejudicial; it shows that defendant was not the aggressor and that he acted to protect himself and other people. *State v Grace* (1995) 341 NC 640, 461 SE2d 330.

Footnotes

Footnote 65. *United States v Jardina* (CA5 La) 747 F2d 945, 16 Fed Rules Evid Serv 1254, cert den 470 US 1058, 84 L Ed 2d 833, 105 S Ct 1773.

Counterfeit checks and ID cards recovered from the defendant's apartment and unrelated to the charged offense of interstate transportation of forged checks were admissible to prove that the defendant was the person who presented the checks for payment where direct evidence of the identity of the forger was weak. *United States v Maestas* (CA5 Tex) 546 F2d 1177, 2 Fed Rules Evid Serv 671.

In a prosecution for altering obligations of the United States, identity may be shown by evidence of defendant's prior acts of passing 2-dollar bills altered to look like 20-dollar bills. *United States v Hamilton* (CA6 Mich) 684 F2d 380, 11 Fed Rules Evid Serv 433, cert den 459 US 976, 74 L Ed 2d 291, 103 S Ct 312.

Footnote 66. *United States v Riggins* (CA9 Wash) 539 F2d 682, 2 Fed Rules Evid Serv 1341, cert den 429 US 1045, 50 L Ed 2d 758, 97 S Ct 749.

Footnote 67. *United States v Buck* (CA9 Cal) 548 F2d 871, 1 Fed Rules Evid Serv 806, cert den 434 US 890, 54 L Ed 2d 175, 98 S Ct 263.

Footnote 68. *United States v Rogers* (CA9 Cal) 769 F2d 1418, 18 Fed Rules Evid Serv 1258.

Footnote 69. *State v Bishop*, 293 NC 84, 235 SE2d 214.

Footnote 70. *United States v Griffin* (CA4 Va) 13 Fed Rules Evid Serv 1990.

Footnote 71. *Buckner v State* (Tex Crim) 571 SW2d 519.

Footnote 72. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154.

Footnote 73. *United States v Pilla* (CA8 Minn) 550 F2d 1085, 77-2 USTC ¶ 9636, 40 AFTR 2d 77-5503, cert den 432 US 907, 53 L Ed 2d 1080, 97 S Ct 2954, reh den 434 US 882, 54 L Ed 2d 166, 98 S Ct 247.

Footnote 74. *United States v Walters* (CA1 Mass) 904 F2d 765, 30 Fed Rules Evid Serv 465.

Footnote 75. *United States v Czarnecki* (CA6 Mich) 552 F2d 698, 1 Fed Rules Evid Serv 1348, 41 ALR Fed 487, cert den 431 US 939, 53 L Ed 2d 257, 97 S Ct 2652.

Footnote 76. *United States v Tibbetts* (CA4 W Va) 565 F2d 867, 2 Fed Rules Evid Serv 821.

Footnote 77. *United States v Ingraham* (CA1 Me) 832 F2d 229, 24 Fed Rules Evid Serv 259, cert den 486 US 1009, 100 L Ed 2d 202, 108 S Ct 1738.

Footnote 78. *United States v Di Geronimo* (CA2 NY) 598 F2d 746, 4 Fed Rules Evid Serv 796, cert den 444 US 886, 62 L Ed 2d 117, 100 S Ct 180.

Footnote 79. *United States v Phillips* (CA5 Fla) 664 F2d 971, 9 Fed Rules Evid Serv 970, cert den 457 US 1136, 73 L Ed 2d 1354, 102 S Ct 2965, later proceeding (CA11 Fla) 723 F2d 1538, reh den (CA11 Fla) 727 F2d 1116 and cert den 467 US 1228, 81 L Ed 2d 878, 104 S Ct 2684 and cert den 457 US 1136, 73 L Ed 2d 1354, 102 S Ct 2965 and cert den 459 US 906, 74 L Ed 2d 166, 103 S Ct 208.

Footnote 80. *United States v White* (CA8 Mo) 645 F2d 599, 7 Fed Rules Evid Serv 1543, cert den 452 US 943, 69 L Ed 2d 959, 101 S Ct 3092.

Footnote 81. *United States v Townsend* (CA7 Ill) 924 F2d 1385, 32 Fed Rules Evid Serv 333, post-conviction proceeding (ND Ill) 769 F Supp 1482.

Footnote 82. *United States v Ewings* (CA7 Ill) 936 F2d 903, 33 Fed Rules Evid Serv 645, reh, en banc, den (CA7) 1991 US App LEXIS 18096, post-conviction proceeding (ND Ill) 1992 US Dist LEXIS 13713.

Footnote 83. *State v James*, 217 Kan 96, 535 P2d 991.

Footnote 84. *People v Alcala*, 36 Cal 3d 604, 205 Cal Rptr 775, 685 P2d 1126, later proceeding (Cal) 1990 Cal LEXIS 1463, petition den (Dec 17, 1992) and later proceeding (Cal) 1992 Cal LEXIS 6434, reported in full 4 Cal 4th 742, 15 Cal Rptr 2d 432, 842 P2d 1192, 93 CDOS 55, 93 Daily Journal DAR 119, mod 4 Cal 4th 1115a, 93 CDOS 1798, 93 Daily Journal DAR 3209 and mod, reh den (Cal) 1993 Cal LEXIS 1277 and stay gr (Cal) 1993 Cal LEXIS 3435 and cert den (US) 126 L Ed 2d 171, 114 S Ct 215, reh den (US) 126 L Ed 2d 486, 114 S Ct 589 (prosecution for forcible kidnaping and first degree murder of a 12-year-old girl who defendant lured into his vehicle, drove to an isolated rural area, hit over the head with a blunt instrument, and upon whom he inflicted multiple stab wounds; evidence that he lured an 8-year-old girl into his vehicle, drove her to his home, apparently raped her and inflicted a severe head wound with a steel bar, that he offered a 13-year-old girl a ride and refused to let her out of the car and took her to a beach, and that he drove an initially consenting 15-year-old girl into the mountains, beat her unconscious, and raped her vaginally and anally was not admissible where fundamental issue in the case at bar was the identity of the girl's abductor and killer).

§ 454 --Where defense claims alibi or misidentification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A defense of alibi puts the identity of the defendant in a criminal action squarely in issue, and evidence of another crime or act which is relevant to that issue is therefore admissible. 85 To counter an alibi set up by one accused of crime, evidence is admissible that he was seen in the vicinity of the crime at about the time it was committed, although at the time when seen he was engaged in the commission of other crimes. 86

Evidence that the accused had been misidentified in connection with a crime similar to the one charged has also been held admissible on the ground that such evidence tends to show that someone other than defendant committed the crime charged. 87

Footnotes

Footnote 85. *Thomas v State*, 132 Fla 78, 181 So 337; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *State v Rasler*, 216 Kan 582, 533 P2d 1262; *State v Griffin* (Mo) 336 SW2d 364; *Warren v State*, 178 Tenn 157, 156 SW2d 416.

There were sufficient distinguishing characteristics to permit the state to introduce an extraneous rape offense after defendant, who was charged with attempted aggravated rape, had placed his identity in issue by raising the defense of alibi, where the primary and extraneous offenses occurred within a five-day period, the victims in both instances were coeds at the same school, they were at or about the places they resided, and the assailant in both instances wore sunglasses and held a sharp object to the throat of the

victim. *Dickey v State* (Tex Crim) 646 SW2d 232.

Footnote 86. *People v Jennings*, 252 Ill 534, 96 NE 1077.

Footnote 87. *Holt v United States* (CA5 Ga) 342 F2d 163; *State v Echols*, 203 Conn 385, 524 A2d 1143; *Commonwealth v Jewett*, 392 Mass 558, 467 NE2d 155, 50 ALR4th 1039.

Annotation: Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 ALR4th 1049.

§ 455 Showing "modus operandi," generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although Rule 404(b) does not list "modus operandi" as one of the matters for which evidence of other crimes or acts may be introduced, it is generally recognized that where prior crimes or acts of the accused are unique or unusual, and strikingly similar in nature to the crime charged, or very close in detailed resemblance to the crime charged, then such crimes may be proven and the trier allowed to infer that the accused is probably the culprit. 88

◆ Distinction: While "common plan" 89 and "modus operandi" are sometimes used interchangeably, the concepts are distinguishable since "modus operandi" (that is, the common method of committing a crime) refers to patterns of criminal conduct in which the method of perpetration is so distinctive that separate crimes are recognizable as the handiwork of one person by a characteristic "signature." 90

Modus operandi is used not so much to prove that since the defendant apparently resolved to do the act, therefore he probably did it, as it is to suggest that since the defendant acted in a similar and unusual or distinctive manner previously, therefore it is more likely that the defendant (rather than someone else) did the act on the occasion of the charged crime. In other words, the inference is from modus operandi to the "identity" 91 of defendant as the culprit. 92

Where evidence of a prior crime is introduced to show the defendant's modus operandi in carrying out the prior crime and by inference the crime charged in the instant case, the activity engaged in must be a sufficiently unique act to counterbalance the prejudice arising from any inference of involvement in uncharged crimes. 93 A prior or subsequent crime or other incident is not admissible for the purpose of proving modus operandi merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused. 94 This type of testimony is properly excluded from the government's direct case where the probative value of evidence as modus operandi testimony is clearly outweighed by its prejudicial effect on a defendant's character defense. 95

◆ Practice guide: Admission of evidence of a prior similar crime under Federal Rules of Evidence 404(b) for the limited purpose of proving identity or modus operandi is not conditioned upon the defendant's taking the stand. 96

§ 455 ----Showing "modus operandi", generally [SUPPLEMENT]

Case authorities:

In prosecution for operating automobile chop shop, receiving stolen vehicles, and altering vehicle identification numbers, evidence of defendant's possession of other stolen vehicles not charged in indictment was relevant to his knowledge of character of stolen vehicles charged, and demonstrated his modus operandi and scheme for retagging stolen vehicles listed in indictment. *United States v Evans* (1994, CA7 Ind) 27 F3d 1219.

In prosecution for child molestation of 11-year-old girl, trial court did not err in admitting similar transaction evidence without making determination required in case precedent, where pretrial hearing was conducted pursuant to state's notice of intent to use similar transaction evidence and, at that hearing, trial court determined that alleged similar activities involved children of same age as victim and from same area of residence and that evidence would go to establish demeanor, motive, and modus operandi—trial court's determination implicitly included all elements required by precedent. *Cornelius v State* (1994) 213 Ga App 766, 445 SE2d 800.

Footnotes

Footnote 88. *Louisell and Mueller*, Federal Evidence § 140.

Footnote 89. As to evidence of other crimes admissible to prove a plan, see §§ 448 et seq.

Footnote 90. *State v Bowen*, 48 Wash App 187, 738 P2d 316.

As to whether modus operandi is a proper subject for expert testimony, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 403-407.

Footnote 91. As to the admissibility of evidence of other crimes, wrongs, or acts for the purpose of proving identity, see § 452.

Footnote 92. See *United States v Baldarrama* (CA5 Tex) 566 F2d 560, 3 Fed Rules Evid Serv 99, cert den 437 US 906, 57 L Ed 2d 1136, 98 S Ct 3094 and cert den 439 US 844, 58 L Ed 2d 145, 99 S Ct 140, characterizing the identity exception as synonymous with the modus operandi exception.

Footnote 93. *United States v Miller* (CA1 Me) 589 F2d 1117, 3 Fed Rules Evid Serv 1418, cert den 440 US 958, 59 L Ed 2d 771, 99 S Ct 1499; *United States v Oliphant* (CA9 Cal) 525 F2d 505, cert den 424 US 972, 47 L Ed 2d 740, 96 S Ct 1473 ("striking similarity" between defendant's modus operandi in earlier offenses and the crime of mail theft, for which defendant was on trial, made the earlier offenses admissible).

Law Reviews: Weissenberg, Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b). 70 Iowa LR 579 (1985).

Footnote 94. United States v Goodwin (CA5 Fla) 492 F2d 1141.

Footnote 95. United States v Herman (CA3 Pa) 589 F2d 1191, 3 Fed Rules Evid Serv 1605, cert den 441 US 913, 60 L Ed 2d 386, 99 S Ct 2014.

Footnote 96. United States v Mills (CA9 Cal) 597 F2d 693, 4 Fed Rules Evid Serv 1040.

§ 456 --Admissibility in particular cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of other crimes, wrongs, or acts which has been admitted to show modus operandi includes—

—a defendant's admission of 15 other bank robberies where, by his own statements, he had a distinct modus operandi, which was practically a signature to his robberies. 97

—evidence that defendant engaged in a prior bank robbery, since both the prior and the charged offenses involved an oral request for change for a \$5 bill followed by an oral demand for money. 98

—evidence of a prior bank robbery where each crime involved a pistol, a warning against using dye packs, a getaway car, and a police scanner. 99

—evidence that defendant had robbed other three banks and in each instance had threatened a bank teller with a toy gun hidden inside a newspaper. 1

—evidence of an attempted grocery store break-in, in a prosecution for bank robbery, where both offenses occurred in small rural communities in the early morning hours, and prior to breaking into buildings, perpetrators in each case cut lines leading to the buildings' security systems. 2

—evidence of a prior uncharged robbery, which resembled the transactions in instant case in distinctive details, including the use of walkie-talkies and duct tape to bind victims in the same way. 3

—evidence of the defendant's participation in a subsequent drug deal transacted in the same manner as those covered by the indictment. 4

—evidence of ammunition found in a narcotics defendant's bedroom, since the government's expert witness informed the jury that those who deal in drugs typically keep firearms for protection and the government introduced the ammunition to prove that

defendant was engaged in the trade. 5

—evidence of the accused's involvement in prior arson incidents under similar circumstances. 6

—evidence that the defendant had participated in a previous kidnapping using plans, methods, and techniques identical to those used in the kidnapping and extortion charged in the instant case. 7

—evidence that defendant had similarly beaten, raped, and forced three other young women into prostitution, in a prosecution for kidnapping and illegal transportation of women in interstate commerce for purposes of prostitution. 8

—evidence that a sexual assault defendant had regularly assaulted his daughter in the past, and had threatened her with physical harm and death, to establish defendant's modus operandi in overcoming a victim's will by putting her in fear of harm. 9

—evidence of a similar offense committed against another, in a prosecution for deviate sexual assault, where the crimes shared strikingly similar characteristics, in that both women were attacked on apartment house elevators, the perpetrator in both cases stopped the elevators as means of keeping his victims from escaping, and searched both women and their clothing, including their bras. 10

—evidence of a prior act of smuggling statues through airport and avoiding customs, in a prosecution for kidnapping and murdering a foreign money courier as he entered the U.S., to show that he could have done the same with the victim. 11

—evidence that defendant was apprehended the day after the charged offense (transporting stolen money orders in interstate commerce), trying to pass money orders identical in amount, payee, and payor, and bearing numbers following sequentially those cashed on the occasion alleged in the instant case. 12

—evidence of crimes of which the defendant was previously convicted which were strikingly similar to the ones with which he was charged in the instant case, in that each incident involved a bizarre extortion attempt based on the poisoning of a food item in a store and a subsequent demand for diamonds to forestall further poisonings. 13

—evidence, in a counterfeiting prosecution, that process used to make the bills at issue was a unique one, that it had been encountered only once before in the experience of the Secret Service, and that on that prior occasion the perpetrator was the defendant. 14

§ 456 --Admissibility in particular cases [SUPPLEMENT]

Case authorities:

In prosecution for incest, trial court properly admitted evidence of seven other incidents of improper sexual contact with victim over period of 10 years, where similar-transaction evidence is admissible in sexual assault cases to show plan, scheme, design, modus operandi, motive, or guilty knowledge, if evidence relates to material fact in case, if evidence is logically relevant to material fact, if logical relevance is independent of prohibited inference that defendant committed crime charged because of his criminal

propensities, and if probative value of evidence substantially outweighs danger of unfair prejudice. *People v Leonard* (1993, Colo App) 872 P2d 1325, cert den (Colo) 1994 Colo LEXIS 395.

Evidence of defendant's participation in a robbery an hour before the robbery and two murders for which defendant was on trial was admissible under Rule 404(b) to show defendant's identity as a perpetrator of the murders where, in both the prior robbery and the crimes against the murder victims, there were at least two individuals involved who incapacitated the victims by pulling their clothing down around their elbows and hands, and at least one person was robbed during both events. The evidence tended to show that defendant punched the prior robbery victim in the face and that the male murder victim had "areas of abrasion and bruising on his face"; and the similar acts and close proximity in time thus tend to indicate that the same person was involved in both the prior robbery and the murders. Furthermore, the probative value of defendant's involvement in the prior robbery outweighs any potential for unfair prejudice. GS § 8C-1, Rules 404(b), 403. *State v Goode* (1995) 341 NC 513, 461 SE2d 631.

In prosecution for sexual indecency with child, evidence that defendant committed prior acts of sexual misconduct with same child victim was admissible in order to rebut defendant's evidence as to his sterling character and in order to show that defendant was acting in conformity with his established habit in relationship to 5-year-old to 10-year-old boy victim. *Waddell v State* (1994, Tex App Beaumont) 873 SW2d 130.

Footnotes

Footnote 97. *United States v Danzey* (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179.

Footnote 98. *United States v Johnson* (CA9 Wash) 820 F2d 1065, 23 Fed Rules Evid Serv 261.

Footnote 99. *United States v Haney* (CA4 NC) 914 F2d 602, 31 Fed Rules Evid Serv 429.

Footnote 1. *United States v Sappe* (CA2 NY) 898 F2d 878, 29 Fed Rules Evid Serv 1355 (noting that while there are other cases involving a gun hidden in a newspaper, these occurred long ago and in other jurisdictions, so the method was not too common to qualify as a signature).

Footnote 2. *United States v Porter* (CA10 Kan) 881 F2d 878, 28 Fed Rules Evid Serv 691, cert den 493 US 944, 107 L Ed 2d 336, 110 S Ct 348.

Footnote 3. *United States v Connelly* (CA7 Ill) 874 F2d 412, 27 Fed Rules Evid Serv 1442.

Footnote 4. *United States v Lyles* (CA2 NY) 593 F2d 182, 3 Fed Rules Evid Serv 928, cert den 440 US 972, 59 L Ed 2d 789, 99 S Ct 1537 and cert den 440 US 975, 59 L Ed 2d 794, 99 S Ct 1545 and cert den 444 US 847, 62 L Ed 2d 61, 100 S Ct 94.

Where defendant previously sold crack cocaine out of a convenience store packaged in

matchboxes and these transactions were "identical" to the one charged, the court properly admitted the evidence to show modus operandi. *United States v Brookins* (CA5 Miss) 919 F2d 281, 31 Fed Rules Evid Serv 616.

Footnote 5. *United States v Jenkins*, 289 US App DC 83, 928 F2d 1175, 32 Fed Rules Evid Serv 679.

Footnote 6. *United States v Scott* (CA5 La) 795 F2d 1245, 21 Fed Rules Evid Serv 543 (incendiary devices used in the various arsons found to be "signature devices" connecting the accused to the criminal activities); *State v Lewis* (Minn App) 385 NW2d 352; *State v Allen*, 301 Or 569, 725 P2d 331.

Annotation: Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 ALR2d 891.

Footnote 7. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314.

Footnote 8. *United States v Winters* (CA9 Cal) 729 F2d 602, 15 Fed Rules Evid Serv 516.

Footnote 9. *State v Cardinal*, 155 Vt 411, 584 A2d 1152.

Footnote 10. *People v Houseton* (1st Dist) 141 Ill App 3d 987, 96 Ill Dec 149, 490 NE2d 1354.

Footnote 11. *United States v Maravilla* (CA1 Puerto Rico) 907 F2d 216, 30 Fed Rules Evid Serv 600, appeal after remand (CA1) 951 F2d 412, cert den (US) 118 L Ed 2d 562, 112 S Ct 1960.

Footnote 12. *United States v Milhollan* (CA3 Pa) 599 F2d 518, cert den 444 US 909, 62 L Ed 2d 144, 100 S Ct 221 and (disapproved on other grounds by *United States v Ross*, 456 US 798, 72 L Ed 2d 572, 102 S Ct 2157).

Footnote 13. *United States v Bailleaux* (CA9 Cal) 685 F2d 1105, 11 Fed Rules Evid Serv 1300.

Footnote 14. *United States v Mills* (CA2 NY) 895 F2d 897, 29 Fed Rules Evid Serv 705, cert den 495 US 951, 109 L Ed 2d 541, 110 S Ct 2216.

§ 457 --Inadmissibility in particular cases

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In accordance with the rule that to be admissible as evidence of "modus operandi," the other crimes or acts sought to be introduced must be unique or strikingly similar, 15

evidence of other acts or crimes are frequently found inadmissible on the ground that the requirement of uniqueness or "signature" has not been demonstrated. Thus, evidence of other crimes, wrongs, or acts which has been excluded when offered to show modus operandi includes—

—evidence that defendant had taken other bribes, in a prosecution for receiving bribes, since the other bribes were not part of a unique scheme so unusual as to earmark them as the handiwork of the accused. 16

—defendant's admission that he had robbed a drug dealer, using a knife, about three months before the charged robbery of a postal installation at knifepoint. 17

—evidence of a prior marijuana violation absent a peculiar similarity between the violation and the charged conspiracy to distribute marijuana. 18

—testimony that the accused had participated with the witness in other bank robberies, where the other robberies did not indicate a common plan and were not similar enough to the charged crime to indicate a "signature." 19

—testimony about the defendant's purchase of a yacht four days prior to his arrest for importing and possessing marijuana, as this was not a sufficiently unique act to counterbalance the prejudice arising from the inference that defendant was in the business of smuggling, a crime with which he was not charged. 20

—a photograph showing defendant standing nude with a minor female, in a trial for conduct involving fellatio of a 15-year old boy. 21

§ 457 --Inadmissibility in particular cases [SUPPLEMENT]

Case authorities:

In prosecution for lewd and lascivious conduct with child, trial court erred in admitting evidence of allegation of defendant's touching another minor 1 month prior to charged act, where act was not part of continuous series of sexual acts with one victim and was not so distinctive and unique as to constitute defendant's "signature." *State v Perrillo* (1994, Vt) 649 A2d 1031.

Footnotes

Footnote 15. § 455.

Footnote 16. *United States v O'Connor* (CA2 NY) 580 F2d 38, 3 Fed Rules Evid Serv 107, 47 ALR Fed 771; *United States v Benedetto* (CA2 NY) 571 F2d 1246, 2 Fed Rules Evid Serv 1299.

Footnote 17. *United States v Pisari* (CA1 Mass) 636 F2d 855, 7 Fed Rules Evid Serv 552, finding evidence not admissible under FRE 404(b) as proof of identity or modus operandi because the precedents require the conjunction of several identifying characteristics or the presence of some highly distinctive quality. Here, there was no evidence whether the

knives used on these occasions were either similar or distinctive; there was no evidence of the propinquity of the events in time; in one case a store was the target of the crime, in the other, an individual; in one case, there were two robbers, in the other, one; in one case the objects taken were drugs and money; in the other, it was not clear whether drugs or money were taken.

Footnote 18. *United States v Garbett* (CA8 Iowa) 867 F2d 1132, 27 Fed Rules Evid Serv 1114; *United States v Powell* (CA9 Cal) 587 F2d 443, 3 Fed Rules Evid Serv 1407, appeal after remand (CA9 Cal) 632 F2d 754 (evidence of prior conviction of defendant on guilty plea for possession with intent to distribute, where the manner in which the two offenses were committed was dissimilar).

Footnote 19. *United States v Phillips* (CA6 Ky) 599 F2d 134, 4 Fed Rules Evid Serv 984.

Evidence that defendant committed a prior bank robbery should not have been admitted as proof of identity or modus operandi where, even though the prior robbery had common features with the charged robbery (lone gunman, use of handgun, lack of disguise, proximity in time), these similarities did not amount to a "signature"; there were more striking dissimilarities, since in earlier crime, defendant used dynamite as the main weapon, posed as a businessman, and took a hostage. *United States v Lail* (CA11 Fla) 846 F2d 1299, 25 Fed Rules Evid Serv 1213.

Footnote 20. *United States v Miller* (CA1 Me) 589 F2d 1117, 3 Fed Rules Evid Serv 1418, cert den 440 US 958, 59 L Ed 2d 771, 99 S Ct 1499.

Footnote 21. *People v Engelman*, 434 Mich 204, 453 NW2d 656.

d. Procedural Matters [458-462]

§ 458 Time for admitting Rule 404(b) evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of other crimes, wrongs, or acts may be offered during the presentation of a party's case in chief ²² and also during rebuttal, ²³ if advance notice has been given to the defendant. ²⁴ If the requirements of Federal Rules of Evidence 404(b) are satisfied, evidence of past bad acts can be admitted on rebuttal for impeachment by contradiction, after the defendant has denied the misconduct on cross-examination, even though its admission violates the letter of Federal Rules of Evidence 608(b), which prohibits a party from offering extrinsic evidence to prove specific instances of conduct for the purpose of attacking or supporting a witness' credibility. ²⁵

◆ Practice guide: If the government attempts to introduce bad acts through cross-examination of the defendant or on rebuttal, the trial court should determine whether the evidence is cumulative or necessary to prove an essential element of the

crime charged. If the evidence is cumulative, the trial court should more closely scrutinize its prejudicial effect. If the evidence is necessary to prove an element of the charge, the trial judge may have erred in not sustaining a defendant's motion for a directed verdict of acquittal. Moreover, a defendant may have a valid objection under Federal Rules of Evidence 611(b) that the government's cross-examination exceeds the scope of the direct examination. 26

Federal Rules of Evidence 404(b) was not intended to preclude prejudicial inferences being drawn from prior bad or criminal acts of the defendant by the defendant himself, only by the government. 27 Where the defendant himself first offers evidence of a prior conviction while testifying on direct examination, he may not object to the government's subsequent inquiries into the relevant aspects of that prior conviction. 28 And where the defense invites an inference of prior bad conduct by asking leading questions of the witness, it may not complain about the government's inquiry into the matter. 29

One point of view is that it is usually preferable for the trial court to await the conclusion of the defendant's case before admitting evidence of other crimes, since by this time the court will best be able to judge the prosecutor's need for the evidence and weigh the probative value of the evidence against its prejudicial effect. 30 Another viewpoint, however, is that the better practice is for the prosecutor to introduce evidence of other bad acts in the government's case in chief, since in most instances such evidence will surface prior to trial on a motion in limine, at which time, on a proffer by the government, the trial court will determine whether the evidence is relevant and admissible under Federal Rules of Evidence 404(b) and whether the evidence is more probative than prejudicial. 31

When a government witness volunteers a reference to other offenses or acts by the defendant, Federal Rules of Evidence 404(b) is inapplicable if the government plays no active role and exercises no bad faith in soliciting such information. So long as the government makes no attempt to introduce or exploit such evidence for the purpose of reflecting upon the defendant's guilt, the reference made by the witness is not patently inculpatory, and any taint that might flow from such evidence could be cured by a cautionary instruction. 32

Footnotes

Footnote 22. *United States v Smith Grading & Paving, Inc.* (CA4 SC) 760 F2d 527, 1985-1 CCH Trade Cases ¶ 66573, 17 Fed Rules Evid Serv 1168, cert den 474 US 1005, 88 L Ed 2d 457, 106 S Ct 524; *United States v Kovic* (CA7 Ill) 684 F2d 512, 11 Fed Rules Evid Serv 854, cert den 459 US 972, 74 L Ed 2d 284, 103 S Ct 304.

Faced with a plea of not guilty, the prosecution is under no obligation to wait and see whether the defendant argues the non-existence of the element of a crime before the prosecution presents evidence of prior wrongdoings establishing that element. *United States v Buchanan* (CA5 La) 633 F2d 423, 7 Fed Rules Evid Serv 538, cert den 451 US 912, 68 L Ed 2d 301, 101 S Ct 1984.

Footnote 23. *United States v Johnson* (CA2 NY) 525 F2d 999, cert den 424 US 920, 47 L Ed 2d 327, 96 S Ct 1127; *United States v Smith Grading & Paving, Inc.* (CA4 SC) 760 F2d 527, 1985-1 CCH Trade Cases ¶ 66573, 17 Fed Rules Evid Serv 1168, cert den 474

US 1005, 88 L Ed 2d 457, 106 S Ct 524; *United States v Kovic* (CA7 Ill) 684 F2d 512, 11 Fed Rules Evid Serv 854, cert den 459 US 972, 74 L Ed 2d 284, 103 S Ct 304; *United States v Riggins* (CA9 Wash) 539 F2d 682, 2 Fed Rules Evid Serv 1341, cert den 429 US 1045, 50 L Ed 2d 758, 97 S Ct 749; *Snead v State*, 243 Ala 23, 8 So 2d 269; *Jones v Commonwealth*, 303 Ky 666, 198 SW2d 969.

Footnote 24. § 459.

Footnote 25. *United States v Smith Grading & Paving, Inc.* (CA4 SC) 760 F2d 527, 1985-1 CCH Trade Cases ¶ 66573, 17 Fed Rules Evid Serv 1168, cert den 474 US 1005, 88 L Ed 2d 457, 106 S Ct 524; *United States v Horton* (CA6 Mich) 847 F2d 313, 25 Fed Rules Evid Serv 1285, reh den (CA6) 1988 US App LEXIS 14062.

Footnote 26. *United States v Smith Grading & Paving, Inc.* (CA4 SC) 760 F2d 527, 1985-1 CCH Trade Cases ¶ 66573, 17 Fed Rules Evid Serv 1168, cert den 474 US 1005, 88 L Ed 2d 457, 106 S Ct 524.

Footnote 27. *United States v Bickman* (ED Pa) 506 F Supp 1035.

Footnote 28. *United States v Kendall* (CA10 Okla) 766 F2d 1426, 18 Fed Rules Evid Serv 1355, cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848.

Footnote 29. *United States v Bickman* (ED Pa) 506 F Supp 1035.

Footnote 30. *United States v Danzey* (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179.

In a prosecution for aiding and abetting the sale of heroin, where defendant amended his theory of the defense just before the commencement of trial, which theory removed the issue of intent, the District Court should have prevented the government from mentioning evidence of prior heroin sales in its opening statements, and the admission of such evidence should have awaited the conclusion of the defense case. *United States v Colon* (CA2 NY) 880 F2d 650, 28 Fed Rules Evid Serv 800.

Footnote 31. *United States v Smith Grading & Paving, Inc.* (CA4 SC) 760 F2d 527, 1985-1 CCH Trade Cases ¶ 66573, 17 Fed Rules Evid Serv 1168, cert den 474 US 1005, 88 L Ed 2d 457, 106 S Ct 524.

Footnote 32. *United States v Splain* (CA8 Mo) 545 F2d 1131.

§ 459 Advance notice to defendant required

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Federal Rule 404(b) was amended in 1991 to provide that evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident, *provided that* upon request by the accused, the prosecution in a criminal case must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. 33

◆ Comment: The pretrial notice was intended to reduce surprise and promote early resolution on the issue of admissibility. No specific time limits are set in recognition of what constitutes a reasonable request will depend largely on the circumstances of each case. 34 Such notice provisions had previously been enacted in several states. 35

Notice requirements have been applied both by state courts, 36 and by federal courts prior to the adoption of the 1991 amendment. 37

Footnotes

Footnote 33. FRE 404(b).

Footnote 34. Notes of Advisory Committee on December 1991 Amendment to Rule 404; see 28 USCS Appx Rule 404 note.

Footnote 35. Notes of Advisory Committee on December 1991 Amendment to Rule 404, referring to a Florida rule requiring 10 days' notice and a Texas rule requiring notice but containing no time limit.

Footnote 36. *Moor v State* (Alaska App) 709 P2d 498; *State v Brown* (La) 318 So 2d 24.

Footnote 37. *United States v King* (ED NC) 121 FRD 277.

§ 460 Effect of request for order in limine

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A trial court may not allow the government to offer evidence of defendant's prior conviction on cross-examination, for the purpose of establishing motive or intent under Rule 404(b), where on a pretrial motion of defendant to prevent the use of prior convictions for impeachment purposes 38 the government had flatly denied any intention to use defendant's prior conviction by agreeing not to offer evidence of a prior felony conviction or cross-examine him as to that conviction. 39 But a trial court did not err in admitting evidence under Rule 404(b) after allegedly denying a motion in limine prior to trial, on a "cold" record and before being exposed to and having heard all the evidence, since the denial of the motion was a preliminary decision subject to change based upon the court's exposure to the evidence at the trial. 40

Footnotes

Footnote 38. Pursuant to Rule 609, discussed in 81 Am Jur 2d, Witnesses §§ 862 et seq.

Footnote 39. United States v Shapiro (CA9 Cal) 879 F2d 468.

Footnote 40. United States v Connelly (CA7 Ill) 874 F2d 412, 27 Fed Rules Evid Serv 1442.

Motion in limine practice is generally discussed in 75 Am Jur 2d, Trial §§ 91 et seq.

§ 461 Function of limiting instructions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When the trial court, in its discretion, finds that evidence is admissible under Federal Rules of Evidence 404(b), but its admission runs the risk of prejudice, 41 the court must be careful to instruct correctly as to the limited purpose for which such evidence is admitted, 42 and to make it clear that such evidence may be considered only for that limited purpose. 43 When evidence of other crimes is admitted for a proper purpose, a limiting instruction should be given to caution the jury against drawing an impermissible inference that the defendant is more likely to have committed the crime in question solely because of involvement in past crimes. 44

A trial judge may give such an instruction under Rule 404(b) sua sponte, notwithstanding that defendant is responsible for raising "other acts" evidence through cross-examination of a prosecution witness. 45 But a court's failure to instruct a jury as to the limited purpose of testimony relating to the past conduct of a defendant is not necessarily plain error requiring reversal in the absence of an objection by the defendant. 46

Footnotes

Footnote 41. For the purpose of FRE 403, discussed in §§ 324 et seq.

Footnote 42. United States v Aims Back (CA9 Mont) 588 F2d 1283, 3 Fed Rules Evid Serv 937.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Forms: Instruction to jury—Consideration of evidence admitted for limited purpose. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 18.

Footnote 43. United States v Danzey (CA2 NY) 594 F2d 905, 4 Fed Rules Evid Serv 1, cert den 441 US 951, 60 L Ed 2d 1056, 99 S Ct 2179; United States v Zeidman (CA7 Ill) 540 F2d 314, 2 Fed Rules Evid Serv 609.

It was no abuse of discretion to allow evidence of a defendant's prior felony convictions where: (1) the trial court on voir dire inquired into the possible prejudices of potential jurors as to a witness-defendant whose testimony contained an admission of such prior felony convictions; (2) the court instructed the jury that such prior convictions could be considered only insofar as they affected the credibility of the defendant as a witness; (3) the court cautioned the jury that it could not use such evidence in determining whether defendant did the act charged; and (4) the court instructed the jury that it must first determine guilt or innocence before it could consider such evidence for the purpose of determining the defendant's state of mind or intent. *United States v Hall* (CA8 Mo) 588 F2d 613, 4 Fed Rules Evid Serv 233.

Testimony of a doctor appointed to examine defendant pursuant to defendant's plea of not guilty by reason of insanity, that defendant had told him that at age 18 defendant had fondled a 12-year-old girl and served an 18-month sentence at a youth center was properly admitted where the court admonished the jury that evidence concerning past similar behavior by defendant was being allowed for the purpose of assessing defendant's sanity on the date of the crime, but was not to be used to infer guilt of the crime charged. *Smith v State* (Ind) 432 NE2d 1363.

Footnote 44. *United States v Day*, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 45. *United States v Woods* (CA6 Mich) 877 F2d 477.

Footnote 46. *United States v Reese* (CA6 Mich) 568 F2d 1246, 2 Fed Rules Evid Serv 871 (trial judge's instruction that other crimes testimony presented in rebuttal by government related only to issue of defendant's good character held not plain error under FR Crim P 52(b) where other statements by court tended to put rebuttal testimony in proper perspective); *United States v Faulkner* (CA6 Ky) 538 F2d 724, cert den 429 US 1023, 50 L Ed 2d 624, 97 S Ct 640.

§ 462 Appellate review of rulings of admissibility under Rule 404(b)

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the admission of evidence of other crimes, wrongs, or acts is challenged on appeal, the duty of the appellate court is to assess its relevancy and probative value, and if such evidence is found relevant under Federal Rules of Evidence 404, the appellate court may not reverse the ruling of the District Court unless it finds the evidence so prejudicial that its probative value is outweighed. 47 The trial court's decision to admit evidence under Rule 404(b) is reviewed under an abuse of discretion standard. 48 Broad discretion is afforded the trial judge in deciding whether to admit wrongful act evidence, 49 and the judge's decision will not be overturned without a clear showing that the requirements of Federal Rules of Evidence 404(b) have not been met, 50 or that there has been a prejudicial abuse of discretion. 51

The decision of the trial judge is accorded great deference because his firsthand exposure to all the evidence and his familiarity with the course of the trial proceedings are the best qualifications available for evaluating the value of the evidence in its proper context. 52

◆ Practice guide: An objection to evidence of other crimes, wrongs, or acts on the ground that under Federal Rules of Evidence 403 the probative value of the evidence is substantially outweighed by its prejudicial effect should be sufficient to preserve for appeal the point that the evidence is not admissible under Federal Rules of Evidence 404(b). 53

**§ 462 ----Appellate review of rulings of admissibility under Rule 404(b)
[SUPPLEMENT]**

Case authorities:

Whether defendant had lost right to contest on appeal judge's ruling admitting "other acts" evidence was question of law reviewed independently. *State v Jones* (1993, App) 179 Wis 2d 215, 507 NW2d 351.

Footnotes

Footnote 47. *United States v Little* (CA8 Ark) 562 F2d 578.

Annotation: Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of Federal Rules of Evidence, in civil cases, 64 ALR Fed 648.

Footnote 48. *United States v Sanders* (CA10 Okla) 928 F2d 940, cert den (US) 116 L Ed 2d 109, 112 S Ct 142 (allegedly erroneous admission of evidence of uncharged crimes in RICO prosecution did not have prejudicial cumulative effect, since either limiting instruction was given in each instance or defendant failed to object to testimony being offered); *State v Danielski* (Minn App) 374 NW2d 322, later proceeding (Minn App) 395 NW2d 438.

To similar effect in a non-Rule state, see *People v Hayes*, 52 Cal 3d 577, 276 Cal Rptr 874, 802 P2d 376, 91 CDOS 174, 91 Daily Journal DAR 220, cert den (US) 116 L Ed 2d 440, 112 S Ct 420.

Footnote 49. *United States v Williams* (CA2 NY) 596 F2d 44, 4 Fed Rules Evid Serv 57, cert den 442 US 946, 61 L Ed 2d 317, 99 S Ct 2893; *United States v Evans* (CA8 Mo) 697 F2d 240, 12 Fed Rules Evid Serv 529, cert den 460 US 1086, 76 L Ed 2d 350, 103 S Ct 1779.

Footnote 50. *United States v Evans* (CA8 Mo) 697 F2d 240, 12 Fed Rules Evid Serv 529, cert den 460 US 1086, 76 L Ed 2d 350, 103 S Ct 1779.

Footnote 51. *United States v Davis* (CA5 Ga) 546 F2d 583, 2 Fed Rules Evid Serv 268, cert den 431 US 906, 52 L Ed 2d 391, 97 S Ct 1701.

Footnote 52. *Young v Rabideau* (CA7 Ill) 821 F2d 373, 23 Fed Rules Evid Serv 4, cert

den 484 US 915, 98 L Ed 2d 221, 108 S Ct 263, stating that when the same evidence has both legitimate and forbidden uses, so that its introduction is valuable yet dangerous, the district judge has great discretion.

Footnote 53. United States v Currier (CA1 Me) 836 F2d 11, 24 Fed Rules Evid Serv 630.

4. Subsequent Remedial Measures (Rule 407) [463-479]

a. In General [463-472]

§ 463 General rule of inadmissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, evidence of repairs, change of conditions, or precautions taken after an accident or injury, is not admissible as evidence or an admission of negligence before the accident. 54

The Rules specifically provide that when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligent or culpable conduct in connection with the event. 55 The Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or for impeachment purposes. 56

◆ **Caution:** Since a number of states that have adopted the Uniform Rules have made substantial changes in the language of Rule 407, frequently in regard to products liability actions. 57 counsel is advised to consult the language of the applicable rule or statute.

Measures taken prior to an occurrence are not covered by Federal Rules of Evidence 407, since it applies solely to measures taken after an event. 58 Nor would Rule 407 seem to apply to actions taken after an event but initiated prior to it, 59 although there is authority to the contrary. 60

◆ **Caution:** It is clear from the wording in the history of Rule 407 that the term "event" refers to the time of the accident or injury to plaintiff, not to the time of manufacture of the product, the creation of the hazard, 61 or the sale of the accident-causing item by the manufacturer. 62

◆ **Practice guide:** If evidence of subsequent remedial measures is erroneously admitted at trial, the District Court has the discretion to determine whether or not a mistrial should be granted or whether to instruct the jury to disregard any reference to such evidence. 63 But it has been held that the erroneous admission of evidence of

subsequent remedial measures cannot be cured by the court's instruction to the jury that such evidence may not be regarded as the defendant's admission of liability, particularly when the probative value of the evidence is outweighed by the danger of unfair prejudice and confusion. 64

§ 463 ----General rule of inadmissibility [SUPPLEMENT]

Practice Aids: 30 Am Jur Proof of Facts 3d 307, Evidence of Subsequent Remedial Measures in Civil Actions

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases. 15 ALR5th 119.

Case authorities:

Prosthetic manufacturer's letters to customers after plaintiff's fall when his prosthetic leg broke were properly excluded on ground that they furnished precise torque measurements to be observed in screwing pylon to clamp in prosthetic limbs and were thus post-accident safety measure, despite plaintiffs' arguments that letters were admissible to prove feasibility of providing torque measurements earlier and to show control manufacturer exerted over its prosthetist customers since feasibility was not controverted and control was not issue. *Cameron v Otto Bock Orthopedic Indus.* (1994, CA1 Mass) 43 F3d 14.

Motion in limine is granted, where worker brought strict products liability claim against manufacturer of machine which injured him, and manufacturer sought to exclude evidence of remedial design changes in machine between time worker's employer purchased machine and time of worker's injury, 23 years later, because FRE 407 bars admission of subsequent remedial measures to show negligence in connection with injury, and rule applies to postmanufacture, pre-injury changes. *Wusinich v Aeroquip Corp.* (1994, ED Pa) 843 F Supp 959.

In seaman's Jones Act case, district court did not abuse its discretion in admitting redacted version of captain's report of plaintiff's accident since version admitted did not identify any subsequent remedial measure taken by vessel owner. *Allred v Maersk Line, Ltd.* (1994, CA4 Va) 35 F3d 139.

In suit alleging, inter alia, negligent misrepresentation by defendant regarding expiration dates of stock options, notices sent by defendant to remind stock option holders of impending deadlines was admissible to impeach defense witness's testimony that language of post-retirement deadlines for exercise of stock options was simple and straightforward, regardless of whether it was admissible as evidence of subsequent remedial measure. *Trytko v Hubbell, Inc.* (1994, CA7 Ind) 28 F3d 715, reh den (1994, CA7) 1994 US App LEXIS 28060.

In an appeal of a take-nothing judgment in a slip and fall case, the trial court properly excluded evidence: (1) where the victim attempted to use a statement made to her by a store employee to impeach another store employee by showing bias, because bias of a witness can be shown only by introducing evidence of prior statements made by that witness; (2) where the victim attempted to introduce the store's safety manual, because the victim did not lay a proper predicate for the admission of the manual by asking the

witness if she had ever seen or read the manual; and (3) where the victim attempted to introduce the store's post-accident instruction for the employees to be more careful, because it was not a subsequent remedial measure that could be used as evidence of the feasibility of a precautionary measure since the store did not alter the manner in which the plants were sprayed. *Keetch v Kroger Co.* (1992, Tex) 845 SW2d 262.

Footnotes

Footnote 54. *Columbia & P. S. R. Co. v Hawthorne*, 144 US 202, 36 L Ed 405, 12 S Ct 591; *Knight v Otis Elevator Co.* (CA3 Pa) 596 F2d 84, 4 Fed Rules Evid Serv 73; *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968; *County of Hennepin v AFG Industries, Inc.* (CA8 Minn) 726 F2d 149, 14 Fed Rules Evid Serv 1865, 38 UCCRS 853; *Wilkinson v Carnival Cruise Lines, Inc.* (CA11 Fla) 920 F2d 1560, 32 Fed Rules Evid Serv 25; *Baker v Merry-Go-Round Roller Rink, Inc.* (Ala) 537 So 2d 1; *Anchorage v Steward* (Alaska) 374 P2d 737; *Slow Development Co. v Coulter*, 88 Ariz 122, 353 P2d 890; *Kearns v Steinkamp*, 184 Ark 1177, 45 SW2d 519; *Daggett v Atchison, T. & S. F. R. Co.*, 48 Cal 2d 655, 313 P2d 557, 64 ALR2d 1283; *Houser v Floyd* (3rd Dist) 220 Cal App 2d 778, 34 Cal Rptr 96, 94 ALR2d 1423; *Diamond Rubber Co. v Harryman*, 41 Colo 415, 92 P 922; *Hall v Burns*, 213 Conn 446, 569 A2d 10; *Voynar v Butler Mfg. Co.* (Fla App D4) 463 So 2d 409, 10 FLW 269, CCH Prod Liab Rep ¶ 10411, review den (Fla) 475 So 2d 696; *Georgia S. & F. R. Co. v Cartledge*, 116 Ga 164, 42 SE 405; *Kath v East S. L. & S. R. Co.*, 232 Ill 126, 83 NE 533; *Cincinnati, H. & D. R. Co. v Armuth*, 180 Ind 673, 103 NE 738; *Newport v Maytum* (Ky) 342 SW2d 703; *Kentucky & West Virginia Power Co. v Stacy*, 291 Ky 325, 164 SW2d 537, 170 ALR 1; *Long v Joestlein*, 193 Md 211, 66 A2d 407; *National Laundry Co. v Newton*, 300 Mass 126, 14 NE2d 108; *Wincher v Detroit*, 144 Mich App 448, 376 NW2d 125; *Employers Mut. Ins. Co. v Oakes Mfg. Co.* (Minn App) 356 NW2d 719; *Bellistri v St. Louis* (Mo App) 671 SW2d 405; *Panagoulis v Philip Morris & Co.*, 95 NH 524, 68 A2d 672; *Spinelli v Golda*, 6 NJ 68, 77 A2d 233; *Di Paolo v Somma* (2d Dept) 111 App Div 2d 899, 490 NYS2d 803; *Tyson v Long Mfg. Co.*, 249 NC 557, 107 SE2d 170, 78 ALR2d 588; *Lacy v Uganda Invest. Corp.* (Cuyahoga Co) 7 Ohio App 2d 237, 29 Ohio Ops 2d 177, 94 Ohio L Abs 73, 195 NE2d 586; *Kansas C. S. R. Co. v Martin* (Okla) 293 P2d 600; *Williams v Portland General Electric Co.*, 195 Or 597, 247 P2d 494 (recognizing rule); *Hyndman v Pennsylvania R. Co.*, 396 Pa 190, 152 A2d 251; *Lapierre v Greenwood*, 85 RI 484, 133 A2d 126, 64 ALR2d 392, adhered to 85 RI 492, 135 A2d 269; *Shields v South Carolina Dept. of Highways & Public Transp.* (App) 303 SC 439, 401 SE2d 185; *Illinois C. R. Co. v Wyatt*, 104 Tenn 432, 58 SW 308; *Enterprise Products Co. v Sanderson* (Tex App Beaumont) 759 SW2d 174, writ diss (May 24, 1989); *Desmarchier v Frost*, 91 Vt 138, 99 A 782; *Whitten v McClelland*, 137 Va 726, 120 SE 146; *Mabe v Huntington Coca-Cola Bottling Co.*, 145 W Va 712, 116 SE2d 874; *Heiden v Milwaukee*, 226 Wis 92, 275 NW 922, 114 ALR 420.

Annotation: Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—Modern state cases, 15 ALR5th 119.

Practice References Subsequent Repairs or Precautions. 32 Am Jur POF2d 253, Admission by Conduct or Silence § 7.

10 Am Jur Proof of Facts 295, Repairs.

Evidence of repairs subsequent to injury. 11 Am Jur Trials 310.

Footnote 55. FRE 407; Uniform Rules of Evidence, Rule 407.

Footnote 56. FRE 407; Uniform Rules of Evidence, Rule 407.

As to admissibility for particular purposes, see §§ 473 et seq.

Footnote 57. See § 466 as to products liability and other strict liability actions.

Footnote 58. *Lindsay v Ortho Pharmaceutical Corp.* (ED NY) 481 F Supp 314, 4 Fed Rules Evid Serv 1004, revd on other grounds (CA2 NY) 637 F2d 87, CCH Prod Liab Rep ¶ 8843, 7 Fed Rules Evid Serv 462; *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871.

Evidence that a manufacturer has changed warnings on one of its products after the product was sold to plaintiff but prior to the accident is admissible, as FRE 407 only excludes evidence of subsequent remedial measures which were taken after the accident. *Cates v Sears, Roebuck & Co.* (CA5 La) 928 F2d 679, CCH Prod Liab Rep ¶ 12798, 32 Fed Rules Evid Serv 823, 19 FR Serv 3d 784.

Footnote 59. *Raymond v Raymond Corp.* (CA1 NH) 938 F2d 1518, CCH Prod Liab Rep ¶ 12860, 33 Fed Rules Evid Serv 1294 (criticized on other grounds by *Burke v Deere & Co.* (CA8 Iowa) CCH Prod Liab Rep ¶ 13609) (design modifications to side loader model manufactured subsequent to model in issue did not constitute subsequent remedial measures since they were on drawing board prior to manufacturer of model in issue).

Footnote 60. *Kaczmarek v Allied Chemical Corp.* (CA7 Ind) 836 F2d 1055, 24 Fed Rules Evid Serv 449 (in suit arising out of accident in which plaintiff was squirted with sulphuric acid, evidence that chemical supplier replaced the coupling on its hoses with a different and perhaps safer one was properly excluded, even though the decision to replace the couplings was taken before the accident and merely implemented afterwards).

Footnote 61. *Huffman v Caterpillar Tractor Co.* (CA10 Colo) 908 F2d 1470, 30 Fed Rules Evid Serv 130, reh den, en banc (CA10) 30 Fed Rules Evid Serv 135; *Hackett v Alco Standard Corp.*, 71 Or App 24, 691 P2d 142, CCH Prod Liab Rep ¶ 10323, review den 298 Or 822, 698 P2d 963.

Footnote 62. *Cates v Sears, Roebuck & Co.* (CA5 La) 928 F2d 679, CCH Prod Liab Rep ¶ 12798, 32 Fed Rules Evid Serv 823, 19 FR Serv 3d 784.

Footnote 63. *Mouton v Tug "Ironworker"* (CA5 La) 811 F2d 946, 1988 AMC 605, 22 Fed Rules Evid Serv 1017.

The court did not declare a mistrial where counsel, within the hearing of the jury, made reference to evidence which was inadmissible under FRE 407, claiming that he wished to use it for impeachment purposes, the court saying that evidence of defendant's negligence was strong and that the incident could not have affected the deliberation of the jury

following a cautionary instruction. *Arcement v Southern Pacific Transp. Co.* (CA5 La) 517 F2d 729, 1 Fed Rules Evid Serv 71.

Footnote 64. *Fish v Georgia-Pacific Corp.* (CA2 Vt) 779 F2d 836, CCH Prod Liab Rep ¶ 10904, 19 Fed Rules Evid Serv 583.

§ 464 Purpose of rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 407 is based on the policy of encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them. 65 The extrinsic policy basis for Rule 407 is that allowing evidence of subsequent remedial measures would discourage owners from improving the condition causing the injury because of their fear of the evidential use of such improvement to their disadvantage. 66

Evidence of subsequent remedial measures is incompetent or inadmissible because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant. 67 Some decisions also emphasize, in excluding evidence of subsequent repairs made or precautions taken after an accident, that if the rule was otherwise and such evidence was to be admitted, it would amount to an admission or confession of negligence on the part of the defendant 68 and would bring collateral issues into the case. 69

◆ Observation: It has been noted that perhaps the more important reason why Rule 407 was codified was that prominent exceptions and uneven application of the common law doctrine by the courts had caused the rule to lose its vitality by making the Rule a positive rule of admissibility rather than one of exclusion. Yet despite codification, it appears that the Rule against admitting evidence of subsequent repairs has not regained its vitality and many still view it as a rule of inclusion rather than one of exclusion. 70 Moreover, the fact that the proof can be introduced for impeachment purposes invites courtroom "games": Ostensibly seeking an admission from an adverse witness that greater care could have been taken, trial counsel will actually be happier (when subsequent precautions have in fact been taken) if he can goad the witness to say just the opposite—that "we did all we reasonably could"—so that the counterproof of subsequent precautions may come in, theoretically for impeachment purposes and to show feasibility. 71 Furthermore, despite the avowed policy of the courts to read the exceptions narrowly, 72 it has been pointed out that in view of the fact that the exceptions listed in the rule are nonexclusive (being preceded by the term "such as"), that the purposes beyond the reach of the exclusionary principle are so numerous, and that so often is evidence of subsequent measures admitted, that Rule 407 seldom requires actual exclusion of evidence. 73

§ 464 ----Purpose of rule [SUPPLEMENT]**Case authorities:**

Evidence of modification of lumber- mill saw to include physical guard over opening was not subject to exclusion under Rule 407 since third party, not defendant- manufacturer, modified it, and district court's exclusion of evidence as unfairly prejudicial was improper since fact that proffered modification tended to show negligence or product liability rather than just feasibility did not constitute improper use of evidence, and it was not unfairly prejudicial on issue of whether saw was unreasonably dangerous at time of manufacture since modification was not subsequent design developed well after saw was manufactured. *Espeignnette v Gene Tierney Co.* (1994, CA1 Me) 43 F3d 1, CCH Prod Liab Rep ¶ 14121, 41 Fed Rules Evid Serv 94.

Footnotes

Footnote 65. *Pau v Yosemite Park* (CA9 Cal) 928 F2d 880, 91 CDOS 2081, 91 Daily Journal DAR 3341, 33 Fed Rules Evid Serv 478, 19 FR Serv 3d 1487, 14 UCCRS2d 79; *Meller v Heil Co.* (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390; *Rimkus v Northwest Colorado Ski Corp.* (CA10 Colo) 706 F2d 1060, 12 Fed Rules Evid Serv 764; *Brooks v Cellin Mfg. Co.*, 251 Ga 395, 306 SE2d 657, on remand 168 Ga App 479, 310 SE2d 585.

The theory underlying the rule excluding evidence of subsequent remedial measures is that because action taken after an incident reflects hindsight, an inference of negligence would be improper, since such an inference would assume that because the defendant had learned from the accident, he should have learned before the accident. *Wollenhaupt v Andersen Fire Equipment Co.*, 232 Neb 275, 440 NW2d 447.

Footnote 66. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Woolard v Mobil Pipe Line Co.* (CA5 Tex) 479 F2d 557, reh den (CA5 Tex) 480 F2d 925 and cert den 414 US 1025, 38 L Ed 2d 316, 94 S Ct 450; *Bailey v Kawasaki-Kisen, K. K.* (CA5 La) 455 F2d 392, 16 FR Serv 2d 324, appeal after remand (CA5 La) 478 F2d 839; *Russell v Page Aircraft Maintenance, Inc.* (CA5 Ala) 455 F2d 188; *Louisville & Nashville R. Co. v Williams* (CA5 Ala) 370 F2d 839; *Bauman v Volkswagenwerk Aktiengesellschaft* (CA6 Tenn) 621 F2d 230, CCH Prod Liab Rep ¶ 8682, 5 Fed Rules Evid Serv 1276; *Lolie v Ohio Brass Co.* (CA7 Ill) 502 F2d 741; *Wallner v Kitchens of Sara Lee, Inc.* (CA7 Ill) 419 F2d 1028 (noting that the exclusionary rule is "based upon the salutary policy of avoiding jury prejudice and encouraging persons to make repairs following an accident"); *Diamond Rubber Co. v Harryman*, 41 Colo 415, 92 P 922; *Terre H. & I. R. Co. v Clem*, 123 Ind 15, 23 NE 965; *Fourseam Coal Corp. v Barnett* (Ky) 240 SW2d 544; *Chicago Mill & Lumber Co. v Carter*, 209 Miss 71, 45 So 2d 854; *Wollenhaupt v Andersen Fire Equipment Co.*, 232 Neb 275, 440 NW2d 447; *Fanelty v Rogers Jewelers, Inc.*, 230 NC 694, 55 SE2d 493; *Illinois C. R. Co. v Wyatt*, 104 Tenn 432, 58 SW 308.

Such evidence would put an unfair interpretation on human conduct and offer an inducement to omit repairs and improvements calculated to prevent future accidents.

Newport v Maytum (Ky) 342 SW2d 703.

Annotation: Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 ALR5th 119.

Footnote 67. Columbia & P. S. R. Co. v Hawthorne, 144 US 202, 36 L Ed 405, 12 S Ct 591; Camp Bird v Larson (CA8 Colo) 152 F 160; McGarr v National & Providence Worsted Mills, 24 RI 447, 53 A 320; Worthy v Jonesville Oil Mill, 77 SC 69, 57 SE 634.

Footnote 68. Columbia & P. S. R. Co. v Hawthorne, 144 US 202, 36 L Ed 405, 12 S Ct 591; Camp Bird v Larson (CA8 Colo) 152 F 160; Kentucky & West Virginia Power Co. v Stacy, 291 Ky 325, 164 SW2d 537, 170 ALR 1.

Footnote 69. Standard Oil Co. v Tierney, 92 Ky 367, 17 SW 1025; Illinois C. R. Co. v Wyatt, 104 Tenn 432, 58 SW 308.

Footnote 70. Low, Federal Rule of Evidence 407 and Strict Products Liability—The Rule Against Subsequent Repairs Lives On. 48 Journal of Air Law and Commerce 887, 900 (1983).

Footnote 71. Louisell and Mueller, Federal Evidence § 163.

Admissibility for impeachment purposes is discussed in § 478; to show feasibility in § 477.

Footnote 72. § 473.

Footnote 73. Louisell and Mueller, Federal Evidence § 165.

§ 465 Inadmissibility to prove negligent or culpable conduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 407 provides that evidence of measures taken after an event which, if taken previously, would have made the event less likely to occur, is not admissible to prove negligence or culpable conduct ⁷⁴ in connection with the event. Rule 407 is broad enough to make inadmissible the question of negligence or culpable conduct, evidence of—

—post-accident repairs. ⁷⁵

—installation of safety devices. ⁷⁶ such as the addition of handrails. ⁷⁷

—changes in design. ⁷⁸

—the removal of dangerous conditions. ⁷⁹

- changes in the scene of an accident. 80
- changes in safety procedures. 81
- changes in other procedures. 82 such as the introduction of a revised consent form. 83
- changes in regulations. 84
- changes in labels or instructions, including warnings regarding the product. 85
- installation of warning signs. 86
- voluntary withdrawal of the product from the market. 87
- change in language in contested passage in a book in its subsequent paperback edition. 88
- the dismissal of an employee charged with causing an accident. 89
- changes in prison regulations restricting the possession and transfer of personal property. 90
- changes in police department policies after the incident. 91
- police department disciplinary proceedings and evidence about the investigation of actions taken by a police officer. 92

§ 465 ----Inadmissibility to prove negligent or culpable conduct [SUPPLEMENT]

Case authorities:

In action against nature park for negligence when musky bit patron, trial court reasonably exercised its discretion by excluding evidence of subsequent remedial measure of placing warning signs by musky pond day after incident where trial court's explanation, that it could have allowed information into evidence in safe-place case as exception to prohibition against subsequent remedial measures but chose not to since fact that signs were there was not probative enough and therefore prejudicial effect would outweigh any probative value, showed trial court examined relevant facts, applied proper standards and, using demonstrative rational process, reached conclusion reasonable judge could reach (Stats §§ 904.03, 904.07). *Ollhoff v Peck* (1993, App) 177 Wis 2d 719, 503 NW2d 323, review den (Wis) 508 NW2d 423.

Footnotes

Footnote 74. For courts distinguishing between "negligence" and "culpable conduct" on the one hand, and strict liability cases on the other hand, see § 466.

Footnote 75. *Steele v Wiedemann Machine Co.* (CA3 Pa) 280 F2d 380, 3 FR Serv 2d 967

(proof that plaintiff's employer ordered "a new safety lever of the same type as the original" a month after accident involving punch press machine).

Evidence that a defendant ski-lift operator removed adjustment pins from a ski-lift chair after plaintiff caught her parka on a pin as she attempted to exit at a station, was carried beyond the station, and fell 20 feet, was inadmissible. *Houser v Floyd* (3rd Dist) 220 Cal App 2d 778, 34 Cal Rptr 96, 94 ALR2d 1423.

See *Gronneberg v Hoffart* (ND) 466 NW2d 809, a negligence action arising out of a rear-end collision, where plaintiff alleged that defendant's brake lights had not worked before the accident; the trial court properly excluded evidence of repairs to the brake lights made 3 months after the accident since the 3-month interval between the accident and repair left plenty of time for any part of a 17-year old car to need additional repairs.

Practice References Subsequent Repairs or Precautions. 32 Am Jur POF2d 253, Admission by Conduct or Silence § 7.

Evidence of repairs subsequent to injury. 11 Am Jur Trials 310.

Footnote 76. *Columbia & P. S. R. Co. v Hawthorne*, 144 US 202, 36 L Ed 405, 12 S Ct 591 (adding rod, nuts, and planks to prevent pulley from falling down); *Knight v Otis Elevator Co.* (CA3 Pa) 596 F2d 84, 4 Fed Rules Evid Serv 73 (guard placed around elevator buttons); *Louisville & Nashville R. Co. v Williams* (CA5 Ala) 370 F2d 839 (at railway crossing, the addition of highway markings, automatic signal crossing lights, and the trimming of nearby bushes); *Powers v J. B. Michael & Co.* (CA6 Tenn) 329 F2d 674, cert den 377 US 980, 12 L Ed 2d 748, 84 S Ct 1886 (addition of danger signs and smudge pots at place of accident on highway); *Lolie v Ohio Brass Co.* (CA7 Ill) 502 F2d 741 (support added to power cable); *Wallner v Kitchens of Sara Lee, Inc.* (CA7 Ill) 419 F2d 1028 (installation of strip of metal to serve as guard on conveyer, and addition of lubricators and drain lines); *Spurr v La Salle Constr. Co.* (CA7 Ill) 385 F2d 322 (addition of chain-barrier or guard rail around open pit).

Practice References Elevator accident cases, checklist of sources of documentary evidence. 7 Am Jur Trials 387 § 7.

Footnote 77. *Kerr-McGee Corp. v Ma-Ju Marine Services, Inc.* (CA5 La) 830 F2d 1332, 23 Fed Rules Evid Serv 1353, 92 ALR Fed 707, reh den, en banc (CA5 La) 835 F2d 288 and reh den, en banc (CA5 La) 835 F2d 288; *Nice v Chesapeake & O. R. Co.* (WD Mich) 305 F Supp 1167.

Footnote 78. *Cann v Ford Motor Co.* (CA2 NY) 658 F2d 54, CCH Prod Liab Rep ¶ 9077, 8 Fed Rules Evid Serv 1416, 32 FR Serv 2d 713, cert den 456 US 960, 72 L Ed 2d 484, 102 S Ct 2036 (modification in transmission); *Stephan v Marlin Firearms Co.* (CA2 Conn) 353 F2d 819, cert den 384 US 959, 16 L Ed 2d 672, 86 S Ct 1584 (addition of offset spur on hammer of firearm); *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237 (post-accident modifications made to the skip hoist); *Bauman v Volkswagenwerk Aktiengesellschaft* (CA6 Tenn) 621 F2d 230, CCH Prod Liab Rep ¶ 8682, 5 Fed Rules Evid Serv 1276 (change in design of doorlatch on car); *Cox v General Electric Co.* (CA6 Mich) 302 F2d 389 (addition of braking device to bring spinning tub in washing machines to a stop when machine is shut off); *County of Hennepin v AFG Industries, Inc.* (CA8 Minn) 726 F2d

149, 14 Fed Rules Evid Serv 1865, 38 UCCRS 853; *Polk v Ford Motor Co.* (CA8 Mo) 529 F2d 259, 1 Fed Rules Evid Serv 545, cert den 426 US 907, 48 L Ed 2d 832, 96 S Ct 2229 (change from flange-mounted to strap-mounted fuel tanks in automobiles); *Boeing Airplane Co. v Brown* (CA9 Wash) 291 F2d 310 (post-accident change in alternator drive in aircraft engines).

Evidence that manufacturer decided to make warning type anti-two-blocking device standard equipment on its cranes was not relevant to whether crane manufactured 6 years earlier was defectively designed at time it was sold, particularly when danger of two-blocking was acknowledged to be well-known. *Roberts v Harnischfeger Corp.* (CA5 Tex) 901 F2d 42, 29 Fed Rules Evid Serv 1000.

In action by an airline against the manufacturer of airplanes to recover for the destruction of an airplane which crashed in a storm, where the evidence clearly showed that the damage was caused by fatigue cracks in the wing joints of the plane, the trial court was correct in refusing to permit the plaintiff to introduce evidence of the modifications in the wing joint which were made by the manufacturer after the damage was done, to show what the manufacturer should have done in the first place. *Northwest Airlines, Inc. v Glenn L. Martin Co.* (CA6 Ohio) 224 F2d 120, 57 Ohio Ops 391, 71 Ohio L Abs 593, 50 ALR2d 882, reh den (CA6 Ohio) 229 F2d 434, 50 ALR2d 897 and cert den 350 US 937, 100 L Ed 818, 76 S Ct 308, reh den 350 US 976, 100 L Ed 846, 76 S Ct 431.

Footnote 79. *Choctaw, O. & G. R. Co. v McDade*, 191 US 64, 48 L Ed 96, 24 S Ct 24 (relocation of waterspout after railroader was killed when struck by spout while giving signal from moving train car); *Arcement v Southern Pacific Transp. Co.* (CA5 La) 517 F2d 729, 1 Fed Rules Evid Serv 71 (removal of boards between the tracks of a railroad trestle, following its collapse); *Bailey v Kawasaki-Kisen, K. K.* (CA5 La) 455 F2d 392, 16 FR Serv 2d 324, appeal after remand (CA5 La) 478 F2d 839 (removal of grease from winch); *Chicago, B. & Q. R. Co. v Kelley* (CA8 Neb) 74 F2d 80 (removal of weeds from track bed).

Footnote 80. *Wilkinson v Carnival Cruise Lines, Inc.* (CA11 Fla) 920 F2d 1560, 32 Fed Rules Evid Serv 25 (evidence that sliding door which injured passenger was left open for remainder of cruise); *Fisher v Hardesty* (Ky) 252 SW2d 877 (in an action for injuries sustained from fall on thin sheet of ice in defendant's store, testimony as to the defendant's sprinkling salt on the vestibule floor after plaintiff's accident should not have been admitted in evidence).

Practice References Repairs or Change of Conditions following Accident. 10 Am Jur Proof of Facts 297, Proof No. 1.

Sidewalk Defects, Repair after Injury. 21 Am Jur Proof of Facts 764.

Footnote 81. *Villari v Terminix International, Inc.* (ED Pa) 692 F Supp 568, 26 Fed Rules Evid Serv 864, 101 ALR Fed 867 (exterminator's cessation of use of certain chemical); *Hall v American S.S. Co.* (CA6 Ohio) 688 F2d 1062, 11 Fed Rules Evid Serv 933 (change of policy under which steamship deck was no longer hosed down in stormy weather); *Salvi v Montgomery Ward & Co.* (1st Dist) 140 Ill App 3d 896, 95 Ill Dec 173, 489 NE2d 394, CCH Prod Liab Rep ¶ 11084 (seller's change in policy, to prohibit sale of airguns to customers under 18, in action to recover from seller of airgun for injury inflicted by gun sold to victim's 14-year old brother); *Blake v Springfield S. R. Co.*, 6

Mass App 553, 379 NE2d 1112, appeal after remand 9 Mass App 912, 403 NE2d 1197 (in action for injuries sustained by a child while riding on a school bus, evidence that the bus company subsequently installed adult monitors on its buses was inadmissible).

Footnote 82. *Eastern Air Lines, Inc. v American Cyanamid Co.* (CA5 La) 321 F2d 683 (reports, activities, recommendations of defendant's air pollution control committee).

Footnote 83. *Hanson v Parkside Surgery Center* (CA6 Tenn) 872 F2d 745, 27 Fed Rules Evid Serv 1169, 13 FR Serv 3d 585, cert den 493 US 944, 107 L Ed 2d 337, 110 S Ct 349 and (criticized on other grounds by *Cabral v Sullivan* (CA1 Mass) 961 F2d 998).

Footnote 84. *SEC v Geon Industries, Inc.* (CA2 NY) 531 F2d 39, CCH Fed Secur L Rep ¶ 95441 (introduction of new company regulation concerning brokerage practices); *Russell v Page Aircraft Maintenance, Inc.* (CA5 Ala) 455 F2d 188 (regulation change, post-accident safety bulletin, and accident report recommending addition of lights to special army vehicle); *Ford v Schmidt* (CA7 Wis) 577 F2d 408, 3 Fed Rules Evid Serv 127, cert den 439 US 870, 58 L Ed 2d 181, 99 S Ct 199.

Footnote 85. *Nickerson v G.D. Searle & Co.* (CA1 Mass) 900 F2d 412, 29 Fed Rules Evid Serv 1185 (changes in IUD labels and warnings); *Fish v Georgia-Pacific Corp.* (CA2 Vt) 779 F2d 836, CCH Prod Liab Rep ¶ 10904, 19 Fed Rules Evid Serv 583 (evidence that, 5 years after the accident giving rise to suit, defendant warned customers about formaldehyde emissions from particle board); *Cann v Ford Motor Co.* (CA2 NY) 658 F2d 54, CCH Prod Liab Rep ¶ 9077, 8 Fed Rules Evid Serv 1416, 32 FR Serv 2d 713, cert den 456 US 960, 72 L Ed 2d 484, 102 S Ct 2036 (change in automobile owner's manual to include instruction "to turn off the ignition before leaving the car"); *Smyth v Upjohn Co.* (CA2 NY) 529 F2d 803 (warnings to prescribing physicians published by drug manufacturer after incident in question); *Petree v Victor Fluid Power, Inc.* (CA3 Pa) 831 F2d 1191, CCH Prod Liab Rep ¶ 11573, 23 Fed Rules Evid Serv 1213, 8 FR Serv 3d 1060, appeal after remand (CA3 Pa) 887 F2d 34, 28 Fed Rules Evid Serv 1252 (warning decal attached to presses after sale of offending press, but before injury in instant case); *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591 (change in published warning on uses and side effects of the drug in question, which change occurred after the drug was prescribed for plaintiff); *Mills v Beech Aircraft Corp.* (CA5 Miss) 886 F2d 758, 28 Fed Rules Evid Serv 1231, 15 FR Serv 3d 342 (manual amended to provide a more detailed explanation of installation of turnbuckle similar to the one that allegedly failed); *Edwards v Sears, Roebuck & Co.* (CA5 Miss) 512 F2d 276, 16 UCCRS 1249 (withdrawal of tire manuals); *Haynes v American Motors Corp.* (CA8 Ark) 691 F2d 1268, CCH Prod Liab Rep ¶ 9426, 11 Fed Rules Evid Serv 1471 (driver's manual published by defendant after the accident); *Sterner v U.S. Plywood-Champion Paper, Inc.* (CA8 Iowa) 519 F2d 1352 (more emphatic warnings on labels of all-purpose household adhesive).

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 86. *Falgoust v Richardson Industries, Inc.* (La App 5th Cir) 552 So 2d 1348,

cert den (La) 558 So 2d 1126 (after swimming pool accident, pool owners purchased and installed additional warning signs).

But see § 471 as to warning signs installed by someone other than the defendant.

Footnote 87. *Wolf v Procter & Gamble Co.* (DC NJ) 555 F Supp 613, 12 Fed Rules Evid Serv 294, 37 FR Serv 2d 1053 (tampons alleged to have caused toxic shock syndrome).

See the discussion of the closely-related question of product recall in § 469.

Footnote 88. *World Boxing Council v Cosell* (SD NY) 715 F Supp 1259, 16 Media L R 2119, 28 Fed Rules Evid Serv 715 (action for libel, claiming actual malice, against sportscaster/author; pointing out that if author altered text, evidence concerning his subsequent remedial measures is barred by Rule 407, and if publisher altered text, no inference can be drawn about author's "malice" at time of original edition).

Footnote 89. *1 Armour & Co. v Skene* (CA1 Mass) 153 F 241 (teamster discharged one year after accident); *Webster v Orr*, 174 Cal 426, 163 P 361 (truck driver); *Rynar v Lincoln Transit Co.*, 129 NJL 525, 30 A2d 406 (bus driver).

Footnote 90. *Ford v Schmidt* (CA7 Wis) 577 F2d 408, 3 Fed Rules Evid Serv 127, cert den 439 US 870, 58 L Ed 2d 181, 99 S Ct 199 (regulations taking effect after the incident giving rise to the suit).

Footnote 91. *Luera v Snyder* (DC Colo) 599 F Supp 1459.

Footnote 92. *Maddox v Los Angeles* (CA9 Cal) 792 F2d 1408, 21 Fed Rules Evid Serv 20.

In a civil rights action brought to recover damages resulting from an illegal search of plaintiffs' home and office, a press release which summarized the results of an investigation of incidents giving rise to the lawsuit was not admissible where the release stated that officers involved exercised poor judgment in failing to read a writ of assistance thoroughly, and that appropriate disciplinary action would be taken, since the release set out remedial measures taken by the city within the ambit of FRE 407. *Specht v Jensen* (CA10 Colo) 863 F2d 700, 26 Fed Rules Evid Serv 1271, appeal after remand (CA10 Colo) 936 F2d 584, reported in full (CA10) 1991 US App LEXIS 12819.

§ 466 Strict liability cases: exclusionary rule held inapplicable

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Opinion is divided on the question of whether the exclusionary doctrine barring admission of evidence of subsequent remedial measures applies in product liability litigation. 93 In the landmark *Ault* case—which was handed down while Congress was enacting the Federal Rules of Evidence—the California Supreme Court held that the

doctrine excluding proof of subsequent remedial measures does not apply to strict liability claims against manufacturers. 94

In *Ault*, the question was whether plaintiff could support his personal injury claim against an automaker by evidence of a post-accident change in the design of a gearbox. The vehicle in which he had been riding plunged over a cliff, and plaintiff's theory was that the accident had been caused when the gearbox failed from metal fatigue. In the action, which was tried on a theory of strict liability in tort, the trial court admitted evidence that, after the accident, the defendant manufacturer of the vehicle had ceased to use aluminum in manufacturing its gear boxes and had changed to iron, which plaintiff's experts testified was less likely to fail. The California Supreme Court held that the underlying purpose of the law would not be served by applying the exclusionary doctrine in this context since, while the exclusionary rule is applied in negligence cases as a matter of "public policy"—on the ground that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred—the exclusionary rule plays no comparable role in the products liability field. The court noted that the normal products liability defendant is a corporate mass producer of goods who manufactures tens of thousands of units of goods and that it would be manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. 95

◆ Observation: The court in *Ault* rejected the claim that the term "culpable conduct" 96 encompasses the "blameworthy" conduct of a manufacturer in placing on the market a defective product, suggesting that its construction would not empty the term of all meaning, since it would still embrace such "faulty conduct" as "wanton and reckless" behavior, which are not comfortably included in "negligence." 97

A number of states have followed the reasoning in *Ault*, holding that evidence of subsequent measures is admissible in strict liability cases. 98 Thus, a state court has cited the "dramatic" difference between negligence cases, where due care will exonerate defendant, and strict liability cases, where it is no longer any answer that the defendant injured the plaintiff carefully; development of strict liability cannot have been intended to countenance an evidentiary rule which would so sweepingly exclude postaccident design evidence of a defect simply because it touches on prior conduct under which present law is irrelevant to liability. 99

The legislative history of Federal Rule 407 is silent on the question raised and resolved in California by *Ault*. A few circuits have embraced *Ault*, taking the view that evidence of such subsequent remedial measures is admissible as substantive evidence in a strict liability action, 1 although most of the federal circuit courts do apply the exclusionary rule. 2

◆ Caution: Although the Eighth Circuit generally holds that the exclusionary rule does not apply in strict liability cases, it has applied Federal Rules of Evidence 407 in strict liability actions alleging a failure to warn about the dangers of an unavoidably unsafe product where issues of reasonableness and foreseeability closely akin to those raised in negligence cases are present. 3

◆ Practice guide: In jurisdictions where evidence of subsequent remedial measures is admissible with regard to strict liability claims, but not with regard to negligence claims, counsel for the defense should be careful to request a limiting instruction under Federal Rules of Evidence 105. 4

Some state enactments based on the Uniform Rules of Evidence include the defective condition of a product in a products liability action in the list of purposes for which evidence of a remedial measure need not be excluded. 5

§ 466 ----Strict liability cases: exclusionary rule held inapplicable [SUPPLEMENT]

Practice Aids: Federal Rule of Evidence 407: Should it apply to products liability? 11
Touro LR 1:253 (1994).

Case authorities:

The proscriptions of Evid R 407 do not apply to a products liability action premised upon strict liability in tort, where, by its own terms, the rule excludes evidence of subsequent remedial measures only when negligence or culpable conduct is alleged; in a products liability case based on strict liability, the focus is solely on the defective condition of the product and not on what the defendant knew or should have known of the defect which caused the injury. *McFarland v Bruno Mach. Corp.*, 68 OS3d 305, 626 NE2d 659.

Footnotes

Footnote 93. For a discussion of jurisdictions and federal circuits applying the rule in product liability cases, see § 467.

Footnote 94. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986.

◆ Comment: The opinion of the California Supreme Court in *Ault* has a major bearing on Rule 407 interpretation because it (1) construed language in a state statute which is substantially identical to Rule 407, (2) proved to be a highly influential opinion, among both state and federal courts, (3) introduced variation in what before had been a broad and uniform exclusionary doctrine, and (4) influenced a number of states that adopted the Uniform Act to change the provisions of Rule 407 to accord with the holding of the *Ault* case.

Footnote 95. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986.

Footnote 96. As to inadmissibility of subsequent remedial measures to prove "culpable conduct," see § 465.

Footnote 97. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986.

Footnote 98. *Caterpillar Tractor Co. v Beck (Alaska)* 624 P2d 790, CCH Prod Liab Rep ¶

8894 (evidence of post-accident design change); *Martinez v Atlas Bolt & Screw Co.* (Colo App) 636 P2d 1287, CCH Prod Liab Rep ¶ 9163 (evidence that after accident defendant incorporated a remote control TV camera into its locomotive to improve visibility); *Millette v Radosta* (1st Dist) 84 Ill App 3d 5, 39 Ill Dec 232, 404 NE2d 823, CCH Prod Liab Rep ¶ 8717 (upholding receipt of product recall letter); *Sutkowski v Universal Marion Corp.* (3d Dist) 5 Ill App 3d 313, 281 NE2d 749 (criticized on other grounds by *Kerns v Engelke* (5th Dist) 54 Ill App 3d 323, 12 Ill Dec 270, 369 NE2d 1284); *Siruta v Hesston Corp.*, 232 Kan 654, 659 P2d 799, CCH Prod Liab Rep ¶ 9578; *Carey v General Motors Corp.*, 377 Mass 736, 387 NE2d 583; *Jeep Corp. v Murray*, 101 Nev 640, 708 P2d 297, CCH Prod Liab Rep ¶ 10751; *Rainbow v Albert Elia Bldg. Co.* (1981, 4th Dept) 79 App Div 2d 287, 436 NYS2d 480, CCH Prod Liab Rep ¶ 8949, affd 56 NY2d 550, 449 NYS2d 967, 434 NE2d 1345; *Matsko v Harley Davidson Motor Co.*, 325 Pa Super 452, 473 A2d 155, CCH Prod Liab Rep ¶ 10012; *Shaffer v Honeywell, Inc.* (SD) 249 NW2d 251; *D.L. v Huebner*, 110 Wis 2d 581, 329 NW2d 890, CCH Prod Liab Rep ¶ 9511; *Caldwell v Yamaha Motor Co.* (Wyo) 648 P2d 519, CCH Prod Liab Rep ¶ 9357.

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583 § 7.

Footnote 99. *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545, CCH Prod Liab Rep ¶ 8902.

Footnote 1. *Donahue v Phillips Petroleum Co.* (CA8 Mo) 866 F2d 1008, CCH Prod Liab Rep ¶ 12037, 27 Fed Rules Evid Serv 402, reh den, en banc (CA8) 1989 US App LEXIS 5772; *R.W. Murray, Co. v Shatterproof Glass Corp.* (CA8 Mo) 758 F2d 266, 17 Fed Rules Evid Serv 999, 40 UCCRS 1283; *Burke v Deere & Co.* (CA8 Iowa) 6 F3d 497; *Roth v Black & Decker, Inc.* (CA8 Mo) 737 F2d 779, CCH Prod Liab Rep ¶ 10138, 15 Fed Rules Evid Serv 1827; *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427; *Herndon v Seven Bar Flying Service, Inc.* (CA10 NM) 716 F2d 1322, CCH Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170.

Existence and substance of combine manufacturer's warning-decal program constituted evidence of subsequent remedial measure that was relevant to strict liability issue and not precluded by Rule 407. *Lockley v Deere & Co.* (CA8 Ark) 933 F2d 1378, CCH Prod Liab Rep ¶ 12917, reh den (CA8) 1991 US App LEXIS 13096.

Annotation: 38 ALR4th 583.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Practice References American Law of Products Liability 3d §§ 17:81-17:89.

Footnote 2. § 467.

Footnote 3. § 467.

Footnote 4. *Roth v Black & Decker, Inc.* (CA8 Mo) 737 F2d 779, CCH Prod Liab Rep ¶ 10138, 15 Fed Rules Evid Serv 1827.

§ 467 --Exclusionary rule held applicable

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In contrast to the view allowing the admission of evidence of subsequent remedial measures in a strict liability case, 6 a majority of federal circuits which have considered the issue reject *Ault* 7 and hold that Rule 407 does apply in strict liability cases, so that evidence of subsequent measures is excludable. 8 The same result has also been reached in some states (both with and without similar rules). 9

Traditionally it has been noted that the introduction of evidence about subsequent changes in product or its design threatens to confuse the jury 10 by diverting its attention from whether the product was defective at the relevant time, 11 and is properly excludable for its lack of probative value. 12 In rejecting the *Ault* doctrine, the courts have advanced a number of arguments:

(1) The argument that culpable conduct is not at issue in a strict liability case is purely semantic; although a manufacturer may be held strictly liable even if the accident was unavoidable, in other cases liability will be imposed where the accident might have been avoided, and in such a case the failure to apply Federal Rules of Evidence 407 might deter subsequent remedial measures to the same degree as in a negligence case. 13 Arguing that the terms should be given a greater-includes-the-lesser construction so as to embrace the "conduct" which produces defective products, the court in the leading case of *Werner v Upjohn Co.*, 14 stated that strict liability involves conduct which is technically less blameworthy than simple negligence, since the plaintiff need not prove a breach of duty by the defendant other than placing the product on the market. From a policy standpoint it follows that if the rule expressly excludes evidence of subsequent repairs to prove culpable conduct that the same should be true for strict liability. Stated another way, if the common law and Congress were willing to exclude the evidence on the issue of culpable conduct, the result should be no different on policy grounds as long as strict liability is not distinguishable on some other ground. 15

(2) Whatever may be the difference between a focus on the product in strict liability cases and a focus on defendant's conduct in negligence cases, it produces but an empty distinction when it comes to the underlying purposes of the Rule. 16

(3) At least some kinds of "strict liability" claims in fact raise negligence issues, or issues which cannot be distinguished from negligence. 17

Despite the fact that the Eighth Circuit has held that the exclusionary rule does not apply in strict liability cases, 18 it has applied Federal Rules of Evidence 407 in strict liability actions alleging a failure to warn about the dangers of an unavoidably unsafe product

where issues of reasonableness and foreseeability closely akin to those raised in negligence cases are present. 19 It has been pointed out that the issue of due care is essential to the determination of liability in a case involving prescription drugs and the standard for liability under strict liability and negligence is essentially the same in a case involving the adequacy of a warning, particularly when a failure-to-warn case involves an unavoidably dangerous drug. 20

Variations of the Uniform Rules of Evidence enacted by some states provide that negligence or culpable conduct also include the manufacture or sale of a defective product, or include strict liability along with negligence and culpable conduct. 21

§ 467 --Exclusionary rule held applicable [SUPPLEMENT]

Case authorities:

Evidence as to alterations of ballpark premises after accident in which plaintiff was hit by baseball while watching game was not material to question of liability at time of injury, where there was no evidence that operator of park was aware of any hidden hazards before injury. *Simpson v City of Muskogee* (1994, Okla App) 879 P2d 1269.

Footnotes

Footnote 6. § 466.

Footnote 7. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986, discussed in § 466.

Footnote 8. *Roy v Star Chopper Co.* (CA1 RI) 584 F2d 1124, 26 FR Serv 2d 484, cert den 440 US 916, 59 L Ed 2d 466, 99 S Ct 1234; *Fish v Georgia-Pacific Corp.* (CA2 Vt) 779 F2d 836, CCH Prod Liab Rep ¶ 10904, 19 Fed Rules Evid Serv 583; *Cann v Ford Motor Co.* (CA2 NY) 658 F2d 54, CCH Prod Liab Rep ¶ 9077, 8 Fed Rules Evid Serv 1416, 32 FR Serv 2d 713, cert den 456 US 960, 72 L Ed 2d 484, 102 S Ct 2036; *Josephs v Harris Corp.* (CA3 Pa) 677 F2d 985, CCH Prod Liab Rep ¶ 9287, 10 Fed Rules Evid Serv 612, 34 FR Serv 2d 28; *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *Cook v McDonough Power Equipment, Inc.* (CA5 La) 720 F2d 829, CCH Prod Liab Rep ¶ 9882, 14 Fed Rules Evid Serv 398; *Grenada Steel Industries, Inc. v Alabama Oxygen Co.* (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163; *Hall v American S.S. Co.* (CA6 Ohio) 688 F2d 1062, 11 Fed Rules Evid Serv 933; *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968; *Oberst v International Harvester Co.* (CA7 Ill) 640 F2d 863, CCH Prod Liab Rep ¶ 8866, 7 Fed Rules Evid Serv 43; *Gauthier v AMF, Inc.* (CA9 Mont) 788 F2d 634, CCH Prod Liab Rep ¶ 10989, 20 Fed Rules Evid Serv 648, reh den, en banc (CA9 Mont) 805 F2d 337.

Annotation: Products liability: admissibility of evidence of postinjury warning

measures undertaken by defendant, 38 ALR4th 583.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 9. *Hallmark v Allied Products Corp.* (App) 132 Ariz 434, 646 P2d 319, CCH Prod Liab Rep ¶ 9316; *Ortho Pharmaceutical Corp. v Chapman*, 180 Ind App 33, 388 NE2d 541; *Troja v Black & Decker Mfg. Co.*, 62 Md App 101, 488 A2d 516, CCH Prod Liab Rep ¶ 10512, cert den 303 Md 471, 494 A2d 939, (expressly declining to adopt the *Ault* rationale, and following decision of Fourth Circuit in *Werner*); *Smith v E. R. Squibb & Sons, Inc.*, 405 Mich 79, 273 NW2d 476, 26 UCCRS 330; *Price v Buckingham Mfg. Co.*, 110 NJ Super 462, 266 A2d 140; *Krause v American Aerolights, Inc.*, 307 Or 52, 762 P2d 1011, CCH Prod Liab Rep ¶ 11986; *Haysom v Coleman Lantern Co.*, 89 Wash 2d 474, 573 P2d 785, 93 ALR3d 86 (not followed on other grounds by *Little v PPG Industries, Inc.*, 19 Wash App 812, 579 P2d 940).

Footnote 10. *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *Cook v McDonough Power Equipment, Inc.* (CA5 La) 720 F2d 829, CCH Prod Liab Rep ¶ 9882, 14 Fed Rules Evid Serv 398.

Footnote 11. *Cook v McDonough Power Equipment, Inc.* (CA5 La) 720 F2d 829, CCH Prod Liab Rep ¶ 9882, 14 Fed Rules Evid Serv 398; *Grenada Steel Industries, Inc. v Alabama Oxygen Co.* (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163 (question is existence of defect at time of sale).

Footnote 12. *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *Meller v Heil Co.* (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390.

Footnote 13. *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968.

Footnote 14. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591 (considering the application of Rule 407 in the context of a suit against a drug manufacturer alleging breach of a duty adequately to instruct on use of the drug and to warn of possible side effects).

Footnote 15. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591 (also noting that there is a "gap" in Rule 407, so that Rule 407 does not apply, but requiring the federal courts to fill the gap with common law which is essentially identical in content, only directed specifically at product liability cases).

Footnote 16. *Cann v Ford Motor Co.* (CA2 NY) 658 F2d 54, CCH Prod Liab Rep ¶ 9077, 8 Fed Rules Evid Serv 1416, 32 FR Serv 2d 713, cert den 456 US 960, 72 L Ed 2d 484, 102 S Ct 2036; *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862,

later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968 (purpose of promoting safety is not fundamentally affected by whether the basis of liability is the defendant's negligence or his product's defectiveness or inherent dangerousness," for in either case admitting subsequent measures reduces "the incentive to take such measures"); *Krause v American Aerolights, Inc.*, 307 Or 52, 762 P2d 1011, CCH Prod Liab Rep ¶ 11986.

Footnote 17. *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968 (strict liability may be a misnomer in products cases, for liability exists only if a product is defective or unreasonably dangerous, which bring into play factors of cost and risk similar to those that determine negligence; *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314; *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515.

Any distinction between strict liability and negligence in product liability suits is very much diminished in duty-to-warn cases, particularly in the context of dangerous drugs, where "the primary issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous; the issue under either theory is essentially the same: Was the warning adequate? *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 18. § 466.

Footnote 19. *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314; *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515.

Footnote 20. *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515.

Footnote 21. 13A ULA, Uniform Rules of Evidence, Rule 407, Variations from Official Text.

§ 468 --Law governing

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is a conflict of authority as to whether Federal Rules of Evidence 407 or a state rule governing the admissibility of subsequent remedial measures applies in a strict liability action brought in federal court on the basis of diversity. One view holds that

Federal Rules of Evidence 407 governs, because federal law governs the admissibility of evidence in diversity cases. 22 Under this view, it is recognized that Federal Rules of Evidence 407 has both substantive and procedural aspects; although its primary purpose is to promote safety, a purely substantive goal, an important procedural reason for the rule is to enhance accuracy and reduce expense in the adjudicative process by keeping from the jury evidence that Congress does not believe a jury has the ability from which to draw the correct inferences. 23

In the federal circuits that follow the reasoning of the *Ault* case, 24 the opposite view has been expressed in products liability cases, holding that the admissibility of evidence in diversity actions is not governed exclusively by federal law, that is, the Federal Rules of Evidence, and that the question of whether subsequent remedial measures are admissible is a matter of state law. 25 Since the purpose of the exclusionary rule is not to expedite trial proceedings, but rather to promote public policy in a substantive law area, when conflicts arise between Federal Rules of Evidence 407 and state law regarding admissibility of evidence of subsequent remedial measures the state rule controls because: (1) there is no federal products liability law; (2) the elements and proof of a products liability case are governed by the law of the state where the injury occurred; and (3) an announced state law which conflicts with Federal Rules of Evidence 407 is so closely tied to the substantive law to which it relates that it must be applied in a diversity action in order to promote uniformity, and to prevent forum shopping. 26 To similar effect, it has been held that because the question of whether to permit evidence of subsequent remedial measures in strict products liability actions depends upon policy considerations rather than relevancy, it is governed by state law in diversity actions. 27

◆ Caution: In a few instances it has been said that it is not clear whether federal or state law applies to evidence of subsequent remedial measures in strict liability cases. 28

Footnotes

Footnote 22. *Rioux v Daniel International Corp.* (DC Me) 582 F Supp 620, 16 Fed Rules Evid Serv 245; *Dixon v International Harvester Co.* (CA5 Miss) 754 F2d 573, CCH Prod Liab Rep ¶ 10426, 17 Fed Rules Evid Serv 837; *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968; *Public Service Co. v Bath Iron Works Corp.* (CA7 Ind) 773 F2d 783, 19 Fed Rules Evid Serv 235.

Policies underlying FRE 407 rule of exclusion of subsequent remedial measures are procedural in nature, and thus FRE 407 governs even in case based on diversity jurisdiction, despite contrary state court ruling that rule of exclusion is inapplicable in actions founded on strict liability. *Fasanaro v Mooney Aircraft Corp.* (ND Cal) 687 F Supp 482, 25 Fed Rules Evid Serv 850.

As to what rules of evidence govern in diversity cases, generally, see § 11.

Annotation: Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 23. *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968.

Footnote 24. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986, discussed in § 466.

Footnote 25. *Wheeler v John Deere Co.* (CA10 Kan) 862 F2d 1404, CCH Prod Liab Rep ¶ 11982, 27 Fed Rules Evid Serv 518, later proceeding (DC Kan) 1990 US Dist LEXIS 3543 and appeal after remand (CA10 Kan) 935 F2d 1090, CCH Prod Liab Rep ¶ 12850, 33 Fed Rules Evid Serv 292, reh, en banc, den (CA10) 1991 US App LEXIS 20184, costs/fees proceeding (CA10 Kan) 986 F2d 413; *Moe v Avions Marcel Dassault-Breguet Aviation* (CA10 Colo) 727 F2d 917, CCH Prod Liab Rep ¶ 10026, 14 Fed Rules Evid Serv 1666.

Footnote 26. *Moe v Avions Marcel Dassault-Breguet Aviation* (CA10 Colo) 727 F2d 917, CCH Prod Liab Rep ¶ 10026, 14 Fed Rules Evid Serv 1666.

Law Reviews: Flink, Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability, 53 For LR 1485 (1985).

Finkelstein, Comity and Tragedy: The Case of Rule 407, 38 Vand LR 585 (1985).

Footnote 27. *Wheeler v John Deere Co.* (CA10 Kan) 862 F2d 1404, CCH Prod Liab Rep ¶ 11982, 27 Fed Rules Evid Serv 518, later proceeding (DC Kan) 1990 US Dist LEXIS 3543 and appeal after remand (CA10 Kan) 935 F2d 1090, CCH Prod Liab Rep ¶ 12850, 33 Fed Rules Evid Serv 292, reh, en banc, den (CA10) 1991 US App LEXIS 20184, costs/fees proceeding (CA10 Kan) 986 F2d 413.

Footnote 28. *Donahue v Phillips Petroleum Co.* (CA8 Mo) 866 F2d 1008, CCH Prod Liab Rep ¶ 12037, 27 Fed Rules Evid Serv 402, reh den, en banc (CA8) 1989 US App LEXIS 5772; *Monger v Cessna Aircraft Co.* (CA8 Mo) 812 F2d 402, 22 Fed Rules Evid Serv 835.

§ 469 Evidence of product recall

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When voluntarily undertaken by the manufacturer of a product, product recall campaigns appear to come under the "subsequent measures" category of Rule 407, and would be within the exclusionary doctrine if it applies. But often recall campaigns are launched under regulatory pressure, which suggests on the one hand that the main underlying policy of Rule 407 (to encourage responsible behavior) is not implicated (the government having taken control),²⁹ but which injects on the other hand the complicating factor that the recall reflects not so much the manufacturer's conclusion that the product is defective or dangerous as the government's conclusion.³⁰

Courts following *Ault*³¹ often admit evidence of product recall,³² while courts rejecting *Ault* are more likely reach the opposite result.³³ Some opinions point to government involvement in the recall as a reason to find Rule 407 inapplicable and

conclude that the proof should be admitted. 34

◆ Observation: In such cases the hearsay doctrine is implicated, the question being whether governmental findings satisfy the criteria set up by Rule 803(8)—the exception for official records and findings. 35

Other opinions have concluded that the very fact of official involvement makes it unfair to admit the evidence and produces a counterincentive against cooperating with regulatory agencies. 36

◆ Reminder: Evidence of product recall is subject to the relevancy requirement, and may reasonably be excluded if the recall addressed a condition not present in the product in suit or unrelated to the accident. 37

Footnotes

Footnote 29. As to measures required by government agencies, see § 470.

Footnote 30. See *Lindsay v Ortho Pharmaceutical Corp.* (CA2 NY) 637 F2d 87, CCH Prod Liab Rep ¶ 8843, 7 Fed Rules Evid Serv 462 (trial court admitted evidence of changes in drug labels, which it characterized as "admissions" of the defendant; in light of FDA control, reviewing court questioned whether such changes could be considered "a voluntary admission," suggesting that FDA "conclusions" might be hearsay which does not fit within FRE 803(8), and that trial court should consider whether such evidence should be excluded under FRE 403).

Footnote 31. *Ault v International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986, generally discussed in § 466.

Footnote 32. *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427; *Millette v Radosta* (1st Dist) 84 Ill App 3d 5, 39 Ill Dec 232, 404 NE2d 823, CCH Prod Liab Rep ¶ 8717 (criticized on other grounds by *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790); *Carey v General Motors Corp.*, 377 Mass 736, 387 NE2d 583; *Barry v Manglass* (2d Dept) 55 App Div 2d 1, 389 NYS2d 870, appeal after remand (2d Dept) 77 App Div 2d 887, 431 NYS2d 89, affd 55 NY2d 803, 447 NYS2d 423, 432 NE2d 125; *Matsko v Harley Davidson Motor Co.*, 325 Pa Super 452, 473 A2d 155, CCH Prod Liab Rep ¶ 10012.

Annotation: Products liability: Admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Footnote 33. *Vockie v General Motors Corp., Chevrolet Div.* (ED Pa) 66 FRD 57, affd without op (CA3 Pa) 523 F2d 1052; *Chase v General Motors Corp.* (CA4 Va) 856 F2d 17, 26 Fed Rules Evid Serv 1010; *Landry v Adam* (La App 4th Cir) 282 So 2d 590.

Testimony concerning the manufacturer's recall of the model of car involved in plaintiff's accident in order to modify the braking system was inadmissible because the recall took place after the accident; but since the actual change in the brake design was made several months before plaintiff's accident, evidence of the design change was admissible. *Chase*

v General Motors Corp. (CA4 Va) 856 F2d 17, 26 Fed Rules Evid Serv 1010.

See also, as to the admissibility of recall letters, 63 Am Jur 2d, Products Liability § 259.

Footnote 34. Herndon v Seven Bar Flying Service, Inc. (CA10 NM) 716 F2d 1322, CCH Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170; Millette v Radosta (1st Dist) 84 Ill App 3d 5, 39 Ill Dec 232, 404 NE2d 823, CCH Prod Liab Rep ¶ 8717; Barry v Manglass (2d Dept) 55 App Div 2d 1, 389 NYS2d 870, appeal after remand (2d Dept) 77 App Div 2d 887, 431 NYS2d 89, affd 55 NY2d 803, 447 NYS2d 423, 432 NE2d 125.

Footnote 35. Lindsay v Ortho Pharmaceutical Corp. (CA2 NY) 637 F2d 87, CCH Prod Liab Rep ¶ 8843, 7 Fed Rules Evid Serv 462; O'Dell, 904 F2d 1194 (involving agency reports dealing with "Agent Orange").

Generally, for a discussion of FRE 803(8), see § 658.

Footnote 36. Vockie v General Motors Corp., Chevrolet Div. (ED Pa) 66 FRD 57, affd without op (CA3 Pa) 523 F2d 1052 (recall letters sent out under statutory duty were excluded as having "minimal probative value").

For a contrary view, see Farner v Paccar, Inc. (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427, in which the court took the position that it is not reasonable to assume that manufacturers will risk liability for subsequent injuries caused by defects known by them to exist in order to avoid the possible use of recall evidence as an admission against them, and that therefore evidence of recall should be admissible.

Footnote 37. Glynn Plymouth, Inc. v Davis, 120 Ga App 475, 170 SE2d 848, affd 226 Ga 221, 173 SE2d 691, conformed to 121 Ga App 717, 175 SE2d 410 (stating that even if recall letter can avoid bar against proving subsequent measures, it provided no proof of defect at time of accident, for there could be no assumption that the vehicle in question was one of the small percentage of the number produced and sold that went out with the defect).

§ 470 Measures required by government agency

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a measure is taken, not out of a sense of social responsibility, but, rather, because the measure is required by a superior authority—as in the case of reports required by a government agency—the reasons for the measure are outside the rationale behind the Rule, and Federal Rules of Evidence 407 may not be invoked to render such evidence inadmissible. 38 Thus, evidence of an amendment to a manufacturer's warning accompanying the Cu-7 intrauterine device (IUD), which amendment was made after the plaintiff sustained injuries from her use of the IUD, was admissible under Federal Rules of Evidence 407 where the manufacturer's remedial measure of amending the warning was taken in compliance with a regulation of the federal Food and Drug Administration

that had been issued prior to plaintiff's receiving the IUD, because the manufacturer's post-injury measure was mandatory rather than voluntary, and because the FDA regulation and the manufacturer's post-injury warning were probative of the state of medical knowledge at the time the plaintiff received her IUD, and of the manufacturer's having notice, prior to the plaintiff's sustaining injury, of a feasible alternative warning.

39

◆ Observation: In upholding the admissibility of a product recall letter, it was noted that the policy underlying the exclusionary rule does not apply, since the recall of defective vehicles is not voluntary but mandated by federal statute. 40

However, if the measure is not mandatory, it would fall under Rule 407 and not be admissible. 41

Footnotes

Footnote 38. *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871; *O'Dell v Hercules, Inc.* (CA8 Ark) 904 F2d 1194, 30 Fed Rules Evid Serv 1124 (measures mandated by government authority, in action against maker of "Agent Orange").

See *In Re Aircrash in Bali* (CA9 Cal) 871 F2d 812, 27 Fed Rules Evid Serv 815, cert den 493 US 917, 107 L Ed 2d 258, 110 S Ct 277 (FAA report on Pan Am safety record and procedures, pursuant to investigation begun 5 days after air crash, was not barred by FRE 407 in litigation arising from the crash, as being a subsequent remedial measure, where it was prepared by the FAA without the voluntary participation of defendant Pan Am).

Footnote 39. *Kociemba v G. D. Searle & Co.* (DC Minn) 683 F Supp 1579, CCH Prod Liab Rep ¶ 11870, 26 Fed Rules Evid Serv 499, later proceeding (DC Minn) 683 F Supp 1582, 26 Fed Rules Evid Serv 495.

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Footnote 40. *Millette v Radosta* (1st Dist) 84 Ill App 3d 5, 39 Ill Dec 232, 404 NE2d 823, CCH Prod Liab Rep ¶ 8717 (criticized on other grounds by *Davis v International Harvester Co.* (2d Dist) 167 Ill App 3d 814, 118 Ill Dec 589, 521 NE2d 1282, CCH Prod Liab Rep ¶ 11790).

Generally, as to the admissibility of recall letters, see § 469.

Footnote 41. *Catchings v Glendale* (App) 154 Ariz 420, 743 P2d 400 (letter from chief of safety standard section of FAA, notifying city airport manager that proximity of streets and railroad trestle to runways presented safety issue and that approach surface clearances in regulations could be achieved by displacement of threshold was not admissible in action brought by survivors of airplane crash victims against airport where regulations were not mandatory; fact that displaced threshold markings were placed on runway subsequent to accident was inadmissible).

§ 471 Measures taken by third parties

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The policy of Rule 407 is not to be served by excluding evidence of subsequent measures undertaken by third parties not involved in the litigation. While Rule 407 makes no express provision for this situation, substantial modern authority is to the effect that Rule 407 does not apply where third persons carry out remedial measures. 42 Nor is it error to receive, as against one defendant, evidence of post-accident changes effected by another defendant. 43 Evidence of third-party action may also be admissible to show that it would have been feasible 44 to improve the safety of the product. 45

The post-accident erection of a sign on a road in a national park stating that bicyclists on rental bicycles were not permitted on the steep hill ahead was not excludable as a subsequent remedial measure since it was not a measure taken by the defendant concessionaire which rented the bicycle but by the United States Park Service which controlled the road. 46 Similarly, in a suit against a railroad, it was not error to admit evidence of post-accident repairs or improvements at a grade crossing where such changes were made by the State Highway Department which was not a party to the suit. 47

But a state rule akin to Rule 407 was held to preclude an elevator manufacturer sued for injuries sustained by a hospital employee on strict liability grounds from introducing evidence of postaccident safety measures taken by the hospital. Although the rule had no application to a theory of strict liability, 48 it was nevertheless applicable where the jury was asked to determine, for purposes of apportionment, whether the nonparty hospital was negligent, where there was no strict liability theory asserted against the hospital, and where the jury's determination would have a direct effect on the amount of damages the manufacturer would be required to pay. 49

◆ Observation: While neither the text of Rule 407 nor the policy underlying it excludes evidence of subsequent repairs made by someone other than the defendant, exclusion would nevertheless be proper where the evidence lacked sufficient probative value and injected the dangers of confusion and misleading the jury. 50 In one instance, the court said it could not see how an alternative design, developed by another person years after the product in question was manufactured, is relevant to whether the product was reasonably safe at the time it was made. 51

§ 471 ----Measures taken by third parties [SUPPLEMENT]

Case authorities:

In litigation involving large ventilation system to supply fresh air to tunnel under Baltimore Harbor, evidence that Maryland Transit Authority had fan shafts redesigned with larger diameter was not excludible as subsequent remedial measure since measures were not taken by defendant, but by third party. *TLT-Babcock v Emerson Elec. Co.*

Footnotes

Footnote 42. *Herrington v Hiller* (CA5 Tex) 883 F2d 411, 28 Fed Rules Evid Serv 1134; *Middleton v Harris Press & Shear, Inc., Subsidiary of American Hoist & Derrick Co.* (CA5 Tex) 796 F2d 747, 21 Fed Rules Evid Serv 549; *Dixon v International Harvester Co.* (CA5 Miss) 754 F2d 573, CCH Prod Liab Rep ¶ 10426, 17 Fed Rules Evid Serv 837; *Grenada Steel Industries, Inc. v Alabama Oxygen Co.* (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163; *United States Fidelity & Guaranty Co. v Plovdivba* (CA7 Wis) 683 F2d 1022, 11 Fed Rules Evid Serv 578; *Lolie v Ohio Brass Co.* (CA7 Ill) 502 F2d 741; *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427; *Pau v Yosemite Park* (CA9 Cal) 928 F2d 880, 91 CDOS 2081, 91 Daily Journal DAR 3341, 33 Fed Rules Evid Serv 478, 19 FR Serv 3d 1487, 14 UCCRS2d 79; *Denolf v Frank L. Jursik Co.*, 395 Mich 661, 238 NW2d 1; *D.L. v Huebner*, 110 Wis 2d 581, 329 NW2d 890, CCH Prod Liab Rep ¶ 9511.

Footnote 43. *Wallner v Kitchens of Sara Lee, Inc.* (1970, CA7 Ill) 419 F2d 1028, 1032.

Footnote 44. Generally, as to the admissibility of subsequent remedial measures to prove "feasibility", see § 475.

Footnote 45. *Dixon v International Harvester Co.* (CA5 Miss) 754 F2d 573, CCH Prod Liab Rep ¶ 10426, 17 Fed Rules Evid Serv 837 (evidence that third party added screen and metal plate to cab of tractor was properly admissible, in suit against manufacturer for personal injuries suffered by driver speared by sapling, to prove that additional protection was feasible).

Footnote 46. *Pau v Yosemite Park* (CA9 Cal) 928 F2d 880, 91 CDOS 2081, 91 Daily Journal DAR 3341, 33 Fed Rules Evid Serv 478, 19 FR Serv 3d 1487, 14 UCCRS2d 79.

Footnote 47. *Louisville & Nashville R. Co. v Williams* (CA5 Ala) 370 F2d 839.

Footnote 48. § 466.

Footnote 49. *Santilli v Otis Elevator Co.* (1st Dist) 215 Cal App 3d 210, 263 Cal Rptr 496, review den.

Footnote 50. *Middleton v Harris Press & Shear, Inc., Subsidiary of American Hoist & Derrick Co.* (CA5 Tex) 796 F2d 747, 21 Fed Rules Evid Serv 549.

Footnote 51. *Grenada Steel Industries, Inc. v Alabama Oxygen Co.* (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163.

§ 472 Evidence of non-remedial actions

[View Entire Section](#)

Not all action taken after an injury-causing event is necessarily a "subsequent remedial measure." For example, evidence of post-event tests or reports conducted for the purpose of investigating the occurrence to discover what might have gone wrong is not excludible under Federal Rules of Evidence 407, because in this instance no remedial measure is being taken to remedy any flaws or failures. 52 In other words, "subsequent remedial measures" include only the actual remedial measures themselves and not the initial steps taken toward ascertaining whether any remedial measures are called for. 53 A fortiori, a report on the safety of an appliance, which defendants had commissioned prior to plaintiff's accident, and which had eventually been used to help plan a voluntary recall of the appliance, was not a "remedial measure." 54

◆ Caution: A party's efforts to exclude evidence as a subsequent remedial measure will not be sanctioned by the court where such measure is seen as a deliberate destruction of highly relevant evidence. 55

Footnotes

Footnote 52. *Dow Chemical Corp. v Weevil-Cide Co.* (CA10 Kan) 897 F2d 481, 29 Fed Rules Evid Serv 1394 (plaintiff's internal memorandum on question whether it should withdraw from liquid grain fumigant market did not constitute subsequent remedial measure in subrogation case arising out of products liability case, since there was nothing remedial about report's recommendation that plaintiff remain in grain fumigant business without conducting any further medical research); *Rocky Mountain Helicopters, Inc. v Bell Helicopters Textron, Div. of Textron, Inc.* (CA10 Utah) 805 F2d 907, 22 Fed Rules Evid Serv 86.

See *In Re Aircrash in Bali* (CA9 Cal) 871 F2d 812, 27 Fed Rules Evid Serv 815, cert den 493 US 917, 107 L Ed 2d 258, 110 S Ct 277, holding that an airline's internal report on its safety record and problems was not a subsequent remedial measure under FRE 407 where the report took many months to prepare and came out only one day after the crash, so that it was not a response to the crash.

Footnote 53. *Fasanaro v Mooney Aircraft Corp.* (ND Cal) 687 F Supp 482, 25 Fed Rules Evid Serv 850.

Minutes of railway safety committee meeting held 8-9 months after plaintiff's accident were irrelevant since fact that railway may have been aware of continuing problem at time of meeting was not probative of its knowledge at time of accident, and plaintiff offered no evidence to establish that minutes' reference to a continuing problem related back to the date of accident. *Gulbranson v Duluth, M. & I. R. R. Co.* (CA8 Minn) 921 F2d 139, 31 Fed Rules Evid Serv 1077.

Footnote 54. *Benitez-Allende v Alcan Aluminio Do Brasil, S.A.* (CA1 Puerto Rico) 857 F2d 26, CCH Prod Liab Rep ¶ 11926, 26 Fed Rules Evid Serv 1293, cert den 489 US 1018, 103 L Ed 2d 196, 109 S Ct 1135 (pressure cooker).

Footnote 55. *Albrecht v Baltimore & O. R. Co.* (CA4 Md) 808 F2d 329, 22 Fed Rules

Evid Serv 530 (the court did not interpret the defendant's destruction of the ladder from which the plaintiff fell as a remedial measure, but rather found the action as relevant in ascertaining whether or not the railroad negligently failed to maintain a safe place to work).

b. Admissibility for Particular Purposes [473-479]

§ 473 Generally; non-exhaustive nature of provision

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 407 does not require the exclusion of evidence of subsequent measures when offered for particular purposes, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. 56 Although the exceptions listed in Federal Rules of Evidence 407 are illustrative, 57 and not exhaustive, 58 the exceptions to the rule are to be narrowly read in order to preserve the important policy of encouraging subsequent remedial measures. 59 Furthermore, in order to be admissible the evidence must be both relevant and probative. 60

◆ Practice guide: The admissibility of evidence of subsequent remedial measures when offered for particular purposes cannot be determined in advance of trial, because the relevance of such evidence can only be determined in the context of the state of the evidence at the time that proof of subsequent remedial measures is offered in evidence. 61 Therefore, the trial judge has broad power to ensure that evidence of remedial measures is not improperly admitted under the guise of the "other purpose" exception. 62

Under Federal Rules of Evidence 407, before evidence of subsequent measures may be introduced for other purposes, such purposes must be "controverted." 63 Therefore, evidence of subsequent measures will be automatically excluded unless a genuine issue is present. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403. 64 Because the exceptions listed in Federal Rules of Evidence 407 deal with situations where the defendant attempts to make offensive use of the exclusion, such as contending that no remedial measure was possible or making statements conflicting with the fact of the subsequent remedial measure, any new exceptions should follow this rationale. 65

◆ Practice guide: Once a trial court has determined that evidence of subsequent remedial measures is admissible for a purpose other than showing negligence, the court must make it plain to the jury that the evidence may only be considered with respect to issues other than the possible negligence of the defendant. 66 Furthermore, in order to preserve the point for appeal, counsel should request such a limiting instruction, and should object to a failure of the trial court to so instruct the jury. 67

A party can lay the groundwork for the exclusion of evidence of subsequent measures to prove ownership, control, or feasibility of precautionary measures by making an admission. 68

§ 473 ----Generally; non-exhaustive nature of provision [SUPPLEMENT]

Practice Aids: 30 Am Jur Proof of Facts 3d 307, Evidence of Subsequent Remedial Measures in Civil Actions

Footnotes

Footnote 56. FRE 407; Uniform Rules of Evidence, Rule 407.

Annotation: Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Practice References Louisell and Mueller, Federal Evidence § 165.

Hunter, Federal Trial Handbook 2d § 73.19.

Proof of Repairs or Change of Conditions following Accident. 10 Am Jur Proof of Facts 295, Repairs, Proof 1.

Footnote 57. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 58. *Albrecht v Baltimore & O. R. Co.* (CA4 Md) 808 F2d 329, 22 Fed Rules Evid Serv 530; *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 59. *Albrecht v Baltimore & O. R. Co.* (CA4 Md) 808 F2d 329, 22 Fed Rules Evid Serv 530.

◆ Comment: Despite the fact that there is authority for reading the exceptions to the rule narrowly, it has been noted that there are so many exceptions that the effect of the rule is to permit more inclusion than exclusion of evidence. § 464.

Annotation: Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 60. *Hull v Chevron U.S.A., Inc.* (CA10 Wyo) 812 F2d 584, 22 Fed Rules Evid Serv 822, 7 FR Serv 3d 516.

Footnote 61. *Rioux v Daniel International Corp.* (DC Me) 582 F Supp 620, 16 Fed Rules Evid Serv 245.

Footnote 62. *Hallmark v Allied Products Corp.* (App) 132 Ariz 434, 646 P2d 319, CCH

Prod Liab Rep ¶ 9316.

For examples of other particular purposes, see § 479.

Footnote 63. Advisory Committee Notes to Federal Rules of Evidence, FRE 407.

As to the issue of controverting the feasibility of remedial measures, see § 476.

Footnote 64. Advisory Committee Notes to Federal Rules of Evidence, FRE 407.

Evidence of subsequent remedial measures sought to be admitted under an exception to FRE 407 was ruled inadmissible under FRE 403 because the probative value was substantially outweighed by the danger of unfair prejudice or confusion to the jury. *Stallworth v Illinois C. G. Railroad* (CA11 Ala) 690 F2d 858, 11 Fed Rules Evid Serv 1531.

Footnote 65. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 66. *Rimkus v Northwest Colorado Ski Corp.* (CA10 Colo) 706 F2d 1060, 12 Fed Rules Evid Serv 764 (defendant marked the rocks identifying a danger zone on a ski slope the day after the plaintiff's accident).

Footnote 67. *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427.

Footnote 68. Advisory Committee Notes to Federal Rules of Evidence, FRE 407.

A defendant may stipulate as to the feasibility of marketing an alternative product which would not have caused the injury in question in order to gain the benefit of evidentiary rules which would exclude evidence of subsequent remedial measures to prove the feasibility of taking such measures at the time of an accident. *Gauthier v AMF, Inc.* (CA9 Mont) 788 F2d 634, CCH Prod Liab Rep ¶ 10989, 20 Fed Rules Evid Serv 648, reh den, en banc (CA9 Mont) 805 F2d 337.

§ 474 Ownership or control

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 407 specifically provides that it does not require exclusion of evidence of subsequent measures when offered to prove ownership or control of the premises or instrumentality involved in an event. 69 This is in accord with the widely-recognized exception to the rule of inadmissibility where it is necessary to show that the defendant had control of the premises or device, where the matter of control is in dispute. 70 For example, evidence that a defendant, subsequent to an accident, had shortened the boom of a crane which had come into contact with high-tension wires that had electrocuted the deceased has been held admissible to prove control of the crane by the

defendant, in a wrongful death action. 71 Evidence that a defendant subsequently put out signs to show that the portion of the road in question was under defendant's control has been ruled admissible in an action against a road contractor for negligent failure to put out warning signs. 72

In actions arising out of an accident in which a passing train struck the scaffold of a sign painter who had been hired by railroad advertising company to paint a viaduct owned by railroad, evidence of the advertising company's post-accident adoption of a procedure notifying railroads of the presence of their painters was admissible to show whether notification to the railroads was in the advertising company's control, where such fact was disputed. 73

On the other hand, where control is not in dispute, as where defendant admits control of the premises, evidence of subsequent repairs is not admissible. 74

Footnotes

Footnote 69. FRE 407; Uniform Rules of Evidence, Rule 407.

Footnote 70. *Woolard v Mobil Pipe Line Co.* (CA5 Tex) 479 F2d 557, reh den (CA5 Tex) 480 F2d 925 and cert den 414 US 1025, 38 L Ed 2d 316, 94 S Ct 450; *Stauffer Chemical Co. v Buckalew* (Ala) 456 So 2d 778; *Williams v Milner Hotels Co.*, 130 Conn 507, 36 A2d 20; *Grochowski v Stewart* (Super) 53 Del 330, 169 A2d 14; *Dillon v U.S. Steel Corp.* (1st Dist) 159 Ill App 3d 186, 111 Ill Dec 54, 511 NE2d 1349, app den 117 Ill 2d 542, 115 Ill Dec 399, 517 NE2d 1085; *Huxol v Nickell*, 205 Kan 718, 473 P2d 90; *Finn v Peters*, 340 Mass 622, 165 NE2d 896; *Bond v Weiner*, 346 Mo 258, 140 SW2d 25; *Nuckols v Andrews Invest. Co.* (Mo App) 364 SW2d 128; *Spinelli v Golda*, 6 NJ 68, 77 A2d 233; *Olivia v Gouze*, 285 App Div 762, 140 NYS2d 438, affd 1 NY2d 811, 153 NYS2d 71, 135 NE2d 602; *Hendrickson v Astoria*, 127 Or 1, 270 P 924; *Leghart v Montour R. Co.*, 395 Pa 469, 150 A2d 836; *Houston Lighting & Power Co. v Taber* (Tex Civ App) 221 SW2d 339, writ ref n r e; *Richmond v Grizzard*, 205 Va 298, 136 SE2d 827.

Annotation: Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 ALR5th 119.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 71. *Parsons v Blount Bros. Constr. Co.* (CA6 Ohio) 281 F2d 414, 13 Ohio Ops 2d 312.

Practice References American Law of Products Liability 3d §§ 14:53-14:66.

Footnote 72. *Powers v J. B. Michael & Co.* (CA6 Tenn) 329 F2d 674, cert den 377 US 980, 12 L Ed 2d 748, 84 S Ct 1886.

Footnote 73. *Carter v Indiana H. B. R. Co.* (1st Dist) 190 Ill App 3d 1052, 138 Ill Dec 321, 547 NE2d 488.

Footnote 74. Haffey v Lemieux, 154 Conn 185, 224 A2d 551, 21 ALR3d 1091 (action by a letter carrier against a homeowner to recover for personal injuries suffered by the carrier from a fall caused when a concrete porch step collapsed).

In action involving the collision of plaintiff's automobile on a highway with defendants' cow and calf, which had been grazing on fenced land adjacent to the highway, the trial court properly refused to allow plaintiff to introduce evidence of defendants' subsequent repairs made to a cattle guard near the accident site, where defendants did not maintain they had no control over cattle guards and did not deny their duty to maintain them. Landrum v De Bruycker, 90 SD 304, 240 NW2d 119.

§ 475 Feasibility of precautionary measures

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of subsequent measures may be offered for the purpose of showing the feasibility of precautionary measures, if controverted. 75 In other words, evidence of subsequent remedial measures is admissible to show the feasibility of cautionary measures where feasibility is contested by the party against whom such evidence is offered. 76 Moreover, feasibility should be actually, and not merely formally, in dispute before evidence of subsequent remedial measures is admitted. 77

◆ Caution: Federal Rules of Evidence 407 and similar state principles require that the feasibility of precautionary measures be controverted, and evidence of subsequent corrective measures is not admissible where the feasibility of alternative designs is conceded. 78 And where such evidence is offered after previous testimony that such repairs could be made simply, easily, and inexpensively, additional evidence regarding subsequent repairs is cumulative and possibly prejudicial under Federal Rules of Evidence 403, justifying its exclusion. 79

Feasibility denotes whether it would have been practicable to have employed the remedial measures earlier. 80 It does not involve the question of whether the defendant knew or should have known but nonetheless did not employ remedial measures earlier, such being a question of culpability or negligence. 81 Whether something is feasible relates not only to actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance; that is to say, "feasible" means not only possible, but also capable of being utilized, or dealt with successfully. 82

◆ Observation: The feasibility exception raises difficult issues if the change in design, procedure, or warning made by defendant is arguably the product of a technological breakthrough which had not been made at the time of the accident. The fact of change does not always mean improvement. When such difficulties appear, the exception cannot assure admissibility, 83 and concerns of relevancy and confusion of issues provide ample basis for exclusion of the evidence. 84

Footnotes

Footnote 75. *Fish v Georgia-Pacific Corp.* (CA2 Vt) 779 F2d 836, CCH Prod Liab Rep ¶ 10904, 19 Fed Rules Evid Serv 583; *Anderson v Malloy* (CA8 Mo) 700 F2d 1208; *Transgo, Inc. v Ajac Transmission Parts Corp.* (CA9 Cal) 768 F2d 1001, 227 USPQ 598, 82 ALR Fed 97, cert den 474 US 1059, 88 L Ed 2d 778, 106 S Ct 802, later proceeding (CA9 Cal) 911 F2d 363, 15 USPQ2d 1907, 17 FR Serv 3d 924; *Hull v Chevron U.S.A., Inc.* (CA10 Wyo) 812 F2d 584, 22 Fed Rules Evid Serv 822, 7 FR Serv 3d 516; *Meller v Heil Co.* (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390 (evidence offered to prove the feasibility of precautionary measures); *Luera v Snyder* (DC Colo) 599 F Supp 1459; *Sutkowski v Universal Marion Corp.* (3d Dist) 5 Ill App 3d 313, 281 NE2d 749; *Bandstra v International Harvester Co.* (Iowa App) 367 NW2d 282, CCH Prod Liab Rep ¶ 10741; *Siruta v Hesston Corp.*, 232 Kan 654, 659 P2d 799, CCH Prod Liab Rep ¶ 9578; *Torre v Harris-Seybold Co.*, 9 Mass App 660, 404 NE2d 96, CCH Prod Liab Rep ¶ 8722; *Baleno v Jacuzzi Research, Inc.* (4th Dept) 93 App Div 2d 982, 461 NYS2d 659; *Berarducci v State Teachers Retirement System (Trumbull Co)* 21 Ohio App 3d 195, 21 Ohio BR 208, 486 NE2d 1183.

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 76. *Bauman v Volkswagenwerk Aktiengesellschaft* (CA6 Tenn) 621 F2d 230, CCH Prod Liab Rep ¶ 8682, 5 Fed Rules Evid Serv 1276; *Donahue v Phillips Petroleum Co.* (CA8 Mo) 866 F2d 1008, CCH Prod Liab Rep ¶ 12037, 27 Fed Rules Evid Serv 402, reh den, en banc (CA8) 1989 US App LEXIS 5772.

Footnote 77. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 78. *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864, CCH Prod Liab Rep ¶ 10022, later proceeding (2d Dept) 115 App Div 2d 693, 496 NYS2d 519, later proceeding (2d Dept) 113 App Div 2d 502, 497 NYS2d 382 (non-rules state).

Footnote 79. *Knight v Otis Elevator Co.* (CA3 Pa) 596 F2d 84, 4 Fed Rules Evid Serv 73.

Footnote 80. *Wetherill v University of Chicago* (ND Ill) 565 F Supp 1553, 15 Fed Rules Evid Serv 749.

Footnote 81. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Wetherill v University of Chicago* (ND Ill) 565 F Supp 1553, 15 Fed Rules Evid Serv 749.

Footnote 82. *Anderson v Malloy* (CA8 Mo) 700 F2d 1208 (defendant controverted feasibility of installation of peepholes and chain locks on door by saying that such measures would provide only a false sense of security, this being an inference that the devices would not successfully provide security and would create a lesser level of security after they were installed).

Footnote 83. *Rainbow v Albert Elia Bldg. Co.* (4th Dept) 79 App Div 2d 287, 436 NYS2d 480, CCH Prod Liab Rep ¶ 8949, *affd* 56 NY2d 550, 449 NYS2d 967, 434 NE2d 1345 (in suit against motorcycle manufacturer, evidence of 1971 studies on use of crash bars was properly excluded, since they were not relevant unless they were related to the technology of the industry in 1968, the date of manufacture).

See *Meller v Heil Co.* (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, *cert den* 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390 (construing state statute) suggesting that design changes or subsequent warnings are "simply not relevant" if not scientifically known at the time of the sale.

Footnote 84. *Louisell and Mueller*, Federal Evidence § 165.

§ 476 --Controverting issue of feasibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There are two lines of authority on the issue of how the feasibility of taking precautionary measures may be controverted. Under one view, a controversy as to the feasibility of precautionary measures may only be raised by the defendant; 85 only if the defendant contends that no such repair or improvement was possible, will the plaintiff be allowed to introduce evidence of subsequent remedial measures. 86 Furthermore, a plaintiff will not be allowed to controvert the feasibility of change in a design defect case by merely asserting that the manufacturer did not make a change in the product. 87

Under the alternative line of authority, the court will hold that a defendant has controverted feasibility unless it expressly concedes by stipulation or admission that at the time of the accident in question precautionary measures were feasible, and the court will allow a plaintiff to present evidence of later remedial measures to show their feasibility prior to the accident. 88 Under this view, even if the feasibility of remedial measures is apparent, so that it would be pointless for a defendant to deny the feasibility of modification, manufacturer defendants are deemed to controvert feasibility unless they unequivocally admit it. 89 The court will find a controversy because the plaintiff is obligated to prove this element of her case. 90 Moreover, the defendant will not be permitted to subsequently assert that because it did not attempt to rebut the plaintiff's proof, the issue was not controverted at trial. 91

Footnotes

Footnote 85. *Albrecht v Baltimore & O. R. Co.* (CA4 Md) 808 F2d 329, 22 Fed Rules

Evid Serv 530; Grenada Steel Industries, Inc. v Alabama Oxygen Co. (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163; Duggam v Board of County Comrs. (Colo App) 747 P2d 6; Kenneally v Thurn (Tex App San Antonio) 653 SW2d 69, writ ref n r e (Dec 31, 1983).

Annotation: Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Practice References American Law of Products Liability 3d §§ 14:53-14:66.

Footnote 86. Werner v Upjohn Co. (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591.

Footnote 87. Grenada Steel Industries, Inc. v Alabama Oxygen Co. (CA5 Miss) 695 F2d 883, CCH Prod Liab Rep ¶ 9494, 12 Fed Rules Evid Serv 940, reh den (CA5 Miss) 699 F2d 1163.

Footnote 88. Meller v Heil Co. (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390; Herndon v Seven Bar Flying Service, Inc. (CA10 NM) 716 F2d 1322, CCH Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170.

In a products liability action arising when the operator of a drill got his hand caught between the flights of the auger and a metal centralizer attached to the H beam that held the auger in place for drilling, evidence that subsequent to the accident the plaintiff's employer welded a guard on the centralizer, and that it was used thereafter with the guard attached to it, was admissible to show the feasibility of guarding the centralizer, irrespective of whether the issue of feasibility was a part of the plaintiff's case, or the defendant injected it as a defense. Brown v Quick Mix Co., Div. of Koehring Co., 75 Wash 2d 833, 454 P2d 205.

Footnote 89. Herndon v Seven Bar Flying Service, Inc. (CA10 NM) 716 F2d 1322, CCH Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170.

Footnote 90. Meller v Heil Co. (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390.

Footnote 91. Meller v Heil Co. (CA10 Colo) 745 F2d 1297, CCH Prod Liab Rep ¶ 10069, cert den 467 US 1206, 81 L Ed 2d 347, 104 S Ct 2390.

§ 477 --Specific measures demonstrating feasibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of subsequent measures admitted for the purpose of proving the feasibility of

taking precautionary measures includes evidence of—

—a change of design of a product subsequent to an event, for the purpose of underscoring the feasibility of such precautionary measures. 92 but not to show that if such measures had been taken previously, the event would have been less likely to occur. 93

—a postoccurrence change which tends to satisfy the plaintiff's burden, in a defective design case, that the product as designed was incapable of preventing the injury complained of, that there existed an alternative design which would have prevented the injury, and that in terms of cost, practicality, and technological possibility, the alternative design was feasible. 94

—a remedial instruction, for the purpose of proving that with a different instruction, the harm would not have resulted and that failure to give such instruction created an unreasonably dangerous product. 95

—warning labels for the purpose of showing the feasibility and the cost of giving a warning. 96

—changes in the standard equipment provided for a product, to show that such additional measures were feasible. 97

—the addition of further safety devices to give the operator of a product additional protection. 98

—a change in policy requiring police officers riding in squad cars to have attended state police academy, in an action arising out of the shooting of plaintiff by a police officer. 99

Footnotes

Footnote 92. *Friedman v National Presto Industries, Inc.* (ED NY) 566 F Supp 762, 13 Fed Rules Evid Serv 1948; *Bendix-Westinghouse Automotive Air Brake Co. v Latrobe Die Casting Co.* (DC Colo) 427 F Supp 34; *Majchrzak v Heil Co.* (4th Dept) 99 App Div 2d 649, 471 NYS2d 722.

Footnote 93. *Bendix-Westinghouse Automotive Air Brake Co. v Latrobe Die Casting Co.* (DC Colo) 427 F Supp 34.

Footnote 94. *Robbins v Farmers Union Grain Terminal Asso.* (CA8 SD) 552 F2d 788, 1 Fed Rules Evid Serv 1320.

Footnote 95. *Robbins v Farmers Union Grain Terminal Asso.* (CA8 SD) 552 F2d 788, 1 Fed Rules Evid Serv 1320 (evidence of subsequent change in instructions to cattle feed supplement warning that product should not be fed to newly arrived feed lot cattle was introduced).

In a strict liability action brought against a company which had supplied an odorizing agent for propane gas, a District Court did not err in admitting into evidence a brochure explaining the possibility of odor fade, that was prepared by the manufacturer subsequent to the accident, since the pivotal issue was not the adequacy of the warning that had been

given, but rather the manufacturer's contention that it was not feasible to provide warnings. *Donahue v Phillips Petroleum Co.* (CA8 Mo) 866 F2d 1008, CCH Prod Liab Rep ¶ 12037, 27 Fed Rules Evid Serv 402, reh den, en banc (CA8) 1989 US App LEXIS 5772.

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Footnote 96. *Whitehead v St. Joe Lead Co.* (CA3 NJ) 729 F2d 238, 15 Fed Rules Evid Serv 204.

Footnote 97. *Brown v Link Belt Corp.* (CA9 Or) 565 F2d 1107, 2 Fed Rules Evid Serv 848.

Footnote 98. *Dixon v International Harvester Co.* (CA5 Miss) 754 F2d 573, CCH Prod Liab Rep ¶ 10426, 17 Fed Rules Evid Serv 837.

Footnote 99. *Languirand v Hayden* (CA5 Miss) 717 F2d 220, 70 ALR Fed 1, reh den (CA5 Miss) 721 F2d 819 and cert den 467 US 1215, 81 L Ed 2d 363, 104 S Ct 2656.

§ 478 Impeachment and rebuttal

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 407 does not preclude the admission of evidence of subsequent measures for purposes of impeachment. 1 Evidence of subsequent repairs, alterations, or precautions may be admissible in impeachment of a witness, 2 or rebuttal of testimony that a product could not be improved. 3 When the defendant opens the issue by claiming that all reasonable care was being exercised at the time of an occurrence, the plaintiff may attack that contention by showing later repairs or changes in design which are inconsistent with that claim. 4 Plaintiffs may also rebut the contention that they were properly warned of possible dangers in using the manufacturer's product. 5

It has been suggested that evidence of subsequent remedial measures itself contradicts and in a sense impeaches a defendant's contention that he was exercising due care or that materials used in the manufacture of a product were appropriate for their intended application; but to allow such an argument to satisfy the impeachment exception would make the rule of inadmissibility meaningless. 6 Therefore, a court will be reluctant to admit for impeachment purposes evidence of subsequent remedial measures which simply contradict a defendant's testimony that it used due care with respect to a product. 7 Thus, it has been held that where defendant offers evidence that the device, process or design in question is reasonably safe, such proof does not amount to a contention that all precautions have been taken or that nothing better was possible, and in this situation, proof of a subsequent remedial measure designed to improve the device, process, or design should not be admissible under the impeachment clause of Rule 407. 8

In a number of cases, the courts have allowed evidence of subsequent measures for

impeachment purposes under the exception to Rule 407. 9 Thus, in a wrongful death action, where a witness testified that a particular product was safe to operate, his letter, after decedent's death, to dealers of the product warning them about the death-dealing propensities of the product when used in the fashion employed by the deceased, was admissible for impeachment purposes. 10 In an action for damages against a carrier by a woman who was raped in a dark area of a station, where a witness testified that lighting at the station was checked on a daily basis, evidence that a new fluorescent fixture was installed four days after the attack was admissible for impeachment purposes. 11 Testimony that plaintiffs found it advisable to include more detailed instructions for the use of a product which failed in service, in an action for damages against a manufacturer, could properly be used to impeach plaintiffs' witnesses who stated that the fabrication plans were adequate and that more precise grinding instructions were unnecessary. 12

Footnotes

Footnote 1. FRE 407; Uniform Rules of Evidence, Rule 407.

Footnote 2. *Choctaw, O. & G. R. Co. v McDade*, 191 US 64, 48 L Ed 96, 24 S Ct 24; *Daggett v Atchison, T. & S. F. R. Co.*, 48 Cal 2d 655, 313 P2d 557, 64 ALR2d 1283; *Baldwin v Norwalk*, 96 Conn 1, 112 A 660; *Johns-Manville Sales Corp. v Janssens* (Fla App D1) 463 So 2d 242, 9 FLW 2048, 9 FLW 2482, review den (Fla) 467 So 2d 999 and (disapproved on other grounds by *Chrysler Corp. v Wolmer* (Fla) 499 So 2d 823, 11 FLW 605, CCH Prod Liab Rep ¶ 11217) as stated in *W.M. v Department of Health & Rehabilitative Services* (Fla App D1) 553 So 2d 274, 14 FLW 2730, review den (Fla) 564 So 2d 490; *Kath v East S. L. & S. R. Co.*, 232 Ill 126, 83 NE 533; *Brazil Block Coal Co. v Gibson*, 160 Ind 319, 66 NE 882; *Noe v O'Neil*, 314 Ky 641, 236 SW2d 893; *Goodell v Sviokla*, 262 Mass 317, 159 NE 728; *Hickey v Kansas C. S. R. Co. (Mo)* 290 SW2d 58; *Leghart v Montour R. Co.*, 395 Pa 469, 150 A2d 836.

Annotation: Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 ALR5th 119.

Footnote 3. *Howard v Faberge, Inc. (Tex App Houston (1st Dist))* 679 SW2d 644, CCH Prod Liab Rep ¶ 10326, 46 ALR4th 1185, writ ref n r e (Mar 20, 1985).

Where defendant's witnesses testified that the floor was in the same condition at the time tests were made as at the time the plaintiff fell, and that the tests showed that the floors were not slippery, the plaintiff was properly permitted, in rebuttal, to show that abrasive strips had been placed on the floor subsequently to the fall. *Slow Development Co. v Coulter*, 88 Ariz 122, 353 P2d 890.

Footnote 4. *Kenny v Southeastern Pennsylvania Transp. Authority* (CA3 Pa) 581 F2d 351, 3 Fed Rules Evid Serv 636, cert den 439 US 1073, 59 L Ed 2d 39, 99 S Ct 845; *Muzyka v Remington Arms Co. (CA5 Tex)* 774 F2d 1309, CCH Prod Liab Rep ¶ 10755, 19 Fed Rules Evid Serv 356; *Patrick v South Cent. Bell Tel. Co. (CA6 Tenn)* 641 F2d 1192, 6 Fed Rules Evid Serv 990.

In a negligence action brought by motel guests against a motel, in which it was alleged that plaintiff was attacked and raped by an unknown assailant who forcibly entered her

hotel room due to the motel's negligence in failing to provide reasonably safe lodging, the court improperly refused to admit evidence showing that, subsequent to the rape, the motel installed peepholes and chain locks in rooms, where, during the trial, defendant offered testimony suggesting that the installation of peepholes and chains would provide only a false sense of security; plaintiffs were entitled to the impeach credibility of defendants by showing that, although defendants testified that they had done everything necessary to secure the motel, defendants in fact took further security measures, after the rape occurred, by installing devices that they testified could not be used successfully. *Anderson v Malloy* (CA8 Mo) 700 F2d 1208.

In a personal injury action arising from the spontaneous ejection of a natural cork stopper from a champagne bottle, plaintiff was entitled to introduce evidence that two years after the accident the champagne label had been changed to include a warning that the stopper would eject soon after removal of a wire hood, where the manufacturer had explicitly denied that a cork stopper could ever spontaneously eject without negligent mishandling of the bottle. *Murray v Almaden Vineyards, Inc.* (Fla App D2) 429 So 2d 24, CCH Prod Liab Rep ¶ 9535.

In an action against a feed-lot owner for damages caused to a neighboring dairy farm when cattle escaped the feed-lot during a blizzard, evidence that the feed-lot owner had subsequently erected snow fences was admissible where the feed-lot manager had testified that snow fences would not have been effective to prevent the escape of cattle and were dangerous and impractical. *Kurz v Dinklage Feed Yard, Inc.*, 205 Neb 125, 286 NW2d 257.

Annotation: Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 5. *Lockley v Deere & Co.* (CA8 Ark) 933 F2d 1378, CCH Prod Liab Rep ¶ 12917, reh den (CA8) 1991 US App LEXIS 13096 (where existence and substance of combine manufacturer's warning-decal program constituted evidence of subsequent remedial measure that was relevant to strict liability issue and not precluded by Rule 407, evidence that farmers did not receive warning decal was relevant to rebut manufacturer's claim that accident was caused by their negligence).

Footnote 6. *Probus v K-Mart, Inc.* (CA7 Ind) 794 F2d 1207, CCH Prod Liab Rep ¶ 11042, 20 Fed Rules Evid Serv 1097; *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968.

Footnote 7. *Flaminio v Honda Motor Co.* (CA7 Wis) 733 F2d 463, CCH Prod Liab Rep ¶ 10072, 15 Fed Rules Evid Serv 968.

Footnote 8. *Wilkinson v Carnival Cruise Lines, Inc.* (CA11 Fla) 920 F2d 1560, 32 Fed Rules Evid Serv 25 (in suit for injuries after sliding glass door on cruise ship shut on plaintiff's foot, ship's officer testified that door was in normal operating condition when he inspected it that day and had been properly maintained; since witness did not claim defendant exercised all reasonable care or that door was in safest or best condition, court erred in admitting proof that it was thereafter kept open, which impeached nothing and likely gave rise to the precise inference of negligence that Rule 407 was designed to avoid).

Footnote 9. *Werner v Upjohn Co.* (CA4 Md) 628 F2d 848, CCH Prod Liab Rep ¶ 8739, 6 Fed Rules Evid Serv 481, cert den 449 US 1080, 66 L Ed 2d 804, 101 S Ct 862, later proceeding (CA4 Md) 731 F2d 204, 38 FR Serv 2d 1591; *Jones v Benefit Trust Life Ins. Co.* (CA5 Miss) 800 F2d 1397, 21 Fed Rules Evid Serv 1054; *Dollar v Long Mfg., N. C., Inc.* (CA5 Ga) 561 F2d 613, 2 Fed Rules Evid Serv 760, 24 FR Serv 2d 408, reh den (CA5 Ga) 565 F2d 163 and reh den (CA5 Ga) 565 F2d 163 and cert den 435 US 996, 56 L Ed 2d 85, 98 S Ct 1648; *Public Service Co. v Bath Iron Works Corp.* (CA7 Ind) 773 F2d 783, 19 Fed Rules Evid Serv 235; *Transgo, Inc. v Ajac Transmission Parts Corp.* (CA9 Cal) 768 F2d 1001, 227 USPQ 598, 82 ALR Fed 97, cert den 474 US 1059, 88 L Ed 2d 778, 106 S Ct 802, later proceeding (CA9 Cal) 911 F2d 363, 15 USPQ2d 1907, 17 FR Serv 3d 924; *Herndon v Seven Bar Flying Service, Inc.* (CA10 NM) 716 F2d 1322, CCH Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170; *Davis v Fox River Tractor Co.* (CA10 Okla) 518 F2d 481 (response to testimony on behalf of defendant that safety modification would render hopper machine ineffective).

Evidence that manufacturer started placing warning decal on his hydraulic presses 21 years after plaintiff's injury should have been admitted for impeachment purposes in second trial since issue of failure to warn of danger inherent in intended and reasonably foreseeable use of press was not addressed in first trial. *Petree v Victor Fluid Power, Inc.* (CA3 Pa) 887 F2d 34, 28 Fed Rules Evid Serv 1252.

Footnote 10. *Dollar v Long Mfg., N. C., Inc.* (CA5 Ga) 561 F2d 613, 2 Fed Rules Evid Serv 760, 24 FR Serv 2d 408, reh den (CA5 Ga) 565 F2d 163 and reh den (CA5 Ga) 565 F2d 163 and cert den 435 US 996, 56 L Ed 2d 85, 98 S Ct 1648.

Annotation: Products liability: admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Footnote 11. *Kenny v Southeastern Pennsylvania Transp. Authority* (CA3 Pa) 581 F2d 351, 3 Fed Rules Evid Serv 636, cert den 439 US 1073, 59 L Ed 2d 39, 99 S Ct 845.

Footnote 12. *Public Service Co. v Bath Iron Works Corp.* (CA7 Ind) 773 F2d 783, 19 Fed Rules Evid Serv 235.

§ 479 Other particular purposes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts have allowed evidence of subsequent measures for other purposes, such as—

—to explain measurements, maps, photographs, and the like. 13

—to aid in identification. 14

—to show the condition of the place or thing involved at the time of the accident. 15

- to show changed conditions. 16
- to show knowledge of a dangerous condition. 17
- to show knowledge of the availability of a better design. 18
- to show the requirements of the design specifications. 19
- to show that the plaintiff was not guilty of contributory negligence. 20 as by undermining the testimony of a witness that the danger could be seen from a distance and thus could be avoided. 21
- to show the cause of injury. 22
- to show the specific duty with which a person was charged, 23 such as building a barricade or fence at a construction site. 24
- to show that it was possible to have avoided the accident. 25

Footnotes

Footnote 13. *Choctaw, O. & G. R. Co. v McDade*, 191 US 64, 48 L Ed 96, 24 S Ct 24; *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871; *Judis v Borg-Warner Corp.*, 339 Mich 313, 63 NW2d 647; *Mintz v Atlantic C. L. R. Co.*, 236 NC 109, 72 SE2d 38; *Beardslee v Columbia Tp.*, 188 Pa 496, 41 A 617.

Annotation: Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 ALR5th 119.

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence, 50 ALR Fed 935.

Footnote 14. *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871; *Williams v Milner Hotels Co.*, 130 Conn 507, 36 A2d 20; *Kath v East S. L. & S. R. Co.*, 232 Ill 126, 83 NE 533; *Crockett v Mexico*, 336 Mo 145, 77 SW2d 464; *Salladay v Dodgeville*, 85 Wis 318, 55 NW 696.

Footnote 15. *Choctaw, O. & G. R. Co. v McDade*, 191 US 64, 48 L Ed 96, 24 S Ct 24; *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871; *Stauffer Chemical Co. v Buckalew* (Ala) 456 So 2d 778; *Montgomery v Quinn*, 246 Ala 154, 19 So 2d 529; *Fisher v Hardesty* (Ky) 252 SW2d 877; *Union P. R. Co. v Edmondson*, 77 Neb 682, 110 NW 650; *Whellkin Coat Co. v Long Branch Trust Co.*, 121 NJL 106, 1 A2d 394; *Stricker v Portland R., L. & P. Co.*, 79 Or 526, 144 P 1193; *Peterson v King County*, 41 Wash 2d 907, 252 P2d 797.

In a suit for injuries to a boy when a fire extinguisher fell from a wall in a city building onto his foot, court did not err in admitting a photograph of the wall taken after the

incident and showing the extinguisher in another place, as proof of the condition of the wall. *Richmond v Grizzard*, 205 Va 298, 136 SE2d 827.

In slip-and-fall case, a statement of one employee of defendant to another employee to "get some salt and put on this and get a broom and sweep it" was admissible for the limited purpose of showing the condition of the premises at time of the accident, though inadmissible as an admission of negligence. *Polster v Griff's of America, Inc.*, 184 Colo 418, 520 P2d 745, on remand 34 Colo App 161, 525 P2d 1179.

Annotation: 64 ALR2d 1296 § 6[d].

Footnote 16. *St. Louis S. R. Co. v Jackson*, 242 Ark 858, 416 SW2d 273, appeal after remand 246 Ark 268, 438 SW2d 41; *Brazil Block Coal Co. v Gibson*, 160 Ind 319, 66 NE 882; *Panagoulis v Philip Morris & Co.*, 95 NH 524, 68 A2d 672; *Cameron v Pacific Lime & Gypsum Co.*, 73 Or 510, 144 P 446; *Beardslee v Columbia Tp.*, 188 Pa 496, 41 A 617; *Lederman v Pennsylvania R. Co.*, 165 Pa 118, 30 A 725; *Lincoln v Central V. R. Co.*, 82 Vt 187, 72 A 821; *Salladay v Dodgeville*, 85 Wis 318, 55 NW 696.

But see *Arceement*, 517 F2d 729, holding inadmissible evidence of changes made in railroad trestle after an accident involving the collapse of the trestle under the weight of plaintiff's truck.

Footnote 17. *Rozier v Ford Motor Co.* (CA5 Ga) 573 F2d 1332, 3 Fed Rules Evid Serv 119, 25 FR Serv 2d 1133, 50 ALR Fed 914, reh den (CA5 Ga) 578 F2d 871.

Evidence that owner of hot springs replaced all warnings signs with new signs specifically warning of danger to children of burns from springs was admissible to show that the owner knew of the risk of burns to children, where the erection of signs was close enough in time to the accident to allow the inference that the owner, at the time of the injury, was aware of the danger noted on new signs. *Van Gordon v Portland General Electric Co.*, 298 Or 497, 693 P2d 1285.

Footnote 18. *Sterner v U.S. Plywood-Champion Paper, Inc.* (CA8 Iowa) 519 F2d 1352.

Rule 407 did not exclude evidence of a change in brake design of an automobile which occurred 2 or 3 months after plaintiffs' car was manufactured and sold to them, but prior to the date of the accident. *Chase v General Motors Corp.* (CA4 Va) 856 F2d 17, 26 Fed Rules Evid Serv 1010.

In a products liability case against an automobile manufacturer on the basis of an allegedly defective design of the gasoline tank and filler system in a truck, evidence of crash testing conducted by the manufacturer subsequent to the manufacture and sale of the truck and evidence of resultant design changes were admissible to establish that safer alternate designs for the fuel filler system were available at the time of the accident. *American Motors Corp. v Ellis* (Fla App D5) 403 So 2d 459, CCH Prod Liab Rep ¶ 9037, petition den (Fla) 415 So 2d 1359.

Footnote 19. *Jaeger v Henningson, Durham & Richardson, Inc.* (CA8 SD) 714 F2d 773, 13 Fed Rules Evid Serv 1960, later proceeding (CA8 SD) 739 F2d 1341.

Footnote 20. *Herndon v Seven Bar Flying Service, Inc.* (CA10 NM) 716 F2d 1322, CCH

Prod Liab Rep ¶ 9760, 14 Fed Rules Evid Serv 40, cert den 466 US 958, 80 L Ed 2d 553, 104 S Ct 2170.

Footnote 21. *Rimkus v Northwest Colorado Ski Corp.* (CA10 Colo) 706 F2d 1060, 12 Fed Rules Evid Serv 764 (defendant marked rocks identifying a danger zone on a ski slope the day after plaintiff's accident).

Footnote 22. *Steele v Wiedemann Machine Co.* (CA3 Pa) 280 F2d 380, 3 FR Serv 2d 967 (in an action against a machine manufacturer by an injured workman, evidence showing that the employer ordered a new safety guard was properly admissible in support of the defendant's contention that the original guard was missing, worn, or broken at the time of the accident, and not faulty in design); *Wetherill v University of Chicago* (ND Ill) 565 F Supp 1553, 15 Fed Rules Evid Serv 749 (introduction of publications as admission by manufacturer that prenatal DES exposure causes type of injuries suffered by plaintiffs); *Union Light, Heat & Power Co. v Lakeman*, 156 Ky 33, 160 SW 723.

Footnote 23. *Shelton v Southern R. Co.*, 193 NC 670, 139 SE 232.

But see *Standridge v Alabama Power Co.* (Ala) 418 So 2d 84, an action to recover for the death of an ironworker who died of a heart attack on a construction site of a power plant, based on the theory that defendant failed to provide proper medical facilities at the plant; evidence of subsequent remedial measures to improve health care facilities at the plant was inadmissible to establish a duty, since the issue of duty was not an exception to the general rule of inadmissibility of remedial measures.

Evidence that a fence was erected by the defendant railroad after horses were killed was admissible as evidence of the railroad company's recognition of a defect which it was bound to remedy. *Zenier v Spokane I. R. Co.*, 78 Idaho 196, 300 P2d 494.

Footnote 24. *Baldwin Contracting Co. v Winston Steel Works, Inc.* (1st Dist) 236 Cal App 2d 565, 46 Cal Rptr 421; *Ottis v Brough*, 90 Idaho 124, 409 P2d 95 (superseded by statute on other grounds as stated in *Harrison v Taylor*, 115 Idaho 588, 768 P2d 1321); *Huxol v Nickell*, 205 Kan 718, 473 P2d 90.

Footnote 25. *Indianapolis & S. L. R. Co. v Horst*, 93 US 291, 3 US 291, 23 L Ed 898; *Grant v Arizona Public Service Co.* (1982) 133 Ariz 434, 652 P2d 507; *Willey v Boston Electric Light Co.*, 168 Mass 40, 46 NE 395; *Kanz v J. Neils Lumber Co.*, 114 Minn 466, 131 NW 643; *Hyndman v Pennsylvania R. Co.*, 396 Pa 190, 152 A2d 251; *West v Bayfield Mill Co.*, 144 Wis 106, 128 NW 992.

Avoidability of accidents is frequently discussed in terms of "feasibility" of taking precautionary measures; see §§ 475 et seq.

5. Payment of Medical and Similar Expenses (Rule 409) [480-482]

§ 480 Inadmissibility to establish negligence

[View Entire Section](#)

Evidence showing payment, or an offer or promise of payment, of the medical, hospital, and similar expenses of an injured party is not admissible to establish negligence on the part of the party making the payment, offer, or promise, in the absence of other circumstances indicating that such conduct amounted to an admission of liability. 26 The reason for this rule is that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person. 27

◆ Observation: It has been noted that the exclusionary principle is significant in the context of "advance payments" by insurance carriers to persons injured in accidents, that is, payments made prior to settlement or trial of underlying issues respecting negligence or damages; the importance of encouraging such advance payments is obvious. 28

The generally accepted view has been codified in a Rule which provides that evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. 29

◆ Caution: There is one jurisdiction, however, where it has been held that evidence of payment, or an offer or promise of payment, of the medical, hospital, and similar expenses of an injured party, is admissible for the purpose of establishing negligence on the part of the party making the payment or offer. 30 There is also some authority supporting such a result where the payment or offer is accompanied by an admission of liability, or the surrounding circumstances indicate such an admission. 31 And even where such evidence is not admissible, the improper admission of such evidence does not necessarily constitute reversible error. 32

§ 480 ----Inadmissibility to establish negligence [SUPPLEMENT]

Case authorities:

In personal injury action against county based on county's negligence in supervising plaintiff's foster care, trial court properly excluded from evidence payments by AFDC and Medi-Cal, and medical services provided by Shriner's Hospital. However, after return of verdict that included damages for which such payments were made or were obligated to be made, county could bring noticed motion to have judgment reduced by amounts paid before trial, whereupon trial court would have to order reimbursement from judgment to provider of any payments made by Medi-Cal, AFDC, and other nonfederal publicly funded sources of benefits with statutory lien rights. Further, court could (but was not required to) order reimbursement of private medical programs or similar sources. *Scott v County of Los Angeles* (1994, 2nd Dist) 27 Cal App 4th 125, 32 Cal Rptr 2d 643, 94 CDOS 5923, 94 Daily Journal DAR 10695, review den (Cal) 1994 Cal LEXIS 5603 and (criticized by California Fed. Savings & Loan Assn. v City of Los Angeles (2nd Dist) 29 Cal App 4th 1222, 34 Cal Rptr 2d 879, 94 CDOS 8222, 94 Daily Journal DAR 15199).

Footnotes

Footnote 26. *Home Ins. Co. v Spears* (App) 267 Ark 704, 590 SW2d 71; *Oldenburg v Sears, Roebuck & Co.* (2nd Dist) 152 Cal App 2d 733, 314 P2d 33; *Sokolowski v Medi Mart, Inc.*, 24 Conn App 276, 587 A2d 1056 (offer); *Stumpner v Harrison* (Mun Ct App Dist Col) 136 A2d 870; *Babcock v Flowers*, 144 Fla 479, 198 So 326; *Gray v Delta Air Lines, Inc.*, 127 Ga App 45, 192 SE2d 521; *Fields v Rutledge* (Ky) 284 SW2d 659, 58 ALR2d 210; *Binewicz v Haglin*, 103 Minn 297, 115 NW 271; *Dister v Ludwig*, 362 Mo 162, 240 SW2d 694; *Clairmont v Cilley*, 85 NH 1, 153 A 465; *Rekart v Safeway Stores, Inc.* (App) 81 NM 491, 468 P2d 892, 38 ALR3d 354 (recognizing rule); *Gosnell v Ramsey*, 266 NC 537, 146 SE2d 476; *Hughes v Anchor Enterprises, Inc.*, 245 NC 131, 95 SE2d 577, 63 ALR2d 685; *Burns v Joseph Flaherty Co.*, 278 Pa 579, 123 A 496; *McIntire v Winn Dixie Greenville, Inc.*, 275 SC 323, 270 SE2d 440; *Howell v Hairston*, 261 SC 292, 199 SE2d 766, 65 ALR3d 925.

In an action to recover actual damages sustained by parents as a result of having to provide medical care for their son, who was shot in the eye with an air rifle by the son of defendants, trial court properly excluded testimony that defendants paid \$100 in partial payment of such medical expenses. *Howell v Hairston*, 261 SC 292, 199 SE2d 766, 65 ALR3d 925.

Footnote 27. *Oldenburg v Sears, Roebuck & Co.* (2nd Dist) 152 Cal App 2d 733, 314 P2d 33; *Grogan v Dooley*, 211 NY 30, 105 NE 135; *Sias v Consolidated Lighting Co.*, 73 Vt 35, 50 A 554.

In an action for malpractice in the performance of a tonsillectomy on a child seven years of age, based on the loss of two front teeth through the use of a mouth prop, it was proper to exclude testimony that soon after the operation the defendant offered the child's father a check for \$300 toward the child's dental bill, where it appears that the defendant was a neighbor and a friend and that the offer was attributable, not to an admission of liability, but to motives of friendship and human kindness. *Fields v Rutledge* (Ky) 284 SW2d 659, 58 ALR2d 210.

Footnote 28. *Louisell and Mueller*, Federal Evidence § 177.

◆ Comment: The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. Advisory Committee Notes to FRE Rule 409.

Footnote 29. FRE Rule 409; Uniform Rules of Evidence, Rule 409.

Footnote 30. *Mick v Kroger Co.* (5th Dist) 73 Ill App 2d 155, 218 NE2d 654, rev'd on other grounds 37 Ill 2d 148, 224 NE2d 859, 21 ALR3d 926; *Hanlon v Lindberg*, 319 Ill App 1, 48 NE2d 735 (evidence admissible because not in the nature of a disputed offer of compromise).

See *Hartford Acci. & Indem. Co. v Sanford* (WD Okla) 344 F Supp 969, holding that advance payments by insurance carrier to motorcyclist injured by defendant in collision estopped carrier in its declaratory judgment action from denying liability to the motorcyclist under the policy.

Annotation: Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital, and similar expenses of injured party by opposing party, 65 ALR3d 932 § 7.

Footnote 31. *Brice v Bauer*, 108 NY 428, 15 NE 695; *Brown v Wood*, 201 NC 309, 160 SE 281.

Annotation: 65 ALR3d 932 § 4.

Footnote 32. *San Antonio v Hagle* (Tex App San Antonio) 685 SW2d 682, writ ref n r e (May 15, 1985) and reh'g of writ of error overr (Jul 10, 1985) (in an action to recover for injuries sustained by plaintiff when shot in the hand by a police officer, the admission of plaintiff's testimony that another police officer told her that "they" would take care of her medical expenses was error where there was no evidence the officer was authorized to make such an offer and admission on behalf of the city and no evidence that the statement accompanied an authorized act and was closely enough connected with his performance of an authorized act to come within the meaning of the term "res gestae"; however, in view of the ample evidence of negligence on the part of the officer who shot plaintiff, admission of plaintiff's testimony was not reversible error).

§ 481 Admissibility for other purposes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the furnishing of medical benefits is not excludible under FRE Rule 409 if it is offered not to prove liability or the extent of injury, but for some other purpose, such as to show that the alleged tortfeasor is an employer or the tort victim is an employee under a statutory compensation system. 33 Some common-law decisions applying state rules indicate that evidence of assistance, or offers to assist, may be shown in proof of other specific narrow elements essential to a finding of liability, such as ownership or control of a vehicle or instrumentality, or agency. 34

◆ **Observation:** It has been pointed out however, that when offered for any such purposes, proof of payment of medical, hospital, or similar expenses, or of offers or promises to pay such expenses, should be excluded under Rule 409, since, had the intent of the Rule been to exclude evidence only when offered upon the foundational question of "negligence or culpable conduct," and to allow receipt of such evidence on narrow factual components which comprise liability, the Rule could have been drafted in the same manner as Rule 407, which does allow proof of subsequent remedial measures upon such points. 35

Contrary to Rule 408, dealing with offers of compromise, 36 Rule 409 does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or

promises to pay medical expenses, where factual statements may be expected to be incidental in nature. 37

Footnotes

Footnote 33. *Savoie v Otto Candies, Inc.* (CA5 La) 692 F2d 363, 1985 AMC 220, 12 Fed Rules Evid Serv 269 (in Jones Act litigation, evidence of maintenance payments admitted to prove seaman status of plaintiff).

Footnote 34. *Great Atlantic & Pacific Tea Co. v Custin*, 214 Ind 54, 13 NE2d 542, reh den 214 Ind 67, 14 NE2d 538 (admissible as to question whether injury occurred in defendant's store); *Flieg v Levy*, 148 App Div 781, 133 NYS 249, affd 208 NY 564, 101 NE 1102 (in action for personal injuries received by a child as a result of being kicked by a horse allegedly owned by the defendant, evidence admissible to establish the defendant's ownership of the horse); *Brown v Wood*, 201 NC 309, 160 SE 281 (admissible as evidence of agency of the defendant driver of the car at the time of the accident).

But see *Burress v Dupree*, 287 Ala 524, 253 So 2d 31, holding that a promise to pay the medical expenses of the injured party, made by the owner of a vehicle involved in an accident, is inadmissible where it would tend to impute blame to the owner for the acts of the driver.

If the control or identity of the apparatus causing the injury is involved, an offer of assistance to the injured party, or the payment of his hospital and medical expenses, may be competent as evidence of an implied admission bearing on that issue. *Meegal v Memphis S. R. Co.*, 33 Tenn App 247, 34 Tenn App 403, 238 SW2d 519, 20 ALR2d 286 (dictum).

Annotation: Admissibility of evidence showing payment, or offer or promise of payment, of medical, hospital, and similar expenses of injured party by opposing party, 65 ALR3d 932 § 8.

Footnote 35. *Louisell and Mueller*, Federal Evidence § 179.

See also FRE Rule 411 which provides that evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted "negligently or otherwise wrongfully." For a discussion of FRE Rule 411, see §§ 483 et seq.

Footnote 36. For a discussion of Rule 408, see §§ 507 et seq.

Footnote 37. Advisory Committee Notes to FRE Rule 409.

§ 482 --Mitigation of damages

[View Entire Section](#)

Nothing in Rule 409 38 indicates an intent to require exclusion of any kind of evidence to the effect that one party has rendered assistance to another, when offered in proof by the very party rendering such assistance to mitigate a damage claim brought by the party assisted. In this circumstance, the proof is not offered to show "liability" within the meaning of the Rule, but to demonstrate nonliability, or at least to reduce the amount of liability. 39

Footnotes

Footnote 38. FRE Rule 409; Uniform Rules of Evidence, Rule 409.

Footnote 39. See *Moore-McCormack Lines, Inc. v Richardson* (CA2 NY) 295 F2d 583, 96 ALR2d 1085, cert den 368 US 989, 7 L Ed 2d 526, 82 S Ct 606, reh den 370 US 965, 8 L Ed 2d 835, 82 S Ct 1580 and cert den 370 US 937, 8 L Ed 2d 806, 82 S Ct 1577 (proper to offset against award to seaman's widow the sums paid by insurance carrier of defendant shipowner); *Walsh v Boston Sand & Gravel Co.* (DC Mass) 175 F Supp 411 (crediting amounts previously paid by defendant to injured seaman in order "to avoid double payment"); *Spielman v New York, N. H. & H. R. Co.* (DC NY) 147 F Supp 451 (previous payments of plaintiff's medical expenses by railroad would be deducted from amount of judgment thereafter awarded); *Lundy v Calmar S.S. Corp.* (DC NY) 96 F Supp 19 (advance payments by defendant shipowner would be deducted from libellant's damages).

Practice References Louisell and Mueller, Federal Evidence § 179.

6. Liability Insurance (Rule 411) [483-495]

a. In General; In Negligence Cases [483-492]

(1). Overview [483-487]

§ 483 General rule of inadmissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a broad general rule, evidence directly or indirectly showing or tending to show that the defendant in a personal injury or death action carries liability insurance, protecting himself against liability to third persons on account of his own negligence, is not admissible. 40 Conversely, if the plaintiff in a personal injury action makes no

attempt to show that the defendant is indemnified from loss by an insurance company, it is not proper for the defendant to offer testimony showing that he is not indemnified by insurance. 41 Under this rule, any evidence offered by the plaintiff, through the direct examination of his own witnesses or the introduction of documents, that the defendant carries liability insurance should be excluded. 42

The general rule of inadmissibility has been codified in the Rules of Evidence which provide that evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. 43 Accordingly, under FRE Rule 411 both disclosure of evidence of insurance, 44 or lack of insurance, 45 is inadmissible. However, the Rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, 46 such as proof of agency, ownership, or control, 47 or bias or prejudice of a witness. 48

The Federal Rules of Evidence, rather than state rules, govern the admissibility of evidence of insurance in diversity cases. 49

- ◆ Practice guide: Testimony regarding insurance, excluded under FRE Rule 411, should be given outside the presence of the jury, to produce an accurate record for review rather than mere speculation. 50

- ◆ Observation: The courts generally deny the right of the plaintiff's attorney to cross-examine the defendant, or a witness for the defendant, with the purpose of eliciting a statement of the fact that he carries liability insurance or of eliciting such fact upon redirect examination of the plaintiff. 51

- ◆ Comment: A provision of the discovery rules expressly permits discovery of "the existence and contents" of any insurance agreements which might provide funds to satisfy a judgment, even while recognizing that evidence of insurance is not "by reason of disclosure admissible" at trial. 52 There is no indication that the framers of Rule 411 intended in any way to affect discovery rights respecting insurance under the Civil Rules, and Rule 411 should not be so read. Indeed, the discovery of insurance was made possible mainly in the interests of encouraging pretrial settlement, 53 and the discovery rule thus serves the basic policy underlying Rule 408, which deals with compromises and offers to compromise. 54

§ 483 ----General rule of inadmissibility [SUPPLEMENT]

Case authorities:

In personal injury action by shingle deliverer who fell through hole in roof against general contractor building garage, contractor's testimony that he was "missionary builder" and was not being paid for job did not open door to admit evidence that contractor carried insurance, and trial court did not err in excluding evidence of contractor's insurance, where contractor's statements were not knowing and flagrant misstatements about absence or presence of insurance, indirect information as to contractor's insurance was relayed to jury during voir dire, and trial court instructed jury not be influenced by sympathy for or against any party in action. *Canape v Peterson* (1994, Colo App) 878 P2d 83, reh den (Apr 1, 1994) and cert gr (Colo) 1994 Colo LEXIS 682.

Footnotes

Footnote 40. *Robins Engineering, Inc. v Cockrell* (Ala) 354 So 2d 1; *Poulin v Zartman* (Alaska) 548 P2d 1299; *Waid v Bergschneider*, 94 Ariz 21, 381 P2d 568; *Strahan v Webb*, 231 Ark 426, 330 SW2d 291; *Royal Globe Ins. Co. v Superior Court of Butte County*, 23 Cal 3d 880, 153 Cal Rptr 842, 592 P2d 329 (ovrld on other grounds by *Moradi-Shalal v Fireman's Fund Ins. Companies*, 46 Cal 3d 287, 250 Cal Rptr 116, 758 P2d 58); *Staples v Hoefke* (2nd Dist) 189 Cal App 3d 1397, 235 Cal Rptr 165; *Prudential Property & Casualty Ins. Co. v District Court of Seventeenth Judicial Dist. (Colo)* 617 P2d 556; *Douglass v Galvin* (Fla App D2) 130 So 2d 282; *Schaefer v Athens*, 120 Ga App 301, 170 SE2d 339; *Evans v Park* (App) 112 Idaho 400, 732 P2d 369; *Kirbach v Commonwealth Edison Co. (5th Dist)* 40 Ill App 3d 587, 352 NE2d 468; *Price v King*, 255 Iowa 314, 122 NW2d 318; *Sales v Bradley* (Ky) 356 SW2d 588; *Moffett v Lumpkin* (La App 4th Cir) 382 So 2d 278; *Carver v Lavigne*, 160 Me 414, 205 A2d 159; *Schneider v Schneider*, 160 Md 18, 152 A 498, 72 ALR 449; *Stehouwer v Lewis*, 249 Mich 76, 227 NW 759, 74 ALR 844; *Schultz v Swift & Co.*, 210 Minn 533, 299 NW 7; *Mid-Continent Aircraft Corp. v Whitehead* (Miss) 357 So 2d 122; *Callaway v Lilly* (Mo App) 605 SW2d 155; *Fielding v Publix Cars*, 130 Neb 576, 265 NW 726, 105 ALR 1306; *Brandimarte v Green*, 37 NJ 557, 182 A2d 562; *Akin v Lee*, 206 NY 20, 99 NE 85; *Krieger v Insurance Co. of North America* (4th Dept) 66 App Div 2d 1025, 411 NYS2d 730; *Modern Electric Co. v Dennis*, 259 NC 354, 130 SE2d 547; *Vega v Evans*, 128 Ohio St 535, 191 NE 757, 95 ALR 381; *Walton v Bennett* (Okla) 376 P2d 240; *Sherrick v Landstrom*, 229 Or 415, 367 P2d 432; *Patton v Franc*, 404 Pa 306, 172 A2d 297; *Harrod v Ciamciarulo*, 95 RI 504, 188 A2d 459; *Crocker v Weathers*, 240 SC 412, 126 SE2d 335; *Colwell v Jones*, 48 Tenn App 353, 346 SW2d 450; *Eoff v Hal & Charlie Peterson Foundation* (Tex App San Antonio) 811 SW2d 187; *Tjas v Proctor* (Utah) 591 P2d 438 (ovrld on other grounds by *Williams v Melby* (Utah) 699 P2d 723) as stated in *Donahue v Durfee* (Utah App) 780 P2d 1275, 118 Utah Adv Rep 64, review pending (Utah) 121 Utah Adv Rep 56 and cert den (Utah) 129 Utah Adv Rep 58 and cert den (Utah) 789 P2d 33; *Landry v Hubert*, 100 Vt 268, 137 A 97, appeal after remand 101 Vt 111, 141 A 593, 63 ALR 396; *Schotis v North Coast Stevedoring Co.*, 163 Wash 305, 1 P2d 221, 78 ALR 1427; *Barnette v Doyle* (Wyo) 622 P2d 1349.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 3.

Practice References *Louisell and Mueller, Federal Evidence* §§ 192, 193.

Forms: Motion–In limine–Mention of insurance. 23A Am Jur Pl & Pr Forms (Rev), Trial, Form 93.

Footnote 41. *Waid v Bergschneider*, 94 Ariz 21, 381 P2d 568; *Miller v Alvey*, 246 Ind 560, 207 NE2d 633; *Reno v Erickstein*, 209 Mont 36, 679 P2d 1204; *Taulborg v Andresen*, 119 Neb 273, 228 NW 528, 67 ALR 642; *Piechuck v Magusiak*, 82 NH 429, 135 A 534; *Kresel v Giese* (ND) 231 NW2d 780; *Benton v Johnson*, 45 Or App 959, 609 P2d 890, review den 289 Or 373.

Where there are two or more defendants, it is improper to show that one is not protected

by insurance. *Derrick v Rock*, 218 Ark 339, 236 SW2d 726.

Annotation: 4 ALR2d 761 § 4.

Footnote 42. *Crossler v Safeway Stores, Inc.*, 51 Idaho 413, 6 P2d 151, 80 ALR 463; *Fielding v Publix Cars*, 130 Neb 576, 265 NW 726, 105 ALR 1306; *Akin v Lee*, 206 NY 20, 99 NE 85; *Lytton v Marion Mfg. Co.*, 157 NC 331, 72 SE 1055; *Vasquez v Pettit*, 74 Or 496, 145 P 1066.

A statement by a physician testifying for the plaintiff, in an action for personal injuries, that he had been called to attend the plaintiff by a physician representing an insurance company, by which a part of his bill might or would be paid, was improper. *Schotis v North Coast Stevedoring Co.*, 163 Wash 305, 1 P2d 221, 78 ALR 1427.

Footnote 43. FRE Rule 411; Uniform Rules of Evidence, Rule 411.

◆ Comment: The rule includes contributory negligence or other fault of a plaintiff as well as fault of a defendant. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 411.

Footnote 44. *Posttape Associates v Eastman Kodak Co.* (CA3 Pa) 537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832, appeal after remand (ED Pa) 450 F Supp 407, 23 UCCRS 855; *Rozark Farms, Inc. v Ozark Border Electric Cooperative* (CA8 Mo) 849 F2d 306, 25 Fed Rules Evid Serv 1344 (applying Missouri law); *Hannah v Haskins* (CA8 Mo) 612 F2d 373, 5 Fed Rules Evid Serv 451; *Charter v Chleborad* (CA8 Neb) 551 F2d 246, 1 Fed Rules Evid Serv 878, cert den 434 US 856, 54 L Ed 2d 128, 98 S Ct 176.

Annotation: Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541 §§ 3, 4.

Footnote 45. *Ikerd v Lapworth* (CA7 Ind) 435 F2d 197, 14 FR Serv 2d 1007.

Footnote 46. § 493.

Footnote 47. § 494.

Footnote 48. § 495.

Footnote 49. *Reed v General Motors Corp.* (CA5 La) 773 F2d 660, 19 Fed Rules Evid Serv 826.

Footnote 50. *Hunziker v Scheidemantle* (CA3 Pa) 543 F2d 489, 1 Fed Rules Evid Serv 323; *Posttape Associates v Eastman Kodak Co.* (CA3 Pa) 537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832, appeal after remand (ED Pa) 450 F Supp 407, 23 UCCRS 855.

Footnote 51. 81 Am Jur 2d, Witnesses § 817.

Footnote 52. FR Civ P, Rule 26(b)(2), discussed in 23 Am Jur 2d, Depositions and Discovery § 42.

Footnote 53. Advisory Committee Notes to FR Civ P, Rule 26(b)(2).

§ 484 Purpose of rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The principle of exclusion expressed in Rule 411⁵⁵ is a specific application of the concept of relevancy defined in Rule 401. But it has been said to be more than that; there is a widespread belief that the mention of insurance will induce juries in close cases to opt for a finding of liability, where otherwise they might find nonliability out of sympathy for a defendant thought personally responsible for paying any judgment; it is widely feared as well that the mention of insurance invites higher awards.⁵⁶ In other words, there is a feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds,⁵⁷ and result in extravagant jury verdicts.⁵⁸ The chief reason for denying its admissibility has been said to lie in the fact that it tends to influence and prejudice jurors by imparting to them the information that whatever verdict they may render will be immaterial to the defendant, since he will not have to pay it.⁵⁹

Technically, such evidence is inadmissible because it is irrelevant; the fact that the defendant carries liability insurance is not relevant to the fact of his liability,⁶⁰ though the situation may be different if punitive damages are sought.⁶¹ Clearly, the mere fact that insurance to protect against the consequences of negligence is carried by one charged with such consequences is no evidence of negligent propensities,⁶² and it cannot be introduced as an admission of negligence.⁶³ However, where the defendant concedes that he is less likely to use care if insured, than if uninsured, the fact that he does carry insurance becomes competent evidence upon the question of his negligence.⁶⁴

♦ Observation: It has been suggested that the theory that insurance will incline a party toward carelessness is tenuous at best, and—at least in the common context of automobile accidents, where the exercise of care is directly related to the instinct for self-preservation—probably wholly fallacious, and that the theory that the absence of coverage will incline a person toward the exercise of care, or on the contrary that it indicates general carelessness, hence negligence on a particular occasion, seems likewise improbable.⁶⁵

Footnotes

Footnote 55. FRE Rule 411; Uniform Rules of Evidence, Rule 411.

Footnote 56. See *Ouachita Nat. Bank v Tosco Corp.* (CA8 Ark) 686 F2d 1291, 11 Fed Rules Evid Serv 714, 34 FR Serv 2d 1131, on reh, en banc (CA8 Ark) 716 F2d 485, 13 Fed Rules Evid Serv 1911 (Rule 411 is designed to avoid the possibility of prejudice to the insured party; it being generally thought that the jury's knowledge that a plaintiff is

receiving insurance benefits, or that a defendant is carrying liability insurance, might serve to decrease or increase, respectively, the amount of damages awarded by the jury); *Posttape Associates v Eastman Kodak Co.* (CA3 Pa) 537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832, appeal after remand (ED Pa) 450 F Supp 407, 23 UCCRS 855 (knowledge that a party is insured may affect a verdict if the jury knows that some of the loss has been paid by insurance or that it would satisfy a judgment against a defendant).

Footnote 57. *Williams v Bennett* (CA11 Ala) 689 F2d 1370, 35 FR Serv 2d 251, cert den 464 US 932, 78 L Ed 2d 305, 104 S Ct 335.

Footnote 58. *Kiernan v Van Schaik* (CA3 Del) 347 F2d 775, 9 FR Serv 2d 47a.1, Case 1.

Footnote 59. *Ikerd v Lapworth* (CA7 Ind) 435 F2d 197, 14 FR Serv 2d 1007; *Gilliam v Gerhardt*, 34 Hawaii 466; *Crossler v Safeway Stores, Inc.*, 51 Idaho 413, 6 P2d 151, 80 ALR 463; *Akin v Lee*, 206 NY 20, 99 NE 85.

Admission in a tort action of evidence showing that the defendant is insured creates a substantial likelihood of misuse. *Eichel v New York Cent. R. Co.*, 375 US 253, 11 L Ed 2d 307, 84 S Ct 316.

Footnote 60. *Feins v Ralby*, 245 Mass 228, 139 NE 530, 28 ALR 511; *Lytton v Marion Mfg. Co.*, 157 NC 331, 72 SE 1055; *Butcher v Stull*, 140 W Va 31, 82 SE2d 278.

Footnote 61. See *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564, noting that while statements that defendant in a negligence action is insured or uninsured typically have been forbidden under FRE Rule 411, because they are irrelevant to the issue of whether a defendant acted negligently or otherwise wrongfully, where punitive damages are sought, the ultimate source of payment is relevant for the jury must know the impact an award will have on the defendant to properly assess punitive damages.

Footnote 62. *Reid v Owens*, 98 Utah 50, 93 P2d 680, 126 ALR 55.

Footnote 63. *Sears v Southern Pacific Co.* (CA9 Cal) 313 F2d 498, 6 FR Serv 2d 926; *Davis v North Carolina Shipbuilding Co.*, 180 NC 74, 104 SE 82; *Rinehart & Dennis Co. v Brown*, 137 Va 670, 120 SE 269.

Footnote 64. *Herschensohn v Weisman*, 80 NH 557, 119 A 705, 28 ALR 514.

Footnote 65. *Louisell and Mueller*, Federal Evidence § 193.

§ 485 Unresponsive or inadvertent reference to insurance

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If counsel propounds a question which calls for proper testimony in response, the fact that an unresponsive or inadvertent answer includes a reference to insurance will not

generally be a ground for declaring a mistrial. 66 In some cases a distinction has been made between the proper rule to be applied where counsel examines his own witness and where he examines a witness of the adverse party, it being said that it cannot be presumed that the plaintiff's counsel in cross-examining the defendant's witness will know what the answer will be, as might be the case if the plaintiff or one of his witnesses were testifying. 67

Footnotes

Footnote 66. *Corbett v Borandi* (CA3 Pa) 375 F2d 265; *Marks v Mobil Oil Corp.* (ED Pa) 562 F Supp 759, 13 Fed Rules Evid Serv 506, *affd without op* (CA3 Pa) 727 F2d 1100 and *affd without op* (CA3 Pa) 727 F2d 1100; *Gleaton v Green* (CA4 SC) 156 F2d 459; *Gleaton v Green* (CA4 SC) 156 F2d 459; *Garee v McDonell* (CA7 Ill) 116 F2d 78, *cert den* 313 US 561, 85 L Ed 1521, 61 S Ct 837; *Pillsbury Flour Mills Co. v Miller* (CA8 Mo) 121 F2d 297; *Zanetti Bus Lines, Inc. v Hurd* (CA10 Wyo) 320 F2d 123; *Brandwein v Elliston*, 268 Ala 598, 109 So 2d 687; *Muehlebach v Mercer Mortuary & Chapel, Inc.*, 93 Ariz 60, 378 P2d 741; *Ragon v Day*, 228 Ark 215, 306 SW2d 687; *Little v Superior Court of Orange County*, 55 Cal 2d 642, 12 Cal Rptr 481, 361 P2d 13 (*recognizing rule*); *Lord v Poore* (Sup) 48 Del 595, 108 A2d 366; *Douglass v Galvin* (Fla App D2) 130 So 2d 282; *Steinmetz v Chambley*, 90 Ga App 519, 83 SE2d 318; *Barry v Arrow Transp. Co.*, 83 Idaho 41, 358 P2d 1041; *American Nat. Bank & Trust Co. v Rockford* (2d Dist) 55 Ill App 3d 806, 13 Ill Dec 620, 371 NE2d 337; *Stewart v Hilton*, 247 Iowa 988, 77 NW2d 637; *Borth v Borth*, 221 Kan 494, 561 P2d 408; *Herald v Gross* (Ky) 343 SW2d 831; *Carver v Lavigne*, 160 Me 414, 205 A2d 159; *Reardon v Buck*, 335 Mich 318, 55 NW2d 847; *Ostrowski v Mockridge*, 242 Minn 265, 65 NW2d 185, 47 ALR2d 733; *Adams v Misener*, 113 Mont 550, 131 P2d 472; *Segebart v Gregory*, 160 Neb 64, 69 NW2d 315; *Sleeper v World of Mirth Show, Inc.*, 100 NH 158, 121 A2d 799; *Knapp v Fulton County Nat. Bank & Trust Co.* (3d Dept) 6 App Div 2d 742, 174 NYS2d 296, *app den* 5 NY2d 705; *John W. Simmons Trucking Co. v Briscoe* (Okla) 373 P2d 49; *Strout v American Stores Co.*, 385 Pa 230, 122 A2d 797; *Tucker v Reynolds*, 268 SC 330, 233 SE2d 402; *Chapin v Hunt* (Tex Civ App Beaumont) 521 SW2d 123, *writ diss w o j* (Jul 9, 1975) and *rehg of writ of error overr* (Jul 23, 1975); *Simmons v Boyd*, 199 Va 806, 102 SE2d 292; *Lyster v Metzger*, 68 Wash 2d 216, 412 P2d 340; *Adkins v Smith*, 142 W Va 772, 98 SE2d 712; *Elite Cleaners & Tailors, Inc. v Gentry* (Wyo) 510 P2d 784.

Plaintiff corporation was not entitled to a new trial where its compensation insurance carrier's interest as a party plaintiff was inadvertently disclosed to the jury by a label on an exhibit delivered to the jury by court staff during deliberations. *Heuss v Rockwell Standard Corp.* (CA6 Mich) 495 F2d 1207.

Where the word "insurance" was used voluntarily by one of the defendants on cross-examination, and not through any fault or improper question of the plaintiff's attorney, the defendants could not be heard to complain of any prejudice that might have resulted to them thereby. *Flatt v Hill* (Tex Civ App Dallas) 379 SW2d 926, *writ ref n r e* (Jul 29, 1964) and *rehg of writ of error overr* (Oct 7, 1964).

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 12.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541 § 10.

Practice References The grounds for declaring a mistrial are generally discussed in 75B Am Jur 2d, Trial §§ 1715 et seq.

Footnote 67. *Hatfield v Levy Bros.*, 18 Cal 2d 798, 117 P2d 841.

A mistrial was not warranted where the insurance reference was by the assistant superintendent of the defendant and was not responsive to counsel for the plaintiff's question, where counsel did not pursue or emphasize the subject. *Flynn v Grand Cent. Public Market, Inc.* (2nd Dist) 176 Cal App 2d 243, 1 Cal Rptr 237.

§ 486 Reference to insurance as part of an admission by defendant

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the defendant makes a statement amounting to an admission of liability, it will not be rendered inadmissible by the fact that the jury may incidentally be apprised thereby of the fact that the defendant is covered by liability insurance. 68 However, where it is not necessary to bring to light the matter of insurance in questioning witnesses as to admissions of the defendant, such references are improper and should be omitted. 69 It has been said that counsel should be required to elicit the testimony in such a way as to preclude revelation of the irrelevant fact of insurance unless the reference to insurance is itself freighted with admission. 70 Of course, where the defendant does not admit liability, his mere statement that he carries insurance does not come within the exception concerning a reference to insurance as part of an admission by the defendant. 71

Footnotes

Footnote 68. *Hunt v Ward*, 262 Ala 379, 79 So 2d 20; *Dillon v Wallace* (1st Dist) 148 Cal App 2d 447, 306 P2d 1044; *Pruitt v Pierce*, 100 Ga App 808, 112 SE2d 327; *Cameron v Columbia Builders, Inc.*, 212 Or 388, 320 P2d 251; *Taylor v Owen* (Tex Civ App San Antonio) 290 SW2d 771, writ ref n r e; *Gittens v Lundberg*, 3 Utah 2d 392, 284 P2d 1115.

No prejudicial error existed where the plaintiff testified that the defendant stated to her that he carried insurance and said: "You go after them and we will back you up," where the judge instructed the jury that the statement was admitted only to determine whether it constituted an admission against interest and should not affect the jury's deliberations. *Hawke v Burns* (4th Dist) 140 Cal App 2d 158, 294 P2d 1008.

Admissions by the owner of an automobile showing his knowledge of the recklessness and speeding propensities of his son are not rendered inadmissible in an action based on the son's alleged negligent operation of the automobile by the fact that they included a statement that the father was carrying liability insurance to protect his son. *Reid v*

Owens, 98 Utah 50, 93 P2d 680, 126 ALR 55.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 8.

Footnote 69. Anderson v Mothershead, 19 Cal App 2d 97, 64 P2d 995.

In an action for injuries caused to a patient in a nursing home, the exclusion of evidence with regard to a telegram sent by the owner to his insurer which stated that a nurse caused the injury by bumping into the patient was not reversible error where numerous witnesses had testified that the owner had remarked that the nurse had bumped into the patient, such evidence being merely cumulative. Lagrone v Helman, 233 Miss 654, 103 So 2d 365.

Where evidence as to the defendant's admission of liability had been admitted previously, the trial court did not err in excluding the defendant's statement to the plaintiff which included a reference to insurance. Cameron v Columbia Builders, Inc., 212 Or 388, 320 P2d 251.

Footnote 70. Reid v Owens, 98 Utah 50, 93 P2d 680, 126 ALR 55.

Footnote 71. The plaintiff's testimony that the defendant said, "I am sorry this happened. I have got plenty insurance," does not come within the exception permitting the mention of insurance as part of an admission by the defendant. Lindsey v Rogers (Mo App) 220 SW2d 937.

The defendant's alleged statement made a few minutes after the accident, to the effect, "Don't worry, I have \$50,000 in insurance," was properly excluded, since it was not an admission of guilt or of liability, nor could it be admitted as part of the res gestae, although if the statement had included such an admission, it would have been properly admitted even though reference to insurance was therein continued. Ashworth v Morrison (App, Lawrence Co) 26 Ohio Ops 2d 25, 93 Ohio L Abs 503, 196 NE2d 465, motion overr.

Payment of a property damage claim to one defendant by the insurance company of the other defendant was not admissible in an action against both defendants for personal injury where the payment was made by the defendant's insurance company without his knowledge. City Transp. Co. v Vatsures (Tex Civ App Waco) 278 SW2d 373, writ dismissed.

§ 487 When insurer is party to the action

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the statutes regarding liability insurance in some jurisdictions, it is proper to join the defendant's insurer as a party defendant, 72 and of course where that is the case, it is

manifest to the jury that the defendant carries liability insurance. 73 But the fact that the existence of insurance was admissible, as where an insurance company is named as a defendant and there is independent substantive evidentiary relevance to the fact that each party is insured, does not mean that the court is bound, or even permitted to admit the amount of insurance coverage. 74 In a federal diversity case in which the court sits in a state, such as Louisiana, which has a direct action statute allowing the plaintiff to sue an insurer directly, the application of FRE Rule 411 has the above result. 75

When an insurer is a party of record, a division of authority exists as to the necessity of separate trials to avoid disclosure of the existence of liability coverage on the issue of liability for negligence. Where one of several issues at trial would have disclosed the existence of liability insurance coverage, a motion for a separate trial on that issue may be granted. 76 However, other cases have denied a motion for a separate trial made by a third-party defendant insurance company, where the presence of the insurance company, as a party of record, would reveal the existence of insurance, as in motor vehicle cases where the existence of liability coverage of automobiles was considered so common as to minimize any potential prejudice. 77

Footnotes

Footnote 72. 7A Am Jur 2d, Automobile Insurance § 454.

Footnote 73. *Reeves v Tittle* (Tex Civ App) 129 SW2d 364, writ ref.

Under a statute providing that the insurance company could be made a party in an action against the insured, and permitting the trial court to try the liability issue separately from the insurance coverage, the trial court's order enjoining any reference to the defendant insurance company during the trial was invalid. *Vuchetich v General Casualty Co.*, 270 Wis 552, 72 NW2d 389.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 14.

Footnote 74. *Reed v General Motors Corp.* (CA5 La) 773 F2d 660, 19 Fed Rules Evid Serv 826 (where each party had stipulated that they were insured and gave the names of their insurers, it was error under FRE Rule 411 to admit evidence that defendant had coverage in the amount of only \$5,000 per person and \$10,000 per accident).

Footnote 75. *Reed v General Motors Corp.* (CA5 La) 773 F2d 660, 19 Fed Rules Evid Serv 826.

Footnote 76. *Bowie v Sorrell* (DC Va) 113 F Supp 373, revd on other grounds (CA4 Va) 209 F2d 49, 43 ALR2d 781.

A court may order bifurcation of the trial and the impaneling of two juries to consider separately the issues of liability and of waiver and/or estoppel of the statute of limitations where a jury hearing evidence of waiver and estoppel would become aware that the defendant was insured, thus prejudicing the defendant on the issue of liability. *Bowytz v Skolnick* (DC Del) 113 FRD 635.

(2). Prejudicial Effect [488-492]

§ 488 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the introduction of evidence from which the jury is informed or may infer that the defendant carries liability insurance may be erroneous, the prejudicial or nonprejudicial effect of such an error is also to be considered, and in this respect the courts have taken into account various factors or circumstances. 78 For instance, a question or reference as to insurance will ordinarily not be deemed prejudicial where such question or reference is merely cumulative, the matter of insurance having been previously brought to the attention of the jury in some other way. 79 In cases where it does not appear that there is any necessary relationship between an allegedly objectionable question or testimony and liability insurance, it will usually be held that no prejudicial error has been committed. 80 Where a reference to insurance leaves it in doubt as to whether it is liability insurance which is referred to, or some other type of insurance, and where it is uncertain whether it is the plaintiff's or the defendant's insurance to which the evidence refers, the courts are inclined to regard the reference to insurance as relatively harmless. 81

◆ **Observation:** The weighing of alleged prejudice arising from statements of counsel, in an action based on negligence, which disclose an adverse party's liability insurance coverage is a matter within the trial judge's discretion, determined by the circumstances under which the statement was made. 82

◆ **Caution:** The conduct of the defendant's counsel may be such as to estop him from successfully making the objection that a question or testimony as to insurance is such prejudicial error as to require the declaration of a mistrial; or it may be that a motion for a mistrial will be refused because the defendant's counsel does not make a timely objection. 83 In other words, the failure of counsel to request proper instructions of caution to avoid prejudice or injury to a client may constitute a waiver of objections to improper references which have been made to liability insurance coverage. 84 And since the admission of evidence regarding the defendant's insurance can prejudice only the defendant, it cannot be made the basis for a new trial on the motion of the plaintiff after an adverse verdict. 85

Disclosure that the defendant carries insurance is not reversible error where the case is tried by the court without a jury. 86

Footnotes

Footnote 78. Such evidence is not prejudicial where one defendant is a large corporation against which the jury would be as likely to find as against an insurance company. *Tuttle v Pacific Intermountain Express Co.*, 121 Utah 420, 242 P2d 764.

A judgment against an insured will be affirmed although the plaintiff's witness inadvertently mentions insurance, where there is no attempt improperly to influence the jury and it does not appear that the result of the trial was affected. *Colwell v Jones*, 48 Tenn App 353, 346 SW2d 450.

Footnote 79. *Packard v Moore*, 9 Cal 2d 571, 71 P2d 922; *McCullough v Langer*, 23 Cal App 2d 510, 73 P2d 649; *Jaenisch v Vigen*, 209 Minn 543, 297 NW 29.

But see *Somach v Norris* (Ala) 361 So 2d 1005, holding that references to insurance coverage during plaintiff's cross-examination, plaintiff's redirect examination, and closing argument amounted to reversible error whereas a single reference would have raised a question of waiver of objection.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 20.

Footnote 80. *Smith v Illinois Valley Ice Cream Co.* (2d Dist) 20 Ill App 2d 312, 156 NE2d 361; *Rhinehart v Lemmon* (Md) 29 A2d 279; *Johnson v Sleizer*, 268 Minn 421, 129 NW2d 761; *Ross v Burnham*, 91 NH 80, 13 A2d 733; *Budwee v New England Motors, Inc.*, 99 RI 663, 210 A2d 131; *Cummings v Tweed*, 195 SC 173, 10 SE2d 322; *H. J. Heinz Co. v Ashley* (Tex Civ App Galveston) 291 SW2d 427.

An improper reference to insurance could not be implied from the fact that the plaintiff's attorney asked her if a representative of the defendant had talked to her. *Montgomery v Vinzant* (Tex Civ App Fort Worth) 297 SW2d 350.

Annotation: 4 ALR2d 761 § 23.

Footnote 81. *Sutherland v Woodring*, 103 Ga App 205, 118 SE2d 846; *Ramsey v Deatherage* (Ky) 342 SW2d 715; *Huling v Finn*, 67 RI 369, 24 A2d 620.

Fact that a witness in rebuttal offered by the plaintiff gave the names of the persons whom he saw at the scene of the accident and that one of these persons was an insurance adjuster, did not authorize a mistrial, since the jury did not know the class of insurance handled or adjusted by such person or whether he appeared there in the capacity of a spectator or on business. *Rosenberg v Coman*, 134 Fla 768, 184 So 238.

An inadvertent reference to an "insurance adjuster" is not a ground for a new trial, since it could refer to accident as well as indemnity insurance. *Crawford v Alexander* (Ky) 259 SW2d 476.

An inadvertent reference to an insurance company in connection with a hospital bill did not justify reversal where the reference could mean hospitalization as well as public liability coverage. *Siratt v Worth Const. Co.* (Tex Civ App) 263 SW2d 842, revd 154

Tex 84, 273 SW2d 615.

Annotation: 4 ALR2d 761 § 22.

Footnote 82. Generally, as to the effect of statements by counsel that defendant carries liability insurance, see 75A Am Jur 2d, Trial §§ 618-620.

Footnote 83. Gorton v Doty, 57 Idaho 792, 69 P2d 136; Ritter v Hatteberg (2d Dist) 14 Ill App 2d 548, 145 NE2d 119; Gamble v Lewis, 227 Ind 455, 85 NE2d 629; Ramsey v Deatherage (Ky) 342 SW2d 715; Grossman v Tiner (Tex Civ App Waco) 347 SW2d 627, writ ref n r e (Oct 11, 1961) and reh'g of writ of error overr (Nov 8, 1961); Hendrickson v Konopaski, 14 Wash App 390, 541 P2d 1001.

A mistrial will be refused where the defendant fails to ask for a ruling on his assignment of misconduct when a witness volunteers a statement about insurance. Gluckstein v Lipsett, 93 Cal App 2d 391, 209 P2d 98.

Where a witness inadvertently referred to insurance and the trial court on its own motion directed that the statement be ignored and the plaintiff made no objection, the plaintiff could not later claim a mistrial. Segebart v Gregory, 160 Neb 64, 69 NW2d 315.

It was proper to deny a motion for a mistrial where carrier's name was introduced as a direct result of improper conduct of defendant and without any intention by plaintiff to elicit such information and where the jury's determination of defendant's liability was not influenced by the mere mention of the carrier's name. Kowalski v Loblaws, Inc. (4th Dept) 61 App Div 2d 340, 402 NYS2d 681.

The court would not consider whether the mention of insurance prejudiced the defendant where the defendant only objected to the evidence, which was stricken, and did not move for a mistrial. Walton v Bennett (Okla) 376 P2d 240.

Annotation: 4 ALR2d 761 § 24.

Footnote 84. Gleaton v Green (CA4 SC) 156 F2d 459; Complete Auto Transit, Inc. v Wayne Broyles Engineering Corp. (CA5 Ala) 351 F2d 478.

Footnote 85. Muenzler v Phillips (Okla) 276 P2d 221.

The plaintiff was clearly not prejudiced by the defendant's mention of his insurance carrier, and there was no error in the denial of a right to cross-examine the defendant on any question involving the defendant's insurance carrier. Falkner v Martin, 74 NM 159, 391 P2d 660 (superseded by statute on other grounds as stated in Safeco Ins. Co. v United States Fidelity & Guaranty Co., 101 NM 148, 679 P2d 816).

Footnote 86. Rutherford v Bentz, 345 Ill App 532, 104 NE2d 343.

§ 489 Reference to universal or mandatory automobile insurance

[View Entire Section](#)

In view of the general practice of automobile owners to purchase liability insurance, and of the general knowledge of jurors of the prevalence of such practice, evidence in an automobile accident case suggesting that the defendant is insured is not generally considered prejudicial to the defendant. 87 Clearly, where the insurance is compulsory, it is not error for plaintiff's counsel to so examine the defendant's witness as to elicit the fact that the defendant is insured. 88

Footnotes

Footnote 87. Cuccarese v Soloman (CA2 NY) 405 F2d 866; B-Amused Co. v Millrose Sporting Club, Inc. (DC NY) 168 F Supp 709; Crockett v Boysen (DC Minn) 26 FRD 148, 4 FR Serv 2d 773; Snowwhite v State, 243 Md 291, 221 A2d 342, 19 ALR3d 1155; Reeves v Gentile (Utah) 813 P2d 111, 161 Utah Adv Rep 14 (recognizing that it is common knowledge that most drivers have automobile insurance and that most businesses have liability insurance).

Footnote 88. Mercer v Braswell, 140 Ga App 624, 231 SE2d 431; Yellow Cab Co. v Bradin, 172 Md 388, 191 A 717; Shadwick v Hills (Franklin Co) 79 Ohio App 143, 34 Ohio Ops 498, 47 Ohio L Abs 375, 69 NE2d 197.

In the age of compulsory automobile liability insurance, only a rare individual would not be aware that defendant was insured, and thus any prejudice from the mention of insurance is minimal. Galuska v Arbaiza (2d Dept) 106 App Div 2d 543, 482 NYS2d 846.

The rule that notice to the jury of insurance should be avoided is inapplicable where insurance or indemnity is required by law and the insurer may be joined as a defendant. Scott v Wells, 214 SC 511, 53 SE2d 400.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 13.

§ 490 Cure of error

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In regard to whether the error in injecting the question of insurance into the case may be cured by the exclusion of the objectionable matter or by an instruction to disregard it, the general rule appears to be that in the absence of anything indicating that the verdict returned was adversely affected, or anything to indicate persistent and studied attempts to bring the objectionable matter before the jury, prompt action in striking improper references to the defendant's insurance from the record, coupled with instructions

admonishing the jury to disregard such matters, sufficiently protects the defendant's rights without requiring reversal of the judgment. 89

◆ **Caution:** A defendant may be estopped on appeal to claim prejudice from the trial court's failure to either declare a mistrial or give a cautionary instruction, if after the plaintiff makes a statement implying that the defendant was protected by liability insurance, the defendant does not exercise the option to request that a cautionary instruction be given. 90

However, there are cases in which the view is taken, or the circumstances are such, or the attempt is so deliberate, that the prejudicial effect of an attempt to inject improperly into the evidence in an accident case matters from which the jury might infer that the defendant was insured against liability cannot be cured by its exclusion and by instruction to the jury to disregard it. 91

Where the fact that defendant is insured is admissible, a trial court's admonitions to a jury at the trial's conclusion that they are not to consider the liability limits of the parties' insurance policies in determining who, if anyone, was negligent, does not suffice to cure the error of admitting the limits of insurance coverage. 92

Footnotes

Footnote 89. *Corbett v Borandi* (CA3 Pa) 375 F2d 265; *Lenz v Southern Pacific Co.* (CA5 Tex) 493 F2d 471; *Wagnon v Patterson*, 260 Ala 297, 70 So 2d 244 (holding that the court's lengthy instruction warning the jury not to consider insurance nullified any inadvertent reference to insurance by any plaintiff); *Malco Theatres, Inc. v McLain*, 196 Ark 188, 117 SW2d 45; *Douglass v Webb* (2nd Dist) 209 Cal App 2d 290, 26 Cal Rptr 60; *Jaekel v Funk*, 111 Colo 179, 138 P2d 939; *Smith v Greene*, 144 Ga App 739, 242 SE2d 312; *Barry v Arrow Transp. Co.*, 83 Idaho 41, 358 P2d 1041; *Bortz v Henne*, 415 Pa 150, 204 A2d 52.

No prejudice was shown where deputy marshal in response to juror's question had told him that one of persons who had been in regular attendance at trial was connected with underwriting company where court offered to admonish jury that matter of insurance had nothing to do with case and all parties rejected that offer and where there was no showing that jury discussed matter. *Koppinger v Cullen-Schiltz & Associates* (CA8 Iowa) 513 F2d 901.

If any prejudice possibly arose from plaintiff's inadvertent comment that "this won't cost him [defendant] one red cent," that prejudice was cured, where court promptly instructed jury to disregard plaintiff's comment. *Borth v Borth*, 221 Kan 494, 561 P2d 408.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 26.

Footnote 90. *Belanger v Silva*, 120 RI 19, 384 A2d 605.

Footnote 91. *Boyne v Schulte* (Mo App) 222 SW2d 503; *Akin v Lee*, 206 NY 20, 99 NE 85; *King v Starr*, 43 Wash 2d 115, 260 P2d 351 (holding that a deliberate reference to the

fact that the defendant had no insurance was not eradicated by the court's instruction to the jury to disregard it, and warranted new trial).

A failure to declare a mistrial is erroneous where the plaintiff, on direct examination, twice quoted the defendant as saying he had insurance, since an admonition to disregard such evidence introduced in bad faith is insufficient. *Lindsey v Rogers* (Mo App) 220 SW2d 937.

Annotation: 4 ALR2d 761 § 26.

Footnote 92. *Reed v General Motors Corp.* (CA5 La) 773 F2d 660, 19 Fed Rules Evid Serv 826.

§ 491 Where defendant opened door to reception of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the defendant's counsel opens the door to a certain line of inquiry, he cannot object if the inquiry when pursued by the plaintiff's counsel brings to light the fact that the defendant is covered by liability insurance. 93 In particular, under a statutory provision to the effect that when part of a conversation is given in evidence the whole on the same subject may be inquired into by the other parties, it has been held that where the defendant brings out on direct examination part of a conversation relative to an accident, the plaintiff may inquire fully into the entire conversation on cross-examination, although the fact that the defendant is insured is thereby incidentally disclosed. 94 Similarly, where the plaintiff injects the matter of insurance into the case, the defendant may establish the fact that he is not protected by liability insurance. 95

Where there is uncertainty as to whose insurance company the reference to insurance refers to or whether it is to liability insurance or some other type of insurance, the reference is harmless. 96

Footnotes

Footnote 93. *Villa Rica v Couch* (CA5 Ga) 281 F2d 284; *Garee v McDonell* (CA7 Ill) 116 F2d 78, cert den 313 US 561, 85 L Ed 1521, 61 S Ct 837; *Turner v Modern Beauty Supply Co.*, 152 Fla 3, 10 So 2d 488; *Seyferlich v Maxwell* (1st Dist) 28 Ill App 2d 469, 171 NE2d 806; *Dirks v Gates*, 182 Kan 581, 322 P2d 750; *Ramsey v Deatherage* (Ky) 342 SW2d 715; *Cobb v Insured Lloyds* (La App 3d Cir) 387 So 2d 13, 15 ALR4th 896, cert den (La) 394 So 2d 615; *Missey v Kwan* (Mo App) 595 SW2d 460; *Reicheneker v Seward*, 203 Neb 68, 277 NW2d 539; *Vanni v Cloutier*, 100 NH 272, 124 A2d 204; *Tuttle v Suznevich*, 394 Pa 614, 149 A2d 888; *Gragg v Williams* (Tex Civ App Fort Worth) 310 SW2d 394; *Simmons v Boyd*, 199 Va 806, 102 SE2d 292; *Reynolds v Donoho*, 39 Wash 2d 451, 236 P2d 552.

Where the defendant's counsel questioned a witness as to his occupation and received the

answer, "I'm a special investigator," the plaintiff's counsel had the right on cross-examination to bring out the fact that the witness was employed by an insurance company and also the relationship of that insurance company to the case, since it might affect the credibility of the witness and the weight to be given his testimony. *Leavitt v St. Louis Public Service Co.* (Mo App) 340 SW2d 131.

Where the defendant puts an insurance adjuster on the stand, the plaintiff may, on cross-examination, bring out the fact of employment by the insurance company representing the defendant. *Butcher v Stull*, 140 W Va 31, 82 SE2d 278.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 10.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541 § 8.

Footnote 94. *Hatfield v Levy Bros.*, 18 Cal 2d 798, 117 P2d 841.

Footnote 95. *Stehouwer v Lewis*, 249 Mich 76, 227 NW 759, 74 ALR 844.

Footnote 96. *Complete Auto Transit, Inc. v Wayne Broyles Engineering Corp.* (CA5 Ala) 351 F2d 478.

§ 492 Determination, after verdict, whether evidence affected it

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Frequently, where the size of the verdict returned by the jury is not excessive, and the question of liability is reasonably clear, the court will conclude that evidence as to the defendant's insurance did not materially affect the verdict. 97 However, where the fact of insurance has been erroneously introduced in evidence by the plaintiff's counsel, who wilfully does so merely for the purpose of influencing a verdict or prejudicing the jury against the defendant, the introduction results in reversible error, at least where the evidence is conflicting and the case is a close one on its facts. 98

Footnotes

Footnote 97. *Vaughan v Southern Bakeries Co.* (DC SC) 247 F Supp 782; *Peters v Benson* (Alaska) 425 P2d 149; *Bergan v Ormsby* (2nd Dist) 131 Cal App 2d 505, 281 P2d 70; *Creek v Naylor*, 309 Ill App 601, 33 NE2d 740; *Caylor v Atchison, T. & S. F. R. Co.*, 189 Kan 210, 368 P2d 281, different results reached on reh 190 Kan 261, 374 P2d 53; *Nunnellee v Nunnellee* (Ky) 415 SW2d 114 (\$300 verdict); *White v Makela*, 304 Mich 425, 8 NW2d 123; *Smith v Yellow Cab Co.*, 173 Wis 33, 180 NW 125.

Reference to insurance was not ground for reversal where \$25,000 damages had been

sought for young man crippled for life, and jury had only awarded \$10,000. *Thompson v Barnette*, 170 Kan 384, 227 P2d 120.

But see *Catrambone v Bloom* (MD Pa) 13 Fed Rules Evid Serv 1707, holding prejudice likely where a punitive damage award was 20 and 40 times greater than compensatory award.

A statement by the plaintiff's doctor on cross-examination that he wrote a letter to the insurance company was not prejudicial where the plaintiff had received a higher verdict on a prior trial. *Southwestern Freight Lines v McConnell* (Tex Civ App) 269 SW2d 427, writ ref n r e.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 21.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541 § 22.

Footnote 98. *Edwards v Earnest*, 206 Ala 1, 89 So 729, 22 ALR 1387; *Coe v Van Why*, 33 Colo 315, 80 P 894; *Crossler v Safeway Stores, Inc.*, 51 Idaho 413, 6 P2d 151, 80 ALR 463; *Maddox v Grauman* (Ky) 265 SW2d 939, 41 ALR2d 964; *Viou v Brooks-Scanlon Lumber Co.*, 99 Minn 97, 108 NW 891; *Simpson v Foundation Co.*, 201 NY 479, 95 NE 10; *Vasquez v Pettit*, 74 Or 496, 145 P 1066; *Nicholson v Garriss*, 418 Pa 146, 210 A2d 164; *Gittens v Lundberg*, 3 Utah 2d 392, 284 P2d 1115; *Landry v Hubert*, 100 Vt 268, 137 A 97, appeal after remand 101 Vt 111, 141 A 593, 63 ALR 396; *Schwalen v W. P. Fuller & Co.*, 107 Wash 476, 182 P 592, 10 ALR 296, supp op 107 Wash 480, 187 P 367.

b. Admissibility on Issues Other Than Negligent or Wrongful Conduct [493-495]

§ 493 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Notwithstanding the general rule against the introduction of evidence suggesting or implying that the defendant is protected by liability insurance, 99 evidence that defendant was insured may be admissible on issues other than negligence. 1 The suggestion of the possession of insurance will not be avoided at the cost of suppressing evidence material to the establishment of a cause of action. 2 In other words, it is competent to show that the defendant carries liability or indemnity insurance where to do so tends to prove some material issue properly in the case; under such circumstances, the mere fact that it is not admissible to prove another matter does not render it incompetent.

3

A document otherwise admissible in evidence is not rendered inadmissible by the fact that it contains an incidental reference to insurance, nor will the receipt of such document in evidence constitute prejudicial error. 4 Furthermore, although it may be proper or advisable to keep from the jury the reference in the document to insurance where this is feasible, 5 this should not be done if such deletion would change the meaning or tenor of the document. 6

◆ Practice guide: The foundation for offering evidence of insurance coverage for a purpose other than to show liability or wrongful conduct must be established outside the presence of the jury to avoid prejudice to the rights of the parties. 7

§ 493 ----Generally [SUPPLEMENT]

Case authorities:

Securities fraud defendant's Form 10-K annual report disclosing company's provision of terms of net 30 days for most products, extension to 90 days at discretion of management, and return for credit under certain circumstances was properly excluded as evidence of subsequent remedial measures since potential prejudice was great given hotly contested issue whether defendant granted unconditional right to return and extraordinary credit terms to its distributors. *Malone v Microdyne Corp.* (1994, CA4 Va) 26 F3d 471, CCH Fed Secur L Rep ¶ 98237.

Footnotes

Footnote 99. § 483.

Footnote 1. *Pinkham v Burgess* (CA1 Me) 933 F2d 1066, 32 Fed Rules Evid Serv 1223 (in legal malpractice suit, court properly admitted evidence that defendant discussed insurance with plaintiff's husband where purpose was to show extent to which defendant became involved in husband's business dealings).

Footnote 2. *Gigliotti v United Illuminating Co.*, 151 Conn 114, 193 A2d 718; *Toppass v Perkins' Adm'x*, 268 Ky 186, 104 SW2d 423; *Snowwhite v State*, 243 Md 291, 221 A2d 342, 19 ALR3d 1155; *Sibley v Nason*, 196 Mass 125, 81 NE 887; *Stanford v Morgan* (Mo App) 588 SW2d 89; *Goodall v Doss*, 44 Tenn App 145, 312 SW2d 875.

Evidence that the defendant city carried only a \$10,000 liability insurance on a police car was admissible under a statute limiting recovery against the city to the amount of such policy. *Terre Haute v Deckard*, 243 Ind 289, 183 NE2d 815.

In personal injury suit, it was error to exclude plaintiff's evidence that defendant's insurance carrier had encouraged plaintiff to go to school to learn a new trade, and had promised to take care of him, where evidence was offered in rebuttal of defense claim that defendant could have mitigated damages by going back to work earlier. *Kubista v Romaine*, 87 Wash 2d 62, 549 P2d 491.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death

action carries liability insurance, 4 ALR2d 761 § 5.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541.

Footnote 3. *Posttape Associates v Eastman Kodak Co.* (CA3 Pa) 537 F2d 751, 2 Fed Rules Evid Serv 581, 19 UCCRS 832, appeal after remand (ED Pa) 450 F Supp 407, 23 UCCRS 855 (evidence of indemnity insurance coverage was relevant to the knowledge of the corporation and its principals of the custom of film manufacturers limiting their liability to replacement of film); *Savoie v Otto Candies, Inc.* (CA5 La) 692 F2d 363, 1985 AMC 220, 12 Fed Rules Evid Serv 269; *Stehouwer v Lewis*, 249 Mich 76, 227 NW 759, 74 ALR 844.

In action by insured against an insurance agent seeking damages for negligence of the insurance agent in failing to procure adequate coverage against loss by fire, the insurance agent's mentioning of his liability insurance during cross-examination was not inadmissible where it was associated with or interwoven with another part of the statement admitting fault, so as to be inseparable. *Crump v Geer Bros., Inc.* (Ala) 336 So 2d 1091.

In a suit by employees of an electrical contractor against a public utility for injuries sustained during construction of the utility's electrical substation, a contract between the contractor and the utility, requiring the contractor to carry liability insurance, was admissible in the trial court's discretion to overcome the utility's defense that its liability to the contractor's employees was limited to workmen's compensation. *Gigliotti v United Illuminating Co.*, 151 Conn 114, 193 A2d 718.

Footnote 4. *Guarnaccia v Wiecenski*, 130 Conn 20, 31 A2d 464; *Cherry v Stockton*, 75 NM 488, 406 P2d 358.

No prejudicial error was involved in admitting a lease in evidence although it contained a provision that the lessee should maintain public liability insurance for the benefit of the lessor, where no subsequent reference to this part of the lease was made and it did not appear that the lease had been sent to the jury room as an exhibit. *Sorensen v Hutson* (4th Dist) 175 Cal App 2d 817, 346 P2d 785.

The use at trial of a lease on a tractor involved in a collision, which provided that compensation was to be "70 per cent less insurance," did not constitute reversible error as injecting insurance into the case. *Moore v Palmer*, 350 Mich 363, 86 NW2d 585.

Eliciting from the plaintiff on cross-examination that a notation on a repair bill indicated that the bill was to be sent to the plaintiff's insurance company was not error, since the information was relevant and if unexplained might give rise to the inference that the repair bill was to be sent to the defendant's insurance company. *Grantham v Herod* (Mo) 320 SW2d 536.

Footnote 5. Elimination of a statement in a hospital record relating to insurance, when admitting the record in evidence, was not error. *Jones v Gilland* (4th Dist) 137 Cal App 2d 486, 290 P2d 329.

In a wrongful death action against a construction company, engineering firm, and others, it was proper to delete from a contract between the construction company and city all

references to the company's obligation to insure against hazards, despite the contention of the engineering firm that this deletion prevented it from showing the full extent of its lack of imposed responsibility for the project. *Koppinger v Cullen-Schiltz & Associates* (CA8 Iowa) 513 F2d 901.

The trial court's refusal to permit in evidence a contract indicating that the defendant was an independent contractor, with exclusion of a portion referring to insurance, was error. *Capozi v Hearst Pub. Co.*, 371 Pa 503, 92 A2d 177.

Footnote 6. *Casey v Roman Catholic Archbishop*, 217 Md 595, 143 A2d 627, 72 ALR2d 893, holding that where the defendant sought to introduce a pretrial statement of the plaintiff's witness, which contained a reference to insurance, and the deletion of the reference would substantially alter the meaning, exclusion of the reference should not be permitted, and the defendant must elect between the introduction of the entire statement or none of it.

Footnote 7. *Hunziker v Scheidemantle* (CA3 Pa) 543 F2d 489, 1 Fed Rules Evid Serv 323.

Forms: Motion—In limine—Mention of insurance. 23A Am Jur Pl & Pr Forms (Rev), Trial, Form 93.

—In limine—For order prohibiting reference during trial to insurance payments received by principal. 23A Am Jur Pl & Pr Forms (Rev), Trial, Form 94.

§ 494 To prove agency, employment, ownership or control

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the provision of Rule 411, as well as under similar state law, that exclusion of evidence of insurance against liability is not required when offered for another purpose, evidence may be admitted to prove an agency or employment relationship by showing that an employer or principal carries liability insurance on one alleged to be his employee or agent, where there is a dispute as to the existence of the employer-employee relationship or of an agency. 8 Evidence is also admissible to prove that defendant has control over certain property by using evidence that he insures himself against liability in connection with it. 9 Similarly, evidence is admissible to show that an instrumentality causing an injury is owned by the defendant. 10

Footnotes

Footnote 8. *Hunziker v Scheidemantle* (CA3 Pa) 543 F2d 489, 1 Fed Rules Evid Serv 323; *Ashmore v Ford* (App) 267 Ark 854, 591 SW2d 666; *Muraszki v William L. Clifford, Inc.*, 129 Conn 123, 26 A2d 578; *Mihalovich v Appanoose County* (Iowa) 217 NW2d 564; *Keitz v National Paving & Contracting Co.*, 214 Md 479, 134 A2d 296, on reh 214 Md 496, 136 A2d 229; *Layton v Cregan & Mallory Co.*, 263 Mich 30, 248 NW

539; *Luke Constr. Co. v Jernigan*, 252 Miss 9, 172 So 2d 392; *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454, remittitur and 9 NY2d 686, 212 NYS2d 421, 173 NE2d 241.

An exception to the rule of inadmissibility exists where the evidence is relevant to an issue of which of two or more defendants was the employer of the operator of the vehicle involved. *Snowwhite v State*, 243 Md 291, 221 A2d 342, 19 ALR3d 1155.

In a wrongful death case arising from an automobile accident, it was prejudicial error to exclude evidence that defendant did not have liability insurance where it was material to the issue of whether defendant had been hired by or was an employee of codefendant. *Muckenthaler v Ehinger* (Mo) 409 SW2d 625.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 6.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed 541 § 5.

Footnote 9. *Perkins v Rice*, 187 Mass 28, 72 NE 323; *Anderson v Ohm* (Minn) 258 NW2d 114.

An inquiry whether the defendant father insured the vehicle driven by his son is pertinent, where questions of ownership and control are present, and defendants were trying to overcome the presumption arising from the fact that the automobile was in the father's name. *Appelhans v Kirkwood*, 148 Colo 92, 365 P2d 233.

But in a suit for injuries sustained in a fall on the stairs in a building leased for business purposes, evidence that the owners carried liability insurance was not admissible to prove that they exercised control over the part of the premises where the accident occurred, where the insurance covered the entire building. *Sales v Bradley* (Ky) 356 SW2d 588.

In a wrongful death action arising out of a helicopter crash, testimony referring to the deceased pilot's insurer's control over the wreckage was properly admitted where the issue of control was disputed as a result of the defense expert's repeated reference to parts of the wreckage which were not available for inspection and which were missing, which parts, he stated, might have proved the accident was caused by a mechanical failure rather than pilot error as plaintiff claimed. *Davis v Stallones* (Tex App Houston (1st Dist)) 750 SW2d 235.

Annotation: 4 ALR2d 761 § 6.

Footnote 10. *Dobbins v Crain Bros., Inc.* (WD Pa) 432 F Supp 1060, 1 Fed Rules Evid Serv 483, aff'd in part and rev'd in part on other grounds (CA3 Pa) 567 F2d 559 (proving ownership and control of a vehicle); *Pollock Stores Co. v Chatwell*, 192 Ark 83, 90 SW2d 213; *Appelhans v Kirkwood*, 148 Colo 92, 365 P2d 233; *Hicks v Land* (Fla App D1) 117 So 2d 11, cert den (Fla) 120 So 2d 617; *Burns v Getty*, 53 Idaho 347, 24 P2d 31; *Seyferlich v Maxwell* (1st Dist) 28 Ill App 2d 469, 171 NE2d 806; *Sibley v Nason*, 196 Mass 125, 81 NE 887; *Biggins v Wagner*, 60 SD 581, 245 NW 385, 85 ALR 776; *Jerdal v Sinclair*, 54 Wash 2d 565, 342 P2d 585.

In a personal injury suit, where defendants denied ownership of the truck causing the injury, evidence that plaintiff received an insurance draft in the amount of the repair bill on his car, which draft named one defendant as the insured, was properly received under Mississippi law for the sole purpose of bearing on the issue of ownership and agency. *Newell v Harold Shaffer Leasing Co.* (CA5 Miss) 489 F2d 103.

A liability insurance policy in which the defendant stated that it was the owner of the farm on which the accident occurred was admissible where the defendant denied ownership and control of the farm. *Nuckols v Andrews Invest. Co.* (Mo App) 364 SW2d 128.

Annotation: 4 ALR2d 761 § 6.

§ 495 To prove bias, interest, or motive

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In applying the rule excluding any testimony or statement to the effect that a defendant in a negligence action is insured, regard must be had to the right to cross-examine witnesses to show interest or bias, and this right is not to be abridged or denied because facts may incidentally be developed that are irrelevant to the issue and prejudicial to the other parties. Accordingly, facts tending to show interest, bias, or motive on the part of a witness may be elicited on cross-examination, although such examination may necessarily disclose that the defendant in a negligence action was protected by insurance.

11 However, a defendant cannot testify that he is insured in order to demonstrate that he is testifying honestly because he has no financial interest in the outcome of the case.

12

Under the provision of Rule 411 that exclusion of evidence of insurance against liability is not required when offered for another purpose, as well under similar state law, evidence has been admitted to impeach a witness by showing bias, interest, or motive affecting the witness's credibility, 13 or to establish the identity of the preparer of an impeaching document. 14

Where, under the pertinent state constitution, the legislature cannot define what is relevant or set aside evidentiary rules, a statute prohibiting admission of evidence that any witness is covered by professional liability insurance issued by a health care provider was found unconstitutional, so that the bias exception to Rule 411 applied. Therefore, evidence that the defense expert was health care insurer's vice president was admissible to show possible bias and prejudice. 15

As a general rule, where a previously written statement is produced in court and used for the purpose of impeaching the plaintiff or one of his witnesses, it is proper for the plaintiff's counsel to show that the person procuring such statement was a representative of the defendant's insurance company. 16 However, unless an open bona fide attack has been made on such a statement, it is improper to show that it was procured by an

insurance adjuster. 17 Moreover, where there is no substantial variance between such statement and the plaintiff's testimony, the fact that the person procuring the statement was an insurance adjuster is wholly irrelevant. 18

Footnotes

Footnote 11. *Hinton & Sons v Strahan*, 266 Ala 307, 96 So 2d 426; *Causey v Cornelius* (2nd Dist) 164 Cal App 2d 269, 330 P2d 468; *Vindicator Consol. Gold Min. Co. v Firstbrook*, 36 Colo 498, 86 P 313; *Chloupek v Jordan* (1st Dist) 49 Ill App 3d 809, 7 Ill Dec 489, 364 NE2d 650; *Triplett v St. Louis Public Service Co.* (Mo App) 372 SW2d 515; *Quigley v Roath*, 227 Or 336, 362 P2d 328; *O'Donnell v Bachelor*, 429 Pa 498, 240 A2d 484; *Butcher v Stull*, 140 W Va 31, 82 SE2d 278; *Martell v Kutcher*, 195 Wis 19, 216 NW 522.

Annotation: Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance, 4 ALR2d 761 § 7.

Footnote 12. *Patton v Franc*, 404 Pa 306, 172 A2d 297.

Footnote 13. *Corbett v Borandi* (CA3 Pa) 375 F2d 265 (disclosure that expert witness for a defendant was employed by an insurance company to prepare his report and testify at trial was required in order that jury might fairly evaluate his testimony with knowledge of what could conceivably motivate the testimony); *Ikerd v Lapworth* (CA7 Ind) 435 F2d 197, 14 FR Serv 2d 1007 (restriction of the scope of cross-examination is proper where the inquiry goes to the credibility of a person not called to testify).

In a medical malpractice action, where a defense witness testified that plaintiff's expert had a bad reputation for truth and veracity, it was reversible error to disallow plaintiff's cross-examination of the defense witness which aimed at showing that the latter was employed in part by the liability carrier which represented the defendant in this action; the fact of such employment "was clearly admissible to show possible bias" of the defense witness under FRE Rule 411. *Charter v Chleborad* (CA8 Neb) 551 F2d 246, 1 Fed Rules Evid Serv 878, cert den 434 US 856, 54 L Ed 2d 128, 98 S Ct 176.

Footnote 14. *Varlack v SWC Caribbean, Inc.* (CA3 VI) 550 F2d 171, 1 Fed Rules Evid Serv 647, 23 FR Serv 2d 37, 40 ALR Fed 526.

When an attempt was made to impeach a witness with a statement signed by him, the party offering the witness had the right to bring out on redirect examination the identity and interest of the person preparing the statement and the circumstances under which it was obtained even though it might establish the person as a representative of the liability insurance carrier of the appellant. *Complete Auto Transit, Inc. v Wayne Broyles Engineering Corp.* (CA5 Ala) 351 F2d 478.

Footnote 15. *Barsema v Susong*, 156 Ariz 309, 751 P2d 969, 3 Ariz Adv Rep 21.

Footnote 16. *Complete Auto Transit, Inc. v Wayne Broyles Engineering Corp.* (CA5 Ala) 351 F2d 478; *Industrial Farm Home Gas Co. v McDonald*, 234 Ark 744, 355 SW2d 174; *Pinkerton v Oak Park Nat. Bank* (1st Dist) 16 Ill App 2d 91, 147 NE2d 390; *Ayers v*

Christiansen, 222 Kan 225, 564 P2d 458; Silver Fleet Motor Express v Gilbert, 291 Ky 696, 165 SW2d 541; Gegan v Kemp, 302 Mich 218, 4 NW2d 525; Turner v Caldwell (Mo App) 349 SW2d 493; Young v Sonking, 275 App Div 871, 88 NYS2d 392; Stygles v Ellis, 80 SD 346, 123 NW2d 348.

Annotation: 4 ALR2d 761 § 9.

Footnote 17. Huey & Philp Hardware Co. v McNeil (Tex Civ App) 111 SW2d 1205, writ dismissed.

Where the contents of a statement taken from the plaintiff by an adjuster for the insurance company were admitted by the plaintiff to be correct, the trial court did not err later in refusing to permit the plaintiff to testify that the one taking the statement was an adjuster for the insurance company, such evidence being relevant only if the correctness of the statement was questioned or denied. Beardsley v Weaver, 402 Pa 130, 166 A2d 529.

Footnote 18. Smith v Pacific Truck Express, 164 Or 318, 100 P2d 474.

7. Victim's Past Behavior in Rape Cases [496-506]

§ 496 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal Rules of Evidence, admission of evidence of an alleged rape victim's past sexual behavior either in the form of reputation or opinion evidence ¹⁹ or any other type evidence ²⁰ is severely limited.

It has also been observed that such "rape shield" laws have been enacted by almost every state. ²¹ A concise version of such a law is also contained in the Uniform Rules of Evidence. ²² Generally speaking, these laws deny a defendant in a sexual assault case the opportunity to examine the complainant concerning her prior sexual conduct or reputation. They also deny a defendant the opportunity to offer extrinsic evidence of the prior sexual conduct or reputation of the complainant. ²³ These statutes are principally designed to prevent defense counsel from eliciting evidence of a victim's promiscuity as part of a general credibility attack, typically on the question of consent. ²⁴

Although Rule 412 makes no reference to the right of the victim to appeal an adverse ruling, the right of immediate appeal is implicit as a necessary corollary of the Rule's explicit protection of privacy interests. ²⁵

In excluding evidence under Rule 412, the court will also take into account whether or not the evidence is collateral to the issue of the alleged rape. ²⁶ For example, evidence of past sexual conduct introduced to challenge the general credibility of a witness, rather than her credibility with respect to specific testimony concerning the alleged rape, is

collateral in nature and may be excluded as too prejudicial. 27

The policy of Federal Rules of Evidence 412, to guard against unwarranted intrusion into the victim's private life, may be taken into account in determining the amount of unfair prejudice under Federal Rules of Evidence 403. 28

◆ **Observation:** The nation's rape shield laws have been categorized into four approaches: the Michigan, Texas, Federal and California approaches. The rape shield laws which follow the Michigan approach are general prohibitions on prior sexual conduct or reputation evidence but have highly specific exceptions allowing for this evidence in those circumstances in which it is highly relevant and material to the presentation of a defense and therefore constitutionally required. The laws written under the Texas approach are purely procedural in nature and often involve untrammelled judicial discretion. The federal approach is characterized by a general prohibition of sexual conduct or reputation evidence, exceptions allowing for this evidence in circumstances where the evidence is undeniably relevant, and a general "catch-basin" provision allowing for introduction of relevant evidence on a case-by-case basis. The key feature of the California approach is that the sexual conduct or reputation evidence is separated into two categories—evidence offered to prove consent is generally inadmissible unless the evidence concerned prior sexual conduct between the complainant and the defendant, while any sexual conduct or reputation evidence may be used to attack the complainant's credibility as long as the trial court determines that it is relevant to the issue. 29

§ 496 ----Generally [SUPPLEMENT]

Practice Aids: Extending rape shield protection to sexual harassment actions: New Federal Rule of Evidence 412 undermines *Meritor Savings Bank v. Vinson*, 25 Southw U LR 2:363 (1996).

Case authorities:

District court committed plain error by admitting doctor's diagnosis that alleged victim had been repeatedly sexually abused, given victim's admitted consensual sexual activity. *United States v Whitted* (1993, CA8 SD) 11 F3d 782, 38 Fed Rules Evid Serv 939.

Rape shield law must at times yield to defendant's constitutional right to cross-examine witnesses and to present defense but, before being allowed to introduce relevant but otherwise excluded evidence, defendant must make offer of proof establishing that prior act clearly occurred, act closely resembled those at issue in instant case, act is relevant to material issue, evidence is necessary to defendant's case and probative value of evidence outweighs its prejudicial effect. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 1993 Wisc LEXIS 754.

Footnotes

Footnote 19. FRE 412(a).

Footnote 20. FRE 412(b).

Footnote 21. *State v Herndon* (App) 145 Wis 2d 91, 426 NW2d 347 (disapproved on other grounds by *State v Pulizzano*, 155 Wis 2d 633, 456 NW2d 325); Comment to 1986 Amendment to Uniform Rules of Evidence Rule 412.

Law Reviews: Haxton, Comments: Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence, Wis LR 1219, 1222 (1985).

Footnote 22. Uniform Rules of Evidence Rule 412.

Footnote 23. *State v Herndon* (App) 145 Wis 2d 91, 426 NW2d 347 (disapproved on other grounds by *State v Pulizzano*, 155 Wis 2d 633, 456 NW2d 325).

Law Reviews: J. A. Vaught, M. Henning, Admissibility of a rape victim's prior sexual conduct in Texas: a contemporary review and analysis, 23 St M LJ 893-928 (1992).

Footnote 24. *Commonwealth v Thevenin*, 33 Mass App 588, 603 NE2d 222, review den 414 Mass 1102, 606 NE2d 915.

Footnote 25. *Doe v United States* (CA4 Va) 666 F2d 43, 9 Fed Rules Evid Serv 945.

Annotation: Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 65 ALR Fed 519.

Footnote 26. *United States v One Feather* (CA8 SD) 702 F2d 736, 12 Fed Rules Evid Serv 1516.

Footnote 27. *United States v One Feather* (CA8 SD) 702 F2d 736, 12 Fed Rules Evid Serv 1516.

Footnote 28. *United States v One Feather* (CA8 SD) 702 F2d 736, 12 Fed Rules Evid Serv 1516.

The Federal District court has authority in a proper case to exclude evidence of past sexual behavior of the complaining witness if its probative value is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury. *United States v Galloway* (CA10 Utah) 937 F2d 542, 33 Fed Rules Evid Serv 575, appeal after remand (CA10 Utah) 963 F2d 1388, cert den (US) 121 L Ed 2d 341, 113 S Ct 418.

Footnote 29. *State v Herndon* (App) 145 Wis 2d 91, 426 NW2d 347 (disapproved on other grounds by *State v Pulizzano*, 155 Wis 2d 633, 456 NW2d 325).

Law Reviews: Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn LR 763 (1985-86).

§ 497 "Past sexual behavior" defined

[View Entire Section](#)
[Go to Parallel Reference Table](#)

"Past sexual behavior" is defined, for the purpose of the federal rule, as sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged. 30 The term refers to sexual behavior at any time prior to trial, and not only to sexual behavior occurring prior to the date of the offense charged in the indictment. 31

The phrase "sexual behavior" means a volitional or non-volitional physical act that the victim has performed for the purpose of sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person. 32 Thus, such prior sexual conduct may have been consensual or the result of nonconsensual or assaultive behavior. 33

Books, movies, conversations, or observing others engaged in sexual activity are said to be sources of information as to sexual matters other than personal experience, and not sexual conduct. The act of writing about sexual desires or activities is not itself prior sexual conduct. 34

§ 497 ----"Past sexual behavior" defined [SUPPLEMENT]

Rules:

(FRE, Rule 412(d), regarding the definition of past sexual behavior, was removed in 1994).

Case authorities:

In a prosecution for first-degree rape and second-degree kidnapping, the trial court did not err in admitting evidence of prior sexual acts between the complainant and defendant which was pertinent to the defense that complainant consented to the sexual act in question, nor did the court err in excluding evidence of sexual acts which was irrelevant and cumulative. *State v Jenkins* (1994) 115 NC App 520, 445 SE2d 622, stay gr 336 NC 784, 447 SE2d 435 and review den (NC) 1994 NC LEXIS 604.

Footnotes

Footnote 30. FRE 412(d).

Footnote 31. *Goodson v State* (Miss) 566 So 2d 1142, reh den (Miss) 1990 Miss LEXIS 487, in which the court noted that the relevance of other sexual behavior of the victim which may explain the source of semen, pregnancy, disease or injury and thus exonerate the accused, is not necessarily affected by whether it occurred before or after the event charged in the indictment.

The inclusion of all sexual behavior of the victim which precedes the date of trial is in accord with the avowed purposes of the rule, which are to protect rape victims from the

degrading and embarrassing disclosure of intimate details about their private lives, to encourage reporting of sexual assaults, and to prevent wasting time on distractive collateral and irrelevant matters. *United States v Torres* (CA9 Ariz) 937 F2d 1469, 91 CDOS 5370, 91 Daily Journal DAR 8004, 33 Fed Rules Evid Serv 660, cert den (US) 116 L Ed 2d 789, 112 S Ct 886.

Footnote 32. *State v Wright*, 97 Or App 401, 776 P2d 1294, review den 308 Or 593, 784 P2d 1100.

Footnote 33. *Commonwealth v Johnson*, 389 Pa Super 184, 566 A2d 1197, app gr 525 Pa 643, 581 A2d 569.

Footnote 34. *State v Vonesh* (App) 135 Wis 2d 477, 401 NW2d 170.

§ 498 Scope of federal rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Rule 412 proscriptions apply equally to the government and to the defendant. 35 The ban on sexual conduct evidence embraces evidence of the lack of sexual conduct, such as the victim's introduction of evidence of virginity, because such evidence is equally likely to provoke unfair prejudice. 36

◆ **Observation:** The Advisory Committee on the Rules of Criminal Procedure of the Judicial Conference of the United States has recommended changes to Federal Rule 412 which are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all persons who claim to be victims of sexual misconduct. The scope of the expanded rule would exclude evidence of an alleged victim's sexual history in civil as well as criminal cases, and would apply in all cases in which there is evidence that someone was the victim of sexual misconduct, without regard to whether the alleged victim or person accused is a party to the litigation. 37

§ 498 ----Scope of federal rule [SUPPLEMENT]

Practice Aids: The Crime Bill of 1994 and the law of character evidence: Congress was right about consent defense cases, 22 *Fordham Urb LJ* 2:271 (1995).

Footnotes

Footnote 35. *Government of Virgin Islands v Jacobs* (DC VI) 634 F Supp 933.

Footnote 36. *Government of Virgin Islands v Jacobs* (DC VI) 634 F Supp 933.

Annotation: Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity, 35 ALR3d 1452.

Footnote 37. Advisory Committee on Rules of Criminal Procedure, Report to Judicial Conference of United States, Standing Committee on Federal Rules of Criminal Procedure, reprinted in USCS Advance, March, 1993, p. 329 et seq.

§ 499 Public policy considerations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Federal Rule 412 and similar state rape shield laws reflect the now virtually universal view that chastity is irrelevant to the veracity of a witness and sexual activity has no bearing on the issue of consent. 38 The theory of the rape shield statute, that prior sexual activity is not probative of the issue of rape unless one of the statutory exceptions obtains, applies not only to the victim's testimony on cross-examination but also to the testimony of other witnesses. 39

◆ Caution: A court has admitted evidence of a victim's sexual conduct reputation as probative of the defendant's state of mind based on what he knew about her reputation. 40

The principal purpose of Federal Rule 412 and similar state provisions is to protect the privacy of the victims 41 from the degrading and embarrassing disclosure of intimate details about their private lives. 42 This, in turn, encourages the reporting and prosecution of rapes. 43 Because the purpose of a rape shield statute is to protect the victims of crimes and not the accused, such a statute generally does not bar the admission of evidence of a defendant's prior sexual abuse of the victim. 44

Footnotes

Footnote 38. Doe v United States (CA4 Va) 666 F2d 43, 9 Fed Rules Evid Serv 945; Government of Virgin Islands v Jacobs (DC VI) 634 F Supp 933; McGilberry v State (Ala App) 516 So 2d 907.

Law Reviews: A. Althouse, Thelma and Louise and the law: do rape shield rules matter? 25 Loy LR (LA) 629-1023 (April, 1992).

F. Tuerkheimer, A reassessment and redefinition of rape shield laws, 50 Ohio St LJ 1245-74 (1989).

Footnote 39. State v Madsen (Mo) 772 SW2d 656, cert den 493 US 1046, 107 L Ed 2d 840, 110 S Ct 845.

Footnote 40. Doe v United States (CA4 Va) 666 F2d 43, 9 Fed Rules Evid Serv 945.

However, evidence of alleged rape victim's consensual sex with another during recent 3-day period would not be admitted at rape trial, even though the Fourth Circuit does not categorically exclude under Rule 412 evidence of a victim's past sexual behavior with others when offered solely to show the accused's state of mind, because the evidence at most suggests that the victim is a woman of easy virtue, which is irrelevant to the accused's state of mind but highly prejudicial to the victim. United States v Saunders (ED Va) 736 F Supp 698, 30 Fed Rules Evid Serv 373, later proceeding (ED Va) 743 F Supp 444.

Footnote 41. Thompson v State (Iowa) 492 NW2d 410.

Footnote 42. United States v Cardinal (CA6 Mich) 782 F2d 34, 19 Fed Rules Evid Serv 1381, cert den 476 US 1161, 90 L Ed 2d 724, 106 S Ct 2282, reh den 478 US 1032, 92 L Ed 2d 768, 107 S Ct 14, post-conviction proceeding (CA6 Mich) 954 F2d 359 (referring to Congressional Record, H11944, October 10, 1978); Government of Virgin Islands v Jacobs (DC VI) 634 F Supp 933; Thompson v State (Iowa) 492 NW2d 410; State v Arrington, 251 Kan 747, 840 P2d 477.

Rape shield laws were implemented to overcome the invidious and outrageous common law evidentiary rule allowing complainants to be asked in depth about their prior sexual experiences for the purpose of humiliation and harassment and to show unchastity. State v Herndon (App) 145 Wis 2d 91, 426 NW2d 347 (disapproved on other grounds by State v Pulizzano, 155 Wis 2d 633, 456 NW2d 325).

Footnote 43. Government of Virgin Islands v Jacobs (DC VI) 634 F Supp 933; Thompson v State (Iowa) 492 NW2d 410; State v Arrington, 251 Kan 747, 840 P2d 477.

Footnote 44. Baggett v State (Ind) 514 NE2d 1244.

§ 500 Constitutional implications of "rape shield" statutes

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A rape shield statute generally does not on its face violate a defendant's constitutional right to present evidence, although such a statute may in a given case, as applied, impermissibly infringe upon a defendant's rights to confrontation and compulsory process. 45

The defendant's right of confrontation does not extend to matters that are irrelevant and have little or no probative value, such as the victim's reputation for chastity. 46

In a rape prosecution, preclusion of evidence of a prior sexual relationship between the alleged victim and the accused does not necessarily violate the rights of the accused under the Federal Constitution's Sixth Amendment to present relevant evidence, where

such evidence is precluded as a sanction for the accused's failure to comply with a state statutory provision which requires the accused, if he proposes to offer evidence of his own past sexual conduct with the alleged rape victim, to file a written motion and an offer of proof within a certain number of days after his arraignment. 47 The decision whether the statutory notice requirement violates a defendant's right to confrontation must be made on a case by case basis. 48

§ 500 ----Constitutional implications of "rape shield" statutes [SUPPLEMENT]

Case authorities:

That victim in sexual assault prosecution may have subsequently had sex for money with someone other than defendant was presumptively irrelevant under rape-shield statute, and it shed no relevant light on issue whether she consented to sexual contact with defendant; hence, evidence of such conduct was properly rejected by trial court. *People v Braley* (1993, Colo App) 879 P2d 410, reh den (Jan 27, 1994).

In prosecution for sexual assault, evidence that complainant had sexual intercourse with four different men subsequent to alleged sexual assault was inadmissible under rape shield statute limiting evidence of complaining witness's "past sexual behavior"; evidence of sexual behavior after alleged assault is no less embarrassing or prejudicial, and is of no greater relevance at trial, than evidence of sexual behavior before alleged offense. *Cuyler v State* (1992, Tex App Austin) 841 SW2d 933.

Rape shield law must at times yield to defendant's constitutional right to cross-examine witnesses and to present defense but, before being allowed to introduce relevant but otherwise excluded evidence, defendant must make offer of proof establishing that prior act clearly occurred, act closely resembled those at issue in instant case, act is relevant to material issue, evidence is necessary to defendant's case and probative value of evidence outweighs its prejudicial effect. In *Interest of Michael R.B.* (1993) 175 Wis 2d 713, 499 NW2d 641, reconsideration den (Wis) 505 NW2d 142.

Footnotes

Footnote 45. *State v Pulizzano*, 155 Wis 2d 633, 456 NW2d 325, appeal after remand (Wis App) slip op, a case in which it was held that the defendant, charged with sexually abusing a child, had a constitutional right on confrontation and compulsory process grounds to cross-examine the child concerning prior instances of sexual abuse by other adults, which incidents could have formed a basis for the child's explicit knowledge of sexual matters.

Cross-examination of a statutory rape complainant regarding prior accusations of sexual abuse and fondling and testimony of 3 prior persons accused that accusations against them were false will be allowed, regardless of whether or not such allegations are evidence of "past sexual behavior," because defendant's constitutional interests in confronting witnesses against him and presenting an adequate defense outweigh the possibility of embarrassment the complainant might suffer. *United States v Stamper* (WD NC) 766 F Supp 1396, 34 Fed Rules Evid Serv 69, affd without op (CA4 NC) 959 F2d 231, reported in full (CA4 NC) 34 Fed Rules Evid Serv 1432.

As to admissibility of evidence required to satisfy constitutional requirements, see § 503.

Footnote 46. *People v Cornes* (5th Dist) 80 Ill App 3d 166, 35 Ill Dec 818, 399 NE2d 1346, later proceeding (CA7 Ill) 724 F2d 61.

Footnote 47. *Michigan v Lucas*, 500 US 145, 114 L Ed 2d 205, 111 S Ct 1743, 91 CDOS 3624, 91 Daily Journal DAR 5815, 32 Fed Rules Evid Serv 225, on remand, remanded 193 Mich App 298, 484 NW2d 685, supp op 201 Mich App 717, 507 NW2d 5.

As to the admissibility of evidence of a prior sexual relationship between the accused and the complainant, generally, see § 502.

Footnote 48. *People v Lucas*, 201 Mich App 717, 507 NW2d 5.

§ 501 Prior false charges by complainant

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While it is clearly provided in the Uniform Rules of Evidence that the accused in a prosecution for rape or sexual assault may bring out, on cross-examination of the complaining witness, that she previously brought false charges of rape or sexual assault, 49 modern cases are in conflict on this issue, with some authority pointing toward the conclusion that the defense may do so, 50 and some pointing in the opposite direction. 51

A defendant who alleges an ongoing scheme of fabrication by the complainant with respect to charges of sexual abuse, has been permitted to introduce evidence of prior allegations of sexual abuse and the bias or motive of the complainant in making such allegations. 52

◆ Comment: According to some textwriters, it is clear that evidence that the complaining witness brought false charges previously is evidence which undercuts veracity, and by nature what is being proved in such cases is not the sexual conduct by the complaining witness, but false statements which directly relate to veracity. If the defense only knows that the complaining witness previously brought a complaint which led to prosecution and acquittal, it is of course true that the complainant may have told the truth before, so her prior conduct did not amount to an attempt to mislead or deceive. But that possibility is not sufficient to justify blocking cross-examination in the later case, for the cross-examiner's burden in this context should be no heavier than raising doubt as to the complainant's veracity. Yet there is some potential for humiliation of the complainant, and for confusion of issues, if the prior charges led to acquittal for reason other than the merits, and arguably good reason to disallow cross-examination where the only underlying facts are that the complainant previously made a complaint that did not lead to prosecution. 53

Footnotes

Footnote 49. Uniform Rules of Evidence, Rule 412(b)(ii).

Federal Rule 412 contains no explicit provision in this regard.

Footnote 50. *United States v Bartlett* (CA8 SD) 794 F2d 1285, cert den 479 US 934, 93 L Ed 2d 361, 107 S Ct 409, later proceeding (CA8 SD) 856 F2d 1071, 27 Fed Rules Evid Serv 321 (implying that a defendant in a rape prosecution would be entitled under Rule 412(b)(1), perhaps because of the constitutional guarantee of a fair trial, to introduce evidence that the alleged victim had made a prior false accusation of rape); *Miller v State*, 105 Nev 497, 779 P2d 87; *Clinebell v Commonwealth*, 235 Va 319, 368 SE2d 263.

Trial court erred by excluding evidence that prosecuting witness had accused 10 or 12 people of sexual misconduct and later recanted some accusations, since rape shield law did not prohibit evidence that victim lied about sexual misconduct; evidence did not involve victim's past sexual conduct, but rather victim's propensity to make false statements regarding sexual misconduct. *Smith v State*, 259 Ga 135, 377 SE2d 158, cert den 493 US 825, 107 L Ed 2d 53, 110 S Ct 88.

Annotation: Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 65 ALR Fed 519.

Texts *Louisell and Mueller*, Federal Evidence § 197.

Footnote 51. *United States v Cardinal* (CA6 Mich) 782 F2d 34, 19 Fed Rules Evid Serv 1381, cert den 476 US 1161, 90 L Ed 2d 724, 106 S Ct 2282, reh den 478 US 1032, 92 L Ed 2d 768, 107 S Ct 14, post-conviction proceeding (CA6 Mich) 954 F2d 359 (evidence that complainant had previously charged her stepfather and defendant with sexual assault, but had subsequently withdrawn these charges was properly excluded under Rule 412); *Hollis v State* (Ala App) 380 So 2d 409; *Carter v State* (Ind) 451 NE2d 639; *Kelley v State* (Ind App) 566 NE2d 591; *State v Kobow* (Minn App) 466 NW2d 747.

Footnote 52. *United States v Stamper* (WD NC) 766 F Supp 1396, 34 Fed Rules Evid Serv 69, affd without op (CA4 NC) 959 F2d 231, reported in full (CA4 NC) 34 Fed Rules Evid Serv 1432, in which the court expressed the view that Federal Rule 412 cannot be manipulated by the prosecution or the complainant so as to envelope the complainant's motivation or state of mind in a shroud of statutory inadmissibility, thereby depriving the defendant of a proper and important function of the constitutionally protected right of cross-examination.

§ 502 Exceptional circumstances allowing evidence of victim's past behavior; generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Both Federal Rule 412⁵⁴ and Rule 412 of the Uniform Rules⁵⁵ provide for exceptions to the general rule of inadmissibility of evidence of the victim's past sexual behavior in certain instances where there is a proper foundation for admitting such evidence.⁵⁶

A trial court is justified in excluding proffered evidence of past sexual behavior when the proponent of the evidence fails to establish a proper purpose for its admission.⁵⁷ Evidence of prior sexual conduct is inadmissible under Federal Rule 412 where the tendered testimony regarding the victim's past sexual behavior does not encompass behavior with the defendant so as to illustrate consent, is not relevant to the issue of who actually was the source of semen or injury, and is never specifically offered as evidence constitutionally required to be admitted.⁵⁸

The foundation for admission of such evidence cannot be bolstered upon appeal.⁵⁹

◆ Caution: Even if otherwise admissible under one of the enumerated exceptions of Federal Rule 412(b), the exclusion of evidence of the complainant's past sexual behavior is proper under Rule 403 if the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.⁶⁰

§ 502 ----Exceptional circumstances allowing evidence of victim's past behavior; generally [SUPPLEMENT]

Case authorities:

In a prosecution for first-degree rape and second-degree kidnapping, the trial court did not err in admitting evidence of prior sexual acts between the complainant and defendant which was pertinent to the defense that complainant consented to the sexual act in question, nor did the court err in excluding evidence of sexual acts which was irrelevant and cumulative. *State v Jenkins* (1994) 115 NC App 520, 445 SE2d 622, stay gr 336 NC 784, 447 SE2d 435 and review den (NC) 1994 NC LEXIS 604.

Footnotes

Footnote 54. FRE 412(b).

Footnote 55. Uniform Rules of Evidence, Rule 412(b).

Footnote 56. §§ 503-505.

Footnote 57. *United States v Nez* (CA10 NM) 661 F2d 1203, 9 Fed Rules Evid Serv 38, 65 ALR Fed 514.

Footnote 58. *United States v Nez* (CA10 NM) 661 F2d 1203, 9 Fed Rules Evid Serv 38, 65 ALR Fed 514.

Annotation: Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 ALR4th 685.

Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 65 ALR Fed 519.

Footnote 59. *United States v Nez* (CA10 NM) 661 F2d 1203, 9 Fed Rules Evid Serv 38, 65 ALR Fed 514.

Footnote 60. *United States v Galloway* (CA10 Utah) 937 F2d 542, 33 Fed Rules Evid Serv 575, appeal after remand (CA10 Utah) 963 F2d 1388, cert den (US) 121 L Ed 2d 341, 113 S Ct 418.

§ 503 --Admission of evidence constitutionally required

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence other than reputation or opinion evidence of a victim's past sexual behavior is admissible if the Constitution requires it to be admitted. 61

The first exception is intended to cover those instances where, because of an unusual set of circumstances if the general rule of inadmissibility were to be followed, it might deprive a defendant of the constitutional right to a fair trial. 62 Rule 412's constitutional exception embraces the accused's right to confront his victim with impeachment evidence consisting of prior sexual conduct where the government first opens the door on this line of cross-examination. 63 For example, when a victim testifies that she was a virgin prior to the rape the accused may cross-examine the complaining witness on prior specific sexual acts provided that the probative value of the proffered proof outweighs the resulting prejudice. 64

Illustrative of the first exception permitting evidence of specific instances of the victim's past sexual behavior if constitutionally required is a state prosecution for statutory rape in which defendant claimed that complainant's prior sexual behavior with other men was relevant in that it accounted for her belief that she was pregnant, which in turn motivated her to accuse defendant of rape to avoid the anger of a strict mother. In that case, the

court held that the trial court's refusal to permit defendant to cross-examine the alleged victim on these points violated confrontation rights to bring out possible bias, prejudice, or ulterior motives. 65

§ 503 --Admission of evidence constitutionally required [SUPPLEMENT]

Rules:

(FRE, Rule 412(b)(1)(C)), amended in 1994, now contains the provision regarding the defendant's constitutional rights.

Case authorities:

Defendant charged with rape, sexual abuse, and carnal knowledge failed to satisfy requirements for admitting victim's sexual history evidence since he raised no issue as to source of semen or injury and did not seek to show prior instances of consensual sex between victim and himself, and there was no basis for concluding that admission of evidence was otherwise constitutionally required. *United States v Johns* (1994, CA8 Minn) 15 F3d 740.

Footnotes

Footnote 61. FRE 412(b)(1).

As to constitutional implications of rape shield statutes, generally, see § 500.

Annotation: Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Footnote 62. Remarks of Senators Bayh and Biden, Congressional Record, Oct. 12, 1978, S 18579-18581.

Footnote 63. *Government of Virgin Islands v Jacobs* (DC VI) 634 F Supp 933.

As to the admissibility of evidence concerning prior false charges of sexual misconduct brought by the complainant, see § 501.

Annotation: Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 ALR4th 283.

Federal constitutional right to confront witnesses—Supreme Court cases, 98 L Ed 2d 1115.

Footnote 64. *Government of Virgin Islands v Jacobs* (DC VI) 634 F Supp 933.

Annotation: Admissibility of prosecution evidence on issue of consent, that rape

victim was a virgin, absent defense attack on her chastity, 35 ALR3d 1452.

Footnote 65. State v De Lawder, 28 Md App 212, 344 A2d 446, 90 ALR3d 1286.

Law Reviews: Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn LR 763, 883 (1986).

§ 504 --Past sexual behavior with person other than person accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a criminal case in which a person is accused of rape or of assault with intent to commit rape, Federal Rule 412 provides that evidence other than reputation or opinion evidence of a victim's past sexual behavior is admissible if it consists of past sexual behavior with persons other than the accused and is offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury. 66 Under the analogous provision of the Uniform Rules, which is stated somewhat more broadly, exclusion is not required if the evidence of specific incidents of sexual behavior with one other than the accused is offered for a purpose other than consent, such as proof of the source of semen, pregnancy, disease, injury, mistake, or the intent of the accused. 67

A second exception under Federal Rule 412 applies when the accused claims that he had no relations with the alleged victim; he can use evidence of the victim's past sexual relations with others to rebut the victim's claim that the rape caused certain physical consequences, such as semen or injury. 68

However, evidence of past sexual conduct with others will be excluded if found to be irrelevant to the source of injury. 69

◆ **Comment:** According to some textwriters, evidence within the second exception does not involve an attempt to prove the conduct (or consent) of the victim by proof of her character, but rather involves an attempt to account for the injuries she suffered by proof that it was caused by someone other than the accused. Such evidence, according to the same textwriters, may be circumstantial. These textwriters have also opined that the term "injury" should be interpreted broadly to include not only bruises, abrasions, and similar indications of physical abuse, but pregnancy, which in the context of the alleged rape is in a real sense an injury. However, they caution that although the term "injury" could be read to encompass harm of a nonphysical nature, such as feared pregnancy and psychic trauma, such construction would give rise to a real risk of undermining the protections Federal Rule 412 is designed to accord. Thus, they say that if the term "injury" embraces psychological damage, the accused is likely to argue that the true causes of such damage lie in sexual experiences of the victim having no relation to the crime charged, and to offer as evidence in support of this defense the sexual history of the victim. 70

Under the Uniform Rules, the accused also may introduce evidence of the alleged victim's sexual behavior with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged. 71

**§ 504 --Past sexual behavior with person other than person accused
[SUPPLEMENT]**

Rules:

(FRE, Rule 412(b)(1)(A)), amended in 1994, provides for evidence of specific instances of sexual behavior by the alleged victim offered to prove a person other than the accused was the source of semen, injury, or other physical evidence.

Case authorities:

In a prosecution of defendant for first- degree statutory rape of his daughter, the trial court did not err in denying defendant's motion to suppress evidence of defendant's molestation of another daughter several years earlier, since the daughter's testimony was sufficiently similar to that recounted by the victim concerning the manner of abuse to show a common plan or scheme, and remoteness in time did not make the daughter's testimony inadmissible because it was due to defendant's having almost no access to the daughters of his first marriage following his divorce. *State v Jacob* (1994) 113 NC App 605, 439 SE2d 812.

Footnotes

Footnote 66. FRE 412(b)(2)(A).

Court erred in excluding evidence concerning victim's prior sexual contacts with another person who had been convicted of sexual assault on victim, since prosecution relied heavily on medical testimony about victim's enlarged hymenal opening and also evidence of area considered to be abrasion and defendant's right to defend by cross-examination showing that conditions could have resulted from earlier conduct with another person was crucial. *United States v Begay* (CA10 NM) 937 F2d 515, 33 Fed Rules Evid Serv 895.

Annotation: Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Footnote 67. Uniform Rules of Evidence, Rule 412(b)(i).

Footnote 68. Remarks of Representative Holtzman, Congressional Record, Oct. 10, 1978, H 11944-11945.

In prosecution for rape, evidence that complainant had sex with her boyfriend the night before she was allegedly raped was admissible on issue of origin of semen. *State v*

Gibbons (RI) 418 A2d 830.

Footnote 69. *United States v Azure* (CA8 ND) 845 F2d 1503, 25 Fed Rules Evid Serv 1053 (evidence of the victim's alleged consensual sexual activities with another male were excluded as irrelevant to the source of the three centimeter laceration on the victim's vaginal wall).

In prosecution for alleged aggravated sexual abuse on 9-year old victim, evidence of subsequent incidents of alleged sexual behavior of victim was properly excluded since underpants on which semen was found had been continuously in police custody so that incidents had no relevance to source of semen found on victim's underpants. *United States v Torres* (CA9 Ariz) 937 F2d 1469, 91 CDOS 5370, 91 Daily Journal DAR 8004, 33 Fed Rules Evid Serv 660, cert den (US) 116 L Ed 2d 789, 112 S Ct 886.

Footnote 70. *Louisell & Mueller*, Federal Evidence § 198[B].

Footnote 71. Uniform Rules of Evidence, Rule 412(b)(iii).

§ 505 --Past sexual behavior with person accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence other than reputation or opinion evidence of a victim's past sexual behavior is admissible if it consists of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged. 72 Under a state rape shield statute, it has been held that the trial court may allow evidence of the victim's prior sexual conduct if it finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution. 73

◆ Caution: This exception is not applicable where the victim was too young to give a valid consent in any event. 74

§ 505 --Past sexual behavior with person accused [SUPPLEMENT]

Case authorities:

In a prosecution for first-degree rape and second-degree kidnapping, the trial court did not err in admitting evidence of prior sexual acts between the complainant and defendant which was pertinent to the defense that complainant consented to the sexual act in question, nor did the court err in excluding evidence of sexual acts which was irrelevant and cumulative. *State v Jenkins* (1994) 115 NC App 520, 445 SE2d 622, stay gr 336 NC 784, 447 SE2d 435 and review den (NC) 1994 NC LEXIS 604.

Footnotes

Footnote 72. FRE 412(b)(2)(B).

Under a state rape shield statute, evidence of past sexual behavior of the victim directly involving the participation of the accused may be considered by the jury as bearing on the issue of consent. *McGilberry v State* (Ala App) 516 So 2d 907.

Annotation: Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Footnote 73. *Marks v State*, 192 Ga App 64, 383 SE2d 626, in which the trial court allowed appellant to testify that he had had prior sexual intercourse with the complaining witness, but disallowed testimony from the accused that he had overheard conversations by the victim's family members that she "ran around."

Footnote 74. *United States v Torres* (CA9 Ariz) 937 F2d 1469, 91 CDOS 5370, 91 Daily Journal DAR 8004, 33 Fed Rules Evid Serv 660, cert den (US) 116 L Ed 2d 789, 112 S Ct 886.

§ 506 Procedure in federal court for introducing evidence of victim's past behavior

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Counsel for defendants accused of committing a federal crime involving sexual abuse who intend to enter evidence of the victim's past sexual behavior as permitted within the limitations in Rule 412 75 must follow a specific procedure before such evidence may be admitted. 76 Before the person accused in federal court of committing a sex offense can introduce evidence of specific instances of the alleged victim's past sexual behavior in those situations allowed by Rule 412(b)(1) and (2), the following steps must be taken—

—a written motion to offer such evidence must be filed not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin; the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

—the motion must be served on all other parties and on the alleged victim.

—the motion must be accompanied with a written offer of proof. 77

If the court determines that the offer of proof contains evidence described in Federal Rules of Evidence 412(b), the court must order a hearing in chambers to determine if such evidence is admissible. At the hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. 78

Notwithstanding Federal Rules of Evidence 104(b), 79 if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, will accept evidence on the issue of whether such condition of fact is fulfilled and will determine such issue. 80

If the court determines on the basis of the hearing in chambers that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence will be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. 81

◆ Comment: Some textwriters have taken the view that under Rule 412(c) only the judge should determine the admissibility of the evidence in question pursuant to Rule 104(a). In other words, regardless of the nature of factual questions which may arise in determining the admissibility of the proof, those questions are to be treated as questions of "admissibility" under Rule 104(a), and not as questions of conditional relevancy under Rule 104(b), which would call for judge and jury to play coordinate roles and thus substantially lessen the protection provided by the exclusionary doctrine. 82 They have also noted that the provision of Federal Rules of Evidence 412(c)(3) relating to the court order apparently does not apply to evidence which is "constitutionally required to be admitted" under Federal Rules of Evidence 412(b)(1), since Rule 412(b)(1) refers only to Rule 412(c)(1) and (2) as prescribing the appropriate procedure for evidence which is constitutionally required to be admitted, and not to Rule 412(c)(3). 83

The Uniform Rules of Evidence make no provision for notice or for an in camera hearing, as do many of the state and federal versions of Rule 412, since it was believed that existing rules of criminal procedure and the inherent power of the court to conduct proceedings in an orderly and fair manner provide adequate protection. 84 However, versions of the Uniform Rules enacted by some states follow the federal text in this regard. 85

§ 506 ----Procedure in federal court for introducing evidence of victim's past behavior [SUPPLEMENT]

Rules:

(FRE, Rule 412), amended in 1994, now applies to civil as well as criminal proceedings to exclude evidence of an alleged victim's past sexual behavior or alleged sexual predisposition, with certain exceptions. (FRE, Rule 412(b)(2) provides that in a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair

prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(FRE, Rule 412(c)(1) and (2)), amended in 1994, now set forth the procedure to determine admissibility of evidence of an alleged victim's past sexual behavior and provides for written notice at least 14 days before trial unless the court requires a different time for filing, and provides for service of the motion and for an in camera hearing, and for the motion, related papers, and the record of the hearing to be sealed and remain under seal unless the court orders otherwise. As to rules allowing evidence of defendant's prior sexual assaults and child molestation, (Federal Rules of Evidence, Rules 413-415), added by Congress in 1994; see § 404.

Footnotes

Footnote 75. FRE 412(b)(1) permitting evidence constitutionally required to be admitted.

FRE 412(b)(2)(A) permitting such evidence of sexual activity with persons other than the accused with respect to whether the accused was the source of the semen or injury and (B) permitting such evidence of prior sexual activity with the accused upon the issue of consent.

Annotation: Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 ALR4th 1076.

Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 65 ALR Fed 519.

Footnote 76. FRE 412(c).

Footnote 77. FRE 412(c)(1)-(2).

Footnote 78. FRE 412(c)(2).

Footnote 79. FRE 104(b) provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court must admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Footnote 80. FRE 412(c)(2).

Footnote 81. FRE 412(c)(3).

Annotation: Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 65 ALR Fed 519.

Footnote 82. Louisell & Mueller, Federal Evidence § 199.

Footnote 83. Louisell & Mueller, Federal Evidence § 199.

Footnote 84. Uniform Rules of Evidence Rule 412, Comment to the 1986 Amendment.

8. Evidence of Compromise and Offers to Compromise [507-516]

§ 507 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Both Federal Rule 408 and Rule 408 of the Uniform Rules provide that evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. 86

◆ Definition: An "offer to compromise" is generally defined as the settlement of differences by mutual concessions; an adjustment of conflicting claims. 87

Rule 408 does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations; 88 nor does it require such exclusion when evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. 89 The Rule, while phrased in terms of offers of compromise, must be similarly applied with respect to completed compromises when offered against party thereto, although such a situation will not ordinarily occur, except when a party to the present litigation has compromised with a third person. 90

Although it is error for a court to admit evidence of a settlement agreement for the jury's consideration in determining liability and the quantum of damages, the verdict and judgments will not be reversed unless prejudice is shown. 91

◆ Observation: Whenever the possibility of jury confusion substantially outweighs the probative value of evidence, it may be excluded. Evidence of a compromise or settlement may be excluded on this basis, even where it is not introduced for the purpose of establishing liability on the part of one of the settling parties. 92

§ 507 ----Generally [SUPPLEMENT]

Case authorities:

Damages in legal malpractice case could not be fixed by reference to plaintiff's alleged agreement to settle for approximately that amount, by virtue of Rule's prohibition on

evidence of settlement offer, in absence of evidence that settlement formed new contract. *Banker v Nighswander*, Martin & Mitchell (1994, CA2 Vt) 37 F3d 866.

Bill that itemizes what sender thinks recipient owes him and demands payment, even under threat of legal action, is not offer in settlement or document in settlement negotiations excludable under Rule. *Winchester Packaging v Mobil Chem. Co.* (1994, CA7 Ill) 14 F3d 316, 38 Fed Rules Evid Serv 1016.

Footnotes

Footnote 86. FRE 408; Uniform Rules of Evidence, Rule 408.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Practice References Louisell and Mueller, Federal Evidence § 170.

Hunter, Federal Trial Handbook 2d § 73.18.

Footnote 87. *Rochester Machine Corp. v Mulach Steel Corp.*, 498 Pa 545, 449 A2d 1366.

Footnote 88. § 510.

Footnote 89. § 516.

Footnote 90. Advisory Committee Notes to Federal Rules of Evidence, Rule 408.

Footnote 91. *Branch v Fidelity & Casualty Co.* (CA5 La) 783 F2d 1289, 20 Fed Rules Evid Serv 179; *Deere & Co. v International Harvester Co.* (CA FC) 710 F2d 1551, 218 USPQ 481, 13 Fed Rules Evid Serv 1443.

Footnote 92. *Williams v Chevron U.S.A., Inc.* (CA5 La) 875 F2d 501, 28 Fed Rules Evid Serv 296, a case in which the judge chose to exclude evidence of a settlement with one of several defendants, such evidence being offered to impeach the plaintiff's testimony that he did not have the financial means to pay for a particular surgical procedure.

It is well recognized, and rightly so, that the risks of prejudice and confusion entailed in receiving settlement evidence are such that often Rule 403 and the underlying policy of Rule 408 to encourage settlement require exclusion even when a permissible purpose can be discerned. *Stacey v Bangor Punta Corp.* (DC Me) 620 F Supp 636, 19 Fed Rules Evid Serv 1330.

As to the admissibility of settlement evidence for purposes other than showing the validity or amount of a claim, see § 516.

§ 508 Public policy considerations

[View Entire Section](#)

Rule 408 is designed to foster full and free discussion and negotiations in order to encourage out-of-court settlements, 93 eliminating much of the concern with technicalities which riddled the common-law rule, and it should be interpreted with that policy in mind. 94 The rule reflects the reality that permitting consideration of settlement offers as reflecting an admission of liability in the amount of the offer would seriously discourage parties from discussing settlement or making settlement offers. 95 An additional principle underlying the Rule is that the evidence is irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim. 96

Footnotes

Footnote 93. *McHann v Firestone Tire & Rubber Co.* (CA5 Miss) 713 F2d 161, CCH Prod Liab Rep ¶ 9782, 13 Fed Rules Evid Serv 1611, 72 ALR Fed 582; *Prudential Ins. Co. v Curt Bullock Builders, Inc.* (ND Ill) 626 F Supp 159; *United States v Contra Costa County Water Dist.* (CA9 Cal) 678 F2d 90, 10 Fed Rules Evid Serv 982; *Bradbury v Phillips Petroleum Co.* (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73; *Cheyenne River Sioux Tribe v United States* (CA FC) 806 F2d 1046, cert den 482 US 913, 96 L Ed 2d 673, 107 S Ct 3184, later proceeding 14 Cl Ct 94, affd (CA FC) 862 F2d 275, cert den 490 US 1075, 104 L Ed 2d 650, 109 S Ct 2087; *Sokolowski v Medi Mart, Inc.*, 24 Conn App 276, 587 A2d 1056.

Footnote 94. *Prudential Ins. Co. v Curt Bullock Builders, Inc.* (ND Ill) 626 F Supp 159.

Footnote 95. *Cheyenne River Sioux Tribe v United States* (CA FC) 806 F2d 1046, cert den 482 US 913, 96 L Ed 2d 673, 107 S Ct 3184, later proceeding 14 Cl Ct 94, affd (CA FC) 862 F2d 275, cert den 490 US 1075, 104 L Ed 2d 650, 109 S Ct 2087.

Footnote 96. *United States v Contra Costa County Water Dist.* (CA9 Cal) 678 F2d 90, 10 Fed Rules Evid Serv 982; *Miller v Component Homes, Inc.* (Iowa) 356 NW2d 213.

Under Rule 408 it would be unfair for the defendant to reveal to the jury the value that the plaintiff placed on her case at the time the plaintiff assessed the amount of damages she allegedly sustained when responding to a discovery request designed to secure information that could lead to a settlement. *Fiarman v Western Pub. Co.* (ED Mich) 107 FRD 110, 42 BNA FEP Cas 1529, 19 Fed Rules Evid Serv 209, 3 FR Serv 3d 86, later proceeding (ED Mich) 620 F Supp 544, 42 BNA FEP Cas 1530, affd (CA6 Mich) 810 F2d 85, 42 BNA FEP Cas 1532, 42 CCH EPD ¶ 36862 (the evidence was also excluded under Rule 403).

§ 509 Requisites for invocation of Rule

In order that such evidence of compromise or offer to compromise will be excluded under Rule 408, it is required that—

—there is a *claim*.

—the claim is *disputed* as to either validity or amount. 97

—the *purpose* of offering the evidence is to prove the *validity* or *invalidity* of the claim or its *amount*. 98

—*valuable consideration* is furnished or offered to be furnished, or accepted or offered to be accepted.

Rule 408 does not define what constitutes "valuable consideration." While generally understood to mean something such as money or anything having monetary value, a "valuable consideration" technically consists of the acquisition of some legal right by the promisor, in return for which he makes the promise, or in the giving up of some legal right by the promisee, in return for which the promise is made to him. 99

Footnotes

Footnote 97. Advisory Committee Notes to Federal Rules of Evidence, Rule 408.

The trial court did not err in admitting the deposition testimony of a witness that the insurance company had reimbursed her for insurance claims to cover medical costs where there was no evidence that either the validity or the amount of the payment was ever the subject of dispute. *Dallis v Aetna Life Ins. Co.* (CA11 Ga) 768 F2d 1303, 18 Fed Rules Evid Serv 976.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Footnote 98. Advisory Committee Notes to Federal Rules of Evidence, Rule 408.

Footnote 99. 17A Am Jur 2d, Contracts § 127.

§ 510 Conduct or statements during compromise negotiations, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of conduct or statements made in compromise negotiations is not admissible. 1
In order to be excludible under Federal Rules of Evidence 408 statements must (1) be

made in settlement negotiations, 2 (2) relate to issues involved in the proceedings, 3 and (3) offer to compromise or settle any claim in the action being litigated. 4 Read literally, Federal Rules of Evidence 408 does not appear to cover compromises and compromise offers that do not involve a dispute that is the subject of the suit, even if one of the parties to the suit was also a party to the compromise. However, even where the settlement relates to prior claims that arguably arose out of different events and transactions, where these claims are related inasmuch as they arose in the course of the same large scale project operated by the defendant, and the claims sued upon are similar enough to be relevant, there is a sufficient basis for bringing the evidence concerning the compromises and settlements under the umbrella of Rule 408. 5

Federal Rule of Evidence 408 does not prevent the same party who submitted the material in the course of settlement discussions from using the material later at trial, because Rule 408 is designed to avoid one party using material against the party who submitted the material for settlement purposes. 6

◆ Caution: A party waives its right to object to admission of evidence under Federal Rules of Evidence 408 where it fails to make timely and specific objections on the grounds stated in Rule 408, but rather objects to the evidence for other reasons. 7 Furthermore, where testimony relating to an offer of compromise is permitted for the sole purpose of calculating damages, the court should not advert to it in deciding the issue of liability; otherwise it might be a ground for reversal of the judgment, since Rule 408 makes compromise offers inadmissible in evidence. 8

§ 510 ----Conduct or statements during compromise negotiations, generally [SUPPLEMENT]

Case authorities:

In action for breach of lease, letter written by tenant's counsel setting forth tenant's understanding of how electric costs should be calculated was not inadmissible under Rule 408 since it was not offered to show offer of compromise but for discrete proposition that tenant had access to all documents it needed to compute electric costs. *Sage Realty Corp. v Insurance Co. of N. Am.* (1994, CA2 NY) 34 F3d 124.

Court trying defendant on charges of mail fraud and filing false tax return did not abuse its discretion when admitting defendant's statements made to investigator during compromise negotiations with Securities Division of Indiana Secretary of State's Office; clear reading of rule suggests that it applies only to civil proceedings, specifically language concerning validity and amount of claim, and public interest in prosecution of crime is greater than public interest in settlement of civil disputes. *United States v Prewitt* (1994, CA7 Ind) 34 F3d 436.

Footnotes

Footnote 1. FRE 408.

Footnote 2. *Mendelovitz v Adolph Coors Co.* (CA5 Tex) 693 F2d 570, 1982-83 CCH Trade Cases ¶ 65090, 12 Fed Rules Evid Serv 321; *Trans Union Credit Information Co. v*

Associated Credit Services, Inc. (CA6 Ohio) 805 F2d 188, 22 Fed Rules Evid Serv 41 (statements and conduct sought to be excluded were made at a meeting unrelated to compromise negotiations); General Leaseways, Inc. v National Truck Leasing Asso. (CA7 Ill) 830 F2d 716, 1987-2 CCH Trade Cases ¶ 67706, 24 Fed Rules Evid Serv 85 (statements made in telephone call prior to written settlement offer were not excluded by Rule 408 even though offer referred back to telephone call); Blu-J, Inc. v Kemper C.P.A. Group (CA11 Fla) 916 F2d 637, 31 Fed Rules Evid Serv 653.

In suit charging racial discrimination in village's handling of applications for building permits, District Court did not abuse its discretion by refusing to admit letter and draft agreement written by village's attorney to plaintiffs' original attorney since there was substantial showing that letter was part of settlement attempt and would have been used by plaintiff to establish claim that demands of defendants were pretext for racial animus. New Burnham Prairie Homes, Inc. v Burnham (CA7 Ill) 910 F2d 1474, 30 Fed Rules Evid Serv 1052.

Footnote 3. Vulcan Hart Corp. (St. Louis Div.) v NLRB (CA8) 718 F2d 269, 114 BNA LRRM 2745, 98 CCH LC ¶ 10489, 14 Fed Rules Evid Serv 961 (criticized on other grounds by NLRB v Champ Corp. (CA9) 913 F2d 639, 135 BNA LRRM 2252, 116 CCH LC ¶ 10268).

Footnote 4. Mendelovitz v Adolph Coors Co. (CA5 Tex) 693 F2d 570, 1982-83 CCH Trade Cases ¶ 65090, 12 Fed Rules Evid Serv 321; General Leaseways, Inc. v National Truck Leasing Asso. (CA7 Ill) 830 F2d 716, 1987-2 CCH Trade Cases ¶ 67706, 24 Fed Rules Evid Serv 85.

Footnote 5. Bradbury v Phillips Petroleum Co. (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73 (seven prior claims brought by landowners arose in the course of the same large scale uranium exploration project conducted by the defendant).

District Court did not err in applying Rule 408 to prevent plaintiff from offering evidence, at trial, of statements made by attorneys in course of settling prior related litigation between same parties, where case represented continuation of feud between parties arising out of breakup of business association and public policy strongly encourages settlement. Fiberglass Insulators, Inc. v Dupuy (CA4 SC) 856 F2d 652, 26 Fed Rules Evid Serv 1225.

Footnote 6. Hulter v Commissioner, 83 TC 663, 16 Fed Rules Evid Serv 793.

Footnote 7. ESCO Corp. v United States (CA9 Or) 750 F2d 1466, 85-1 USTC ¶ 9147, 17 Fed Rules Evid Serv 1022, 55 AFTR 2d 85-798.

Footnote 8. Ward v Allegheny Ludlum Steel Corp. (CA3 Pa) 560 F2d 579, 15 BNA FEP Cas 471, 14 CCH EPD ¶ 7783, 1 Fed Rules Evid Serv 1046.

§ 511 --How to determine what is a compromise negotiation

[View Entire Section](#)

Courts have regarded discussions between two parties as settlement negotiations where (1) after the plaintiff had filed an action, 9 the parties met to talk about their interpretation of the matter in dispute, with the assistance of outside counsel, 10 and counsel for the parties agreed that the discussions in the meeting would not be later used for any purpose; 11 and (2) it was contemplated that litigation might be necessary, counsel for the parties having conceded in a written communication between themselves that litigation was possible. 12

Where the point of threatened litigation has not been reached, communications between parties are not considered compromise negotiations. 13 Thus, in business communications between companies which have not crystallized to such a point, 14 an admission in a conversation during an informal investigation, 15 an effort to head off a criminal prosecution rather than resolve a civil claim, 16 and a mere effort to buy time in which to pay an obligation, even though the validity of the obligation is later disputed 17 have been considered admissible as outside the rule. Moreover, one who is not a party to a settlement may invoke the protection of Rule 408 to exclude evidence of the settlement. 18

Uniform Rule 408 explicitly provides that compromise negotiations encompass mediation. 19

◆ Caution: The admission of any statement made during, or any document prepared for, any kind of conciliation effort at least raises a Rule 408 issue. 20

Footnotes

Footnote 9. *Trans Union Credit Information Co. v Associated Credit Services, Inc.* (CA6 Ohio) 805 F2d 188, 22 Fed Rules Evid Serv 41.

Footnote 10. *Trans Union Credit Information Co. v Associated Credit Services, Inc.* (CA6 Ohio) 805 F2d 188, 22 Fed Rules Evid Serv 41; *Olin Corp. v Insurance Co. of N. Am.* (SD NY) 603 F Supp 445, 22 Env't Rep Cas 1618, adhered to, motion den (SD NY) 607 F Supp 1377.

Footnote 11. *Trans Union Credit Information Co. v Associated Credit Services, Inc.* (CA6 Ohio) 805 F2d 188, 22 Fed Rules Evid Serv 41.

Footnote 12. *Olin Corp. v Insurance Co. of N. Am.* (SD NY) 603 F Supp 445, 22 Env't Rep Cas 1618, adhered to, motion den (SD NY) 607 F Supp 1377.

Footnote 13. *Re B.D. International Discount Corp.* (CA2 NY) 701 F2d 1071, 10 BCD 406, 8 CBC2d 300, CCH Bankr L Rptr ¶ 69183, 12 Fed Rules Evid Serv 1535, 73 ALR Fed 752, cert den 464 US 830, 78 L Ed 2d 110, 104 S Ct 108 (negotiations took place before filing of bankruptcy petition and at time of negotiation creditor did not dispute bank's claim but was simply endeavoring to get more time in which to pay); *United States v Peed* (CA4 Md) 714 F2d 7, 13 Fed Rules Evid Serv 1964 (no civil suit was pending at the time the conversation seeking compromise took place); *Prudential Ins. Co. v Curt*

Bullock Builders, Inc. (ND Ill) 626 F Supp 159; Cruces v KFC Corp. (CA8 Mo) 768 F2d 230, 18 Fed Rules Evid Serv 1247 (the initial offer was made more than three years before the lawsuit was filed and it was not clear to the court that the plaintiff had a claim against the defendant at that time); Big O Tire Dealers, Inc. v Goodyear Tire & Rubber Co. (CA10 Colo) 561 F2d 1365, 195 USPQ 417, 2 Fed Rules Evid Serv 443, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905; Deere & Co. v International Harvester Co. (CA FC) 710 F2d 1551, 218 USPQ 481, 13 Fed Rules Evid Serv 1443.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Footnote 14. Big O Tire Dealers, Inc. v Goodyear Tire & Rubber Co. (CA10 Colo) 561 F2d 1365, 195 USPQ 417, 2 Fed Rules Evid Serv 443, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905; Olin Corp. v Insurance Co. of N. Am. (SD NY) 603 F Supp 445, 22 Env't Rep Cas 1618, adhered to, motion den (SD NY) 607 F Supp 1377.

Footnote 15. United States v Meadows (CA5 Ga) 598 F2d 984, 4 Fed Rules Evid Serv 567.

Footnote 16. United States v Peed (CA4 Md) 714 F2d 7, 13 Fed Rules Evid Serv 1964.

Footnote 17. Prudential Ins. Co. v Curt Bullock Builders, Inc. (ND Ill) 626 F Supp 159.

Footnote 18. Kennon v Slipstreamer, Inc. (CA5 Tex) 794 F2d 1067, 21 Fed Rules Evid Serv 81.

Footnote 19. Uniform Rules of Evidence, Rule 408.

Footnote 20. Prudential Ins. Co. v Curt Bullock Builders, Inc. (ND Ill) 626 F Supp 159.

District Court did not abuse its discretion in excluding former employer's offer to discharged employee of money for "outplacement services" 3 weeks after employee's discharge where employee had already received severance package and had retained lawyer although not yet filed claims against employer. Mundy v Household Finance Corp. (CA9 Cal) 885 F2d 542, 50 BNA FEP Cas 1303, 51 CCH EPD ¶ 39315, 117 CCH LC ¶ 56452, 28 Fed Rules Evid Serv 918.

§ 512 Applicability of Rule in criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While Rule 408 has been applied in criminal cases to exclude evidence with respect to plea bargaining by representatives of the government with the defendant, 21 it should be noted that Rule 410 generally governs admissibility of evidence of guilty pleas and plea negotiations. 22 It has been held that the rule excluding from evidence offers of compromise or settlement of a claim which is disputed as to either validity or amount

applies only to civil litigation, since the reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not ordinarily constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount." 23

Rule 408 governs the admission of related civil settlement negotiations in a criminal trial. 24 Thus, in a criminal prosecution for obtaining duplicate paychecks by fraud, in which a prosecution witness testified that defendant had admitted knowledge of an administrative error causing the duplicate checks to be issued, where defense counsel elicited from such witness on cross-examination that defendant had subsequently agreed to a repayment schedule, it was held that defense counsel could not later complain that the testimony about the repayment schedule was inadmissible and that he was merely "forced" to introduce such testimony. The court stated that even though such testimony might otherwise have been barred by Rule 408 as a settlement offer, this testimony was solicited by defense counsel on cross-examination and appeared to have been a calculated, tactical defense decision. 25

◆ Comment: One commentator has observed that there are good reasons why Rule 408 should, along with Rule 410, apply to plea bargaining in criminal cases. The last sentence of the Rule, which makes it clear that the exclusionary principle does not reach proof of an effort to obstruct a criminal investigation or prosecution, would hardly be necessary if Rule 408 applied only in civil litigation. Moreover, statements and offers made by the Government during plea bargaining are customarily considered inadmissible when offered by the defendant, and Rule 410 does not appear to reach these; an unwarranted gap is thus closed if Rule 408 applies in this context. 26

§ 512 ----Applicability of Rule in criminal cases [SUPPLEMENT]

Case authorities:

In prosecution for knowingly selling counterfeit works of art, evidence of defendant's prior settlement with FTC was admissible notwithstanding Rules 408 and 404 since it served alternative purposes: it showed that defendant was on notice when he subsequently sold other prints that those prints were forgeries, that defendant knew he could not sell prints without reporting sale to FTC, facts from FTC case provided background for defendant's indictment and laid evidentiary foundation for many of government's exhibits in criminal proceeding, and stipulation itself constituted direct judicial admission to accusation of fraud in conduct underlying indictment. *United States v Austin* (1995, CA7 Ill) 54 F3d 394, reh den (1995, CA7 Ill) 1995 US App LEXIS 15724.

Footnotes

Footnote 21. *United States v Verdoorn* (CA8 Iowa) 528 F2d 103, 1 Fed Rules Evid Serv 1093.

Footnote 22. §§ 517 et seq.

Footnote 23. *United States v Baker* (CA2 NY) 926 F2d 179, 32 Fed Rules Evid Serv 414, holding that Rule 408 did not apply to evidence of defendant's pre-arrest statements to FBI special agent about "making a deal" with other FBI agent.

Footnote 24. *United States v Meadows* (CA5 Ga) 598 F2d 984, 4 Fed Rules Evid Serv 567.

Footnote 25. *United States v Meadows* (CA5 Ga) 598 F2d 984, 4 Fed Rules Evid Serv 567.

Footnote 26. *Louisell and Mueller*, Federal Evidence § 170.

§ 513 Applicability to third party settlement, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 408 applies to the case where the settlement agreement is entered into between a litigant and a third party, not just to the case where the agreement is between the two litigants themselves. 27 Therefore, a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person, nor can plaintiff show the defendant's liability or extent of liability by proof of defendant's settlement with a third person. 28

◆ Observation: While Rule 408 is more commonly invoked to bar the admission of agreements between a defendant and a third party to compromise a claim arising out of the same transaction as the one being litigated, 29 the Rule also bars evidence of settlements between plaintiffs and third party joint tortfeasors or former co-defendants. 30 If the policies underlying Rule 408 mandate that settlements may not be admitted against a defendant who has recognized and settled a third party's claim against him, it is axiomatic that those policies likewise prohibit the admission of settlement evidence against a plaintiff who has accepted payment from a third party against whom he has a claim. 31

Evidence of a third party's payment of a significant settlement amount to the plaintiff may not be admitted on behalf of the defendant to show that the actions of such third party were the cause in fact of the plaintiff's damages, because evidence of causation or noncausation is fully subsumed under the Rule's prohibition of evidence concerning the validity or invalidity of a claim. 32

Footnotes

Footnote 27. *McInnis v A.M.F., Inc.* (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943; *Southern Pacific Transp. Co. v Veliz* (App) 117 Ariz 199, 571 P2d 696; *Missouri P. R. Co. v Arkansas Sheriff's Boys' Ranch*, 280 Ark 53, 655 SW2d 389; *Windemuller Electric Co. v Blodgett Memorial*

Medical Center, 130 Mich App 17, 343 NW2d 223; Baker v Blue Ridge Ins. Co., 215 Neb 111, 337 NW2d 411.

The fact that the settlement with a codefendant absent from trial was for a nominal amount suggested that the plaintiffs thought that the settling codefendant was not liable for the plaintiffs' injuries and therefore pointed the finger at the defendant in court and could be taken by the jury as a reflection of the strength of the plaintiffs' case against the defendant, thus improperly inviting the jury to consider the settlement amount in its deliberations. Kennon v Slipstreamer, Inc. (CA5 Tex) 794 F2d 1067, 21 Fed Rules Evid Serv 81.

Footnote 28. Young v Verson Allsteel Press Co. (ED Pa) 539 F Supp 193, 10 Fed Rules Evid Serv 1538 (defendants attempt to admit evidence of the plaintiff's settlement with a former codefendant not present at trial is merely an attempt to circumvent the express prohibition of Rule 408); McHann v Firestone Tire & Rubber Co. (CA5 Miss) 713 F2d 161, CCH Prod Liab Rep ¶ 9782, 13 Fed Rules Evid Serv 1611, 72 ALR Fed 582.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Footnote 29. McInnis v A.M.F., Inc. (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943.

Footnote 30. Quad/Graphics, Inc. v Fass (CA7 Wis) 724 F2d 1230, 14 Fed Rules Evid Serv 737.

Footnote 31. McInnis v A.M.F., Inc. (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943.

Footnote 32. McInnis v A.M.F., Inc. (CA1 RI) 765 F2d 240, 18 Fed Rules Evid Serv 607, 84 ALR Fed 259, on remand (DC RI) 625 F Supp 943.

§ 514 --Evidence of settlement in separate lawsuit

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Evidence of a settlement in a different law suit may be excluded under Rule 408. 33 While a literal reading of the rule suggests an application solely to negotiations or compromises involving the claim being litigated, the rationale behind the rule applies in circumstances in which a plaintiff attempts to introduce evidence of a settlement involving the same defendant but a different plaintiff. If such evidence were routinely allowed in subsequent law suits, it would give any litigant pause before settling. 34

§ 514 --Evidence of settlement in separate lawsuit [SUPPLEMENT]

Case authorities:

DNA evidence used to identify one of coconspirators via blood found in victim's van was properly admitted; it was relevant to whether defendant was in victim's van on night of murder, government's experts clearly indicated that FBI's DNA procedures were generally accepted, underlying methodology and reasoning were scientifically valid, and it is undisputed that general principle that individuals can be identified by DNA is scientifically valid. *United States v Bonds* (1993, CA6 Ohio) 12 F3d 540, 38 Fed Rules Evid Serv 688, 1994 FED App. 85P, reh, en banc, den (CA6) 1994 US App LEXIS 3679, later proceeding (CA6 Ohio) 18 F3d 1327.

Footnotes

Footnote 33. *Abundis v United States*, 15 Cl Ct 619, 28 BNA WH Cas 1569, 110 CCH LC ¶ 35118, 26 Fed Rules Evid Serv 1358, partial summary judgment den 18 Cl Ct 657, 29 BNA WH Cas 1651, 113 CCH LC ¶ 35282, later proceeding (CA FC) 976 F2d 691, 92 Daily Journal DAR 14751, 123 CCH LC ¶ 35705.

Footnote 34. *Abundis v United States*, 15 Cl Ct 619, 28 BNA WH Cas 1569, 110 CCH LC ¶ 35118, 26 Fed Rules Evid Serv 1358, partial summary judgment den 18 Cl Ct 657, 29 BNA WH Cas 1651, 113 CCH LC ¶ 35282, later proceeding (CA FC) 976 F2d 691, 92 Daily Journal DAR 14751, 123 CCH LC ¶ 35705.

§ 515 Admissibility of otherwise discoverable evidence presented during compromise negotiations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Neither Federal Rules of Evidence 408 nor Uniform Rule 408 requires the exclusion of evidence that is otherwise discoverable merely because it is presented in the course of compromise negotiations. 35 This provision does not make material which exists only because of settlement negotiations admissible against the party who submitted the material, but rather allows the discovery and admission of material which exists independently of the settlement negotiations even though such material was disclosed during the negotiations. 36 Thus, a party cannot immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation. 37 Furthermore, Rule 408 does not preclude the discovery of settlement discussions which culminate in a settlement under circumstances where the plaintiff seeks only to discover the documents and not to admit them into evidence at trial. 38

◆ Comment: The intent of Federal Rules of Evidence 408 is to foster settlement negotiations by limiting the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial; the rule was never intended to be a broad discovery privilege. 39 Furthermore, the policy of Federal Rules of Evidence 408 would not be served by excluding from discovery documents relating to

Footnotes

Footnote 35. FRE 408; Uniform Rules of Evidence, Rule 408.

Footnote 36. *Hulter v Commissioner*, 83 TC 663, 16 Fed Rules Evid Serv 793; *Morse/Diesel, Inc. v Fidelity & Deposit Co.* (SD NY) 122 FRD 447, 27 Fed Rules Evid Serv 69, later proceeding (SD NY) 1990 US Dist LEXIS 4632, later proceeding (SD NY) 1990 US Dist LEXIS 6548, later proceeding (SD NY) 763 F Supp 28, mod, on reh, in part (SD NY) 768 F Supp 115, claim dismissed (SD NY) 1992 US Dist LEXIS 3749.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Footnote 37. *NAACP Legal Defense & Educational Fund, Inc. v U.S. Dept. of Justice* (DC Dist Col) 612 F Supp 1143, 18 Fed Rules Evid Serv 1421.

Senate Judiciary Committee Report No. 93-1277 p. 10.

Footnote 38. *Triax Co. v United States*, 11 Cl Ct 130, 33 CCF ¶ 74663.

Footnote 39. *NAACP Legal Defense & Educational Fund, Inc. v U.S. Dept. of Justice* (DC Dist Col) 612 F Supp 1143, 18 Fed Rules Evid Serv 1421.

Footnote 40. *Triax Co. v United States*, 11 Cl Ct 130, 33 CCF ¶ 74663.

§ 516 Admissibility where offered for other purposes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of compromise or offers of compromise is admissible if the evidence is offered for a purpose other than establishing the validity or amount of a claim, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. 41 For example, Rule 408 specifically allows an exception for items used to prove a consequential material fact at issue other than the claim's validity or its amount. 42 Moreover, evidence of statements made in the course of settlement negotiations will be admitted even if offered for a purpose other than one of the purposes specifically named in Rule 408. 43

An eventual settlement between the plaintiff and the defendant insurance company is not admissible as an exception to Rule 408 where offered for the purpose of showing bad faith, as an eventual settlement does not indicate that an initial denial of insurance coverage was in bad faith. 44

It is within the discretion of the trial court whether to admit evidence for another purpose.

45 In making its determination, a court must balance both the weight of the policy considerations behind the rule against the need for the evidence, 46 and the relevance of the evidence against its prejudicial effect. 47 The better practice is to exclude evidence of compromises or compromise offers when it is doubtful whether the evidence is offered for another purpose. 48 Moreover, the decision to exclude or admit evidence under Rule 408 will not be reversed absent a clear abuse of discretion. 49

◆ Observation: The rationale underlying the common law rule that gave rise to Rule 408 was to exclude the offer of compromise only when it was tendered as an admission of the weakness of the offering party's claim or defense, not when the purpose is otherwise. 50

Footnotes

Footnote 41. FRE 408; Uniform Rules of Evidence, Rule 408.

Letters of the plaintiff to the defendant offering to settle their differences were properly admitted for the purpose of showing that the defendant had not inadvertently failed to make payment to the plaintiff. *Miller v Component Homes, Inc.* (Iowa) 356 NW2d 213.

Footnote 42. *Prudential Ins. Co. v Curt Bullock Builders, Inc.* (ND Ill) 626 F Supp 159.

Footnote 43. *United States v Gonzalez* (CA2 NY) 748 F2d 74, 16 Fed Rules Evid Serv 950.

Annotation: Evidence involving compromise or offer of compromise as inadmissible under Rule 408 of Federal Rules of Evidence, 72 ALR Fed 592.

Footnote 44. *Lampliter Dinner Theater, Inc. v Liberty Mut. Ins. Co.* (CA11 Ala) 792 F2d 1036.

Footnote 45. *Belton v Fibreboard Corp.* (CA5 Tex) 724 F2d 500, 14 Fed Rules Evid Serv 1825; *Weir v Federal Ins. Co.* (CA10 Colo) 811 F2d 1387, CCH Prod Liab Rep ¶ 11288, 22 Fed Rules Evid Serv 912, 3 UCCRS2d 93; *Bradbury v Phillips Petroleum Co.* (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73.

Footnote 46. *Prudential Ins. Co. v Curt Bullock Builders, Inc.* (ND Ill) 626 F Supp 159.

Footnote 47. *Weir v Federal Ins. Co.* (CA10 Colo) 811 F2d 1387, CCH Prod Liab Rep ¶ 11288, 22 Fed Rules Evid Serv 912, 3 UCCRS2d 93; *Bradbury v Phillips Petroleum Co.* (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73.

Footnote 48. *Bradbury v Phillips Petroleum Co.* (CA10 Colo) 815 F2d 1356, 22 Fed Rules Evid Serv 1744, 94 OGR 73.

Footnote 49. *Weir v Federal Ins. Co.* (CA10 Colo) 811 F2d 1387, CCH Prod Liab Rep ¶ 11288, 22 Fed Rules Evid Serv 912, 3 UCCRS2d 93.

Footnote 50. *Hulter v Commissioner*, 83 TC 663, 16 Fed Rules Evid Serv 793 (party was not barred from using his own expert witness' testimony and expert witness' report at trial

merely because same party offered such evidence in settlement negotiations).

9. Pleas, Offers of Pleas, and Related Statements in Criminal Cases [517-524]

§ 517 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Except when admitted for special purposes, 51 evidence of the following is not admissible pursuant to Federal Rules of Evidence 410, in any federal civil or criminal proceeding, against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedures regarding either of the foregoing pleas, or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. 52

However, such a statement is admissible in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel. 53

The Uniform Rules of Evidence contain a similar provision, under which evidence of a plea later withdrawn, of guilty, or an admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. 54

Federal Rule 410 by its terms deals only with pleas and plea negotiations in criminal cases. 55

The essence of plea bargaining is negotiation, and a precondition of successful negotiations is an assurance of confidentiality which will encourage the candid give-and-take essential to reaching an agreeable compromise. 56 Federal Rules of Evidence 410 is designed to promote active plea negotiations and to encourage frank

§ 517 ----Generally [SUPPLEMENT]

Case authorities:

Admission of drug defendant's guilty plea to felony menacing was not plain error, even if it did not qualify as conviction since defendant was given probation, suspended sentence and case was subsequently dismissed; no substantive rights were prejudiced by its admission and defendant opened door for cross-examination about it by testifying in detail about circumstances surrounding it. *United States v Swanson* (1993, CA8 Minn) 9 F3d 1354.

District court did not abuse its discretion in excluding evidence of surveyor's 12-year-old conviction for conspiracy to defraud shipping companies by falsifying surveys in exchange for bribes in instant action by shipper against carrier for cargo damage, given age of conviction and witness's claim that guilty plea on which conviction was based was coerced. *American Home Assurance Co. v American President Lines* (1994, CA9 Cal) 44 F3d 774, 95 CDOS 7, 95 Daily Journal DAR 35.

The trial court did not err in a first-degree murder resentencing by failing to strike plea agreements in which the State accepted guilty pleas to felony murder only. The plea bargain served only to limit the maximum time the defendant would serve in prison if the jury failed to recommend a sentence of death and did not "suppress" an aggravating circumstance supported by evidence or otherwise limit the sentence the jury could recommend for first-degree murder. *State v Green* (1994) 336 NC 142, 443 SE2d 14.

Footnotes

Footnote 51. Discussed in § 524.

Footnote 52. FRE 410; FR Crim P, Rule 11(e)(6).

Annotation: Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Practice References Plea bargaining techniques. 25 Am Jur Trials 69.

Footnote 53. FRE 410; FR Crim P, Rule 11(e)(6).

Footnote 54. Uniform Rules of Evidence, Rule 410.

Observation Most of the states which have adopted a version of the Uniform Rules seem to follow the wording of Federal Rules of Evidence 410. See 13A ULA, Uniform Rules of Evidence Rule 410, Variations from Official Text.

Footnote 55. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955.

Footnote 56. *State v Davis* (Hamilton Co) 70 Ohio App 2d 48, 24 Ohio Ops 3d 42, 434 NE2d 285, motion overr.

Footnote 57. *United States v Sockwell* (CA5 La) 699 F2d 213, 12 Fed Rules Evid Serv 927, cert den 461 US 936, 77 L Ed 2d 311, 103 S Ct 2106; *United States v Robertson* (CA5 Tex) 560 F2d 647, on reh (CA5 Tex) 582 F2d 1356, 3 Fed Rules Evid Serv 1499; *Rachlin v United States* (CA8 Mo) 723 F2d 1373, 14 Fed Rules Evid Serv 1325.

§ 518 Withdrawn guilty pleas

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A withdrawn guilty plea is not, except under certain limited circumstances, 58 admissible against the defendant who made the plea, in any civil or criminal proceeding. 59 Admission of such pleas would reduce the act of withdrawal to a meaningless gesture, 60 and this policy is reflected in Federal Rules of Evidence 410. Nevertheless, the exclusion of an offer to plead guilty is only required where the evidence is offered against the defendant, and where the defendant personally seeks to introduce such evidence it may be admitted, where relevant. 61

Federal Rules of Evidence 410 does not prohibit the use of unwithdrawn guilty pleas, and a statement made by a witness at the time of pleading guilty is admissible for collateral use to impeach such testimony at a subsequent trial. 62 Use of such statements is only prohibited when used against the person who made the plea and after that person has withdrawn the plea of guilty. 63

A state may not enter into a plea agreement, obtain a statement thereunder, abort the agreement, and then use the statements in its case in chief at trial on the merits. 64 The reason for the State's repudiation of the agreement is immaterial with respect to the admissibility of the statement. The justification of the rescission, repudiation, or breach of the agreement by the State goes to whether the defendant is entitled to have the agreement enforced; it does not affect the admissibility of the statement obtained under it. 65

Footnotes

Footnote 58. For a discussion of the circumstances under which a withdrawn guilty plea is admissible, see § 517.

Footnote 59. FRE 410.

◆ Observation: This principle is observed in states which have not adopted the Federal Rules of Evidence. See, for example, *State v Wilson* (Mo App) 750 SW2d 560.

Annotation: Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 ALR2d 326.

Footnote 60. *Kercheval v United States*, 274 US 220, 71 L Ed 1009, 47 S Ct 582.

Footnote 61. *Heindel v United States* (CA6 Ohio) 150 F2d 493, 45-2 USTC ¶ 9372, 34 AFTR 32.

Footnote 62. *United States v Mathis* (CA4 Md) 550 F2d 180, 1 Fed Rules Evid Serv 443, cert den 429 US 1107, 51 L Ed 2d 560, 97 S Ct 1140; *State v Hansen*, 194 Mont 197, 633 P2d 1202.

Footnote 63. *United States v Mathis* (CA4 Md) 550 F2d 180, 1 Fed Rules Evid Serv 443, cert den 429 US 1107, 51 L Ed 2d 560, 97 S Ct 1140.

Footnote 64. *Allgood v State*, 309 Md 58, 522 A2d 917.

Footnote 65. *Allgood v State*, 309 Md 58, 522 A2d 917.

§ 519 Nolo contendere pleas

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal and Uniform Rule both make inadmissible a plea of nolo contendere or an offer to plead nolo contendere, against the person making the plea in any subsequent civil or criminal action, 66 thus giving effect to the principal characteristic of such a plea, the avoidance of any admission of guilt which is inherent in a guilty plea. 67 Accordingly, the rule prohibits admitting a defendant's nolo contendere plea to a criminal charge regarding an incident as an admission by a party in a wrongful death action arising from the same incident. 68 Moreover, the government may not use a nolo plea to prove that a defendant had admitted guilt by the plea and thereby meet its initial burden of proving the defendant committed the act. 69

The erroneous admission of a prior nolo contendere plea will not lead to a reversal of defendant's convictions where before the defendant was questioned about the plea he had already admitted the conduct that formed the basis of it, so that the additional fact of the plea added little to what the jury already knew and the trial judge instructed the jury to consider only those crimes alleged in the indictment. 70

Rule 410 contemplates a situation where a nolo contendere plea is sought to be used against the pleader in a subsequent civil or criminal action in which he or she is the

defendant. 71 Where the person who entered the prior no-contest plea is now a plaintiff in a civil action, use of the no-contest plea for estoppel purposes is not "against the defendant" within the meaning of Rule 410. 72 Thus, even though a guilty plea is not conclusive for purposes of collateral estoppel, a guilty plea is admissible in a subsequent civil action on the independent ground that it is an admission. 73

◆ Comment: Some writers have stated that Federal Rules of Evidence 410 was not designed to require exclusion of proof of a judgment or conviction based upon a nolo contendere plea, where such a conviction has independent nonhearsay significance. 74

Although Federal Rules of Evidence 410 precludes the admission of a nolo contendere plea, the underlying facts are not insulated from admissibility under Federal Rules of Evidence 404(b). 75

§ 519 ----Nolo contendere pleas [SUPPLEMENT]

Case authorities:

Insurer's argument that criminality of insured's actions was conclusively determined by his pleas of "no contest" to state criminal charges must fail, where insurer seeks to exclude coverage for wrongful death of teenager by electrocution, because FRE 410 provides that evidence of no contest plea is not admissible in subsequent civil proceeding. *Tower Ins. Co. v Judge* (1993, DC Minn) 840 F Supp 679.

Trial court in personal injury action arising from automobile accident, as result of which defendant driver pleaded guilty to charge of driving under influence of alcohol, properly excluded evidence of defendant's two prior nolo contendere pleas to similar charges on issue of plaintiff's entitlement to award of punitive damages, but erred in admitting evidence of such pleas as to issue of amount of such damages, but evidence establishing commission of such prior offenses other than nolo pleas or disposition would be admissible. *Holt v Grinnell* (1994) 212 Ga App 520, 441 SE2d 874, 94 Fulton County D R 1070, cert den (1994, Ga) 1994 Ga LEXIS 703.

Footnotes

Footnote 66. FRE 410; Uniform Rules of Evidence Rule 410.

Footnote 67. Advisory Committee Notes to Federal Rules of Evidence, Rule 410.

Annotation: Plea of nolo contendere or non vult contendere, 89 ALR2d 540.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Footnote 68. *Fisher v Wainwright* (CA5 Fla) 584 F2d 691; *Neuner v Clinkenbeard* (WD Okla) 466 F Supp 54, 3 Fed Rules Evid Serv 1603.

Footnote 69. *United States v Wyatt* (CA11 Ga) 762 F2d 908, 18 Fed Rules Evid Serv

673, reh den, en banc (CA11 Ga) 779 F2d 60 and cert den 475 US 1047, 89 L Ed 2d 575, 106 S Ct 1266.

Footnote 70. United States v Manzella (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457.

Footnote 71. Walker v Schaeffer (CA6 Ohio) 854 F2d 138, 26 Fed Rules Evid Serv 763.

Footnote 72. Walker v Schaeffer (CA6 Ohio) 854 F2d 138, 26 Fed Rules Evid Serv 763.

Footnote 73. State Farm Fire & Casualty Co. v Bomke (CA9 Cal) 849 F2d 1218.

Footnote 74. Louisell and Mueller, Federal Evidence § 186.

Cases in which a judgment or conviction based upon a nolo contendere plea has independent nonhearsay significance include: cases involving deportation or revocation of a license (Sokoloff v Saxbe (CA2) 501 F2d 571; Qureshi v Immigration & Naturalization Service of Dept. of Justice (CA5) 519 F2d 1174); and prosecutions under habitual offender statutes in which prior convictions may be received and given the effect of enhancing a sentence (United States ex rel. Clark v Skeen (DC W Va) 126 F Supp 24, app dismd (CA4 W Va) 222 F2d 423; United States ex rel. Collins v Claudy (DC Pa) 106 F Supp 367, revd on other grounds (CA3 Pa) 204 F2d 624).

Footnote 75. United States v Wyatt (CA11 Ga) 762 F2d 908, 18 Fed Rules Evid Serv 673, reh den, en banc (CA11 Ga) 779 F2d 60 and cert den 475 US 1047, 89 L Ed 2d 575, 106 S Ct 1266.

§ 520 Plea bargaining statements, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn is not admissible in any civil or criminal proceeding against the defendant who was a participant in the plea discussions. 76 The inadmissibility of inculpatory admissions made during the course of such negotiations, as part of the government's case in chief, is not dependent upon the defendant being represented by counsel at the bargaining stage. 77

Rule 410 will not apply—

—where a guilty plea is accepted and not withdrawn. 78

—where the defendant is bargaining solely for leniency for third persons, since it is within the contemplation of the parties that the negotiating defendant will go to trial even if the

negotiations are successful. 79

—to testimony by government witnesses concerning offers to co-operate in the future, where a defendant spontaneously offers co-operation and attendant admissions are made without attaching conditions concerning plea bargaining. 80

—where there was no "plea bargain" 81 and the defendant did not agree to plead guilty on any charges 82 or even discuss doing so in exchange for leniency on other charges, and no evidence was obtained against the defendant as a result of his co-operation. 83

—to testimony given before a grand jury pursuant to a completed plea bargain from which the defendant later withdraws and goes to trial, since such testimony is not given in an attempt to obtain concessions in exchange for his plea. 84

—to statements made by a person co-operating with government law enforcement efforts at a time when no charges have been lodged or considered. 85

—to statements made during plea discussions at the sentencing stage of a criminal proceeding because Rule 1101(d)(3) expressly excludes the application of the Federal Rules of Evidence, other than with respect to privileges, at sentencing. 86

§ 520 ----Plea bargaining statements, generally [SUPPLEMENT]

Case authorities:

In prosecution for bank fraud and conspiracy and obstructing investigation of that fraud, evidence of defendant's discussions with federal agents for debriefing in accordance with terms of his plea agreement was highly relevant to crimes charged and not hearsay, since no party suggested that federal agents' conduct at debriefings were offered as truthful assertions and their statements were offered to show effect they had, not for their truth. *United States v Ballis* (1994, CA5 Tex) 28 F3d 1399, reh, en banc, den (1994, CA5 Tex) 1994 US App LEXIS 31223.

Government was properly permitted to use defendant's plea bargaining proffer statements to rebut defense witness's testimony since defendant waived any objection to such use by signing proffer letter prior to plea negotiations that specifically precluded government's use of defendant's statements in its case in chief but specifically provided that they could be used as rebuttal evidence. *United States v Dortch* (1993, CA7 Ill) 5 F3d 1056, 37 Fed Rules Evid Serv 1033, petition for certiorari filed (Nov 18, 1993) and petition for certiorari filed (Dec 20, 1993).

Admission of statement which defendant made during plea negotiations was not erroneous since it was admitted only as to codefendant who did not participate in plea negotiations. *United States v Testa* (1994, CA7 Ill) 33 F3d 747.

Defendant's statements made during plea bargain proffer were admissible for impeachment purposes where defendant signed proper waiver. *United States v Maldonado* (1994, CA7 Ill) 38 F3d 936, 40 Fed Rules Evid Serv 495.

By statute, statements made during plea negotiations are not admissible. *State v Nicholson* (1994, App) 187 Wis 2d 687, 523 NW2d 573.

Footnotes

Footnote 76. FRE 410; Uniform Rules of Evidence Rule 410; FR Crim P, Rule 11(e)(6).

Annotation: Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Practice References Plea bargaining techniques. 25 Am Jur Trials 69.

Footnote 77. United States v Smith (CA10 Kan) 525 F2d 1017.

Footnote 78. United States v Benson (CA8 ND) 640 F2d 136.

Where plea negotiations ultimately result in the acceptance of a plea, statements made in the early stages of plea negotiation are not rendered inadmissible by reason of the fact that negotiations were broken off by the government for a period of time; progress toward a plea is rarely smooth and unbroken, and Rule 410 looks only to the end result of the process. United States v Paden (CA5 Miss) 908 F2d 1229, 30 Fed Rules Evid Serv 1057, reh den, en banc (CA5 Miss) 914 F2d 251, cert den 498 US 1039, 112 L Ed 2d 699, 111 S Ct 710.

Footnote 79. United States v Robertson (CA5 Tex) 560 F2d 647, on reh (CA5 Tex) 582 F2d 1356, 3 Fed Rules Evid Serv 1499.

Footnote 80. United States v Levy (CA2 NY) 578 F2d 896, 3 Fed Rules Evid Serv 886.

Footnote 81. United States v Serna (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887; United States v Weiss (CA5 Ga) 599 F2d 730, 5 Fed Rules Evid Serv 82, reh den (CA5 Ga) 603 F2d 860.

Footnote 82. United States v Weiss (CA5 Ga) 599 F2d 730, 5 Fed Rules Evid Serv 82, reh den (CA5 Ga) 603 F2d 860; United States v Ceballos (CA11 Fla) 706 F2d 1198, 13 Fed Rules Evid Serv 673.

Footnote 83. United States v Weiss (CA5 Ga) 599 F2d 730, 5 Fed Rules Evid Serv 82, reh den (CA5 Ga) 603 F2d 860.

Footnote 84. United States v Stirling (CA2 NY) 571 F2d 708, CCH Fed Secur L Rep ¶ 96308, 2 Fed Rules Evid Serv 1257, cert den 439 US 824, 58 L Ed 2d 116, 99 S Ct 93.

Footnote 85. United States v Arroyo-Angulo (CA2 NY) 580 F2d 1137, 3 Fed Rules Evid Serv 421, cert den 439 US 913, 58 L Ed 2d 260, 99 S Ct 285 and cert den 439 US 1005, 58 L Ed 2d 681, 99 S Ct 618 and cert den 439 US 1131, 59 L Ed 2d 93, 99 S Ct 1052.

§ 521 --Necessary elements of plea discussion

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 410 applies only to statements made in the course of plea negotiations, which are defined as discussions in advance of the time of pleading with the view to an agreement whereby the defendant will enter a plea in hope of receiving certain charge or sentence concessions. 87 For example, a pretrial meeting between the defendant, his retained counsel, the prosecuting attorney, and two government agents to discuss the possibility of the defendant's co-operation with the government may be considered as part of the overall plea bargaining process. 88 However, statements made by defense counsel about the strengths or weaknesses of the government's case do not count as an attempt to negotiate a plea. 89

Plea bargaining negotiations under Rule 410 must include a discussion, 90 or a written communication 91 between a government attorney, 92 and counsel for the accused where the government conveys an offer to allow pleading to a lesser charge, 93 and the accused possesses a subjective intent to enter into a plea bargain where the expectation is reasonable given the totality of the circumstances. 94

The understanding of the accused at the time the statements were made has been an important factor in determining whether statements were made in the course of plea negotiations in a number of cases, 95 particularly where the proposed bargain was not consummated. 96 In this regard, it has been said that a statement may be considered to have been made in the course of plea negotiations if: (1) the suspect exhibited an actual subjective expectation that he was negotiating a plea at the time of the discussion; and (2) the suspect's expectation was reasonable given the totality of the circumstances. 97 A defendant's expectation that he was involved in a plea negotiation has been found not to have been reasonable where the defendant made statements to members of the clergy who were not agents for the state and did not purport to be, and where the statements were made before there was any discussion as to the role such clergypersons would play in helping the defendant obtain leniency. 98

§ 521 --Necessary elements of plea discussion [SUPPLEMENT]

Case authorities:

Statements made by defendant/attorney charged with wire fraud and money laundering were not made in course of plea negotiations so as to be inadmissible since no plea bargain was offered or even contemplated at time he made statements in issue; defendant was attorney familiar with Sentencing Guidelines and aware that offenses with which he could be charged were serious, and his statements to FBI and IRS agent who came to his

office and to Assistant U.S. Attorney were offered unconditionally in effort to cooperate, perhaps in hopes of improving his situation and eventually gaining motion for substantial assistance at sentencing. *United States v Hare* (1995, CA8 Mo) 49 F3d 447, reh den (1995, CA8 Mo) 1995 US App LEXIS 7619.

Footnotes

Footnote 87. *United States v Jimenez-Diaz* (CA5 Fla) 659 F2d 562, 9 Fed Rules Evid Serv 462, cert den 456 US 907, 72 L Ed 2d 164, 102 S Ct 1754.

Footnote 88. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887.

Annotation: Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Practice References Plea bargaining techniques. 25 Am Jur Trials 69.

Footnote 89. *United States v Hinton* (CA2 NY) 703 F2d 672, 12 Fed Rules Evid Serv 1833, cert den 462 US 1121, 77 L Ed 2d 1351, 103 S Ct 3091 (applying FR Crim P, Rule 11(e)(6), the equivalent of Rule 406).

Footnote 90. *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840.

Footnote 91. *United States v Ceballos* (CA11 Fla) 706 F2d 1198, 13 Fed Rules Evid Serv 673.

Footnote 92. Discussed in § 523.

Footnote 93. *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840; *Rachlin v United States* (CA8 Mo) 723 F2d 1373, 14 Fed Rules Evid Serv 1325.

Footnote 94. *United States v Posey* (CA5 Ga) 611 F2d 1389, 5 Fed Rules Evid Serv 771; *United States v Keith* (CA5 La) 764 F2d 263, 19 Fed Rules Evid Serv 1238; *Rachlin v United States* (CA8 Mo) 723 F2d 1373, 14 Fed Rules Evid Serv 1325; *United States v Babat* (CMA) 18 MJ 316, 16 Fed Rules Evid Serv 659.

Footnote 95. *United States v Smith* (CA10 Kan) 525 F2d 1017; *United States v Gentry* (MD Tenn) 525 F Supp 17.

Footnote 96. *United States v Ross* (CA5 Tex) 493 F2d 771.

Footnote 97. *United States v Guerrero* (CA9 Guam) 847 F2d 1363, 25 Fed Rules Evid Serv 1110 (a prosecution for bribery in which US Attorney's brief appearance and vague

promise that he would take any co-operation into consideration did not transform FBI's investigatory interview into plea discussions); *Gillum v State* (Okla Crim) 681 P2d 87.

Accused drug dealer's statements to drug enforcement agent are inadmissible under Rule 410(4), where defendant offered to set up purchase of several thousand tablets of LSD but was without counsel when he spoke to agent he understood to be authorized by prosecutor to set up deal for leniency in exchange for cooperation, because accused drug dealer had reasonable subjective expectation that he was negotiating plea at time of statements. *United States v Swidan* (ED Mich) 689 F Supp 726, 26 Fed Rules Evid Serv 544, affd (CA6 Mich) 888 F2d 1076, 28 Fed Rules Evid Serv 1531, reh den, en banc (CA6) 1989 US App LEXIS 19802.

Footnote 98. *Bottoson v State* (Fla) 443 So 2d 962, cert den 469 US 873, 83 L Ed 2d 153, 105 S Ct 223.

§ 522 --Plea offer

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An offer to plead guilty or nolo contendere to the crime charged or any other crime and statements related to these pleas are generally inadmissible. 99

The policy of promoting plea discussions between defendants and the government would be substantially undermined by allowing a defendant to use the government's offer to plea bargain as evidence in his or her favor. 1 Neither the prosecution nor the defense is permitted to introduce evidence of such an offer made in the course of plea negotiations, because the underlying intent of the rule is to prohibit the introduction of any evidence which would be adverse to a fair trial. 2

Footnotes

Footnote 99. *Banks v State* (Okla Crim) 810 P2d 1286, cert den (US) 116 L Ed 2d 787, 112 S Ct 883.

Footnote 1. *State v Pearson* (Utah App) 818 P2d 581, 170 Utah Adv Rep 35.

Footnote 2. *State v Pearson* (Utah App) 818 P2d 581, 170 Utah Adv Rep 35.

§ 523 --Participation of government attorney

[View Entire Section](#)

Federal Rules of Evidence 410 excludes evidence of plea discussions with an attorney of the prosecuting authority. 3 Although courts still require the participation of a government attorney, 4 some courts have relaxed this requirement by not requiring the attorney's actual physical presence when a particular statement is made to a government agent, 5 provided the government attorney expressly authorizes the bargain the government agent strikes with the accused. 6 For example, there is no plea bargaining discussion when a defendant, not charged with a crime, is told by the officer that he lacks authority to plea bargain. 7 In an exceptional situation, plea negotiations with other than an attorney may be inadmissible where due to government misrepresentations, the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion and the expectation is reasonable, given the totality of the circumstances. 8 The courts which allow government agents to negotiate with defendants provided the government attorney expressly authorizes the bargain the agent strikes with the accused recognize that without this proviso government attorneys might attempt to avoid the operation of the rules by authorizing law enforcement officials to conduct plea negotiations. 9

◆ **Caution:** While the Federal version of Rule 410(4) limits inadmissibility to statements made in the course of plea discussions with an attorney for the prosecuting authority, some states do not limit application of Rule 410 to discussions involving an attorney for the State. 10 At least one state has expressly rejected any reading of Rule 410 which would limit its application to discussions involving an attorney for the prosecuting authority, stating that such a per se rule, which turns on the actual authority of the government representative to negotiate a plea, is capable of working substantial injustice in many cases. 11 Limiting Rule 410 solely to discussions involving an attorney for the prosecuting authority can easily prejudice an accused who made damaging admissions when he thought he was making an offer to plead after having explicitly waived constitutional protections. Basic fairness to an accused who in good faith makes a reasonable attempt to engage in plea negotiations requires that the State be foreclosed from using an accused's well-intentioned but misdirected efforts against him at trial should plea negotiations ultimately break down. 12

Footnotes

Footnote 3. FRE 410; FR Crim P, Rule 11(e)(6).

Annotation: When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

Practice References Plea bargaining techniques. 25 Am Jur Trials 69.

Footnote 4. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887; *United States v Bernal* (CA9

Nev) 719 F2d 1475, 14 Fed Rules Evid Serv 695.

Footnote 5. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887; *United States v Keith* (CA5 La) 764 F2d 263, 19 Fed Rules Evid Serv 1238 (discussions were inadmissible despite the fact that they were in the spirit of cooperation and were hopeful of obtaining leniency); *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840.

Footnote 6. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887; *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840.

Footnote 7. *United States v Sebetich* (CA3 Pa) 776 F2d 412, 19 Fed Rules Evid Serv 384, reh den, en banc (CA3) 828 F2d 1020 and cert den 484 US 1017, 98 L Ed 2d 673, 108 S Ct 725.

Footnote 8. *United States v Keith* (CA5 La) 764 F2d 263, 19 Fed Rules Evid Serv 1238; *United States v Posey* (CA5 Ga) 611 F2d 1389, 5 Fed Rules Evid Serv 771.

Footnote 9. *Rachlin v United States* (CA8 Mo) 723 F2d 1373, 14 Fed Rules Evid Serv 1325.

Footnote 10. *State v Little* (Me) 527 A2d 754; *State v Dornbusch* (SD) 384 NW2d 682; *Williams v State* (Del Sup) 491 A2d 1129, cert den 474 US 824, 88 L Ed 2d 64, 106 S Ct 78; *McKenna v State*, 101 Nev 338, 705 P2d 614, cert den 474 US 1093, 88 L Ed 2d 907, 106 S Ct 868; *State v McBride* (Minn App) 357 NW2d 395; *Blackwell v State* (Okla Crim) 663 P2d 12; *State v Taylor* (Iowa) 336 NW2d 721; *Anderson v State* (Fla) 420 So 2d 574; *People v Oliver*, 111 Mich App 734, 314 NW2d 740 (disapproved on other grounds by *People v Williams*, 422 Mich 381, 373 NW2d 567); *People v Friedman*, 79 Ill 2d 341, 38 Ill Dec 141, 403 NE2d 229.

Footnote 11. *State v Little* (Me) 527 A2d 754.

Footnote 12. *State v Little* (Me) 527 A2d 754.

§ 524 Use of pleas and plea bargaining statements for other purposes

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A statement made in the course of any proceeding regarding a guilty plea which is later withdrawn, a plea of nolo contendere, or a statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn, is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered

contemporaneously with it; or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. 13

Evidence of pleas, offers to plead, and plea bargaining statements cannot be introduced against the *accused* for impeachment purposes, 14 but such evidence does not impede a defendant's impeachment of prosecution witnesses concerning their own pleas, plea bargaining and agreements with the government whenever these may bear upon their credibility, since the proof is offered against the prosecuting authority and not the witnesses. 15

A trial court may properly refuse to limit questioning of the defendant as to a withdrawn guilty plea where the prosecution gives notice that should the defendant take the witness stand cross-examination will include questions regarding the facts surrounding the withdrawn guilty plea for the purpose of seeking a perjury indictment against the defendant for contradicting the prior sworn statement given in the course of the proceeding regarding the guilty plea which was later withdrawn. 16

**§ 524 ----Use of pleas and plea bargaining statements for other purposes
[SUPPLEMENT]**

Case authorities:

Brother's plea allocution, which satisfies both Confrontation Clause and FRE 804(b)(3), need not be excluded under FRE 403, even though allocution, in which he admits existence of conspiracy and his provision of silencer-equipped gun in connection with robbery of post office truck, is clearly prejudicial, where other brother has already pleaded guilty to robbery and conspiracy but not murder, because such evidence will not cause "unfair prejudice" but will lead to decision on merits. *United States v Gallego* (1996, SD NY) 913 F Supp 209.

Plea agreements of Sherman Act defendant's coconspirators were properly admitted since otherwise jury could not properly assess coconspirators' credibility as witnesses, which was relevant to establishing underlying facts that formed basis of defendant's conviction, and trial court sought to prevent any misunderstanding or misuse of pleas by giving jury detailed instructions. *United States v Gaev* (1994, CA3 Pa) 24 F3d 473, 1994-1 CCH Trade Cases ¶ 70578, reh, en banc, den (1994, CA3 Pa) 1994 US App LEXIS 12699.

Statements which defendant made in course of plea negotiations should not have been admitted to impeach his inconsistent trial testimony, but admission was harmless as to cocaine conspiracy conviction since defendant admitted during direct examination to participating in it; admission was harmful on possession count, however, since it was based on credibility decision by jury. *United States v Acosta-Ballardo* (1993, CA10 NM) 8 F3d 1532, 38 Fed Rules Evid Serv 370.

In prosecution for theft and criminal mischief, defendant was not entitled to introduce testimony of absent codefendant's guilty plea on basis of unavailability, where defendant did not attempt to procure attendance of codefendant by process or other means, even though codefendant was on supervised probation through same trial court; fact that state subpoenaed codefendant was immaterial, since rule requires party seeking to have statement admitted to make good faith effort to procure attendance of witness. *Register v*

Footnotes

Footnote 13. FRE 410; FR Crim P, Rule 11(e)(6).

Annotation: Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 ALR Fed 854.

Practice References Plea bargaining techniques. 25 Am Jur Trials 69.

Footnote 14. United States v Lawson (CA2 NY) 683 F2d 688, 10 Fed Rules Evid Serv 1656, later proceeding (CA2 NY) 736 F2d 835; United States v Albano (SD NY) 414 F Supp 67, 76-1 USTC ¶ 9474, 38 AFTR 2d 76-5269; United States v Martinez (CA5 Tex) 536 F2d 1107, reh den (CA5 Tex) 541 F2d 282 and cert den 429 US 985, 50 L Ed 2d 597, 97 S Ct 505; United States v Geders (CA5 Fla) 566 F2d 1227, 2 Fed Rules Evid Serv 952, on reh (CA5 Fla) 585 F2d 1303, cert den 441 US 922, 60 L Ed 2d 396, 99 S Ct 2031.

Footnote 15. United States v Mathis (CA4 Md) 550 F2d 180, 1 Fed Rules Evid Serv 443, cert den 429 US 1107, 51 L Ed 2d 560, 97 S Ct 1140.

Annotation: Use of plea bargain or grant of immunity as improper vouching for credibility of witness in federal cases, 76 ALR Fed 409.

Footnote 16. United States v Gleason (CA8 Mo) 766 F2d 1239, 85-2 USTC ¶ 9519, 56 AFTR 2d 85-5432, cert den 474 US 1058, 88 L Ed 2d 777, 106 S Ct 801, later proceeding (WD Mo) 86-1 USTC ¶ 9241, 57 AFTR 2d 86-1278 (court's refusal to limit cross-examination resulted in defendant not taking the stand).

10. Suggestive Matters Before Acts or Offenses [525]

§ 525 Antecedent criminal preparations

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In a criminal prosecution, evidence showing preparation for the commission of the crime charged is admissible for the state. 17 Thus, in a prosecution for the sale of a controlled substance, evidence of a defendant's acts of altering the amounts of drugs or prescriptions in his possession, approximately one week prior to the alleged sale of a controlled

substance for which he was being prosecuted, is evidence of preparation for the commission of the crime charged and is admissible. 18

Evidence in explanation of such antecedent preparations is admissible for the accused, 19 and, to rebut the inference arising from such preparations, the accused may give in evidence any circumstance tending to show innocent motives. 20

§ 525 ----Antecedent criminal preparations [SUPPLEMENT]

Case authorities:

There was no error in a murder prosecution in the admission of testimony that defendant had been seen in possession of a black rifle with a clip on the bottom and "a long handle that pulled back" where no murder weapon was produced at trial, but a federal firearms form was introduced which showed that an individual who identified himself as defendant purchased a .22 caliber semiautomatic rifle which a fifteen-round clip and retracting stock, and the pathologist indicated that the victim's wounds had been caused by a .22- caliber weapon. When no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes especially relevant. *State v Ysut Mlo* (1994) 335 NC 353, 440 SE2d 98.

Footnotes

Footnote 17. *State v Morgan*, 211 La 572, 30 So 2d 434; *State v Doherty*, 72 Vt 381, 48 A 658.

Footnote 18. *State v Maggard*, 104 Ariz 462, 455 P2d 259.

Footnote 19. *State v Morgan*, 211 La 572, 30 So 2d 434.

Footnote 20. *State v Doris*, 51 Or 136, 94 P 44; *Smith v State*, 46 Tex Crim 267, 81 SW 936; *State v Doherty*, 72 Vt 381, 48 A 658.

11. Suggestive Matters After Acts or Offenses [526-543]

a. Civil Cases [526-529]

§ 526 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Evidence of the acts or conduct of a person subsequently to the time of a transaction in

controversy which are indicative of his state of mind in the doing of an act or which are suggestive of the fact of one's connection with that transaction, 21 and which afford reasonable inferences or throw any light upon the subject matter contested, 22 or upon which any reasonable inference or presumption can be founded as to the truth or falsity of the issue or of a disputed fact, 23 is generally admissible in the trial of a civil action. 24 For example, it has been held that a trustworthy method of determining the existence of an agreement whereby one person binds himself to pursue a prescribed course of conduct over a given period of time is to determine whether that person actually followed the prescribed course of conduct during that time, or whether he deemed himself unrestricted by the agreement. 25 It must be borne in mind, however, that the law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. 26

Acts suggesting that the present contention of a litigant is false or an exaggeration or an afterthought are admissible in evidence. 27 Thus, one's failure to complain or to make a claim may be a circumstance which may be proved as indicating the nonexistence of a ground of complaint or of the basis of a claim. 28 Similarly, it may be proved that one's adversary recognized the validity of a demand which he now disputes or in the past occupied a position inconsistent with his present one. 29

The rule that evidence of flight of a person suspected of or charged with wrongdoing is admissible against him, which rule is largely confined to defendants in criminal proceedings, 30 may find application in civil cases where the defendant leaves the jurisdiction to avoid service of summons upon him. 31 However, such evidence is merely corroborative in character and is consequently not admissible where there is no evidence of wrongdoing on the part of the defendant. 32

§ 526 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not err in a first degree-murder prosecution by admitting evidence that defendant had burned the victim's body a day after killing her. Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence; □ defendant's handling of the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation. *State v Rose* (1994) 335 NC 301, 439 SE2d 518.

The trial court did not err in a caveat proceeding by excluding evidence regarding the behavior of the primary beneficiary after the execution of the will. *In re Will of Jones* (1994) 114 NC App 782, 443 SE2d 363.

Footnotes

Footnote 21. *Caswell v Maplewood Garage*, 84 NH 241, 149 A 746, 73 ALR 433, remanded on other grounds 131 NH 319, 553 A2d 291, appeal after remand on other grounds 133 NH 498, 577 A2d 1236, costs/fees proceeding, remanded (NH) 630 A2d 776.

Footnote 22. *Callihan v Washington Water Power Co.*, 27 Wash 154, 67 P 697.

Footnote 23. *State v Burpee*, 65 Vt 1, 25 A 964.

In determining whether an interlineation in a deed was made before or after execution, the jury may consider any difference in ink and writing and also the fact that it was withheld from registration. *Wicker v Jones*, 159 NC 102, 74 SE 801.

Footnote 24. Generally as to the proof of other acts and transactions, see §§ 547 et seq.

The admissibility of evidence of the willingness or refusal of a party in a civil action to submit himself or his property to an examination or test is treated in § 544.

Footnote 25. *Hall v Pierce*, 210 Or 98, 307 P2d 292, 65 ALR2d 316, reh den 210 Or 145, 309 P2d 997 and motion to dismiss app den 210 Or 148, 309 P2d 998.

Footnote 26. *Xenia Bank v Stewart*, 114 US 224, 29 L Ed 101, 5 S Ct 845.

In an action for compensation due under a contract to furnish plans for a building, evidence is not admissible of a threat made by plaintiff's counsel to defendant during negotiations for settlement of the controversy. *Orth v Board of Public Education*, 272 Pa 411, 116 A 366, 20 ALR 1352.

In a suit to hold one liable for injuries caused by a dog, the defendant's evidence is not admissible that, without knowledge, his daughter killed the dog soon after the transaction upon which the suit is based, especially where it appears that she did so because she thought there was danger of trouble between her father and the plaintiff. *Holmes v Murray*, 207 Mo 413, 105 SW 1085.

Generally, as to the necessity of a rational connection between the fact proved and the fact presumed or inferred, see § 191.

Footnote 27. *Field v Koonce*, 178 Ark 862, 12 SW2d 772, 68 ALR 1303.

Footnote 28. *Lilly v Hamilton Bank of New York* (CA3 Pa) 178 F 53; *Field v Koonce*, 178 Ark 862, 12 SW2d 772, 68 ALR 1303; *Mears v New York, N. H. & H. R. Co.*, 75 Conn 171, 52 A 610 (failure of consignee's agent to question condition of goods); *Sears v Kings C. E. R. Co.*, 152 Mass 151, 25 NE 98.

As to admissions from silence, see §§ 799 et seq.

Footnote 29. *Field v Koonce*, 178 Ark 862, 12 SW2d 772, 68 ALR 1303.

Footnote 30. §§ 532 et seq.

Footnote 31. *McManus v Donlin*, 23 Wis 2d 289, 127 NW2d 22.

Footnote 32. *McManus v Donlin*, 23 Wis 2d 289, 127 NW2d 22.

§ 527 Transfer of property after accident or injury

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is well established that evidence of one's transfers of property after the happening of an accident, or the occurrence of some other event which may render him liable in damages, is admissible to show a consciousness of liability and a purpose to evade satisfaction of it. 33 Where such evidence is admitted, evidence is also admissible on behalf of the defendant to explain the reason for the disposition of his property. 34

§ 527 ----Transfer of property after accident or injury [SUPPLEMENT]

Case authorities:

The trial court did not err in a noncapital first-degree murder prosecution by sustaining the State's objection to the admission of evidence of the circumstances surrounding the sale of a farm owned by the victim's family after her death where the evidence did not point directly or indirectly to the guilt of any other specific person or persons but created, at most, conjecture that defendant was not the perpetrator. State v Jones (1994) 337 NC 198, 446 SE2d 32.

Footnotes

Footnote 33. Poston v Gaddis (Ala) 372 So 2d 1099; Bush v Jackson, 191 Colo 249, 552 P2d 509; Batick v Seymour, 186 Conn 632, 443 A2d 471; Cusick v Miller, 102 Kan 663, 171 P 599; Cox v Wright-Hennepin Co-op. Electric Asso., 281 Minn 228, 161 NW2d 294, 38 ALR3d 991; Harmon v Haas, 61 ND 772, 241 NW 70, 80 ALR 1131; State v Anderson, 58 ND 721, 227 NW 220, 65 ALR 1304; Heneky v Smith, 10 Or 349.

Annotation: Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 ALR3d 996 § 3[a].

Footnote 34. Johnson v O'Brien, 258 Minn 502, 105 NW2d 244, 88 ALR2d 577; Harmon v Haas, 61 ND 772, 241 NW 70, 80 ALR 1131.

§ 528 Interference with fair trial; suppression or fabrication of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of conduct of a party to an action having for its motive or purpose prevention of

a fair trial, by intimidation or corruption of a witness ³⁵ or otherwise, is admissible against the party on the ground of its tendency to prove the falsity or fraudulent nature of a claim or defense. ³⁶

Similarly, evidence of the misconduct of a party who has destroyed or withheld evidence which he or she ought to produce is admissible as tending to show that the party is unwilling to rely on the truth of his or her cause. ³⁷ For example, in an action for damages for personal injuries, it has been held proper, after the close of defendant's case, for the plaintiff, in rebuttal on the question of damages, to solicit the testimony from defendant's attorney as a witness that, upon demand of the defendant, the plaintiff submitted to an examination by a doctor designated by the defendant, the purpose of plaintiff's attorney being to permit comments by him to the jury with respect to the failure of the defendant to call the doctor as a witness. ³⁸

A presumption or inference arises from such proof that the evidence, if produced, would be unfavorable to the party seeking to suppress it. ³⁹

Footnotes

Footnote 35. § 529.

Footnote 36. *Maynard v Bailey*, 85 W Va 679, 102 SE 480, 9 ALR 981.

Footnote 37. *Hardwick v Kansas City Gas Co.*, 355 Mo 100, 195 SW2d 504, 166 ALR 556; *Hall v Pennsylvania R. Co.*, 257 Pa 54, 100 A 1035.

Footnote 38. *Hays v Viscome*, 122 Cal App 2d 135, 264 P2d 173, 39 ALR2d 1435.

Footnote 39. §§ 244 et seq.

§ 529 --Attempt to bribe, intimidate, or influence witness

<p>View Entire Section Go to Parallel Reference Table</p>

Evidence tending to prove that a party to a civil action, or an agent of the party, has attempted to bribe, intimidate, or otherwise influence a witness so that the witness either does not testify or testifies falsely, is admissible as an admission of the weakness of the party's case or of the false or fraudulent nature of his or her claim. ⁴⁰ This rule does not apply, of course, where the attempt to influence the witness is made by one not a party to the action or who is not shown to be an agent of a party, unless there is some testimony sufficient to connect the defendant with the attempt. ⁴¹

Evidence of an attempt to influence a witness is not admissible where the influence is exerted in an attempt merely to induce one to testify. ⁴²

Footnotes

Footnote 40. Great American Ins. Co. v Horab (CA8 ND) 309 F2d 262, 6 FR Serv 2d 898; Chicago C. R. Co. v McMahon, 103 Ill 485; Gebhardt v United R. Co. (Mo) 220 SW 677, 9 ALR 1076; De Groodt v Skrbina, 111 Ohio St 108, 2 Ohio L Abs 72, 2 Ohio L Abs 438, 144 NE 601, 38 ALR 591; McHugh v McHugh, 186 Pa 197, 40 A 410; Austin v Howard (Tex Civ App) 158 SW2d 556, writ ref w o m; Maynard v Bailey, 85 W Va 679, 102 SE 480, 9 ALR 981.

Annotation: Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Footnote 41. Drummond v Drummond, 212 Ala 242, 102 So 112; Austin v Howard (Tex Civ App) 158 SW2d 556, writ ref w o m; Green v Woodbury, 48 Vt 5.

Where there is evidence of a conspiracy between an infant and next friend to defraud a defendant by a false claim of injury, evidence is admissible of attempts by the next friend to bribe witnesses to give false testimony in the case. Gebhardt v United R. Co. (Mo) 220 SW 677, 9 ALR 1076.

Footnote 42. Garrett v St. Louis Transit Co., 219 Mo 65, 118 SW 68.

b. Criminal Prosecutions [530-543]

§ 530 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general proposition, in a criminal prosecution evidence of the conduct of the accused subsequent to the time of the offense with which he or she is charged may, if it has any probative significance in such respect, go to the jury as a means of establishing the fact of the accused's innocence or guilt. 43 In this respect, what one does or says immediately after being charged with having committed a criminal offense is admissible for the purpose of showing innocence or guilt. 44 Evidence is admissible of the emotional conduct of the accused after the commission of the offense, 45 such as the fact that the accused was confused or embarrassed, 46 or was stolid or indifferent, 47 or remained silent as to his or her age, name, and address when arrested. 48

When a person accused of a crime endeavors in any manner to escape or evade threatened prosecution by flight or concealment, 49 resistance to lawful arrest, 50 the destruction or concealment of stolen property or property the possession of which is illegal, 51 or other ex post facto indication of a desire to evade prosecution, 52 such fact may be shown in evidence as one of a series of circumstances from which guilt may

be inferred.

In weighing such evidence, ordinary caution is required, yet such inferences are to be drawn from it as experience indicates are warranted. 53 Whether the conduct of an accused was contrary to the ordinary behavior of a person charged with crime or was attributable to his or her mental characteristics and natural disposition is peculiarly a question for the jury to determine. 54

§ 530 ----Generally [SUPPLEMENT]

Case authorities:

When the question is whether a defendant's conduct evidenced a peculiar plan to commit particular offense, there is no reason to exclude conduct occurring subsequently. *People v Coleman* (1994) 158 Ill 2d 319, 198 Ill Dec 813, 633 NE2d 654, reh den (Apr 4, 1994) and cert den (US) 130 L Ed 2d 143, 115 S Ct 215.

There was no error in a first- degree murder prosecution in the introduction of testimony that the witness had never seen defendant drive the victim's car prior to the day he was arrested, had not known the victim to loan his car to anyone, and had never known defendant to own a watch where the defendant was driving the victim's car and had the victim's watch in his pocket when he was questioned. □ □ Testimony concerning defendant's sudden and unprecedented possession of the victim's personal property immediately after the victim's murder is relevant to the issue of whether defendant was involved in the killing; however, assuming error under the balancing test of GS § 8C-1, Rule 403, defendant did not show a reasonable possibility that a different result would have been reached at trial had the error not occurred. *State v Ysut Mlo* (1994) 335 NC 353, 440 SE2d 98.

Evidence that defendant was armed with a shotgun at the time of his arrest and that he was hesitant to submit to arrest for a murder committed less than a week before was relevant to show defendant's knowledge of his own guilt. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

The trial court did not err in a first- degree murder prosecution by admitting testimony concerning defendant's actions prior to and after the murder where the testimony tends to implicate defendant in the theft of quarters missing from the victim's bedroom and therefore in the murder, and tends to show that defendant had the opportunity to carry out his threats to kill the victim on the night of the murder. Although defendant argued that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, the defendant did not demonstrate any abuse of discretion. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Footnotes

Footnote 43. *Andrews v United States* (CA5 Ga) 157 F2d 723, cert den 330 US 821, 91 L Ed 1272, 67 S Ct 771; *Gray v United States* (CA9 Cal) 9 F2d 337; *Liles v State*, 30 Ala 24; *People v La Crosse*, 5 Cal App 2d 696, 43 P2d 596; *Ryan v State*, 83 Fla 610, 92 So 571; *McCutcheon v State*, 199 Ind 247, 155 NE 544; *State v Lambert*, 104 Me 394, 71

A 1092; *Pettie v State*, 316 Md 509, 560 A2d 577; *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618; *People v Minchella*, 268 Mich 123, 255 NW 735, 93 ALR 805, cert den 293 US 619, 79 L Ed 707, 55 S Ct 217 and cert den 294 US 717, 79 L Ed 1250, 55 S Ct 547; *People v Reddy*, 261 NY 479, 185 NE 705, 87 ALR 763; *State v Case*, 93 NC 545; *Mohler v Commonwealth*, 132 Va 713, 111 SE 454; *State v Dooley*, 133 Wash 392, 233 P 646.

Evidence that defendant in a robbery conviction had lied about his whereabouts on the day of the crime was admissible as substantive evidence tending to prove defendant's guilt. *Brown v State* (Fla App D3) 391 So 2d 729.

Testimony that defendant falsely identified himself to police officers following his arrest was admissible even though defendant had not been given the Miranda warnings. *State v Young*, 54 NC App 366, 283 SE2d 812, affd 305 NC 391, 289 SE2d 374.

Footnote 44. *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618; *People v Minchella*, 268 Mich 123, 255 NW 735, 93 ALR 805, cert den 293 US 619, 79 L Ed 707, 55 S Ct 217 and cert den 294 US 717, 79 L Ed 1250, 55 S Ct 547; *State v Schaeffer*, 96 Ohio St 215, 117 NE 220; *State v Giudice*, 170 Iowa 731, 153 NW 336.

As to the admissibility of evidence of the willingness or refusal of an accused to submit to an examination or test such as a lie detector test or a test to determine the accused's blood alcohol level, see §§ 544 et seq.

Footnote 45. *Prince v State*, 100 Ala 144, 14 So 409.

Footnote 46. *People v Arnold*, 43 Mich 303, 5 NW 385.

Footnote 47. *Greenfield v People*, 85 NY 75.

Footnote 48. *State v Taylor*, 70 Vt 1, 39 A 447.

Footnote 49. §§ 532 et seq.

Footnote 50. § 531.

Footnote 51. *People v MacCagnan*, 129 Cal App 2d 100, 276 P2d 679; *State v Barnes*, 47 Or 592, 85 P 998; *Cruze v State*, 114 Tex Crim 450, 25 SW2d 875, 68 ALR 1186 (ovrld on other grounds by *Helton v State*, 164 Tex Crim 488, 300 SW2d 87).

Footnote 52. *Cortes v State*, 135 Fla 589, 185 So 323.

Footnote 53. *Liles v State*, 30 Ala 24; *Greenfield v People*, 85 NY 75.

Footnote 54. *State v Lambert*, 104 Me 394, 71 A 1092; *Greenfield v People*, 85 NY 75.

§ 531 Resistance to arrest

[View Entire Section](#)

Proof of resistance to, or of an attempt to escape, arrest, 55 including flight or concealment of the accused prior to arrest, 56 is generally deemed to be admissible in evidence as tending to show consciousness of guilt, provided, of course, that the fact of commission of a crime has been proved. 57

§ 531 ----Resistance to arrest [SUPPLEMENT]

Case authorities:

Evidence that defendant was armed with a shotgun at the time of his arrest and that he was hesitant to submit to arrest for a murder committed less than a week before was relevant to show defendant's knowledge of his own guilt. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

Footnotes

Footnote 55. *Bird v United States*, 187 US 118, 47 L Ed 100, 23 S Ct 42; *Glass v State*, 147 Ala 50, 41 So 727; *People v MacCagnan*, 129 Cal App 2d 100, 276 P2d 679; *People v Anderson*, 17 Ill 2d 422, 161 NE2d 835; *Anderson v State*, 147 Ind 445, 46 NE 901; *State v Lambert*, 104 Me 394, 71 A 1092; *McPherson v State*, 208 Miss 784, 45 So 2d 589; *State v Ball (Mo)* 339 SW2d 783, 91 ALR2d 1042; *Martinez v State*, 140 Tex Crim 159, 140 SW2d 187, later proceeding 140 Tex Crim 181, 153 SW2d 721; *Silver v State*, 110 Tex Crim 512, 8 SW2d 144, 60 ALR 290, application den 110 Tex Crim 521, 9 SW2d 358, 60 ALR 297.

Footnote 56. § 532.

Footnote 57. *State v Sullivan*, 34 Idaho 68, 199 P 647, 17 ALR 902.

§ 532 Flight or concealment before arrest, generally

Flight, concealment, or analogous conduct, when unexplained, is admissible as indicating consciousness of guilt, 58 for it is not to be supposed that one who is innocent and conscious of that fact would flee. 59

◆ **Definition:** The term "flight" has been applied in reference to actions of the defendant whereby he or she: fled the scene of the crime; left the jurisdiction; ran from the police or resisted arrest; or attempted to escape from custody. 60

The time lapse between the date of the commission of an offense and flight does not affect the admissibility of the evidence of flight. 61 Thus, the fact that a defendant did not flee for several days after the commission of the crime, and the fact that the defendant had not been taken into custody or formally arrested before a hasty departure affected the weight and not the admissibility of the evidence. 62 Furthermore, the fact that the defendant fled the courtroom when the case first came on for trial some six months after defendant's arrest does not affect the admissibility of evidence of the defendant's flight, since such remoteness in time goes only to the weight and not to the admissibility of such evidence. 63

Because flight alone is not necessarily more consistent with guilt than innocence, 64 evidence of flight must be accompanied by facts pointing to the motive which prompted it. 65 As bearing upon the motive of the accused in fleeing, it is competent for the prosecution to show that the defendant had knowledge of facts from which it might readily be inferred that an investigation would be made and evidence discovered tending to establish the defendant's guilt, 66 and it may show a warning by another person to the defendant to flee immediately following crime. 67

§ 532 ----Flight or concealment before arrest, generally [SUPPLEMENT]

Case authorities:

Evidence of defendant's prearrest flight and subpoena for his business records was properly admitted to establish context for defendant's prearrest communications with federal authorities; it was admissible as evidence of consciousness of guilt also given close proximity between subpoena and flight and communications with authorities during flight to explain his version of events. *United States v Melson* (1993, CA8 Ark) 7 F3d 750.

There was no plain error in a first-degree murder prosecution in the trial court's instruction on flight where, except for that portion of the instruction informing the jury that "an escape from custody constitutes evidence of flight," the instruction is identical to the appropriate pattern jury instruction and that additional portion is a correct statement of the law. Flight is not an element of any of the offenses with which defendant was charged and the instruction thus could not have relieved the State of its burden of proving every element of the offenses. *State v McDougald* (1994) 336 NC 451, 444 SE2d 211.

The evidence was sufficient to warrant an instruction on flight in a first-degree murder prosecution where defendant ran from the scene after a neighbor fired his gun, threw down the identifying Redskins jacket he was wearing and disappeared among the bushes, a bloodhound was unsuccessful in tracking him, and he telephoned the police department hours later to turn himself in. *State v Fisher* (1994) 336 NC 684, 445 SE2d 866.

There was sufficient evidence in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense to instruct the jury on flight where defendant did not object or allege plain error, but the merits of the issue were considered under a plain error analysis and the jury could reasonably infer flight from the evidence that defendant left the victim's naked body in a dark, secluded rural area; removed her clothing and jewelry to delay identification; left the scene; and was not apprehended until more than three months later, efforts which indicate an attempt by

defendant to evade detection and capture. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not err in a noncapital first-degree murder prosecution by instructing the jury on flight as evidence of guilt where there was evidence that defendant immediately sped away in his truck after shooting the victim five times and, although aware that police officers had visited his house in search of him, did not contact the police or return home for two weeks following the shooting. The court appropriately instructed the jury that it was to determine the weight to be given the evidence and that it was the contention of the State rather than the court that defendant had fled. Defendant did not request that another explanation for defendant's unavailability be suggested in the court's instructions. *State v Watson* (1994) 338 NC 168, 449 SE2d 694, reconsideration den, stay den 338 NC 523.

The evidence in a prosecution for first-degree murder, conspiracy to commit murder, and burglary supports a finding by the jury that defendant was in flight, and the pattern jury instruction on flight was a correct statement of law, where the jury received testimony that defendant told everyone to pack up and go to a motel as soon as he heard that the victim had been murdered; defendant decided that he and another man were going to leave town; and defendant ordered the other man to drive them to the bus station, where they boarded a bus for New York. Although defendant contends that there was evidence to rebut the State's inference of flight, it was for the jury to decide whether all of the facts and circumstances supported the State's contention that defendant had fled and the trial court appropriately told the jury that evidence of flight "may" be considered. *State v Wilson* (1994) 338 NC 244, 449 SE2d 391, writ den, stay den (NC) 1995 NC LEXIS 11.

The evidence in a first-degree murder trial was sufficient to support the trial court's instruction on flight as evidence of guilt where it showed that defendant left the scene of the murder and drove to his home in Virginia; after defendant became aware of injuries to the victim from being dragged behind defendant's logging truck, defendant drove the victim to a deserted area and dropped the victim into a creek fifteen to eighteen feet off the road and at the bottom of a twenty- foot drop; and after defendant got home, his truck was cleaned up and painted so that there was no evidence of blood on the truck. *State v House* (1995) 340 NC 187, 456 SE2d 292.

Footnotes

Footnote 58. *Hickory v United States*, 160 US 408, 40 L Ed 474, 16 S Ct 327; *United States v Flores* (CA5 Tex) 564 F2d 717; *State v Lampkins*, 283 NC 520, 196 SE2d 697 (flight of accused is admissible as some evidence of guilt); *State v Murvin*, 304 NC 523, 284 SE2d 289; *Commonwealth v Robinson*, 273 Pa Super 462, 417 A2d 740; *Gauthier v State*, 28 Wis 2d 412, 137 NW2d 101, cert den 383 US 916, 15 L Ed 2d 671, 86 S Ct 910.

Footnote 59. *Turpin v Commonwealth*, 140 Ky 294, 130 SW 1086.

Footnote 60. *Fenelon v State* (Fla) 17 FLW S 101, corrected (Fla) 594 So 2d 292, 17 FLW S 112.

Footnote 61. *Reno v State* (Tex App Tyler) 649 SW2d 322.

Evidence tending to show flight of an accused is admissible, regardless of the strength or conclusiveness of such evidence, and where the defendant in a prosecution for the sale of marijuana admitted that he had fled from the authorities on several occasions, including the day of his arrest, such evidence was admissible despite the defendant's contention that it was too remote in time from the indictment. *Law v State* (Ala App) 342 So 2d 412, cert den (Ala) 342 So 2d 413 and cert den 434 US 919, 54 L Ed 2d 276, 98 S Ct 392.

Footnote 62. *State v Mash*, 305 NC 285, 287 SE2d 824.

Footnote 63. *State v De Berry*, 38 NC App 538, 248 SE2d 356.

Footnote 64. *Merritt v State* (Fla) 523 So 2d 573.

Footnote 65. *People v Reddy*, 261 NY 479, 185 NE 705, 87 ALR 763.

Footnote 66. *Wendling v Commonwealth*, 143 Ky 587, 137 SW 205; *State v Bonning*, 60 Mont 362, 199 P 274, 25 ALR 879 (ovrld on other grounds by *State v Campbell*, 146 Mont 251, 405 P2d 978, 22 ALR3d 824).

Footnote 67. *Doyal v State*, 70 Ga 134.

§ 533 --Facts showing flight

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Testimony by the police that they made a search for the defendant is competent evidence to show flight. 68 Thus, an officer's testimony that he obtained a warrant for defendant's arrest on the date of the crime, and had been attempting service but could not locate the defendant for five days is competent to show flight by the defendant. 69

Evidence indicating that the defendant walked calmly, rather than ran, from the scene of a shooting, is sufficient to indicate flight by the defendant, 70 although proof that the defendant left the scene of the crime is not proof of flight absent additional evidence to show that the accused secreted himself or left the county or jurisdiction immediately after the commission of the crime. 71 The fact that notices of reward for capture of the accused were sent to various parts of the country is admissible, 72 but the introduction in evidence of a document offering a reward for the return of designated property and containing a description of the defendant is not admissible in proof of flight. 73

Evidence that the accused, having left the prosecuting jurisdiction, knew of and opposed an attempt at extradition, without more, does not suffice to show flight. 74

§ 533 --Facts showing flight [SUPPLEMENT]

Case authorities:

The evidence was sufficient to warrant an instruction on flight in a first-degree murder prosecution where defendant ran from the scene after a neighbor fired his gun, threw down the identifying Redskins jacket he was wearing and disappeared among the bushes, a bloodhound was unsuccessful in tracking him, and he telephoned the police department hours later to turn himself in. *State v Fisher* (1994) 336 NC 684, 445 SE2d 866.

Footnotes

Footnote 68. *Bernard v People*, 124 Colo 424, 238 P2d 852; *State v Davis*, 237 Mo 237, 140 SW 902.

Footnote 69. *State v Carter*, 293 NC 532, 238 SE2d 493.

Footnote 70. *State v Carswell*, 40 NC App 752, 253 SE2d 635, cert den 297 NC 613, 257 SE2d 220.

Footnote 71. *Rowser v State* (Ala App) 346 So 2d 533, cert den (Ala) 346 So 2d 536.

Footnote 72. *State v Wallace*, 162 NC 622, 78 SE 1.

Footnote 73. *State v Woodruff*, 47 Kan 151, 27 P 842; *State v Pancoast*, 5 ND 516, 67 NW 1052.

Footnote 74. *State v Mayell*, 163 Conn 419, 311 A2d 60.

§ 534 --Explanation of flight or concealment; voluntary surrender

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the prosecution introduces evidence against the defendant in a criminal case tending to show that after the commission of the crime charged, the defendant concealed himself or fled from the vicinity, the defendant is entitled to the benefit of any explanation which he may offer as to why he fled or concealed himself. 75

Insanity or drunkenness, 76 fear of violence, 77 demands of business or other duties, 78 or social invitations, 79 are some of the circumstances that the accused may offer in explanation or mitigation of the fact of flight. That the explanation for the defendant's flight is fantastic does not affect its admissibility; rather, the reasonableness of the defendant's explanation is for the jury in determining the weight to be attached to the circumstances of his flight. 80

It has been held that, after evidence of the defendant's flight has been introduced by the prosecution, it is error to exclude evidence of his voluntary surrender. 81 However, there is other authority to the effect that the fact that the defendant surrenders voluntarily

after he has fled is immaterial, on the ground that such surrender often takes place after flight and concealment. 82 In any event, it has been held that while evidence of voluntary surrender tends to weaken the effect of the evidence of flight, it does not affect its relevancy and it need not be withdrawn from the consideration of the jury. 83

**§ 534 --Explanation of flight or concealment; voluntary surrender
[SUPPLEMENT]**

Case authorities:

Evidence that defendant charged with assaulting federal officer with weapon drove away from tribal officer's car because he had some old warrants on him was not other crimes evidence, but explained circumstances of charged offense. *United States v Oakie* (1993, CA8 SD) 12 F3d 1436, reh, en banc, den (CA8) 1994 US App LEXIS 1426 and reh, en banc, den (CA8) 1994 US App LEXIS 1424.

Footnotes

Footnote 75. *State v Champ*, 174 Kan 60, 254 P2d 319; *Commonwealth v Hanley*, 337 Mass 384, 149 NE2d 608, 66 ALR2d 222, cert den 358 US 850, 3 L Ed 2d 85, 79 S Ct 79; *Walters v State*, 17 Tex App 226; *Hines v Commonwealth*, 136 Va 728, 117 SE 843, 35 ALR 431; *State v Wilson*, 38 Wash 2d 593, 231 P2d 288, cert den 342 US 855, 96 L Ed 644, 72 S Ct 81 and cert den 343 US 950, 96 L Ed 1352, 72 S Ct 1044.

Footnote 76. *Peacock v State*, 50 NJL 653, 14 A 893.

Footnote 77. *Lewis v State*, 96 Ala 6, 11 So 259; *Smith v State*, 106 Ga 673, 32 SE 851; *State v Baker*, 110 Mo 7, 19 SW 222.

Footnote 78. *Goforth v State*, 183 Ala 66, 63 So 8.

Footnote 79. *State v Champ*, 174 Kan 60, 254 P2d 319.

Footnote 80. *State v Wilson*, 38 Wash 2d 593, 231 P2d 288, cert den 342 US 855, 96 L Ed 644, 72 S Ct 81 and cert den 343 US 950, 96 L Ed 1352, 72 S Ct 1044.

Footnote 81. *Allen v State*, 146 Ala 61, 41 So 624; *Dixon v State*, 12 Ga App 17, 76 SE 794.

Footnote 82. *Robinson v People*, 114 Colo 381, 165 P2d 763.

Footnote 83. *People v Maughs*, 8 Cal App 107, 96 P 407; *State v Minard*, 96 Iowa 267, 65 NW 147.

§ 535 --As evidence of guilt of another person, or of another crime

[View Entire Section](#)

In the event that several are arrested for the same crime, the flight of one is not ordinarily evidence against another 84 because flight is merely a circumstance tending to establish a consciousness of guilt in the person fleeing. 85

While flight because of one crime is generally not admissible as evidence of guilt of another crime, 86 such evidence has been admitted where it bears relevance to the defendant's guilt concerning the offenses charged in the current prosecution. 87

Footnotes

Footnote 84. *People v Stanley*, 47 Cal 113.

Footnote 85. *People v Stanley*, 47 Cal 113; *State v Weaver*, 165 Mo 1, 65 SW 308; *People v Sharp*, 107 NY 427, 14 NE 319.

Footnote 86. *State v Bonning*, 60 Mont 362, 199 P 274, 25 ALR 879 (ovrld on other grounds by *State v Campbell*, 146 Mont 251, 405 P2d 978, 22 ALR3d 824); *Hines v State* (Tex App Houston (1st Dist)) 646 SW2d 469, petition for discretionary review ref (Oct 20, 1982).

Footnote 87. *Freeman v State* (Fla) 547 So 2d 125, 14 FLW 400 (evidence of flight was properly admitted against murder defendant who attempted to escape while awaiting trial on another homicide charge which carried potential death penalty, even though one charge carried more serious penalty, where both were serious offenses and defendant attempted to elude prosecution for both).

In a prosecution for first-degree murders arising out of convenience store robbery-murders, the trial court did not abuse its discretion in admitting sheriff's deputies' testimony regarding a car chase that culminated in defendant's arrest, even though the chase took place after police attempted to arrest defendant for collateral crimes of robbery and attempted kidnapping that occurred after defendant's involvement in the charged murders, where the circumstances surrounding defendant's arrest were crucial to link defendant to the murder weapon. *O'Connell v State* (Fla) 480 So 2d 1284, 10 FLW 620.

§ 536 Attempted suicide

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that one charged with a crime attempts to commit suicide soon after the offense occurs, 88 or in order to escape prosecution for committing such crime, 89 is admissible in evidence. The principle upon which evidence of flight of one accused of a crime is admitted 90 is applicable to evidence that the accused, when in custody,

charged with crime, attempted to take his own life and thereby escape further prosecution. 91 However, evidence of a suicide attempt which takes place after the defendant has already pled guilty and is awaiting sentencing is not admissible, since such an attempt is not probative of flight from a pending prosecution. 92

Attempted suicide, as does flight, tends to show a consciousness of guilt. 93 Thus, in prosecution for kidnapping and sexual abuse, evidence of defendant's alleged suicide attempt while in squad car en route to jail was admissible to show defendant's consciousness of guilt. 94

Footnotes

Footnote 88. State v Plunkett, 62 Nev 258, 142 P2d 893.

Footnote 89. State v Bittner, 209 Iowa 109, 227 NW 601; State v Painter, 329 Mo 314, 44 SW2d 79; State v Jagers, 71 NJL 281, 58 A 1014; Commonwealth v Giacobbe, 341 Pa 187, 19 A2d 71.

Annotation: Admissibility of evidence relating to accused's attempt to commit suicide, 22 ALR3d 840.

Footnote 90. § 532.

Footnote 91. State v Brown, 128 NH 606, 517 A2d 831; State v Mann, 244 NJ Super 484, 582 A2d 1048, aff'd 254 NJ Super 332, 603 A2d 533, cert'gr 130 NJ 13, 611 A2d 652 and rev'd on other grounds, remanded 132 NJ 410, 625 A2d 1102; Commonwealth v Sanchez, 416 Pa Super 160, 610 A2d 1020, app den 533 Pa 624, 620 A2d 490.

Footnote 92. Meggison v State (Fla App D5) 540 So 2d 258, 14 FLW 800 (disapproved on other grounds by Fenelon v State (Fla) 17 FLW S 101).

Footnote 93. People v Butler (2nd Dist) 12 Cal App 3d 189, 90 Cal Rptr 497; McKinney v State (Del Sup) 466 A2d 356; People v Campbell (2d Dist) 126 Ill App 3d 1028, 82 Ill Dec 39, 467 NE2d 1112, cert den 471 US 1136, 86 L Ed 2d 695, 105 S Ct 2677; State v Hunt, 305 NC 238, 287 SE2d 818; State v Brown, 128 NH 606, 517 A2d 831; State v White (Tenn Crim) 649 SW2d 598.

Footnote 94. State v Mitchell (Iowa) 450 NW2d 828.

§ 537 Escape or attempted escape from jail or custody

<p>View Entire Section Go to Parallel Reference Table</p>

Evidence that a person charged with crime escaped and fled from jail or the custody of an officer, 95 or attempted such an escape, 96 or fled after he had been admitted to bail, 97 is admissible against him as a circumstance tending in some degree to disclose his

consciousness of guilt. The general objection to the admissibility of such evidence of escape or attempt to escape is that it tends to charge the accused with the commission of a different offense, one that would have no tendency to establish motive, criminal intent, or a uniform course of action, as to the offense for which he is being tried, but such objection has been uniformly overruled. 98 Evidence of escape or attempted escape from custody or jail is a form of circumstantial evidence, and that it is equivocal or consistent with suppositions other than guilt does not render it inadmissible. 99 Evidence of flight as indicative of a consciousness of guilt is a classic example of the admissibility of equivocal circumstantial evidence. 1

An FBI "wanted" circular published and circulated following the issuance of federal warrant for "unlawful flight" after the defendant's escape from jail while awaiting trial is properly admissible into evidence as tending to show the fact of the defendant's flight from custody. 2

Footnotes

Footnote 95. *Murrell v State*, 46 Ala 89; *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199; *State v Harris* (Mo App) 669 SW2d 579, post-conviction proceeding (Mo App) 779 SW2d 700 (evidence of escape is admissible to show consciousness of guilt, even if escapee was being held for two or more charges); *Hodge v State* (Tex Crim) 506 SW2d 870; *State v Mayle*, 136 W Va 936, 69 SE2d 212.

Footnote 96. *People v Hooker* (2nd Dist) 130 Cal App 2d 687, 279 P2d 784; *People v Robinson* (1st Dist) 91 Ill App 3d 1138, 47 Ill Dec 580, 415 NE2d 585; *Wood v State*, 221 Miss 901, 74 So 2d 851; *State v Biggs*, 224 NC 722, 32 SE2d 352; *State v Barnes*, 47 Or 592, 85 P 998.

The possession of tools suitable for effecting an escape is an incriminating fact which may go to the jury. *State v Lambert*, 104 Me 394, 71 A 1092.

Evidence that the accused, while confined in prison, upon being interrogated as to his conduct upon a certain occasion, stated that he had intended to attempt to overpower the jailer and effect his escape, is admissible as a circumstance against him. *Bines v State*, 118 Ga 320, 45 SE 376.

Footnote 97. *State v Hetland*, 141 Iowa 524, 119 NW 961; *State v Bonning*, 60 Mont 362, 199 P 274, 25 ALR 879 (ovrld on other grounds by *State v Campbell*, 146 Mont 251, 405 P2d 978, 22 ALR3d 824); *State v Osborne*, 54 Or 289, 103 P 62.

Footnote 98. *State v Mayle*, 136 W Va 936, 69 SE2d 212.

Footnote 99. *People v Yazum*, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263.

Footnote 1. *People v Yazum*, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263.

Footnote 2. *Gauthier v State*, 28 Wis 2d 412, 137 NW2d 101, cert den 383 US 916, 15 L Ed 2d 671, 86 S Ct 910.

§ 538 --Where person is detained for two or more crimes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is the rule in some states that when an accused is in custody or jail under two or more separate and distinct charges and he escapes or attempts to escape, evidence of the escape, which ordinarily tends to show consciousness of guilt, 3 is inadmissible upon the trial of any one of the two or more charges. 4 The reason usually given for the exclusionary rule is that it is impossible to determine which charge motivated the accused to escape or attempt to escape, and that he may have been motivated by consciousness that he was guilty of the offense for which he is not on trial. 5 However, where it is clear from the evidence that the accused escaped from or attempted to escape from custody or jail because of the specific charge for which he is on trial, there is no reason or occasion for the application of this exclusionary rule. 6

It is the rule in other states that when an accused is in custody or jail under two or more separate and distinct charges and he escapes or attempts to escape, evidence of the escape is admissible upon the trial of any one of the two or more charges. 7 Whether an escape shows consciousness of guilt of the offense on trial, when the accused is also charged with other offenses, is a question of fact for the jury, going to the weight of the evidence rather than to its admissibility. 8 The fact that the evidence of the escape or attempted escape has limited probative force under such circumstances has been held not to require its exclusion, it being reasoned that evidence of escape or attempted escape from custody or jail is equivocal and consistent with suppositions other than guilt even where the accused is charged with only one crime. 9 Such evidence has been held admissible even though it places the accused, on trial for one crime, in the position of either disclosing to the jury the other crime with which he is charged but not then on trial, or remaining silent while the jury weighs the fact of escape or attempted escape unenlightened by knowledge of the dual reason for his detention. 10

Footnotes

Footnote 3. § 537.

Footnote 4. State v Green (Mo) 236 SW2d 298; State v Crawford, 59 Utah 39, 201 P 1030.

Annotation: Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted, 3 ALR4th 1085.

Footnote 5. State v Green (Mo) 236 SW2d 298.

Footnote 6. State v Green (Mo) 236 SW2d 298.

Footnote 7. State v Meeks (Mo App) 659 SW2d 306; People v Yazum, 13 NY2d 302,

246 NYS2d 626, 196 NE2d 263.

Footnote 8. Centeno v State, 260 Ark 17, 537 SW2d 368, 3 ALR4th 1081.

Footnote 9. People v Yazum, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263.

Footnote 10. People v Yazum, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263.

§ 539 Refusal to flee or escape; voluntary surrender

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so, 11 at least in the absence of any testimony that he had attempted to flee or escape. 12 Thus, the trial court in an armed robbery prosecution properly refused to allow the defendant to show that he was not arrested for several days after he was questioned by an officer and that during that time he did not attempt to flee. 13

§ 539 ----Refusal to flee or escape; voluntary surrender [SUPPLEMENT]

Case authorities:

The trial court did not err in failing to instruct the jury that evidence of defendant's nonflight from the scene may be considered in determining whether the combined circumstances indicate innocence or a showing of nonguilt. State v Burr (1995) 341 NC 263, 461 SE2d 602.

Footnotes

Footnote 11. Lingerfelt v State, 125 Ga 4, 53 SE 803; Bailey v State, 94 Miss 863, 48 So 227.

Footnote 12. Hayes v State, 33 Ala App 364, 33 So 2d 744; Dunson v State, 202 Ga 515, 43 SE2d 504.

As to voluntary surrender after flight, see § 534.

Footnote 13. State v Thomas, 34 NC App 594, 239 SE2d 288, cert den 294 NC 445, 241 SE2d 846 and cert den 439 US 926, 58 L Ed 2d 318, 99 S Ct 308.

§ 540 Articles taken from accused; weapons or tools of crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a well-established principle of criminal law that evidence of guilt found upon a person under legal arrest for a crime is admissible against the defendant. 14 Whatever is found upon his person or in his possession which was a part of the means by which he accomplished the crime, whether an instrument, device, or token, is legitimate evidence for the prosecution and may be taken from him and used for that purpose. 15

Footnotes

Footnote 14. *Bailey v State*, 238 Ark 210, 381 SW2d 467; *Evans v State*, 106 Ga 519, 32 SE 659; *Rusher v State*, 94 Ga 363, 21 SE 593; *Medsker v State*, 224 Ind 587, 70 NE2d 182; *State v Oliver*, 302 NC 28, 274 SE2d 183, appeal after remand 309 NC 326, 307 SE2d 304.

Practice References Searching suspects. 1 Am Jur Trials 602, Locating and Preserving Evidence in Criminal Cases.

Footnote 15. *Maxwell v State*, 129 Ala 48, 29 So 981; *Hassell v State* (Ala App) 342 So 2d 1357; *Evans v State*, 106 Ga 519, 32 SE 659; *England v State*, 249 Ind 446, 233 NE2d 168; *State v Lambert*, 104 Me 394, 71 A 1092; *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618; *State v Miller* (Mo) 368 SW2d 353; *State v Spaugh*, 200 Mo 571, 98 SW 55; *Commonwealth v Yount*, 455 Pa 303, 314 A2d 242; *Stanley v State* (Tex Crim) 606 SW2d 918; *Martinez v State*, 140 Tex Crim 159, 140 SW2d 187, later proceeding 140 Tex Crim 181, 153 SW2d 721; *State v Edwards*, 51 W Va 220, 41 SE 429; *Thornton v State*, 117 Wis 338, 93 NW 1107.

§ 541 Possession of fruits of crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of the fact that a defendant was found to be in possession of the fruits of a crime recently after its commission is admissible, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. 16

◆ **Observation:** The accused's explanation regarding possession of property supposed to have been recently stolen is admissible as original evidence on behalf of the defendant if made at the time his or her possession was first directly or circumstantially

challenged, or when the accused was charged with the theft. 17

In those instances where evidence of possession by the defendant of property other than that involved in the crime with which he is charged has no proper tendency to connect him with the crime charged, its only effect being to discredit the defendant by showing or tending to show that the defendant had been guilty of other crimes, such evidence is inadmissible. 18 On the other hand, evidence of the possession of other property by the defendant may be admissible because it is found in such close connection with the property involved in the crime charged that evidence regarding it is inseparable from evidence of possession of the property charged in the indictment, or because the fact appears incidentally and naturally in showing the whole transaction concerning the property involved in the prosecution. 19 Evidence of the possession of other property than that involved in the prosecution is frequently admitted for the purpose of showing the intent of the defendant in doing the particular act charged against him as a crime, 20 or to prove scienter, or guilty or criminal knowledge with respect to the crime charged, 21 or as tending to show that such crime was a part of a system of criminal acts. 22

§ 541 ----Possession of fruits of crime [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder prosecution by admitting testimony concerning defendant's actions prior to and after the murder where the testimony tends to implicate defendant in the theft of quarters missing from the victim's bedroom and therefore in the murder, and tends to show that defendant had the opportunity to carry out his threats to kill the victim on the night of the murder. Although defendant argued that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, the defendant did not demonstrate any abuse of discretion. *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Footnotes

Footnote 16. *Odom v United States* (CA5 Fla) 377 F2d 853, 22 ALR3d 705, appeal after remand (CA5 Fla) 403 F2d 45, cert gr 399 US 904, 26 L Ed 2d 559, 90 S Ct 2203, cert dismd 400 US 23, 27 L Ed 2d 122, 91 S Ct 112, reh den 400 US 984, 27 L Ed 2d 396, 91 S Ct 363; *Bailey v State*, 238 Ark 210, 381 SW2d 467; *State v Lavallee*, 122 Vt 75, 163 A2d 856.

Footnote 17. *Johnson v State*, 165 Tex Crim 468, 308 SW2d 869.

Footnote 18. *State v Ball* (Mo) 339 SW2d 783, 91 ALR2d 1042; *State v Wilson*, 221 Or 602, 351 P2d 944.

Footnote 19. *Commonwealth v Gallagher*, 200 Pa Super 136, 186 A2d 842.

Footnote 20. *State v Sanborn*, 157 Me 424, 173 A2d 854.

Footnote 21. *Peters v People*, 151 Colo 35, 376 P2d 170; *State v Sanborn*, 157 Me 424, 173 A2d 854.

§ 542 Change in financial condition

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the crime for which the defendant is being prosecuted is of such nature that the acquisition of money may be regarded as a natural result of its perpetration, evidence of the sudden acquisition of money by the defendant or of a significant improvement in his financial condition is admissible, even though the source of the money is not definitely traced or identified by the prosecution. 23 Although some cases insist, in order for evidence of money found in the accused's possession to be admissible, that the prior impecunious condition of the accused first be established, 24 other cases regard the evidence as admissible and treat the absence of a showing of the accused's prior impecunious condition as going merely to the weight of the evidence. 25

Evidence that an accomplice of the defendant suddenly acquired money or significantly improved his financial condition is also admissible, even though the source of the money is not definitely traced or identified by the prosecution. 26

The probative value of evidence that the defendant was in possession of money is enhanced where a relatively brief period of time has elapsed between the commission of the crime and the apprehension of the defendant. 27 In contrast, where the interval is substantial, the evidence that the defendant was in possession of money may even be rendered inadmissible, particularly where his prior impecunious condition has not been shown. 28

Evidence that the defendant was in possession of money has been held admissible where the crime for which the defendant was being prosecuted constituted burglary, 29 possession of heroin, 30 unlawful homicide, 31 larceny, 32 embezzlement, 33 robbery, 34 extortion, 35 or a liquor violation. 36

Footnotes

Footnote 23. United States v Diaz (CA2 NY) 878 F2d 608, 28 Fed Rules Evid Serv 658, cert den 493 US 993, 107 L Ed 2d 540, 110 S Ct 543; United States v White (CA5 Ga) 589 F2d 1283; United States v Bartley (CA8 Mo) 855 F2d 547, 26 Fed Rules Evid Serv 838; United States v Lattimore (CA11 Fla) 902 F2d 902, cert den 498 US 905, 112 L Ed 2d 228, 111 S Ct 272; Sullivan v State (Ala App) 340 So 2d 878, cert den (Ala) 340 So 2d 881; Logan v State, 264 Ark 920, 576 SW2d 203; Whippler v State, 218 Ga 198, 126 SE2d 744, cert den 375 US 960, 11 L Ed 2d 318, 84 S Ct 446; Mitchell v State, 236 Ga 251, 223 SE2d 650; State v Crawford, 99 Idaho 87, 577 P2d 1135; People v Bixler, 49 Ill 2d 328, 275 NE2d 392, cert den 405 US 1066, 31 L Ed 2d 796, 92 S Ct 1500; Hill v State, 267 Ind 480, 371 NE2d 1303; State v Carney, 216 Kan 704, 533 P2d 1268; Brown v Commonwealth (Ky) 458 SW2d 444; State v Holmes (La) 354 So 2d 1282; State v

Lofton (La App 3d Cir) 528 So 2d 188, cert den (La) 532 So 2d 149; State v Dunton (Me) 396 A2d 1001; Commonwealth v Finn, 362 Mass 206, 285 NE2d 105; People v Coleman, 14 Mich App 515, 165 NW2d 615; State v Loggins (Mo App) 778 SW2d 783; State v Banks, 195 Neb 340, 237 NW2d 875; State v Belcher (App) 83 NM 130, 489 P2d 410; People v Connolly, 253 NY 330, 171 NE 393; State v Puckett, 211 NC 66, 189 SE 183; State v Madden, 292 NC 114, 232 SE2d 656; State v Kehn, 50 Ohio St 2d 11, 4 Ohio Ops 3d 74, 361 NE2d 1330, cert den 434 US 858, 54 L Ed 2d 130, 98 S Ct 180; State v Smith, 40 Or App 91, 594 P2d 860; Commonwealth v Eackles, 286 Pa Super 146, 428 A2d 614; State v Caldwell (Tenn Crim) 656 SW2d 894; State v Crowder, 114 Utah 202, 197 P2d 917; State v Parr, 64 Wash 2d 921, 395 P2d 196.

Trial judge did not abuse discretion, in admitting in evidence in a prosecution for conspiracy to import marijuana, documents showing large purchases by defendants, including purchases of houses and cars, and other financial transactions including bank, mutual fund, and brokerage account records from the time immediately following an alleged conspiracy and continuing for the next five years, where an IRS agent testified that defendants' income tax returns did not show income even close to the level necessary to complete the purchases and transactions. United States v Newton (CA1 RI) 891 F2d 944, 29 Fed Rules Evid Serv 526.

Annotation: Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 ALR2d 1046.

Footnote 24. People v Orloff, 65 Cal App 2d 614, 151 P2d 288; State v Ball (Mo) 339 SW2d 783, 91 ALR2d 1042; State v Vernor (Mo App) 522 SW2d 312; State v Guffey, 205 Kan 9, 468 P2d 254; State v Sutton, 249 Or 527, 439 P2d 627.

Footnote 25. People v Falls (4th Dist) 150 Cal App 2d 554, 310 P2d 484; State v Cofer, 73 Idaho 181, 249 P2d 197; Nelson v State, 167 Ind App 59, 337 NE2d 877; State v Banks, 195 Neb 340, 237 NW2d 875; State v Smollok, 148 NJ Super 382, 372 A2d 1105, cert den 74 NJ 274, 377 A2d 678; State v Smith, 40 Or App 91, 594 P2d 860; State v Young, 30 Utah 2d 280, 516 P2d 1398.

Footnote 26. State v Hobbs, 252 Iowa 439, 107 NW2d 242; State v Barry, 43 Wash 2d 807, 264 P2d 233.

Footnote 27. State v Cofer (1952) 73 Idaho 181, 249 P2d 197.

Commonwealth v Locke (1959) 338 Mass 682, 157 NE2d 233.

State v Hampton (1955, Mo) 275 SW2d 356.

Footnote 28. State v Ball (1960, Mo) 339 SW2d 783, 91 ALR2d 1042.

People v Klotzko (1949) 275 App Div 863, 89 NYS2d 274.

Footnote 29. Fields v State, 179 Ga App 116, 345 SE2d 662; People v Reddick, 65 NY2d 835, 493 NYS2d 124, 482 NE2d 920.

Footnote 30. State v Smith, 40 Or App 91, 594 P2d 860.

Footnote 31. *State v Crawford*, 99 Idaho 87, 577 P2d 1135.

Footnote 32. *Harrison v State* (Fla App D1) 104 So 2d 391.

Footnote 33. *State v Sutton*, 53 NC App 281, 280 SE2d 751.

Footnote 34. *United States v Morris* (CA5 Ga) 647 F2d 568; *Logan v State*, 264 Ark 920, 576 SW2d 203; *Halfacre v State*, 265 Ark 378, 578 SW2d 237, appeal after remand 269 Ark 39, 598 SW2d 89; *State v Dunton* (1979, Me) 396 A2d 1001 *State v Snipe* (Minn) 304 NW2d 630; *State v Byrnes* (Mo App) 619 SW2d 791; *State v Sutton*, 249 Or 527, 439 P2d 627; *Oliver v State* (Tex Crim) 491 SW2d 125; *State v Hedgebeth*, 11 Utah 2d 146, 356 P2d 166; *State v Sanders*, 27 Utah 2d 354, 496 P2d 270; *State v Young*, 30 Utah 2d 280, 516 P2d 1398.

In a robbery prosecution, there was no error in admitting in evidence money identified as that found on defendant's person some 12 hours after the robbery, even though the sum exceeded the amount taken in the robbery. *State v Rodney* (La App 4th Cir) 459 So 2d 669.

Footnote 35. *Commonwealth v Halleron* (1949) 163 Pa Super 583, 63 A2d 140.

Footnote 36. *Hagan v United States* (1957, CA5 Ga) 245 F2d 556.

§ 543 Interference with fair trial; attempt to bribe or influence witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An attempt by an accused in a criminal prosecution to induce a witness to testify falsely, 37 or not to testify against the accused, 38 or to stay away from the trial, 39 may be introduced in evidence against the defendant. The theory upon which evidence of this character is admitted is the strong improbability of similar action by an innocent person. 40

An attempt by a third person to influence a witness not to testify or to testify falsely is relevant and admissible in a criminal prosecution on the issue of the defendant's guilt where it is established that the attempt was made with the authorization of the accused. 41 Thus, in a case in which the defendant's friends and relatives have tried to intimidate a prosecution witness, and there is no evidence tending to connect the defendant with these activities, evidence of the threats and intimidation is not admissible against the defendant. 42

◆ **Observation:** An exception to the general rule that evidence of threats by third persons is only admissible where the threats can be linked to the defendant exists where the evidence of threats is offered not to prove the guilt of the accused, but rather to explain a witness' prior inconsistent statement. Evidence of threats to a witness or fear on the part of a witness, offered to explain an inconsistency, is admissible in

criminal cases for credibility or rehabilitation purposes even if the threats or fear have not been linked to the defendant. 43

**§ 543 ----Interference with fair trial; attempt to bribe or influence witness
[SUPPLEMENT]**

Case authorities:

A defendant's attempt to eliminate a state witness is relevant and admissible. *Heath v State* (1994, Fla) 648 So 2d 660, 19 FLW S 540, petition for certiorari filed (Apr 24, 1995).

Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused, where the relevance of such evidence is based on consciousness of guilt inferred from such actions. *Heath v State* (1994, Fla) 648 So 2d 660, 19 FLW S 540, petition for certiorari filed (Apr 24, 1995).

Testimony that defendant and his friends threatened the State's principal witness and warned him not to testify and that defendant on one occasion shot the witness in the thigh was relevant to show defendant's awareness of his guilt, and the trial court did not err by finding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. G.S. § 8C-1, Rule 403. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

Footnotes

Footnote 37. *Davis v Commonwealth*, 204 Ky 601, 265 SW 10; *State v Ettenberg*, 145 Minn 39, 176 NW 171; *State v Christian* (Mo) 245 SW2d 895; *State v Minton*, 234 NC 716, 68 SE2d 844, 31 ALR2d 682.

Footnote 38. *Mottenon v State* (Ala App) 346 So 2d 18; *Collier v Commonwealth* (Ky) 339 SW2d 167; *Davis v Commonwealth*, 204 Ky 601, 265 SW 10.

Testimony by an accomplice in a burglary prosecution that defendant had warned him, while they were in jail awaiting trial, that he should think hard on his testimony because it could cause trouble for his wife and relatives constituted an attempt to induce a witness not to testify which was admissible on the issue of defendant's guilt. *Goodman v State* (Fla App D1) 418 So 2d 308, petition den (Fla) 427 So 2d 736.

Footnote 39. *State v Russell*, 62 Wash 2d 635, 384 P2d 334.

Evidence that after a mistrial of a prosecution a defendant sought to get a third person to induce a witness for the prosecution to leave the country is admissible against such defendant on a subsequent trial. *Carnahan v United States* (CA8 Mo) 35 F2d 96, 67 ALR 1035, cert den 281 US 723, 74 L Ed 1141, 50 S Ct 238.

Footnote 40. *Turpin v Commonwealth*, 140 Ky 294, 130 SW 1086; *People v Minchella*, 268 Mich 123, 255 NW 735, 93 ALR 805, cert den 293 US 619, 79 L Ed 707, 55 S Ct

217 and cert den 294 US 717, 79 L Ed 1250, 55 S Ct 547.

Footnote 41. *Stumpf v State* (Alaska App) 749 P2d 880, cert den 490 US 1070, 104 L Ed 2d 639, 109 S Ct 2075; *People v Terry*, 57 Cal 2d 538, 21 Cal Rptr 185, 370 P2d 985, cert den 375 US 960, 11 L Ed 2d 318, 84 S Ct 446; *State v Walker*, 214 Conn 122, 571 A2d 686, later proceeding (Conn Super) 1992 Conn Super LEXIS 769, motion gr (Conn Super) 1992 Conn Super LEXIS 1998, motion gr (Conn Super) 1992 Conn Super LEXIS 3126 and related proceeding 33 Conn App 122, 634 A2d 1177; *State v Price* (Fla) 491 So 2d 536, 11 FLW 319; *Commonwealth v Ciampa*, 406 Mass 257, 547 NE2d 314.

Annotation: Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Footnote 42. *Guerrero v State* (Tex App Houston (14th Dist)) 650 SW2d 102.

Footnote 43. *State v Walker*, 214 Conn 122, 571 A2d 686, later proceeding (Conn Super) 1992 Conn Super LEXIS 769, motion gr (Conn Super) 1992 Conn Super LEXIS 1998, motion gr (Conn Super) 1992 Conn Super LEXIS 3126 and related proceeding 33 Conn App 122, 634 A2d 1177.

12. Willingness or Refusal to Submit to or Allow Examination or Test [544-546]

§ 544 Physical examination of person

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is generally held that evidence is admissible in a civil action to show that a party to the action refused to permit a physical examination of his person. 44

In criminal prosecutions the question of the admissibility of evidence of the refusal of the accused to submit to an examination of his person depends to a large extent upon whether this would violate the rule against compelling the accused to give testimony which would tend to incriminate himself. 45

Footnotes

Footnote 44. *Union P. R. Co. v Botsford*, 141 US 250, 35 L Ed 734, 11 S Ct 1000; *Levine v Scaglione*, 95 NJ Super 338, 231 A2d 229.

As to whether a physical examination of a party may be ordered by the court or whether a party may be thus required to exhibit his injuries to the jury, see 23 Am Jur 2d, *Depositions and Discovery* §§ 282 et seq.

Footnote 45. As to whether physical examinations of one accused of a crime violate the

constitutional privilege against self-incrimination, see 21A Am Jur 2d, Criminal Law §§ 947 et seq.

§ 545 Test to determine alcohol in system

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence that the accused in a criminal case refused to submit to a scientific test to determine the amount of alcohol in his system, where such question is otherwise relevant, is of sufficient probative value to be admissible, because it indicates the accused's consciousness of guilt. 46 In some states, the legislature has enacted statutes which deal specifically with the admissibility of evidence that the accused in a criminal case refused to submit to a blood alcohol test which statutes are, of course, controlling. 47

§ 545 ----Test to determine alcohol in system [SUPPLEMENT]

Practice Aids: Driving Under the Influence: Tactical Considerations in Sobriety Checkpoint Cases. 59 Am Jur Trials 79.

Case authorities:

In DUI prosecution, trial court improperly suppressed evidence of defendant's refusal to submit to breath test. Defendant had no constitutional right to attorney at that time since tests for intoxication provide real, not communicative, evidence. Creation of (or refusal to create) real evidence does not rise to level of custodial interrogation since it does not require accused to communicate any personal beliefs or knowledge of facts. State v Leroy (1990) 15 Kan App 2d 68, 803 P2d 577.

In DUI prosecution, trial court erred in admitting evidence of defendant's refusal to take breathalyzer test where, although statute expressly stated that fact of refusal was admissible, statute also provided that no inference or presumption concerning guilt or innocence arose due to failure to submit to test; defendant successfully argued that evidence of refusal was admissible only if it was relevant to issue other than guilt or innocence (such as police officer's failure to follow proper procedure). Krauss v State (1991) 322 Md 376, 587 A2d 1102.

Trial court erred in suppressing evidence that defendant in DUI prosecution refused to submit to chemical testing even though defendant had not been warned that refusal would result in license suspension; statutory language indicated that legislature did not intend that introduction of evidence of refusal be conditioned on sufficient warning having been given. Commonwealth v Ruttle (1989) 388 Pa Super 262, 565 A2d 477.

In DUI prosecution, trial court erred in suppressing evidence of defendant's refusal to take breathalyzer test; revocation of implied consent to test was constitutionally admissible as prosecutorial evidence, and state did not have to lay foundation for such

evidence by showing that, at the time, test machine was in proper working order and technician was properly qualified. *State v Jansen* (1991) 305 SC 320, 408 SE2d 235.

In DUI prosecution, trial court properly suppressed evidence of defendant's refusal to submit to alcohol test (by failing to provide two adequate breath samples, as required) where defendant had not first been properly advised of his rights, the "informing the accused" form that was used having been deficient. *State v Grade* (1991, App) 165 Wis 2d 143, 477 NW2d 315.

In DUI prosecution, trial court properly suppressed evidence of defendant's refusal to submit to alcohol test (by failing to provide two adequate breath samples, as required) where defendant had not first been properly advised of his rights, the "informing the accused" form that was used having been deficient in that it failed to advise of consequences of submitting to test. *State v Algaier* (1991, App) 165 Wis 2d 515, 478 NW2d 292.

Footnotes

Footnote 46. *People v Conterno*, 170 Cal App 2d Supp 817, 339 P2d 968; *State v Durrant* (Sup) 55 Del 510, 188 A2d 526; *State v Benson*, 230 Iowa 1168, 300 NW 275.

Annotation: Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

Footnote 47. *Gibson v Troy* (Ala App) 481 So 2d 463 (evidence admissible); *State v Hennessey* (Iowa) 405 NW2d 846 (evidence admissible); *People v Miller* (5th Dist) 75 Ill App 3d 775, 31 Ill Dec 581, 394 NE2d 783 (evidence inadmissible).

These matters most frequently arise in connection with criminal prosecutions for operating a motor vehicle while intoxicated, which cases are more fully treated at 7A Am Jur 2d, Automobiles and Highway Traffic § 379.

§ 546 Lie detector test

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is generally held in criminal prosecutions that evidence is not admissible that the accused was willing or unwilling to take a lie detector test. 48 The contention that evidence of the accused's refusal to take a lie detector test tends to establish consciousness of guilt, 49 and that evidence of the accused's willingness to take such a test shows consciousness of innocence, 50 has been rejected. Since a guilty suspect would have nothing to lose by expressing a willingness to take a lie detector test, it being the general rule that the results could not be used as evidence against him, evidence of an accused's willingness or unwillingness to take such a test has little probative value, and thus is not properly admissible. 51

On the other hand, notwithstanding the general rule that it is improper to question an accused as to whether he took or refused to take a lie detector test, the state is entitled to show that the accused was offered a lie detector test but declined to take it if the accused has previously voluntarily testified that he was willing to take such a test. 52

Furthermore, testimony regarding a defendant's initial willingness to take a polygraph test prior to his statement that the test would not be necessary because of his desire to confess to the crime is admissible as evidence of circumstances leading up to the confession and does not violate the prohibition against introduction of evidence of a criminal defendant's unwillingness to take a polygraph test. 53

◆ Observation: It may be noted that the admission of such testimony has been ruled harmless error where the trial court properly admonished jury to disregard the testimony. 54

Footnotes

Footnote 48. Rothgeb v United States (CA8 Mo) 789 F2d 647, 20 Fed Rules Evid Serv 681; Garmon v Lumpkin County (CA11 Ga) 878 F2d 1406; State v Britson, 130 Ariz 380, 636 P2d 628; Lemons v State, 172 Ga App 193, 322 SE2d 521; Napier v State (Ind) 445 NE2d 1361; State v McCarty, 224 Kan 179, 578 P2d 274; Stallings v Commonwealth (Ky) 556 SW2d 4; State v Forrest (La) 356 So 2d 945; State v Trafton (Me) 425 A2d 1320; State v Jackson (Mo App) 664 SW2d 583; Pasgove v State, 98 Nev 434, 651 P2d 100; State v Ober, 126 NH 471, 493 A2d 493; State v Marks, 201 NJ Super 514, 493 A2d 596; People v McCain (2d Dept) 42 App Div 2d 866, 347 NYS2d 72; State v Cook, 280 NC 642, 187 SE2d 104; State v Swanson (ND) 225 NW2d 283; Commonwealth v Ball, 254 Pa Super 148, 385 A2d 568; State v Pressley, 290 SC 251, 349 SE2d 403; Barber v Commonwealth, 206 Va 241, 142 SE2d 484; Hemauer v State, 64 Wis 2d 62, 218 NW2d 342; Schmunk v State (Wyo) 714 P2d 724.

But see Wilson v Donegal Mut. Ins. Co., 410 Pa Super 31, 598 A2d 1310, holding that statement of defendant, on cross-examination, that his attorney had advised him to not take any sort of polygraph test because such tests were inadmissible and inaccurate, while not wholly without relationship to prior statement of defendant so as to be admissible for impeachment purposes had, at best, a very tenuous and indirect relationship to the prior statement, so that lower court went beyond the bounds of its discretion in permitting inquiry by prosecutor into an essentially non-relevant area, but that the elicitation of such testimony did not require a new trial where the reference to the polygraph was so ineffectual and inconsequential that it could in no way have obstructed the jury from a fair determination of the issues in the case based on relevant factors.

Annotation: Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 ALR2d 819.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

Footnote 49. State v Green, 254 Iowa 1379, 121 NW2d 89, 95 ALR2d 810; State v Kolander, 236 Minn 209, 52 NW2d 458.

Footnote 50. People v Durso, 40 Ill 2d 242, 239 NE2d 842, cert den 393 US 1111, 21 L

Ed 2d 807, 89 S Ct 923.

In a prosecution for first-degree murder, the defendant's offers to take a polygraph test, clearly inadmissible on their own, did not become admissible when included in the defendant's taped confession, part of which was introduced at his trial. *State v Britson*, 130 Ariz 380, 636 P2d 628.

Footnote 51. *State v La Rocca*, 81 NJ Super 40, 194 A2d 578; *Durham v State*, 240 Ga 203, 240 SE2d 14.

Footnote 52. *Leach v State* (Tex Crim) 548 SW2d 383.

The trial court did not err in refusing to strike the defendant's testimony regarding his willingness to take a lie detector test where the defendant himself interjected the issue into the record by an unresponsive answer on direct examination, where the defendant subsequently agreed to undergo an examination and stipulated that the test results could be admitted into evidence, and where defense counsel did not object to prior testimony until after the test results unfavorable to defendant were about to be introduced into evidence. *State v Roach*, 223 Kan 732, 576 P2d 1082.

Footnote 53. *State v Bishop*, 223 Kan 539, 574 P2d 1386.

Footnote 54. *Stallings v Commonwealth* (Ky) 556 SW2d 4.

13. Similar or Comparable Occurrences, Transactions, or Conditions [547-555]

a. In General [547, 548]

§ 547 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, evidence of conduct of a person on another occasion or occasions is considered to be irrelevant on the question of his or her conduct on the occasion in issue. 55 Evidence of other specific, though similar, acts may not be proved simply to show that, having done the same thing before, the person is likely to have done it on the occasion in issue, 56 unless the acts are connected in some special way, indicating a relevancy beyond mere similarity as to some particulars. 57 In criminal cases, the rule, subject to various exceptions, is that proof that the accused has committed another and separate offense is not admissible for the purpose of proving that he is guilty of the offense with which he stands charged. 58

There are, however, limitations upon the general rule excluding evidence of similar or comparable facts, acts, and conduct. Certain exceptions to this rule have been recognized

where the evidence offered has some relevancy to the issues presented other than mere similarity. Although not subject to precise categorization, evidence of other similar acts will be admitted if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) identity. 59

§ 547 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse. 24 ALR5th 465.

Footnotes

Footnote 55. *Thomas v Newnan Hospital*, 185 Ga App 764, 365 SE2d 859, the court stating that conduct in other transactions is neither relevant nor admissible.

As to habit or reputation of party concerning negligence or care, see § 396.

Footnote 56. *Dillon v U.S. Steel Corp.* (1st Dist) 159 Ill App 3d 186, 111 Ill Dec 54, 511 NE2d 1349, app den 117 Ill 2d 542, 115 Ill Dec 399, 517 NE2d 1085; *Re Estate of Brandon*, 55 NY2d 206, 448 NYS2d 436, 433 NE2d 501.

In a negligence action against the operator of a motor vehicle, evidence introduced for the purpose of establishing that the defendant had, on a prior occasion, driven a motor vehicle in a reckless or careless manner, is deemed inadmissible. *Moore v Swoboda* (4th Dist) 213 Ill App 3d 217, 157 Ill Dec 37, 571 NE2d 1056, app den 141 Ill 2d 544, 162 Ill Dec 492, 580 NE2d 118.

Footnote 57. *Reed v Clark*, 277 SC 310, 286 SE2d 384; *Cooper v Eastern Airlines, Inc.*, 90 Misc 2d 52, 393 NYS2d 306.

In a negligence case involving an accident between a tractor-trailer and a farm animal, testimony about a prior escape of cattle from the defendant's farm was properly admitted. The theory of the case was that the cattle guard which fenced in the defendant's livestock had deteriorated and was not effective to retain the cattle in the pasture, thus permitting the animal in question to escape and wander into the road where it caused an accident with the plaintiff's truck. *Oconee Roller Mills, Inc. v Spitzer* (App) 300 SC 358, 387 SE2d 718.

Evidence concerning unrelated transaction tending to show defendant's level of business sophistication and companies' transactions was admissible to refute defendant's defense that he was not aware of the nature of transactions involving a company through which false statements and reports in an application for a loan were filed. *United States v Calandrella* (CA6 Ky) 605 F2d 236, cert den 444 US 991, 62 L Ed 2d 420, 100 S Ct 522.

For a discussion of the use of evidence of similar acts to establish intent or absence of mistake in a fraud action, see § 437.

Footnote 58. §§ 405 et seq.

Footnote 59. Re Estate of Brandon, 55 NY2d 206, 448 NYS2d 436, 433 NE2d 501.

As to the admissibility of evidence of other acts or statements to prove one's state of mind, see §§ 435, 436.

§ 548 Similar facts, conditions, or events

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, an issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same or substantially similar circumstances. 60 Evidence of similar occurrences or conditions may be admitted upon a showing of substantial identity of circumstances and reasonable proximity in time. 61 Such evidence is also admissible where the direct issue at hand is not the identity of circumstances. For instance, in a negligence action in which the control and ownership of certain property is at issue, evidence of similar circumstances or conditions is admissible to establish this. 62

§ 548 ----Similar facts, conditions, or events [SUPPLEMENT]

Practice Aids: Being civil to similar fact evidence, 12 Civ Jus Q 188 (1993).

Case authorities:

In prosecution for armed robbery, trial court did not err in admitting evidence of similar transaction, where state presented evidence of similar transaction in city immediately across river from site of crime charged; both incidents involved armed robberies of grocery stores in July of 1992, in both cases, perpetrator, acting alone, robbed grocery store during evening hours, and after each robbery, perpetrator ordered victim and second witness to go to back of store while he fled on foot. *Allison v State* (1994) 213 Ga App 195, 444 SE2d 347, 94 Fulton County D R 1661.

In prosecution for assault and robbery and other crimes, trial court's error, if any, in refusing to admit evidence that some other victim had been assaulted in about same place about hour earlier was harmless where, at best, proffered evidence demonstrated only that person other than defendant engaged in similar attack; there was not even mere conjecture that assault on present victim was committed by that other individual. *State v Bull* (1993, App Div) 268 NJ Super 504, 634 A2d 101, certif den 135 NJ 304, 639 A2d 303.

Footnotes

Footnote 60. *Durham v Ciba-Geigy Corp.* (SD) 315 NW2d 696, 33 UCCRS 588.

As to the presumption regarding continuance of a condition or state of facts, see §§ 291 et seq.

Law Reviews: F. H. Hare, Jr., M. K. Shelly, The admissibility of other similar incident evidence: a three-step approach, 15 Am J Trial Ad 541-58 (Spring 1992).

Footnote 61. *Martin v Amusements of America, Inc.*, 38 NC App 130, 247 SE2d 639, cert den 296 NC 106, 249 SE2d 804.

Footnote 62. *Plyworld, Inc. v St. Paul Fire & Marine Ins. Co.* (Ala) 351 So 2d 1363, a negligence action involving the destruction of a premises by fire in which evidence regarding the fact that a fire door had been chained prior to the fire in such a way as to block its proper operation was admissible, notwithstanding the rule that evidence as to a condition before the time of an accident may not be introduced without a prior showing that conditions were substantially the same on both occasions, where the evidence was introduced not to prove negligence, but prove ownership or control over the fire door.

b. Prior Accidents or Injuries at Same Location [549-552]

§ 549 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of other similar accidents at the same location can be circumstantially relevant in a negligence action to show the existence of a defective or dangerous condition, notice thereof, or causation on the occasion in question. 63 Thus, in actions involving the allegedly defective condition of a place, the admission of such evidence is within the trial court's discretion, to be exercised in light of all the surrounding circumstances indicating the relevance of the evidence with due regard for any possible prejudice to the defendant. 64 Factors contributing to a determination of whether evidence of a prior accident is admissible include:

- (1) the similarity of the circumstances surrounding prior accidents and the accident in the case at bar; 65
- (2) the amount of time elapsing between prior accidents and the accident in the case at trial; 66
- (3) defendant's opportunity to prepare for the introduction of prior accident evidence; 67 and
- (4) the possibility of introducing collateral issues and confusing the issues in the case at trial. 68

The admission of evidence of prior accidents or injuries is an exception to the general rule which ordinarily excludes evidence of independent events and occurrences not directly connected with the matter in dispute. 69

Footnotes

Footnote 63. *Simon v Kennebunkport (Me)* 417 A2d 982, 21 ALR4th 465.

For a discussion of the admissibility of evidence of other accidents and injuries in the context of products liability actions, see 63 Am Jur 2d, Products Liability § 411.

Annotation: Products liability: admissibility of evidence of other accidents to prove hazardous nature of product, 42 ALR3d 780.

Footnote 64. *Alabama G. S. R. Co. v Johnston*, 281 Ala 140, 199 So 2d 840; *Johnson v State (Alaska)* 636 P2d 47; *De Elena v Southern Pacific Co.*, 121 Ariz 563, 592 P2d 759; *Oates v St. Louis S. R. Co.*, 266 Ark 527, 587 SW2d 10; *Kopfing v Grand Cent. Public Market*, 60 Cal 2d 852, 37 Cal Rptr 65, 389 P2d 529; *Liberty Mut. Ins. Co. v Kimmel (Fla App D3)* 465 So 2d 606, 10 FLW 752; *Ladson Invest. v Bagent*, 151 Ga App 24, 258 SE2d 718; *Warshaw v Rockresorts, Inc.*, 57 Hawaii 645, 562 P2d 428; *Cogswell v C. C. Anderson Stores Co.*, 68 Idaho 205, 192 P2d 383; *Newton v Meissner (1st Dist)* 76 Ill App 3d 479, 31 Ill Dec 864, 394 NE2d 1241; *State by Indiana State Highway Com. v Fair (Ind App)* 423 NE2d 738; *Harris v Thompson (Ky)* 497 SW2d 422; *Holmes v Christopher (La App 4th Cir)* 435 So 2d 1022, cert den (La) 440 So 2d 723 and cert den (La) 440 So 2d 724 and cert den (La) 440 So 2d 724 and cert den (La) 440 So 2d 765; *Simon v Kennebunkport (Me)* 417 A2d 982, 21 ALR4th 465; *Elwell v Del Torchio*, 349 Mass 766, 208 NE2d 221; *Freed v Simon*, 370 Mich 473, 122 NW2d 813; *Runkle v Burlington Northern*, 188 Mont 286, 613 P2d 982; *Gilliard v Long Island R. Co.*, 45 NY2d 996, 413 NYS2d 116, 385 NE2d 1044; *Whitman v Riddell*, 324 Pa Super 177, 471 A2d 521; *Callan v Peters Constr. Co. (App)* 94 Wis 2d 225, 288 NW2d 146.

As to the effect of prior similar incidents on an owner's liability, see 62 Am Jur 2d, Premises Liability § 41.

Footnote 65. *Lerner v Seaboard C. L. R. Co. (SD NY)* 594 F Supp 963; *Rollins v Department of Transp.*, 238 Kan 453, 711 P2d 1330; *Kromhout v Commonwealth*, 398 Mass 687, 500 NE2d 789; *Dudley v County of Saratoga (3d Dept)* 145 App Div 2d 689, 535 NYS2d 231, app den 73 NY2d 710, 541 NYS2d 764, 539 NE2d 592; *Mendenhall v Commonwealth, Dept. of Transp.*, 113 Pa Cmwlth 550, 537 A2d 951, app den 520 Pa 610, 553 A2d 971; *Gable v Kroger Co.*, 186 W Va 62, 410 SE2d 701.

In an action to recover for injuries sustained by plaintiff when, while in a pasture rounding up straying cattle, his horse collided with another, causing both riders to be knocked to the ground, evidence of an earlier trail ride accident was properly excluded where the only similarity between the two events was that each occurred while working with cattle and one defendant was present in each incident. *Winkelmann v Battle Island Ranch (Tex App Houston (14th Dist))* 650 SW2d 543.

Footnote 66. *Chicago, R.I. & P. R. Co. v Lynch*, 246 Ark 1282, 441 SW2d 793; *Perret v*

Seaboard C. L. R. Co. (Fla) 299 So 2d 590; Haukom v Chicago, G. W. R. Co., 269 Minn 542, 132 NW2d 271; Roll 'R' Way Rinks, Inc. v Smith, 218 Va 321, 237 SE2d 157.

In personal injury action arising out of a slip and fall on ice in a parking lot, the trial court properly admitted evidence regarding prior falls in the lot, where the prior falls occurred in the same time period as plaintiff's fall. Erickson v Wasatch Manor, Inc. (Utah App) 802 P2d 1323, 149 Utah Adv Rep 71.

Footnote 67. Johnson v State (Alaska) 636 P2d 47.

Footnote 68. Perret v Seaboard C. L. R. Co. (Fla) 299 So 2d 590; Simon v Kennebunkport (Me) 417 A2d 982, 21 ALR4th 465; Hess v Chicago, R. I. & P. R. Co. (Mo) 479 SW2d 425.

Footnote 69. Taylor v Kansas City, 342 Mo 109, 112 SW2d 562.

§ 550 As showing existence of defect or danger

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Subject to the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues, 70 the courts have generally recognized that evidence of prior similar accidents at the same place as that of the accident in suit, or evidence of prior similar injuries resulting from the same appliance as the injury in suit, is admissible for the purpose of showing the existence of dangerous or defective premises or appliances. 71

Footnotes

Footnote 70. § 549.

Footnote 71. McDonald's Corp. v Grissom (Ala) 402 So 2d 953; Ault v International Harvester Co., 13 Cal 3d 113, 117 Cal Rptr 812, 528 P2d 1148, 74 ALR3d 986; Ladson Invest. v Bagent, 151 Ga App 24, 258 SE2d 718; Henderson v Illinois C. G. R. Co. (4th Dist) 114 Ill App 3d 754, 70 Ill Dec 595, 449 NE2d 942.

§ 551 As showing notice or knowledge of defect or danger

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Subject to the general requirements of similarity of conditions, reasonable proximity in

time, and avoidance of confusion of issues, 72 the courts have generally recognized that evidence of prior similar accidents at the same place as the place in suit, or evidence of prior similar injuries resulting from the same appliance as the injury in suit, is admissible upon the question of notice or knowledge of the defective or dangerous condition. 73

Footnotes

Footnote 72. § 549.

Footnote 73. *Johnson v State (Alaska)* 636 P2d 47; *Perret v Seaboard C. L. R. Co. (Fla)* 299 So 2d 590; *Liberty Mut. Ins. Co. v Kimmel (Fla App D3)* 465 So 2d 606, 10 FLW 752; *Highlands Ins. Co. v Missouri P. R. Co. (La App 3d Cir)* 532 So 2d 317, companion case (La App 3d Cir) 532 So 2d 327, cert gr (La) 534 So 2d 435, reh den (La) 535 So 2d 732 and affd (La) 540 So 2d 287; *Elwell v Del Torchio*, 349 Mass 766, 208 NE2d 221; *Sweetman v State Highway Dept.*, 137 Mich App 14, 357 NW2d 783; *Hess v Chicago, R. I. & P. R. Co. (Mo)* 479 SW2d 425; *Hyde v County of Rensselaer*, 51 NY2d 927, 434 NYS2d 984, 415 NE2d 972.

As to the effect of prior similar incidents on an owner's liability, see 62 Am Jur 2d, Premises Liability § 41.

§ 552 As showing negligence or cause of injury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the courts recognize that evidence of prior similar accidents is admissible to show the existence or knowledge of a defect or danger, 74 they have frequently stated or held, usually in connection with the exclusion of the evidence where the negligence charged did not concern the defective character of the defendant's property, that evidence of prior accidents is not admissible on the basic issue of the defendant's negligence. 75

Evidence of prior accidents at the same place has sometimes been recognized as admissible as tending to demonstrate that plaintiff's injury was caused by the same condition which operated to cause the prior accident. 76

Footnotes

Footnote 74. §§ 550, 551.

Footnote 75. *Pembroke Management, Inc. v Cossaboon*, 157 Ga App 675, 278 SE2d 100; *Harris v Thompson (Ky)* 497 SW2d 422; *Kromhout v Commonwealth*, 398 Mass 687, 500 NE2d 789; *Runkle v Burlington Northern*, 188 Mont 286, 613 P2d 982; *Rader v Gibbons & Reed Co.*, 261 Or 354, 494 P2d 412.

Annotation: Modern status of rules as to admissibility of evidence of prior accidents

or injuries at same place, 21 ALR4th 472.

Footnote 76. *Burgbacher v Mellor*, 112 Ariz 481, 543 P2d 1110; *Simon v Kennebunkport (Me)* 417 A2d 982, 21 ALR4th 465; *Safeway Stores, Inc. v Bozeman (Tex Civ App Tyler)* 394 SW2d 532, writ ref n r e (Jan 26, 1966) and reh'g of writ of error overr (Feb 23, 1966).

c. Absence of Other Accidents or Injuries [553-555]

§ 553 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the absence of other accidents at the same place, or evidence of the absence of other injuries resulting from the use or operation of the same appliance, is relevant where the plaintiff contends that he or she has been harmed on, near, or by the defendant's property because of a defective condition which has been in existence over a considerable period of time. 77 Evidence of the absence of previous accidents at the same place where the plaintiff was injured, or of the absence of prior injuries arising from the use or operation of the appliance whereby the plaintiff was injured, has generally been held admissible as tending to show that the place or appliance was not dangerous 78 and that the defendant did not have actual or constructive knowledge of a dangerous condition, 79 although at least one jurisdiction has flatly refused to admit such evidence, on the basis that it introduces collateral issues which distract the attention of the jurors from the central issues at hand and greatly protracts the trial. 80

The question whether evidence of the absence of other accidents or injuries is of sufficient value to outweigh the possible inconvenience of investigating the collateral matters involved is largely a matter of trial administration, as to which the trial court should be allowed a large measure of discretion. 81 Thus, proffered evidence of the absence of prior accidents, though relevant, is properly excluded where it is unnecessary for resolution of any disputed issue in the case. 82

◆ Caution: Such evidence is not admissible where it will lead to confusion of the issues before the jury. 83

Footnotes

Footnote 77. *Facey v Merkle*, 146 Conn 129, 148 A2d 261, 70 ALR2d 358; *William Laurie Co. v McCullough*, 174 Ind 477, 90 NE 1014, reh'g overr 174 Ind 490, 92 NE 337; *Hubbell v Yonkers*, 104 NY 434, 10 NE 858.

Annotation: Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Footnote 78. McDonald's Corp. v Grissom (Ala) 402 So 2d 953; Schuller v Hy-Vee Food Stores, Inc. (Iowa) 328 NW2d 328, later proceeding (Iowa App) 407 NW2d 347; Ketcher v Illinois C. G. R. Co. (La App 1st Cir) 440 So 2d 805, cert den (La) 444 So 2d 1220; McCarty v Nashwauk, 282 Minn 262, 164 NW2d 380; Christoforou v Lown (1st Dept) 120 App Div 2d 387, 502 NYS2d 184; Rathbun v Humphrey Co., 94 Ohio App 429, 52 Ohio Ops 145, 65 Ohio L Abs 455, 113 NE2d 877, motion overr; Baker v Lane County, 37 Or App 87, 586 P2d 114.

Evidence of absence of other accidents on landing outside bar was admissible to show that landing was not dangerous. Crochet v Freeman (La App 1st Cir) 504 So 2d 1064.

In action arising out of train-vehicle collision in which plaintiff was injured, evidence of whether there had been prior accidents at railroad crossing was relevant to issue of whether additional protection for crossing was needed. Wollaston v Burlington Northern, Inc., 188 Mont 192, 612 P2d 1277.

Footnote 79. Higgins v Hicks Co. (CA8 SD) 756 F2d 681; Doe v United States (CA11 Fla) 718 F2d 1039 (applying Florida law); Tracy v Lombard (2d Dist) 116 Ill App 3d 563, 71 Ill Dec 838, 451 NE2d 992; Schuller v Hy-Vee Food Stores, Inc. (Iowa) 328 NW2d 328, later proceeding (Iowa App) 407 NW2d 347; Ketcher v Illinois C. G. R. Co. (La App 1st Cir) 440 So 2d 805, cert den (La) 444 So 2d 1220; Pierce v Platte-Clay Electric Cooperative, Inc. (Mo) 769 SW2d 769; Taylor v New York City Transit Authority, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340; Douglas v Dewey (App) 154 Wis 2d 451, 453 NW2d 500.

In an action to recover for burns and bodily injuries allegedly resulting from the use of a hair conditioner, wherein the plaintiff alleged that the defendant knew or should have known of the flammable nature of the product, the trial court does not abuse its discretion in admitting testimony that the defendant had received no complaints of injury from use of the conditioner under jury instructions that the testimony is admitted only on the limited issue of the defendant's knowledge or lack of knowledge of the alleged flammable characteristics of the product. Hardman v Helene Curtis Industries, Inc. (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033.

Footnote 80. Jones v Pak-Mor Mfg. Co. (App) 145 Ariz 132, 700 P2d 830, CCH Prod Liab Rep ¶ 9927, vacated on other grounds, in part, approved, in part 145 Ariz 121, 700 P2d 819, CCH Prod Liab Rep ¶ 10364, 51 ALR4th 1167, cert den 474 US 948, 88 L Ed 2d 295, 106 S Ct 314.

Footnote 81. Silver v New York C. R. Co., 329 Mass 14, 105 NE2d 923; Robitaille v Netoco Community Theatres, 305 Mass 265, 25 NE2d 749, 128 ALR 592; Nubbe v Hardy Continental Hotel System, 225 Minn 496, 31 NW2d 332.

Footnote 82. Grubaugh v St. Johns, 82 Mich App 282, 266 NW2d 791, an action arising out of an automobile accident based on alleged negligence of a city in failing to provide a traffic control device at intersection, in which proffered testimony that the city police department had no record of any accident having occurred at the intersection for 12 years prior to instant accident was unnecessary since the need for traffic control devices was

patent.

Footnote 83. *Dill v Dallas County Farmers' Exchange* (Mo) 267 SW2d 677.

§ 554 Necessity of showing similarity of conditions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In order for evidence of the absence of other accidents or injuries to be admissible, it must be shown that during the period involved the conditions at the place in question were substantially similar to those prevailing at the time of the accident in suit. 84 It must also be shown that the use of the premises or appliance on the prior occasions was substantially identical with the reasonably anticipated use by the plaintiff. 85 The determination of just what degree of substantiality satisfies the requirements of the rule depends to a large degree upon the factual situation presented in the particular case, and it appears that the matter is frequently left to the discretion of the trial court. 86

Footnotes

Footnote 84. *Nungaray v Pleasant Valley Lima Bean Growers & Warehouse Asso.* (2nd Dist) 142 Cal App 2d 653, 300 P2d 285; *Facey v Merkle*, 146 Conn 129, 148 A2d 261, 70 ALR2d 358; *Pippin v Ranch House South, Inc.* (Del Sup) 366 A2d 1180; *Baker v Lane County*, 37 Or App 87, 586 P2d 114; *Commonwealth, DOT v Weller*, 133 Pa Cmwlth 18, 574 A2d 728, reh den (Pa Cmwlth) 1990 Pa Commw LEXIS 334; *Mobbs v Central Vermont Ry., Inc.*, 155 Vt 210, 583 A2d 566, 10 ALR5th 1004; *Gabel v Koba*, 1 Wash App 684, 463 P2d 237.

In an action by an eight-year-old invitee at a county fairgrounds who was injured when he reached his hand through a fence and tugged on the rope of a horse which reared, causing his fingers to be severed by the fence, the similar conditions requirement was fulfilled to the extent the evidence related to circumstances in which horses had been tied to the fence when members of the public were present on the fairgrounds. *Baker v Lane County*, 37 Or App 87, 586 P2d 114.

Annotation: Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Footnote 85. *Facey v Merkle*, 146 Conn 129, 148 A2d 261, 70 ALR2d 358.

Footnote 86. *Hogg v First Nat. Bank*, 82 Ga App 861, 62 SE2d 634; *Howe v Jameson*, 91 NH 55, 13 A2d 471.

§ 555 Absence of other accidents when following custom or practice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The courts are not in agreement on the question whether, in an action where it is charged that a custom or practice followed by the opposing party constituted negligence, this charge may be met by evidence showing that when the custom or practice was followed at other times or places no similar accident resulted. While there are a number of cases which appear to exclude such evidence on the ground that it is irrelevant and without probative force,⁸⁷ evidence of the absence of other similar accidents from the custom or practice which was alleged to be negligent has been admitted in a number of cases on the theory that such evidence has some tendency to show that the custom or practice in question is not in fact attended with such dangers as to render its employment negligence.⁸⁸ Such evidence has sometimes been admitted on the issue whether the person alleged to have been negligent is chargeable with notice of the dangers involved in the practice.⁸⁹

Although total identity of conditions at the time of the accident in suit and at the other times involved in the proffered evidence can never be established, evidence of the absence of other accidents should not be admitted where the conditions are substantially dissimilar.⁹⁰

Footnotes

Footnote 87. *Oakland v Pacific Gas & Electric Co.*, 47 Cal App 2d 444, 118 P2d 328; *Oglesby v Conger*, 31 Colo App 504, 507 P2d 883; *South Atlantic S.S. Co. v Munkacsy* (Sup) 37 Del 580, 187 A 600, cert den 299 US 607, 81 L Ed 448, 57 S Ct 233; *Trautloff v Dannen Mills, Inc.* (Mo App) 316 SW2d 866.

Testimony that for several years before plaintiff was injured in a collision between the automobile in which he was riding and defendant's sheep, which were unattended on the highway, it had been the defendant's custom to graze his sheep on the side of the highway and that never before had one of the animals been killed by an automobile, has been held to have been improperly admitted, the court saying that the fact that defendant had handled his sheep negligently over a period of years without mishap lent no sanctity to his experience. *Caperon v Tuttle*, 100 Utah 476, 116 P2d 402, 135 ALR 1399.

Footnote 88. *Fletcher v Baltimore & P. R. Co.*, 168 US 135, 42 L Ed 411, 18 S Ct 35; *Sanders v Wheaton*, 273 Ark 416, 619 SW2d 674; *Horn Cos. v Batchelor*, 171 Ga App 838, 321 SE2d 399; *Jackson v Chicago, M., S. P. & P. R. Co.*, 238 Iowa 1253, 30 NW2d 97; *Ward v Penn Mut. Life Ins. Co.* (Mo App) 352 SW2d 413; *Golden Villa Nursing Home, Inc. v Smith* (Tex App Houston (14th Dist)) 674 SW2d 343, writ ref n r e; *Kalkopf v Donald Sales & Mfg. Co.*, 33 Wis 2d 247, 147 NW2d 277.

In a negligence action by an employee who was injured while helping another worker lift a piece of machinery weighing some 300 pounds, testimony by the other worker that he and only one other man had manually installed such machinery hundreds of times before

was admissible for the purpose of rebutting the inference that defendants were negligent in not using additional men or equipment, where, during plaintiffs' case-in-chief, the fact was fully developed that hoisting equipment and additional farm hands were available to assist in the placement of the machinery. *Sanders v Wheaton*, 273 Ark 416, 619 SW2d 674.

Annotation: Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

Footnote 89. *Bergman v Williams*, 173 Minn 250, 217 NW 127.

Footnote 90. *Pittman v Littlefield* (CA1 NH) 438 F2d 659; *McCullough v Langer*, 23 Cal App 2d 510, 73 P2d 649; *Sammons v Webb*, 86 Ga App 382, 71 SE2d 832; *DiBuono v A. Barletta & Sons, Inc.*, 127 Pa Cmwlth 1, 560 A2d 893, app den 524 Pa 632, 574 A2d 73.

14. State of Mind; Knowledge, Belief, Intent, and Motive [556-558]

a. In General [556, 557]

§ 556 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in a case. 91 The courts, of course, cannot ascertain thoughts that have had no outward manifestations, and the state of a person's mind, his or her knowledge, or belief, and intent must be inferred from the person's statements and actions. 92 Where it becomes material to show the mental operation of a person or to ascertain the reasons or influences which have induced certain action or conduct on his part, either they may be shown by accompanying circumstances, 93 or, it is generally held, the person may testify directly about them, even though such testimony may partake in some degree of the nature of a conclusion. 94

Whenever issues of duress, 95 undue influence, 96 fraud, 97 and good faith 98 are raised, the evidence must take a rather wide range and may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions. 99

Where malice is an essential factor in a case, it is sometimes presumed from the doing of the act charged. 1

§ 556 ----Generally [SUPPLEMENT]

Case authorities:

The court did not err in a first- degree murder prosecution by admitting testimony from the victim's twelve- year-old son that his state of mind when the defendant entered the house on a prior occasion was "fear." Although the jury had probably concluded on its own that the witness was in fear when he fled the house, the testimony was relevant to prove matters other than the character of the defendant in that it was relevant to rebut defendant's contention that he was in the house with the consent of the victim, the testimony served to corroborate testimony indicating that defendant had threatened the victim, and it demonstrated the state of the familial relationship in the period immediately preceding the murder. *State v Lynch* (1994) 337 NC 415, 445 SE2d 581.

Evidence of a rifle telescope was relevant and admissible in a first-degree murder trial to show that defendant and a co-participant armed themselves to hit a distant target at night in low light and thus that defendant premeditated and deliberated the killing where the evidence at trial showed that the victim had been shot at night from a distance of more than three or four feet by bullets from a .22 caliber rifle and that the shots were fired in rapid succession; defendant told a deputy sheriff that he fired a .22 caliber rifle at the victim and supplied information as to where the rifle was located; a duffel bag containing, among other things, the .22 caliber rifle used in the shooting and the dismounted telescope was found at the co- participant's residence; "scrape marks" on the mounting bracket of the rifle corresponded to "scrape marks" on the telescope; defendant stated that he and the co- participant waited until night to commit the robbery-murder; and a killing done from a distance in low light is the type of situation that would call for a telescopically equipped weapon. *State v Ward* (1994) 338 NC 64, 449 SE2d 709.

Evidence that a murder victim's husband was incarcerated on felony drug charges on the night of the murder was not relevant to show that defendant did not have the specific intent to kill the victim and was properly excluded by the trial court in this first-degree murder trial since (1) this evidence had no logical tendency to show that there were drugs hidden in the victim's house and could not reasonably support an inference that defendant was at the victim's house to steal cocaine and did not plan to kill the only person who could lead him to the cocaine, and (2) such an inference was contradicted by defendant's own statement that a co-participant told him that he had a job to do, namely, to rob and perhaps kill the victim; that he waited, armed with a rifle, with the co-participant in a bush behind the victim's house; and that he started shooting when the victim got out of her truck. *State v Ward* (1994) 338 NC 64, 449 SE2d 709.

Statements made by defendant to an officer prior to his arrest on the current drug charges that he was just a businessman who should be left alone and that officers "should concentrate on those drug dealers who ripped people off and shoot people" were relevant on the issue of defendant's intent to sell and deliver drugs, and the trial court did not err by finding that the probative value of those statements outweighed any danger of unfair prejudice. *State v Taylor* (1995) 117 NC App 644, 453 SE2d 225.

Footnotes

Footnote 91. *Potter v United States*, 155 US 438, 39 L Ed 214, 15 S Ct 144; *Cope v Davison*, 30 Cal 2d 193, 180 P2d 873, 171 ALR 667; *Application of Frank* (3d Dept) 14

App Div 2d 139, 218 NYS2d 208; *Bridges v State*, 247 Wis 350, 19 NW2d 529, reh den 247 Wis 374, 19 NW2d 862.

Footnote 92. *American Communications Asso. v Douds*, 339 US 382, 94 L Ed 925, 70 S Ct 674, 26 BNA LRRM 2084, 18 CCH LC ¶ 65760, reh den 339 US 990, 94 L Ed 1391, 70 S Ct 1017.

Footnote 93. *State v Hernandez*, 7 Ariz App 200, 437 P2d 952; *Re Estate of Carson*, 184 Cal 437, 194 P 5, 17 ALR 239; *Grimshaw v Ford Motor Co.* (4th Dist) 119 Cal App 3d 757, 174 Cal Rptr 348, CCH Prod Liab Rep ¶ 8999; *State v Hetrick*, 84 Kan 157, 113 P 383; *Application of Frank* (3d Dept) 14 App Div 2d 139, 218 NYS2d 208.

Footnote 94. *Nelson v Grimes* (CA8 Neb) 256 F2d 816; *Miller v State*, 230 Ark 352, 322 SW2d 685; *Cope v Davison*, 30 Cal 2d 193, 180 P2d 873, 171 ALR 667; *Newman v Newman*, 221 Ind 432, 48 NE2d 455; *Williams v Stroh Plumbing & Electric, Inc.*, 250 Iowa 599, 94 NW2d 750, 82 ALR2d 465; *Colburn v Krabill*, 232 Iowa 290, 3 NW2d 154; *Wood v Custer*, 86 Kan 387, 121 P 355; *State v Hetrick*, 84 Kan 157, 113 P 383.

Footnote 95. 25 Am Jur 2d, *Duress and Undue Influence* § 32.

Footnote 96. 25 Am Jur 2d, *Duress and Undue Influence* § 47.

Footnote 97. 37 Am Jur 2d, *Fraud and Deceit* §§ 450 et seq.; 37 Am Jur 2d, *Fraudulent Conveyances* § 222.

Footnote 98. *Harper v Durden*, 177 Ga 216, 170 SE 45, 89 ALR 625; *Stone v Monticello Const. Co.*, 135 Ky 659, 117 SW 369; *Griffith v Shipley*, 74 Md 591, 22 A 1107; *Klein v Pollard*, 149 Mich 200, 112 NW 717; *Orr v Mallon*, 190 Okla 598, 126 P2d 83; *North America Life Ins. Co. v Wilburn* (Tex Civ App Dallas) 392 SW2d 364.

Footnote 99. *Scurry v Cook*, 206 Ga 876, 59 SE2d 371; *North America Life Ins. Co. v Wilburn* (Tex Civ App Dallas) 392 SW2d 364; *Ashby v State* (Tex Civ App Dallas) 283 SW2d 270.

Footnote 1. As to presumption of malice, see 52 Am Jur 2d, *Malice* § 5.

A discussion of particular matters of proof admissible on an issue of malice will be found in connection with the treatment of evidence admissible in the various particular actions or prosecutions in which malice is a factor, including 32 Am Jur 2d, *False Imprisonment* § 127; 40 Am Jur 2d, *Homicide* § 283; 52 Am Jur 2d, *Malicious Prosecution* § 152.

§ 557 Knowledge or notice

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the knowledge which a person may have had is material to a judicial proceeding,

this is a fact to be proved as any other fact, and a wide range of proof is admissible in this respect. 2 It may be evidenced by the affirmative statement or admission of the possessor of the knowledge. 3 Knowledge, like intent, is a state of mind and may be proved by circumstantial evidence, 4 since direct evidence on such facts is rarely available. 5

Proof that other injuries were received at the same place at which a particular injury occurred is admissible to show notice of a dangerous condition at such place. 6 And where a practice or custom has been followed for several years, prior to an accident for which action is brought, evidence of the practice or custom may be introduced for the purpose of showing constructive notice of such practice. 7 In criminal cases, proof of the commission of other crimes may be permitted for the purpose of showing the defendant's knowledge and intention. 8

§ 557 ----Knowledge or notice [SUPPLEMENT]

Case authorities:

Evidence of a decedent's past drinking habits was admissible in an action arising from an automobile accident in which the decedent was the passenger, the driver and decedent had been drinking, and contributory negligence was an issue. Evidence of the deceased's drinking habits was relevant to his knowledge of the effects of alcohol. While plaintiff argued that the probative value was outweighed by the prejudicial effect of the evidence, there was other damaging testimony about the decedent's drinking habits to which plaintiff did not object. GS § 8C-1, Rule 404(b). *McFarland v Cromer* (1995) 117 NC App 678, 453 SE2d 527.

Footnotes

Footnote 2. *Ralston v Turpin*, 129 US 663, 32 L Ed 747, 9 S Ct 420; *Cope v Davison*, 30 Cal 2d 193, 180 P2d 873, 171 ALR 667; *Ashby v State* (Tex Civ App Dallas) 283 SW2d 270; *Bridges v State*, 247 Wis 350, 19 NW2d 529, reh den 247 Wis 374, 19 NW2d 862.

In a negligent entrustment action, evidence of a limousine driver's previous convictions for traffic violations were admissible to show that the driver's employer had knowledge of the driver's incompetence. *Burley v Hudson*, 122 NH 560, 448 A2d 375.

Footnote 3. *Nelson v Grimes* (CA8 Neb) 256 F2d 816; *Oil Workers International Union v Superior Court of Contra Costa County*, 103 Cal App 2d 512, 230 P2d 71, 28 BNA LRRM 2643, 20 CCH LC ¶ 66545.

The trial court in a first degree murder case did not err in allowing several of the state's witnesses to testify that decedent had often referred to defendant Rinck as "Bobby Swink," since the evidence was offered to show decedent's knowledge of defendant Rinck's identity as one of the persons who had robbed him and to explain why he referred to defendant as "Bobby Swink" during a telephone call which he made to the police department on the day that he was killed. *State v Rinck*, 303 NC 551, 280 SE2d 912.

Footnote 4. Fireman's Fund Ins. Co. v Trippe (Mo App) 402 SW2d 577.

Footnote 5. Grimshaw v Ford Motor Co. (4th Dist) 119 Cal App 3d 757, 174 Cal Rptr 348, CCH Prod Liab Rep ¶ 8999.

Footnote 6. § 551.

Footnote 7. Chickasha v Daniels, 123 Okla 73, 251 P 978, 51 ALR 568.

Footnote 8. §§ 443, 439.

b. Intent or Motive [558]

§ 558 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Intent as a state of mind is a fact which may be proved when it is material. 9 Because it can rarely be established by direct evidence, intent must often be proved circumstantially and by inference. 10 Considerable latitude is given in the admission of evidence to show such intent or motive. 11 Intent may be proved by one's words 12 or conduct, 13 or by facts and circumstances which characterize the transaction. 14 On direct examination, a witness may testify as to his or her intention, motive, or other unexpressed mental state, provided that the testimony is material to the issues in the case. 15

§ 558 ----Generally [SUPPLEMENT]

Case authorities:

Testimony by a social worker that defendant had received checks from government agencies for his son until two months before a murder committed during the robbery of a convenience store was not improper character evidence and was relevant under Rules 401 and 404(b) to show motive. GS § 8C-1, Rules 401 and 404(b). State v Powell (1995) 340 NC 674, 459 SE2d 219.

In light of testimony that immediately prior to stabbing a murder victim, defendant speculated that the victim had been "messaging around" with his wife, defendant's statements in a letter to his wife regarding his anger and desire to kill someone as a result of his wife cheating on him, written four days prior to the murder, were relevant to show a motive for defendant's killing of the victim, and the State was properly permitted to cross-examine defendant about this letter. State v Goode (1995) 341 NC 513, 461 SE2d 631.

In a prosecution arising from the murder of a police officer during his attempt to arrest

the defendant in connection with an assault from which the defendant was fleeing, it was not error for the court to permit the prosecutor to introduce into evidence photographs of the defendant's hotel room which depicted graffiti stating "Fuck the Police" since the expression revealed the defendant's general malicious attitude towards police officers and was relevant to show that he had a fixed bias against police officers and that such bias could have contributed to his motive for and malice in the shooting of the officer. Commonwealth v Lacava (Pa) 666 A2d 221.

In action by borrowers against bank alleging fraud by bank in misrepresenting that it would extend them a \$500,000 line of credit, evidence that bank was preparing SBA loan application for borrowers, along with bank officer's denial at trial that he had made an agreement with the borrowers for the line of credit, was insufficient evidence that bank never intended to perform agreement. T.O. Stanley Boot Co. v Bank of El Paso (1992, Tex) 847 SW2d 218, 19 UCCRS2d 514, reh'g of cause overr (Mar 24, 1993).

Footnotes

Footnote 9. Brezinski v Brezinski (4th Dept) 84 App Div 2d 464, 446 NYS2d 833, appeal after remand (4th Dept) 94 App Div 2d 969, 463 NYS2d 975.

Footnote 10. Zilg v Prentice-Hall, Inc. (SD NY) 515 F Supp 716, 7 Media L R 1634, appeal after remand (CA2 NY) 717 F2d 671, 9 Media L R 2257, 43 ALR4th 1163, cert den 466 US 938, 80 L Ed 2d 460, 104 S Ct 1911; Ashby v State (Tex Civ App Dallas) 283 SW2d 270.

Footnote 11. Butler v Watkins, 80 US 456, 13 Wall 456, 20 L Ed 629.

Footnote 12. State Board of Tax Comrs. v Farmers Cooperative Co., 175 Ind App 85, 370 NE2d 389; Fuller v Preston State Bank (Tex App Dallas) 667 SW2d 214, writ ref n r e (Jul 11, 1984), a case in which the court held that a witness may testify to his or her intent in executing an apparent sale of a homestead.

The testimony of a witness in a criminal prosecution for homicide, to the effect that defendant had stated that men should settle their differences "in blood," was relevant as probative on his motive, intent, or state of mind. Morejon v State (Fla App D3) 394 So 2d 1100.

Footnote 13. State Board of Tax Comrs. v Farmers Cooperative Co., 175 Ind App 85, 370 NE2d 389; John Hancock Mut. Life Ins. Co. v Bennett (Tex Civ App) 159 SW2d 892, writ ref w o m.

Footnote 14. Stuart v Hayden, 169 US 1, 42 L Ed 639, 18 S Ct 274; Greenacre v Filby, 276 Ill 294, 114 NE 536; Re Vincent, 268 Ind 101, 374 NE2d 40; Application of Frank (3d Dept) 14 App Div 2d 139, 218 NYS2d 208; Kramer v Skiatron of America, Inc., 32 Misc 2d 1022, 223 NYS2d 283.

In gang-related murder prosecution, proof of gang membership is admissible where it may supply defendant's motive for committing the offense tried. People v Campbell (1st Dist) 232 Ill App 3d 597, 173 Ill Dec 846, 597 NE2d 820, app den 146 Ill 2d 635, 176 Ill Dec 806, 602 NE2d 460; State v Ruof, 296 NC 623, 252 SE2d 720.

In a criminal prosecution for two murders, testimony that one of the victims had told the sheriff two days before the murders that he and the defendant had engaged in a serious argument was relevant for the limited purpose of showing ill will between the victim and the defendant and as tending to show a resulting motive, intent, malice, premeditation, and deliberation on the part of defendant. *State v Alston*, 307 NC 321, 298 SE2d 631.

As to admissibility of evidence regarding motive and intent in homicide cases, generally, see 40 Am Jur 2d, Homicide §§ 280 et seq.

As to admissibility of expert and opinion evidence on the question of specific intent, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 193, 194.

Footnote 15. *Starr v Starr*, 293 Ala 204, 301 So 2d 78, overruling prior inconsistent cases.

15. Physical Condition [559]

§ 559 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence regarding the physical condition of a party, such as his strength, is admissible, if relevant to the issues in a case. 16 Of course, evidence relative to a physical condition is not admissible when such condition is not relevant to an issue in the case on trial. 17 Evidence regarding the physical condition of any party to a motor vehicle accident is admissible in an action to recover damages for injuries sustained. 18

§ 559 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder prosecution by admitting testimony from the State's pathologist during the guilt phase concerning the pain and suffering caused by the wounds to the victims. Expert testimony concerning the pain and suffering of the victims in a first-degree murder case is relevant and admissible to assist the jury in ascertaining whether the defendant was acting with premeditation and deliberation. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

In a prosecution for murder, evidence of the victim's pregnancy was properly admitted since police used the presence of fetal remains in the pelvic area of the victim's skeleton to identify the victim. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

Footnotes

Footnote 16. Thiede v Utah Territory, 159 US 510, 40 L Ed 237, 16 S Ct 62 (testimony that the defendant in a homicide case was a strong, powerful man is not incompetent where there is evidence that the homicide was caused by a powerful blow).

Evidence that the deceased was larger and more powerful than the defendant in a murder case and had a general reputation of being quarrelsome and dangerous is competent on the question of self-defense, especially if his character in this respect was known to the defendant. Smith v United States, 161 US 85, 40 L Ed 626, 16 S Ct 483.

As to evidence to establish damages for personal injury, see 22 Am Jur 2d, Damages § 926.

Footnote 17. Insurance Co. v Mahone, 88 US 152, 21 Wall 152, 22 L Ed 593.

Footnote 18. 8 Am Jur 2d, Automobiles and Highway Traffic § 1024.

16. Establishing Identity in Criminal Prosecutions [560-576]

a. In General [560-564]

§ 560 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Identification of the defendant as the guilty actor is essential. Any evidence which serves to establish the actor's identity is relevant ¹⁹ and, if competent, is admissible. This evidence may relate directly to the alleged actor, such as his or her physical characteristics; ²⁰ the result of efforts to trail the guilty person, such as bloodhound evidence; ²¹ or the results of scientific methods of criminal detection. ²²

A witness may testify as to the identity of a person on the basis of any fact which leads the witness to believe that he or she knows the identity of such person. ²³

Facts indicating identity may be introduced in evidence even though they tend to show the commission of another crime. ²⁴

§ 560 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility in evidence of composite picture or sketch produced by police to identify offender. ²³ ALR5th 672.

Case authorities:

Admission of testimony that assault victim identified defendant in photographic array was admissible, even if array was somewhat suggestive in that defendant was only person wearing orange prison clothing and standing in front of police height chart, since victim's identification was reliable. *Chism v State* (1993) 312 Ark 559, 853 SW2d 255.

Child's identification of abuser to medical personnel during examination is not admissible as hearsay exception based on presumption of truthfulness of statements in pursuit of medical treatment, but is admissible under FS § 90.803(23), which establishes special procedure, including notice and hearing, for establishing admissibility of out-of-court statements made by children under 12 years old in child abuse cases; State's admission of evidence without compliance with notice and hearing requirements is permissible because child's statements were also admissible as prior consistent statements to rebut charges by defense counsel that child fabricated charges in response to improper influence by prosecutors. *State v Jones* (1993, Fla) 625 So 2d 821, 18 FLW S 456.

In a prosecution for armed assault with intent to rob a bank, a witness who was acquainted with the defendant was improperly permitted to testify that it was the defendant who was depicted in a videotape of another bank robbery since the jurors were capable of drawing their own conclusions regarding that issue. *Commonwealth v Austin*, 421 Mass 357, 657 NE2d 458.

The court did not err when it refused to allow the introduction of evidence that, 8 months after the crime at issue but before the trial began, defense counsel mistook another person for the defendant while at a jail and did not realize his error until he had spoken to that person for a while since there was no evidence that the other person had committed any strikingly similar crimes. *Commonwealth v Rosa*, 422 Mass 18, 661 NE2d 56.

A judge's excluding evidence of another person who looks like the defendant is not an abuse of his discretion when an uninvolved person mistakes the other person for the defendant and that alleged alternate perpetrator did not commit any strikingly similar crimes. *Commonwealth v Rosa*, 422 Mass 18, 661 NE2d 56.

The trial court did not err by denying defendant's motion to dismiss a first-degree murder prosecution for insufficient evidence placing him at the scene of the crime where the State's evidence at trial tended to show that defendant's automobile was parked at Vanessa Craddock's (the victim's) house minutes before the shootings; defendant was seen striking the victim immediately before shots were heard; several shots were heard and her son was heard crying; both the victim and her son were found dead from gunshot wounds; after the shots were heard, the blue automobile alleged to be defendant's sped from the victim's residence; and defendant told another woman that he had just come from "Van's" when he arrived at her residence minutes after the murders were committed. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

Although evidence of a prior altercation with an eyewitness is relevant as a general rule, that evidence loses its relevance when, as here, the identity of the person with whom defendant argued is merely speculation. *State v Floyd* (1994) 115 NC App 412, 445 SE2d 54.

Police officer's identification of defendant from photograph was not unduly suggestive, although officer was shown series of photographs consecutively rather than simultaneously, as second police officer, who was selecting photographs, did not suggest possible identification of defendant, and first officer had carefully observed defendant during drug transaction and knew "immediately" that defendant's photograph was that of perpetrator. *State v Thompson* (1995, La App 2d Cir) 665 So 2d 686.

Footnotes

Footnote 19. *Watkins v Sowders*, 449 US 341, 66 L Ed 2d 549, 101 S Ct 654; *Manson v Brathwaite*, 432 US 98, 53 L Ed 2d 140, 97 S Ct 2243; *Herrera v Collins* (CA5 Tex) 904 F2d 944, cert den 498 US 925, 112 L Ed 2d 260, 111 S Ct 307; *Coleman v State* (Ala App) 443 So 2d 1355; *Hilton v State*, 278 Ark 259, 644 SW2d 932; *People v Garza* (1st Dist) 125 Ill App 3d 182, 80 Ill Dec 483, 465 NE2d 595; *State v Johnson* (La App 4th Cir) 443 So 2d 744; *Commonwealth v Robinson*, 19 Mass App 1010, 476 NE2d 268, review den 395 Mass 1101, 480 NE2d 24; *People v Hunt*, 120 Mich App 736, 327 NW2d 547; *State v Santoro*, 229 NJ Super 501, 552 A2d 184; *People v Shepard* (1st Dept) 162 App Div 2d 226, 556 NYS2d 594, app den 76 NY2d 944, 563 NYS2d 73, 564 NE2d 683; *Sanchez v State* (Tex App San Antonio) 705 SW2d 304; *Ortega v State* (Tex App Amarillo) 628 SW2d 539; *Goldade v State* (Wyo) 674 P2d 721, cert den 467 US 1253, 82 L Ed 2d 844, 104 S Ct 3539.

For a discussion of the admissibility of improperly obtained identification evidence, see §§ 628-630.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense, 66 ALR3d 10.

Footnote 20. § 565.

Footnote 21. § 575.

Footnote 22. §§ 568, 573, 574.

Footnote 23. *Randall v State*, 73 Ga App 354, 36 SE2d 450, cert den 329 US 749, 91 L Ed 645, 67 S Ct 72; *Barnett v State*, 104 Ohio St 298, 135 NE 647, 27 ALR 351.

Footnote 24. *Wethington v State*, 3 Md App 237, 238 A2d 581.

However, evidence of a crime committed by accused, other than the crime charged in the indictment, is not admissible to prove the identity of defendant where identity is

established by other evidence and is not truly in issue. *People v Condon* (2d Dept) 30 App Div 2d 845, 292 NYS2d 763, affd 26 NY2d 139, 309 NYS2d 152, 257 NE2d 615.

For discussion concerning when evidence of defendant's other crimes, acts, or wrongs may be offered to identify the defendant as the perpetrator of the charged offense, see § 423.

§ 561 Post-indictment extrajudicial identification; Sixth Amendment implications

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where the right to counsel has been denied in connection with a pretrial identification, such as a lineup, subsequent trial testimony of the witness regarding the pretrial identification of the defendant is inadmissible. 25 The witness may, however, identify the accused at trial as the perpetrator of the offense provided that the prosecution can establish by clear and convincing evidence that the in-court identification is based upon observations of the suspect rather than an improper pretrial identification. 26

◆ Observation: Congress has apparently attempted to nullify the application of *Wade* 27 in federal prosecutions by the passage of a statute providing that the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States. 28 It has been noted in this regard that the fact that an eyewitness might on some occasion prior to trial have identified the accused, without a lawyer for the accused being present, cannot in reason, law, or common sense justify a rule of evidence which would serve to exclude a subsequent in-court eyewitness identification. 29

§ 561 ----Post-indictment extrajudicial identification; Sixth amendment implications [SUPPLEMENT]

Case authorities:

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

Footnotes

Footnote 25. *Gilbert v California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951; *United States v Wade*, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

◆ Caution: The United States Supreme Court, in *United States v Ash*, 413 US 300, 37 L Ed 2d 619, 93 S Ct 2568, has refused to extend the right to counsel principles announced in *United States v Wade* and *Gilbert v California* to a photographic lineup. In *Ash*, the Supreme Court held that there is no right to have counsel present when the police show photographs of the defendant and others to witnesses, and this is so even if the defendant has already been indicted. The Court reasoned there is no right to counsel at a photographic identification because unlike a lineup there is no "trial-like confrontation" involving the presence of the accused.

The right to counsel at a lineup is generally discussed in 21A Am Jur 2d, Criminal Law §§ 802 et seq.

Footnote 26. *United States v Wade*, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

Footnote 27. *United States v Wade*, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

Footnote 28. 18 USCS § 3502.

Footnote 29. *Russell v United States*, 133 US App DC 77, 408 F2d 1280, cert den 395 US 928, 23 L Ed 2d 245, 89 S Ct 1786, in which concurring Judge Danaher pointed to Section 3502 and to an extract of Senate Report No. 1097 explaining the purpose of such provision.

§ 562 Cautionary instruction regarding reliability of identification testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A cautionary instruction to the jury as to the potential unreliability of eyewitness identification testimony is proper, if not mandatory, 30 where the circumstances suggest some level of doubt regarding the accuracy of the identification; 31 however, a failure to give the instruction may 32 or may not 33 be prejudicial.

The instruction has been considered unnecessary—

—where the jury is adequately instructed as to the credibility of witnesses, 34 the state's burden of proof, 35 or both. 36

—where the identification testimony is corroborated by other evidence. 37

—where the identification testimony is positive, certain, and consistent. 38

—where the issue of identification is adequately developed in the course of cross-examination or in the closing argument to the jury. 39

**§ 562 ----Cautionary instruction regarding reliability of identification testimony
[SUPPLEMENT]**

Case authorities:

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

Footnotes

Footnote 30. *State v Hart* (Mont) 625 P2d 21, cert den 454 US 827, 70 L Ed 2d 102, 102 S Ct 119 (necessity of this type of instruction is especially clear when there is only a single eyewitness' unsubstantiated testimony which identifies the offender).

Footnote 31. *Shields v State* (Ala App) 397 So 2d 184, cert den (Ala) 397 So 2d 189; *State v Harden*, 175 Conn 315, 398 A2d 1169; *Wilkerson v United States* (Dist Col App) 427 A2d 923, cert den 454 US 852, 70 L Ed 2d 143, 102 S Ct 295; *State v Bagby*, 231 Kan 176, 642 P2d 993; *Commonwealth v Moffett*, 383 Mass 201, 418 NE2d 585, 15 ALR4th 566; *People v Dyson*, 106 Mich App 90, 307 NW2d 739; *State v Helterbridle* (Minn) 301 NW2d 545; *State v Hart* (Mont) 625 P2d 21, cert den 454 US 827, 70 L Ed 2d 102, 102 S Ct 119; *State v Green*, 86 NJ 281, 430 A2d 914; *People v Rodriguez* (1st Dept) 61 App Div 2d 914, 402 NYS2d 843; *People v Carney* (2d Dept) 73 App Div 2d 972, 424 NYS2d 243; *State v Kinard*, 54 NC App 443, 283 SE2d 540; *Commonwealth v Mouzon*, 456 Pa 230, 318 A2d 703; *State v Roy*, 140 Vt 219, 436 A2d 1090; *State v Watson*, 173 W Va 553, 318 SE2d 603.

Annotation: Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases, 23 ALR4th 1089.

Footnote 32. *Brooks v State* (Ala App) 380 So 2d 1012 (criticized by *Grace v State* (Ala App) 456 So 2d 862); *State v Warren*, 230 Kan 385, 635 P2d 1236, 23 ALR4th 1070; *State v Murphy* (Mo) 415 SW2d 758; *State v Green*, 86 NJ 281, 430 A2d 914; *People v Rodriguez* (1st Dept) 61 App Div 2d 914, 402 NYS2d 843; *Commonwealth v Wilkerson*, 204 Pa Super 213, 203 A2d 235; *State v Payne*, 167 W Va 252, 280 SE2d 72.

Footnote 33. *Shields v State* (Ala App) 397 So 2d 184, cert den (Ala) 397 So 2d 189; *State v Harden*, 175 Conn 315, 398 A2d 1169; *State v Bagby*, 231 Kan 176, 642 P2d 993; *State v Brown*, 230 Kan 499, 638 P2d 912; *Commonwealth v Cole*, 13 Mass App 908, 429 NE2d 1029, app den 385 Mass 1102, 440 NE2d 1174; *State v Ritchie*, 292 Minn 413, 195 NW2d 570; *State v Hart* (Mont) 625 P2d 21, cert den 454 US 827, 70 L Ed 2d 102, 102 S Ct 119; *People v Thomas* (2d Dept) 74 App Div 2d 614, 424 NYS2d 496;

State v Kasper, 137 Vt 184, 404 A2d 85, later proceeding 142 Vt 31, 451 A2d 1125, later proceeding 145 Vt 117, 483 A2d 608.

Footnote 34. People v Palumbo, 192 Colo 7, 555 P2d 521; State v Benjamin, 33 Conn Supp 586, 363 A2d 762; Hackett v State, 266 Ind 103, 360 NE2d 1000; Stanley v State (Ind App) 435 NE2d 54; State v Wright (Iowa) 274 NW2d 307; State v Artis (La) 391 So 2d 847; England v State, 274 Md 264, 334 A2d 98; State v Jones, 273 SC 723, 259 SE2d 120.

Footnote 35. Buchanan v State (Alaska) 561 P2d 1197; State v Freeman (Fla) 380 So 2d 1288; Miller v State, 249 Ga 96, 287 SE2d 543; Roy v State (Tex App Houston (1st Dist)) 627 SW2d 488.

Footnote 36. Rowser v State (Ala App) 346 So 2d 533, cert den (Ala) 346 So 2d 536; Dayton v State (Alaska) 598 P2d 67; Conley v State, 270 Ark 886, 607 SW2d 328; Lewis v State, 266 Ind 371, 363 NE2d 1230; State v Quinn (Mo) 594 SW2d 599; State v Taylor (Mo App) 630 SW2d 95.

Footnote 37. Taylor v State, 157 Ga App 212, 276 SE2d 691; State v White (Mo App) 617 SW2d 596; State v Rovles, 41 Or App 653, 598 P2d 1249; State v Jones, 273 SC 723, 259 SE2d 120.

Footnote 38. Minnifield v State (Ala App) 392 So 2d 1288.

Shields v State (Ala App) 397 So 2d 184, cert den (Ala) 397 So 2d 189; State v Guster, 66 Ohio St 2d 266, 20 Ohio Ops 3d 249, 421 NE2d 157.

Footnote 39. Conley v State, 270 Ark 886, 607 SW2d 328; State v Edwards, 23 Wash App 893, 600 P2d 566.

Footnote 40. Cole v State (Okla Crim) 646 P2d 1298; Commonwealth v Johnson, 433 Pa 34, 248 A2d 840.

§ 563 Extrajudicial identification, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Besides testimony of a witness identifying a defendant in court, evidence is sometimes given of the fact that the defendant was previously identified as being the perpetrator. The testimony of the person by whom the extrajudicial identification was made, as to the fact of such identification, has been held admissible in some cases, ⁴¹ but not in others. ⁴² A reason frequently assigned for the admission of evidence as to a prior identification of the accused is that it is ordinarily more reliable than an identification at the trial, its closer relation to the criminal act in point of time affording less opportunity for deterioration or fading of the identifier's impressions or recollection and for changes in the appearance of the accused or guilty party, thus enabling the identifier to be more

certain as to the identification. 43

The testimony of the identifier as to the fact that at some earlier time he identified the defendant has generally been held admissible against the objection that it is hearsay, 44 for the reason, as stated in some cases, that such testimony relates to a matter within the knowledge of the witness. 45 The evidence has been excluded on the ground that it is not permissible for the witness to bolster his identification of the accused at the trial by stating that he had identified him on a prior occasion, 46 although this argument has been criticized as being without merit. 47

The testimony of the identifying witness as to the prior identification is not admissible as original or substantive evidence, 48 although there is some authority to the contrary. 49 It has been declared admissible in corroboration of the testimony of the same witness identifying the accused at the trial, 50 as well as in rebuttal of testimony tending to impeach or discredit the identifying witness. 51

§ 563 ----Extrajudicial identification, generally [SUPPLEMENT]

Case authorities:

A show-up identification is inherently suggestive if a witness is presented with only one suspect for identification, but a show-up is not invalid if it does not give rise to a substantial likelihood of irreparable misidentification given the totality of the circumstances. *Perez v State* (1995, Fla) 648 So 2d 715, 20 FLW S 25.

Defendant in narcotics case was entitled to Wade hearing with regard to undercover officer's identification where (1) 26 days had elapsed between officer's initial encounter with defendant and his identifications on day of defendant's arrest, (2) officer had misidentified location of first identification (which led to erroneous arrests of innocent parties at premises), and (3) identifications on day of arrest were suggestive given fact that they consisted of several street viewings (including one after defendant was arrested and handcuffed) and subsequent showup at station house. *People v Mato* (1994) 83 NY2d 406, 611 NYS2d 92, 633 NE2d 446.

Mere labelling of identification as "confirmatory" will not obviate need for Wade hearing since case-by- case analysis of facts and circumstances remains necessary. *People v Mato* (1994) 83 NY2d 406, 611 NYS2d 92, 633 NE2d 446.

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

Footnotes

Footnote 41. *United States v Domina* (CA9 Cal) 784 F2d 1361, 20 Fed Rules Evid Serv 735, cert den 479 US 1038, 93 L Ed 2d 845, 107 S Ct 893; *State v McClendon*, 199

Conn 5, 505 A2d 685; *Harley v United States* (Dist Col App) 471 A2d 1013; *People v Henderson* (1st Dist) 175 Ill App 3d 483, 124 Ill Dec 934, 529 NE2d 1051; *State v Trevino*, 230 Neb 494, 432 NW2d 503, habeas corpus den (CA8 Neb) 2 F3d 829; *People v White*, 73 NY2d 468, 541 NYS2d 749, 539 NE2d 577, cert den 493 US 859, 107 L Ed 2d 127, 110 S Ct 170; *Commonwealth v Steele*, 522 Pa 61, 559 A2d 904.

In a prosecution for rape, deviate sexual assault, and armed robbery, evidence of the victim's out-of-court identification of the accused was relevant where the identifier was available in court for cross-examination. *People v Carter* (1st Dist) 132 Ill App 3d 523, 87 Ill Dec 779, 477 NE2d 1307.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Footnote 42. *Moore v Illinois*, 434 US 220, 54 L Ed 2d 424, 98 S Ct 458, on remand (CA7 Ill) 577 F2d 411, cert den 440 US 919, 59 L Ed 2d 471, 99 S Ct 1242; *Rudd v Florida* (CA5 Fla) 477 F2d 805; *People v Christman*, 23 NY2d 429, 297 NYS2d 134, 244 NE2d 703; *Virgil v State*, 84 Wis 2d 166, 267 NW2d 852.

Footnote 43. *State v Frost*, 105 Conn 326, 135 A 446; *Basoff v State*, 208 Md 643, 119 A2d 917; *Commonwealth v Locke*, 335 Mass 106, 138 NE2d 359; *State v Wilson*, 38 Wash 2d 593, 231 P2d 288, cert den 342 US 855, 96 L Ed 644, 72 S Ct 81 and cert den 343 US 950, 96 L Ed 1352, 72 S Ct 1044.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Admissibility of evidence as to extrajudicial or pretrial identification of accused, 71 ALR2d 449.

Footnote 44. *United States v Owens*, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193, on remand (CA9) 844 F2d 701, 24 Fed Rules Evid Serv 1000, on remand (CD Cal) 699 F Supp 815, 27 Fed Rules Evid Serv 547, appeal after remand (CA9 Cal) 889 F2d 913, 28 Fed Rules Evid Serv 1546 (the federal rule of evidence which provides for the exclusion of hearsay does not require the barring of testimony concerning a prior out-of-court identification when the identifying witness is unable, because of memory loss, to be effectively cross-examined as to the basis for his identification).

Footnote 45. *People v Gardner*, 402 Mich 460, 265 NW2d 1.

Footnote 46. *People v Orr* (1st Dist) 149 Ill App 3d 348, 102 Ill Dec 772, 500 NE2d 665, app den (Ill) 106 Ill Dec 53, 505 NE2d 359; *Jones v State* (Okla Crim) 695 P2d 13.

Footnote 47. *Evans v State*, 177 Ga App 820, 341 SE2d 483; *People v Carr* (2d Dept) 141 App Div 2d 756, 530 NYS2d 12, app den 72 NY2d 916, 532 NYS2d 850, 529 NE2d 180.

Police officers' in-court identification of defendant was not improperly bolstered by permitting them to testify concerning their prearrest discovery of the defendant's name and address and their visit to that address. *People v Morabito* (2d Dept) 143 App Div 2d

948, 533 NYS2d 743, app den 73 NY2d 858, 537 NYS2d 504, 534 NE2d 342.

Footnote 48. *People v Williams* (1st Dist) 71 Ill App 3d 547, 28 Ill Dec 50, 390 NE2d 32.

Footnote 49. *Commonwealth v Brown*, 389 Mass 382, 450 NE2d 172; *State v Hendrix*, 50 Wash App 510, 749 P2d 210, review den 110 Wash 2d 1029.

Footnote 50. *People v Hudson* (1st Dist) 137 Ill App 3d 606, 92 Ill Dec 391, 484 NE2d 1246.

Footnote 51. *Carlisle v State* (Ala App) 371 So 2d 975.

§ 564 --Testimony concerning extrajudicial identification made by another

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The testimony of a third person who has heard or observed an extrajudicial identification made by another, as to the fact of such identification having been made, has been held admissible. 52 The testimony of the third person has been declared admissible in corroboration of the testimony of the identifier at the trial, 53 as well as in rebuttal of testimony tending to impeach or discredit the identifying witness, 54 or in rebuttal of a charge or suggestion of falsity. 55

◆ **Observation:** Some of the thinking in support of admissibility is that testimony of the third person to the effect that he had seen the identifier observe the accused on the occasion of the identification relates to a matter within the knowledge of the witness, 56 or that the identifier is present and subject to cross-examination at the trial. 57

The testimony of a third person as to the extrajudicial identification has been declared inadmissible on the ground that it constitutes hearsay. 58

The testimony of the third person is not admissible as original or substantive evidence as to the identity of the accused as the guilty actor, 59 although there is some authority to the contrary. 60

§ 564 --Testimony concerning extrajudicial identification made by another [SUPPLEMENT]

Case authorities:

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342

Footnotes

Footnote 52. *Coleman v State* (Ala App) 443 So 2d 1355; *State v Townsend*, 206 Conn 621, 539 A2d 114; *People v Shum*, 117 Ill 2d 317, 111 Ill Dec 546, 512 NE2d 1183, cert den 484 US 1079, 98 L Ed 2d 1022, 108 S Ct 1060, reh den 485 US 1015, 99 L Ed 2d 719, 108 S Ct 1492; *State v Harris* (Mo) 711 SW2d 881; *State v Spence*, 182 W Va 472, 388 SE2d 498.

In sexual assault prosecution in which 2 1/2-year-old victim was judged incompetent to testify, the doctor who treated her, her mother, and the mother's boyfriend were properly permitted to testify about the victim's statements to them on the identity of the abuser. *State v Dollinger*, 20 Conn App 530, 568 A2d 1058, app den 215 Conn 805, 574 A2d 220.

Footnote 53. *State v Finn*, 111 Ariz 271, 528 P2d 615; *People v Brown* (2d Dist) 122 Ill App 3d 452, 77 Ill Dec 684, 461 NE2d 71; *Commonwealth v Stohr*, 361 Pa Super 293, 522 A2d 589.

Footnote 54. *Thomas v State* (Ala) 461 So 2d 16; *State v McCrary* (Mo App) 655 SW2d 79.

Footnote 55. *Thomas v State* (Ala) 461 So 2d 16; *Wright v State*, 254 Ga 484, 330 SE2d 358; *People v Brown* (2d Dist) 122 Ill App 3d 452, 77 Ill Dec 684, 461 NE2d 71.

Footnote 56. *Key v State*, 240 Ala 19, 197 So 364; *People v Filas*, 369 Ill 78, 15 NE2d 718; *Johnson v State*, 254 Wis 320, 36 NW2d 86.

Footnote 57. *Jones v United States* (Dist Col App) 516 A2d 513; *State v Monroe* (La) 397 So 2d 1258, cert den 463 US 1229, 77 L Ed 2d 1411, 103 S Ct 3571, reh den 463 US 1249, 77 L Ed 2d 1455, 104 S Ct 36.

Footnote 58. *Ellison v Sachs* (DC Md) 583 F Supp 1241, 16 Fed Rules Evid Serv 759, affd (CA4 Md) 769 F2d 955, 18 Fed Rules Evid Serv 1070; *Moody v State* (Ind) 448 NE2d 660.

Footnote 59. *People v Moretti*, 330 Ill 422, 161 NE 766.

Footnote 60. *Lucas v State*, 160 Tex Crim 443, 271 SW2d 821; *State v Wilson*, 38 Wash 2d 593, 231 P2d 288, cert den 342 US 855, 96 L Ed 644, 72 S Ct 81 and cert den 343 US 950, 96 L Ed 1352, 72 S Ct 1044.

b. Particular Bases for Identification [565-576]

§ 565 Physical characteristics

The identification of the accused by the witness may be based on a recognition of his physical characteristics and appearance, or on some mark on, or peculiarity of, the accused. 61

While several courts have ruled it improper to admit in evidence a sketch of the defendant drawn by a police artist from a description given him by a witness to identify the defendant, 62 others have determined that such evidence is admissible. 63

Evidence is also admissible to show that the defendant has altered his appearance to avoid identification. 64

§ 565 ----Physical characteristics [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 1, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Case authorities:

In prosecution of two brothers for armed robbery of several establishments, testimony of investigating officers regarding photo lineup identification of defendants by witnesses was proper after inability of witnesses to make positive identification at trial as to which brother was involved, where original identification was made within days of crime when memory was fresher, defendant's appearance was substantially changed in 2 years since crime, and line-up photograph depicted defendant at time crime occurred. *Harper v State* (1994) 213 Ga App 444, 445 SE2d 303, 94 Fulton County D R 2095.

In prosecution for aiding and abetting burglary, photographic lineup was impermissibly suggestive and gave rise to substantial likelihood of misidentification, where witness was shown photos of defendant's face and one of his tennis shoes with fluorescent strings. *State v Ostrem* (1994, Minn App) 520 NW2d 426.

Footnotes

Footnote 61. *Simon v State* (Fla App D3) 209 So 2d 682, cert den (Fla) 218 So 2d 173; *State v Reuschel*, 131 Vt 554, 312 A2d 739; *State v Lacaille*, 131 Vt 161, 303 A2d 131.

Footnote 62. *People v Turner* (1st Dist) 91 Ill App 2d 436, 235 NE2d 317; *Commonwealth v Joseph*, 11 Mass App 879, 421 NE2d 105, app den (Mass) 440 NE2d 1172 and habeas corpus proceeding (CA1 Mass) 763 F2d 9; *People v Ivey* (4th Dept) 83 App Div 2d 788, 443 NYS2d 452, later proceeding (4th Dept) 138 App Div 2d 963, 526 NYS2d 869; *Commonwealth v Morris*, 522 Pa 533, 564 A2d 1226.

Annotation: Admissibility and weight, in criminal case, of expert or scientific

evidence respecting characteristics and identification of human hair, 23 ALR4th 1199.

Admissibility of evidence tending to identify accused by his own bite marks, 77 ALR3d 1122.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 42 ALR3d 1217.

Footnote 63. *People v Cooks* (1st Dist) 141 Cal App 3d 224, 190 Cal Rptr 211, cert den 464 US 1046, 79 L Ed 2d 180, 104 S Ct 718 (composite drawing of suspect based on witness' description would be admissible, provided offering party laid proper foundation by showing that drawing was made at time when crime was fresh in witness' memory and that drawing was offered only after witness had testified that he made identification on which drawing was based, and that it was true recollection of his opinion at that time); *State v Motta*, 66 Hawaii 254, 659 P2d 745; *Wilson v State* (Tex App Dallas) 722 SW2d 3; *Harrison v Commonwealth*, 9 Va App 187, 384 SE2d 813.

Composite drawing produced on "Identikit" composition system was not hearsay statement of witness whose description resulted in drawing, but was substantive evidence of defendant's identity. *Commonwealth v Thornley*, 400 Mass 355, 509 NE2d 908, appeal after remand 406 Mass 96, 546 NE2d 350.

Footnote 64. *Randall v State*, 73 Ga App 354, 36 SE2d 450, cert den 329 US 749, 91 L Ed 645, 67 S Ct 72.

§ 566 Voice and sounds, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Testimony by a witness that he recognized the accused by their voice is admissible, provided the witness has some basis for comparison of the accused's voice with the voice which he has identified as that of the accused. 65 It is acceptable that the witness had acquired his knowledge of the accused's voice after the event to which he testifies, as well as before that time. 66

Voice exemplar evidence is not admissible as of right but lies within the sound discretion of the trial court, which is in the best position to weigh its relevance, reliability, and whether its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury. 67

Ordinarily, testimony identifying the accused by recognition of his voice is regarded as direct evidence. 68 However, there is authority to the effect that such testimony constitutes opinion evidence which is not admissible unless the witness has a basis for his opinion, either by having acquired a familiarity with the accused's voice, or by virtue of the accused's voice having some peculiarity or characteristic making it easily recognizable. 69

Hesitancy or uncertainty on the part of a witness identifying an accused by voice recognition goes only to the weight and not to the admissibility of such identification. 70 Courtroom demonstrations testing the witness' ability to identify the accused's voice have been disallowed. 71

§ 566 ----Voice and sounds, generally [SUPPLEMENT]**Case authorities:**

In § 1983 suit based on police officers' alleged use of excessive force in arresting onlooker who criticized police conduct toward suspect, district court erred in excluding tape recording of police officers and dispatcher that contained statement "run him over," after it determined that it was not satisfied, after hearing one officer testify at trial, that voice on tape was his; district court should not have excluded tape on authentication grounds without making finding that no rational juror could have concluded that officer in question made statement. *Ricketts v City of Hartford* (1996, CA2 Conn) 74 F3d 1397, 43 Fed Rules Evid Serv 903, amd, on reh, in part, reh den, in part (1996, CA2 Conn) 1996 US App LEXIS 2302.

In prosecution for kidnapping and burglary, victim's voice identification of defendant was not impermissibly suggestive, although identification procedure was conducted in office of defendant's parole officer, suggesting that defendant was criminal, where there was no indication that defendant was criminal who raped victim, victim listened to voice of another man in parole office as well, and defendant's voice was in no way highlighted. *State v Ripperger* (1994, Iowa App) 514 NW2d 740.

In prosecution for felony murder and related offenses, trial court did not abuse its discretion by using tape recording of defendant's voice along with others, in attempting to attack credibility of witness who testified he recognized defendant's voice as that of customer, where defendant failed to take opportunity to establish proper foundation. *State v Griffin* (1993) 116 NM 689, 866 P2d 1156.

In prosecution for conspiracy to possess marijuana, trial court committed reversible error in admitting tape recording of drug transaction made by undercover officer, which was nearly incomprehensible, where prosecution identified voices of two undercover operatives and informer, but did not identify defendant's voice or voices of any alleged coconspirators, and admission of tape was prejudicial, since prosecution emphasized tape and encouraged jury to listen to it during their deliberations. *Leos v State* (1994, Tex Crim) 883 SW2d 209.

Footnotes

Footnote 65. *United States v Robinson* (CA4 NC) 707 F2d 811, 12 Fed Rules Evid Serv 2023; *United States v Cooper* (CA6 Mich) 868 F2d 1505, 27 Fed Rules Evid Serv 680, cert den 490 US 1094, 104 L Ed 2d 996, 109 S Ct 2440; *United States v Taylor* (CA8 Minn) 905 F2d 239, 30 Fed Rules Evid Serv 632; *United States v Leone* (CA8 Iowa) 823 F2d 246, 23 Fed Rules Evid Serv 751; *United States v Domina* (CA9 Cal) 784 F2d 1361, 20 Fed Rules Evid Serv 735, cert den 479 US 1038, 93 L Ed 2d 845, 107 S Ct 893; Ex

parte Favors (Ala) 437 So 2d 1370; Kellensworth v State, 278 Ark 261, 644 SW2d 933; State v Blevins, 13 Conn App 413, 536 A2d 1002; Vouras v State (Del Sup) 452 A2d 1165; Mitchell v State, 254 Ga 353, 329 SE2d 481; Gilstrap v State, 162 Ga App 841, 292 SE2d 495; Delatorre v State (Ind) 544 NE2d 1379; Matthews v State (Ind) 518 NE2d 807; State v Hanks, 236 Kan 524, 694 P2d 407; Warren v State (Miss) 456 So 2d 735; State v Johnson, 207 Mont 214, 674 P2d 1077, cert den 467 US 1215, 81 L Ed 2d 365, 104 S Ct 2693; State v Ferris, 212 Neb 835, 326 NW2d 185, appeal after remand 216 Neb 606, 344 NW2d 668; State v West, 317 NC 219, 345 SE2d 186; State v Torain, 316 NC 111, 340 SE2d 465, cert den 479 US 836, 93 L Ed 2d 77, 107 S Ct 133; Hall v State (Okla Crim) 753 P2d 372; Commonwealth v Stewart, 304 Pa Super 382, 450 A2d 732; State v Phinney (SD) 348 NW2d 466; Burnett v State (Tex App Dallas) 784 SW2d 510, petition for discretionary review ref (Apr 4, 1990) and habeas corpus den (CA5 Tex) 982 F2d 922, 38 Fed Rules Evid Serv 39; State v Hoffpauir, 44 Wash App 195, 722 P2d 113, review den 107 Wash 2d 1003.

Girlfriend's familiarity with former boyfriend's voice, coupled with statement by girlfriend that she recognized boyfriend's voice immediately before she was injured by blast from shotgun, provided probable cause for boyfriend's arrest and trial on charge of first-degree assault. Taylor v State (Ala App) 421 So 2d 1314.

In a rape case, although the victim never saw her assailant because a blanket was thrown over her head, she stated that he talked to her for 1 1/2 hours, and he spoke in broken English, that she was able to identify the voice of a person who called her on the telephone three months later as that of her assailant, and in a later voice lineup she identified defendant's voice as that of her assailant. Wilson v State, 282 Ark 551, 669 SW2d 889.

Annotation: Identification of accused by his voice, 70 ALR2d 995.

Footnote 66. Knoedler v State, 69 Md App 764, 519 A2d 811; Sparks v State (Miss) 412 So 2d 754 (superseded by statute on other grounds as stated in Stromas v State (Miss) 618 So 2d 116); Williams v State (Tex App Dallas) 747 SW2d 812.

Footnote 67. People v Williams (2d Dept) 160 App Div 2d 753, 554 NYS2d 58, app gr 76 NY2d 798, 559 NYS2d 1004, 559 NE2d 698 and affd (CA2 NY) 996 F2d 1481, cert den (US) 1994 US LEXIS 1551.

Footnote 68. United States v Moia (CA2 NY) 251 F2d 255; Lee v State, 242 Miss 97, 134 So 2d 145; State v Plyler, 275 SC 291, 270 SE2d 126.

Footnote 69. United States v Bice-Bey (CA4 NC) 701 F2d 1086, 12 Fed Rules Evid Serv 1280, cert den 464 US 837, 78 L Ed 2d 123, 104 S Ct 126; State v Hanks, 236 Kan 524, 694 P2d 407; State v Kinard, 39 Wash App 871, 696 P2d 603, review den 103 Wash 2d 1041.

As to opinion evidence, generally, see 31A Am Jur 2d, Expert and Opinion Evidence.

Footnote 70. Jackson v State, 12 Ark App 378, 677 SW2d 866; State v Brooks, 49 NC App 14, 270 SE2d 592, cert den and app dismd 301 NC 723, 276 SE2d 285; Commonwealth v Reid, 448 Pa 288, 292 A2d 297.

§ 567 --Voice identification based on telephonic communication

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is immaterial whether the witness saw the accused speak or merely heard his voice. Thus a witness who is able to identify the accused's voice may testify that statements made on a telephone were statements of the accused. 72 The identity of a person speaking on the telephone may be established by circumstantial evidence, 73 but a mere statement of identify by a caller on the telephone is not sufficient proof of the caller's identity. 74

§ 567 --Voice identification based on telephonic communication [SUPPLEMENT]

Practice Aids: "Earwitness" voice recognition: Factors affecting accuracy and impact on jurors, 8 Appl Cognitive Psychol 7:661 (1994).

Footnotes

Footnote 72. United States v Basey (CA9 Cal) 613 F2d 198, cert den 446 US 919, 64 L Ed 2d 274, 100 S Ct 1854; United States v Watson (CA10 Okla) 594 F2d 1330, 4 Fed Rules Evid Serv 1440, cert den 444 US 840, 62 L Ed 2d 51, 100 S Ct 78; Marshall v State, 289 Ark 462, 712 SW2d 894, petition den (Ark) 1991 Ark LEXIS 259; People v Czemerynski (Colo) 786 P2d 1100, reh den (Colo) 1990 Colo LEXIS 155.

Footnote 73. United States v Safari (CA4 Va) 849 F2d 891, 25 Fed Rules Evid Serv 1460, cert den 488 US 945, 102 L Ed 2d 363, 109 S Ct 374 and (not followed by United States v Ayala (ACMR) 37 MJ 632); United States v Orozco-Santillan (CA9 Cal) 903 F2d 1262; State v Nickles (Utah) 728 P2d 123, 43 Utah Adv Rep 20.

Annotation: Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 ALR3d 79.

Footnote 74. State v Marlar, 94 Idaho 803, 498 P2d 1276; State v Mitchell, 226 Kan 776, 602 P2d 1383; State v Lopez (App) 96 NM 456, 631 P2d 1324; State v Williams (Cuyahoga Co) 64 Ohio App 2d 271, 18 Ohio Ops 3d 262, 413 NE2d 1212, motion overr.

§ 568 --Voice spectrography

[View Entire Section](#)

While it has frequently been held that voice spectrography techniques are not so generally accepted in the scientific community as to render test results admissible in criminal prosecutions, 75 there is growing authority to the contrary. 76

§ 568 --Voice spectrography [SUPPLEMENT]

Practice Aids: Voicegram Identification Evidence 54 Am Jur Trials 1.

Footnotes

Footnote 75. Cornett v State (Ind) 450 NE2d 498; State v Williams (Me) 388 A2d 500; Reed v State, 283 Md 374, 391 A2d 364, 97 ALR3d 201; Commonwealth v Topa, 471 Pa 223, 369 A2d 1277.

Something more than the bare opinion of the developer of a technique and equipment which enable its operator to make a visual picture or "voiceprint" of a person's voice from a tape recording, however qualified as an expert the developer may be, is required in order to satisfy the court that identification by voiceprint technique and equipment has a sufficient scientific basis to produce uniform and reasonably reliable results. State v Cary, 49 NJ 343, 230 A2d 384, 24 ALR3d 1255, on remand 99 NJ Super 323, 239 A2d 680, remanded 53 NJ 256, 250 A2d 15, appeal after remand 56 NJ 16, 264 A2d 209.

Annotation: Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

Footnote 76. United States v Smith (CA7 Ill) 869 F2d 348, 27 Fed Rules Evid Serv 938; People v Bein, 114 Misc 2d 1021, 453 NYS2d 343; State v Williams, 4 Ohio St 3d 53, 4 Ohio BR 144, 446 NE2d 444; State v Wheeler (RI) 496 A2d 1382.

§ 569 Identification by body part impressions; fingerprints

The correspondence of fingerprints found at the scene of a crime with those of the accused is admissible to identify the accused as the guilty actor. 77 Fingerprints taken without a warrant or court order and not obtained in the booking process are nevertheless admissible. 78 Likewise, fingerprints taken routinely as a result of the accused's incarceration for an unrelated offense, are admissible. 79

Fingerprints, when duly authenticated, are admissible to prove the identity of the defendant as being the same person previously convicted of other crimes, for purposes of

enhanced sentencing under habitual offender statutes. 80

A defendant may show the absence of his fingerprints at the scene of a crime of which he is accused. 81

The introduction in evidence of a fingerprint record containing extraneous material which in itself is incompetent may or may not constitute reversible error, depending on such factors as whether the material was or was not seen by the jury or whether the objection thereto was waived by the defendant. 82 Thus, reversible error occurred in a burglary prosecution, where the trial court admitted into evidence, over objection, a photostatic copy of the defendant's master fingerprint card which contained certain information from which the jury could infer that the defendant had committed prior offenses. 83

On the other hand, use of a fingerprint card has been found not to be prejudicial where all objectionable portions relating to a prior offense were masked out and the jury was instructed not to examine the covered side of card. 84 Furthermore, there is no error in a court's refusal to delete the date and place of the taking of a fingerprint card, despite fact that the date precedes the offense currently being tried, where nothing on the card indicates that the defendant had any prior criminal involvement or that fingerprints had been taken for any reason other than mere noncriminal identification. 85

§ 569 ----Identification by body part impressions; fingerprints [SUPPLEMENT]

Case authorities:

The fact that the defendant's thumbprint was on a plastic clown mask found on the landing of the apartment house in which a murder victim was found was properly admitted into evidence. *Commonwealth v Morris*, 422 Mass 254, 662 NE2d 683.

If the only identification evidence is the defendant's fingerprint at the crime scene, the prosecution must prove beyond a reasonable doubt that the fingerprint was placed there during the crime. *Commonwealth v Morris*, 422 Mass 254, 662 NE2d 683.

Where there is evidence that a person touched an object and it is later proved that the defendant's fingerprints were on that object, an inference that the defendant was present at the time of the touching is warranted. *Commonwealth v Morris*, 422 Mass 254, 662 NE2d 683.

Evidence did not warrant a finding beyond a reasonable doubt that the defendant's fingerprint was placed on a plastic clown mask during the murder at issue where (1) the mask was found on the landing of the apartment house in which the murder victim was found, (2) the Commonwealth's expert testified that he could not tell when the print was placed on the mask, (3) the jury was warranted in finding that one of the fleeing intruders dropped the mask where it was found, that conditions at the crime scene permitted the impression of a thumbprint on the smooth, clean surface of the mask, and that a fingerprint is very fragile and is subject to smudging and obliteration, and (4) the jury was also warranted in inferring that the mask had been concealed in some way when it was brought to the scene. *Commonwealth v Morris*, 422 Mass 254, 662 NE2d 683.

The trial court did not err in a first-degree murder prosecution by admitting evidence concerning fingerprints taken from defendant in 1989 where the prosecutor deleted any

reference to the date when the fingerprints were taken after defendant objected. The fingerprint card as admitted contained no evidence of any prior criminal arrests, indictments, or convictions. Moreover, there was no prejudicial error in the manner in which the card was admitted, even though defendant contended that there was prejudice in attempting to admit the card with the date, then whiting out the date in the jury's presence. *State v Baity* (1995) 340 NC 65, 455 SE2d 621.

The State submitted substantial evidence of circumstances from which the jury could find in a prosecution for murder, burglary, robbery, and attempted rape that defendant's fingerprints could only have been impressed at the time the crimes charged were committed where the State's evidence showed that the victim was wearing her eyeglasses all day on the day the crimes were committed; the victim was studying or reading most of that day; she was reading when the group left at around 10:00 p.m. for a party, leaving her alone in the apartment; the furniture was in order and the victim was sitting on the sofa with her eyeglasses on, reading the newspaper when the group left the apartment; when the group returned approximately an hour later, the apartment was in disarray, the victim's lifeless body was lying on the floor away from the sofa, which had been moved, and her eyeglasses were on the coffee table; no one else was in the apartment; and defendant's fingerprint was found on the inside lens of the victim's eyeglasses. This evidence, disclosing the circumstances under which the eyeglasses were found, when combined with other testimony placing defendant in the vicinity of the victim's apartment, constitutes substantial evidence from which the jury could find that defendant's fingerprints could only have been impressed on the lens between the hours of 10:00 p.m. and 11:05 p.m. Since the evidence also showed that the crimes were committed during the same period, the fingerprint evidence logically tends to show that defendant was present and participated in the commission of the crimes. *State v Montgomery* (1995) 341 NC 553, 461 SE2d 732.

There was no error in a prosecution for first-degree murder, burglary, robbery, and attempted rape in the admission of testimony that an expert had compared a fingerprint from the crime scene with a fingerprint card from defendant on file before his arrest. Defendant's use of the fingerprint expert's report opened the door and created confusion which the State could clear up by introducing evidence that the report was based on a ten-print card that was on file prior to defendant's arrest for this crime. *State v Montgomery* (1995) 341 NC 553, 461 SE2d 732.

Footnotes

Footnote 77. *Government of Virgin Islands v Edwards* (CA3 VI) 903 F2d 267, 30 Fed Rules Evid Serv 610; *People v Hunt* (2nd Dist) 133 Cal App 3d 543, 184 Cal Rptr 197; *Rivers v State*, 250 Ga 288, 298 SE2d 10; *Davis v State*, 194 Ga App 902, 392 SE2d 327; *People v Barber* (3d Dist) 116 Ill App 3d 767, 72 Ill Dec 472, 452 NE2d 725; *Dier v State* (Ind) 442 NE2d 1043, later proceeding (Ind) 524 NE2d 789; *State v Brown* (La App 2d Cir) 556 So 2d 248; *State v Abbott* (Mo App) 654 SW2d 260; *State v Luna*, 211 Neb 630, 319 NW2d 737, habeas corpus proceeding (CA8 Neb) 772 F2d 448, post-conviction proceeding 230 Neb 966, 434 NW2d 526; *State v Evans*, 99 NC App 88, 392 SE2d 441; *Commonwealth v Porter*, 524 Pa 162, 569 A2d 942, cert den 498 US 925, 112 L Ed 2d 260, 111 S Ct 307, reh den 498 US 1017, 112 L Ed 2d 597, 111 S Ct 593; *State v Kyger* (Tenn Crim) 787 SW2d 13, reh den (Tenn Crim) 1989 Tenn Crim App LEXIS 757, post-conviction proceeding (Tenn Crim) 1993 Tenn Crim App LEXIS 224;

Cobb v State (Tex App Corpus Christi) 655 SW2d 276; Watkins v State (Tex App Tyler) 635 SW2d 869.

As to the requirement of expert testimony to establish identification by fingerprint or palmprint, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 279 et seq.

Annotation: Fingerprints, palm prints, or bare footprints as evidence, 28 ALR2d 1115.

Footnote 78. Turner v State (Ind) 506 NE2d 827.

Footnote 79. Stewart v State, 205 Ga App 495, 422 SE2d 567.

Footnote 80. State v Ross, 107 Ariz 240, 485 P2d 810; State v Tamplin (App) 126 Ariz 175, 613 P2d 839; Hardin v State, 275 Ind 63, 414 NE2d 570; State v Moore, 220 Kan 707, 556 P2d 409; State v Jackson (La) 362 So 2d 522; State v Mills, 199 Neb 295, 258 NW2d 628; State v Gallegos (App) 91 NM 107, 570 P2d 938.

Footnote 81. Watts v State (Fla App D2) 354 So 2d 145 (suppression of evidence of fingerprints, lifted by police from truck used in robbery, which did not match fingerprints of victim or any of defendants, was reversible error); Commonwealth v Wright, 255 Pa Super 512, 388 A2d 1084; Banks v State (Tenn Crim) 556 SW2d 88.

Footnote 82. Hardy v State (Ala App) 406 So 2d 442; People v Bartels (2d Dist) 30 Ill App 3d 551, 333 NE2d 457; State v Montoya, 94 NM 704, 616 P2d 417; Hinton v State (Tex Crim) 626 SW2d 781; State v Van Isler, 168 W Va 185, 283 SE2d 836.

Footnote 83. Brown v State (Ala App) 369 So 2d 881.

Footnote 84. Bradshaw v State, 132 Ga App 363, 208 SE2d 173.

Footnote 85. Parrish v State (Fla App D3) 366 So 2d 530.

§ 570 --Palm prints and bare footprints

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The correspondence of palm prints or bare hand marks found at the scene of a crime with those of the accused, 86 or the correspondence of bare footprints found at the scene of a crime with those of the accused, 87 is admissible to identify the accused as the guilty actor.

Footnotes

Footnote 86. Aschmeller v South Dakota (CA8 SD) 534 F2d 830; Merriweather v State (Ala App) 364 So 2d 374, cert den (Ala) 364 So 2d 377; Turner v State, 235 Ga 826, 221

SE2d 590; Staton v State, 135 Ga App 55, 217 SE2d 384; In Interest of W. (3d Dist) 100 Ill App 3d 41, 55 Ill Dec 396, 426 NE2d 542; State v Riley (Iowa App) 454 NW2d 595; State v Henson, 221 Kan 635, 562 P2d 51; State v Baldwin (La) 388 So 2d 664, cert den 449 US 1103, 66 L Ed 2d 830, 101 S Ct 901, reh den 450 US 971, 67 L Ed 2d 622, 101 S Ct 1493, habeas corpus den (WD La) 524 F Supp 332, affd (CA5 La) 653 F2d 942, cert den 456 US 950, 72 L Ed 2d 475, 102 S Ct 2021, reh den 457 US 1112, 73 L Ed 2d 1323, 102 S Ct 2918, habeas corpus den (CA5 La) 704 F2d 1325, reh den (CA5 La) 709 F2d 712 and cert den 467 US 1220, 81 L Ed 2d 374, 104 S Ct 2669, application den, reh den 467 US 1268, 82 L Ed 2d 866, 104 S Ct 3565; State v Crawford (Mo) 619 SW2d 735.

Footnote 87. Paschal v State, 139 Ga App 842, 229 SE2d 795; Commonwealth v Bartolini, 299 Mass 503, 13 NE2d 382, cert den 304 US 565, 82 L Ed 1531, 58 S Ct 950; State v Abbott (Mo App) 654 SW2d 260; People v Sunset Bay, 67 NY2d 787, 501 NYS2d 19, 492 NE2d 127; State v Bullard, 312 NC 129, 322 SE2d 370, 45 ALR4th 1147.

As to the requirement for admissibility that the testimony concerning bare footprints be offered by a qualified expert in such identification techniques, see 31A Am Jur 2d, Expert and Opinion Evidence § 288.

Annotation: Admissibility of bare footprint evidence, 45 ALR4th 1178.

§ 571 --Constitutional implications as affecting admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The admission in evidence of fingerprints, palm prints, or bare footprints which the defendant allowed to be taken is not violative of defendant's privilege against self-incrimination. 88 Indeed, the privilege is not violated even where the accused is compelled to submit to the taking of prints. 89

It is not required that the accused be assisted by counsel 90 or that he be given the Miranda warnings 91 at the time fingerprints are taken.

Footnotes

Footnote 88. People v Hicks, 108 Misc 2d 730, 438 NYS2d 964, affd (1st Dept) 124 App Div 2d 1076, 508 NYS2d 130, app gr (App Div, 1st Dept) 510 NYS2d 475 and affd 69 NY2d 969, 516 NYS2d 648, 509 NE2d 343, reconsideration den 70 NY2d 796, 522 NYS2d 113, 516 NE2d 1226; Johnson v Commonwealth, 208 Va 481, 158 SE2d 725, cert dismd 396 US 801, 24 L Ed 2d 58, 90 S Ct 11.

Footnote 89. Re Grand Jury Proceedings (CA5 Tex) 558 F2d 1177; United States v Sechrist (CA7 Wis) 640 F2d 81; People v Montoya, 190 Colo 11, 543 P2d 514; State v Brown, 220 Kan 684, 556 P2d 443; State v Robertson (La) 358 So 2d 931; Moore v State

(Miss) 374 So 2d 821; *Sloane v State* (Tex Crim) 507 SW2d 747.

Footnote 90. *Lindsey v State* (Ala App) 331 So 2d 797; *Wilson v State*, 158 Ga App 174, 279 SE2d 345; *Wills v State* (Tex Crim) 501 SW2d 925.

Footnote 91. *Gregory v United States* (CA9 Nev) 391 F2d 281, cert den 393 US 870, 21 L Ed 2d 138, 89 S Ct 157.

As to the use of fingerprints obtained from an accused as a result of a detention which was illegal under the Fourth and Fourteenth Amendments, see § 633.

§ 572 Footprints and tracks produced by shoes or boots

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The correspondence of footprints or tracks found near the scene of a crime to the shoes or tracks of the accused is admissible to identify the accused as the guilty actor. 92

In a number of cases, testimony showing the existence of footprints or tracks near the scene of the crime has been held admissible even without an attempt to compare them with the shoes or tracks of the accused. 93 However, in other cases, it has been held necessary that the accused be connected with the footprints or tracks to be identified in order for evidence of their correspondence to his shoes or tracks to be considered competent. 94

Some courts have allowed photographs of footprints to be introduced in evidence in connection with the testimony of a witness as to the correspondence of the footprints or tracks found near the scene of the crime to the shoes or tracks of the accused. 95 Indeed, a number of courts have permitted plaster casts of footprints found near the scene of the crime to be introduced in evidence, the purpose usually being to show the correspondence of such footprints to the shoes of the accused. 96

Footnotes

Footnote 92. *Tarver v State* (Ala App) 500 So 2d 1232, affd, en banc (Ala) 500 So 2d 1256, cert den 482 US 920, 96 L Ed 2d 685, 107 S Ct 3197, postconviction proceeding (Ala App) 1993 Ala Crim App LEXIS 266, later proceeding (Ala) 1993 Ala LEXIS 1421, appeal after remand (Ala App) 1994 Ala Crim App LEXIS 33; *People v Farmer*, 47 Cal 3d 888, 254 Cal Rptr 508, 765 P2d 940, reh den (Cal) 1989 Cal LEXIS 969 and stay den (Cal) 1989 Cal LEXIS 1048 and cert den 490 US 1107, 104 L Ed 2d 1021, 109 S Ct 3158 and (not followed by *People v Triplett* (4th Dist) 16 Cal App 4th 624, 20 Cal Rptr 2d 225, 93 CDOS 4454, 93 Daily Journal DAR 7549); *People v Knights* (1st Dist) 166 Cal App 3d 46, 212 Cal Rptr 307; *Toler v State* (Fla App D1) 457 So 2d 1115, 9 FLW 2194, review dismd (Fla) 461 So 2d 116; *Hampton v State*, 250 Ga 805, 301 SE2d 274; *Banks v State*, 179 Ga App 798, 348 SE2d 124; *People v Henne* (4th Dist) 165 Ill App 3d 315, 116 Ill Dec 296, 518 NE2d 1276; *Halbig v State* (Ind) 525 NE2d 288;

McNary v State (Ind) 460 NE2d 145; State v Bedwell (Iowa) 417 NW2d 66; Hutt v State, 70 Md App 711, 523 A2d 643, cert den 311 Md 286, 533 A2d 1307; State v Rupprecht (Minn App) 381 NW2d 25; State v Smith, 220 Mont 364, 715 P2d 1301; People v Sunset Bay, 67 NY2d 787, 501 NYS2d 19, 492 NE2d 127; State v Whiteside, 325 NC 389, 383 SE2d 911; State v Williams, 308 NC 47, 301 SE2d 335, cert den 464 US 865, 78 L Ed 2d 177, 104 S Ct 202, reh den 464 US 1004, 78 L Ed 2d 704, 104 S Ct 518, habeas corpus proceeding, remanded (CA4 NC) 961 F2d 448, cert den (US) 121 L Ed 2d 445, 113 S Ct 510; State v Hall, 81 NC App 650, 344 SE2d 811, cert dismd 318 NC 510, 349 SE2d 868; State v Hart, 84 Or App 160, 733 P2d 469; Commonwealth v Ellis, 354 Pa Super 11, 510 A2d 1253; Commonwealth v Sinwell, 311 Pa Super 419, 457 A2d 957; State v Ellis (Utah) 748 P2d 188, 73 Utah Adv Rep 12; State v Partlow, 143 Vt 33, 460 A2d 454.

Trial judge did not abuse discretion in allowing FBI agent to testify in prosecution for robbery and attempted murder as expert on forensic foot morphology, and to state that he had compared casts of footprints found at scene of robbery with running shoes found near defendant's place of employment and that running shoes matched impressions left at scene of robbery, and that he had examined insoles of running shoes, compared wear pattern on insoles to X-rays and impressions of defendant's feet, and that running shoes had been worn by defendant or someone with identical foot morphology. Thiel v State (Alaska App) 762 P2d 478

In addition to circumstantial evidence that defendant ran from police officer when spotted near crime scene shortly after its occurrence, unusual size and tread of defendant's tennis shoes matched footprints found at scene. State v Gorka (Mo App) 782 SW2d 718.

Trial judge did not err in admitting testimony of police officer concerning visual comparison he made of wavy pattern in shoe print found outside basement window at scene of burglary with pattern on tennis shoes taken from defendant after arrest; it was not denial of due process to fail to exclude such testimony merely because no photograph or plaster cast was made where officer did not deliberately refuse to preserve evidence but was prevented from doing so by poor lighting and wet ground. State v Gardner (Mo App) 700 SW2d 172.

As to the admissibility of bare footprint evidence, see § 569.

Annotation: Footprints as evidence, 35 ALR2d 856.

Footnote 93. State v Mark (Iowa) 286 NW2d 396; Cissell v Commonwealth (Ky) 419 SW2d 555; Daniels v Commonwealth, 302 Ky 672, 195 SW2d 265; People v Flores, 92 Mich App 130, 284 NW2d 510; State v Gosnell, 38 NC App 679, 248 SE2d 756.

Footnote 94. Johnson v State, 177 Ind App 501, 380 NE2d 566; Resendez v State (Tex Crim) 495 SW2d 934.

Footnote 95. Munsford v State, 235 Ga 38, 218 SE2d 792; Williams v State, 151 Ga App 683, 261 SE2d 430; Baker v State (Ind) 485 NE2d 122; State v Rowe, 163 W Va 593, 259 SE2d 26; State v Sarinske, 91 Wis 2d 14, 280 NW2d 725.

Footnote 96. James v State, 54 Ala App 458, 309 So 2d 495; Doisher v State (Alaska App) 632 P2d 242, remanded (Alaska) 658 P2d 119; Tiller v State, 238 Ga 67, 230 SE2d

§ 573 Blood tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Electrophoresis allows typing of individual blood proteins and enzymes found in a blood sample by a method that separates electrically charged molecules. It has been observed that the overwhelming majority of jurisdictions has found electrophoresis to have been generally accepted by the scientific community, 97 and the results of blood-grouping tests are thus generally admissible in criminal prosecutions for purposes of identification. 98 While their probative value is somewhat tenuous, there is little, if any, prejudice which can arise from their admission. 99

The results of blood-grouping tests are admissible in a criminal case as a circumstance bearing on the identification of the accused. 1

§ 573 ----Blood tests [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 1, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Case authorities:

Res judicata barred the granting of defendant's motion for blood testing because an earlier default judgment conclusively established defendant's paternity, and defendant failed to appeal the default judgment or make a timely motion under Rule 59(a)(8). *Garrison ex rel. Chavis v Barnes* (1994) 117 NC App 206, 450 SE2d 554.

Footnotes

Footnote 97. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

Footnote 98. *People v Gillespie* (2d Dist) 24 Ill App 3d 567, 321 NE2d 398; *State v Gray*, 292 NC 270, 233 SE2d 905.

That the prosecution produced only one expert on the subject of electrophoretic testing of dried bloodstains was immaterial in a prosecution for various crimes, including murder, since the validity of the procedure was established by case law precedent and defendant offered no evidence reflecting a change in the attitude of the scientific community. *People v Yorba* (4th Dist) 209 Cal App 3d 1017, 257 Cal Rptr 641.

As to the admissibility of blood grouping tests in filiation or bastardy proceedings, see 10 Am Jur 2d, Bastards § 118.

Annotation: Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

Footnote 99. State v Mitchell (App) 140 Ariz 551, 683 P2d 750, habeas corpus proceeding (CA9 Ariz) 878 F2d 319; State v Gray, 292 NC 270, 233 SE2d 905.

Footnote 1. People v Gonzalez (2d Dist) 79 Ill App 3d 498, 34 Ill Dec 824, 398 NE2d 647; People v Eaton, 114 Mich App 330, 319 NW2d 344; State v Bauer, 210 Mont 298, 683 P2d 946; State v Messier, 146 Vt 145, 499 A2d 32, later proceeding, en banc (Vt) 533 A2d 1192.

Trial court did not abuse its discretion in admitting evidence of benzidine tests performed on day after defendant's arrest for kidnapping, assault, and battery with dangerous weapon, assault with intent to murder, and attempted murder by strangulation, which disclosed presence of blood on defendant's shoes since evidence of results of those tests was relevant to question whether defendant was victim's assailant. Commonwealth v Grogan, 11 Mass App 684, 418 NE2d 1276.

§ 574 DNA identification evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

DNA identification evidence—expressly or impliedly including statistical calculations of band pattern frequency in the population—is ordinarily admissible to aid in determining the perpetrator's identity, on grounds that the technique has been scientifically accepted as reliable, or that the proof is at least as probative as prejudicial. 2 DNA identification is based on the universally accepted principle that no two people share exactly the same genetic configuration, that the length and composition of certain DNA base-pair sequences varies from one individual to another at several million sites along the human chromosome, and that by examining the sizes of enough fragments at different sites on different chromosomes, statistical procedures based on known sequence frequencies in the population can be employed to establish the uniqueness of any one person's DNA pattern. 3

◆ Practice guide: Where the general admissibility of DNA identification evidence has not been conclusively settled, the existence or absence of uniform standards defining a proper methodology for forensic DNA testing, and concerning the qualifications of laboratories and their personnel, may bear heavily on a determination whether the scientific community has recognized the technique as capable of producing reliable results, as well as on whether the results in a particular case can be accepted. 4 In a particular case, the testing laboratory's noncompliance with appropriate standards may be shown as a ground for refusing to admit its conclusions into evidence. 5

§ 574 ----DNA identification evidence [SUPPLEMENT]

Practice Aids: Admissibility of forensic DNA profiling evidence: A movement away from *Frye v. United States* and a step toward the Federal Rules of Evidence, 44 Wash U J Urb & Cont L 211 (1993).

36 Am Jur Proof of Facts 3d 1, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Admissibility of DNA identification evidence. 84 ALR4th 313.

Case authorities:

DNA evidence will be admitted along with statistical estimates of coincidental matches occurring in Native American population only, in case in which son is charged with raping mother, who recanted her story on one occasion, because DNA evidence acquired from semen from mother's nightgown, slip, and sheet is based on scientific knowledge and grounded in methods and procedures of science, tempered by legitimate concerns regarding statistical probability calculations of Native American database and alternative, innocuous, and reasonable explanations of semen's presence, and is admissible as relevant and not unduly prejudicial under FRE 403. *United States v Coronado-Cervantes* (1996, DC NM) 912 F Supp 497.

In prosecution for murder, DNA "matching" evidence and population frequency statistical evidence was admissible where there was evidence to satisfy three-pronged test: (1) that theory advanced was generally accepted in scientific community and supported conclusion that DNA testing could produce reliable results; (2) that techniques used to conduct testing were capable of producing reliable result and were generally accepted in scientific community; and (3) that tests conducted were generally accepted techniques and were performed without error. *Perry v State* (1992, Ala App) 606 So 2d 224.

In paternity action, trial court erred in admitting reports of DNA testing where reports were not accompanied by authenticating affidavits; there was no testimony that tests were scientifically accepted or that procedures required to make tests valid had been followed. *Mattox v Department of Revenue, Child Support Enforcement Div. ex rel. Neeson* (1994, Alaska) 875 P2d 763.

In prosecution for first degree murder in which Cellmark Diagnostic Laboratories (Cellmark) performed DNA testing on blood found on defendant's shirt, as well as victim's bone and muscle samples, trial court erred in permitting Cellmark technician to testify that, given match of autorads from blood on defendant's shirt and victim's tissue, probability of random match ranged from one in 14 billion to, more conservatively, one in 60 million. Principles and theory underlying DNA test and Cellmark's match criteria are generally accepted in relevant scientific community. General acceptance regarding these matters permits judicial notice of DNA theory and techniques—at least insofar as Cellmark is concerned—for ascertaining and declaring match. If testing shows that samples do not match, then conclusion is that they are from different individuals; if testing shows that samples do match, conclusion is that they "may be" from same individual. However, there is no general acceptance in relevant scientific community for

Cellmark's random match probability calculations and because these calculations do not meet Frye test, they are inadmissible. However, erroneous admission of statistical probability calculations was harmless in view of overwhelming evidence of guilt. *State v Bible* (1993) 175 Ariz 549, 858 P2d 1152, 145 Ariz Adv Rep 3.

Evidence from DNA testing in form of probability that match shown by testing was simply random occurrence was inadmissible, as such probability calculations were not generally accepted in scientific community. *State v Clark* (1994, Ariz App) 887 P2d 572, 164 Ariz Adv Rep 68.

In prosecution for robbery, kidnapping and unlawful sexual intercourse, trial court erred in admitting determined match between defendant's DNA and semen samples obtained from vaginal smears and victim's panties, though error was harmless, where court declined to admit state's corresponding statistical probability that found match might have occurred by chance—one in six million. DNA evidence is admissible only when both evidence of match and statistical evidence of match are admissible. *Nelson v State* (1993, Del Sup) 628 A2d 69.

In murder prosecution, trial court erred in admitting results of DNA testing, where court failed to premise admissibility of such results on determination that general scientific principles and techniques involved in DNA testing were valid and capable of producing reliable results, and that tester himself had substantially performed scientific procedures in acceptable manner. *Johnson v State* (1994) 264 Ga 456, 448 SE2d 177, 94 Fulton County D R 3059.

In prosecution for murder in which evidence of another murder was admitted as "signature crime" probative of identity, trial court did not err in admitting DNA test results used to link defendant to other murder, despite his claim that procedures employed by testing laboratory were unreliable, where defendant did not challenge qualifications of DNA experts who testified. Once trial court has ruled witness qualified as matter of law to give expert testimony regarding DNA analysis, subsequent evaluation of that evidence goes only to its weight as matter of fact. *Lockhart v State* (1993, Ind) 609 NE2d 1093.

In criminal proceeding, evidence of DNA profile is admissible to prove or disprove identity of person. *Jackson v State* (1992) 92 Md App 304, 608 A2d 782, cert den 328 Md 238, 614 A2d 84.

The court properly admitted expert testimony concerning the probability of a match between the defendant's DNA in the general population where the testimony was based on the ceiling principle, which is a conservative approach based on assumptions favorable to a criminal defendant. *Commonwealth v Lanigan* (1994) 419 Mass 15, 641 NE2d 1342.

In prosecution for aggravated murder, trial court did not err in holding that state's evidence of identification based DNA testing of semen samples seized at crime scene and samples taken from defendant's blood was admissible, despite defendant's claim that specific testing procedures used did not guarantee reliability. Although defendant's experts testified that testing laboratory's opinion, that samples obtained from crime scene and defendant "matched," was in error and that database used by testing laboratory was "scientifically unacceptable," their testimony was controverted by testimony of state's experts on validity of testing process used. It could not be said that state's evidence,

concerning testing procedures used, was so lacking that it had no weight whatever and, although reasonable factfinders might differ as to whether tests performed were accurate, it would be improper to preempt jury's determination. *State v Futch* (1993) 123 Or App 176, 860 P2d 264.

In prosecution for aggravated murder, murder, sexual abuse, and burglary, forensic DNA evidence developed by polymerase chain reaction method was properly admitted as relevant and helpful to trier of fact; results were not expressed in terms of statistical probabilities capable of creating aura of absolute identification, but were expressed as conclusion that identified gene type common to sample and defendant, which was one found in certain percentage of population group; probative value was not outweighed by potential prejudice. *State v Lyons* (1993) 124 Or App 598, 863 P2d 1303.

In rape prosecution, destruction of samples of blood, hair, and tissue in type of DNA testing that necessarily consumed samples was not result of intentional act of district attorney and did not warrant dismissal of charges against defendants, where, although type of DNA testing ordered could not have yielded desired results, district attorney's act in ordering wrong type of test was not intentional but, rather, due to lack of sufficient knowledge about DNA testing. *Commonwealth v Francis* (1994, Pa Super) 648 A2d 49.

In prosecution on seven counts of rape, trial court properly admitted evidence of DNA typing; scientific principle and restricted fragment length polymorphism (RFLP) method of DNA typing are universally accepted and therefore admissible. However, trial court erred in admitting testimony that defendant's DNA "matched" perpetrator's DNA since it was unsupported by valid probability statistics. *State v Cauthron* (1993) 120 Wash 2d 879, 846 P2d 502.

In prosecution for first-degree murder allegedly committed in perpetration of aggravated rape, trial court did not err in allowing evidence of DNA testing to be introduced at trial under statute providing that "[e]vidence of deoxyribonucleic acid profiles, genetic markers of the blood, and secretor status of the saliva offered to establish the identity of the offender of any crime is relevant as proof in conformity with the Louisiana Code of Evidence." *State v Quatrevingt* (1992, La App 4th Cir) 617 So 2d 484, reh gr (La App 4th Cir) 1993 La App LEXIS 1842.

Footnotes

Footnote 2. *State v Pennell* (Del Super) 1989 Del Super LEXIS 520; *Martinez v State* (Fla App D5) 549 So 2d 694, 14 FLW 1989; *Caldwell v State*, 260 Ga 278, 393 SE2d 436, later proceeding 263 Ga 560, 436 SE2d 488, 93 Fulton County D R 4139; *Hopkins v State* (Ind) 579 NE2d 1297; *State v Brown* (Iowa) 470 NW2d 30; *Cobey v State*, 80 Md App 31, 559 A2d 391, cert den 317 Md 542, 565 A2d 670; *State v Williams*, 252 NJ Super 369, 599 A2d 960; *State v Pennington*, 327 NC 89, 393 SE2d 847; *State v Ford*, 301 SC 485, 392 SE2d 781; *State v Wimberly* (SD) 467 NW2d 499; *Glover v State* (Tex Crim) 825 SW2d 127; *Satcher v Commonwealth*, 244 Va 220, 421 SE2d 821, cert den (US) 122 L Ed 2d 705, 113 S Ct 1319, reh den (US) 123 L Ed 2d 504, 113 S Ct 1888; *State v Woodall*, 182 W Va 15, 385 SE2d 253.

Law Reviews: Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*. *Stanf L Rev* 465 (January, 1990).

W. J. Brookbanks, DNA profiling and informed consent in criminal investigations, 1992 NZ LJ 125-128 (April, 1992).

W. C. Thompson, S. Ford, DNA testing: debate update, 28 Trial 52-61 Ap '92.

Practice References Direct examination of expert witness regarding DNA identification evidence. 8 Am Jur POF3d 749, Foundation for DNA Fingerprint Evidence §§ 20-24.

Footnote 3. People v Castro, 144 Misc 2d 956, 545 NYS2d 985.

Footnote 4. State v Schwartz (Minn) 447 NW2d 422.

Law Reviews: Neufeld and Colman, "When Science Takes the Witness Stand," 262 Scientific American 46, 53 (May 1990).

Footnote 5. State v Schwartz (Minn) 447 NW2d 422.

§ 575 Trailing by bloodhounds, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Most courts in which the question of the admissibility of evidence of trailing by bloodhounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, 6 and that the circumstances surrounding the trailing were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury, for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime. 7 But even under this rule, bloodhound evidence is not admissible where the trailing is so uncertain and confused that it has no tendency to prove the defendant's guilt. 8 Nor is evidence of the act of a dog in trailing one accused of a crime admissible if it was not allowed to follow its inclination during the process. 9

In some other jurisdictions, evidence of tracking by a bloodhound is not admissible. 10

§ 575 ----Trailing by bloodhounds, generally [SUPPLEMENT]

Case authorities:

Courts adhere to the principle that bloodhound evidence is inadmissible to establish any factual proposition in a civil or criminal proceeding in Illinois. People v Cruz (1994) 162 Ill 2d 314, 205 Ill Dec 345, 643 NE2d 636.

There was no error in a noncapital first-degree murder prosecution in the admission of

evidence of a bloodhound's actions in tracking the victim where defendant contended that the testimony failed the test for admissibility in *State v McLeod* 196 NC 542, 146 SE 409, as to the bloodhound's pedigree, training, reliability, and the way in which she was keyed to the scent. *State v Taylor* (1994) 337 NC 597, 447 SE2d 360.

Footnotes

Footnote 6. As to the proper foundation necessary to support admission of such evidence, see § 576.

Footnote 7. *Holcombe v State* (Ala App) 437 So 2d 663; *Wilkie v State* (Alaska App) 715 P2d 1199; *People v Craig* (3rd Dist) 86 Cal App 3d 905, 150 Cal Rptr 676; *State v Wallace*, 181 Conn 237, 435 A2d 20; *Cook v State* (Del Sup) 374 A2d 264; *Smith v State*, 122 Ga App 470, 177 SE2d 485; *State v Streeper*, 113 Idaho 662, 747 P2d 71; *Roberts v State*, 298 Md 261, 469 A2d 442; *People v Riemersma*, 104 Mich App 773, 306 NW2d 340; *State v Parton*, 251 NJ Super 230, 597 A2d 1088, cert den 127 NJ 560, 606 A2d 371; *People v Muggelberg* (4th Dept) 132 App Div 2d 988, 518 NYS2d 285, app den 70 NY2d 958, 525 NYS2d 842, 520 NE2d 560; *State v Styles*, 93 NC App 596, 379 SE2d 255; *State v Iverson* (ND) 187 NW2d 1, cert den 404 US 956, 30 L Ed 2d 273, 92 S Ct 322; *State v Harris*, 25 Or App 71, 547 P2d 1394; *State v Johnson*, 306 SC 119, 410 SE2d 547, cert den (US) 118 L Ed 2d 404, 112 S Ct 1691; *State v Bourassa*, 137 Vt 62, 399 A2d 507; *Epperly v Commonwealth*, 224 Va 214, 294 SE2d 882, habeas corpus proceeding 235 Va 35, 366 SE2d 62, habeas corpus den (CA4 Va) 997 F2d 1, cert den (US) 126 L Ed 2d 575, 114 S Ct 611; *State v Socolof*, 28 Wash App 407, 623 P2d 733.

Law Reviews: A. E. Taslitz, A practitioner's guide to dog scent lineups, 28 Crim L Bull 218-245 (May, June, 1992).

Annotation: Evidence of trailing by dogs in criminal cases, 18 ALR3d 1221.

Footnote 8. *State v McLeod*, 196 NC 542, 146 SE 409, appeal after remand 198 NC 649, 152 SE 895.

In a prosecution for burglary, the trial court committed reversible error by admitting, over defendants' objection, testimony of a sheriff that bloodhounds were brought to the place where defendants were apprehended and when the door of patrol car in which defendants had been placed was opened, one dog sniffed at one defendant, where the sheriff had not trained the dogs, was not their handler, and where the dog which the sheriff testified about had not been put on the tracks at scene of crime and had not followed the tracks to defendant. *O'Quinn v State*, 153 Ga App 467, 265 SE2d 824.

Footnote 9. *State v Brown*, 103 SC 437, 88 SE 21.

"Bloodhound testimony" is not admissible where, after being given their initial scent and after running a portion of their course, the dogs were deliberately dragged off the scent by their handler, taken down the highway to a spot in a country lane, and there given a fresh scent and headed toward the house of the accused. *State v Storm*, 125 Mont 346, 238 P2d 1161.

Footnote 10. *People v Stewart* (5th Dist) 229 Ill App 3d 886, 171 Ill Dec 577, 594 NE2d 429; *Brafford v State* (Ind) 516 NE2d 45; *State v Grba*, 196 Iowa 241, 194 NW 250; *Brott v State*, 70 Neb 395, 97 NW 593.

§ 576 --Proper foundation for evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Bloodhound tracking evidence is admissible if:

- (1) the dog has an acute power of scent determination;
 - (2) the dog was trained to track humans and could do so with a high degree of accuracy;
 - (3) the handler is qualified and experienced;
 - (4) the trail had not become stale or contaminated beyond the dog's ability to follow the trail; and
 - (5) the dog began on the trail at a location where the perpetrator was known to have been.
- 11

The fact that the dog has not been exposed to an article carrying defendant's scent before the tracking began does not render the tracking suspect, since it is sufficient that the dog was taken to the place where defendant was last observed. 12

Some jurisdictions require proof that the dog is of a breed known for its ability to pick up human scent. 13 If a dog's owner or handler identifies the dog as a bloodhound and the dog justifies this description by his performance, then the pure blood requirement for introduction of evidence of the dog's conduct has been met. 14

A proper foundation for the admission of bloodhound evidence has been found to have been laid where—

—the officer testified by way of foundation to the ability of the bloodhounds to track human scents, and further testified that he had trained the bloodhounds for seven years and had taken at least six courses in handling that species of dog, and that dogs under his supervision had an approximate 80-percent success rate. 15

—there was testimony to the effect that the dog used in the investigation was a bloodhound trained to follow a trail, that the dog had been used over 100 times to track individuals, that dog had been placed on railroad tracks near where the robber was last seen, and that the dog picked up the track there and followed it to the house where the defendant was found. 16

—evidence amply demonstrated the dog's extensive training in human scent tracking, its

record of success in tracking, and that dog was taken to the place where the perpetrator's recent presence was established, and where court properly instructed jury that evidence was to be viewed with caution. 17

—the dog's qualifications were shown, the robbery scene was protected until the dog's arrival, the dog was placed on the trail where it seemed apparent that the perpetrators of the crime had been, there were no interruptions in the tracking, the dog went to the car where the defendant was hiding along with two other men, and the defendant was subsequently identified by the robbery victim. 18

—the dog tracked the defendant's presence some sixty days after the disappearance of the murder victim, and the dog's trainer testified that the dog had been reliably used in 100 cases in which tracks were between 60 and 70 days old. 19

—defense counsel stipulated to the credentials of the dog's handler, the dog had been on duty for more than one year, the dog had passed all qualifying tests, and the dog reacted with signs indicating he recognized the defendant by scent when commanded to make such a decision. 20

§ 576 --Proper foundation for evidence [SUPPLEMENT]

Case authorities:

There was no error in a noncapital first-degree murder prosecution in the admission of evidence of a bloodhound's actions in tracking the victim where defendant contended that the testimony failed the test for admissibility in *State v McLeod* 196 NC 542, 146 SE 409, as to the bloodhound's pedigree, training, reliability, and the way in which she was keyed to the scent. *State v Taylor* (1994) 337 NC 597, 447 SE2d 360.

Footnotes

Footnote 11. *State v Streeper*, 113 Idaho 662, 747 P2d 71.

In a prosecution for murder, kidnapping, and child molesting, dog-tracking or identification evidence was admissible upon proper foundational showing that breeding, training, performance, and handling of particular dog warranted inference that results obtained from use of that dog were reliable. *State v Roscoe*, 145 Ariz 212, 700 P2d 1312, cert den 471 US 1094, 85 L Ed 2d 525, 105 S Ct 2169.

Foundation for admission of evidence of dog's tracking of defendant was laid where dog had been in canine corps 13 years, dog's tracking ability had been rated as excellent, dog had been successful in locating criminal suspects in more than 100 cases, dog was placed on trail shortly after commission of crime, and identity of defendant as perpetrator was corroborated by testimony of other witnesses. *Starkes v United States* (Dist Col App) 427 A2d 437.

Footnote 12. *State v Irick*, 291 NC 480, 231 SE2d 833.

Footnote 13. *Johnson v State*, 165 Ga App 146, 299 SE2d 740; *State v Davis*, 54 NC App

596, 284 SE2d 139, petition den 305 NC 304, 290 SE2d 705; State v Iverson (ND) 187 NW2d 1, cert den 404 US 956, 30 L Ed 2d 273, 92 S Ct 322.

Footnote 14. State v Porter, 303 NC 680, 281 SE2d 377 (testimony by the handler of the dog which tracked robbery suspect that he was familiar with the dog's lineage, that the dog was a pure blood bloodhound, that the dog had been trained to follow the human scent, and that the dog had successfully done so on at least sixty prior occasions was adequate to establish the dog's pure blood).

Footnote 15. State v Wilson, 180 Conn 481, 429 A2d 931.

Footnote 16. Bogan v State, 165 Ga App 851, 303 SE2d 48.

Footnote 17. People v Abdullah (2d Dept) 134 App Div 2d 503, 521 NYS2d 286, app den 71 NY2d 965, 529 NYS2d 76, 524 NE2d 430.

Footnote 18. Terrell v State, 3 Md App 340, 239 A2d 128.

Footnote 19. State v Jones (Tenn Crim) 735 SW2d 803.

Footnote 20. People v Laidlaw, 169 Mich App 84, 425 NW2d 738.

17. Telephone Conversations and Calls [577-582]

§ 577 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is well established that communications by telephone are admissible in evidence where relevant to the fact or facts in issue. 21 The admissibility of telephone conversations is governed by the same rules of evidence which govern the admission of oral statements made in face-to-face conversations, 22 except that the party against whom the conversation is sought to be used must ordinarily be identified. 23 If, however, evidence of what was said in a conversation, if made face to face, would be inadmissible as hearsay, proof of it as a telephone conversation is likewise inadmissible. 24

§ 577 ----Generally [SUPPLEMENT]

Case authorities:

In products liability action, memorandum containing substance of telephone conversation was properly excluded where there was no evidence that person making notation regularly kept or was under duty to keep written records of his phone conversations, or that he had ever engaged in regular practice of memorializing phone conversations.

Footnotes

Footnote 21. Commercial Casualty Ins. Co. v Lawhead (CA4 W Va) 62 F2d 928, cert den 289 US 731, 77 L Ed 1480, 53 S Ct 527; Carroll v Parry, 43 App DC 363; Wyckoff v Jarrell, 35 Del 542, 170 A 802; Shawyer v Chamberlain, 113 Iowa 742, 84 NW 661; Dorchester Trust Co. v Casey (Mass) 167 NE 915, 71 ALR 1, corrected 268 Mass 494, 176 NE 178 (recognizing rule); Wolfe v Missouri P. R. Co., 97 Mo 473, 11 SW 49; Linch v Carlson, 156 Neb 308, 56 NW2d 101; Everette v D. O. Briggs Lumber Co., 250 NC 688, 110 SE2d 288; Smithers v Light, 305 Pa 141, 157 A 489; Campbell v Di Iorio, 90 RI 141, 156 A2d 79; General Secur. Co. v Sunday School Pub. Board, Inc., 22 Tenn App 590, 125 SW2d 160; Missouri P. R. Co. v Heidenheimer, 82 Tex 195, 17 SW 608.

Practice References 2 Am Jur POF2d 545, Reliability of Scientific Devices—Telephone Calling Line Identification.

36 Am Jur POF2d 605, Foundation for Telephone Conversation.

Footnote 22. Everette v D. O. Briggs Lumber Co., 250 NC 688, 110 SE2d 288.

Footnote 23. § 567.

Footnote 24. Willner v Silverman, 109 Md 341, 71 A 962.

A statement by a person since deceased as to a telephone conversation between one in his presence and the plaintiff was not admissible in evidence under a statute providing that a declaration of a deceased person shall not be inadmissible as hearsay if made in good faith before the commencement of the action, and upon the personal knowledge of the declarant, where there was no evidence that the declarant knew who was at the other end of the line, except that the one telephoning called the plaintiff's place of business. Dorchester Trust Co. v Casey (Mass) 167 NE 915, 71 ALR 1, corrected 268 Mass 494, 176 NE 178.

§ 578 Identification of participants in conversation

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Generally, and other than with respect to telephone calls made in the regular course of business, 25 in order to introduce evidence of a telephone conversation otherwise unobjectionable, the identity of the person who is claimed to have talked over the telephone must first be satisfactorily established by the party seeking the introduction of the telephone conversation. 26 Otherwise, it has been said, the door would be opened for fraud and imposition. 27 When the communication is of such a nature that it can be properly made only to a particular individual, or where a particular individual is

sought to be charged with an admission made in a telephone conversation, such person's identity must be shown. 28

It is not necessary that the witness be able, at the time of hearing the telephone conversation, to identify the person with whom they had the conversation; it is sufficient if the knowledge which enabled him to make the identification was obtained afterward. 29 Nor is it necessary, in all instances, that the proof of the identification be made before the introduction of the evidence of the conversation; such conversation may, in the discretion of the court, be admitted subject to identification. 30

§ 578 ----Identification of participants in conversation [SUPPLEMENT]

Case authorities:

Obscene telephone call was traced to defendant's apartment and he was arrested minutes after call ended. Police then called complainant and she identified defendant's voice over telephone. Held, this voice identification procedure was not unnecessarily suggestive and there was no substantial likelihood of irreparable misidentification. Trial court did not err by overruling motion to suppress identification testimony. *Williams v State* (1993, Tex App Houston (14th Dist)) 850 SW2d 784, petition for discretionary review gr (Sep 15, 1993) and petition for discretionary review gr (Sep 15, 1993).

Footnotes

Footnote 25. § 579.

Footnote 26. *Carroll v Parry*, 43 App DC 363; *Planters Cotton Oil Co. v Western Union Tel. Co.*, 126 Ga 621, 55 SE 495; *Shawyer v Chamberlain*, 113 Iowa 742, 84 NW 661; *Robinson v Lancaster Foundry Co.*, 152 Md 81, 136 A 58, 50 ALR 1196; *A. T. Stearns Lumber Co. v Howlett*, 260 Mass 45, 157 NE 82, 52 ALR 1125; *Boyne City, G. & A. R. Co. v Anderson*, 146 Mich 328, 109 NW 429; *Barrett v Magner*, 105 Minn 118, 117 NW 245; *Teel v May Dept. Stores Co.*, 352 Mo 127, 176 SW2d 440; *Linch v Carlson*, 156 Neb 308, 56 NW2d 101; *Murphy v Jack*, 142 NY 215, 36 NE 882; *Everette v D. O. Briggs Lumber Co.*, 250 NC 688, 110 SE2d 288; *De Lore v Smith*, 67 Or 304, 132 P 521; *Reach v National Bedding Co.*, 276 Pa 467, 120 A 471; *Campbell v Di Iorio*, 90 RI 141, 156 A2d 79; *Colbert v Dallas Joint Stock Land Bank*, 136 Tex 268, 150 SW2d 771; *Young v Seattle Transfer Co.*, 33 Wash 225, 74 P 375; *Danielson v Bank of Scandinavia*, 201 Wis 392, 230 NW 83, 70 ALR 746.

As to the admissibility in criminal proceedings of identification evidence derived from telephonic communications, see § 567.

Footnote 27. *Bailey v State*, 227 Ark 889, 302 SW2d 796, cert den 355 US 851, 2 L Ed 2d 59, 78 S Ct 77; *Wyckoff v Jarrell*, 35 Del 542, 170 A 802; *Smithers v Light*, 305 Pa 141, 157 A 489.

Footnote 28. *Barrett v Magner*, 105 Minn 118, 117 NW 245; *Johnston v Fitzhugh*, 91 Or 247, 178 P 230.

Footnote 29. Mayr v Goldschmidt, 63 Cal App 381, 218 P 621.

Footnote 30. General Hospital Soc. v New Haven Rendering Co., 79 Conn 581, 65 A 1065.

§ 579 --Calls made in regular course of business

[View Entire Section](#)
[Go to Parallel Reference Table](#)

According to most of the cases passing on the matter, evidence is admissible as to a conversation over the telephone where the witness called for a designated person or firm at his or its place of business and the person answering the call claimed to be the person called for, or to represent him or it, and the conversation carried on is one regarding the business transacted by such person or firm. 31 Thus, in an action for personal injuries, the mother of the party injured during the inspection of a rental house could testify to a telephone conversation she had with the wife of the owner of the house pursuant to the rule that any one who answers a telephone call at a place of business is presumed to speak for the company in respect to general business carried on by such company, where the evidence indicated that the owner's rental business was part of the general business carried on by him through the use of that telephone. 32

Footnotes

Footnote 31. Potomac Ins. Co. v Armstrong, 206 Ky 434, 267 SW 188; Sauber v Northland Ins. Co., 251 Minn 237, 87 NW2d 591; Wagley v Colonial Baking Co., 208 Miss 815, 45 So 2d 717, sugg of error overr (Miss) 46 So 2d 925; Everette v D. O. Briggs Lumber Co., 250 NC 688, 110 SE2d 288; Cohen v Standard Acc. Ins. Co., 194 SC 533, 9 SE2d 222; Colbert v Dallas Joint Stock Land Bank, 136 Tex 268, 150 SW2d 771.

Footnote 32. Smith v Seiber (5th Dist) 127 Ill App 3d 950, 82 Ill Dec 697, 469 NE2d 231.

§ 580 --Manner and sufficiency of identification

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is a broad general principle that a person may be recognized and identified by his voice. 33 Accordingly, when the admission in evidence of a telephone conversation is sought for the purpose of establishing the identity of one of the parties to the conversation, the testimony of a witness acquainted with the person whose identity is in

question is admissible with respect to identifying such person's voice. 34 Such person's identity may also be established by other circumstances which satisfactorily indicate the identity of the individual. 35

Testimony by the person receiving a telephone call that the person on the other end of the line identified himself as a specific person is, alone, insufficient to establish the caller's identity. 36 However, courts routinely find a call to be authenticated when self-identification is combined with virtually any circumstantial evidence. 37

§ 580 --Manner and sufficiency of identification [SUPPLEMENT]

Case authorities:

Circumstances adequately established that defendant was caller to employee in state health department to whom she had sent Medicaid provider enrollment application, and substance of telephone conversation with employee was therefore properly admitted in prosecution of defendant and codefendants on racketeering charges involving Medicaid fraud, where employee made call to number defendant had provided and received return call same day, during that period defendant was seeking Medicaid provider number she eventually received thus indicating her strong interest in returning call, and caller provided defendant's father's address as address to which Medicaid payments should be sent. *United States v Khan* (1995, CA2 NY) 53 F3d 507.

Footnotes

Footnote 33. § 566.

Footnote 34. *Robinson v Lancaster Foundry Co.*, 152 Md 81, 136 A 58, 50 ALR 1196; *Dorchester Trust Co. v Casey* (Mass) 167 NE 915, 71 ALR 1, corrected 268 Mass 494, 176 NE 178; *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591; *Linch v Carlson*, 156 Neb 308, 56 NW2d 101; *Everette v D. O. Briggs Lumber Co.*, 250 NC 688, 110 SE2d 288; *De Lore v Smith*, 67 Or 304, 132 P 521; *State v Steadman*, 216 SC 579, 59 SE2d 168, cert den 340 US 850, 95 L Ed 623, 71 S Ct 78, reh den 340 US 894, 95 L Ed 648, 71 S Ct 205; *Gilliland v Southern R. Co.*, 85 SC 26, 67 SE 20; *Colbert v Dallas Joint Stock Land Bank*, 136 Tex 268, 150 SW2d 771.

Practice References Proof of telephone conversations. 3 Am Jur Proof of Facts 379, Conversations, Proof 2.

Footnote 35. *People v Lorraine*, 28 Cal App 2d 50, 81 P2d 1004; *General Hospital Soc. v New Haven Rendering Co.*, 79 Conn 581, 65 A 1065; *Shawyer v Chamberlain*, 113 Iowa 742, 84 NW 661; *Robinson v Lancaster Foundry Co.*, 152 Md 81, 136 A 58, 50 ALR 1196; *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591; *General Secur. Co. v Sunday School Pub. Board, Inc.*, 22 Tenn App 590, 125 SW2d 160.

A sufficient foundation for admission of a telephone conversation, so far as the identification of the parties to it was concerned, was laid by the testimony of a witness that she was familiar with their voices and that she heard one of them ask over the telephone if "this is Marlow," and receive an affirmative answer. *Bingham v National*

Bank of Montana, 105 Mont 159, 72 P2d 90, 113 ALR 315.

Footnote 36. Passovoy v Nordstrom, Inc., 52 Wash App 166, 758 P2d 524, review den 112 Wash 2d 1001.

Footnote 37. Texas Candy & Nut Co. v Horton (Tex Civ App) 235 SW2d 518, writ ref n r e; Passovoy v Nordstrom, Inc., 52 Wash App 166, 758 P2d 524, review den 112 Wash 2d 1001.

Where a person identifies himself by name on the telephone and gives other identifying information about the subject of conversation, the telephone conversation between such person and a witness is admissible provided there is no other objection, and it is to be given such weight as the jury thinks proper. Gutowsky v Halliburton Oil Well Cementing Co. (Okla) 287 P2d 204, 4 OGR 1532.

§ 581 Testimony of bystander

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A telephone conversation between the parties to a proceeding upon the subject matter of the litigation, which has been testified to by one of the parties, may also be testified to by a bystander, so far as he heard the conversation, in corroboration of the testimony of the other witnesses regarding the conversation. 38 The evidence of a bystander as to what he overheard during a telephone conversation has been admitted as original evidence, and not merely in corroboration of one of the speakers; at least this is so insofar as the identity of the parties to the conversation is established. 39

Some cases go so far as to permit a bystander to testify not only as to what he overheard the speaker in his presence say, but to the entire conversation as detailed by such speaker, 40 although as a general rule, the testimony of a bystander as to the portion of a telephone conversation which he has not overheard is excluded as hearsay. 41

In some cases the evidence of a bystander as to a telephone conversation that he has overheard is rejected, usually because of the lack of identification of the person at the other end of the line. 42 In particular, it has been held that such evidence, given in an attempt to establish agency between the parties to the conversation, should be rejected. 43

Footnotes

Footnote 38. Moore v London Gas Co. (Ky) 372 SW2d 270; McCarthy v Peach, 186 Mass 67, 70 NE 1029; City Electrical Service & Equipment Co. v Estey Organ Co., 117 Vt 318, 91 A2d 562.

Footnote 39. Opanowich v Commonwealth, 196 Va 342, 83 SE2d 432.

Footnote 40. *Bailey v McLeod*, 143 Kan 638, 56 P2d 460; *Nebraska Nat. Bank v Burke*, 44 Neb 234, 62 NW 452.

Footnote 41. *Willner v Silverman*, 109 Md 341, 71 A 962.

As to hearsay, generally, see §§ 658 et seq.

Footnote 42. *Birmingham News Co. v Browne*, 228 Ala 395, 153 So 773; *State v Ridge*, 141 Kan 60, 40 P2d 424.

Footnote 43. *Garr v Thomas*, 193 Okla 84, 141 P2d 272.

§ 582 Fact that call was made or received

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In cases in which the fact that a telephone call was made or received becomes a relevant one by reason of its bearing upon a material issue, the fact may become admissible in evidence as an independently relevant one irrespective of the substance or narration involved, or its truth or falsity. This is true both as to criminal 44 and as to civil 45 cases. As is true generally, however, such evidence is inadmissible if it is not relevant to any material issue in the case. 46

Footnotes

Footnote 44. *United States v Fassoulis* (CA2 NY) 293 F2d 243, cert den 368 US 919, 7 L Ed 2d 134, 82 S Ct 240; *People v Osslo*, 50 Cal 2d 75, 323 P2d 397, 34 CCH LC ¶ 71408, cert den 357 US 907, 2 L Ed 2d 1157, 78 S Ct 1152; *People v Vertlieb*, 22 Cal 2d 193, 137 P2d 437; *State v Tolisano*, 136 Conn 210, 70 A2d 118, 13 ALR2d 1405; *People v Nichols*, 378 Ill 487, 38 NE2d 766; *Best v State*, 71 Md App 422, 526 A2d 75, cert den 311 Md 20, 532 A2d 167 and cert den 485 US 978, 99 L Ed 2d 485, 108 S Ct 1274; *Commonwealth v Tselepis*, 198 Pa Super 449, 181 A2d 710; *State v Robb* (SD) 303 NW2d 368; *State v Post*, 59 Wash App 389, 797 P2d 1160, reconsideration den (Wash App) 1990 Wash App LEXIS 411 and review gr 116 Wash 2d 1018, 811 P2d 219, later proceeding 118 Wash 2d 596, 826 P2d 172, mod on other grounds (Wash) 837 P2d 599.

Footnote 45. *Sauber v Northland Ins. Co.*, 251 Minn 237, 87 NW2d 591 (by implication; *Norway v Petit*, 112 Vt 453, 28 A2d 380.

In action by beneficiary to collect proceeds under several accidental death and dismemberment insurance policies in which insurers contended that the policies were void ab initio because they were obtained as a result of a fraudulent scheme by decedent's half-brother to have decedent murdered in order to collect the insurance proceeds, the trial judge did not abuse his discretion in allowing a former employee of one of decedent's half-brother's businesses to testify that, on the night before his testimony at

trial, he received a telephone call from an anonymous caller who told the witness that if he testified he would be dead, where it was obvious from the circumstances that no one but decedent's half-brother had a motive to frighten the witness into fleeing or testifying falsely. *Cerro Gordo Charity v Fireman's Fund American Life Ins. Co.* (CA8 Minn) 819 F2d 1471, 23 Fed Rules Evid Serv 530.

In a suit for the defendant's negligence in permitting water to enter the plaintiff's premises, evidence that the telephone number of the water department was dialed and that someone answered the call by saying "Water Department" was admissible. *Boston v Merchants Nat. Bank*, 338 Mass 245, 154 NE2d 702.

In an action involving the defendant's right to name an apartment building Owen Park Plaza when the plaintiff owned the nearby Owen Park Apartments, testimony that the plaintiff's manager received phone calls intended for Owen Park Plaza was admissible. *Belvidere Land Co. v Owen Park Plaza, Inc.*, 362 Mich 107, 106 NW2d 380, 127 USPQ 545.

Annotation: Admissibility of evidence of fact of making or receiving telephone calls, 13 ALR2d 1409 § 9.

Footnote 46. *Venable v State*, 201 Tenn 262, 298 SW2d 721, holding that evidence that the defendant had charged long-distance calls to the accounts of employers was irrelevant and inadmissible in a prosecution for fraudulent breach of trust and larceny.

18. Other Particular Matters [583-588]

§ 583 Sound recordings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is generally held that evidence offered in the form of a sound recording is not inadmissible because of its form, if properly authenticated. 47 No substantial federal constitutional question is presented by admission in evidence of electronic recordings. 48 The argument that sound-recorded evidence is hearsay, because the recording in effect constitutes an unsworn mechanical witness not subject to cross-examination, has been rejected. 49

The admission in evidence of a sound recording should be preceded by a foundation disclosing that:

(1) it is authentic and correct;

(2) the testimony elicited was freely and voluntarily made, without any kind of duress; all required warnings were given and all necessary acknowledgments and waivers were knowingly and intelligently given;

- (3) it does not contain matter otherwise not admissible into evidence; and
- (4) it is of such clarity as to be intelligible and enlightening to the jury. 50

§ 583 ----Sound recordings [SUPPLEMENT]

Practice Aids: Voicegram Identification Evidence 54 Am Jur Trials 1.

Case authorities:

Audiotape of conversation between cocaine distribution defendant and informant, in which defendant referred to drug-related killing, was probative of relationship between defendant and informant and was not more prejudicial since it did not implicate defendant in any killing. *United States v Broadus* (1993, CA6 Mich) 7 F3d 460.

People failed to lay proper foundation for introduction of tape recording of conversation among undercover officer, defendant, and codefendant since they failed to prove by clear and convincing evidence that tape recording was genuine and had not been tampered with, where undercover officer died prior to trial, and codefendant did not testify that conversation had been fairly and accurately reproduced. *People v Encarnacion* (1992, 4th Dept) 187 AD2d 1007, 591 NYS2d 127, app den 81 NY2d 970, 598 NYS2d 771, 615 NE2d 228.

The State's introduction of a portion of defense counsel's tape-recorded interview with the State's principal witness in which defense counsel stated, following a discussion of threats to the witness and a statement by the witness that his going home made his mother and grandmother nervous, that "I'm going to be nervous being in court with you" did not reflect upon the substantive aspects of defendant's case and would not necessarily portray defendant's attorney's representation of him as unworthy of serious consideration by the jury. Moreover, any error in the admission of this statement did not constitute plain error, defendant having failed to object thereto, since defendant has not shown that a different result would have been reached at trial had this portion of the recording not been played before the jury in light of the strong evidence of defendant's guilt, including eyewitness testimony that defendant shot and killed the victim, evidence of motive, and evidence that defendant and his friends threatened the State's principal witness in an effort to prevent him from testifying. *State v Mason* (1994) 337 NC 165, 446 SE2d 58.

Footnotes

Footnote 47. *Lopez v United States*, 373 US 427, 10 L Ed 2d 462, 83 S Ct 1381, reh den 375 US 870, 11 L Ed 2d 99, 84 S Ct 26; *Gorin v United States* (CA1 Mass) 313 F2d 641, 63-1 USTC ¶ 9295, 11 AFTR 2d 1044, cert den 374 US 829, 10 L Ed 2d 1052, 83 S Ct 1870 and appeal after remand (CA1 Mass) 336 F2d 211, 64-2 USTC ¶ 9845, 14 AFTR 2d 5653, cert den 379 US 971, 13 L Ed 2d 563, 85 S Ct 669; *United States v Littwin* (CA6 Tenn) 338 F2d 141, cert den 380 US 911, 13 L Ed 2d 797, 85 S Ct 896; *Miles Laboratories, Inc. v Frolich* (SD Cal) 195 F Supp 256, 130 USPQ 18, affd (CA9 Cal) 296 F2d 740, 132 USPQ 122, cert den 369 US 865, 8 L Ed 2d 84, 82 S Ct 1030; *Brindley v State*, 193 Ala 43, 69 So 536; *Miller v State*, 230 Ark 168, 321 SW2d 199;

People v Morse, 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33, 12 ALR3d 810; Wilson v Rooney (Fla App D2) 101 So 2d 892; Belfield v Coop, 8 Ill 2d 293, 134 NE2d 249, 58 ALR2d 1008; Commonwealth v Brinkley (Ky) 362 SW2d 494; State v Melerine, 236 La 881, 109 So 2d 454; State v Mottram, 158 Me 325, 184 A2d 225; State v Minneapolis Milk Co., 124 Minn 34, 144 NW 417; Wilkins v Bancroft, 248 Miss 622, 160 So 2d 93, 20 OGR 417; State v Perkins, 355 Mo 851, 198 SW2d 704, 168 ALR 920; Re Estate of Roth (Prob) 15 Ohio Ops 2d 234, 84 Ohio L Abs 345, 170 NE2d 313; Bonicelli v State (Okla Crim) 339 P2d 1063; State v Worthy, 239 SC 449, 123 SE2d 835; State v White, 60 Wash 2d 551, 374 P2d 942, cert den 375 US 883, 11 L Ed 2d 113, 84 S Ct 154; Paulson v Scott, 260 Wis 141, 50 NW2d 376, 31 ALR2d 706.

For a detailed discussion of the proper use and authentication of sound recordings in evidence, see § 945.

Footnote 48. Rosoto v Warden, California State Prison (US) 11 L Ed 2d 15, 83 S Ct 1788.

As to the admissibility of evidence obtained illegally by wiretapping, see §§ 609 et seq.

Footnote 49. NLRB v Tex-Tan, Inc. (CA5) 318 F2d 472, 53 BNA LRRM 2298, 47 CCH LC ¶ 18284 (holding that taped recordings of collective bargaining sessions were not inadmissible as hearsay); State v Porter, 125 Mont 503, 242 P2d 984.

Footnote 50. Lamar v State, 258 Ind 504, 282 NE2d 795, 57 ALR3d 736.

§ 584 Race or nationality of person

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An appeal to national or other prejudice is improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is not admissible, where such evidence is introduced for such purpose and is not relevant to any issue in the action. 51 Of course, however, evidence of race, color, or nationality is admissible where that matter is in issue, as in cases involving defamation by impugning a person's racial status, 52 or employment discrimination. 53

Footnotes

Footnote 51. Atlanta Coca-Cola Bottling Co. v Shipp, 170 Ga 817, 154 SE 243, 71 ALR 1295, ans conformed to 41 Ga App 705, 154 SE 385; Penate v Berry (Tex Civ App El Paso) 348 SW2d 167, writ ref n r e (Nov 15, 1961) and reh'g of writ of error overr (Jan 31, 1962).

In a murder prosecution, testimony by prosecution witness as to the importance of "machismo" among Puerto Rican males was prejudicially irrelevant, since the issue for the jury was to determine the particular motivations behind the actions of the defendant

and his victim as individuals, rather than as members of a group with values allegedly alien to the rest of society. Commonwealth v Tirado, 473 Pa 468, 375 A2d 336.

Footnote 52. 50 Am Jur 2d, Libel and Slander § 78.

Footnote 53. 45C Am Jur 2d, Job Discrimination §§ 2699 et seq.

§ 585 Religious beliefs of person

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The religious preference of a party or a witness may not be used against him or her in any way. 54 In certain limited circumstances, a person's religious practices may be related and relevant to the litigation, but in all other circumstances the issue may not be a part of the considerations of the finder of fact. 55

Footnotes

Footnote 54. Commonwealth v Allen, 239 Pa Super 83, 361 A2d 393.

Footnote 55. Commonwealth v Allen, 239 Pa Super 83, 361 A2d 393.

§ 586 Alibi

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The literal significance of the word "alibi" is "elsewhere," 56 and any evidence which tends to establish the whereabouts of one accused of a crime at the time of its commission is admissible in support of an alibi. 57 That evidence to establish an alibi is cumulative is not necessarily a reason for its exclusion. 58 While the prosecution is permitted considerable latitude in its proof as to when the crime charged was committed, this in no way varies the rules of evidence concerning the materiality or competency of rebuttal evidence. 59

In a few states statutes require the giving of notice to the prosecution of the accused's intention to rely upon an alibi as a defense in a criminal proceeding, and forbid the introduction of evidence to establish an alibi unless the required notice has been given. 60

Evidence is competent in rebuttal of the defense of an alibi which has a tendency to prove that the accused was at the place of the crime at the time the crime was committed. 61 It

has been said that the sole test of the admissibility of evidence in rebuttal of the defense of alibi is whether the evidence offered tends to prove the fact sought to be established.
62

Footnotes

Footnote 56. 21 Am Jur 2d, Criminal Law § 192.

Footnote 57. Vaughn v State, 215 Ind 142, 19 NE2d 239.

Where certain testimony was relevant to the credibility of jail records which supported defendant's alibi, admission of the testimony was not an abuse of discretion and did not result in prejudicial harm. State v Walker, 55 Ohio St 2d 208, 9 Ohio Ops 3d 152, 378 NE2d 1049, cert den 441 US 924, 60 L Ed 2d 397, 99 S Ct 2033.

Annotation: Validity and construction of statute requiring defendant in criminal case to disclose matter as to alibi defense, 45 ALR3d 958 § 6.

Footnote 58. Baimonte v State, 101 Tex Crim 622, 276 SW 921, 41 ALR 1527.

Footnote 59. People v Whitacre, 79 Cal App 27, 248 P 924.

Footnote 60. 21 Am Jur 2d, Criminal Law §§ 193-201.

Footnote 61. Vaughn v State, 215 Ind 142, 19 NE2d 239.

Footnote 62. Vaughn v State, 215 Ind 142, 19 NE2d 239.

§ 587 Evidence incriminating persons other than accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is competent for the accused in a criminal prosecution to show by any legal evidence that another person committed the crime with which he is charged and that he is innocent of any participation in that Crime. 63 In general, anything in the conduct, appearance, or declarations of a third person, subsequent to the commission of a crime for which another is on trial, which tends to connect such person with the crime, is admissible in evidence in behalf of the person charged to show that such other person, and not the accused, committed the crime. 64

To be admissible in a criminal prosecution, evidence that a third party committed the crime with which the defendant is charged need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. 65 However, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice, 66

there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. 67

◆ Observation: Courts should simply treat third-party culpability evidence like any other: if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. 68 Courts must weigh the facts in connection with such an inquiry carefully, and should avoid a hasty conclusion as to the credibility of the evidence, which determination is properly the province of the jury. 69

According to most of the courts considering the question, testimony as to acts and declarations of the person against whom a crime, such as homicide, was committed which tend to show fear of one other than the defendant is not admissible in a trial on behalf of the accused, since it is considered to be too remote, 70 although there is authority which favors the admissibility of such evidence. 71

Evidence of the motive of one other than the defendant to commit the crime is not admissible where there is no other proof in the case which tends to connect such other person with the offense with which the defendant is charged. 72 However, proof of a third person's motive to commit an offense is admissible where there is other testimony tending to connect such person with the commission of the crime. 73

§ 587 ----Evidence incriminating persons other than accused [SUPPLEMENT]

Case authorities:

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by refusing to admit testimony that the victim was assaulted by someone other than defendant on the night she was murdered where the excluded testimony cannot be said to give rise to more than mere speculation and conjecture of another's guilt. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not err by excluding a detective's testimony that, immediately after investigating the murders at issue, he believed that a named person had knowledge of, and might have been involved in, the murders since this testimony constituted mere conjecture that another person was involved in the murders, did not point directly to another's guilt, and was not inconsistent with defendant's guilt. *State v Rose* (1994) 339 NC 172, 451 SE2d 211.

The trial court did not err in a first- degree murder prosecution arising from an armed robbery by excluding testimony that an accomplice who testified against defendant had held a gun on the victim in a prior robbery. Although defendant argued that this evidence was relevant to prove that the accomplice had used the gun in the robbery in this case, it was inadmissible under GS § 8C-1, Rule 404(b) and *State v. McNeil*, 326 NC 712. It was not error to exclude evidence that tended to prove a person other than the defendant had committed a crime when the evidence did not show the same person had committed both crimes. *State v Grace* (1995) 341 NC 640, 461 SE2d 330.

The trial court did not err in a prosecution for conspiracy and first- degree murder by

excluding evidence that decedent's estranged wife had a motive to kill her husband where the evidence offered by defendant pointed solely to motive and was not inconsistent with defendant's guilt, and defendant was able to present relevant evidence in support of his theory through the testimony of other witnesses. *State v Larrimore* (1995) 340 NC 119, 456 SE2d 789.

In a murder prosecution in which the major disputed issue was whether defendant was the second shooter involved in the killing, the trial court did not err by excluding testimony that a man named Prioleau was at one time a suspect in the police investigation and that his fingerprints had been submitted with other evidence to an SBI crime laboratory since this evidence neither pointed directly to the guilt of Prioleau as the second shooter nor tended to exonerate defendant. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party. *State v McCray* (1995) 342 NC 123, 463 SE2d 176.

The trial court did not err in a prosecution for multiple counts of first-degree sexual offense and taking indecent liberties with a child by refusing to allow defendant to introduce the results of medical examinations of other minor children who did not testify at trial but who had allegedly participated in and witnessed the abuse of the victims who did testify and defendant testified that he did not abuse any of his children. GS § 8C-1, Rule 608(b). *State v Parker* (1995) 119 NC App 328, 459 SE2d 9.

Footnotes

Footnote 63. *People v Vatek*, 71 Cal App 453, 236 P 163; *Carlton v People*, 150 Ill 181, 37 NE 244; *Stout v State*, 174 Ind 395, 92 NE 161; *People v Burnstein*, 261 Mich 534, 246 NW 217; *White v State*, 52 Nev 235, 285 P 503; *Hines v Commonwealth*, 136 Va 728, 117 SE 843, 35 ALR 431; *Karnes v Commonwealth*, 125 Va 758, 99 SE 562, 4 ALR 1509.

Footnote 64. *Hines v Commonwealth*, 136 Va 728, 117 SE 843, 35 ALR 431.

Footnote 65. *People v Hall*, 41 Cal 3d 826, 226 Cal Rptr 112, 718 P2d 99.

Footnote 66. *People v Johnson* (1st Dist) 200 Cal App 3d 1553, 247 Cal Rptr 767.

Footnote 67. *People v Kaurish*, 52 Cal 3d 648, 276 Cal Rptr 788, 802 P2d 278, 91 CDOS 147, 91 Daily Journal DAR 248, reh den (Cal) 1991 Cal LEXIS 873 and cert den (US) 116 L Ed 2d 89, 112 S Ct 121; *People v Hall*, 41 Cal 3d 826, 226 Cal Rptr 112, 718 P2d 99; *State v Makerson*, 52 NC App 149, 277 SE2d 869; *State v Gregory*, 198 SC 98, 16 SE2d 532; *Hines v Commonwealth*, 136 Va 728, 117 SE 843, 35 ALR 431.

In a prosecution for first degree murder where defendant contended that it was not he but one of the State's witnesses who shot the deceased, the trial court erred in excluding

evidence which pointed directly to the witness as the guilty party, including evidence that the witness was also arrested and charged with the shooting. *State v Hamlette*, 302 NC 490, 276 SE2d 338, appeal after remand 60 NC App 306, 299 SE2d 769, petition den 308 NC 193, 302 SE2d 246.

Footnote 68. *People v Kaurish*, 52 Cal 3d 648, 276 Cal Rptr 788, 802 P2d 278, 91 CDOS 147, 91 Daily Journal DAR 248, reh den (Cal) 1991 Cal LEXIS 873 and cert den (US) 116 L Ed 2d 89, 112 S Ct 121.

Footnote 69. *People v Hall*, 41 Cal 3d 826, 226 Cal Rptr 112, 718 P2d 99.

Footnote 70. *Goodlett v State*, 136 Ala 39, 33 So 892; *State v McCoy*, 111 Mo 517, 20 SW 240; *Brown v State*, 74 Tex Crim 356, 169 SW 437.

Footnote 71. *Karnes v Commonwealth*, 125 Va 758, 99 SE 562, 4 ALR 1509.

Footnote 72. *State v Perelli*, 125 Conn 321, 5 A2d 705, 121 ALR 1357; *Dobry v State*, 130 Neb 51, 263 NW 681.

Footnote 73. *State v Dyer*, 154 La 379, 97 So 563.

§ 588 Public surveys or polls

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admissibility of the results of a survey or poll of public or consumers' opinion, recognition, preference, or the like, has been recognized or upheld ⁷⁴ on the ground of sheer necessity for admission, ⁷⁵ or on the ground that the witness in testifying to the results of a poll or survey is merely indicating the state of mind of the interviewees, thus eliminating the necessity that they be cross-examined, ⁷⁶ and obviating the objection that such testimony is hearsay. ⁷⁷ Thus, in prosecution for criminal obscenity, exclusion of a public opinion survey was reversible error where the pertinent statute provided that evidence was admissible in obscenity prosecutions to show the degree, if any, of public acceptance of the material, where no objections were made to methodology or partiality of survey, where questions and answers were relevant in that they showed that majority of the state's residents found depictions of nudity and actual or pretended sexual activities acceptable. ⁷⁸

Alleged technical deficiencies in the conduct of a survey, such as poor sampling, inexperienced interviewers, poorly designed questions, and other errors in execution, have been held to affect a survey's weight but not its admissibility. ⁷⁹ On the other hand, a number of decisions have found the results of a survey or opinion poll inadmissible in evidence, as amounting to hearsay ⁸⁰ or inadmissible because of defects in the methods or conduct of the survey, including bias in the questions asked or the way in which they were asked. ⁸¹

§ 588 ----Public surveys or polls [SUPPLEMENT]

Practice Aids: Surveys: growing admissibility but narrow utilization, 83 Trademark Rep 863 (1993).

Footnotes

Footnote 74. Public Utilities Com. v Pollak, 343 US 451, 96 L Ed 1068, 72 S Ct 813; McNeilab, Inc. v American Home Products Corp. (SD NY) 675 F Supp 819, 6 USPQ2d 2001, later proceeding (SD NY) 686 F Supp 73, reaffirmed, on reconsideration (SD NY) 682 F Supp 769 and affd (CA2 NY) 848 F2d 34, 6 USPQ2d 2007; Safeway Stores, Inc. v Safeway Ins. Co. (MD La) 657 F Supp 1307, affd (CA5 La) 791 F2d 929; Standard Oil Co. v Standard Oil Co. (CA10 Wyo) 252 F2d 65, 116 USPQ 176, 76 ALR2d 600; Stanley v Columbia Broadcasting System, Inc., 35 Cal 2d 653, 221 P2d 73, 86 USPQ 520, 23 ALR2d 216.

Annotation: Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USCS §§ 1063, 1114, and 1125), 98 ALR Fed 20.

Practice References Admissibility of opinion survey. 18 Am Jur POF2d 305.

Footnote 75. See Eighth Ave. Coach Corp. v New York, 170 Misc 243, 10 NYS2d 170, affd 259 App Div 870, 20 NYS2d 402, affd 286 NY 84, 35 NE2d 907.

Footnote 76. Standard Oil Co. v Standard Oil Co. (CA10 Wyo) 252 F2d 65, 116 USPQ 176, 76 ALR2d 600; Texas Aeronautics Com. v Braniff Airways, Inc. (Tex) 454 SW2d 199, reh'g of cause overr (Jun 17, 1970) and stay gr (Jun 24, 1970) and motion overr (Nov 4, 1970) and cert den 400 US 943, 27 L Ed 2d 247, 91 S Ct 244.

Footnote 77. § 683.

Footnote 78. People v Nelson (2d Dist) 88 Ill App 3d 196, 43 Ill Dec 476, 410 NE2d 476, the court noting that the fact that the survey did not deal with the particular movies involved in the present prosecution did not prevent the survey from being relevant where it established that the majority of Illinois adults found it acceptable to view, buy, or read materials such as were contained in the movies.

Footnote 79. Jellibbeans, Inc. v Skating Clubs of Georgia, Inc. (CA11 Ga) 716 F2d 833, 222 USPQ 10.

Footnote 80. § 683.

Footnote 81. American Footwear Corp. v General Footwear Co. (CA2 NY) 609 F2d 655, 204 USPQ 609, cert den 445 US 951, 63 L Ed 2d 787, 100 S Ct 1601, 205 USPQ 680; Bristol-Myers Co. v Federal Trade Com. (CA4) 185 F2d 58; Sears, Roebuck & Co. v All

States Life Ins. Co. (CA5 Tex) 246 F2d 161, 114 USPQ 19, cert den 355 US 894, 2 L Ed 2d 192, 78 S Ct 268, 115 USPQ 427.

E. Admissibility of Illegally Obtained Evidence [589-657]

Research References

US Const, Amends 4-6

18 USCS §§ 2234, 2236, 2510, 2511, 2515, 2518, 2520, 3109, 3504, 3731; 28

USCS §§ 636(b)(1)(A), 1291, 2255

FR Crim P 12, 41

ALR Digests: Evidence § 1134-1413

ALR Index: Eavesdropping and Wiretapping; Evidence; Evidence Rules; Exclusion and Suppression of Evidence; Fruit of the Poisonous Tree Doctrine; Interception of Communications; Lineups; Miranda Warnings; Search and Seizure

7 Federal Procedural Forms, L Ed., Criminal Procedure §§ 20:571-20:649, 20:1107; 10A

Federal Procedural Forms, L Ed, Immigration, Naturalization, and Nationality § 40:294

9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 12.1, 12.2, 13, 14

19 Am Jur POF2d 435, Lineups and Showups: Admissibility and Effect of Pretrial Identification; 22 Am Jur POF2d 539, Involuntary Confession: Psychological Coercion; 23 Am Jur POF2d 713, Custodial Interrogation under Miranda v Arizona; 26 Am Jur POF2d 465, Consent to Search Given under Coercive Circumstances; 42 Am Jur POF2d 617, Invalidity of Suspect's Waiver of Miranda Rights

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 26 Am Jur Trials 327, Representation of an Alien in Exclusion, Rescission, and Deportation Hearings; 27 Am Jur Trials 1, Representing the Mentally Disabled Criminal Defendant §§ 67-72

Cook, Constitutional Rights of the Accused 2d §§ 3:57, 3:61, 3:63, 3:64

Fishman, Wiretapping and Eavesdropping § 261

Hall, Search and Seizure §§ 20:1-20:6, 21:1-21:11, 24:3, 25:1-25:5, 26:3-26:21

Hunter, Federal Trial Handbook 2d §§ 38:2, 38:4, 38:5, 38:33

1. General Principles [589-600]

§ 589 Rule of exclusion

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence obtained by means of illegal search and seizure methods ⁸² or as a result of a coerced confession ⁸³ is generally not admissible in criminal or quasi-criminal actions ⁸⁴ where a timely application is made to suppress or exclude the evidence. ⁸⁵

The exclusionary rule is enforced as a means of deterring police misconduct. ⁸⁶ The rule is designed to enforce constitutional rights by deterring violations, rather than by granting the victim redress or restitution. ⁸⁷ Thus, the exclusionary rule does not preclude civil actions for wrongful searches and seizures ⁸⁸ or the levy of criminal

charges against officers guilty of maliciously procuring a search warrant or illegally conducting a search. 89

◆ Observation: The exclusionary rule may also be applied to suppress evidence obtained in contravention of the American Bar Association's Code of Professional Responsibility. Suppression is not, however, a necessary consequence of such a violation. 90

§ 589 ----Rule of exclusion [SUPPLEMENT]

Practice Aids: Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision. 31 ALR5th 229.

State constitutional requirements as to exclusion of evidence unlawfully seized—post-Leon cases. 19 ALR5th 470.

Case authorities:

CCP art 38.23, excluding evidence obtained by officer in violation of laws, applies to evidence obtained by means of criminal trespass but does not apply to evidence obtained by means of civil, or common law, trespass. Officer who walked up defendant's driveway to door of garage, through which he smelled marihuana, did not commit criminal trespass or violate reasonable expectation of privacy in driveway. Garage was at front of house, officer did not cross fence or other obstruction to get to driveway, there was no sign prohibiting entry of driveway, and driveway also served as means of access to front door of house, which did not have separate sidewalk. *Delosreyes v State* (1993, Tex App Houston (1st Dist)) 853 SW2d 684.

Footnotes

Footnote 82. §§ 601 et seq.

Footnote 83. For a discussion of this point, consult subdivision VI.B. concerning confessions, generally.

Footnote 84. § 592.

Footnote 85. § 643.

Footnote 86. *Stone v Powell*, 428 US 465, 49 L Ed 2d 1067, 96 S Ct 3037; *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197; *Terry v Ohio*, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383; *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437.

Practice References Hall, Search and Seizure §§ 20:1-20:6.

Footnote 87. *Stone v Powell*, 428 US 465, 49 L Ed 2d 1067, 96 S Ct 3037, on remand

(CA9 Cal) 539 F2d 693 and reh den, modif den 429 US 874, 50 L Ed 2d 158, 97 S Ct 197; *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437; *State v Clark* (La App 3d Cir) 467 So 2d 602.

Footnote 88. For a discussion of such actions, see 68 Am Jur 2d, Searches and Seizures §§ 216-233.

Footnote 89. For a discussion of criminal offenses related to the procurement and execution of search warrants, see 68 Am Jur 2d, Searches and Seizures § 233.

Footnote 90. *United States v Hammad* (CA2 NY) 846 F2d 854, reh den (CA2 NY) 855 F2d 36 and corrected (CA2 NY) 858 F2d 834, later proceeding (ED NY) 709 F Supp 334, affd (CA2 NY) 902 F2d 1062, cert den 498 US 871, 112 L Ed 2d 154, 111 S Ct 192.

§ 590 Effectiveness of exclusionary rule in deterring police misconduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Several scholars ⁹¹ and the General Accounting Office ⁹² have conducted empirical research into the impact of the exclusionary rule on criminal prosecutions, attempting to determine whether the exclusionary rule has any deterrent effect on the police. The United States Supreme Court has noted the research and the criticisms of it, and has stated that no one has been able to establish with assurance whether the exclusionary rule has the desired deterrent effect in situations where it is applied. ⁹³ Accordingly, the Court has not relied on the empirical studies in formulating the exclusionary rule, but only on the Court's own assumptions regarding human nature and the interrelationships between the various components of the law enforcement system. ⁹⁴

While questions regarding the efficacy of the exclusionary rule have led the Supreme Court to decline to extend it, ⁹⁵ and to recognize new exceptions to it, ⁹⁶ the court has expressed concern that the systemic effects of proposed exceptions to the rule be considered, lest the exceptions swallow the rule as a result of the pressure to introduce all incriminating evidence in each and every criminal case, no matter how obtained. ⁹⁷

Footnotes

Footnote 91. *Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U of Chicago L Rev 665 (1970); *Canon, Is The Exclusionary Rule In Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky LJ 681 (1974); *Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J of Leg Studies 243 (1973); *Van Duizend, Sutton, and Carter, The Search Warrant Process, Preconceptions, Perceptions, Practices* (1985); *Orfield, The Exclusionary Rule And Deterrence: An Empirical Study Of Chicago Narcotics Officers*, 54 U of Chicago L Rev 1016 (1987).

Footnote 92. Report by the Comptroller General of the United States, Impact of the Exclusionary Rule On Federal Criminal Prosecutions, Publication GGD 79 45 (April 19, 1979).

Footnote 93. United States v Janis, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Footnote 94. United States v Janis, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Footnote 95. United States v Janis, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Footnote 96. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52 (recognizing good-faith exception).

As to the good-faith exception to the exclusionary rule, see § 603.

Footnote 97. James v Illinois, 493 US 307, 107 L Ed 2d 676, 110 S Ct 648.

Law Reviews: Baldwin, Due Process And The Exclusionary Rule: Integrity And Justification, 39 U of Florida L Rev 505 (1987).

Fabi, The Exclusionary Rule: Not The "Expressed Juice Of The Wooly-Headed Thistle," 35 Buffalo L Rev 937 (1986).

Bradley, Present At The Creation? A Critical Guide To Weeks v United States And Its Progeny, 30 St. Louis U LJ 1031 (1986).

§ 591 Applicability of rule of exclusion to foreign searches and seizures

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Ordinarily, the exclusionary rule does not apply to arrests and searches made by foreign authorities in their own country and in the enforcement of foreign law unless:

(1) the conduct of the foreign officers shocks the conscience of the United States court;
98

(2) the United States officials participated in the foreign search or interrogation; or

(3) the foreign authorities acted as agents for their United States counterparts. 99

Footnotes

Footnote 98. *United States v Heller* (CA5 Fla) 625 F2d 594, 6 Fed Rules Evid Serv 905.

Footnote 99. *United States v Heller* (CA5 Fla) 625 F2d 594, 6 Fed Rules Evid Serv 905; *United States v Maher* (CA9 Wash) 645 F2d 780, 8 Fed Rules Evid Serv 538.

§ 592 Proceedings in which exclusionary rule is applied; criminal or civil proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The general exclusionary rule is applied in criminal proceedings, and in proceedings of a quasi-criminal nature in which criminal sanctions, such as forfeiture, may be enforced. 1 As for civil proceedings, the Supreme Court has noted that it has never applied the exclusionary rule to exclude evidence in such actions 2 and has held that the exclusionary rule is not applicable in civil deportation hearings, since the likely deterrent value of using the rule in such proceedings is not sufficient to outweigh the social costs of its application. 3

The lower federal courts have sometimes suppressed evidence in cases where federal officers who committed unconstitutional seizures sought to use such evidence in federal civil proceedings. 4 One Federal Circuit has taken the position that it is unsound to reject the exclusionary rule in all civil proceedings, preferring to apply it in civil proceedings with respect to which it has a realistic prospect of achieving marginal deterrence, but not in civil proceedings in which the deterrence rationale for the rule would not be served. 5 Accordingly, application of the exclusionary rule in proceedings under the Occupational Safety and Health Act 6 has been upheld on the ground that the exclusionary sanction would have a potential deterrent impact on the actions of OSHA officials and inspectors. 7 The rule has also been applied in certain customs 8 and tax 9 proceedings, but has been rejected in a civil tax proceeding in which the allegedly illegal search and seizure which produced the disputed evidence was conducted by an agency other than the agency which brought the proceeding, the court taking the position that the deterrence rationale of the exclusionary rule would not be served under such circumstances. 10

The exclusionary rule is not applied in civil cases where private parties seek to introduce evidence obtained through unauthorized searches made by state officials. 11 Illegally obtained evidence is also admissible in administrative proceedings, such as unfair labor practice proceedings, which are not criminal or quasi-criminal in nature. 12

The federal statute relating to evidence obtained as a result of an illegal interception of a wire or oral communication 13 provides that no part of the contents of any such

communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, legislative committee, or other authority. As will be seen, this statutory exclusionary rule in wiretapping cases is broader than the general exclusionary rule in some respects, 14 although the general intent of Congress was to codify then-existing search and seizure law. 15

§ 592 ----Proceedings in which exclusionary rule is applied; criminal or civil proceedings [SUPPLEMENT]

Practice Aids: Admissibility, in motor vehicle license suspension proceedings, of evidence obtained by unlawful search and seizure. 23 ALR5th 108.

Footnotes

Footnote 1. *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 14 L Ed 2d 170, 85 S Ct 1246; *Berkowitz v United States* (CA1 Mass) 340 F2d 168, 8 ALR3d 463; *United States v Five Thousand Six Hundred Eight Dollars & Thirty Cents (\$5,608.30)* (CA7 Ill) 326 F2d 359, 64-1 USTC ¶ 15546, 13 AFTR 2d 1926; *United States v One 1977 Mercedes Benz* (CA9 Cal) 708 F2d 444, 36 FR Serv 2d 1382, cert den 464 US 1071, 79 L Ed 2d 217, 104 S Ct 981.

Practice References Hall, Search and Seizure §§ 25:1-25:5.

Footnote 2. *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Annotation: Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 ALR3d 1375.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 ALR3d 670.

Footnote 3. *Immigration & Naturalization Service v Lopez-Mendoza*, 468 US 1032, 82 L Ed 2d 778, 104 S Ct 3479, on remand, en banc (CA9) 738 F2d 1067, affd without op (CA9) 745 F2d 67, 16 Fed Rules Evid Serv 80.

Law Reviews: Nigro, The Exclusionary Rule In Administrative Proceedings, 54 George Washington L Rev 564 (1986).

Bach, The Exclusionary Rule In The Public School Administrative Disciplinary Proceeding: Answering The Question After *New Jersey v T. L. O.*, 37 Hastings LJ 1133 (1986).

Annotation: Admissibility, in deportation hearing, of evidence obtained by illegal search and seizure, 44 ALR Fed 933.

Practice References Representation of an alien in exclusion, rescission and deportation hearings. 26 Am Jur Trials, pp 373, 374.

Forms: Motion—Before Immigration Judge—To suppress, in deportation proceeding, evidence illegally seized from vehicle by roving border patrol. 10A Federal Procedural Forms, L Ed, § 40:294.

Footnote 4. *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Footnote 5. *Tirado v Commissioner* (CA2) 689 F2d 307, 82-2 USTC ¶ 9580, 50 AFTR 2d 82-5774, cert den 460 US 1014, 75 L Ed 2d 484, 103 S Ct 1256.

Footnote 6. 29 USCS §§ 651 et seq.

Footnote 7. *Donovan v Sarasota Concrete Co.* (CA11) 693 F2d 1061, 67 ALR Fed 706.

Annotation: Admissibility of evidence obtained by unconstitutional search in proceedings under Occupational Safety and Health Act (29 USCS §§ 651 et seq.), 67 ALR Fed 724.

Footnote 8. *Rogers v United States* (CA1 RI) 97 F2d 691.

Footnote 9. *Lassoff v Gray* (WD Ky) 207 F Supp 843, 62-2 USTC ¶ 15421, 10 AFTR 2d 6357; *Romanelli v Commissioner* (CA7) 466 F2d 872, 72-2 USTC ¶ 9627, 72-2 USTC ¶ 9708, 30 AFTR 2d 72-5405, 30 AFTR 2d 72-5650.

Footnote 10. *Tirado v Commissioner* (CA2) 689 F2d 307, 82-2 USTC ¶ 9580, 50 AFTR 2d 82-5774, cert den 460 US 1014, 75 L Ed 2d 484, 103 S Ct 1256.

As to the effect of the relationship between the agency which obtained evidence illegally and the agency bringing the action, see § 597.

Footnote 11. *Honeycutt v Aetna Ins. Co.* (CA7 Ill) 510 F2d 340, cert den 421 US 1011, 44 L Ed 2d 679, 95 S Ct 2416.

Footnote 12. *NLRB v South Bay Daily Breeze* (CA9) 415 F2d 360, 72 BNA LRRM 2081, 60 CCH LC ¶ 10303, cert den 397 US 915, 25 L Ed 2d 96, 90 S Ct 919, 73 BNA LRRM 2537, 62 CCH LC ¶ 10681 and (disapproved on other grounds by *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378) as stated in *Lopez-Mendoza v Immigration & Naturalization Service* (CA9) 705 F2d 1059, revd on other grounds 468 US 1032, 82 L Ed 2d 778, 104 S Ct 3479, on remand, en banc (CA9) 738 F2d 1067, affd without op (CA9) 745 F2d 67, 16 Fed Rules Evid Serv 80.

Footnote 13. 18 USCS § 2515, discussed more fully at §§ 609 et seq.

Footnote 14. § 610.

§ 593 --States and state court proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the general exclusionary rule is enforceable against the states through the due process clause of the Fourteenth Amendment, 16 the states are not foreclosed by the due process clause from balancing the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. 17 The statutory exclusionary rule relating to intercepted wire or oral communications 18 also applies to the states and the political subdivisions of the states. Of course, the states have the power to develop workable rules governing searches and seizures, so long as those rules do not violate the Fourth Amendment and do not violate the rule that illegally seized evidence is inadmissible against one who has standing to complain. 19

A state constitutional amendment eliminating the exclusionary rule for evidence seized in violation of state but not federal law does not violate the due process clause of the Fourteenth Amendment. 20 Thus, a state has the power to eliminate the exclusionary rule as a remedy for violations of a state constitutional right against warrantless searches of trash. 21

Courts have differed over whether the exclusionary rule should prevent the use of illegally seized evidence in an attorney disciplinary proceeding. 22

Footnotes

Footnote 16. *Mapp v Ohio*, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio L Abs 513, 84 ALR2d 933, reh den 368 US 871, 7 L Ed 2d 72, 82 S Ct 23.

Footnote 17. *California v Greenwood*, 486 US 35, 100 L Ed 2d 30, 108 S Ct 1625.

Footnote 18. 18 USCS § 2515, discussed more fully in §§ 609 et seq.

Footnote 19. *Ker v California*, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623, 24 Ohio Ops 2d 201.

Footnote 20. *California v Greenwood*, 486 US 35, 100 L Ed 2d 30, 108 S Ct 1625.

Footnote 21. *California v Greenwood*, 486 US 35, 100 L Ed 2d 30, 108 S Ct 1625.

Footnote 22. *Emslie v State Bar of California*, 11 Cal 3d 210, 113 Cal Rptr 175, 520 P2d 991 (evidence admissible in disciplinary hearing); *People v Harfmann* (Colo) 638 P2d 745, 20 ALR4th 539 (evidence admissible); *Re Langley*, 230 Or 319, 370 P2d 228

(evidence not admissible); *McInnis v State* (Tex Civ App Beaumont) 618 SW2d 389, writ ref n r e (Dec 16, 1981) and reh'g of writ of error overr (Jan 13, 1982) and cert den 456 US 976, 72 L Ed 2d 851, 102 S Ct 2242 (evidence admissible).

Annotation: Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 ALR4th 546.

§ 594 --Grand jury proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The exclusionary rule is not applicable to grand jury proceedings, the Supreme Court believing that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the duties of the grand jury, even though adoption of the exclusionary rule in this context might deter police misconduct. ²³ However, the wiretapping statutes do apply to grand jury proceedings, although a witness or a target of the grand jury inquiry does not have standing to request a full-blown suppression hearing. ²⁴

§ 594 --Grand jury proceedings [SUPPLEMENT]

Case authorities:

In prosecution for second-degree murder, trial court properly admitted witness' grand jury testimony containing her statement to police as past recollection recorded, where witness was eyewitness to murder, witness' statement to police was made on night of murder while details of event were still clear and fresh in her mind, witness testified at trial that she had no present memory of events and that her memory was not refreshed by reviewing her grand jury testimony or her police statement, witness testified that statement she gave to police was accurate and that she testified truthfully at grand jury proceeding, and although defense contended that witness' testimony was inherently unreliable since she tested positive for PCP after first day of testimony, there was no evidence in record that she was under influence of any controlled substance when she made her statement to police on night of murder or when she testified before grand jury. *Carey v United States* (1994, Dist Col App) 647 A2d 56.

Footnotes

Footnote 23. *United States v Calandra*, 414 US 338, 38 L Ed 2d 561, 94 S Ct 613, 66 Ohio Ops 2d 320.

Practice References Hall, Search and Seizure § 24:3.

Footnote 24. § 611.

§ 595 --Sentencing proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Even though certain illegally seized evidence must be excluded in a criminal trial, this does not preclude the trial judge from using this excluded evidence for the purpose of determining the sentence. 25 The exclusionary rule is not applied for a second time at a sentencing hearing, since it is believed that this application of the rule would not have any additional deterrent effect, and since a trial judge should have unfettered access to information relevant to his sentencing decision. 26 Instead, illegally seized evidence may be challenged in a sentencing hearing only on the grounds that it is unreliable or that it was gathered for the express purpose of improperly influencing the sentencing judge. 27

Footnotes

Footnote 25. *United States v Schipani* (CA2 NY) 435 F2d 26, 71-1 USTC ¶ 9243, 27 AFTR 2d 71-466, 22 ALR Fed 852, cert den 401 US 983, 28 L Ed 2d 334, 91 S Ct 1198 (holding that even though certain wiretapping evidence indicating that a defendant was a participant in organized crime was suppressed during a trial, the trial court could take such evidence into account when sentencing the defendant).

Practice References Hall, Search and Seizure § 24:5.

Footnote 26. *United States v Schipani* (CA2 NY) 435 F2d 26, 71-1 USTC ¶ 9243, 27 AFTR 2d 71-466, 22 ALR Fed 852, cert den 401 US 983, 28 L Ed 2d 334, 91 S Ct 1198.

Footnote 27. *United States v Schipani* (CA2 NY) 435 F2d 26, 71-1 USTC ¶ 9243, 27 AFTR 2d 71-466, 22 ALR Fed 852, cert den 401 US 983, 28 L Ed 2d 334, 91 S Ct 1198.

§ 596 --Probation and parole revocation proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At least four Federal Courts of Appeals have declined to apply the exclusionary rule in parole or probation revocation proceedings. 28 In the absence of police harassment of probationers or parolees, 29 it is believed that the suppression of evidence in revocation proceedings would only have a minimal deterrent effect on government

agents. 30 In addition, a probationer or parolee is not endowed with all the rights which he possesses prior to conviction, and evidence which would not be admissible at trial can be considered in revocation proceedings. 31

However, the exclusionary rule has been applied in a probation revocation proceeding, rendering inadmissible evidence seized by a probation officer in an illegal warrantless search of a probationer's home. 32 Furthermore, evidence obtained by unconstitutional searches of a probationer's property has been ruled inadmissible in a federal probation revocation hearing. 33 Additionally, the statutory exclusionary rule relating to intercepted communications is applied in probation revocation proceedings. 34

Footnotes

Footnote 28. *United States v Bazzano* (CA3 Pa) 712 F2d 826, cert den 465 US 1078, 79 L Ed 2d 760, 104 S Ct 1439; *United States v Farmer* (CA6 Ky) 512 F2d 160, cert den 423 US 987, 46 L Ed 2d 305, 96 S Ct 397; *United States v Hill* (CA7 Ill) 447 F2d 817; *United States v Winsett* (CA9 Cal) 518 F2d 51, 30 ALR Fed 817.

Practice References Hall, Search and Seizure § 24:6.

Footnote 29. *United States v Farmer* (CA6 Ky) 512 F2d 160, cert den 423 US 987, 46 L Ed 2d 305, 96 S Ct 397.

Footnote 30. *United States v Winsett* (CA9 Cal) 518 F2d 51, 30 ALR Fed 817.

Footnote 31. *United States v Farmer* (CA6 Ky) 512 F2d 160, cert den 423 US 987, 46 L Ed 2d 305, 96 S Ct 397.

Footnote 32. *United States v Rea* (CA2 NY) 678 F2d 382.

Footnote 33. *United States v Workman* (CA4 NC) 585 F2d 1205, appeal after remand (CA4 NC) 617 F2d 48.

Footnote 34. § 610.

§ 597 Effect of relationship between agency which committed unlawful act and agency which brought action; intersovereign and intrasovereign violations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In civil proceedings, exclusion of illegally obtained evidence is not required as a result of "intersovereign" violations—those in which the sovereign, such as a state, whose agents seized the disputed evidence is different from the sovereign, such as the federal government, which commenced the proceeding. 35 The Supreme Court has concluded that state officials will not be additionally deterred from conducting illegal searches and seizures by the possibility the evidence could be suppressed in a federal

The exclusionary rule is believed by the Supreme Court likely to be most effective when applied to "intrasovereign" violations—those committed by agents of the particular sovereign which brought the action in question. 37 However, when other factors significantly reduce the likely deterrent value of the exclusionary rule in such an action, the rule is not to be used in civil proceedings even if the agency officials whose conduct was unlawful are the same officials who subsequently brought the civil action. 38 Similarly, the exclusionary rule is not to be applied in a proceeding in which the allegedly illegal search and seizure which produced the disputed evidence was conducted by a federal agency other than the federal agency which brought the proceeding, despite the fact that both are agencies of the same sovereign, since the deterrence rationale would not be served by suppressing evidence from a proceeding when the evidence was not seized with the participation or collusion of, or in contemplation of use by, agents responsible for the proceeding in which the evidence was to be presented. 39

Footnotes

Footnote 35. *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

Footnote 36. *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L Ed 2d 158, 97 S Ct 196, 97 S Ct 197.

On the other hand, the Second Circuit has declined to rule out the possibility that in some circumstances the exclusionary rule should be applied with respect to intersovereign violations, taking the position that application of the rule should turn on the prospects for achieving marginal deterrence. *Tirado v Commissioner* (CA2) 689 F2d 307, 82-2 USTC ¶ 9580, 50 AFTR 2d 82-5774, cert den 460 US 1014, 75 L Ed 2d 484, 103 S Ct 1256.

Footnote 37. *Immigration & Naturalization Service v Lopez-Mendoza*, 468 US 1032, 82 L Ed 2d 778, 104 S Ct 3479, on remand, en banc (CA9) 738 F2d 1067, affd without op (CA9) 745 F2d 67, 16 Fed Rules Evid Serv 80.

Footnote 38. *Immigration & Naturalization Service v Lopez-Mendoza*, 468 US 1032, 82 L Ed 2d 778, 104 S Ct 3479, on remand, en banc (CA9) 738 F2d 1067, affd without op (CA9) 745 F2d 67, 16 Fed Rules Evid Serv 80.

Footnote 39. *Tirado v Commissioner* (CA2) 689 F2d 307, 82-2 USTC ¶ 9580, 50 AFTR 2d 82-5774, cert den 460 US 1014, 75 L Ed 2d 484, 103 S Ct 1256.

§ 598 Use of illegally obtained evidence to impeach credibility, generally

The Fourth Amendment does not require a trial court to exclude evidence obtained as a result of an unconstitutional seizure which is used to impeach the testimony of a defendant. 40 The rationale behind this rule is that while the government cannot make an affirmative use of evidence unlawfully obtained, a defendant should also not be able to turn the government's mistake to his own advantage and provide himself with a shield against contradicting his own untruths. 41 If a defendant exercises the right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately and may not turn the illegal method by which evidence in the government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. 42

The use of illegally seized evidence to impeach statements of the accused made in response to government cross-examination reasonably suggested by the accused's direct examination is proper. 43

Statements made by an accused to the police under circumstances rendering the statements inadmissible to establish the prosecution's case in chief, because the technical requirements established under *Miranda* 44 were not met, are admissible under federal constitutional standards for the purpose of impeaching the accused's credibility, where the statements are inconsistent with the accused's trial testimony bearing directly on the crimes charged, and the accused makes no claim that his statements to the police were coerced or involuntary, even though he may not have been given a *Miranda* warning. 45 It should be noted, however, that a number of states have refused to allow such use of statements taken in violation of *Miranda*, extending such protection to the accused on the basis of their respective state constitutions. 46

An involuntary statement cannot be used for any purpose, including impeaching the credibility of the defendant, 47 and a suspect's postarrest silence, after he received *Miranda* warnings, cannot be used to impeach his testimony. 48

Furthermore, the impeachment exception to the exclusionary rule does not extend to the prosecution's use of illegally obtained evidence to impeach the testimony of all defense witnesses, because such an expansion of the exception would frustrate, rather than further, the purposes underlying the exclusionary rule. 49

Footnotes

Footnote 40. *Michigan v Harvey*, 494 US 344, 108 L Ed 2d 293, 110 S Ct 1176; *Stone v Powell*, 428 US 465, 49 L Ed 2d 1067, 96 S Ct 3037, on remand (CA9 Cal) 539 F2d 693 and reh den, modif den 429 US 874, 50 L Ed 2d 158, 97 S Ct 197; *Walder v United States*, 347 US 62, 98 L Ed 503, 74 S Ct 354.

Evidence that defendant's allegedly illegally seized flight bag found in his hotel room contained cocaine was admissible to impeach defendant who asserted that he did not bring cocaine into room. *United States v Brandon* (CA10 Okla) 847 F2d 625, 25 Fed Rules Evid Serv 922, cert den 488 US 973, 102 L Ed 2d 545, 109 S Ct 510.

Annotation: Admissibility, in criminal case, of evidence for purpose of impeachment of witness, as exception to exclusionary rule precluding admission of evidence obtained in violation of federal constitutional rights—Supreme Court cases, 107 L Ed 2d 1162.

Practice References Hunter, Federal Trial Handbook 2d § 38:33.

Cook, Constitutional Rights of the Accused 2d § 3:64.

Footnote 41. Walder v United States, 347 US 62, 98 L Ed 503, 74 S Ct 354.

Footnote 42. Michigan v Harvey, 494 US 344, 108 L Ed 2d 293, 110 S Ct 1176.

Footnote 43. United States v Havens, 446 US 620, 64 L Ed 2d 559, 100 S Ct 1912, 6 Fed Rules Evid Serv 1, reh den 448 US 911, 65 L Ed 2d 1172, 101 S Ct 25 and on remand (CA5 Fla) 625 F2d 1311, cert den 450 US 995, 68 L Ed 2d 195, 101 S Ct 1697.

Footnote 44. Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

The *Miranda* case is discussed in § 749.

Footnote 45. Harris v New York, 401 US 222, 28 L Ed 2d 1, 91 S Ct 643.

Footnote 46. State v Santiago, 53 Hawaii 254, 492 P2d 657, appeal after remand 55 Hawaii 162, 516 P2d 1256; Commonwealth v Henderson, 496 Pa 349, 437 A2d 387; State v Brunelle, 148 Vt 347, 534 A2d 198.

Footnote 47. Mincey v Arizona, 437 US 385, 57 L Ed 2d 290, 98 S Ct 2408, appeal after remand 130 Ariz 389, 636 P2d 637, cert den 455 US 1003, 71 L Ed 2d 871, 102 S Ct 1638, appeal after remand 141 Ariz 425, 687 P2d 1180, cert den 469 US 1040, 83 L Ed 2d 409, 105 S Ct 521.

Footnote 48. Doyle v Ohio, 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (holding that where the defendants claimed at trial that they had been framed by narcotics agents, the prosecutor could not cross-examine them about their failure to complain about the alleged frameup at the time of their arrest).

Footnote 49. James v Illinois, 493 US 307, 107 L Ed 2d 676, 110 S Ct 648.

§ 599 --Sixth Amendment violation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

After a defendant invokes the Sixth Amendment right to assistance of counsel, any

waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case in chief. 50 However, the content of such a discussion may be used to impeach a defendant's trial testimony, because the shield provided by the rule should not be perverted into a license to use perjury as a defense, free from the risk of confrontation with prior inconsistent utterances. 51

Footnotes

Footnote 50. *Michigan v Jackson*, 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404.

Footnote 51. *Michigan v Harvey*, 494 US 344, 108 L Ed 2d 293, 110 S Ct 1176.

§ 600 Use of illegally obtained evidence with respect to subsequent offenses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Illegally obtained evidence is generally admissible with respect to certain offenses committed after the illegal act of the government took place. 52 The deterrent purpose of the exclusionary rule would not be served by forbidding the government to use evidence obtained from an unlawful search and seizure to prove the entirely separate offense of perjury occurring after the illegal search and seizure and suppression of the evidence in state court. 53 In such circumstances, the purpose of the exclusionary rule is satisfied by the exclusion of the evidence from use in connection with the alleged crime committed prior to the illegal search and seizure, 54 while the government's interest in admitting the evidence of perjury is substantial 55 and no significant additional deterrent effect could be realized by suppressing the evidence at a trial of the search victim for a crime committed after the illegal search and with the knowledge that the illegal search had occurred. 56 Moreover, a holding that illegally obtained evidence should be suppressed in such circumstances would in effect give the victim of an illegal search a license to commit any new crimes he cared to, free from the concern that the illegally seized evidence might be used against him in prosecutions for these subsequent crimes. 57 The exclusionary rule also does not prohibit the use of illegally seized evidence to prove tax fraud allegedly committed some months after the seizure, since suppression of such evidence would not achieve substantial deterrence where it was unforeseeable to erring police officers that a suspect would later commit a separate crime, and in any event, any additional deterrent effect resulting from the exclusion of such evidence is outweighed by the necessity of preserving the self-reporting system of the tax structure. 58

However, the Second Circuit has rejected the view that the exclusionary rule is inapplicable with respect to perjury or other crimes committed after an illegal search, and has held that it was proper to suppress testimony as the fruit of an illegal search in a perjury prosecution for perjury which occurred after the illegal intrusion. 59 Additionally, illegally obtained evidence is suppressible where the subsequent perjury charge is tried in the same trial as other charges with respect to which the evidence is

Footnotes

Footnote 52. *United States v Finucan* (CA1 NH) 708 F2d 838; *United States v Turk* (CA5 Fla) 526 F2d 654, reh den (CA5 Fla) 529 F2d 523 and cert den 429 US 823, 50 L Ed 2d 84, 97 S Ct 74; *United States v Paepke* (CA7 Wis) 550 F2d 385, 77-1 USTC ¶ 9302, 39 AFTR 2d 77-884; *United States v Raftery* (CA9 Cal) 534 F2d 854, cert den 429 US 862, 50 L Ed 2d 141, 97 S Ct 167 and appeal after remand (CA9 Cal) 563 F2d 965.

Footnote 53. *United States v Finucan* (CA1 NH) 708 F2d 838; *United States v Raftery* (CA9 Cal) 534 F2d 854, cert den 429 US 862, 50 L Ed 2d 141, 97 S Ct 167 and appeal after remand (CA9 Cal) 563 F2d 965.

Footnote 54. *United States v Raftery* (CA9 Cal) 534 F2d 854, cert den 429 US 862, 50 L Ed 2d 141, 97 S Ct 167 and appeal after remand (CA9 Cal) 563 F2d 965.

Footnote 55. *United States v Finucan* (CA1 NH) 708 F2d 838.

Footnote 56. *United States v Turk* (CA5 Fla) 526 F2d 654, reh den (CA5 Fla) 529 F2d 523 and cert den 429 US 823, 50 L Ed 2d 84, 97 S Ct 74.

Footnote 57. *United States v Turk* (CA5 Fla) 526 F2d 654, reh den (CA5 Fla) 529 F2d 523 and cert den 429 US 823, 50 L Ed 2d 84, 97 S Ct 74.

Footnote 58. *United States v Paepke* (CA7 Wis) 550 F2d 385, 77-1 USTC ¶ 9302, 39 AFTR 2d 77-884.

Footnote 59. *United States v Ceccolini* (CA2 NY) 542 F2d 136, 34 ALR Fed 604, revd on other grounds 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

Footnote 60. *United States v Finucan* (CA1 NH) 708 F2d 838.

2. Grounds for Suppressing Evidence [601-632]

a. Illegal Search and Seizure [601-608]

§ 601 Fourth Amendment exclusionary rule

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under the Fourth Amendment exclusionary rule, evidence obtained as a result of an illegal search or seizure is not admissible in proceedings against an accused 61 where

a timely application is made to suppress or exclude the evidence. 62 This rule prohibits introduction into evidence of tangible materials seized during an unlawful search, testimony concerning knowledge acquired during an unlawful search, and derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. 63

Although the exclusionary rule rests upon the prohibition of unreasonable searches and seizures contained in the Fourth Amendment, 64 that Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. 65 Through an examination of the origin and purpose of the Amendment, the Supreme Court has concluded that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong, and that the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the party aggrieved. 66 Thus, whether the exclusionary sanction is appropriately imposed in a particular case is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. 67

◆ Observation: The fact that state law may require greater protection against searches and seizures than federal law is of no avail to a defendant in federal court, under prosecution for a federal crime, since the test to be applied by a federal court is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed. 68

§ 601 ----Fourth Amendment exclusionary rule [SUPPLEMENT]

Practice Aids: Admissibility, in motor vehicle license suspension proceedings, of evidence obtained by unlawful search and seizure. 23 ALR5th 108.

Case authorities:

Pornographic videotape seized from defendant was inadmissible in evidence where it was seized pursuant to invalid anticipatory search warrant. *United States v Ricciardelli* (1993, CA1 Mass) 998 F2d 8, summary op at (CA1 Mass) 21 M.L.W. 2921, 14 R.I.L.W. 282.

There was no Fourth Amendment violation requiring suppression of documents and papers stolen from defendant lawyer's office and turned over to Assistant United States Attorney where documents and papers had already been searched by private parties so that no warrant was required for government agents to read them. *United States v Knoll* (1994, CA2 NY) 16 F3d 1313.

Police officer's stop of defendants' car was not unlawful as being pretextual where officer had probable cause to stop car for traffic offense of having no visible license plate, and stop was lawful regardless of whether traffic offense was only basis or merely one basis for stop; thus, firearm and evidence of drug trafficking found in search of car was admissible in evidence. *United States v Ferguson* (1993, CA6 Tenn) 8 F3d 385.

District Court's finding that encounter between drug enforcement agents and defendant in

main terminal of railroad station after he had disembarked from train was consensual was not clearly erroneous, and thus evidence obtained during search of defendant's luggage was admissible; court was entitled to find agents' testimony about encounter more reliable than defendant's testimony. *United States v Eddy* (1993, CA7 Ill) 8 F3d 577.

Evidence seized from defendant's business was not inadmissible in evidence on alleged ground that defendant's consent to search his business was tainted by earlier Miranda violation during interrogation by drug enforcement agents where unwarned statement made during interrogation and consent to search were voluntary and, moreover, defendant signed consent-to- search form after having it explained to him and during search gave agents inculpatory evidence consisting of marijuana and drug- transaction records. *United States v Wiley* (1993, CA8 Iowa) 997 F2d 378, petition for certiorari filed (Sep 27, 1993).

Admission of evidence that was tainted by postal inspector's warrantless entry of residence in violation of Fourth Amendment was harmless beyond reasonable doubt where only tainted evidence admitted was testimony concerning events that occurred in bathroom of residence and untainted evidence against defendants was overwhelming. *United States v Johnson* (1993, CA8 Mo) 12 F3d 760, reh den (CA8) 1994 US App LEXIS 1702 and reh, en banc, den (CA8) 1994 US App LEXIS 3170.

Evidence seized from defendant's farm pursuant to search warrant was not inadmissible because of involvement of county undersheriff who had no official authority in county in which seizure occurred where undersheriff was accompanied by state special agents who were vested with powers and privileges of county sheriffs, one of whom applied for and executed warrant. *United States v Occhipinti* (1993, CA10 Kan) 998 F2d 791.

In DUI prosecution, trial court committed reversible error in denying defendant's motion to suppress evidence of blood sample forcibly taken from defendant by police following his arrest and after he had voluntarily given urine sample. State did not demonstrate need for blood sample warranting blood drawn without defendant's consent; police officer's opinion that blood was best test for detecting alcohol was not sufficient. Further, under Vehicle Code provision, person lawfully arrested for DUI has choice of submitting to blood, breath, or urine test, which reflects governmental acknowledgment that urine test is functional equivalent of blood test for evidentiary purposes with respect to presence of alcohol in person's system. *People v Fiscalini* (1991, 4th Dist) 228 Cal App 3d 1639, 279 Cal Rptr 682, 91 CDOS 2565, 91 Daily Journal DAR 4148.

Inspection of defendant's electrical meter by two agents of electrical utility who were searching for evidence that defendant was illegally diverting power did not rise to level requiring Fourth Amendment scrutiny, although utility agents contacted police and requested that officer accompany them to defendant's premises, and informed police of suspected drug activity, where agents had valid independent motive apart from detection or prevention of criminal activity, and police involvement was limited to positioning police officer one block away from inspection to be on hand in event of disturbance. *United States v Cleaveland* (1995, CA9 Or) 95 CDOS 329, 95 daily journal dar 583.

In DUI prosecution, trial court did not err in refusing to suppress results of blood alcohol tests where, although defendant had exercised statutory right to refuse test, police officer learned that defendant had prior DUI conviction and had good-faith belief that, as result, he could require blood test; no public policy would be served by excluding the evidence. *Brockett v State* (1991) 107 Nev 638, 817 P2d 1183.

The trial court did not err in denying defendant's motion for mistrial based on the admission into evidence of a pin and photograph previously suppressed by the trial court in pretrial motions on the ground that defendant's opening argument to the jury had reflected the trial court's suppression order where the suppression order was entered without prejudice to the State to show that the two items might be admissible under another theory of law; defendant was thus aware that the State might come forward with a legally acceptable basis for admission of the evidence; the State showed that the items were lawfully seized by an officer who entered defendant's trailer to effect an arrest; and defense counsel admitted that he did not tell the jury during the opening statement that the State would not offer either the pin or the photograph. Even if the admission of these items was error, defendant failed to present evidence of prejudice worthy of a mistrial considering the overwhelming evidence presented against him. *State v Hill* (1994) 116 NC App 573, 449 SE2d 573.

The trial court did not err in a prosecution arising from defendant hiring someone to kill her former husband and assault a woman whom he was dating and from an attack being carried out on the former husband by admitting telephone records which showed telephone calls from defendant to a coconspirator testifying against her. Assuming standing under the North Carolina Constitution, defendant failed in her burden of showing sufficient action attributable to the State which would implicate the constitutional protections against unreasonable search and seizure. The records were originally recorded in the usual course of Southern Bell's business and not under some State directive, there is no subpoena in the record, and defendant's argument that sufficient action attributable to the State exists because the State called a Southern Bell employee to testify about and produce the records at trial was rejected. *State v Suggs* (1995) 117 NC App 654, 453 SE2d 211.

The evidence gained in the execution of the search warrant of the accused's residence was properly suppressed, where the municipal court judge would not have issued the search warrant for the accused's residence had he not been provided with the evidence of the cocaine found in the accused's vehicle as a result of a violation of the Fourth Amendment rights of the accused. *State v Carter*, 69 OS3d 57, 630 NE2d 355.

In narcotics prosecution, trial court erred in suppressing all evidence seized from defendant's house on basis that information as to heat emanating from house, which information was used in affidavit supporting issuance of search warrant, had been improperly obtained (national guardsman used military thermal imaging device); court should have reevaluated affidavit without benefit of that information and, if remaining information demonstrated probable cause, search of house should have been upheld. *State v Binner* (1994) 128 Or App 639, 877 P2d 642.

Although independent source doctrine applied in state, evidence was nevertheless inadmissible where place of invasion was dwelling place, mode of entry was by battering ram in absence of exigent circumstances, and there was no reasonable explanation for battering down door before warrant arrived. *Commonwealth v Mason* (1993) 535 Pa 560, 637 A2d 251.

Trial court in prosecution for driving under influence of alcohol properly suppressed results of blood test on sample taken by hospital personnel over injured driver's refusal, since legislative intent was clear that automatic suspension of license for refusing test was intended sanction for refusal under implied-consent statutes that rendered

involuntary test results inadmissible. *State v Beyor* (1993, Vt) 641 A2d 344.

Footnotes

Footnote 61. *State v Fisher*, 141 Ariz 227, 686 P2d 750, cert den 469 US 1066, 83 L Ed 2d 436, 105 S Ct 548, post-conviction proceeding, motion for new trial gr, remanded 152 Ariz 116, 730 P2d 825, appeal after remand, remanded 176 Ariz 69, 859 P2d 179, 147 Ariz Adv Rep 14; *State v Anderson*, 286 Ark 58, 688 SW2d 947 (ovrld on other grounds by *Jackson v State*, 291 Ark 98, 722 SW2d 831); *People v Hamilton* (Colo) 666 P2d 152; *State v Johnson*, 110 Idaho 516, 716 P2d 1288.

As to particular proceedings, see §§ 592 et seq.

For a detailed exposition of what constitutes a search or seizure, and the scope of the constitutional protection against unreasonable searches and seizures, see 68 Am Jur 2d, Searches and Seizures.

Footnote 62. *Weeks v United States*, 232 US 383, 58 L Ed 652, 34 S Ct 341 (ovrld on other grounds by *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437).

As to the proper procedure for objecting to the admission of illegally obtained evidence, see §§ 643 et seq.

Annotation: Comment Note.—Federal Constitution as affecting admissibility of evidence obtained by illegal search and seizure, 84 ALR2d 959.

Admissibility of evidence obtained by illegal search and seizure—Supreme Court cases, 6 L Ed 2d 1544.

Practice References Hunter, *Federal Trial Handbook* 2d § 38.1.

Cook, *Constitutional Rights of the Accused* 2d § 3:62.

Forms: Motion in Limine—To suppress mention of various matters. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 12.1.

—By plaintiff in common-law liability case. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 12.2.

Affidavit or declaration—In support of motion to exclude evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 13.

Footnote 63. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

While arriving at the truth is a fundamental goal of the American legal system, without the exclusionary rule the constitutional guarantee against unreasonable searches and seizures would be a mere form of words. *James v Illinois*, 493 US 307, 107 L Ed 2d 676, 110 S Ct 648.

As to derivative evidence, see §§ 633 et seq.

Footnote 64. *Olmstead v United States*, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (ovrld on other grounds by *Berger v New York*, 388 US 41, 18 L Ed 2d 1040, 87 S Ct 1873).

Footnote 65. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 66. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 67. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

For detailed discussion concerning what constitutes an illegal search and seizure, see 68 Am Jur 2d, Search and Seizure §§ 1 et seq.

Footnote 68. *United States v Loggins* (CA6 Mich) 777 F2d 336.

§ 602 Procedural guide for analyzing search and seizure problems

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A method of analyzing search and seizure problems is suggested by the following outline:

(1) Was there a search or seizure within the meaning of the Fourth Amendment?

–If yes, proceed to (2).

–If no, the evidence cannot be suppressed.

(2) Was a warrant required?

–If yes, proceed to (3).

–If no, proceed to (5).

(3) Was a warrant obtained?

–If yes, proceed to (4).

–If no, the evidence should be suppressed.

(4) Was the warrant valid?

–If yes, proceed to (6).

–If no, proceed to (5).

(5) Was there good-faith reliance on the warrant? 69

–If yes, proceed to (6).

–If no, the evidence should be suppressed.

(6) Was the search properly conducted?

–If yes, the evidence should not be suppressed.

–If no, the evidence should be suppressed. 70

§ 602 ----Procedural guide for analyzing search and seizure problems [SUPPLEMENT]

Case authorities:

Defendant's motion to strike suppression hearing testimony of police officer because of government's failure to provide tape recordings of dispatcher's office on date of arrest was legally insufficient where there were no allegations that recordings were actually made, that recordings were destroyed by police department and that contents of recording would have been materially favorable to defendants, since routine administrative destruction of potentially exculpatory evidence does not violate constitution. *United States v Florack* (1994, WD NY) 155 FRD 49.

Footnotes

Footnote 69. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

◆ Caution: This factor will only apply in those jurisdictions which recognize the good-faith exception to application of the exclusionary rule. See § 603.

Footnote 70. 68 Am Jur 2d, Searches and Seizures § 1.

Practice References Excluding illegally obtained evidence. 5 Am Jur Trials, pp 331.

Representation of an alien in exclusion, rescission and deportation hearings. 26 Am Jur Trials, pp 373.

Representing the mentally disabled criminal defendant. 27 Am Jur Trials § 69.

Hall, Search and Seizure §§ 26:3-26:21.

§ 603 Good-faith exception to exclusionary rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Supreme Court has modified the Fourth Amendment exclusionary rule so as not to bar the use, in the prosecution's case in chief, of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate which ultimately is found to be defective. 71 Although the term "good faith" does not fully capture the objective nature of the inquiry required for application of this exception, it is nevertheless known as the "good-faith exception" as a shorthand description. 72 The terms "reasonable reliance," "objective good-faith," and "objectively reasonable" are also used to refer to the conduct required of officers to whom the exception applies. 73

A number of state courts have declined to apply the good-faith exception to the exclusionary rule, finding in their respective criminal statutes 74 or state constitutions 75 grounds for excluding the tainted evidence. While the federal Constitution establishes certain minimum levels of protection which are equally applicable to the analogous state constitutional provisions, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution. 76

The principal rationale for the good-faith exception is that the suppression of evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant would produce only marginal or nonexistent benefits which cannot justify the substantial cost of exclusion. 77 Application of the exclusionary rule is properly restricted to situations in which its remedial purpose is effectively advanced. 78 Exclusion of evidence will not deter police misconduct where an officer acting with objective good faith has obtained a search warrant from a judge or magistrate, and has acted within its scope. 79 In most such cases, there is no police illegality and thus nothing to deter. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or judgment that the form of the warrant is technically sufficient. 80 Similarly, suppressing evidence because a judge failed to make all the necessary clerical corrections with respect to a warrant, despite the judge's assurances that such changes would be made, will not serve the deterrent function of the exclusionary rule, 81 which is not designed to punish the errors of judges and magistrates, and moreover, there is no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on judges or magistrates. 82

The exception has been held to apply to military jurisprudence, 83 although it has also been observed that because a commander is not subject to some of the requirements imposed on magistrates, it should not be automatically assumed that the good-faith exception applies to a commander's authorization of a search. 84

§ 603 ----Good-faith exception to exclusionary rule [SUPPLEMENT]

Case authorities:

Suppression of evidence seized in violation of the Federal Constitution's Fourth Amendment is not required by the exclusionary rule where the evidence was seized incident to an arrest made on the basis of erroneous information—a computer check of a driver stopped for a routine traffic violation revealed the existence of an outstanding misdemeanor warrant for the driver's arrest, when in fact the warrant had been quashed 2 weeks earlier—which in turn resulted from a clerical error of court employees; application of the exclusionary rule is not warranted where it does not result in appreciable deterrence of future violations of Fourth Amendment rights, and the exclusion of evidence at trial would not sufficiently deter future clerical errors of court employees so as to warrant the imposition of such a severe sanction where (1) the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees, (2) no evidence has been presented to show that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among those actors requires application of the extreme sanction of exclusion, and (3) there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed, since court clerks are not adjuncts to the law enforcement team engaged in ferreting out crime, and thus have no stake in the outcome of a particular criminal prosecution. (Stevens, J., dissented from this holding.) *Arizona v Evans* (1995, US) 131 L Ed 2d 34, 115 S Ct 1185, 95 CDOS 1509, 95 Daily Journal DAR 2671.

Even if affidavit supporting warrant to search defendant's residence was defective, good-faith exception to exclusionary rule applied where, based upon explosive devices having been discovered in residence after police officers' warrantless entry in response to report of possible burglary in progress, officers, bomb squad, and ATF agents called in by officers were reasonably under impression that they were responding to exigent circumstances and thus reasonably and in good faith relied on warrant in seizing suspicious piece of white PVC pipe that was later determined to be silencer. *United States v Johnson* (1993, CA6 Tenn) 9 F3d 506.

Good-faith exception to exclusionary rule applied to OSHA's full- scope inspection of tank and pressure vessel manufacturer's plant based on employee's complaint about unsafe conditions in plant where, although OSHA instruction allowing Secretary of Labor to conduct full- scope inspection authorized by single warrant obtained only on basis of employee complaint was invalid, Secretary obtained decisions from both magistrate and District Court upholding warrant and decision from Court of Appeals denying manufacture's application for stay of District Court's order affirming magistrate's denial of manufacture's motion to quash warrant so that it could be said that Secretary relied in objectively good faith on facially valid warrant; for same reason, good-faith exception applied so as to permit full-scope inspection that involved both safety and health components even though warrant only authorized comprehensive safety inspection. *Trinity Indus. v OSHRC* (1994, CA6) 16 F3d 1455, 16 BNA OSHC 1609, 1994 CCH OSHD ¶ 30369, 1994 FED App. 65P.

Good-faith exception to exclusionary rule applied to search of defendant's trailer house pursuant to warrant where affidavit supporting warrant was not so lacking in evidence of probable cause as to render any reliance on warrant objectively unreasonable; affidavit contained information that drugs were found in defendant's car, that large amount of cash was found on his person at time of his arrest for driving on suspended driver's license, and that drugs, drug paraphernalia, and guns were found in prior search of trailer house. *United States v Riedesel* (1993, CA8 Iowa) 987 F2d 1383.

Good-faith exception to exclusionary rule applied to search of defendant's home pursuant to warrant where, regardless of whether there was probable cause to issue warrant, it was objectively reasonable for detective, who filed affidavit in support of warrant, to conclude that there was probable cause since he knew that informant had been seen leaving home and that informant had provided detective with description of drug activities taking place in home. *United States v Chambers* (1993, CA8 Mo) 987 F2d 1331.

District Court did not err in finding that state officers acted in good faith in relying on state warrant to arrest defendant even though warrant did not comport with Federal Rules of Criminal Procedure, and hence court did not err in declining to apply exclusionary rule, where officers' conduct conformed with state law and practice and warrant was facially valid; nor was it unreasonable for federal Secret Service agent to rely on warrant without investigating its validity under Federal Rules. *United States v Gobey* (1993, CA10 Colo) 12 F3d 964, corrected (CA10) slip op.

Suppression of evidence was not required, despite fact that testimony which supported search warrant contained errors, and federal magistrate's proceeding contained flaw which may have controlled its outcome, where errors were not made intentionally or with reckless disregard for the truth. *State v Mechtel* (1993) 176 Wis 2d 87, 499 NW2d 662.

Footnotes

Footnote 71. *Massachusetts v Sheppard*, 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424, on remand 394 Mass 381, 476 NE2d 541; *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Annotation: Admissibility in criminal case of evidence obtained by law enforcement officer allegedly relying reasonably and in good faith on defective warrant, 82 L Ed 2d 1054.

Practice References Cook, *Constitutional Rights of the Accused* 2d § 3:63.

Hunter, *Federal Trial Handbook* 2d § 38.2.

Footnote 72. *United States v Savoca* (CA6 Ohio) 761 F2d 292, cert den 474 US 852, 88 L Ed 2d 126, 106 S Ct 153; *United States v Leary* (CA10 Colo) 846 F2d 592.

Footnote 73. *United States v Savoca* (CA6 Ohio) 761 F2d 292, cert den 474 US 852, 88 L Ed 2d 126, 106 S Ct 153.

Footnote 74. *Polk v State* (Tex App Dallas) 704 SW2d 929, petition for discretionary review gr (Mar 4, 1987) and petition for discretionary review ref (Mar 4, 1987) and affd (Tex Crim) 738 SW2d 274.

Footnote 75. *State v Marsala*, 216 Conn 150, 579 A2d 58; *State v Rothman* (Hawaii) 779 P2d 1; *People v Bigelow*, 66 NY2d 417, 497 NYS2d 630, 488 NE2d 451; *Commonwealth v Edmunds*, 526 Pa 374, 586 A2d 887, ALR4th 1738.

Footnote 76. Commonwealth v Edmunds, 526 Pa 374, 586 A2d 887.

Law Reviews: Yagla, The Good Faith Exception To The Exclusionary Rule: The Latest Example Of "New Federalism" In The States, 71 Marquette L Rev 166 (1987).

Footnote 77. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 78. Illinois v Krull, 480 US 340, 94 L Ed 2d 364, 107 S Ct 1160, on remand 126 Ill 2d 235, 128 Ill Dec 105, 534 NE2d 125.

Footnote 79. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 80. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 81. Massachusetts v Sheppard, 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424, on remand 394 Mass 381, 476 NE2d 541.

Footnote 82. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52.

Footnote 83. United States v Postle (NMCMR) 20 MJ 632.

Footnote 84. United States v Queen (CMA) 26 MJ 136.

§ 604 --Retroactive application of exception

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The good-faith exception to the exclusionary rule is to be applied retroactively, 85 notwithstanding the clear break with the past represented by its recognition. 86

Footnotes

Footnote 85. United States v Cassity (CA6 Mich) 807 F2d 509.

Footnote 86. United States v Sager (CA8 Ark) 743 F2d 1261, cert den 469 US 1217, 84 L Ed 2d 341, 105 S Ct 1196.

§ 605 --Objective reasonableness as test of good faith

In determining whether the exclusionary rule should be applied to exclude evidence obtained pursuant to a warrant, a showing of objectively reasonable good faith on the part of the police officers will ordinarily redeem honest errors and prevent the application of the exclusionary rule. 87

Under the good-faith exception to the exclusionary rule, once the defendants have convinced the court that probable cause for the granting of a search warrant was lacking, the government bears the burden of demonstrating that the law enforcement officers' reliance on the warrant satisfied the good-faith exception. 88 There is an objectively reasonable basis for police officers' mistaken belief that a warrant is valid where the officers have taken every step that could reasonably be expected of them, having prepared an affidavit which was reviewed and approved by a District Attorney, presented that affidavit to a neutral judge who concluded that the affidavit established probable cause, and informed the officers that he would authorize the search as requested, having been told by the judge that necessary changes in the form would be made, having observed the judge make changes, and having received the warrant and the affidavit. 89 Where a warrant is held to be invalid due to a simple error in the determination of probable cause, the evidence should be suppressed only if the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. 90 The proper test is not what the District Court judge would have done if the affidavit had been presented to that judge, or even what most other magistrates might have done if presented with the affidavit, but whether it was entirely unreasonable for the officers to accept the magistrate's belief that, based on the affidavit, there was probable cause for the search. 91 It must also be remembered that the knowledge and understanding on the part of law enforcement officers and their appreciation of constitutional intricacies are not to be judged by the standards applicable to lawyers. 92 Where evidence is sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause, it cannot be said that police officers who provide a truthful affidavit to a neutral magistrate who then issues a warrant are not objectively reasonable in believing that they have probable cause. 93 An officer's expert opinion, being an important factor to be considered by a judge reviewing a warrant application, should also be considered as a factor contributing to objective good faith. 94

§ 605 --Objective reasonableness as test of good faith [SUPPLEMENT]

Case authorities:

Good-faith exception to exclusionary rule did not apply to postal inspectors' seizure of pornographic videotape from defendant pursuant to anticipatory warrant to search defendant's residence where reasonably prudent officer should have known that warrant was substantially deficient on its face and defect was largely, if not entirely, result of postal inspectors' incomplete account to issuing magistrate. *United States v Ricciardelli* (1993, CA1 Mass) 998 F2d 8, summary op at (CA1 Mass) 21 M.L.W. 2921, 14 R.I.L.W. 282.

Footnotes

Footnote 87. *United States v Causey* (CA5 La) 834 F2d 1179, on remand (CA5 La) 835 F2d 1527.

Footnote 88. *United States v Gant* (CA5 Tex) 759 F2d 484, reh den, en banc (CA5 Tex) 765 F2d 1120 and cert den 474 US 851, 88 L Ed 2d 123, 106 S Ct 149.

Footnote 89. *Massachusetts v Sheppard*, 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424, on remand 394 Mass 381, 476 NE2d 541.

Footnote 90. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52; *United States v Savoca* (CA6 Ohio) 761 F2d 292, cert den 474 US 852, 88 L Ed 2d 126, 106 S Ct 153.

Footnote 91. *United States v Gant* (CA5 Tex) 759 F2d 484, reh den, en banc (CA5 Tex) 765 F2d 1120 and cert den 474 US 851, 88 L Ed 2d 123, 106 S Ct 149.

Footnote 92. *United States v Cardall* (CA10 Utah) 773 F2d 1128.

Footnote 93. *United States v Butler* (CA1 RI) 763 F2d 11, 18 Fed Rules Evid Serv 438.

Footnote 94. *United States v Fama* (CA2 NY) 758 F2d 834.

§ 606 --Warrantless search in reliance on statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A good-faith exception to the Fourth Amendment exclusionary rule also applies when an officer undertakes an objectively reasonable warrantless administrative search in reliance on the constitutionality of a statute which is subsequently declared unconstitutional. 95 The application of the exclusionary rule in such a case would not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. Unless the statute is clearly unconstitutional, the officer cannot be expected to question the judgment of the legislature that passed the law. Not only would application of the rule have no deterrent effect on police officers, it would have no significant deterrent effect on legislatures enacting such statutes. 96

However, a statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional law; nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. 97

Footnotes

Footnote 95. Illinois v Krull, 480 US 340, 94 L Ed 2d 364, 107 S Ct 1160, on remand 126 Ill 2d 235, 128 Ill Dec 105, 534 NE2d 125.

Footnote 96. Illinois v Krull, 480 US 340, 94 L Ed 2d 364, 107 S Ct 1160, on remand 126 Ill 2d 235, 128 Ill Dec 105, 534 NE2d 125.

Footnote 97. Illinois v Krull, 480 US 340, 94 L Ed 2d 364, 107 S Ct 1160, on remand 126 Ill 2d 235, 128 Ill Dec 105, 534 NE2d 125.

Law Reviews: Dripps, Living With Leon, 95 Yale LJ 906 (1986).

§ 607 --Factors rendering exception inapplicable

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Despite the good-faith exception, evidence seized pursuant to a defective warrant may still be suppressed if one of four criteria is met:

- (1) a magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit;
- (2) the magistrate abandoned the judicial role and failed to perform a neutral and detached function;
- (3) the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable; or
- (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. 98

Footnotes

Footnote 98. United States v Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52; United States v Gant (CA5 Tex) 759 F2d 484, reh den, en banc (CA5 Tex) 765 F2d 1120 and cert den 474 US 851, 88 L Ed 2d 123, 106 S Ct 149.

§ 608 Silver platter doctrine

[View Entire Section](#)

The so-called "silver platter" doctrine, under which evidence turned over to federal officials by state officials would not be suppressed, even though it was obtained by means of an illegal search, 99 has been repudiated by the Supreme Court. 1 Articles obtained as a result of an unreasonable search and seizure by state officers may not be introduced into evidence against a defendant over his timely objection in a federal criminal trial, even though the search was conducted without the involvement of federal officers. 2 In addition, evidence obtained by means of an illegal search conducted by state officers with federal participation, 3 or by means of an illegal search conducted solely by state officers for the sole purpose of aiding the United States in the enforcement of its laws, 4 is not admissible in a prosecution for a federal offense in the federal courts, where a timely objection has been made. Thus, if federal and state officers both participate in a search, but the search warrant obtained by state authorities was not issued by a judge of a state court of record, as required by FR Crim P 41(a), 5 or did not specify the property which the federal officers wished to seize, 6 the evidence may not be used in a federal prosecution.

The question whether evidence obtained by state officers, or pursuant to a state search warrant, was obtained by means of an unreasonable search and seizure, and is therefore inadmissible in a federal prosecution, is to be judged under federal standards. 7

Footnotes

Footnote 99. *Lustig v United States*, 338 US 74, 93 L Ed 1819, 69 S Ct 1372.

Footnote 1. *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437.

Annotation: Admissibility of evidence obtained by illegal search and seizure—Supreme Court cases, 6 L Ed 2d 1544.

Footnote 2. *Elkins v United States*, 364 US 206, 4 L Ed 2d 1669, 80 S Ct 1437.

Practice References Hunter, *Federal Trial Handbook* 2d § 38.5.

Forms: Motion to suppress evidence seized by state officers. 7 *Federal Procedural Forms*, L Ed § 20:553.

Footnote 3. *Lustig v United States*, 338 US 74, 93 L Ed 1819, 69 S Ct 1372; *Byars v United States*, 273 US 28, 71 L Ed 520, 47 S Ct 248.

Footnote 4. *Gambino v United States*, 275 US 310, 72 L Ed 293, 48 S Ct 137, 52 ALR 1381.

Footnote 5. *United States v Hanson* (CA5 Tex) 469 F2d 1375.

Footnote 6. *United States v Carney* (MD Tenn) 356 F Supp 855 (disapproved on other grounds by *United States v Johnson* (CA8 Mo) 707 F2d 317).

b. Illegal Wiretapping and Electronic Surveillance [609-625]

(1). General Principles [609-611]

§ 609 Title III of the Omnibus Crime Control and Safe Streets Act

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Title III of the Omnibus Crime Control and Safe Streets Act ⁸ is a comprehensive scheme for the regulation of wiretapping and electronic surveillance. ⁹ This statute implements the holdings in several Supreme Court cases that the interception of an oral or wire conversation constitutes a search and seizure within the meaning of the Fourth Amendment. ¹⁰ No part of the contents of an intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in specified proceedings ¹¹ if disclosure of that information is in violation of Title III. ¹²

◆ **Caution:** Although Title III has been amended to protect against the unauthorized interception of electronic communications, ¹³ the statutory exclusionary rule of Title III ¹⁴ applies only to the interception of wire or oral communications and not to the interception of electronic communications. The only judicial remedies and sanctions for nonconstitutional violations of Title III involving electronic communications are those described in Title III with respect to the interception of electronic communications. ¹⁵

◆ **Observation:** One of the goals of Title III was to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized. States were authorized to enact similar legislation, which could be more restrictive but not more permissive than Title III. Over thirty states and the District of Columbia have enacted such legislation. ¹⁶

Footnotes

Footnote 8. 18 USCS §§ 2510 et seq.

Footnote 9. For a detailed discussion of what constitutes "interception" of wire, electronic, or oral communications, and the various methods of intercepting such communications, see 68 Am Jur 2d, Searches and Seizures §§ 238-247.

Footnote 10. For a full discussion of this principle, see 68 Am Jur 2d, Searches and Seizures § 234.

Footnote 11. § 610.

Footnote 12. 18 USCS § 2515.

Practice References Cook, Constitutional Rights of the Accused 2d § 3:57.

Footnote 13. Senate Report No. 99-541, accompanying PL 99-508.

Footnote 14. 18 USCS § 2515.

Footnote 15. 18 USCS § 2518(10)(c).

Footnote 16. See Fishman, Wiretapping and Eavesdropping § 5, which contains a complete list of the states and pertinent statutory citations.

§ 610 Applicability of exclusionary rule in particular proceedings and courts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

No part of the contents of an intercepted wire or oral communication, and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof, if the disclosure of that information would be in violation of Title III of the Omnibus Crime Control and Safe Streets Act. 17 Similarly, the federal wiretap statute 18 gives any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof, the right to move to suppress the contents of any intercepted wire or oral communication on specified grounds. 19 The statutory exclusionary rule applies in both federal and state proceedings and in civil as well as criminal proceedings. 20 It also applies in administrative hearings, such as probation revocation proceedings, 21 even though the general exclusionary rule does not apply in these proceedings. 22

Footnotes

Footnote 17. 18 USCS § 2515.

Footnote 18. 18 USCS § 2518(10)(a).

Footnote 19. As to the grounds for suppression, see § 601.

Footnote 20. Re Marriage of Lopp, 268 Ind 690, 378 NE2d 414, cert den 439 US 1116, 59 L Ed 2d 76, 99 S Ct 1023.

Footnote 21. United States v Manuszak (ED Pa) 438 F Supp 613.

§ 611 --Grand jury proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The use of illegally intercepted evidence before any grand jury is prohibited, ²³ but the federal statute governing the procedure for interception of wire, oral, or electronic communications ²⁴ does not specifically give an aggrieved person the right to move before a grand jury to suppress the contents of an intercepted wire or oral communication. ²⁵ The legislative history indicates that since no person is a party to a grand jury proceeding, the making of a motion to suppress in the context of a grand jury proceeding itself is not envisioned. ²⁶

Although a prospective defendant or a witness does not have standing to bring a suppression motion in a grand jury proceeding before refusing to answer questions based upon information gained through unlawful surveillance, this does not mean that the prohibition against the use of unlawfully intercepted wire or oral communications in grand jury proceedings is not to be enforced. If a witness before a grand jury refuses to answer a question on the ground that it was based on evidence derived from an unauthorized wiretap, the federal statute barring use of improperly intercepted wire or oral communications provides a defense against an ensuing contempt charge. ²⁷

Where illegally obtained evidence is used before a grand jury, dismissal of the grand jury's indictment is warranted only where the prosecutor's misconduct amounts to serious and blatant misconduct which distorts the integrity of the judicial process. ²⁸ Thus, dismissal of an indictment is not warranted where the government was acting in accord with a reasonable, if incorrect, construction of the law, according to which use of the evidence would have been legal. ²⁹

Footnotes

Footnote 23. 18 USCS § 2515.

Footnote 24. 18 USCS § 2518.

Footnote 25. 18 USCS § 2518(10)(a).

Footnote 26. Senate Report No. 1097, accompanying P.L. 90-351, quoted in *Re Persico* (CA2 NY) 491 F2d 1156, cert den 419 US 924, 42 L Ed 2d 158, 95 S Ct 199, reh den 419 US 1060, 42 L Ed 2d 657, 95 S Ct 645.

Footnote 27. *Gelbard v United States*, 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357.

Footnote 28. *United States v Vest* (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv

320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Footnote 29. United States v Vest (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

(2). Exceptions [612-615]

§ 612 Creation by statute or judicial decision

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts are not authorized to create exceptions to the federal statute barring use of improperly intercepted wire or oral communications 30 in the same manner as they may develop exceptions to the Fourth Amendment exclusionary rule, as Congress carefully considered which aspects of the Fourth Amendment exclusionary rule would and would not be incorporated into the statute. 31 Protection of privacy was the dominant concern of Congress when it enacted the statute, whereas the primary purpose of the Fourth Amendment exclusionary rule is the deterrence of unreasonable searches and seizures in violation of the Fourth Amendment. 32 Accordingly, the federal statute barring use of improperly intercepted wire or oral communications is not to be read to include an exception permitting the use of illegally intercepted communications in perjury prosecutions. 33

Footnotes

Footnote 30. 18 USCS § 2515.

Footnote 31. United States v Vest (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Footnote 32. United States v Vest (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Footnote 33. United States v Vest (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

§ 613 Interception by private party; interspousal interception

[View Entire Section](#)

The exclusionary rule concerning interception of wire or oral communications applies to the introduction in evidence of an illegally intercepted communication by an innocent recipient of the communication. 34 The protection of privacy is an overriding Congressional concern behind Title III of the Omnibus Crime Control and Safe Streets Act, and an invasion of privacy is compounded by the disclosure of a communication, even if the disclosing party is merely the innocent recipient of the communication illegally intercepted by another. 35 Thus, the government may be barred from use of a recording made in violation of Title III even if the government was the innocent recipient, rather than the guilty interceptor, of the communication. 36 However, evidence illegally recorded by private parties is admissible where used against the persons who made the tapes and against coconspirators of those persons. 37

While state statutes or constitutional provisions relating to the right of privacy may result in the suppression in state civil cases of wiretap evidence obtained by a private individual, 38 such evidence has been found admissible where a plaintiff in a marital dispute accuses his or her spouse of using tapes of illegally intercepted conversations for the purpose of blackmail. 39 Some courts also enforce an interspousal rule, which permits the admission of tape recordings made by one spouse of conversations between the other spouse and a third party. 40

◆ Observation: Under some of these circumstances, it may be possible to bring federal criminal charges 41 or a civil action for damages 42 against a private party who intercepts, discloses, or uses an illegally intercepted communication.

§ 613 ----Interception by private party; interspousal interception [SUPPLEMENT]

Case authorities:

Motion to suppress taped telephone conversation records is denied, where victim of fraud scheme taped telephone conversations with defrauder, and defrauder claimed that records should be suppressed because taping of conversation without his knowledge and consent violated state law, because federal law governs admissibility of evidence in federal criminal proceedings, and 18 USCS § 2511, which prohibits tapping telephones in connection with illegal activity, does not mandate suppression of evidence merely because tapping itself would have been illegal under state law. *United States v DiFelice* (1993, SD NY) 837 F Supp 81.

Footnotes

Footnote 34. *United States v Vest* (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Annotation: Applicability of provisions of Omnibus Crime Control and Safe Streets Act of 1968 prohibiting interception of wire or oral communications (18 USCS §

2511(1)) to interception by spouse, or spouse's agent, of conversations of other spouse in marital home, 55 ALR Fed 936.

Footnote 35. United States v Vest (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Footnote 36. United States v Vest (CA1 Mass) 813 F2d 477, later proceeding (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489.

Footnote 37. United States v Underhill (CA6 Tenn) 813 F2d 105, cert den 482 US 906, 96 L Ed 2d 376, 107 S Ct 2484 and cert den 483 US 1022, 97 L Ed 2d 766, 107 S Ct 3268 and cert den 484 US 821, 98 L Ed 2d 43, 108 S Ct 81 and cert den 484 US 846, 98 L Ed 2d 98, 108 S Ct 141.

Footnote 38. See, for example Markham v Markham (Fla) 272 So 2d 813, which discusses Florida statutes, and the suppression of such evidence in a domestic relations case pending in state court.

Footnote 39. Re Marriage of Lopp, 268 Ind 690, 378 NE2d 414, cert den 439 US 1116, 59 L Ed 2d 76, 99 S Ct 1023.

Footnote 40. Beaber v Beaber, 41 Ohio Misc 95, 70 Ohio Ops 2d 213, 322 NE2d 910.

Footnote 41. 18 USCS § 2511.

Footnote 42. 18 USCS § 2520.

§ 614 Consent

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is not unlawful for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. 43 It is also not unlawful for a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless the communication is intercepted for the purpose of committing a criminal or tortious act. 44 Accordingly, the wiretap suppression statute 45 does not preclude the use of an intercepted communication when one of the parties has consented to the interception. 46 No official approval is required before a government agent may overhear and record conversations with the consent of one of the parties to the conversation, and such evidence may be admitted in a criminal trial. 47 Where conversations are overheard or recorded by government agents with the consent of one of the conversants, the tapes may

be used as evidence in a federal criminal prosecution even though the warrantless interception of the conversation is in violation of state law. 48

§ 614 ----Consent [SUPPLEMENT]

Case authorities:

Although 4th Amendment search warrant requirement applied to fire scene search of burned remains of defendant's home, requirement was subject to certain exceptions, one of which was defendant's having consented to search. *Stephens v State* (1994) 214 Ga App 183, 447 SE2d 26, 94 Fulton County D R 1470, reconsideration den (Jul 28, 1994).

Footnotes

Footnote 43. 68 Am Jur 2d, Searches and Seizures § 255.

Footnote 44. 68 Am Jur 2d, Searches and Seizures § 255.

Footnote 45. 18 USCS § 2515.

Footnote 46. *United States v Bragan* (CA4 Va) 499 F2d 1376; *United States v Puchi* (CA9 Ariz) 441 F2d 697, cert den 404 US 853, 30 L Ed 2d 92, 92 S Ct 92.

Footnote 47. *United States v Caceres*, 440 US 741, 59 L Ed 2d 733, 99 S Ct 1465, 79-1 USTC ¶ 9294, 43 AFTR 2d 79-872.

Footnote 48. *United States v Diaz* (CA8 Mo) 685 F2d 252.

§ 615 Impeachment

<p>View Entire Section Go to Parallel Reference Table</p>

In accord with the general rule that illegally obtained evidence may be used for impeachment purposes, 49 tape recordings obtained by means of an illegal wiretap are admissible as evidence in a criminal trial for impeachment purposes, and are not subject to the statutory 50 exclusionary rule. 51 This result is based on statements in the Senate Report that the wiretap suppression statute 52 is not intended to enlarge the scope of the suppression rule beyond then existing search and seizure law, including the law relating to use of improperly obtained evidence for impeachment purposes. 53 However, although the government may use wiretap evidence to impeach a defendant, a defendant charged with illegal wiretapping is precluded from using evidence illegally obtained by wiretapping to impeach a government witness. 54

Footnotes

Footnote 49. § 598.

Footnote 50. 18 USCS § 2515.

Footnote 51. *United States v Caron* (CA5 Fla) 474 F2d 506.

Footnote 52. 18 USCS § 2515.

Footnote 53. *United States v Caron* (CA5 Fla) 474 F2d 506, quoting Senate Report No. 1097, accompanying PL 90-351.

Footnote 54. *Anthony v United States* (CA10 Okla) 667 F2d 870, cert den 457 US 1133, 73 L Ed 2d 1350, 102 S Ct 2959.

(3). Grounds for Suppression [616-625]

§ 616 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Any aggrieved party in a specified proceeding 55 may move to suppress the contents of any wire or oral communication intercepted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, or evidence derived therefrom, 56 on the grounds that:

- (1) the communication was unlawfully intercepted; 57
- (2) the order of authorization or approval under which it was intercepted is insufficient on its face; 58 or
- (3) the interception was not made in conformity with the order of authorization or approval. 59

◆ Observation: It can be noted that the last two grounds 60 permit suppression if specific violations of the procedural requisites for properly conducting an interception are committed, while the first 61 is a fairly general ground for suppression. Does the general ground for suppression incorporate all violations of Title III, thereby rendering the latter grounds surplusage? The Supreme Court has held that ground (i) clearly includes some constitutional violations, such as lack of probable cause, but is not limited to constitutional violations, and also includes some failures to observe the requirements under Title III. 62

Suppression is required on the basis that the communication was unlawfully intercepted where there is a failure to satisfy any of the statutory requirements that directly and substantially implement the congressional intention to limit the use of interception procedures to those situations clearly calling for the employment of this extraordinary

investigative device. 63 Furthermore, not every failure to comply fully with any requirement of Title III renders the interception of wire or oral communications unlawful. 64 This distinction is illustrated in the case of an improperly authorized application for an interception order, discussed in the following section.

◆ Caution: The remedies and sanctions described in Title III with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of Title III involving such communications. 65

◆ Comment: It has been suggested by one authority 66 that the following provisions of Title III are central, and that a violation of these provisions should lead to suppression of the resulting evidence. These provisions include the requirement that:

- (1) a designated official authorize the application for an interception order; 67
- (2) evidence of a designated offense be submitted with the application for an interception order; 68
- (3) an application be based on probable cause; 69
- (4) a statement be made as to whether other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or appear to be too dangerous; 70
- (5) an interception order be limited to a 30-day period; 71 and
- (6) the interception terminate upon the attainment of the authorized objective. 72

Use of wiretap information acquired by federal officers in violation of state law, but in compliance with 18 USCS § 2511, does not breach federal law, and therefore, there is no basis for excluding the information. 73

Footnotes

Footnote 55. §§ 610, 611.

Footnote 56. As to what constitutes derivative evidence, see § 633.

Footnote 57. 18 USCS § 2518(10)(a)(i).

Footnote 58. 18 USCS § 2518(10)(a)(ii).

Footnote 59. 18 USCS § 2518(10)(a)(iii).

Practice References Representation of an alien in exclusion, rescission and deportation hearings. 26 Am Jur Trials §§ 327, 374.

Footnote 60. 18 USCS § 2518(10)(a)(ii) and (iii).

Footnote 61. 18 USCS § 2518(10)(a)(i).

Footnote 62. *United States v Giordano*, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Footnote 63. *United States v Giordano*, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Footnote 64. *United States v Chavez*, 416 US 562, 40 L Ed 2d 380, 94 S Ct 1849, on remand (CA9 Cal) 533 F2d 491, cert den 426 US 911, 48 L Ed 2d 837, 96 S Ct 2237.

Footnote 65. 18 USCS § 2518(10)(c).

Footnote 66. *Fishman*, *Wiretapping and Eavesdropping* §§ 253, 254.

Footnote 67. 18 USCS § 2516.

Footnote 68. 18 USCS § 2516.

Footnote 69. 18 USCS § 2518.

Footnote 70. 18 USCS § 2518(1), (3).

Footnote 71. 18 USCS § 2518(5).

Footnote 72. 18 USCS §§ 2518(4), 2518(5).

Footnote 73. *United States v Daniel* (CA9 Alaska) 667 F2d 783.

§ 617 Improperly authorized application for wiretap order

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the Attorney General is permitted to specially designate Assistant Attorneys General to authorize wiretap applications, 74 problems have arisen where an application for a wiretapping authorization falsely stated that it was approved by the properly designated Assistant Attorney General. 75 It has been held that the above provision for preapplication approval by a designated senior official in the Department of Justice is intended to play a central role in the statutory scheme of Title III, and that suppression must follow when it is shown that this statutory requirement has been ignored, such as where subordinates in the Justice Department signed the name of the Attorney General or a designated Assistant Attorney General to the authorization request. 76 But where it appears that the Attorney General personally approved the application for a wiretap order, evidence secured as a result of that interception need not be suppressed, even though the papers filed with the court falsely indicated that the designated Assistant Attorney General had approved the request. 77

Footnotes

Footnote 74. 18 USCS § 2516(1), generally discussed in 68 Am Jur 2d, Searches and Seizures § 265.

Footnote 75. United States v Chavez, 416 US 562, 40 L Ed 2d 380, 94 S Ct 1849, on remand (CA9 Cal) 533 F2d 491, cert den 426 US 911, 48 L Ed 2d 837, 96 S Ct 2237; United States v Giordano, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Footnote 76. United States v Giordano, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Forms: Motion to suppress evidence seized through wiretap on ground that applicant was not authorized to apply for order. 7 Federal Procedural Forms, L Ed § 20:584.

Affidavit in support of motion to suppress wiretap evidence on ground of applicant's lack of authority to apply for order. 7 Federal Procedural Forms, L Ed § 20:596.

Footnote 77. United States v Chavez, 416 US 562, 40 L Ed 2d 380, 94 S Ct 1849, on remand (CA9 Cal) 533 F2d 491, cert den 426 US 911, 48 L Ed 2d 837, 96 S Ct 2237.

§ 618 Facial invalidity of order

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A specified ground for moving to suppress the contents of a wire or oral communication intercepted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act is that the order of authorization or approval under which a communication was intercepted was insufficient on its face. 78 An error which may render a wiretapping order invalid under this provision is a failure by the judge to sign the wiretapping order. 79 Such an error is not a mere clerical error, which can be corrected nunc pro tunc, but indicates that the wiretap order was never approved by the judge, as required by statute. 80 However, it should be noted that if a wiretap order appears complete on its face, and states that the application for the order was authorized by a designated Assistant Attorney General, the order is not invalid on its face, even if it later appears that the designated Assistant Attorney General did not sign the authorization. 81 Under such circumstances, suppression is only available on the ground of unlawful interception if this violation frustrates one of the statutory requirements that directly and substantially implements the Congressional intention to limit the use of wiretapping. 82 Thus, the misidentification of the authorizing official, which can be corrected by a subsequent affidavit, assuming that a proper official did authorize the application, is only a technical defect, and does not render the wiretap order insufficient on its face. 83

Suppression of evidence need not follow from—

—the failure of an application for an extension to contain an explanation of the failure to obtain results, 84 where the application is not founded solely on a renewal of initial allegations, but contains additional allegations and information forming an ample basis for a probable cause finding. 85

—a failure to assert that all other less intrusive investigative techniques were unlikely to succeed, 86 where the affidavit describes the standard techniques that have been tried and facts demonstrating why they are no longer effective, even if every other possible means of investigation has not been exhausted. 87

—a failure to identify the identity of the targets. 88 And if a judge weighs the statutory factors, and finds that an interception order should be issued, the mere fact that additional parties may be overheard, but are not named in the application, does not invalidate the warrant and need not lead to the suppression of evidence. 89

—a failure to specify the period during which interceptions are authorized, 90 such as where a judge failed to date the order, if the clerical error can be corrected by the clerk stamping the date on the order the same day the judge entered it. 91 But if it appears that the date of the entry of the interception order cannot be ascertained, and the order, by its own terms, is for an indefinite duration, evidence obtained thereunder must be suppressed. 92

—the omission of a statement that the interception shall be executed as soon as practicable, 93 so long as the warrant was in fact executed quickly. 94

—a failure to include a minimization clause, 95 where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement by the authorities to abide by it. 96

—a failure to sign an affidavit in support of an application for an interception order, where the agent swore to the truth of the contents of the affidavit before the issuing judge. 97

It has been noted that several state courts have insisted on strict compliance with the statutory requirements of Title III, 98 and have invalidated warrants omitting several of the clauses required by the federal wiretap statute, even where federal courts would not have invalidated the warrant for failure to include a particular clause, and even where the policies underlying those clauses were actually followed by the investigators. 99

Footnotes

Footnote 78. 18 USCS § 2518(10)(a)(ii).

As to the form and content of the warrant, generally, see 68 Am Jur 2d, Searches and Seizures §§ 280 et seq.

Annotation: When do facts shown as probable cause for wiretap authorization under 18 USCS § 2518(3) become "stale," 68 ALR Fed 953.

Forms: Allegation in motion to suppress evidence obtained through authorized wiretap on ground that order of authorization is insufficient on face. 7 Federal Procedural Forms, L Ed § 20:591.

Footnote 79. United States v Ceraso (MD Pa) 355 F Supp 126.

Footnote 80. United States v Ceraso (MD Pa) 355 F Supp 126.

Footnote 81. *United States v Chavez*, 416 US 562, 40 L Ed 2d 380, 94 S Ct 1849, on remand (CA9 Cal) 533 F2d 491, cert den 426 US 911, 48 L Ed 2d 837, 96 S Ct 2237; *United States v Giordano*, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Footnote 82. § 617.

Footnote 83. *United States v Acon* (CA3 Pa) 513 F2d 513.

Footnote 84. 18 USCS § 2518(1)(f).

Footnote 85. *United States v Williams* (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296, cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355.

As to the form and content of an application for a wiretapping order, see 68 Am Jur 2d, Searches and Seizures §§ 259 et seq.

Footnote 86. 18 USCS § 2518(1)(c).

Footnote 87. *United States v Terry* (CA2 NY) 702 F2d 299, 12 Fed Rules Evid Serv 951, cert den 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095.

Footnote 88. 18 USCS § 2518(4)(a).

Footnote 89. *United States v Donovan*, 429 US 413, 50 L Ed 2d 652, 97 S Ct 658, conformed to (CA6 Ohio) 552 F2d 735.

Footnote 90. 18 USCS § 2518(4)(e).

Footnote 91. *United States v Diadone* (CA5 Tex) 558 F2d 775, reh den (CA5 Tex) 562 F2d 1257 and reh den (CA5 Tex) 562 F2d 1258 and cert den 434 US 1064, 55 L Ed 2d 765, 98 S Ct 1239 and cert den 434 US 1064, 55 L Ed 2d 765, 98 S Ct 1239 and cert den 434 US 1064, 55 L Ed 2d 765, 98 S Ct 1239 and (disapproved on other grounds by *United States v Ojeda Rios*, 495 US 257, 109 L Ed 2d 224, 110 S Ct 1845).

Footnote 92. *United States v Lamonge* (CA6 Ohio) 458 F2d 197, cert den 409 US 863, 34 L Ed 2d 110, 93 S Ct 153.

Footnote 93. Required by 18 USCS § 2518(5).

Footnote 94. *United States v Baynes* (ED Pa) 400 F Supp 285.

Footnote 95. Required by 18 USCS § 2518(5).

Footnote 96. *United States v Cirillo* (CA2 NY) 499 F2d 872, cert den 419 US 1056, 42 L Ed 2d 653, 95 S Ct 638, 95 S Ct 639.

Footnote 97. *United States v Florea* (CA6 Ohio) 541 F2d 568, cert den 430 US 945, 51 L Ed 2d 792, 97 S Ct 1579, reh den 431 US 925, 53 L Ed 2d 240, 97 S Ct 2201.

Footnote 98. See *Johnson v State*, 226 Ga 805, 177 SE2d 699; *State v Baldwin*, 289 Md 635, 426 A2d 916, cert den 454 US 852, 70 L Ed 2d 144, 102 S Ct 295 and appeal after

remand 51 Md App 538, 444 A2d 1058, appeal after remand 56 Md App 529, 468 A2d 394, cert den 299 Md 425, 474 A2d 218 and cert den 299 Md 425, 474 A2d 218; State v Pottle, 296 Or 274, 677 P2d 1; Commonwealth v Hashem, 526 Pa 199, 584 A2d 1378; State v Sitko (RI) 460 A2d 1, discussed in Fishman, Wiretapping and Eavesdropping, § 256.

Footnote 99. Cross v State, 225 Ga 760, 171 SE2d 507; State v Luther, 116 RI 28, 351 A2d 594, discussed in Fishman, Wiretapping and Eavesdropping § 256.

§ 619 Failure to comply with order, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence obtained through the interception of wire or oral communications may be suppressed on the ground that the interception was not made in conformity with the order of authorization or approval. 1 While it has been indicated that suppression is not required if there has been substantial compliance with the order and no prejudice to the defendant is shown, 2 it has also been indicated that the good-faith efforts and worthy intentions of the police, a prosecutor's lack of experience and need for secretarial assistance, or a desire to delay requesting an amendment to the wiretap order after an inadvertent unauthorized interception was discovered, are extraneous considerations which will not prevent suppression. 3 If, while conducting a wiretap pursuant to a court order authorizing the interception of a named party's conversations, the police discover that they have inadvertently also intercepted the conversations of a second party whose voice was similar to that of the named party, the conversations of the second party which were intercepted after the date the police discovered the error, may not be admitted into evidence where the police failed to seek an amendment of the wiretapping order. 4

Footnotes

Footnote 1. 18 USCS § 2518(10)(a)(iii).

Footnote 2. Poore v State, 39 Md App 44, 384 A2d 103.

Footnote 3. United States v Capra (CA2 NY) 501 F2d 267, cert den 420 US 990, 43 L Ed 2d 670, 95 S Ct 1424.

Footnote 4. United States v Capra (CA2 NY) 501 F2d 267, cert den 420 US 990, 43 L Ed 2d 670, 95 S Ct 1424.

Practice References Spectrogram voice identification. 19 Am Jur Proof of Facts 423.

§ 620 --Failure to minimize

Title III of the Omnibus Crime Control and Safe Streets Act provides that every interception order, and extension thereof, must contain a provision that the interception be conducted in such a way as to minimize the interception of wire, oral, or electronic communications not otherwise subject to interception under the Act. 5

A suppression motion alleging that there was insufficient minimization of conversation surveillance may be overruled where the movant fails to establish a prima facie pattern of interception of innocent conversations. 6

There has been some disagreement over whether all evidence obtained by interception of wire or oral conversations should be suppressed if the minimization requirements have not been met, or whether only the innocent conversations should be suppressed. 7 One court has said that evidence directly within the ambit of a lawful interception order should not be suppressed because the officers, while awaiting the incriminating evidence, also gathered some extraneous conversations. Thus, the nonincriminating evidence should be suppressed but the conversations which the warrant contemplated overhearing should be admitted into evidence. 8 Under this theory, if the conversations of innocent parties were overheard, those parties should bring a civil action, if they desire redress. 9 On the other hand, another court has observed that if only innocent calls were suppressed, the government could intercept every conversation during the entire period of the wiretap with nothing to lose by doing so, since it would obviously only use at trial those conversations which have incriminating value anyway. 10 Thus, it has been held that a failure by the government to comply with the minimization requirement should require the suppression of all of the communications which were intercepted. 11 The third view tends to reconcile these two lines of authority by distinguishing between blatant violations of the statute, in which no attempt of minimization is made, and cases in which minimization is attempted, but the court concludes that the efforts were inadequate; in the former case, all wiretap evidence should be suppressed, while in the latter case, partial suppression is warranted. 12

However, considerations are different if the police do not violate the general minimization requirement, but violate a special minimization provision of an interception order, such as an order prohibiting the interception of any conversations after a certain hour. 13 In such a case, violations are sufficiently deterred if only the conversations which were seized in violation of the time limitations in the interception order are suppressed. 14

Footnotes

Footnote 5. 68 Am Jur 2d, Searches and Seizures §§ 290 et seq.

Footnote 6. United States v Lawson (CA6 Ohio) 780 F2d 535.

Footnote 7. United States v Principie (CA2 NY) 531 F2d 1132, cert den 430 US 905, 51 L Ed 2d 581, 97 S Ct 1173, 97 S Ct 1174 (noting disagreement).

Footnote 8. *United States v Cox* (CA8 Mo) 462 F2d 1293, cert den 417 US 918, 41 L Ed 2d 223, 94 S Ct 2623, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 156.

Footnote 9. *United States v Cox* (CA8 Mo) 462 F2d 1293, cert den 417 US 918, 41 L Ed 2d 223, 94 S Ct 2623, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 156.

Footnote 10. *United States v Focarile* (DC Md) 340 F Supp 1033, affd (CA4 Md) 469 F2d 522, cert gr 411 US 905, 36 L Ed 2d 194, 93 S Ct 1530 and affd 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820 and affd without op (CA4 Md) 473 F2d 906, cert den 411 US 952, 36 L Ed 2d 414, 93 S Ct 1931.

Footnote 11. *United States v Focarile* (DC Md) 340 F Supp 1033, affd (CA4 Md) 469 F2d 522, cert gr 411 US 905, 36 L Ed 2d 194, 93 S Ct 1530 and affd 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820 and affd without op (CA4 Md) 473 F2d 906, cert den 411 US 952, 36 L Ed 2d 414, 93 S Ct 1931.

Footnote 12. *United States v Principie* (CA2 NY) 531 F2d 1132, cert den 430 US 905, 51 L Ed 2d 581, 97 S Ct 1173, 97 S Ct 1174; *United States v Curreri* (DC Md) 363 F Supp 430.

Footnote 13. *United States v Principie* (CA2 NY) 531 F2d 1132, cert den 430 US 905, 51 L Ed 2d 581, 97 S Ct 1173, 97 S Ct 1174.

Footnote 14. *United States v Principie* (CA2 NY) 531 F2d 1132, cert den 430 US 905, 51 L Ed 2d 581, 97 S Ct 1173, 97 S Ct 1174.

§ 621 --Failure to make timely reports

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An interception order may require reports to be made to the judge who issued the order showing what progress has been made toward the achievement of the authorized objective and the need for continued interception, such reports to be made at such intervals as the judge may require. 15 While progress reports should be timely filed in accordance with the judge's order, the sanction for failure to do so is not the automatic suppression of the tapes. 16 Instead, the judge has the discretion to authorize the proper sanction. 17 A defendant may not successfully move for suppression in the absence of a showing of express prejudice. 18

Footnotes

Footnote 15. 18 USCS § 2518(6), generally discussed in 68 Am Jur 2d, Searches and Seizures §§ 285, 298 et seq.

Footnote 16. *United States v Scafidi* (CA2 NY) 564 F2d 633, cert den 436 US 903, 56 L Ed 2d 400, 98 S Ct 2231 and cert den 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and

cert den 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and cert den 436 US 912, 56 L Ed 2d 413, 98 S Ct 2252, reh den 439 US 960, 58 L Ed 2d 353, 99 S Ct 366.

Footnote 17. United States v Scafidi (CA2 NY) 564 F2d 633, cert den 436 US 903, 56 L Ed 2d 400, 98 S Ct 2231 and cert den 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and cert den 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and cert den 436 US 912, 56 L Ed 2d 413, 98 S Ct 2252, reh den 439 US 960, 58 L Ed 2d 353, 99 S Ct 366.

Footnote 18. United States v Canon (ND Ala) 404 F Supp 841.

§ 622 Recording of intercepted communications

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The contents of any wire, oral, or electronic communication intercepted by any means authorized by Title III of the Omnibus Crime Control and Safe Streets Act shall, if possible, be recorded on tape, wire, or other comparable device. 19 A failure to record, though admittedly a violation of Title III, need not lead to suppression and the reversal of a conviction, since the recording requirement is not central to preserving the right of privacy. 20

§ 622 ----Recording of intercepted communications [SUPPLEMENT]

Case authorities:

Suppression of wiretap evidence was improper in prosecution of former police officer for accepting bribes to overlook illegal lottery operation where statute allowed interception of wire or oral communication involving "suspected criminal activities" when one party had given prior consent; informant had consented to wiretap and had worn body wire during conversations with defendant, and defendant made incriminating statements with respect to his unlawful involvement with lottery operation in conversations with informant. Commonwealth v Taylor (1993, Pa Super) 622 A2d 329.

Police captain, involuntarily retired for racist remarks made during telephone conversation with subordinate, was not entitled to suppress evidence of recorded conversation on basis of statute sanctioning conduct of intercepting oral communications, where all incoming calls to headquarters were regularly monitored and recorded and, as 25- year veteran, defendant knew that conversations were recorded and sometimes transcribed, subordinate knew this, and this knowledge constituted consent of at least one party. Further, law enforcement agencies can intercept and record in-coming telephone calls without consent. Knight v Department of Police (1993, La App 4th Cir) 619 So 2d 1116, cert den (La) 1993 La LEXIS 2966.

Footnotes

Footnote 19. 68 Am Jur 2d, Searches and Seizures § 288.

Footnote 20. United States v Clerkley (CA4 Md) 556 F2d 709, cert den 436 US 930, 56 L Ed 2d 775, 98 S Ct 2830 and cert den 436 US 930, 56 L Ed 2d 775, 98 S Ct 2830 and cert den 436 US 930, 56 L Ed 2d 775, 98 S Ct 2830.

§ 623 Failure to comply with sealing requirements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Immediately upon the expiration of an interception order (or extensions of it), the recordings of the intercepted wire, oral, or electronic communications must be made available to the judge issuing the order and must be sealed under his or her directions. 21 When there has been a violation of the sealing requirement, exclusion of the evidence is justified on the ground that a defendant need not confront inaccurate reproductions of his own conversations. 22 In fact, the Supreme Court has held that delay in sealing recordings derived from electronic surveillance requires suppression of the recordings, unless the government is able to give a satisfactory explanation at the suppression hearing as to why the delay should be deemed excusable. 23

§ 623 ----Failure to comply with sealing requirements [SUPPLEMENT]

Case authorities:

Delay in sealing tapes within two to five day range did not merit suppression, where government explained that it had miscalculated expiration date and had not thought it necessary to contact judge at home in order to seal tapes over weekend. United States v Pitera (1993, CA2 NY) 5 F3d 624, cert den (US) 62 USLW 3552.

District court did not err by not suppressing video and audio tapes of two dinners, even though they were not sealed immediately after they were made, where court concluded that first order governing surveillance activities extended period for ten days and second order extended period for thirty days, and although one tape was not sealed until two days after extended period, tape was timely sealed, where government provided satisfactory explanation, defendant did not object to delay, and court could discern no prejudice. United States v Blandford (1994, CA6 Ky) 33 F3d 685, 1994 FED App 312P, reh, en banc, den (CA6 Ky) 1994 US App LEXIS 34101 and (criticized by United States v Hairston (CA4 NC) 1995 US App LEXIS 1995).

Footnotes

Footnote 21. 68 Am Jur 2d, Searches and Seizures § 303.

Footnote 22. *United States v Ricco* (CA2 NY) 566 F2d 433, cert den 436 US 926, 56 L Ed 2d 768, 98 S Ct 2819.

Annotation: Delay in sealing or failure to seal tape or wire recording as required by 18 USCS § 2518(8)(a) as ground for suppression of such recording at trial, 62 ALR Fed 636.

Footnote 23. *United States v Ojeda Rios*, 495 US 257, 109 L Ed 2d 224, 110 S Ct 1845, later proceeding (CA2 Conn) 922 F2d 934, 31 Fed Rules Evid Serv 1215, stay den 499 US 915, 113 L Ed 2d 236, 111 S Ct 1304 and cert den (US) 115 L Ed 2d 984, 111 S Ct 2811 and cert den (US) 115 L Ed 2d 1025, 111 S Ct 2858 and cert den (US) 115 L Ed 2d 1026, 111 S Ct 2858.

Tape recordings which had been unsealed for use in another trial and resealed by an FBI agent, but not by judicial order, may be admissible, since the judicial seal was absent due to a good faith misunderstanding of the statutory requirements; however, an evidentiary hearing regarding the chain of custody was required in the event of a new trial. *United States v Long* (CA2 NY) 917 F2d 691, 135 BNA LRRM 2812, 31 Fed Rules Evid Serv 526.

For an expanded discussion of the "satisfactory explanation" requirement for admissibility, see 68 Am Jur 2d, Searches and Seizures § 306.

§ 624 Destruction of tapes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Recordings of intercepted wire, oral, or electronic communications may not be destroyed except upon an order of the judge who issued or denied the interception order, and that in any event, the tapes must be kept for 10 years. 24 The purposes of this statute are to insure adequate disclosure of the contents of intercepted communications, 25 in order to enable the aggrieved party to meet his initial burden to demonstrate that there has been illegal wiretapping. 26 Therefore, if the tape recordings of intercepted conversations have been destroyed, the government is at least obligated to provide accurate transcripts of the conversations, 27 or proof that its information was not tainted by illegal wiretapping, but had an independent source. 28

Footnotes

Footnote 24. 18 USCS § 2518(8)(a).

Footnote 25. *United States v Crouch* (CA7 Ill) 528 F2d 625, cert den 429 US 900, 50 L Ed 2d 184, 97 S Ct 266, 97 S Ct 267.

Footnote 26. *United States v Huss* (CA2 NY) 482 F2d 38.

As to the burden of proof, see § 653.

Footnote 27. *United States v Huss* (CA2 NY) 482 F2d 38.

Footnote 28. *United States v Crouch* (CA7 Ill) 528 F2d 625, cert den 429 US 900, 50 L Ed 2d 184, 97 S Ct 266, 97 S Ct 267.

As to the independent source rule, see § 639.

§ 625 Failure to give notice or serve inventory

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The supervising judge must cause notice of the application for an intercept order, the order permitting or disallowing the interception, and the fact that wire, oral, or electronic communications were or were not intercepted to be served on the persons named in the application and such other persons that the judge determines, in his discretion, ought to be served in the interest of justice. 29

A postinterception failure to serve the notice and inventory cannot result in retroactively rendering the interception unlawful. 30 Even if notice was not given until after the 90-day statutory deadline, suppression of the evidence is not required if the defendant fails to show actual prejudice caused by the delay. 31

Footnotes

Footnote 29. 18 USCS § 2518(8)(d), generally discussed in 68 Am Jur 2d, Searches and Seizures §§ 309 et seq.

Annotation: Under what circumstances is suppression of wiretap evidence required when person overheard in wiretap but not mentioned in order therefor is not served with inventory notice provided for by 18 USCS § 2518(8)(d), 54 ALR Fed 599.

Footnote 30. *United States v Donovan*, 429 US 413, 50 L Ed 2d 652, 97 S Ct 658, conformed to (CA6 Ohio) 552 F2d 735.

Footnote 31. *United States v Rizzo* (CA2 NY) 492 F2d 443, cert den 417 US 944, 41 L Ed 2d 665, 94 S Ct 3069; *United States v Cantor* (ED Pa) 328 F Supp 561, affd (CA3 Pa) 470 F2d 890; *United States v Canon* (ND Ala) 404 F Supp 841.

c. Improper Identification Evidence [626-630]

§ 626 Constitutional implications, generally

Apart from any right-to-counsel claim, a confrontation may be so unnecessarily suggestive and conducive to irreparable mistaken identification that an accused would thereby be denied due process of law. 32

Since no lineup or showup can be entirely free from suggestion, the presence of possibly prejudicial factors in a pretrial identification procedure will not necessarily result in the court voiding its results. 33 The validity of a claimed violation of due process depends on the totality of the circumstances surrounding the confrontation. 34

The admissibility of identification evidence is governed by a two-step analysis: first, whether the identification procedure was impermissibly suggestive, 35 and second, whether such suggestiveness created a substantial likelihood of irreparable misidentification. 36 The defendant's protection against the obvious suggestiveness in any courtroom identification confrontation is his right to cross-examination. 37

◆ **Observation:** The two-step test used to determine admissibility of identification evidence reflects the fact that not all impermissibly suggestive confrontations give rise to a substantial likelihood of irreparable misidentification. 38

Footnotes

Footnote 32. *Stovall v Denno*, 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967.

Annotation: Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures, 39 ALR3d 791.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures, 39 ALR3d 487.

Validity, under Federal Constitution, of police lineup or showup procedures—Supreme Court cases, 34 L Ed 2d 839.

Law Reviews: M Zalman, LJ Siegel, The psychology of perception, eyewitness identification, and the lineup, 27 Crim L Bull 159-76 Mr/Ap '91.

Footnote 33. *United States v Simmons* (CA2 NY) 923 F2d 934, 32 Fed Rules Evid Serv 1296, cert den (US) 114 L Ed 2d 104, 111 S Ct 2018 and cert den (US) 116 L Ed 2d 334, 112 S Ct 383, later proceeding (SD NY) 1992 US Dist LEXIS 5088.

Footnote 34. *Stovall v Denno*, 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967.

As to whether the totality of the circumstances indicate reliability of identification in spite of possibly prejudicial factors, see § 627.

Footnote 35. *United States v Rundell* (CA8 Ark) 858 F2d 425.

Footnote 36. *United States v Brown* (CA5 La) 920 F2d 1212, cert den (US) 114 L Ed 2d 119, 111 S Ct 2034.

In a prosecution of multiple defendants for drug importation and other related conspiracies, the trial court properly admitted testimony by a witness of 2 previous photographic identifications the witness had made of one of the defendants, though the witness was unable to identify the defendant at trial. Even though the prior identification procedure had been unnecessarily suggestive, it had been attended by sufficient indicia of reliability, including the fact that the witness had consistently picked the defendant's photograph from 2 different photograph books on 3 separate occasions, the fact that the witness had given an accurate description of the defendant and had been certain of the identification, and the fact that the witness had observed the defendant for one-half hour during one meeting as well as on other occasions. *United States v Di Tommaso* (CA2 NY) 817 F2d 201, 22 Fed Rules Evid Serv 1595.

For a discussion of the admissibility of a lineup identification following illegal arrest, see § 638.

Footnote 37. *State v Smith*, 200 Conn 465, 512 A2d 189.

Footnote 38. *Hulsey v Sargent* (CA8 Ark) 821 F2d 469, 23 Fed Rules Evid Serv 756, cert den 484 US 930, 98 L Ed 2d 258, 108 S Ct 299, appeal after remand, remanded (CA8 Ark) 865 F2d 954, amd (CA8) 1989 US App LEXIS 3515 and cert den 493 US 923, 107 L Ed 2d 270, 110 S Ct 291, app dismd (CA8) 1994 US App LEXIS 1446.

§ 627 --Reliability as determining factor

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Because identification evidence derived from an unnecessarily suggestive source need not be excluded if the totality of the circumstances indicates its reliability, 39 it has been said that the reliability of identification evidence is the linchpin in determining its admissibility. 40 So long as an identification is reliable, its exclusion is not constitutionally mandated. 41

The passage of time between the crime charged and the in-court confrontation with the witnesses generally does not render the in-court identifications so unreliable as to be inadmissible. Rather, the passage of time is a proper item for cross-examination and closing argument, and a circumstance for the jury to consider in assessing the weight to be given the identification testimony. 42 A three to four-month delay between the crime and the identification does not render the identification inherently unreliable. 43

A criminal defendant who concedes that he was apprehended while committing a crime and is guilty as charged, may not object to the admission of eyewitness identifications

made by witnesses at trial, since the defendant has, in effect, conceded that the identifications are reliable. 44

For both in-court and out-of-court identifications, 45 there are five factors to consider in evaluating the reliability of an identification: the opportunity of the witness to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. 46

The following factors suggested by the Supreme Court 47 in determining the totality of the circumstances should be kept in mind by the attorney arguing that the identification was a result of suggestive police procedures rather than observation at the scene:

- The prior opportunity to observe the alleged criminal act
- The existence of any discrepancy between any prelineup description and the defendant's actual description
- Any identification of another person prior to the lineup
- The identification by picture of the defendant prior to lineup
- Failure to identify the defendant on a prior occasion
- The lapse of time between the alleged act and the lineup identification
- Whether the witness knew the defendant

§ 627 --Reliability as determining factor [SUPPLEMENT]

Case authorities:

The trial court did not err by finding that a robbery victim's in- court identification of defendant was based upon what he observed the night of the robbery at a bank teller machine and was of independent origin from a pretrial photographic identification where the victim testified that he was face to face with defendant for ten minutes in a well-lighted area with nothing concealing defendant's facial features and that his corrected vision is 20\20, and a detective testified that the victim's initial description of defendant after the robbery was "pretty close" to his actual appearance and that defendant immediately picked defendant's picture at the photographic lineup and seemed positive about his identification. *State v Lindsey* (1995) 118 NC App 549, 455 SE2d 909.

Footnotes

Footnote 39. *Jennings v State* (Ala App) 513 So 2d 91.

Footnote 40. *Manson v Brathwaite*, 432 US 98, 53 L Ed 2d 140, 97 S Ct 2243; *United States v Dring* (CA9 Cal) 930 F2d 687, 91 CDOS 2449, 91 Daily Journal DAR 3909, 32

Fed Rules Evid Serv 816, cert den (US) 121 L Ed 2d 68, 113 S Ct 110; Glover v State, 276 Ark 253, 633 SW2d 706.

Footnote 41. Mullen v Blackburn (CA5 La) 808 F2d 1143.

Footnote 42. United States v Rundell (CA8 Ark) 858 F2d 425.

Footnote 43. United States v Causey (CA6 Mich) 834 F2d 1277, 24 Fed Rules Evid Serv 370, cert den 486 US 1034, 100 L Ed 2d 606, 108 S Ct 2019.

Footnote 44. Mullen v Blackburn (CA5 La) 808 F2d 1143.

Footnote 45. United States v Dring (CA9 Cal) 930 F2d 687, 91 CDOS 2449, 91 Daily Journal DAR 3909, 32 Fed Rules Evid Serv 816, cert den (US) 121 L Ed 2d 68, 113 S Ct 110.

Footnote 46. Neil v Biggers, 409 US 188, 34 L Ed 2d 401, 93 S Ct 375.

Footnote 47. United States v Wade, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

§ 628 Suggestive lineup

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The manner of conducting a police lineup may be so unnecessarily suggestive and conducive to an irreparably mistaken identification as to constitute a violation of the Due Process Clause. 48 In order to minimize the dangers inherent in the lineup procedure, the Supreme Court has affirmed the right of suspects to have the services of counsel during a lineup, 49 and the fact that counsel was not present when a suspect was placed in a lineup is a ground for suppressing identification evidence. 50 If the circumstances attending a lineup are suggestive or unfair, this fact also renders the evidence of any subsequent identification inadmissible; however, the effect of the totality of the circumstances must be determined before such evidence is ruled inadmissible. 51

Some facts which may make a lineup unduly suggestive are: a prior confrontation between the defendant and the witness, the use of two lineups in which the defendant was the only common participant, a contrast in height between the defendant and other participants in the lineup, and the dressing of the defendant in clothes similar to that worn by the perpetrator of the crime. 52 However, the mere fact that a witness participated in a prior photo identification does not automatically result in a subsequent live lineup being suggestive, notwithstanding that the suspect was the only person who appeared in both lineups. The witness may be cross-examined on the allegation of suggestiveness, and it is within the province of the jury to assess the credibility of the witness on that issue. 53

A line-up is not impermissibly suggestive merely because the individuals composing the

§ 628 ----Suggestive lineup [SUPPLEMENT]

Case authorities:

Defendant had no federal constitutional right to have his attorney observe oral portion of witness' post-lineup identification of defendant. *Sams v Walker* (1994, CA2 NY) 18 F3d 167.

Police lineup testimony was admissible, even though defendant's white tennis shoes were distinctive compared to other participants' footwear, where witnesses had ample time to observe robber during crime, prior descriptions were accurate, and physical similarities and otherwise identical clothing of defendant and other lineup participants supported finding that different shoes was not so impermissibly suggestive as to raise substantial possibility of misidentification. *People v Ridenour* (1994, Colo App) 878 P2d 23, reh den (Feb 17, 1994) and cert den (Colo) 1994 Colo LEXIS 661.

Trial court did not err in denying defense motion to suppress defendant's out-of-court identification in photo lineup where identification procedure used was not so impermissibly suggestive as to give rise to substantial likelihood of irreparable misidentification. Relevant factors were witness' opportunity to see criminal at time of crime, witness' degree of attention at that time, accuracy of witness' prior description of criminal, level of certainty demonstrated by witness at confrontation, and length of time between crime and confrontation. *McGee v State* (1993) 209 Ga App 261, 433 SE2d 374, 93 Fulton County D R 2670.

Fact that defendant was only member of lineup wearing red or maroon clothing did not render lineup unduly suggestive, since two witnesses who identified defendant relied on their memory of defendant's general build or appearance, and witnesses had had opportunity to view perpetrator at scene of crime. *State v Weaver* (1995, Mo) 912 SW2d 499.

Court improperly permitted one of 2 complaining witnesses to make in-court identification where court had found that witness had participated in tainted lineup identification procedure, but there was no hearing on issue of whether witness's ability to recall features of perpetrator had survived taint of lineup, and there was no finding that witness had independent recollection or that such recollection could have served as independent basis for reliable in-court identification. *People v Manuel* (1992, 2d Dept) 182 AD2d 711, 582 NYS2d 735, app den 80 NY2d 834, 587 NYS2d 919, 600 NE2d 646.

Lineup identifications were properly admitted in evidence in prosecution for manslaughter, even though single photograph of defendant had been shown to witnesses 4 months prior to lineup, since suggestiveness of prior identification was sufficiently attenuated in time to nullify any taint. *People v Reynoso* (1992, 1st Dept) 182 AD2d 546, 582 NYS2d 200, app den 80 NY2d 836, 587 NYS2d 921, 600 NE2d 648.

Lineup was not rendered unduly suggestive by detective's comment to eyewitness prior to lineup that he believed police had arrested same individual she had selected from photographic lineup since officer did not suggest which lineup participant was that

individual. *People v Simmonds* (1992, 2d Dept) 182 AD2d 650, 582 NYS2d 236, app den 80 NY2d 910, 588 NYS2d 835, 602 NE2d 244.

Identification testimony was not subject to suppression merely because retired police detective was unable to remember circumstances surrounding victim's transportation to precinct for purpose of viewing lineup; detective's inability to recall facts did not deny defendant's right to explore issue of suggestiveness with regard to lineup. *People v Barton* (1992, 2d Dept) 183 AD2d 836, 584 NYS2d 80.

In trial for numerous sexual offenses against 8 victims, defendant failed to establish that lineups were unfair because 2 victims had seen media coverage of his arrest where (1) one victim testified that she saw newspaper report of defendant's arrest, but that she thought it was after she identified him in lineup, and (2) second victim had spent 7 1/2 hours with defendant while she was repeatedly raped and abused, and thus court properly credited her testimony that she had independent recollection of defendant. *People v Hamilton* (1992, 2d Dept) 186 AD2d 581, 588 NYS2d 379.

Witnesses' identification of defendant in lineup was admissible, although defendant was only person in lineup wearing white pants and perpetrator had been wearing white pants, since each witness had independent basis for identification of defendant. *State v Walker* (1995, RI) 667 A2d 1242.

In prosecution for masked armed robbery as party to crime, victim's voice identification obtained via voice lineup procedure was reliable, where, as to lineup procedure, each of five voices sounded similar in accent, range, and volume, and, although slight lisp in defendant's voice could be detected, any disparity between defendant's voice and that of other participants fell far short of substantial likelihood of suggestiveness required for reversal, where fact that victim was able to articulate, after procedure, distinguishing features of defendant's voice that allowed him to identify defendant as perpetrator did not condemn integrity of lineup as impermissibly suggestive, and where possibility that procedure might have produced better comparison if co-defendant had been included in lineup did not render procedure used impermissibly suggestive; failure of police to abide by defense counsel's request that they conduct another lineup with both defendant and co-defendant as participants or, in alternative, with codefendant alone did not violate defendant's sixth amendment right to counsel, where defense counsel was present through duration of lineup and even asserted his advice and thoughts concerning procedures, and his function as observer was not frustrated. *State v Ledger* (1993, App) 175 Wis 2d 116, 499 NW2d 198.

Lineup identification by eyewitness would not be suppressed on ground that lineup was unduly suggestive, even though defendant was wearing stonewashed denim jeans as witness had reported to police, where (1) description of defendant given by witness also included age, height, weight, build, hair color and facial features, (2) visual examination of lineup photograph indicated that fillers were remarkably similar in appearance to defendant, (3) stonewashed denim jeans were commonplace item of clothing and were not so dissimilar in appearance from pants worn by fillers as to call undue attention to defendant, and (4) all fillers wore sweaters and went shoeless, as did defendant, because defendant's jacket and shoes had been confiscated for evidentiary purposes. *People v Torres* (1992, 1st Dept) 182 AD2d 587, 583 NYS2d 797, app den 80 NY2d 897, 587 NYS2d 927, 600 NE2d 654.

Lineup identification procedure was not improper where (1) officer asked robbery victim

if she wanted to view lineup again after she blurted out number other than defendant's and fled in panic from room because of fear that lineup participants could see her, and (2) victim did not recall making any identification and officer did not tell her that she had chosen wrong suspect. *People v Dabdaub* (1992, 1st Dept) 186 AD2d 481, 589 NYS2d 407, app den 81 NY2d 787, 594 NYS2d 734, 610 NE2d 407.

Footnotes

Footnote 48. *Neil v Biggers*, 409 US 188, 34 L Ed 2d 401, 93 S Ct 375; *Coleman v Alabama*, 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999; *Foster v California*, 394 US 440, 22 L Ed 2d 402, 89 S Ct 1127.

Annotation: Criminal law: dog scent discrimination lineups, 63 ALR4th 143.

Admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures, 39 ALR3d 487.

Validity, under Federal Constitution, of police lineup or showup procedures—Supreme Court cases, 34 L Ed 2d 839.

Practice References Lineups and showups: admissibility and effect of pretrial identification. 19 Am Jur POF2d, p 435.

Footnote 49. *United States v Wade*, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

Footnote 50. *Gilbert v California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951.

Forms: Motion to suppress evidence of pretrial identification and tainted courtroom identification based on defendant being placed in lineup without presence of counsel. 7 Federal Procedural Forms, L Ed § 20:642.

Affidavit in support of motion to suppress evidence of pretrial identification alleging that defendant was placed in lineup without presence or waiver of counsel. 7 Federal Procedural Forms, L Ed § 20:648.

Footnote 51. *Foster v California*, 394 US 440, 22 L Ed 2d 402, 89 S Ct 1127.

Forms: Motion to suppress evidence of pretrial identification and tainted courtroom identification on grounds of unnecessarily suggestive lineup. 7 Federal Procedural Forms, L Ed § 20:641.

Footnote 52. *Foster v California*, 394 US 440, 22 L Ed 2d 402, 89 S Ct 1127.

Footnote 53. *State v Hornbuckle* (Mo) 769 SW2d 89, cert den 493 US 860, 107 L Ed 2d 128, 110 S Ct 171.

Footnote 54. *State v Williamson* (Mo App) 836 SW2d 490.

§ 629 Suggestive showup

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A "showup" may be distinguished from a "lineup" in that in a showup, one or more suspects are shown by themselves to the witnesses, while in a lineup, a larger array of persons, including the suspect, is presented to the witness. The Supreme Court has noted that the practice of showing up suspects outside a lineup has been widely condemned, but the totality of the circumstances must be assessed before a determination is made that a showup was so suggestive as to make the resulting identification inadmissible. 55 For example, a prompt confrontation between the witness and the suspect may be proper and necessary where the police are not sure how long the witness might survive the injuries suffered in the incident in question. 56 A showup may be proper where the witness states that he is already quite sure of his description of the alleged perpetrator of the crime, but that he wants to see the accused again out of an abundance of caution. 57 The admission of identification testimony into evidence is also proper where the identification is based on the complainant's observations and recollections of how the perpetrators appeared at the time of the crime, and not of how the suspects appeared at the police station the next day when a showup was conducted. 58 On the other hand, an identification based on a showup should be suppressed when the showup was conducted in a jail cell, or where the police insisted on a one-to-one confrontation instead of a lineup. 59 It may also be unduly suggestive to have a group of witnesses confront a suspect at one time, especially where one witness has announced that he believes the suspect to be the person who committed the crime, and the other witnesses have agreed. 60 Identification evidence gained through a showup should also be suppressed where a defendant, who has not been identified in the first confrontation, is dressed in clothes similar to that worn by the perpetrator and is again shown to the witnesses. 61

§ 629 ----Suggestive showup [SUPPLEMENT]

Case authorities:

Defendant's identification by victim as person who had pointed gun at him, threatened to kill him, and finally hit him on head with gun, did not violate due process although show-up identification which occurred within minutes of incident had not been preceded by pre-apprehension description of defendant by victim, since identification was fully reliable. *United States v Watson* (1996, CA1 Mass) 76 F3d 4, cert den (1996, US) 1996 US LEXIS 3704.

Showup evidence in narcotics cases should be avoided and, at very least, subjected to Wade hearings to safeguard accuracy given precarious nature of process of identifying individuals in "fast-paced environment" of drug transactions. *People v Mato* (1994) 83 NY2d 406, 611 NYS2d 92, 633 NE2d 446.

Defendant was entitled to suppression of undercover officer's showup identification made 6 days after drug transaction, since 6-day lapse was not integral police procedure

sufficiently connected and contemporaneous to arrest itself, and thus identification was not merely confirmatory; fact that identification was made by trained police officer did not overcome suggestiveness of showup identification. *People v Minaya* (1992, 2d Dept) 183 AD2d 920, 584 NYS2d 155.

Defendant was not entitled to suppression of identification made following street corner showup held 2 days after crime, since showup was not unduly suggestive as police were not responsible for arranging it, where victim telephoned police to advise them of defendant's whereabouts, and police involvement was limited to transporting victim to stated location to confirm defendant's identity. *People v Dade* (1992, 4th Dept) 187 AD2d 959, 591 NYS2d 122, app den 81 NY2d 838, 595 NYS2d 737, 611 NE2d 776.

Defendant was entitled to Wade hearing based on his assertion that he had been displayed to witness in suggestive showup, even though he failed to controvert People's affirmation attesting that he was previously known to witness, where affirmation was merely "boiler-plate" form containing incomplete blank spaces instead of specific allegations detailing in what manner and for how long defendant was known to complainant; under circumstances, affirmation did not establish prima facie showing of prior relationship, and thus defendant was under no duty to reply. *People v Williams* (1992, 1st Dept) 182 AD2d 490, 582 NYS2d 406, app dismd without op 80 NY2d 897, 587 NYS2d 928, 600 NE2d 655, supp op (1st Dept) 189 AD2d 598, 593 NYS2d 180, app den 81 NY2d 978, 598 NYS2d 780, 615 NE2d 237.

Court properly limited defense counsel's cross examination of People's witnesses regarding suggestiveness of station house showup where showup was merely confirmatory. *People v Delgado* (1992, 2d Dept) 186 AD2d 579, 588 NYS2d 378, app den 80 NY2d 1026, 592 NYS2d 675, 607 NE2d 822.

"Showup" identification procedures in which three witnesses observed defendant while he was sitting in a police car, coupled with statements made by officers to two of the witnesses that they had a suspect, that he had changed clothes, and that he no longer had a mustache, were unnecessarily suggestive. However, under the totality of the circumstances there was no substantial likelihood of misidentification and the identification of defendant by each witness was sufficiently reliable to be admissible where each witness observed defendant as he fled from the scene of an armed robbery; each witness indicated a high degree of attention to the appearance of the man they observed; the witnesses' descriptions of the perpetrator varied from defendant's appearance only because defendant had shaved his mustache and changed clothes between the time the witnesses observed him and his apprehension by the police; the identifications by all three witnesses occurred within an hour after the robbery; and the three witnesses were all unequivocal in their identifications of defendant. *State v Capps* (1994) 114 NC App 156, 441 SE2d 621.

While pretrial identification obtained by unnecessarily suggestive means is normally not admissible in court, such identification is not per se inadmissible and may be introduced into evidence if found to be reliable and based upon the witness's independent recall absent the illegal police conduct. *Willacy v State* (1994, Fla) 640 So 2d 1079, 19 FLW S 258.

Evidence of showup identification was not admissible where it occurred about 2 1/2 hours after victim had been robbed, both victim and defendant were transported back to crime scene for showup, victim had been told by police that they knew name of his

robber and had suspect in custody, defendant was in handcuffs and escorted by uniformed officer when viewed by victim, and defendant was not previously known to victim; in such circumstances, lineup was required. *People v Johnson* (1993) 81 NY2d 828, 595 NYS2d 385, 611 NE2d 286.

While limits of appropriate time period between alleged crime and showup identification may vary from case to case, emphasis must be on prompt and immediate nature of identification after crime has been committed, not after defendant has been arrested. *People v Johnson* (1993) 81 NY2d 828, 595 NYS2d 385, 611 NE2d 286.

Footnotes

Footnote 55. *Stovall v Denno*, 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967.

Annotation: Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures, 39 ALR3d 791.

Validity, under Federal Constitution, of police lineup or showup procedures—Supreme Court cases, 34 L Ed 2d 839.

Practice References Lineups and showups: admissibility and effect of pretrial identification. 19 Am Jur POF2d, p 435.

Forms: Motion to suppress evidence of pretrial identification and tainted courtroom identification based on one man showup. 7 Federal Procedural Forms, L Ed § 20:643.

Footnote 56. *Stovall v Denno*, 388 US 293, 18 L Ed 2d 1199, 87 S Ct 1967.

Footnote 57. *Crume v Beto* (CA5 Tex) 383 F2d 36, cert den 395 US 964, 23 L Ed 2d 749, 89 S Ct 2106.

Footnote 58. *United States v Goodlow* (CA8 Mo) 500 F2d 954.

Footnote 59. *Clemons v United States*, 133 US App DC 27, 408 F2d 1230, cert den 394 US 964, 22 L Ed 2d 567, 89 S Ct 1318.

Footnote 60. *Clemons v United States*, 133 US App DC 27, 408 F2d 1230, cert den 394 US 964, 22 L Ed 2d 567, 89 S Ct 1318.

Footnote 61. *United States v Kemper*, 140 US App DC 47, 433 F2d 1153.

§ 630 Suggestive photographic evidence

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The use of pretrial photographic identification of suspects is permissible, but the Supreme Court has recognized that there are risks inherent in this method of identification. 62 Accordingly, while initial identifications by photographs are not prohibited, a claim of prejudice may result in the suppression of such identification evidence. 63 Factors which do not render the use of photographic identifications unduly suggestive, and which do not lead to suppression, include the display of pictures of the suspect and of other persons, in contrast to the display of pictures of the suspect only or of a group of pictures containing numerous pictures of the suspect, 64 the use of a mug shot, if its probative worth outweighs its prejudicial effect in revealing the defendant's prior encounters with the law, 65 and the display of a picture in which the suspect is wearing a distinctive uniform, as distinguished from the display of a picture in which the suspect is dressed in a manner conforming to the description of the perpetrator. 66

If the police officers make suggestive remarks during the viewing, an in-court identification will be suppressed, 67 while it will not be suppressed if no evidence is presented that the officers made suggestive remarks to the witness. 68 Consideration must also be given to the problem of whether any subsequent in-court identification of the accused is so tainted by the witness' identification at an unfairly conducted lineup as to be inadmissible, or whether the in-court identification is adequately supported by an independent source, such as the witness' own recollection of the defendant while the crime was in progress. 69

A defendant does not have the right to have counsel attend a display of photographs to witnesses, and photographic identifications may be used at trial notwithstanding the fact that counsel did not attend the viewing. 70

§ 630 ----Suggestive photographic evidence [SUPPLEMENT]

Case authorities:

Defendant's right against self-incrimination was not violated by prosecutor's comment at trial as to defendant's refusal to put on hat for photographs to be used for identification, since defendant had no Fifth Amendment right to refuse to put on hat. *United States v Bullard* (1994, CA1 Mass) 37 F3d 765, cert den (1995, US) 131 L Ed 2d 734, 115 S Ct 1809.

Pre-trial photographic identifications of defendant by robbery victims were not unduly suggestive in violation of due process where 50 photograph array was presented to each victim in entirely neutral fashion and no attention was directed by police officers to any particular picture in album. *United States v Thai* (1994, CA2 NY) 29 F3d 785.

Defendant's due process rights were not violated by store clerk's in-court identification of defendant as robber where store clerk's pretrial photographic identification from police photo array was not impermissibly suggestive. *Romero v Tansy* (1995, CA10 NM) 46 F3d 1024.

A photographic lineup was not impermissibly suggestive, where accused was identified by a witness to whom accused had sold the murder victim's car, and although several of the photographs had writing on them, the witness testified that he had spent 30 minutes with accused and had paid no attention to the writing. *Gorby v State* (1993, Fla) 630 So

2d 544, 18 FLW S 623, petition for certiorari filed (Mar 25, 1994).

Lineup identification of defendant, conducted 3 months after victims' viewing of photographs of defendant, was sufficiently attenuated from photographic identification to insure its reliability. *People v Murchison* (1993, 2d Dept) 189 AD2d 900, 592 NYS2d 988, app den 81 NY2d 890, 597 NYS2d 951, 613 NE2d 983 and app den 81 NY2d 890, 597 NYS2d 951, 613 NE2d 983.

Family Court properly denied juvenile's motion for Wade hearing on ground that suggestiveness of photographic array was not concern where, during 5-minute encounter during which robbery victim had ample opportunity to observe juvenile, victim recognized him by his unusual hairstyle, having previously seen him approximately 14 times during year prior to incident at junior high school which they both attended, and thus photographic viewing was merely confirmatory. *Re Raul F.* (1992, 1st Dept) 186 AD2d 74, 588 NYS2d 546.

A display of a single photograph to a crime witness raises no due process concerns unless it is determined to be unnecessarily or impermissibly suggestive, and the inquiry into whether the procedure was unnecessarily or impermissibly suggestive involves inquiry into whether good reason existed for the procedure. *Commonwealth v Austin*, 421 Mass 357, 657 NE2d 458.

An inquiry into whether there was good reason to show a single photograph to a crime witness involved issues relating to the nature of the crime involved and corresponding concerns for public safety, the need for efficient police investigation in the immediate aftermath of a crime and usefulness of prompt confirmation of the accuracy of investigatory information; further, each case must be resolved on its own peculiar facts. *Commonwealth v Austin*, 421 Mass 357, 657 NE2d 458.

During an investigation of an attempted bank robbery, there was good reason for the police to show 2 witnesses a videotape of another bank robbery, notwithstanding that such procedure constituted a one- on-one identification procedure, where (1) 3 armed bank robberies had occurred within a few days, (2) the witnesses had examined over 200 photographs without identifying a suspect, (3) the witnesses were certain that they could identify the robber if they saw him again, and one had assisted in the creation of a composite sketch, and (4) the videotaped robbery bore a high degree of similarity to the modus operandi of the attempted bank robbery viewed by the witnesses. *Commonwealth v Austin*, 421 Mass 357, 657 NE2d 458.

Identification procedure was not unduly suggestive, even though victims jointly viewed stack of photographs on top of which defendant's photo had been placed, where there was no evidence that victims consulted with one another in determining which picture depicted their assailant, and both victims had simultaneously exclaimed "that's him" within seconds of having photos placed in front of them. *People v Byrd* (1992, 2d Dept) 183 AD2d 773, 583 NYS2d 849, app den 80 NY2d 902, 588 NYS2d 827, 602 NE2d 235.

Court would affirm determination finding petitioner guilty of assaulting another inmate, despite absence of opportunity to challenge fairness of photographic array, where review of transcript of interview of witness who identified petitioner from array clearly showed that use of array was purely confirmatory in nature, and that actual identification was based on witness's prior acquaintanceship with petitioner. *Santiago v Hoke* (1992, 3d

Dept) 183 AD2d 978, 583 NYS2d 570, app den 80 NY2d 757, 588 NYS2d 825, 602 NE2d 233.

Suppression of identification evidence of 2 witnesses was not required under CLS CPL § 710.30(2) where witnesses made photographic identifications from photo array shown to them by police 2 days after defendant's arraignment, even though notice of identifications was not served on defendant until 62 days after arraignment, when prosecutor first learned of them, since 15-day time limit of statute does not apply to any postarraignment identifications, even those taking place within said 15 days. *People v G.* (1993, Sup) 158 Misc 2d 893, 602 NYS2d 512.

Photo array containing pictures of individuals with significantly disparate features does not constitute fair and untainted identification procedure where police have reason to believe at time photo array is compiled that defendant is alleged perpetrator; under such circumstances, police are obliged to include "fillers" physically similar to defendant. *People v Modeste* (1993, Sup) 159 Misc 2d 250, 603 NYS2d 955.

Photo array containing pictures of individuals with significantly disparate features did not constitute unfair and tainted identification procedure as to codefendant, whom victim identified therein as other shooter involved, where police had no inkling at time photo array was compiled that codefendant was actually other shooter, and photo array consisting merely of known associates of previously identified defendant. *People v Modeste* (1993, Sup) 159 Misc 2d 250, 603 NYS2d 955.

The trial court did not err by finding that no single photograph of defendant was ever shown to a robbery victim prior to a pretrial photographic lineup and that the photographic identification procedure was not impermissibly suggestive, although the victim testified that he was shown a single photograph of defendant prior to the photographic lineup, where a detective testified that the victim was shown bank surveillance pictures of the robbery at an automatic teller machine and asked to describe the events depicted in the pictures in order to verify that a robbery had occurred, and that the victim was shown a single photograph of another alleged perpetrator but was not shown a single photograph of defendant. *State v Lindsey* (1995) 118 NC App 549, 455 SE2d 909.

Drug defendant's due process rights were violated by impermissibly suggestive photo array identification, in which accused's picture stood out from all the other photographs by different skin color and hair type, where there was no independently reliable identification by witnesses. *United States v Eltayib* (1996, CA2 NY) 88 F3d 157.

Footnotes

Footnote 62. *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, on remand (CA7 Ill) 395 F2d 769, appeal after remand (CA7 Ill) 424 F2d 1235.

Footnote 63. *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, on remand (CA7 Ill) 395 F2d 769, appeal after remand (CA7 Ill) 424 F2d 1235.

Annotation: Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures, 39 ALR3d 1000.

Practice References Lineups and showups: admissibility and effect of pretrial identification. 19 Am Jur POF2d, p 435 §§ 2, 4.

Forms: Motion to suppress evidence of pretrial identification and tainted courtroom identification based on unnecessarily suggestive photographic identification. 7 Federal Procedural Forms, L Ed § 20:644.

Footnote 64. *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, on remand (CA7 Ill) 395 F2d 769, appeal after remand (CA7 Ill) 424 F2d 1235.

Footnote 65. *Dirring v United States* (CA1 Mass) 328 F2d 512, cert den 377 US 1003, 12 L Ed 2d 1052, 84 S Ct 1939, reh den 379 US 874, 13 L Ed 2d 83, 85 S Ct 27.

Annotation: Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial, 30 ALR3d 908.

Footnote 66. *United States v Butler* (CA4 Md) 405 F2d 395, cert den 396 US 853, 24 L Ed 2d 102, 90 S Ct 114.

Footnote 67. *United States v Clark* (ED Pa) 289 F Supp 610.

Footnote 68. *United States v Trivette* (DC Dist Col) 284 F Supp 720.

Footnote 69. *Gilbert v California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951.

A witness's identification of the defendant at trial is admissible, notwithstanding a previous identification by means of an impermissibly suggestive photographic array, where there is an independent basis for the in-court identification, such as the witness's observations made at the time of the crime. *State v Gibbs*, 238 Neb 268, 470 NW2d 558.

Footnote 70. *United States v Ash*, 413 US 300, 37 L Ed 2d 619, 93 S Ct 2568.

d. Evidence Obtained Through Entrapment [631, 632]

§ 631 Inapplicability of exclusionary rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that evidence has been obtained by means of entrapment is not a ground for excluding it. 71 A claim that evidence should be suppressed because of entrapment has been rejected as being an undue extension of the exclusionary doctrine, 72 the courts following the common-law rule that a court should not exclude evidence which was unethically, but not unconstitutionally, secured. 73

Footnotes

Footnote 71. *Fletcher v United States*, 111 US App DC 192, 295 F2d 179, cert den 368 US 993, 7 L Ed 2d 530, 82 S Ct 613.

Footnote 72. *Fletcher v United States*, 111 US App DC 192, 295 F2d 179, cert den 368 US 993, 7 L Ed 2d 530, 82 S Ct 613.

Footnote 73. *Olmstead v United States*, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (ovrld on other grounds by *Berger v New York*, 388 US 41, 18 L Ed 2d 1040, 87 S Ct 1873).

§ 632 Evidence obtained through paid informers

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the circumstances of a contingent fee arrangement may properly be considered in connection with weighing an informer's testimony, the use of such an arrangement does not preclude the admissibility of the informer's testimony. 74

◆ Practice guide: A cautionary instruction regarding the testimony of a paid informer having an interest in the outcome of a prosecution may be necessary to focus the jury's attention on the question of the credibility of the witness. 75

Incriminating statements made after indictment and while in jail by an accused to a fellow inmate who was an undisclosed government informant paid on a contingent fee basis, are inadmissible at trial, the government having violated the accused's Sixth Amendment right to counsel by intentionally creating a situation likely to induce the accused to make incriminating statements without the assistance of counsel and having deliberately elicited the incriminating statements. 76

Footnotes

Footnote 74. *United States v Cervantes-Pacheco* (CA5 Tex) 826 F2d 310, 23 Fed Rules Evid Serv 1232, cert den 484 US 1026, 98 L Ed 2d 762, 108 S Ct 749; *United States v Grimes* (CA6 Ohio) 438 F2d 391, 13 ALR Fed 896, cert den 402 US 989, 29 L Ed 2d 155, 91 S Ct 1684; *Union v State*, 7 Ga App 27, 66 SE 24; *People v Mills*, 40 Ill 2d 4, 237 NE2d 697; *Williams v State* (Miss) 463 So 2d 1064, 57 ALR4th 633; *State v Simpson*, 156 Vt 349, 592 A2d 891.

Footnote 75. *Fresneda v State* (Alaska) 483 P2d 1011; *State v Fuller*, 15 Kan App 2d 34, 802 P2d 599.

Footnote 76. *United States v Henry*, 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183.

3. Evidence Derived From Illegally Obtained Evidence [633-642]

a. "Fruit of the Poisonous Tree" Doctrine [633]

§ 633 Suppression of tainted derivative evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The exclusionary rule prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of primary evidence seized during an unlawful search or that is otherwise acquired as the indirect result of an unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. 77 Thus, under the "fruit of the poisonous tree" doctrine, evidence which is located by the police as a result of information or leads obtained from illegally seized evidence is inadmissible in a criminal prosecution. 78 Furthermore, information gained from a tainted statement made after an unlawful arrest cannot properly be used as a lead for finding physical evidence, and any physical evidence so found is a fruit of the unlawful arrest and interrogation and must be suppressed. 79 Fingerprints, 80 identification evidence, 81 and physical evidence 82 obtained as a result of an illegal arrest or detention are inadmissible as fruits of that illegal arrest. Evidence derived from information gained from illegal wiretaps must also be suppressed. 83 However, evidence will not be excluded as fruit of the poisonous tree unless the illegality is at least the "but for" cause of the discovery of the evidence. 84

◆ Observation: The core rationale for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this course is needed to deter police from violations of constitutional and statutory protection. 85 On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired. 86 The doctrine has been applied in connection with violations of the Fifth and Sixth Amendments, as well as of the Fourth Amendment. 87

If the police use information in the suspect's statement to conduct a search, narcotics which are seized cannot be admitted into evidence as they are a "fruit of the poisonous tree" because the search was tainted by the illegal confession. 88

§ 633 ----Suppression of tainted derivative evidence [SUPPLEMENT]

Case authorities:

District court was entitled to hear live testimony from one witness at suppression hearing before magistrate judge in order to make independent assessment of that witness's

credibility without calling other witnesses who had testified at hearing; his credibility did not hinge on credibility of other witnesses since their testimony merely failed to support, and did not contradict, reheard witness's testimony. *United States v Rosa* (1993, CA2 NY) 11 F3d 315, 38 Fed Rules Evid Serv 661, cert den (US) 62 USLW 3691.

Defendant's perceived inconsistent statements to DEA agents at airport, on which statements District Court relied to find that agents properly seized defendant's suitcase and subjected it to legal search, were tainted fruit of unlawful seizure of defendant that occurred prior to agents' hearing of statements and thus could not be considered in determining reasonableness of seizing suitcase. *United States v Lambert* (1995, CA10 Kan) 46 F3d 1064.

Marijuana located by police in unconstitutional search was admissible in civil action by grower challenging assessment of marijuana tax, as tax assessment was neither criminal nor quasi-criminal in nature. *Turner v State Dep't of Revenue* (1994, Ala) 643 So 2d 568.

Where hearing-impaired defendant effectively communicated with police through written questions and answers without assistance of sign language interpreter, noncompliance with Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) does not, by itself, warrant suppression. *People v Gaylord* (1994, App Div, 4th Dept) 621 NYS2d 247, 8 ADD 229, app den (1995) 84 NY2d 1031.

In appeal from judgment convicting defendant of possession of short-barreled shotgun, because defendant failed to raise argument regarding involuntariness of statements at trial court, or to argue on appeal that subsequent statements were inadmissible as fruit of poisonous tree, court of appeals declined to indulge in speculation but rather held that trial court's findings regarding voluntariness were not clearly erroneous (Stats §§ 805.17(2), 941.28(1)(c)). *State v Pounds* (1993, App) 176 Wis 2d 315, 500 NW2d 373.

In prosecution for possessing heroin with intent to distribute in which defendant pleaded guilty, statements made by him to probation officer and incorporated in presentence investigation report admitting that he owned cocaine found in his apartment did not constitute fruit of illegal search conducted on day of his arrest and thus could properly be considered in sentencing him where statements were voluntarily provided after District Court had ordered cocaine suppressed as product of illegal search so that they were sufficiently act of free will to purge primary taint of illegal search. *United States v Raposa* (1996, CA1 RI) 84 F3d 502.

Footnotes

Footnote 77. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

Footnote 78. *Alderman v United States*, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961, reh den 394 US 939, 22 L Ed 2d 475, 89 S Ct 1177 and on remand (DC NJ) 318 F Supp 66, affd (CA3 NJ) 494 F2d 593, cert den 419 US 881, 42 L Ed 2d 121, 95 S Ct 147; *Walder v United States*, 347 US 62, 98 L Ed 503, 74 S Ct 354; *Nardone v United States*, 308 US 338, 84 L Ed 307, 60 S Ct 266; *Silverthorne Lumber Co. v United States*, 251 US 385, 64 L Ed 319, 40 S Ct 182, 3 AFTR 3016, 24 ALR 1426, 17 OhioLr 514 (ovrld on other grounds by *United States v Havens*, 446 US 620, 64 L Ed 2d 559, 100 S Ct 1912, 6 Fed Rules Evid Serv 1).

Annotation: Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Practice References Objecting to an offer of the fruits of illegally obtained evidence. 5 Am Jur Trials, p 492.

Hall, Search and Seizure §§ 22:1-22:15.

Hunter, Federal Trial Handbook 2d § 38.4.

Cook, Constitutional Rights of the Accused 2d § 3.61.

Footnote 79. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

Footnote 80. Davis v Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394, appeal after remand (Miss) 255 So 2d 916, cert den 409 US 855, 34 L Ed 2d 99, 93 S Ct 191 and (ovrld on other grounds by Dunaway v New York, 442 US 200, 60 L Ed 2d 824, 99 S Ct 2248); Bynum v United States, 104 US App DC 368, 262 F2d 465.

But see People v Rodriguez (2d Dept) 162 App Div 2d 478, 556 NYS2d 401, app den 76 NY2d 864, 560 NYS2d 1003, 561 NE2d 903, a case in which the court upheld the trial court's denial of suppression of fingerprint evidence without conducting a hearing, where the supporting allegations consisted entirely of the defense counsel's legal conclusions and failed to set forth factual allegations of the defendant's or the police officers' conduct sufficient to warrant a hearing.

Footnote 81. United States v Edmons (CA2 NY) 432 F2d 577.

Footnote 82. United States v Nicholas (CA8 Mo) 448 F2d 622.

Footnote 83. § 634.

Footnote 84. Segura v United States, 468 US 796, 82 L Ed 2d 599, 104 S Ct 3380.

Footnote 85. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 86. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 87. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 88. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

b. Particular Evidence [634-638]

§ 634 Fruits of illegal electronic surveillance

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence derived from the contents of an illegally intercepted communication is rendered inadmissible in federal court by statute, 89 and an aggrieved person has standing to move to suppress evidence derived from the contents of any wire or oral communication on the grounds specified by the statute. 90 The purpose of this exclusionary rule, like the "fruit of the poisonous tree" doctrine under the Fourth Amendment, 91 is to deter invasions of privacy by denying officials the fruits of their misconduct. 92

Problems with the fruits of illegal wiretaps often occur where a prosecutor seeks a new wiretap based on information learned from an illegal wiretap. For example, an initial interception order may be invalid for failure to obtain the authorization of the designated Assistant Attorney General. 93 If evidence secured in that illegal wiretap is used to obtain an extension of the interception order, 94 or to justify a separate application for a new interception order, 95 evidence derived from the extension or second wiretap may not be used, even though the second application was properly authorized, 96 where the information obtained from the illegal wiretap formed the essence of the allegation of probable cause supporting the applications for later wiretaps. 97

Footnotes

Footnote 89. 18 USCS § 2515.

Footnote 90. As to the grounds for suppression specified in 18 USCS § 2518(10)(a), see § 616.

Footnote 91. § 633.

Footnote 92. *Re Proceedings to Enforce Grand Jury Subpoenas* (ED Pa) 430 F Supp 1071, holding that if the identities of grand jury witnesses were discovered through an illegal wiretap, the witnesses may refuse to comply with a grand jury demand for handwriting exemplars, fingerprints, photographs, and voice exemplars on the ground that these physical characteristics are evidence derived from an illegal wiretap within the meaning of 18 USCS § 2515.

Footnote 93. § 617.

Footnote 94. *United States v Giordano*, 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Footnote 95. *United States v Calallero* (CA6 Mich) 503 F2d 1018; *United States v Roberts* (CA7 Ill) 477 F2d 57, cert den 417 US 908, 41 L Ed 2d 212, 94 S Ct 2604 and cert den 417 US 918, 41 L Ed 2d 223, 94 S Ct 2622; *United States v Spagnuolo* (CA9 Cal) 549 F2d 705.

Footnote 96. *United States v Roberts* (CA7 Ill) 477 F2d 57, cert den 417 US 908, 41 L

Ed 2d 212, 94 S Ct 2604 and cert den 417 US 918, 41 L Ed 2d 223, 94 S Ct 2622.

Footnote 97. United States v Spagnuolo (CA9 Cal) 549 F2d 705.

Practice References Cook, Constitutional Rights of the Accused 2d §§ 3.57, 3.61.

§ 635 Testimony of witness tainted by illegal evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If an accused is forced to give damaging testimony after wrongfully obtained confessions were admitted into evidence against him, the damaging testimony is an inadmissible fruit of such confessions. 98 However, the problem is more complicated if the fruit of the illegal evidence is the testimony of a witness who is not the defendant. 99 In the latter case, the court must take into account the witness' willingness to testify, and the possibility that the witness could be permanently disabled from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the original illegal search or the evidence discovered thereby. 1 The Supreme Court will also weigh the cost of silencing a witness against the possible deterrent effect of applying the exclusionary rule under the circumstance. 2 While no mathematical weight can be assigned to the above factors, the Supreme Court has said that these factors point to the conclusion that the exclusionary rule should be invoked with much reluctance if it will result in the suppression of the testimony of a live witness. 3 Thus, the Supreme Court has permitted the admission at trial of testimony of a witness whose identity was disclosed by a defendant who was given inadequate *Miranda warnings*. 4

§ 635 ----Testimony of witness tainted by illegal evidence [SUPPLEMENT]

Case authorities:

Identification derived from exploitation of illegal arrest is equally tainted whether made by trained officer or lay person. *People v Gethers* (1995) 86 NY2d 159, 630 NYS2d 281, 654 NE2d 102.

Footnotes

Footnote 98. *Harrison v United States*, 392 US 219, 20 L Ed 2d 1047, 88 S Ct 2008.

For a discussion of the admissibility of confessions and admissions tainted by illegal evidence, see § 752.

Footnote 99. *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

Footnote 1. *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

Footnote 2. *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

Footnote 3. *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

Footnote 4. *Michigan v Tucker*, 417 US 433, 41 L Ed 2d 182, 94 S Ct 2357.

§ 636 Tainted documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Documents obtained by the government from third parties are suppressible where, absent an illegal search, government investigators might not have known the identity of the third parties or what to ask them, the government anticipated that the illegal search would help lead to the third parties and documents, and the third parties would not have come forward on their own had the investigators not sought them out. ⁵ However, documents in the government's possession prior to the illegal search are not to be suppressed even if they have been commingled with documents tainted by the illegal search, although the burden is on the government to show what particular documents are free from taint. ⁶ A blanket suppression order is justified if the government cannot demonstrate which documents are clearly separable from those affected by a general taint. ⁷

§ 636 ----Tainted documents [SUPPLEMENT]

Case authorities:

Passport and Arrival/Departure Record form seized by INS agents from alien's apartment were inadmissible in evidence in deportation proceedings as fruits of egregious violations of Fourth Amendment occurring when agents, solely based on alien's Nigerian-sounding name, seized him in hallway of his apartment building and then entered his apartment. *Orhorhaghe v INS* (1994, CA9) 38 F3d 488, 94 CDOS 8004, 94 Daily Journal DAR 14858.

Footnotes

Footnote 5. *United States v Finucan* (CA1 NH) 708 F2d 838.

As to documentary evidence, generally, see subdivision VI.G. of this article.

Footnote 6. *United States v Finucan* (CA1 NH) 708 F2d 838.

Footnote 7. *United States v Finucan* (CA1 NH) 708 F2d 838.

§ 637 Tainted physical evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If the police conduct one illegal search, and on the basis of information gained in that first search, conduct a second search and seize physical evidence, the physical evidence seized is a fruit of the initial wrongful search and must be suppressed. 8 However, if a defendant consents to the second search, physical evidence seized is admissible, even though the first search may have been illegal, so long as the consent is a voluntary and independent act sufficient to break the causal connection between the alleged primary illegality and evidence found as a result of the second search. 9

If police officers find a key during the course of an illegal search, and use the key to enter other premises and seize property located there, the property seized is not admissible into evidence. 10 Similarly, drugs taken from a defendant following a custodial interrogation without probable cause and an unjustified pat-down search are tainted by the illegal detention and must be suppressed. 11

§ 637 ----Tainted physical evidence [SUPPLEMENT]

Case authorities:

Drugs and drug paraphernalia found in defendant's apartment during search that followed his warrantless arrest and written consent to search were not inadmissible in evidence on alleged ground that written consent was fruit of invalid arrest where there was probable cause for arrest. *United States v Garcia* (1993, CA9 Cal) 997 F2d 1273, 93 CDOS 4244, 93 Daily Journal DAR 7299, 25 FR Serv 3d 1454.

In prosecution of defendant for involuntary manslaughter, trial court did not err in suppressing evidence that defendant had refused to submit to intoxication test where statute authorizing refusal stated that "evidence of the refusal shall be admissible in a proceeding under section 577.010 or 577.012," and neither of these sections involved manslaughter; by its express mention of only two sections, legislature intended that statement regarding admissibility of refusal evidence apply only to proceedings brought under those two sections. *State v Cox* (1992, Mo App) 836 SW2d 43.

In prosecution for, inter alia, manslaughter and death by automobile, trial court properly suppressed results of blood test, obtained over defendant's objection, where, at time blood was drawn, record showed that police lacked probable cause to "seize" blood without warrant; defendant had demonstrated no evidence of any physical manifestation of having consumed alcohol when observed by police officer who was involved with drawing of blood. *State v O'Loughlin* (1994, App Div) 270 NJ Super 472, 637 A2d 553.

Trial court erred in suppressing evidence of refusal to take chemical test for blood alcohol level in prosecution for driving under influence of alcohol, where booking officer gave arrestee ample time to contact attorney, assisted her in making contact, and, after

she reached her attorney's answering service, offered more time to contact different attorney, which arrestee declined, prior to recording refusal. *State v Larrett* (1994) 127 Or App 139, 871 P2d 1016.

Footnotes

Footnote 8. *United States v Paroutian* (CA2 NY) 299 F2d 486.

Forms: Allegation in motion to suppress that affidavit on which warrant was issued was based on illegally obtained evidence. 7 Federal Procedural Forms, L Ed § 20:588.

Footnote 9. *United States v Fike* (CA5 Ala) 449 F2d 191 (disapproved on other grounds by *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254) as stated in *United States v Pierre* (CA5 Tex) 932 F2d 377, reh, en banc, gr (CA5 Tex) 943 F2d 6, on reh, en banc (CA5 Tex) 958 F2d 1304, cert den (US) 121 L Ed 2d 207, 113 S Ct 280.

Footnote 10. *Staples v United States* (CA5 Fla) 320 F2d 817; *Nixon v United States* (CA9 Alaska) 36 F2d 316.

Footnote 11. *United States v Prim* (CA9 Hawaii) 698 F2d 972.

§ 638 Lineup identification following illegal arrest

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Even if a defendant's arrest without a warrant was unlawful, his subsequent identification in a lineup is not invalid as a forbidden fruit of the illegal arrest. 12 The lineup identification is not considered to be a fruit of the warrantless arrest if the suspect was brought before a committing magistrate who advised him of his rights prior to the lineup, and if he was represented by counsel at the lineup. 13

Footnotes

Footnote 12. *Johnson v Louisiana*, 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620.

Annotation: Validity, under Federal Constitution, of police lineup or showup procedures—Supreme Court cases, 34 L Ed 2d 839.

Footnote 13. *Johnson v Louisiana*, 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620.

c. Limitations on Doctrine [639-642]

§ 639 Independent source rule, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While evidence gained as a fruit of misconduct by the government cannot be used in a criminal prosecution, this prohibition does not mean the facts thus obtained can never be proved. 14 If knowledge of these facts can be gained from an independent source, the facts can be proved through such independent evidence. 15

The rule is not limited in application to evidence obtained for the first time during an independent lawful search, but also applies to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. 16 In the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source. 17

The independent source doctrine rests upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. 18 The exclusion of evidence with an independent source would put the prosecution in a worse position than it would have occupied absent any error or violation. 19 Thus, the independent source doctrine teaches that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence on a crime are properly balanced by putting the prosecution in the same position it would have been in if no police error or misconduct had occurred. 20

The Supreme Court reasons further that the incentives operating in the independent source situation are such that an officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner, because doing so would risk suppression of all evidence on the premises, both seen and unseen, since the officer's action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the magistrate's decision to grant it. Moreover, the officer without sufficient probable cause to obtain a search warrant would have no added incentive to conduct an unlawful entry, since anything found could not be used to establish probable cause before a magistrate. 21

The rule is applicable only to evidence derived from illegal government conduct and not to evidence obtained as a direct result of an unconstitutional search or seizure 22 or an illegal lineup. 23 Both tangible and intangible tainted evidence may be admissible under the independent source doctrine, since reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. 24

§ 639 ----Independent source rule, generally [SUPPLEMENT]

Case authorities:

Even if x-ray of defendant's suitcase at airport was unlawful, cocaine found in suitcase after defendant consented to Customs agents' search was not inadmissible in evidence as "fruit of poisonous tree" where, notwithstanding agent told defendant about x-ray, trained drug-sniffing dog's alert to presence of drugs in suitcase provided agents with sufficient grounds for seeking defendant's consent. *United States v Navedo-Colon* (1993, CA1 Puerto Rico) 996 F2d 1337, summary op at (CA1 Puerto Rico) 21 M.L.W. 3029, 14 R.I.L.W. 338.

The trial court did not err by finding that a robbery victim's in-court identification of defendant was based upon what he observed the night of the robbery at a bank teller machine and was of independent origin from a pretrial photographic identification where the victim testified that he was face to face with defendant for ten minutes in a well-lighted area with nothing concealing defendant's facial features and that his corrected vision is 20\20, and a detective testified that the victim's initial description of defendant after the robbery was "pretty close" to his actual appearance and that defendant immediately picked defendant's picture at the photographic lineup and seemed positive about his identification. *State v Lindsey* (1995) 118 NC App 549, 455 SE2d 909.

Footnotes

Footnote 14. *Silverthorne Lumber Co. v United States*, 251 US 385, 64 L Ed 319, 40 S Ct 182, 3 AFTR 3016, 24 ALR 1426, 17 OhioLr 514.

Footnote 15. *Silverthorne Lumber Co. v United States*, 251 US 385, 64 L Ed 319, 40 S Ct 182, 3 AFTR 3016, 24 ALR 1426, 17 OhioLr 514.

Annotation: Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Footnote 16. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

Footnote 17. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529; *United States v Silvestri* (CA1 Mass) 787 F2d 736.

Footnote 18. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

Footnote 19. *Nix v Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 20. *Nix v Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 21. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

Footnote 22. *Segura v United States*, 468 US 796, 82 L Ed 2d 599, 104 S Ct 3380.

Footnote 23. *Gilbert v California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951.

Footnote 24. *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

§ 640 --Burden of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The independent source exception contemplates the actuality and not the mere possibility that there was an independent source of information leading to the discovery of the evidence. 25 The burden is on the government to prove that the evidence sought to be introduced had an independent origin, 26 and it is not sufficient for the government to show it had sufficient independent information which would have led, in the normal course of events, to the discovery of the questioned evidence. 27

Footnotes

Footnote 25. *United States v Paroutian* (CA2 NY) 299 F2d 486.

Footnote 26. *United States v Paroutian* (CA2 NY) 299 F2d 486; *United States v Ceraso* (MD Pa) 355 F Supp 126; *United States v Crouch* (CA7 Ill) 528 F2d 625, cert den 429 US 900, 50 L Ed 2d 184, 97 S Ct 266, 97 S Ct 267.

Exclusion of evidence seized under warrant from defendant's home on the alleged ground that the evidence was tainted by a police officer's illegal entry into the home prior to the issuance of a warrant was not required, where there was no evidence that the entry led to the discovery of the seized evidence, and where the search warrant was obtained on information acquired before the entry; such information was a sufficient independent source for the discovery and seizure of the challenged evidence, and the evidence was acquired by means sufficiently distinguishable to be purged of the primary taint. *United States v Fuesting* (CA7 Ill) 845 F2d 664, 25 Fed Rules Evid Serv 680.

Footnote 27. *United States v Paroutian* (CA2 NY) 299 F2d 486.

§ 641 Attenuation doctrine

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Notwithstanding the exclusionary rule, under which evidence obtained as an indirect result of a Fourth Amendment violation is generally deemed inadmissible "fruit of the poisonous tree," there are circumstances under which the causal connection between an

illegal search or seizure and the acquisition of evidence is so remote or attenuated as to purge the taint of the constitutional violation and to render the evidence admissible. 28 The important question is whether, granting establishment of the primary illegality, the evidence to which the objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. 29

◆ Caution: Attenuation analysis—an inquiry as to whether the indirect fruits of an illegal search or seizure should be suppressed as bearing a sufficiently close relationship to the underlying illegality—is appropriate only where, as a threshold matter, it is determined that the challenged evidence is in some sense the product of illegal government activity. 30

No sufficient attenuation of the taint of an unconstitutional search or seizure will be found, so as to render admissible evidence obtained as a consequence of such a search or seizure, unless there is a showing that the evidence was yielded voluntarily and not by coercion. 31

In determining whether the causal connection between an illegal search or seizure and the subsequent obtaining of evidence is so attenuated as to render such evidence admissible, the lapse of time between the illegal act and the obtaining of evidence is a factor to be considered. 32 However, where the search occurs as a result of an illegal detention, this factor has to be balanced against the degree of strictness of the custodial conditions during the detention. Where a congenial atmosphere prevails during the detention, a relatively short lapse of time may be sufficient to purge the taint. 33

Other factors which may properly be considered by a court in determining whether the taint of an unconstitutional search or seizure has been sufficiently attenuated to render the evidence admissible, include:

- Whether any events occurring between the time of an illegal search or seizure and the subsequent obtaining of evidence were of such significance as to attenuate the causal connection sufficiently to render the evidence admissible 34
- Whether the search or seizure was conducted with an improper purpose, and whether the illegality was flagrant 35

§ 641 ----Attenuation doctrine [SUPPLEMENT]

Case authorities:

Attenuation doctrine, by which taint of unlawful arrest may be so attenuated as to render admissible subsequently obtained evidence, is not an exception to exclusionary rule. Instead, it is device by which it is determined whether evidence was obtained as result of unlawful police action and therefore subject to exclusionary rule. Attenuation doctrine is applicable to motions to suppress under CCP art. 38.23. *State v Johnson* (1992, Tex App Texarkana) 843 SW2d 252, petition for discretionary review gr (Apr 14, 1993).

Footnotes

Footnote 28. *New York v Harris*, 495 US 14, 109 L Ed 2d 13, 110 S Ct 1640 (recognizing rule); *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407; *Nardone v United States*, 308 US 338, 84 L Ed 307, 60 S Ct 266.

Annotation: Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Footnote 29. *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

Footnote 30. *New York v Harris*, 495 US 14, 109 L Ed 2d 13, 110 S Ct 1640.

Footnote 31. *Taylor v Alabama*, 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Rawlings v Kentucky*, 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556; *Dunaway v New York*, 442 US 200, 60 L Ed 2d 824, 99 S Ct 2248; *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054; *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254; *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

Footnote 32. *Taylor v Alabama*, 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Rawlings v Kentucky*, 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556.

Footnote 33. *Rawlings v Kentucky*, 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556 (45-minute period held sufficient to purge taint).

Footnote 34. *Taylor v Alabama*, 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

Footnote 35. *United States v Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405, reh den 468 US 1250, 82 L Ed 2d 942, 105 S Ct 52 (recognizing rule); *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054; *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254.

The fact that use of illegal search evidence against a defendant was foreseeable and intended, and that a subsequent conviction was obtained directly through exploitation of the illegality, militates against the conclusion that the connection between the illegal search and the use of the evidence is attenuated. *United States v Garcia-Nunez* (CA9 Cal) 709 F2d 559 (ovrld on other grounds by *United States v McConney* (CA9 Cal) 728 F2d 1195).

§ 642 Inevitable discovery rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Information obtained in an unlawful search, or as a result of an incriminating statement made without the advice of counsel, is not rendered inadmissible under the "fruit of the poisonous tree" doctrine where it is shown that such evidence would have been

discovered even if the illegality had not occurred. 36 This ultimate or inevitable discovery exception to the exclusionary rule has been adopted by the Supreme Court in holding that evidence of the condition of the body of a murder victim, as well as related evidence, is admissible despite the body's having been discovered through statements made by the accused during an unlawful interrogation. 37 Exclusion of evidence that would inevitably have been discovered would undermine the adversary system by putting the prosecution in a worse position than it would have been absent any error or violation, while adding nothing to the integrity or fairness of criminal trials. 38 The prosecution must establish the inevitability of discovery by a preponderance of the evidence, but is not required to prove the absence of bad faith in obtaining the information. 39

There is a functional similarity between the inevitable discovery rule and the independent source rule, 40 in that exclusion of evidence having an independent source, like exclusion of evidence that would inevitably have been discovered, would put the government in a worse position than it would have occupied absent any error or violation. 41 In fact, the inevitable discovery doctrine, with its distinctive requirements, is in reality an extrapolation from the independent source doctrine; since tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered. 42

The inevitable discovery exception to the exclusionary rule applies to the direct as well as the indirect products of an unlawful search by the government. 43

§ 642 ----Inevitable discovery rule [SUPPLEMENT]

Case authorities:

In prosecution for tax evasion in connection with narcotics-related activities, "inevitable discovery" doctrine exception to exclusionary rule applied so as to permit admission in evidence of defendant's bank accounts, record of money orders, and documents regarding his ownership of buildings, restaurant and other businesses, and other properties, all of which were found during unlawful warrantless search of his personal safe, where, at time of that search, government was involved in ongoing investigation of defendant's narcotics violations, which necessarily included investigation of his finances in relation to proceeds of narcotics trade, and led to investigation of his tax returns. *United States v Eng* (1993, CA2 NY) 997 F2d 987, 93-2 USTC ¶ 50402, 93 TNT 145-7, 72 AFTR 2d 93-5486.

Footnotes

Footnote 36. *United States v Falley* (CA2 NY) 489 F2d 33; *United States v Seohnlein* (CA4 Md) 423 F2d 1051, cert den 399 US 913, 26 L Ed 2d 570, 90 S Ct 2215; *Killough v United States*, 119 US App DC 10, 336 F2d 929.

Annotation: Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

What circumstances fall within "inevitable discovery" exception to rule precluding

admission, in criminal case, of evidence obtained in violation of Federal Constitution, 81 ALR Fed 331.

Footnote 37. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 38. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 39. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

An inventory search at FBI office of defendant's bag in which cocaine was found following his arrest at a bus station was a proper incident of his arrest and detention, but it did not follow that such search would inevitably have led to the discovery of cocaine where a review of the record revealed no evidence that such searches were an invariable, routine procedure in the booking and detention of a suspect. United States v Gorski (CA2 Conn) 852 F2d 692.

Footnote 40. § 639.

Footnote 41. Nix v Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501, on remand (CA8 Iowa) 751 F2d 956, cert den 471 US 1138, 86 L Ed 2d 699, 105 S Ct 2681.

Footnote 42. Murray v United States, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529.

Footnote 43. United States v Pimentel (CA2 NY) 810 F2d 366, 33 CCF ¶ 75067 (applying the exception to admit into evidence certain letters found by the District Court to have been removed illegally by a government auditor because there was an ongoing audit which surely would have uncovered the letters at issue).

Law Reviews: Grossman, The Doctrine Of Inevitable Discovery: A Plea For Reasonable Limitations, 92 Dickinson L Rev 313 (1988).

Fishkin, Nix v Williams: An Analysis Of The Preponderance Standard For The Inevitable Discovery Exception, 70 Iowa L Rev 1369 (1985).

4. Presentation and Disposition of Suppression Motion [643-654]

§ 643 Time for presenting motion, generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under the Federal Rules of Criminal Procedure 44 and the practice followed in many states, 45 a motion to suppress evidence must be made prior to trial, and failure

to do so constitutes a waiver of the right to make such a request, although the court, for cause shown, may grant relief from the waiver. 46 Similarly, the wiretapping statutes provide that a motion to suppress the contents of an intercepted wire or oral communication must be made before the trial, hearing, or proceeding, unless there was no opportunity to make such motion or the aggrieved person was not aware of the grounds for the motion. 47

The rules and statutes requiring that a motion to suppress be made before trial, if the defendant then has knowledge of the grounds on which to base the motion, are a crystallization of Supreme Court decisions requiring this procedure. 48 The rules are designed to eliminate from the trial disputes over police conduct which are not immediately relevant to the question of guilt. 49 However, the rules should be applied with some flexibility, because the exclusionary rule carries out an important social policy and not a narrow procedural requirement. 50

◆ Caution: Where the delay is inexcusable, a motion to suppress evidence may be untimely when filed after the trial court's filing deadline, even if made before trial. Counsel's previous lack of awareness of a court decision which forms the basis of the motion is not a sufficient excuse. 51

A suppression motion comes too late if it is presented after a guilty plea. 52

◆ Observation: The exclusionary rule does not become operative or invocable until there is actually or within contemplation a proceeding in which the state proposes to introduce the evidence which is alleged to have been illegally seized. Where a suppression motion is made in the absence of a threatened or pending action, it may be more accurate to articulate the basis of the denial of relief not on a lack of standing basis but rather on the theory there is no justiciable matter before the court since the impact of a suppression order goes solely to the proceeding in which the evidence is to be used, even though the object of the suppression order is the evidence itself. 53 Dismissal of a suppression motion must obtain when there is no threatened or pending prosecution in the jurisdiction in which the motion is made, even if there is such a prosecution pending or threatened elsewhere. 54

§ 643 ----Time for presenting motion, generally [SUPPLEMENT]

Case authorities:

Absent demonstration of cause for failing to file timely motion to suppress evidence based on detention and seizure for which police officers and FBI agents allegedly lacked probable cause, Court of Appeals would not address merits of defendant's Fourth Amendment claim. *United States v Howard* (1993, CA2 Conn) 998 F2d 42.

Defendant by not raising Fourth Amendment objections during District Court proceedings waived his right to object, and thus Court of Appeals would not entertain those issues on his appeal from his conviction. *United States v Scarborough* (1994, CA6 Mich) 43 F3d 1021.

In appeal from judgment convicting defendant of possession of short-barreled shotgun, because defendant failed to raise argument regarding involuntariness of statements at trial

court, or to argue on appeal that subsequent statements were inadmissible as fruit of poisonous tree, court of appeals declined to indulge in speculation but rather held that trial court's findings regarding voluntariness were not clearly erroneous (Stats §§ 805.17(2), 941.28(1)(c)). *State v Pounds* (1993, App) 176 Wis 2d 315, 500 NW2d 373.

Footnotes

Footnote 44. FR Crim P 12(b)(3).

Footnote 45. *State v Neese* (App) 126 Ariz 499, 616 P2d 959; *Duddles v United States* (Dist Col App) 399 A2d 59; *State v Gerhardt*, 97 Idaho 603, 549 P2d 262; *State v Brogdon* (La) 426 So 2d 158, appeal after remand (La) 457 So 2d 616, cert den 471 US 1111, 85 L Ed 2d 862, 105 S Ct 2345, reh den 473 US 921, 87 L Ed 2d 670, 105 S Ct 3547 and habeas corpus proceeding (CA5 La) 790 F2d 1164, 20 Fed Rules Evid Serv 1165, reh den, en banc (CA5 La) 793 F2d 1287 and cert den 481 US 1042, 95 L Ed 2d 824, 107 S Ct 1985, reh den 483 US 1012, 97 L Ed 2d 749, 107 S Ct 3245, habeas corpus proceeding (CA5 La) 824 F2d 338, cert den 483 US 1040, 97 L Ed 2d 802, 108 S Ct 13; *State v Baker* (Me) 409 A2d 216; *State v Briner*, 173 Mont 185, 567 P2d 35.

Footnote 46. FR Crim P 12(f).

For a discussion of the circumstances under which a motion to suppress may be made at trial, see § 644.

Practice References Determining whether to file suppression motion. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence §§ 62 et seq.

Distinctions between motion to suppress and motion in limine. 20 Am Jur Trials 441, Motion in Limine Practice § 7.

Representing the mentally disabled criminal defendant. 27 Am Jur Trials 1 § 67.

Fishman, Wiretapping and Eavesdropping § 261.

Forms: Motion in Limine—To suppress mention of various matters. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 12.1, 12.2

Affidavit or declaration—In support of motion to exclude evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 13.

Footnote 47. 18 USCS § 2518(10)(a).

As to the grounds for a motion to suppress wiretap evidence, see § 616.

Footnote 48. *Jones v United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (ovrld on other grounds by *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967).

Footnote 49. *Jones v United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (ovrld on other grounds by *Simmons v United States*, 390 US 377, 19 L Ed

2d 1247, 88 S Ct 967).

Footnote 50. *Jones v United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (ovrld on other grounds by *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967).

Footnote 51. *United States v Milian-Rodriguez* (CA11 Fla) 828 F2d 679, cert den 486 US 1054, 100 L Ed 2d 921, 108 S Ct 2820.

Footnote 52. *Tucker v United States* (CA8 Mo) 470 F2d 220, cert den 412 US 929, 37 L Ed 2d 157, 93 S Ct 2758.

Footnote 53. *Re Application of Mahler*, 177 NJ Super 337, 426 A2d 1021, certif den 87 NJ 349, 434 A2d 93 and certif den 87 NJ 349, 434 A2d 93 and certif den 87 NJ 350, 434 A2d 94 and certif den 87 NJ 350, 434 A2d 94.

Footnote 54. *Re Application of Mahler*, 177 NJ Super 337, 426 A2d 1021, certif den 87 NJ 349, 434 A2d 93 and certif den 87 NJ 349, 434 A2d 93 and certif den 87 NJ 350, 434 A2d 94 and certif den 87 NJ 350, 434 A2d 94.

§ 644 --Presentation at trial

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally speaking, a suppression motion may not be entertained at trial where a party failed to move to suppress evidence in pretrial proceedings. 55 While a trial court may exercise its discretion to waive such a default and hear a suppression motion presented at trial, 56 it generally will not do so where the defendant or his counsel were aware before trial that the prosecution possessed questionable evidence. 57 It is within the sound discretion of the court to consider a renewed suppression motion at trial after the motion has been presented and denied before trial. 58 The rationale usually given for removing suppression questions from the trial itself is that interrupting the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. 59

A trial witness may waive his objection that the prosecutor's questions to him were based on illegally obtained wiretap evidence by delaying his objection until he is called to the stand. 60

◆ Caution: If a witness waives his right to a suppression hearing, but refuses to answer questions propounded by the prosecution on the ground that they are based on information gained through illegal wiretapping, the witness may be held in contempt. 61

§ 644 --Presentation at trial [SUPPLEMENT]

Case authorities:

Narcotics defendant waived claim that contraband found by Customs agent during search of defendant at airport should be suppressed due to allegedly prolonged detention where defendant did not file motion to suppress until after jury empanelment; defendant's unexplained change of mind from his original decision to challenge contraband was not "cause" for relief from waiver. *United States v Nunez* (1994, CA1 Puerto Rico) 19 F3d 719, summary op at (CA1 Puerto Rico) 22 M.L.W. 1520, 15 R.I.L.W. 11.

Footnotes

Footnote 55. § 643.

Footnote 56. *United States v Allied Stevedoring Corp.* (CA2 NY) 241 F2d 925, 57-1 USTC ¶ 9394, 50 AFTR 1772, cert den 353 US 984, 1 L Ed 2d 1143, 77 S Ct 1282; *United States v Cobb* (CA4 NC) 432 F2d 716; *Small v United States* (CA5 Tex) 396 F2d 764.

Footnote 57. *United States v Di Donato* (CA2 NY) 301 F2d 383, cert den 370 US 917, 8 L Ed 2d 497, 82 S Ct 1557; *Small v United States* (CA5 Tex) 396 F2d 764; *United States v Hamilton* (CA9 Cal) 469 F2d 880.

For example, a motion to suppress evidence which was made for the first time during the course of a trial was untimely where counsel representing the defendant learned at the preliminary hearing that the defendant was arrested without a warrant. *United States v Wood* (CA9 Wash) 550 F2d 435, 1 Fed Rules Evid Serv 492.

Footnote 58. *United States v Raddatz*, 447 US 667, 65 L Ed 2d 424, 100 S Ct 2406, reh den 448 US 916, 65 L Ed 2d 1179, 101 S Ct 36.

Footnote 59. *United States v Gomez* (CA1 RI) 770 F2d 251.

Footnote 60. *United States v Yanagita* (CA2 NY) 552 F2d 940.

Footnote 61. *United States v Yanagita* (CA2 NY) 552 F2d 940.

§ 645 --Presentation before second trial

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If a conviction has been reversed and remanded for a new trial, or if a mistrial occurred, the defendants' original rights are reinstated and they are permitted to file motions to suppress evidence prior to their retrial. 62 However, a court will not entertain such a motion during the course of the second trial, where the arresting officer testified during

the first trial concerning the search and seizure, and no motion to suppress was made before the second trial. 63

§ 645 --Presentation before second trial [SUPPLEMENT]

Case authorities:

The prosecutor's statement in his jury argument in a trial for the first-degree murder of a child that defendant needed to show "adequate provocation" in order to negate deliberation was not an incorrect statement of the law which prevented the jury from properly considering a verdict of second- degree murder. Rather, the prosecutor was referring to the kind of provocation which is insufficient to negate malice and reduce the murder to manslaughter but is sufficient to incite defendant to act suddenly and without deliberation. *State v Burr* (1995) 341 NC 263, 461 SE2d 602.

Footnotes

Footnote 62. *United States v Romano* (DC Me) 241 F Supp 933, vacated on other grounds (CA1 Me) 356 F2d 310.

Footnote 63. *United States v Blythe* (CA4 NC) 325 F2d 96.

§ 646 Standing to move for suppression; Fourth Amendment violations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The protection offered by the Fourth Amendment is personal, and only a victim of an unconstitutional search and seizure may complain. 64 A person who is not a victim of an unconstitutional search and seizure cannot object to the introduction of evidence which was seized, 65 and the supervisory power of the federal courts does not authorize a federal court to suppress, at the instance of an accused not a victim of an illegal search and seizure, otherwise admissible evidence on the ground that it was unlawfully seized from a third party who is not before the court. 66

As a general rule, a person who brings a motion to suppress evidence on the ground that it was seized during an illegal search must assert an interest in the property seized, or a property or possessory interest in the premises searched. 67 Originally it was believed that an exception to this general rule existed where a defendant was charged with a possessory crime, on the theory that the defendant would have to admit possession in order to establish standing. 68 However, in light of later Supreme Court cases holding that testimony at a suppression hearing cannot later be admitted at trial over the defendant's objection, 69 and that the Fourth Amendment only protects persons who have a legitimate expectation of privacy in the place searched, 70 the "automatic standing" rule has been abandoned; the Supreme Court will no longer consider the mere

possession of seized property as a substitute for a factual finding that its owner had a legitimate expectation of privacy in the area searched. 71

Determining whether a legitimate or justifiable expectation of privacy exists, in turn, involves two inquiries:

(1) the claimant must have a subjective expectation of privacy in the area searched; and

(2) that subjective expectation, viewed objectively, must be reasonable. 72

There is generally no reasonable expectation of privacy in abandoned property. 73

§ 646 ----Standing to move for suppression; Fourth Amendment violations [SUPPLEMENT]

Case authorities:

There is no "coconspirator exception" to 4th Amendment standing requirements. Defendants' participation in conspiracy to deliver cocaine did not, in itself, give them an expectation of privacy in automobile possessed by another member of conspiracy. *United States v Padilla* (1993, US) 123 L Ed 2d 635, 113 S Ct 1936, 93 CDOS 3207, 93 Daily Journal DAR 5463, 7 FLW Fed S 244, on remand, remanded (CA9) 993 F2d 721, 93 CDOS 3800, 93 Daily Journal DAR 6508.

Defendants lacked standing to protest police officers' search of parking lot in which loaded pistols and crack cocaine were found under parked cars where defendants failed to assert any reasonable expectation of privacy in seized contraband; neither defendant personally swore out any affidavits with respect to such expectation, lone affidavit in support of their motion to suppress was prepared by attorney who had no first-hand knowledge of relevant events and contained only conclusory allegations that police lacked probable cause or reasonable, articulable suspicion of criminal activity when they arrested defendants, and defendants' interest in suppressing contraband to avoid its evidentiary force against them was not interest protected by Fourth Amendment. *United States v Lewis* (1994, CA1 Mass) 40 F3d 1325.

Defendant passenger in minivan that state trooper stopped for changing lanes without signaling had standing to challenge seizure resulting from stop but had no standing to challenge search of minivan's contents. *United States v Roberson* (1993, CA5 Tex) 6 F3d 1088.

In prosecution for possession of check stolen from mail, defendant had standing to contest law enforcement officers' warrantless search and seizure of checkbook from his friend's hotel room in which friend had lived for approximately three years and in which defendant was overnight guest; fact that checkbook was found in trash can did not constitute abandonment of it so as to deprive defendant of such standing where checkbook was seized prior to his initial denial of interest in checks. *United States v Wilson* (1994, CA5 Tex) 36 F3d 1298.

Defendant driver of van had no standing to object to DEA agents' search of van after valid investigatory stop where, by stating that van was stolen, he effectively disclaimed privacy interest in van and thus abandoned it. *United States v Quiroz-Hernandez* (1995,

CA5 Tex) 48 F3d 858, substituted op, in part, adhered to, reh, en banc, den (1995, CA5 Tex) 1995 US App LEXIS 10311.

Defendant van passenger, who had no legitimate expectation of privacy in bag containing drugs which she denied owning and which was found in van after state trooper had stopped it for speeding, was not entitled to challenge search of bag; and, even if she had requisite expectation of privacy, trooper had authority to open and search bag where he had probable cause to search van. *United States v Critton* (1995, CA6 Ohio) 43 F3d 1089.

In prosecution for manufacturing marijuana, defendant had no legitimate expectation of privacy in codefendant's house and thus lacked standing to challenge officers' search of house pursuant to warrant during which marijuana was found in codefendant's son's suitcase. *United States v Jones* (1994, CA8 Ark) 16 F3d 275.

Narcotics defendant had no standing to contest police officer's search of his tote bag left in open field that was adjacent to his house and yard but that he neither owned nor leased where he failed to demonstrate legitimate expectation of privacy in bag; he put on no evidence whatsoever that he sought to preserve bag and its contents as private or that he even believed that they would be private. *United States v Stallings* (1994, CA8 Ark) 28 F3d 58.

Defendant's apparent ownership interest in ship and status as captain supported his standing to challenge search of ship on Fourth Amendment grounds. *United States v Juda* (1995, CA9 Cal) 46 F3d 961, 95 CDOS 846, 95 Daily Journal DAR 1546.

Defendant driver of truck allegedly provided him by construction company had standing to challenge stop of truck for speeding and his subsequent detention. *United States v Gonzalez-Lerma* (1994, CA10 Utah) 14 F3d 1479.

In prosecution for possession of marijuana, defendant did not have standing to challenge search of car after lawful investigative stop based on reasonable suspicion merely because she was passenger in car or because she was charged with possessory offense. *United States v Eylicio- Montoya* (1994, CA10 NM) 18 F3d 845.

Defendant, who was driver of rental car stopped by highway patrolman for speeding, had no legitimate expectation of privacy in car and thus had no standing to challenge search of car or seizure of cocaine found therein where car was rented by third party and defendant was not authorized to drive it. *United States v Jones* (1995, CA10 Wyo) 44 F3d 860.

Defendant did not have standing to object to the search and seizure of a briefcase and its contents found in his wife's car trunk when defendant never asserted an ownership or possessory interest in the briefcase. *State v Cohen* (1994) 117 NC App 265, 450 SE2d 503.

A defendant on trial for conspiracy to traffic cocaine had no standing to challenge the admissibility of a coconspirator's statement to the police on the ground that the statement was the fruit of an illegal stop since defendant cannot assert the Fourth Amendment rights of another. *State v Smith* (1995) 117 NC App 671, 452 SE2d 827.

The trial court did not err in a prosecution arising from defendant hiring someone to kill

her former husband and assault a woman whom he was dating and from an attack being carried out on the former husband by admitting telephone records which showed telephone calls from defendant to a coconspirator testifying against her. Assuming standing under the North Carolina Constitution, defendant failed in her burden of showing sufficient action attributable to the State which would implicate the constitutional protections against unreasonable search and seizure. The records were originally recorded in the usual course of Southern Bell's business and not under some State directive, there is no subpoena in the record, and defendant's argument that sufficient action attributable to the State exists because the State called a Southern Bell employee to testify about and produce the records at trial was rejected. *State v Suggs* (1995) 117 NC App 654, 453 SE2d 211.

Even if the stop of a vehicle in which defendant and a coconspirator were riding was unconstitutional because officers did not have a reasonable, articulable suspicion of criminal activity, defendant did not have a reasonable expectation of privacy in the coconspirator's luggage where defendant did not assert any property interest in that luggage, and cocaine found in the coconspirator's luggage was admissible in defendant's trial for conspiracy to traffic cocaine. *State v Smith* (1995) 117 NC App 671, 452 SE2d 827.

The driver and passenger of a borrowed car possessed standing to challenge the search and seizure of the evidence found in the car, where the driver demonstrated that he had the owner's permission to use the vehicle and accordingly had a reasonable expectation of privacy in the vehicle, and where both the driver and passenger were equally seized and their freedom of movement was equally affected by the stop and search of the car. *State v Carter*, 69 OS3d 57, 630 NE2d 355.

Trial court properly denied defendant's motion to suppress evidence seized during search of his wife's automobile where defendant, who was suspect in homicide case, was arrested when he and wife exited automobile at service station, defendant and wife were transported to police station and automobile, which was registered to wife, was towed to police station, wife freely and voluntarily consented to search of automobile, and police searched automobile and found handgun under front passenger seat, bullets from which matched those recovered from victim's body. Even if defendant had standing to challenge search and police lacked probable cause, search was permissible on basis of wife's consent. *State v Martinez* (1993, RI) 624 A2d 291.

In prosecution for cultivation of marijuana, trial court improperly held that defendant did not have standing to protest warrantless search of land owned by his father, where one element of offense of cultivation of marijuana is that accused "own or control lands," and standing is met when defendant has a clear possessory interest in land. *Fite v State* (1993, Okla Crim) 873 P2d 293, reh den, in part, on reh (Okla Crim) 1994 Okla Crim App LEXIS 21.

Where defendant passenger in vehicle stopped by police for equipment violation, who was discovered to possess cocaine, challenged lawfulness of vehicle stop on Fourth Amendment grounds, court of appeals erroneously permitted challenge. *State v Howard* (1993) 176 Wis 2d 921, 501 NW2d 9.

In case involving question of whether defendant passenger in vehicle stopped for equipment violation could challenge lawfulness of vehicle stop, use of term "standing" did not serve any useful analytical purpose, since Fourth Amendment rights are personal

and cannot be vicariously asserted. *State v Howard* (1993) 176 Wis 2d 921, 501 NW2d 9.

Appropriate analysis for determining whether defendant can challenge search or seizure focuses on defendant's rights under Fourth Amendment, and requires determination of whether disputed search and seizure has infringed defendant's Fourth Amendment interest. *State v Howard* (1993) 176 Wis 2d 921, 501 NW2d 9.

Footnotes

Footnote 64. *Brown v United States*, 411 US 223, 36 L Ed 2d 208, 93 S Ct 1565; *Alderman v United States*, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961, reh den 394 US 939, 22 L Ed 2d 475, 89 S Ct 1177.

Practice References Standing to object. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 14.

Cook, Constitutional Rights of the Accused 2d § 3:60.

Footnote 65. *Goldstein v United States*, 316 US 114, 86 L Ed 1312, 62 S Ct 1000.

Footnote 66. *United States v Payner*, 447 US 727, 65 L Ed 2d 468, 100 S Ct 2439, 80-2 USTC ¶ 9511, 46 AFTR 2d 80-5174, reh den 448 US 911, 65 L Ed 2d 1172, 101 S Ct 25 and on remand (CA6 Ohio) 629 F2d 1181.

Footnote 67. *Rakas v Illinois*, 439 US 128, 58 L Ed 2d 387, 99 S Ct 421, reh den 439 US 1122, 59 L Ed 2d 83, 99 S Ct 1035.

Annotation: Interest in property as requisite of accused's standing to raise question of constitutionality of search and seizure, 4 L Ed 2d 1999.

Practice References Hall, Search and Seizure §§ 21:1-21:11.

Footnote 68. *Jones v United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233.

Footnote 69. *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, on remand (CA7 Ill) 395 F2d 769, appeal after remand (CA7 Ill) 424 F2d 1235.

Footnote 70. *Rakas v Illinois*, 439 US 128, 58 L Ed 2d 387, 99 S Ct 421, reh den 439 US 1122, 59 L Ed 2d 83, 99 S Ct 1035.

Footnote 71. *Rawlings v Kentucky*, 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556; *United States v Salvucci*, 448 US 83, 65 L Ed 2d 619, 100 S Ct 2547.

Footnote 72. *United States v McHugh* (CA1 RI) 769 F2d 860; *United States v Leary* (CA10 Colo) 846 F2d 592.

Footnote 73. *United States v Gutierrez* (CA5 Tex) 849 F2d 940, reh den, en banc (CA5 Tex) 856 F2d 191; *United States v Brady*, 269 US App DC 18, 842 F2d 1313; *State v*

Asbury (App) 124 Ariz 170, 602 P2d 838; People v Hampton, 198 Colo 566, 603 P2d 133; State v Monk, 291 NC 37, 229 SE2d 163.

Defendants, stopped in airport by drug enforcement agents, had no standing to challenge the admissibility of cocaine found in a travel bag where none of them exhibited a legitimate expectation of privacy in the bag at the time of the search, in that 2 of the defendants specifically disclaimed ownership of the bag, which disclaimers constituted abandonment, and the third defendant had neither possession nor claimed any interest in the bag. United States v Knox (CA6 Tenn) 839 F2d 285, reh den (CA6) 1988 US App LEXIS 5887 and cert den 490 US 1019, 104 L Ed 2d 179, 109 S Ct 1742.

§ 647 --Fifth Amendment violation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although individuals who are not personally the victims of illegal government activity generally cannot assert the constitutional rights of others, a violation of another person's Fifth Amendment rights may rise to the level of a violation of a defendant's rights to a fair trial when the government seeks a conviction through use of evidence obtained by extreme coercion or torture. ⁷⁴ Thus, a defendant has standing to assert his or her own Fifth Amendment right to a fair trial as a valid objection to the introduction of statements extracted from a nondefendant by coercion or other inquisitional tactics. ⁷⁵ The issue is whether the government's investigation methods resulted in a fundamentally unfair trial. ⁷⁶

Footnotes

Footnote 74. United States v Chiavola (CA7 Ill) 744 F2d 1271, 16 Fed Rules Evid Serv 685.

Footnote 75. United States v Merkt (CA5 Tex) 764 F2d 266, reh den, en banc (CA5 Tex) 772 F2d 904.

Footnote 76. United States v Merkt (CA5 Tex) 764 F2d 266, reh den, en banc (CA5 Tex) 772 F2d 904; United States v Chiavola (CA7 Ill) 744 F2d 1271, 16 Fed Rules Evid Serv 685.

§ 648 Motion and response, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A motion to suppress evidence must set forth allegations of relevant factual issues with definiteness, clarity, and specificity. 77 A motion which contains general and conclusory factual allegations, or allegations based upon suspicion and conjecture, is not sufficient. 78

A defendant is required to make factual allegations which, if established, would warrant relief. 79 Since the purpose of a hearing on a motion to suppress is to resolve disputed issues of fact, 80 the court is not required to hold a hearing if this standard is not met. 81 The absence of any meaningful statement of facts by the defendant in support of a motion to suppress prejudices the prosecution in its preparation for the motion, and also hinders the court's research in advance of the hearing. The rule that no suppression hearing is warranted where there is no dispute as to material facts is meant to avoid the time-consuming taking of testimony solely for the purpose of affording defense counsel additional discovery, and an opportunity to examine State's witnesses in advance of trial. 82

If a hearing is ordered, the fact that the suppression motion was general does not constitute a waiver of the objection if the motion was timely and the activities of the officers were fully revealed during the course of the hearing. 83

There are five requirements for a sufficient motion for a mandatory hearing 84 based on allegations that the probable cause finding supporting a warrant was dependent on a false statement knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in the warrant affidavit:

- (1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false;
- (2) the defendant must contend that false statements or omissions were deliberately or recklessly made;
- (3) a detailed offer of proof, including affidavits, must accompany the allegations;
- (4) the veracity of only the affiant must be challenged; and
- (5) the challenged statements must be necessary to define probable cause. 85

◆ Caution: A defendant must state in the suppression motion all grounds upon which a motion to suppress could be based, since a trial court is justified in refusing to hear a new ground for suppression raised for the first time during trial. 86

The judge who signs a search warrant should not rule on a defendant's subsequent motion to suppress the evidence seized thereunder. Rather, the judge should recuse on the motion to suppress. It is inappropriate for a trial judge to rule upon the validity of a search warrant which he or she has issued. 87

Footnotes

Footnote 77. United States v Hickok (CA9 Cal) 481 F2d 377, 73-2 USTC ¶ 9568, 32 AFTR 2d 73-5396.

Practice References Motion, brief, and affidavit in suppression cases. 5 Am Jur Trials, p 331. Excluding Illegally Obtained Evidence § 73.

Representing the mentally disabled criminal defendant. 27 Am Jur Trials, pp 1, 135-137.

Forms: Pretrial motions to suppress. 7 Federal Procedural Forms, L Ed §§ 20:551-20:644.

Motion—Before Immigration Judge—To suppress, in deportation proceeding, evidence illegally seized from vehicle by roving border patrol. 10A Federal Procedural Forms, L Ed § 40:294.

Footnote 78. *Cohen v United States* (CA9 Cal) 378 F2d 751, 5 ALR Fed 147, cert den 389 US 897, 19 L Ed 2d 215, 88 S Ct 217; *United States v Dyer* (DC NM) 609 F Supp 329.

A motion to suppress should be as reasonably specific as possible under the circumstances in order to give the state as much notice as possible of the contentions it must be prepared to meet at a suppression hearing. *State v Johnson*, 16 Or App 560, 519 P2d 1053.

Footnote 79. *Best v United States* (Dist Col App) 582 A2d 966.

But see *Re F.G.* (Dist Col App) 576 A2d 724, stating that in a motion to suppress a showup identification, the defendant is, without more, entitled to an evidentiary hearing, because where there is a showup identification the accused has little access to the evidence relating to it, in order to make factual allegations.

Footnote 80. *State v Downes*, 19 Or App 401, 528 P2d 110.

Footnote 81. *United States v Hickok* (CA9 Cal) 481 F2d 377, 73-2 USTC ¶ 9568, 32 AFTR 2d 73-5396; *Cohen v United States* (CA9 Cal) 378 F2d 751, 5 ALR Fed 147, cert den 389 US 897, 19 L Ed 2d 215, 88 S Ct 217.

Footnote 82. *State v Hewins*, 166 NJ Super 210, 399 A2d 343, affd 178 NJ Super 360, 429 A2d 367.

Footnote 83. *Simpson v United States* (CA10 Wyo) 346 F2d 291 (disapproved on other grounds by *Rakas v Illinois*, 439 US 128, 58 L Ed 2d 387, 99 S Ct 421).

Footnote 84. § 650.

Footnote 85. *United States v Dicesare* (CA9 Cal) 765 F2d 890, amd on other grounds (CA9 Cal) 777 F2d 543.

Footnote 86. *United States v Peterson* (CA4 Va) 524 F2d 167, cert den 423 US 1088, 47 L Ed 2d 99, 96 S Ct 881 and cert den 424 US 925, 47 L Ed 2d 334, 96 S Ct 1136 and (disapproved on other grounds by *Crosby v United States* (US) 122 L Ed 2d 25, 113 S Ct 748, 93 CDOS 277, 93 Daily Journal DAR 572, 6 FLW Fed S 819) as stated in *United*

States v Bundick (CA4 Va) 1993 US App LEXIS 13432.

Footnote 87. Bliss v State, 282 Ark 315, 668 SW2d 936, appeal after remand 288 Ark 546, 708 SW2d 74, post-conviction proceeding 291 Ark 184, 723 SW2d 1, habeas corpus proceeding (CA8 Ark) 888 F2d 551, withdrawn by publisher, reprinted as mod (CA8 Ark) 891 F2d 1335, post-conviction proceeding (Ark) 1990 Ark LEXIS 46, later proceeding (CA8 Ark) 923 F2d 859, reported in full (CA8) 1990 US App LEXIS 23152, later proceeding (Ark) 1992 Ark LEXIS 577.

§ 649 --In wiretapping cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In order to obtain the suppression of evidence obtained through the use of an electronic, mechanical, or other eavesdropping device in violation of the Constitution, laws, or regulations of the United States, one must invoke the procedures specified by the appropriate federal statute. This requires that an aggrieved party must claim evidence is inadmissible because it is the primary product of an unlawful interception or because it was obtained by the exploitation of an unlawful interception. 88

Assuming that a sufficient claim of wiretapping has been filed, 89 the statute requires that the opponent affirm or deny the occurrence of the alleged unlawful act. 90 It has been held that in a federal proceeding, the Federal Government is required to affirm or deny a claim, but that a local police agency is not required to file a response if there is no connection between the local agency and the federal investigation. 91 The requirement that the government affirm or deny the occurrence of illegal electronic surveillance is, as a general rule, only satisfied by affidavits, and affidavits in opposition are inadequate where they are not based on first-hand knowledge. 92

The sufficiency of the government's response is to be measured against the sufficiency of the claim of wiretapping. 93

Footnotes

Footnote 88. 18 USCS § 3504(a)(1).

Forms: Averment in affidavit in support of motion to suppress alleging that evidence was secured through unauthorized wiretap. 7 Federal Procedural Forms, L Ed § 20:623.

Footnote 89. § 649.

Footnote 90. 18 USCS § 3504(a)(1).

Annotation: What claims are sufficient to require government, pursuant to 18 USCS § 3504, to affirm or deny use of unlawful electronic surveillance, 70 ALR Fed 67.

Practice References Representation of an alien in exclusion, rescission, and deportation hearings. 26 Am Jur Trials, pp 331, 374.

Footnote 91. Re Harris (ND Cal) 383 F Supp 1036.

Footnote 92. Cruz v Alexander (SD NY) 509 F Supp 640, revd on other grounds (CA2 NY) 669 F2d 872, cert den 459 US 844, 74 L Ed 2d 89, 103 S Ct 99 and clarified (CA2 NY) 708 F2d 31.

Footnote 93. Re Grand Jury Proceedings (CA5 Fla) 664 F2d 423, 9 Fed Rules Evid Serv 1314, cert den 455 US 1000, 71 L Ed 2d 866, 102 S Ct 1630, 102 S Ct 1631; Re Brummitt (CA5 Tex) 613 F2d 62, cert den 447 US 907, 64 L Ed 2d 856, 100 S Ct 2990 and cert den 447 US 935, 65 L Ed 2d 1130, 100 S Ct 3038.

§ 650 Hearing and determination, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A full suppression hearing is not mandatory in every case in which a motion is made for the suppression of evidence, 94 and such a hearing need not be granted if the motion papers are not sufficient and factual matters are not raised. 95

The Fourth Amendment requires that a hearing be held at the defendant's request where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement was necessary to the finding of probable cause. 96 Although there is a presumption of validity with respect to the affidavit supporting the search warrant and allegations of negligence or innocent mistake are insufficient, an evidentiary hearing is mandatory where the challenger's attack is more than conclusory and is supported by more than a mere desire to cross-examine. 97 If, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in a warrant affidavit to support a finding of probable cause, no hearing is required, but if the remaining content is insufficient, the defendant is entitled to a hearing. 98

Assuming that a timely suppression motion has been filed, 99 the trial court has the discretion to defer consideration of the motion until trial, so long as this action does not affect the government's right to appeal. 1 A court also has the discretion to refuse to conduct a suppression hearing after a trial has begun, 2 or even when a trial was about to begin, if the hearing would delay the trial. 3

A ruling on a pretrial motion to suppress evidence becomes a controlling rule of law in the case, and a litigant is not required and should not be permitted to renew his contention at trial if the matter had been settled in the pretrial order. 4

Questions relating to the competency of evidence obtained by an alleged illegal search and seizure are generally considered to be legal questions for the court and not for the jury. 5 In particular, the legality of a search warrant is considered to be a question of law to be determined by the court without a jury, 6 especially where there is no dispute over the evidence. 7

Where the trial court elects to bifurcate a suppression hearing, grants the defendant's motion on the first ground presented, and is subsequently reversed on appeal, the reviewing court should remand to the trial court for disposition of the alternate grounds for suppression. 8

§ 650 ----Hearing and determination, generally [SUPPLEMENT]

Case authorities:

District court improperly exercised its sanctioning discretion for violation of Jencks Act by suppressing use of two government witnesses' testimony after court had declared a mistrial; additional sanction was not necessary or appropriate, where court did not find intentional wrongdoing on government's part, and failed to find prejudice in its second ruling. *United States v McKoy* (1996, CA9 Nev) 78 F3d 446, 96 CDOS 1416, 96 Daily Journal DAR 2435.

The trial judge did not err in allowing a suppression hearing to continue in the absence of accused's counsel, where co-defendant's counsel handled questioning of the lone witness, accused was not put in the position of having to represent himself, and accused was not prejudiced by counsel's absence. *Stein v State* (1994, Fla) 632 So 2d 1361, 19 FLW S 32, related proceeding (Fla) 632 So 2d 1368, 19 FLW S 35 and petition for certiorari filed (May 16, 1994).

Defendant is not entitled to a new suppression hearing simply because the State failed to call all material witnesses at the suppression hearing. *People v Hudson* (1993) 157 Ill 2d 401, 193 Ill Dec 128, 626 NE2d 161, reh den (Jan 31, 1994).

Trial court erred in suppressing evidence (stolen tools) found in rented garage by landlord looking for tools to repair snowblower with which he was clearing tenant's driveway, where search warrant was supported by landlord's hearsay eyewitness account of discovery of tools, since nonconfidential eyewitness informants' statements are presumed to be reliable. *State v Peck* (1994, Iowa App) 517 NW2d 230.

Trial court in child-neglect prosecution properly suppressed statements made during pre-arrest interview at defendant's home, where social worker had called to request interview in response to child-abuse hotline tip, worker insisted on immediate interview, police officer accompanied social worker and participated in interview, and investigation had already focused on defendant. *State v Hosto- Worthy* (1994, Mo App) 877 SW2d 150.

Defendant should not be collaterally estopped to relitigate, at new Huntley hearing, issue of whether his statements with regard to second murder charge were product of coercion during combined interrogation, even though issue was same as that considered in first Huntley hearing during first murder prosecution, where he did not have full and fair opportunity to litigate issue in that he might have been deterred from testifying regarding first charge because he had argument for suppression that did not depend on his

testimony, i.e., at conclusion of videotaping regarding second murder charge, he invoked his right to remain silent, which he claimed attached to subsequent videotaping regarding first murder charge. *People v Aguilera* (1993) 82 NY2d 23, 603 NYS2d 392, 623 NE2d 519.

Matter would be remanded for suppression hearing where (1) defendant was charged with weapon possession after third parties took briefcase from closet in defendant's apartment and opened briefcase, revealing guns to police officers, (2) defendant moved to suppress guns, and (3) although conference on motion was held, no further proceedings with respect to motion were conducted; court was required either to summarily grant or deny motion or to conduct hearing since defendant raised constitutional issues and sufficiently asserted privacy interest, and record did not indicate that defendant waived his right to hearing. *People v Cole* (1992, 3d Dept) 187 AD2d 873, 590 NYS2d 542.

Footnotes

Footnote 94. *United States v Manuszak* (ED Pa) 438 F Supp 613.

Practice References Hall, Search and Seizure § 26:27.

Footnote 95. § 648.

Footnote 96. *Franks v Delaware*, 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674, on remand (Del Sup) 398 A2d 783.

As to the sufficiency of the motion, see § 648.

Footnote 97. *Franks v Delaware*, 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674, on remand (Del Sup) 398 A2d 783.

Footnote 98. *Franks v Delaware*, 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674, on remand (Del Sup) 398 A2d 783.

Footnote 99. FR Crim P, Rule 12(b)(3), discussed in § 643.

Footnote 1. *United States v Leiser* (DC Mass) 16 FRD 199; *United States v Thompson* (CA9 Nev) 558 F2d 522, cert den 435 US 914, 55 L Ed 2d 504, 98 S Ct 1466; *United States v Spagnuolo* (CA9 Cal) 515 F2d 818, appeal after remand (CA9 Cal) 549 F2d 705.

Footnote 2. *United States v Watts* (CA2 NY) 319 F2d 659.

Footnote 3. *United States v Allied Stevedoring Corp.* (CA2 NY) 241 F2d 925, 57-1 USTC ¶ 9394, 50 AFTR 1772, cert den 353 US 984, 1 L Ed 2d 1143, 77 S Ct 1282; *United States v Dittus* (CA3 Pa) 453 F2d 1335.

Footnote 4. *United States v Montos* (CA5 Fla) 421 F2d 215, cert den 397 US 1022, 25 L Ed 2d 532, 90 S Ct 1262 and (ovrld on other grounds by *United States v Bengivenga* (CA5 Tex) 845 F2d 593) as stated in *United States v Corral-Franco* (CA5 Tex) 848 F2d 536; *Waldron v United States*, 95 US App DC 66, 219 F2d 37.

Footnote 5. *United States v Wheeler* (WD Pa) 172 F Supp 278, 59-2 USTC ¶ 9552, 4 AFTR 2d 5001, *affd* (CA3 Pa) 275 F2d 94, 60-1 USTC ¶ 9306, 5 AFTR 2d 927, *cert den* 363 US 828, 4 L Ed 2d 1523, 80 S Ct 1597.

Footnote 6. *Mesmer v United States* (CA10 Okla) 405 F2d 316.

Footnote 7. *Batten v United States* (CA5 Fla) 188 F2d 75.

Footnote 8. *People v Brooks*, 26 Cal 3d 471, 162 Cal Rptr 177, 605 P2d 1306.

§ 651 --Closure of hearing to public

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Sixth Amendment right to a public trial is applicable to a suppression hearing, and thus any closure of a suppression hearing over the objections of the accused must meet the tests for closure of a trial. 9 Although under certain circumstances, an interest in protecting the privacy of persons not before the court may justify closing portions of a suppression hearing to the public, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, and the trial court must consider reasonable alternatives to closure and must make findings adequate to support the closure. 10

Violation of an accused's Sixth and Fourteenth Amendment rights to a public trial through closure of an entire suppression hearing, at which the accused sought to exclude wiretaps and evidence seized during resulting searches, entitles the accused to relief without any requirement that the accused prove specific prejudice. However, the remedy should be appropriate to the violation and need not include a new trial after a new suppression hearing unless the new public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties. The extent to which the new suppression hearing must be open to the public is to be determined in light of the conditions at the time of the new hearing, giving consideration only to interests that justify closure at that time. 11

Footnotes

Footnote 9. *Waller v Georgia*, 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210, 10 Media L R 1714, *on remand* 253 Ga 146, 319 SE2d 11.

Practice References The right to a public trial is generally discussed in 75 Am Jur 2d, Trial §§ 205 et seq.

Footnote 10. *Waller v Georgia*, 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210, 10 Media L R 1714, *on remand* 253 Ga 146, 319 SE2d 11.

Footnote 11. *Waller v Georgia*, 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210, 10 Media L

§ 652 --Evidence or affidavits

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A motion to suppress may be supported by an affidavit, and the court has the inherent power to require that supporting affidavits be filed. 12 However, affidavits need not be filed if not required by court order or local rule, and the affidavits are not a substitute for competent proof when factual issues are properly raised. 13

In a case where it is alleged that a confession was coerced and should not be admitted into evidence at trial, the defendant is entitled to a full evidentiary hearing in order to explore the factual context in which the confession was given. 14

An evidentiary hearing is not required where a defendant contests the facial validity of a wiretap application or order, since such matters must be determined from the relevant papers, and additional testimony is not likely to be relevant. 15 However, if it appears that the application and interception order are facially sufficient, and the defendant attacks the accuracy of information contained in the application, the defendant must allege that the government is guilty of a deliberate falsehood or a reckless disregard for the truth, and must accompany those allegations by an offer of proof by means of affidavits or sworn statements of witnesses. 16

§ 652 --Evidence or affidavits [SUPPLEMENT]

Case authorities:

Defendants' motion to strike suppression hearing testimony of police officer would be denied where it did not allege that transcripts or tape recordings of any dispatches to or from police officer actually were made, that they were destroyed if in fact they existed, or whether contents if they existed would have been materially favorable to defendants' cross-examination of officer. *United States v Florack* (1994, WD NY) 155 FRD 49.

Footnotes

Footnote 12. *Cohen v United States* (CA9 Cal) 378 F2d 751, 5 ALR Fed 147, cert den 389 US 897, 19 L Ed 2d 215, 88 S Ct 217.

Forms: Affidavits in support of suppression motions. 7 Federal Procedural Forms, L Ed, §§ 20:555-20:557, 20:592-20:596, 20:614-20:623, 20:648.

Footnote 13. *Cohen v United States* (CA9 Cal) 378 F2d 751, 5 ALR Fed 147, cert den 389 US 897, 19 L Ed 2d 215, 88 S Ct 217.

Practice References Locating and interviewing witnesses. 5 Am Jur Trials, p 331.
Excluding Illegally Obtained Evidence §§ 42, 43.

Testimony at hearing. 5 Am Jur Trials, p 331. Excluding Illegally Obtained Evidence
§§ 76 et seq.

Electronic eavesdropping by concealed microphone or microphone-transmitter. 30
Am Jur Proof of Facts 113.

Footnote 14. Jackson v Denno (1964) 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28
Ohio Ops 2d 177, 1 ALR3d 1205.

Annotation: Comment Note: Constitutional aspects of procedure for determining
voluntariness of pretrial confession, 1 ALR3d 1251.

Footnote 15. Losinno v Henderson (SD NY) 420 F Supp 380; United States v Losing
(CA8 Mo) 539 F2d 1174, appeal after remand (CA8 Mo) 560 F2d 906, cert den 434 US
969, 54 L Ed 2d 457, 98 S Ct 516.

Footnote 16. Franks v Delaware, 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674, on
remand (Del Sup) 398 A2d 783.

§ 653 --Burden of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A defendant has the initial burden of showing standing—some privacy interest which has been violated by the government. 17 A defendant also has the burden of establishing a prima facie case showing that the evidence was obtained in violation of the United States Constitution or statutes. 18

However, once illegal governmental activities have come to light, and the defendant has gone forward with some specific evidence demonstrating a taint, the government has the ultimate burden of showing that its evidence was not tainted by such illegality. 19 Thus, once a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure. 20 The government also has the burden of showing that a warrantless search was conducted pursuant to consent, and that the consent was voluntary and uncoerced. 21

§ 653 --Burden of proof [SUPPLEMENT]

Case authorities:

District Court erred in placing burden of proof on defendant during suppression hearing to show that police officer's warrantless search of his car after traffic stop violated Fourth Amendment, since, after it was established that stop and search were without warrant and it was shown that defendant had standing, burden then shifted to government to justify search. *United States v Chavis* (1995, CA5 Tex) 48 F3d 871.

Court should have granted suppression of evidence of defendant's car, which was retrieved by police as result of information supplied by defendant in statements which had been properly suppressed, since it was not shown that car would inevitably have been discovered irrespective of initial wrong. *People v Lavin* (1992, 2d Dept) 182 AD2d 710, 582 NYS2d 478, app den 80 NY2d 834, 587 NYS2d 918, 600 NE2d 645, habeas corpus den (ED NY) 1993 US Dist LEXIS 9127.

Footnotes

Footnote 17. *United States v Gomez* (CA1 RI) 770 F2d 251; *United States v Baker* (SD NY) 443 F Supp 526.

As to standing, see § 646.

Practice References Hall, Search and Seizure § 26:28.

Footnote 18. *United States v Tierney* (CA9 Cal) 448 F2d 37, holding that this burden was not met where the defendants proved that foreign police did not follow the constitutional law of the United States, since foreign police are not bound by the United States Constitution.

Footnote 19. *Alderman v United States*, 394 US 165, 22 L Ed 2d 176, 89 S Ct 961, reh den 394 US 939, 22 L Ed 2d 475, 89 S Ct 1177 and on remand (DC NJ) 318 F Supp 66, affd (CA3 NJ) 494 F2d 593, cert den 419 US 881, 42 L Ed 2d 121, 95 S Ct 147; *Nardone v United States*, 308 US 338, 84 L Ed 307, 60 S Ct 266.

Footnote 20. *Xenia v Wallace*, 37 Ohio St 3d 216, 524 NE2d 889.

Footnote 21. *United States v Matlock*, 415 US 164, 39 L Ed 2d 242, 94 S Ct 988; *Bumper v North Carolina*, 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382.

§ 654 Disposition of motion

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

A pretrial motion, which would include a suppression motion, must be determined before the trial unless the court, for good cause, orders that the motion be deferred for

determination at the trial of the general issue or until after the verdict, except where a party's right to appeal is adversely affected. 22

If factual issues are involved in determining the motion, the court must state its essential findings on the record. 23 The verbatim record must include such findings of fact and conclusions of law as are made orally. 24

§ 654 ----Disposition of motion [SUPPLEMENT]

Case authorities:

District Court erred in suppressing evidence found in pickup truck of narcotics defendant, who was lawfully in police custody, without first ruling on voluntariness of his consent to search truck. *United States v McCurdy* (1994, CA10 NM) 40 F3d 1111.

Trial court properly found that defendant abandoned his automobile and properly denied defendant's motion to suppress evidence seized from it, where defendant fled country; removed automobile's license plates so that it could not be driven legally and was no longer readily identifiable as property of defendant; and left automobile on street for days without moving it; defendant could not claim reasonable expectation of privacy in automobile's contents. *State v Sivri* (1994) 231 Conn 115, 646 A2d 169.

Motion to suppress gun as product of unlawful search and seizure would be denied where police officer, responding to radio run specifically complaining of "man with a gun," arrived on scene and observed 3 men, including defendant, standing near vehicle with vinyl bag on its trunk and holster on ground nearby, and after men furtively stepped back from holster, patted outside of bag, revealing outline of gun, since officer could be said to have reasonably feared for his safety and thus, under circumstances, was justified in patting outside of bag. *People v Harmon* (1990) 149 Misc 2d 337, 563 NYS2d 1006.

Footnotes

Footnote 22. FR Crim P, Rule 12(e).

As to the court's power to defer a suppression hearing, see § 650.

Practice References Practical considerations after entry of order on suppression motion. 5 Am Jur Trials, p 331. Excluding Illegally Obtained Evidence §§ 108 et seq.

Forms: Order—Exclusion of evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 14.

Footnote 23. FR Crim P 12(e).

Footnote 24. FR Crim P 12(g).

Forms: Orders granting suppression motions. 7 Federal Procedural Forms, L Ed §§ 20:558, 20:597, 20:598, 20:624.

5. Appellate Review and Collateral Attack [655-657]

§ 655 Appeal by defendant or aggrieved party, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An order denying a motion to suppress is interlocutory and cannot be immediately appealed by a defendant, whether the motion is made before detention or arrest, 25 before indictment, 26 or after an indictment is handed down. 27 Where the criminal process is already in motion, it cannot be interrupted by an appeal on the motion to suppress, and a ruling on a motion to suppress cannot be regarded as an independent proceeding. 28 Generally, only a motion to have seized evidence returned, not a motion to suppress its use at trial, is sufficiently independent of the criminal proceeding so as to be separately appealable. 29

In passing on the correctness of a trial court's denial of a criminal defendant's motion to suppress, the reviewing court may consider the evidence introduced at the pretrial suppression hearing. 30 It has also been held that the reviewing court may also consider evidence adduced at trial, even though it may not have been presented at the pretrial hearing. 31

The harmless error rule has been applied in search and seizure cases. 32 The test of whether a violation of the Fourth Amendment exclusionary rule may be treated as harmless error is whether the erroneously admitted evidence might have contributed to the defendant's conviction. 33 If this is the case, a reversal is necessary, even if there is sufficient other evidence to support the conviction. 34

§ 655 ----Appeal by defendant or aggrieved party, generally [SUPPLEMENT]

Case authorities:

Court would review defendant's challenge to constitutionality of search for plain error where he failed to challenge it at district court level; when officer asked defendant to step out of car, defendant consented to search of vehicle, and neither officer's testimony nor any argument made by defense counsel suggested that police used coercive tactics to gain defendant's consent. *United States v Perrin* (1995, CA4 Va) 45 F3d 869.

District court did not commit plain error in rejecting defendant's motion to suppress heroin found in his boot as incident of weapons search; defendant did not clearly present to district court two-pronged issue of whether officer was justified in reaching into defendant's boot after detecting bulge in it and, if so, whether officer was justified in removing package, and court did rule that officer was justified in searching for weapons

to protect himself and that events occurring after that were recognized to be drug find, which gave officer probable cause to make reasonable inquiry as to what package was and to search it by making small incision in it. *United States v Maldonado* (1995, CA5 Tex) 42 F3d 906.

Court of Appeals had no jurisdiction to hear defendant van passenger's claim that statement that he owned bag, which was found in van and to which drug detection dog alerted after state trooper had stopped van for speeding and other incriminating evidence had been found, should be suppressed because it was product of illegal arrest without probable cause, where claim was raised for first time on appeal from defendant's conviction and thus was waived, and, moreover, claim did not satisfy standard for plain error; similarly, Court of Appeals would not consider codefendant's claim that bag should not have been opened because it was closed container and canine signal did not justify opening it, where claim was not raised in District Court and did not satisfy standard for plain error. *United States v Critton* (1995, CA6 Ohio) 43 F3d 1089.

Defendant, on appeal from District Court's denial of his motion to suppress, waived his right to have Court of Appeals consider his challenge to warrant to search his duffel bag at airport where he failed to raise matter before District Court. *United States v Dixon* (1995, CA8 Mo) 51 F3d 1376.

In reviewing circuit's denial of motion to suppress and circuit court's conclusion that search was reasonable, supreme court will uphold circuit court's findings of historical or evidentiary fact unless they are against great weight and clear preponderance of evidence. *In Interest of Isiah B.* (1993, App) 176 Wis 2d 639, 500 NW2d 637, cert den (US) 62 USLW 3250.

Footnotes

Footnote 25. *United States v Regional Consulting Services for Economic & Community Dev., Inc.* (CA4 W Va) 766 F2d 870.

Footnote 26. *DiBella v United States*, 369 US 121, 7 L Ed 2d 614, 82 S Ct 654.

Footnote 27. *Cogen v United States*, 278 US 221, 73 L Ed 275, 49 S Ct 118.

Footnote 28. *DiBella v United States*, 369 US 121, 7 L Ed 2d 614, 82 S Ct 654.

Practice References Hall, Search and Seizure § 27:2.

Footnote 29. *DiBella v United States*, 369 US 121, 7 L Ed 2d 614, 82 S Ct 654.

Footnote 30. *United States v Smith* (CA10 Utah) 527 F2d 692.

Footnote 31. *United States v Smith* (CA10 Utah) 527 F2d 692.

Footnote 32. *Chambers v Maroney*, 399 US 42, 26 L Ed 2d 419, 90 S Ct 1975, reh den 400 US 856, 27 L Ed 2d 94, 91 S Ct 23; *Segurola v United States*, 275 US 106, 72 L Ed 186, 48 S Ct 77.

The general principles of harmless error have been applied in cases where evidence admitted at a criminal trial should have been excluded because it was based on out-of-court identification procedures which violated the Constitution. *United States v Wade*, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; *Gilbert v California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951.

Annotation: Violation of federal constitutional rule (*Mapp v Ohio*) excluding evidence obtained through unreasonable search or seizure, as constituting reversible or harmless error, 30 ALR3d 128.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error, 31 L Ed 2d 921.

Prejudicial effect of admitting at criminal trial evidence of confession or other self-incriminating statement obtained from accused in violation of Federal Constitution—Supreme Court cases, 113 L Ed 2d 757.

Practice References Cook, *Constitutional Rights of the Accused* 2d § 3:65.

Footnote 33. *Fahy v Connecticut*, 375 US 85, 11 L Ed 2d 171, 84 S Ct 229.

Footnote 34. *Fahy v Connecticut*, 375 US 85, 11 L Ed 2d 171, 84 S Ct 229.

§ 656 --De novo versus deferential review

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Motions to suppress are generally reviewed de novo. 35 Review of the motion to suppress is a mixed question of law and fact, and although findings of fact are reviewed under a clearly erroneous standard, the application of the law to those facts is subject to the de novo standard of review. 36 Accordingly, the issue of the objective reasonableness of police officers' reliance on a search warrant under the good-faith exception to the exclusionary rule is reviewable de novo on appeal, 37 even though the findings of underlying facts upon which that determination is based are binding on appeal unless clearly erroneous. 38 Similarly, where the facts are not in dispute, the question of standing is reviewable de novo on appeal. 39 The denial of an evidentiary hearing based on allegations challenging the veracity of a warrant affidavit is reviewed de novo. 40

Footnotes

Footnote 35. *United States v Thomas* (CA9 Cal) 844 F2d 678, later proceeding (CA9 Cal) 863 F2d 622.

Footnote 36. *United States v Alexander* (CA11 Ga) 835 F2d 1406.

Footnote 37. *United States v Maggitt* (CA5 Miss) 778 F2d 1029, cert den 476 US 1184, 91 L Ed 2d 548, 106 S Ct 2920; *United States v Hendricks* (CA9 Ariz) 743 F2d 653, cert den 470 US 1006, 84 L Ed 2d 382, 105 S Ct 1362; *United States v Leary* (CA10 Colo) 846 F2d 592.

Footnote 38. *United States v Maggitt* (CA5 Miss) 778 F2d 1029, cert den 476 US 1184, 91 L Ed 2d 548, 106 S Ct 2920.

Footnote 39. *United States v Broadhurst* (CA9 Cal) 805 F2d 849; *United States v Leary* (CA10 Colo) 846 F2d 592.

Footnote 40. *United States v Dicesare* (CA9 Cal) 765 F2d 890, amd on other grounds (CA9 Cal) 777 F2d 543.

§ 657 Appeal by prosecution

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In federal court, the prosecution may appeal from a decision or order of a District Court suppressing or excluding evidence in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information. 41

The prosecution's appeal is limited to the propriety of the suppression order, although the court may consider other arguments brought by the defendant which support the propriety of the suppression order. 42 However, if the determination of a suppression motion was based on the District Court's determination of credibility, such as where there is a dispute over whether the defendant consented to the search, this determination of credibility is not subject to appellate review. 43

Consistent with the ordinary rule of appellate procedure, the government's challenges to the defendant's standing may be rejected where the government failed to raise the issue before the District Court. 44 Furthermore, the government may forfeit its opportunity to challenge the standing of defendants when it has made contrary assertions in the court below, when it has acquiesced in contrary findings by that court, or when it has failed to raise such question in a timely fashion during the litigation. 45 The government's conduct requires forfeiture, and constitutes something more than mere waiver, where the government induces the defendants to forgo the opportunity to establish their legitimate expectations of privacy in the District Court and then, on appeal, seeks to have the appellate court decline to decide the merits of the defendants' appeal because they failed to establish the requisite nexus between their personal privacy interests and the government's assertedly illegal activity. 46

The Federal Government is authorized to appeal an order suppressing evidence which the government intends to use in a pending federal criminal trial, provided that the appeal is

taken within 30 days after the decision has been rendered. 47 Where the government has filed a motion with the trial court to reconsider the suppression order, the 30-day period runs from the date of the trial court's order denying the motion to reconsider, and not from the date of the initial suppression order. 48

§ 657 ----Appeal by prosecution [SUPPLEMENT]

Case authorities:

Court of Appeals lacked jurisdiction over defendants' cross-appeal from order granting in part defendants' motion to suppress evidence, since 18 USCS § 3731, which permits government to take immediate appeal from order granting pretrial motion to suppress, does not provide for cross-appeal by defendant; defendants may raise as part of government's appeal any alternative arguments which would have supported order of suppression, but they may not assert those arguments as part of separate appeals or raise any arguments as to evidence not ordered suppressed by district court. *United States v Shameizadeh* (1994, CA6) 41 F3d 266.

Court of Appeals had jurisdiction over government's appeal of trial court's suppression order, because, as defendant acknowledged, suppressed evidence contained substantial proof of fact material to espionage charges under 18 USCS § 3731; standard to determine whether evidence is material is not whether evidence has potential for increasing defendant's term of incarceration, but whether evidence would be persuasive to reasonable trier of fact in establishing proposition for which government seeks to admit it. *United States v Poulsen* (1994, CA9 Cal) 41 F3d 1330, 94 CDOS 9349, 94 Daily Journal DAR 17306.

Footnotes

Footnote 41. 18 USCS § 3731.

Annotation: Review on appeal by United States under 18 USCS sec. 3731 of orders suppressing or excluding evidence, or for return of seized property, 34 ALR Fed 617.

Practice References Fishman, Wiretapping and Eavesdropping § 292.

Forms: Notice of appeal by government from pretrial order. 7 Federal Procedural Forms, L Ed § 20:1119.

Footnote 42. *United States v Moody* (CA3 Pa) 485 F2d 531.

Footnote 43. *United States v Harris* (CA3 Pa) 507 F2d 197.

Footnote 44. *United States v Amuny* (CA5 Tex) 767 F2d 1113, reh den, en banc (CA5 Tex) 775 F2d 301.

Footnote 45. *Steagald v United States*, 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642, on remand (CA5 Ga) 656 F2d 109, reh gr (CA5 Ga) 664 F2d 1241, on reh (CA5 Ga) 664 F2d 1242; *United States v Amuny* (CA5 Tex) 767 F2d 1113, reh den, en banc (CA5 Tex)

775 F2d 301.

Footnote 46. United States v Amuny (CA5 Tex) 767 F2d 1113, reh den, en banc (CA5 Tex) 775 F2d 301.

Footnote 47. 18 USCS § 3731.

Footnote 48. United States v Ibarra (US) 116 L Ed 2d 1, 112 S Ct 4, 91 Daily Journal DAR 12656.

VI. PARTICULAR TYPES OF EVIDENCE [658-859]

A. Hearsay [658-707]

Research References

US Const Amend 6

8 USCS § 1360(d); 10 USCS §§ 2736(d), 7730; 17 USCS § 410(c); 18 USCS § 4241(f); 28 USCS § 2639(c)(1); 29 USCS § 161(4)

Bankruptcy Rule 9017

FR Civ P, Rules 32, 43, 56, 59, 60

FR Crim P, Rules 4(a), 12, 15, 33

FR Evid, Rules 801-806

Uniform Rules of Evidence, Rules 801-807

ALR Digests: Evidence §§ 986-997, 1039-1064, 1116, 1129-1132; Witnesses §§ 89, 98

ALR Index: Hearsay; Pedigree

5 Am Jur Trials 611, Presenting Plaintiff's Case §§ 34, 38; 6 Am Jur Trials 201,

Cross-examination of plaintiff and plaintiff's witnesses § 49

3 Am Jur Proof of Facts 269, Common Law Marriage; 4 Am Jur Proof of Facts 1, Death, Proof 5; 12 Am Jur POF2d 459, Determination of Heirship § 28; 21 Am Jur POF2d 101, Impeachment of witness—prior inconsistent statements; 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence § 2124, 29, 32; 49 Am Jur POF2d 649, General Reputation of Person in Community § 8

1. In General [658-660]

§ 658 Design of hearsay rules

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under the hearsay rule, out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or under circumstances that impress the declarant with the solemnity of his or her statements; the

declarant's word is not subject to cross-examination; and the declarant is not available so that his or her demeanor and credibility may be assessed by the jury. 49 The hearsay rule is based on concerns which arise when an out-of-court statement is offered to prove the truth of the matter asserted; the trier of fact must then depend on the veracity of an out-of-court declarant to establish a material fact. 50 The hearsay rule does not prevent a witness from testifying as to what he heard; instead it is a restriction on the proof of facts through extrajudicial statements. 51

The approach to hearsay adopted in the Federal Rules of Evidence 52 is that of the common law: a general rule excluding hearsay evidence with exceptions under which evidence is admissible although it constitutes hearsay. 53 The Uniform Rules of Evidence follow the same approach. 54

§ 658 ----Design of hearsay rules [SUPPLEMENT]

Case authorities:

The trial court did not err in a prosecution for multiple offenses including arson where defendant's teacher had testified for the State that she smelled petroleum on defendant's bookbag and clothes two days after the fire and the court would not let defendant question the teacher on cross-examination as to the explanation defendant gave when she questioned him. The testimony of the teacher as to what the defendant had told her was hearsay and does not come within any exception to the hearsay rule. *State v Beamer* (1994) 339 NC 477, 451 SE2d 190.

There was no merit to defendant's contention that the trial court allowed inadmissible hearsay into evidence, since one statement was offered for the non-hearsay purpose of impeaching defendant's brother and to explain conduct of investigating officers, and another statement merely confirmed what the jury had already heard. *State v Westall* (1994) 116 NC App 534, 449 SE2d 24, review den 338 NC 671, 453 SE2d 185.

Footnotes

Footnote 49. *Chambers v Mississippi*, 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038; *State v McVay*, 127 Ariz 450, 622 P2d 9, appeal after remand 131 Ariz 369, 641 P2d 857; *State v Freber* (Fla) 366 So 2d 426; *Kelly v State* (Wyo) 694 P2d 126.

Footnote 50. *Re Estate of Raketti* (ND) 340 NW2d 894.

Footnote 51. *State v Roy*, 214 Neb 204, 333 NW2d 398; *State v Amos* (App) 153 Wis 2d 257, 450 NW2d 503.

Footnote 52. FR Evid, Rule 801-806.

Footnote 53. Advisory Committee Notes to Federal Rules of Evidence, Introductory Note: The Hearsay Problem.

Footnote 54. Uniform Rules of Evidence, Rule 801-806.

§ 659 Hearsay ordinarily inadmissible; exceptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Unless hearsay falls within one of the exceptions to the hearsay rule, it is inadmissible as evidence. 55 Courts have long imposed exceptions on the hearsay rule based on considerations of necessity for the evidence and the trustworthiness of the statements. 56 In addition, hearsay may be admissible under express statutory exceptions. 57

The same approach is taken under the Federal and Uniform Rules of Evidence. 58

The admissibility of hearsay evidence in criminal prosecutions is limited by the constitutional right of a defendant to be confronted with the witnesses against him. 59

Absent special statutes or regulations requiring administrative agencies to comply with the rules of evidence observed in the courts, hearsay is admissible in agency proceedings. 60

§ 659 ----Hearsay ordinarily inadmissible; exceptions [SUPPLEMENT]

Practice Aids: Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Uniform Rules of Evidence. 38 ALR5th 433.

Case authorities:

Newspaper article describing explosive nature of taxi drivers' strike in San Juan was admissible, not for truth of matter asserted, but as tending to establish that defendant hotel management knew or should have known of strike's volatile nature and taken precautions to avoid harm to hotel guests whom it transported to and from airport during strike. *Coyne v Taber Partners I* (1995, CA1 Puerto Rico) 53 F3d 454.

In prosecution for bank fraud and money laundering arising out of scheme to process telemarketing charges, admission of cooperating conspirator's testimony regarding two merchant account holders and one telemarketer that he allegedly recruited was inadmissible hearsay since there was no showing that conspiracy existed, but error was harmless since it was merely cumulative. *United States v Brown* (1994, CA7 Ill) 31 F3d 484.

Physician's statement that, eight days before she was murdered, patient identified her estranged husband as person who raped her was admissible as pertinent to physician's treatment of her since he testified that identity of assailant was important to his recommendation regarding patient's after-care, including appropriate counseling, but patient's statement that husband had threatened to kill her if he caught her with another man was not admissible under any hearsay exception. *United States v Joe* (1993, CA10

In action for wrongful death of apartment tenants who died from carbon monoxide poisoning from allegedly defective gas heater and ventilation pipe, hearsay testimony by witness regarding telephone calls made by tenant, in witness' presence, to report gas odor in apartment was not admissible under notice exception to hearsay rule, where critical element sought to be proved was whether tenant had given notice of gas leak to apartment management, but there was no evidence to establish identity of individual tenant spoke with at time witness overheard tenant make calls. *Avon-Avalon, Inc. v Collins* (1994, Ala) 643 So 2d 570.

Even if hearsay testimony was not used to prove the truth of the matter asserted, the inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information to establish the logical sequence of events outweighed the probative value of such evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and although a police dispatch report indicating that an unidentified informant had called to report that a man with a rifle was chasing a female down the street was admitted to show why the officer had been dispatched to the scene, the State linked the report with other evidence to establish that accused had used a rifle to commit the offenses, because the contents of the statement were not relevant to establish a logical sequence of events, nor was the reason why officers arrived at the scene a material issue in the case. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

Daughter's hearsay statement was not admissible during murder prosecution to prove rape, where accused who was convicted of murdering his wife and a man who husband believed had raped her and was sentenced to death contended that his daughter should have been allowed to testify that wife had told daughter that she had been raped by the man husband murdered, because the statement was never communicated to accused by either wife or daughter, admission of the statement was prohibited by FS § 90.802, and the statement fell within no known exception to the hearsay rule. *Cannady v State* (1993, Fla) 620 So 2d 165, 18 FLW S 277.

The hearsay testimony of a police dispatch report was erroneously admitted into evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and although the dispatch report indicating that an unidentified informant had called to report that a man with a rifle was chasing a female down the street was admitted to show why the officer had been dispatched to the scene, the State linked the report with other evidence to establish that accused had used a rifle to commit the offenses, because regardless of the purpose for which the State said the evidence was offered, it was used to prove the truth of the matter asserted. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

The hearsay testimony of a police dispatch report was erroneously admitted into evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and although the dispatch report indicating that an unidentified informant had called to report that a man with a rifle was chasing a female down the street was admitted to show why the officer had been dispatched to the scene, the State linked the report with other evidence to establish that accused had used a rifle to commit the offenses, because regardless of the purpose for which the State said the evidence was offered, it was used to prove the truth of the matter asserted. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

The trial court improperly admitted certain highly prejudicial hearsay statements made by child victims and the boyfriend of victims' mother, where accused was convicted of multiple counts of lewd assault in the presence of a minor under 16 and sexual battery upon a minor under 12, and the court allowed the state to introduce at trial a tape recording made by boyfriend of an interview with the victims which contained highly prejudicial statements, purportedly as nonhearsay prior consistent statements of victims offered to rebut accused's theory that boyfriend had manipulated the victims to make false statements against accused, because the recording was not made before a motive to fabricate existed, and the statements were made to the very person accused of manipulation. *LeBlanc v State* (1993, Fla App D3) 619 So 2d 1021, 18 FLW D 952, corrected, remanded (Fla App D3) 18 FLW D 1369.

Merely because statement suffers some impediment under one hearsay exception does not preclude proponent of evidence from satisfying court that different, better- fitting exception fully applies. *People v Buie* (1995) 86 NY2d 501, 634 NYS2d 415, 658 NE2d 192.

Defendant's hearsay statement to his girlfriend on the same day he confessed to the police that he had shot a gun but had not shot anyone was not admissible under the principle that, when the State offers part of a confession, the accused may require the entire confession to be admitted into evidence where defendant's statement to his girlfriend was not made at the same time as the confession and was not a part of the confession, and the State did not attempt to introduce testimony concerning defendant's self- serving declaration and thus did not open the door to its admission. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

Footnotes

Footnote 55. *Taylor v State* (Ind) 587 NE2d 1293, reh den (May 7, 1992); *Feldman v Lederle Lab.*, 132 NJ 339, 625 A2d 1066, CCH Prod Liab Rep ¶ 13503.

Footnote 56. *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (Sep 12, 1990).

Footnote 57. *State v Fischer* (ND) 459 NW2d 818, habeas corpus proceeding (CA8 ND) 957 F2d 609 (even where a state laboratory report was hearsay, it was admissible where the state legislature passed a statute making a certified copy of a state laboratory analytical report prima facie evidence of the results of the reports findings in certain prosecutions).

Footnote 58. FR Evid, Rule 802; Uniform Rules of Evidence, Rule 802.

Forms: Motion for new trial based on improper admission of hearsay evidence. 1A Federal Procedural Forms, L Ed, 1:3626.

Footnote 59. *Bentley v State* (Alaska App) 706 P2d 1193.

Footnote 60. 2 Am Jur 2d, Administrative Law § 348.

§ 660 --Effect of other statutes on Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The hearsay rules are not to conflict with the Federal Rules of Civil Procedure providing, for example, for the use of depositions in civil cases in the proceedings in which they were taken, especially when the deponent is more than 100 miles from the place of trial, 61 or for the admissibility of affidavits in connection with motions, 62 including those for summary judgment, 63 new trials, 64 and relief from a judgment or order. 65

The rule also does not conflict with Federal Rules of Criminal Procedure where they provide, for example, for the use of depositions in the proceedings in which they were taken; 66 the admissibility of affidavits to show probable cause for arrest warrants; 67 or the admissibility of affidavits in connection with pretrial 68 and posttrial 69 motions.

The Rules of Bankruptcy are likewise unaffected. 70

Among those statutes permitting receipt of hearsay evidence are statutes providing for: the admissibility of depositions; 71 the admissibility of affidavits; 72 and the admissibility of official records. 73

Some statutes and rules may be said to require exclusion of out-of-court statements as to which the hearsay rules would remove any hearsay objection, such as provisions stating that advance payment for claims in connection with military death or injury does not constitute admission by the government of liability for the accident, 74 or that a finding by the court that the defendant is mentally competent to stand trial will not be admissible as evidence in a trial for the offense charged. 75

Footnotes

Footnote 61. FR Civ P, Rule 32.

Footnote 62. FR Civ P, Rule 43(e).

Footnote 63. FR Civ P, Rule 56.

Footnote 64. FR Civ P, Rule 59.

Footnote 65. FR Civ P, Rule 60.

Footnote 66. FR Crim P, Rule 15.

Footnote 67. FR Crim P, Rule 4.

Footnote 68. FR Crim P, Rule 12.

Footnote 69. FR Crim P, Rule 33.

Footnote 70. USCS Rules of Bankruptcy, Rule 9017, providing that the Federal Rules of Evidence apply in bankruptcy cases subject to specific provisions governing matters of evidence.

Footnote 71. 28 USCS § 2639(c)(1).

Footnote 72. 10 USCS § 7730; 28 USCS § 2639(c)(1).

Footnote 73. 8 USCS §§ 1360(d); 17 USCS § 410(c).

Footnote 74. 10 USCS § 2736(d).

Footnote 75. 18 USCS § 4241(f).

2. What Constitutes Hearsay Within Exclusionary Rule [661-667]

§ 661 Hearsay defined

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Hearsay is evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. 76 This rule is adopted in both the Federal Rules and the Uniform Rules of Evidence. 77 To constitute hearsay (1) the statement 78 must be an out-of-court statement, as distinct from the declarant's 79 original testimony at a trial or hearing, 80 and (2) the out-of-court statement must be offered to prove the truth of the matter asserted. 81 Even if the proponent of the testimony is the declarant himself, the testimony constitutes hearsay where the declarant is present in the courtroom but does not testify. 82

If the out-of-court statement is being offered for a purpose other than proving the truth of the matter asserted, it is not hearsay. 83 If no nonhearsay use is available to the proponent, the out-of-court statement will be excludible, 84 unless the statement can be fitted to one of the hearsay exceptions. 85

§ 661 ----Hearsay defined [SUPPLEMENT]

Case authorities:

Customs agent's testimony of her interview with two coconspirators was hearsay, notwithstanding that jury was not told exactly what words declarants had spoken, since testimony conveyed substance of what they said—namely that defendant was involved, agent's state of mind as investigation progressed was irrelevant, any explanation why

agent had investigated defendant was amply explained by fact that his address had been used by coconspirators and appeared on matchbook in coconspirator's possession, defendant did not engage in any tactics that would justify rebuttal through state-of-mind evidence, coconspirators' statements addressed most important disputed issue in trial by directly implicating defendant, coconspirators did not testify so defendant had no opportunity to discredit their declarations to agent by cross-examination, and limiting instructions were unlikely to prevent jury from considering declarations for their truth. *United States v Reyes* (1994, CA2 Conn) 18 F3d 65, 38 Fed Rules Evid Serv 1367.

Co-worker's telephone message stating that defendant's employee had told her that foreclosure notice was being served on plaintiff's wife was not hearsay since it was not offered to prove that plaintiff was married or that notice of foreclosure was being served on his wife, but to prove that improper information was conveyed to third person in violation of Fair Debt Collection Practices Act, and therefore admissible in support of summary judgment motion. *Committe v Dennis Reimer Co., L.P.A.* (1993, DC Vt) 150 FRD 495.

Evidence in trademark infringement suit that unidentified person at trade show remarked on similarity of parties' fiberglass pipes was properly excluded as hearsay. *Smith Fiberglass Prods. v Ameron, Inc.* (1993, CA7 Wis) 7 F3d 1327, 28 USPQ2d 1614, reh den (CA7) 1993 US App LEXIS 31897.

Hearsay is permitted in sentencing proceedings to prevent them from becoming full-blown trial with endless parade of witnesses, but sentencing court may only rely on hearsay when it is reliable and defendant has reasonable opportunity to rebut contested hearsay. *United States v McGill* (1994, CA7 Ind) 32 F3d 1138.

Discharged employee's affidavit is not admissible in opposition to motion for summary judgment, where employee claimed that he was discharged for violation of attendance program, but white employees were allowed to use retroactive vacation days to avoid discharge for violation of attendance program, affidavit contains report of employee's conversation with white employee, and reports assertions made by white employee, because employee offered assertions of white employee to prove their truth, so the affidavit contains hearsay and is inadmissible under FRE 801. *Cornelius v Hondo Inc.* (1994, ND Ill) 843 F Supp 1243, 64 BNA FEP Cas 124.

Trial court did not abuse its discretion in excluding drug coconspirator's prior testimony at detention hearing as hearsay where it credited government's contention that it did not have similar motive to develop coconspirator's testimony by cross-examination at detention hearing as it would have had at trial. *United States v Fischl* (1994, CA8 Minn) 16 F3d 927, reh, en banc, den sub nom *United States v Main* (CA8) 1994 US App LEXIS 5490.

Insured's statements to his father, sister and others about his desire to change beneficiary on his life insurance policy following his divorce were inadmissible hearsay in sister's action against insurance company for agent's alleged failure to provide change of beneficiary forms, since they were only relevant to show that deceased wished to change his beneficiary or asked agent to do so and thus were offered for truth of matter asserted. *Barnes v Prudential Ins. Co. of Am.* (1996, CA8 Mo) 76 F3d 889.

Certificate of insurance admitted to prove insured status of financial institution is not hearsay, since it falls outside definition of hearsay, being written statement

memorializing fact of legal relationship between insurer and insured, which affects legal rights of parties or is circumstance bearing on conduct affecting their rights. *United States v Bellucci* (1993, CA9 Cal) 995 F2d 157, 93 CDOS 4067, 93 Daily Journal DAR 6950.

In personal injury action arising out of hit-and-run accident, trial court improperly admitted statement made by anonymous witness on police report under catchall or residual exception to hearsay rule, where, pursuant to applicable statute, statement could only be admitted if there was adequate basis to believe that statement was reliable and trustworthy, and this standard was not met since witness was not witness at trial and not available for cross-examination, and record and did not include any information that would have enabled court to determine trustworthiness and reliability of statement of anonymous witness. *O'Shea v Mignone* (1994) 35 Conn App 828, 647 A2d 37, app den 231 Conn 938.

Trial court in prosecution for use of weapon properly excluded defense-proffered tape recording of telephone conversation between victim and defendant's former girlfriend, where recording contained inadmissible hearsay as well as admissible evidence, but defendant made no effort to present only admissible portions of recording. *State v Griffin* (1993, Mo App) 859 SW2d 816.

The trial court did not err in a prosecution for murder, robbery, and conspiracy by admitting testimony that an accomplice had told the witness the morning after the murder and robbery that he thought the victim had more money than they had found, that she should say she did not know anything about the shooting if anyone asked, and that she would go to jail and lose her children if she did not so. The testimony was not introduced for the truth of the statement but to again explain why the witness did not report the offense in a more timely manner. The testimony that the victim had less money than expected could not have been too prejudicial because it added little to the testimony of this witness and did not rise to the level of a fundamental error affecting the basic fairness of the trial. G.S. § 8C-1, Rule 801(c). *State v Lamb* (1995) 342 NC 151, 463 SE2d 189.

Hearsay is statement, other than one made by declarant, offered into evidence to prove truth of matter asserted (Stats § 908.01(3)). *Roebke v Newell Co.* (1993, App) 177 Wis 2d 624, 503 NW2d 295, review den (Wis) 508 NW2d 423.

Footnotes

Footnote 76. *State v Getz*, 250 Kan 560, 830 P2d 5; *State v Shaw* (Mo) 847 SW2d 768, cert den (US) 126 L Ed 2d 212, 114 S Ct 260, reh den (US) 126 L Ed 2d 488, 114 S Ct 591; *Feldman v Lederle Lab.*, 132 NJ 339, 625 A2d 1066, CCH Prod Liab Rep ¶ 13503.

Footnote 77. FR Evid, Rule 801(c); Uniform Rules of Evidence, Rule 801(c).

Footnote 78. As to what constitutes a "statement," see § 662.

Footnote 79. As to who is a "declarant," see § 663.

Footnote 80. *United States v Nacrelli* (ED Pa) 468 F Supp 241, affd without op (CA3 Pa)

614 F2d 771; *United States v Summers* (CA5 Ala) 598 F2d 450, 4 Fed Rules Evid Serv 1146; *State v Durr*, 58 Ohio St 3d 86, 568 NE2d 674, reh den, stay den 59 Ohio St 3d 721, 572 NE2d 697 and cert den (US) 116 L Ed 2d 252, 112 S Ct 310.

Investigating officer's testimony that there were eight people in bank at time of robbery, deduced from his interviews with all persons in the bank shortly after the incident, is not hearsay but his own deduction. *United States v Stout* (CA8 Mo) 599 F2d 866, 4 Fed Rules Evid Serv 683, cert den 444 US 877, 62 L Ed 2d 106, 100 S Ct 163.

Police reports and test results were inadmissible hearsay when the author of the report was unavailable for cross examination. *McDaniel v DeJean* (La App 3d Cir) 556 So 2d 1336.

Repeating information at trial observed on a computer readout on a police intoxilizer machine constituted hearsay. *May v State* (Tex App Dallas) 784 SW2d 494, petition for discretionary review ref (June 27, 1990) and motion den, habeas corpus den (Tex App Dallas) 852 SW2d 3, petition for discretionary review ref (Sep 15, 1993).

Footnote 81. *United States v Oaxaca* (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310; *United States v Abascal* (CA9 Cal) 564 F2d 821, 1 Fed Rules Evid Serv 694, cert den 435 US 942, 55 L Ed 2d 538, 98 S Ct 1521 and cert den 435 US 953, 55 L Ed 2d 804, 98 S Ct 1583; *State v Durr*, 58 Ohio St 3d 86, 568 NE2d 674, reh den, stay den 59 Ohio St 3d 721, 572 NE2d 697 and cert den (US) 116 L Ed 2d 252, 112 S Ct 310.

It was considered hearsay where a wife attempted to relate the contents of a conversation with her husband the night before his death where the conversation concerned the husband's perception that a machine he was working with was dangerous and where the statement was offered at trial to show that the machine was in fact dangerous. *Turner v Wean United, Inc.* (Ala) 531 So 2d 827, CCH Prod Liab Rep ¶ 11937.

Footnote 82. *United States v Phelps* (ED Ky) 572 F Supp 262, 14 Fed Rules Evid Serv 877.

Footnote 83. As to nonhearsay uses of out-of-court statements, see § 664.

Footnote 84. FR Evid, Rule 802; Uniform Rules of Evidence, Rule 802.

Footnote 85. FR Evid, Rule 801(d), 803, 804; Uniform Rules of Evidence, Rule 801(d), 803, 804.

§ 662 --"Statement"

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A "statement" subject to the hearsay rule is (1) an oral or written assertion or (2)

nonverbal conduct of a person, if it is intended by the person as an assertion. 86 A person makes an assertion when that person speaks, writes, acts, or fails to act with the intent to convey an expression of fact or opinion. 87 The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct not intended as an assertion 88 and any oral statement which is not intended as an assertion. 89

Oral or written statements which directly 90 or impliedly state the matter to be proved are assertive statements excludible as hearsay. 91 For example, a newspaper article is considered hearsay evidence of the facts in the article and is inadmissible to prove those facts. 92 Where conduct is apparently nonassertive, the party seeking to exclude such conduct as hearsay bears the burden of proving that the actor intended his or her conduct to be assertive. 93

The hearsay rules do not prevent the introduction of nonassertive material, including tangible evidence such as comparison photographs 94 or police sketches of a suspect; 95 otherwise every piece of tangible evidence capable of supporting an inference could be said to be an assertion. 96 However, it has been held that a police composite sketch is hearsay: it has the same effect as if the victim had made a verbal description of the suspect's physical characteristics; the fact that the sketch is in picture form does not change the fact that it is being offered as a statement made out of court to prove what the suspect looked like. 97 Other examples of nonassertive tangible evidence include: evidence of notebooks describing drug transactions which were seized on the premises of the accused, as supporting the inference that the apartment was the scene of drug sales and related activity; 98 and bookmaking records found in the possession of a taxpayer and offered as proof that he earned money through bookmaking, and not offered to establish the truth of transactions recorded in them. 99

§ 662 --"Statement" [SUPPLEMENT]

Case authorities:

Since "statement" signifies "single declaration or remark" for purposes of residual exception to hearsay rule, court must examine narrative sentence by sentence and rule upon admissibility of each single declaration or remark and determine whether it has particularized guarantees of trustworthiness, relates to material fact, and its admission furthers purposes of Rules of Evidence and interests of justice. *United States v Canan* (1995, CA6 Ky) 48 F3d 954, 41 Fed Rules Evid Serv 543.

Defendant charged with using communication facility to facilitate commission of federal drug crimes was not rendered ineffective assistance for counsel's failure to call his drug counselor as witness since any relevant testimony counselor could have provided was inadmissible hearsay because it consisted of statements made to counselor that were not necessary for treatment. *United States v Kozinski* (1994, CA7 Ill) 16 F3d 795.

Securities fraud defendant's motion in limine to exclude affidavit of deceased stockholder is denied, where defendant claims stockholder gave him stock certificate representing 35,000 shares of corporate stock to use as he saw fit, but affidavit, prepared with assistance of stock transfer agent, seeks new certificate to replace certificates lost, destroyed, or never delivered, because affidavit, although not dispositive document, is admissible under hearsay exception at FRE 803(15) for statements purporting to establish

or affect interest in property. *United States v Weinstock* (1994, DC Utah) 863 F Supp 1529.

Footnotes

Footnote 86. FR Evid, Rule 801(a); Uniform Rules of Evidence, Rule 801(a). *State v Williams*, 133 Ariz 220, 650 P2d 1202 (diagram drawn by witness to demonstrate to the jury declarant's out of court gestures constituted hearsay repetition of the declarant's nonverbal conduct which was intended by the declarant as an assertion of what another individual had told her); *State v Bawdon* (SD) 386 NW2d 484; *State v Blades*, 225 Conn 609, 626 A2d 273; *People v Bowers* (Colo) 801 P2d 511.

Gas station company's practice of back-billing its gas station for amounts due on unauthorized credit card sales constituted nonverbal conduct intended as an assertion of the unauthorized signature where offered through the gas station manager's testimony about having been back billed for disputed charges in the trial of one of the gas station employees for a charge of forging the signature of the credit card holder. *State v McGann*, 132 Ariz 296, 645 P2d 811.

Child's use of anatomical dolls and a child's gesturing in response to questions by police officers regarding sexual abuse is intended to be communicative and qualifies as hearsay. *People v Bowers* (Colo) 801 P2d 511; *State v Bratt*, 250 Kan 264, 824 P2d 983.

It was hearsay where a detective testified that, in response to inquiry as to whether mother had any picture frames made by the defendant, mother went upstairs and came back with a picture frame; mother's conduct constituted implied statement that the defendant had made the picture frame that she brought. *Commonwealth v Rush*, 529 Pa 498, 605 A2d 792.

Annotation: Written recitals or statements as within rule excluding hearsay, 10 ALR2d 1035.

Footnote 87. *State v Carlson*, 311 Or 201, 808 P2d 1002.

Footnote 88. *United States v Abou-Saada* (CA1 Mass) 785 F2d 1, 19 Fed Rules Evid Serv 1481, cert den 477 US 908, 91 L Ed 2d 572, 106 S Ct 3283; *United States v Butler* (CA1 RI) 763 F2d 11, 18 Fed Rules Evid Serv 438; *United States v Hensel* (CA1 Me) 699 F2d 18, 1984 AMC 1907, 12 Fed Rules Evid Serv 1025, cert den 461 US 958, 77 L Ed 2d 1317, 103 S Ct 2431 and cert den 464 US 823, 78 L Ed 2d 99, 104 S Ct 91 and cert den 464 US 824, 78 L Ed 2d 100, 104 S Ct 94; *State v Snowden* (App) 138 Ariz 402, 675 P2d 289; *State v Blades*, 225 Conn 609, 626 A2d 273 (police officer was permitted to testify that he found an icepick in the handbag of the victim where the information demonstrated a nonassertive act of the victim which tended to show her fear of the defendant).

Footnote 89. *United States v Jackson* (CA5 Ala) 588 F2d 1046, 4 Fed Rules Evid Serv 245, 49 ALR Fed 461, reh den (CA5 Ala) 591 F2d 1343 and cert den 442 US 941, 61 L Ed 2d 310, 99 S Ct 2882; *United States v Zenni* (ED Ky) 492 F Supp 464, 6 Fed Rules Evid Serv 441; *Shea v Honolulu*, 67 Hawaii 499, 692 P2d 1158.

Penitentiary warden's testimony as to defendant's nickname in prison reported nonassertive oral conduct and was therefore not hearsay and helped to establish identity of defendant as one of two abductors of women who testified as to names abductors called each other. *United States v Weeks* (CA5 Tex) 919 F2d 248, 31 Fed Rules Evid Serv 1457, cert den 499 US 954, 113 L Ed 2d 481, 111 S Ct 1430.

Witness was permitted to testify that another individual had asked him if he had been told that the victim has been sexually abused; although the asker of the question never testified at trial, the statement was not hearsay because the individual's remark was a question and not an assertion of truth. *Reaves v State* (Ind) 586 NE2d 847.

Statements made by children who are allegedly victims of sexual abuse while they are having nightmares or are dreaming have been considered involuntary verbal reactions instead of conscious, intentional assertions of fact or opinion and, as such, have been considered nonassertive utterances. *State v Stevens*, 58 Wash App 478, 794 P2d 38, review den 115 Wash 2d 1025, 802 P2d 128.

Annotation: Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 ALR4th 802.

Footnote 90. *United States v Kitzman* (CA8 Ark) 520 F2d 1400.

Footnote 91. *Flores v United States* (CA9 Cal) 551 F2d 1169, 77-1 USTC ¶ 9380, 1 Fed Rules Evid Serv 1355, 39 AFTR 2d 77-1344.

Citations issued against employer for violations of workplace safety regulations which indicated that the employer was cited for the decedent's death are inadmissible in a wrongful death action where they are offered to prove that the employer was in fact responsible for the decedent's death. *Swartz v Dow Chemical Co.*, 414 Mich 433, 326 NW2d 804.

Receipts constituted written assertions that stated amounts of money were received from named parties and fell within the definition of hearsay where offered as proof of the amounts that the various parties had actually paid to the person issuing the receipts. *State v Sutton* (Utah) 707 P2d 681.

Footnote 92. *People v Burt*, 89 Mich App 293, 279 NW2d 299; *State v Damiano* (RI) 587 A2d 396.

A TV guide is an out-of-court statement of what was scheduled to be shown on the television; where it is offered by a party to prove the truth of the matter asserted, specifically as evidence of what was actually aired so as to rebut a parties' alibi, it would be hearsay. *People v Burt*, 89 Mich App 293, 279 NW2d 299.

Annotation: Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Footnote 93. *United States v Butler* (CA1 RI) 763 F2d 11, 18 Fed Rules Evid Serv 438; *United States v Hensel* (CA1 Me) 699 F2d 18, 1984 AMC 1907, 12 Fed Rules Evid Serv 1025, cert den 461 US 958, 77 L Ed 2d 1317, 103 S Ct 2431 and cert den 464 US 823, 78 L Ed 2d 99, 104 S Ct 91 and cert den 464 US 824, 78 L Ed 2d 100, 104 S Ct 94.

Footnote 94. *United States v Oaxaca* (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310.

Footnote 95. *United States v Moskowitz* (CA2 NY) 581 F2d 14, 3 Fed Rules Evid Serv 476, cert den 439 US 871, 58 L Ed 2d 184, 99 S Ct 204.

However, it has been held that a police composite sketch of a perpetrator which was drawn based solely on oral assertions is a statement and is not exempt from the hearsay rule. *State v Patterson*, 103 NC App 195, 405 SE2d 200, review gr 330 NC 200, 412 SE2d 63 and affd 332 NC 409, 420 SE2d 98.

Footnote 96. *United States v Oaxaca* (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310.

Footnote 97. *State v Motta*, 66 Hawaii 254, 659 P2d 745.

Footnote 98. *United States v Wilson* (CA8 Mo) 532 F2d 641, 1 Fed Rules Evid Serv 222, cert den 429 US 846, 50 L Ed 2d 117, 97 S Ct 128.

Footnote 99. *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922.

§ 663 --"Declarant"

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A declarant under the hearsay rule is a person who makes a statement. 1 The declarant is to be distinguished from the witness who seeks to offer the statement at trial.

◆ Comment: An out-of-court statement which overcomes a hearsay objection may still be subject to exclusion if the declarant lacks firsthand knowledge of the matter asserted in view of FRE 602. Although FRE 602 by its terms imposes a personal knowledge requirement only upon testifying witnesses, the same requirement applies generally to hearsay declarants. 2 However, admission of testimony concerning a prior, out-of-court identification by a witness who is unable, due to memory loss, to explain the basis of the identification does not violate the Confrontation Clause or rules of evidence. 3

§ 663 --"Declarant" [SUPPLEMENT]

Case authorities:

Hearsay nature of private investigator's declaration in patent infringement action that accused products were for sale at stores within jurisdiction did not preclude its

consideration on appeal from dismissal of complaint for lack of personal jurisdiction, and in any case evidence bore circumstantial indicia of reliability so that it might be admissible at trial also. *Beverly Hills Fan Co. v Royal Sovereign Corp.* (1994, CA FC) 21 F3d 1558, 30 USPQ2d 1001, 28 FR Serv 3d 435, cert dismd (1994, US) 63 USLW 3109.

Footnotes

Footnote 1. FR Evid, Rule 801(b); Uniform Rules of Evidence, Rule 801(b).

Footnote 2. Advisory Committee Notes to Federal Rules of Evidence, FR Evid, Rule 801.

For the general requirements for witnesses under FRE 602, see 32B Am Jur 2d, Federal Rules of Evidence §§ 322 et seq.

Footnote 3. *United States v Owens*, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193.

§ 664 Nonhearsay uses of out-of-court statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A statement having probative worth simply by virtue of the fact that it was uttered, if relevant to a material fact in issue, is not hearsay and is generally admissible, unless its probative value is found to be substantially outweighed by the prejudicial effect. 4 Where a statement is not offered for the truth of the contents of the conversation, but only to show that it was made, then the statement is not hearsay. 5 For example, a statement that is offered to show its patent falsity, so as to suggest the defendant's consciousness of guilt, is not hearsay. 6 Similarly, a newspaper article could be properly admitted to evidence where the articles were not offered to prove the facts in the story, but instead were admitted to support the idea that the public was aware of the information mentioned in the articles. 7

Among the kinds of out-of-court statements that have been held admissible as having been offered for a nonhearsay purpose are—

—certain verbal acts. 8

—statements relating to a contemporaneous nonverbal act which has legal significance in itself; 9 however, a statement which, though relating to a contemporaneous act, makes an assertion about some previous condition or event is hearsay. 10

—words bearing on an object which is otherwise admissible in evidence, which identify the object as connected with a certain person or place, to prove ownership 11 or origin 12 of the object; however, notations of names, addresses, phone numbers, and the like written on slips of paper or entered in address books, which are offered to connect the

bearer or owner to the person indicated by the notation, are hearsay, 13 although the notation may be received in evidence if it is not offered as an accurate representation of a particular person's address or telephone number. 14

—statements relating to the state of mind of the listener. 15

—statements relating to the state of mind of the declarant. 16

§ 664 ----Nonhearsay uses of out-of-court statements [SUPPLEMENT]

Case authorities:

Hearsay statement of undercover police officer that he was forced to sniff cocaine at gunpoint was properly admitted to rehabilitate officer where defense counsel sought to discredit police officer with discrepancy between this statement and trial testimony that gun was displayed but never removed from one defendant's waistband. *United States v Castillo* (1994, CA2 NY) 14 F3d 802, later proceeding (CA2 NY) 1994 US App LEXIS 10932 and petition for certiorari filed (Apr 28, 1994).

Testimony of defamation plaintiff's friend that she had telephoned store where plaintiff had worked and been informed by manager that plaintiff had been terminated because of accusations that she stole money from employer was not hearsay since manager's statement was not offered for truth of matter, but to prove that manager uttered that statement. *Starr v Pearle Vision* (1995, CA10 Okla) 54 F3d 1548.

Coconspirator's testimony that he heard another conspirator tell defendant to take car and to make marijuana into "squares" and load it into another car was admissible for non-hearsay purpose, namely, to show effect of statements on defendant. *United States v Nieto* (1995, CA10 Okla) 60 F3d 1464.

Assuming that two letters defendant wrote to his girlfriend in which he set forth details concerning his contention that he had killed the victim while defending himself from a homosexual assault were admissible for corroboration under Rule 806, the trial court's exclusion of these letters was not prejudicial error since defendant was able to get into evidence that he stated in the letters that he killed in self- defense, and there is no reasonable possibility that a different verdict would have been returned if defendant had put before the jury more details of the killing as corroborative evidence. *State v Lovin* (1995) 339 NC 695, 454 SE2d 229.

There was no error in a first- degree murder prosecution in the admission of testimony by an officer that the mother of an absent witness had said that the witness had moved and that she did not know where the witness was. The testimony was admissible to prove the difficulty of finding the witness and was not hearsay when used for that purpose. The prosecutor's lapsus linguae in stating that the testimony was offered for the truth of the matter did not convert nonhearsay testimony to hearsay and, in any event, the testimony was so peripheral that it could not have prejudiced defendants. *State v Bowie* (1995) 340 NC 199, 456 SE2d 771.

The trial court did not err in a prosecution for attempted first- degree statutory rape and attempted first-degree sexual offense by allowing the State's medical expert to testify about statements the victim made to her during a physical examination. Whether the

testimony fell within the medical diagnosis exception to the hearsay rule was not addressed because the statements corroborated the earlier testimony of the victim, defendant objected to the testimony "except for purposes of corroboration," and the trial court properly instructed the jury that the testimony was received only for the purpose of corroboration. *State v Robertson* (1994) 115 NC App 249, 444 SE2d 643.

An officer's testimony reciting the statements of two eyewitnesses that a vehicle almost ran their car off the road, that they observed the vehicle leave the road and strike a stop sign, and that they followed the vehicle to a residence and saw a man in a white shirt and blue pants exit the vehicle, fall to the ground, and then enter the residence did not constitute hearsay since the testimony was not offered to prove the truth of the matters asserted by the eyewitnesses but was offered to show the basis for the officer's reasonable belief at the time he arrested petitioner that petitioner had been driving while impaired. *Melton v Hodges* (1994) 114 NC App 795, 443 SE2d 83.

In narcotics prosecution, taped statements concerning drug buys were not hearsay since they were introduced not for truth of matter asserted, but, rather, to place defendant's statements in context and make them comprehensible to jury. Even if statements had been hearsay, however, they were admissible under residual hearsay exception where witness ignored subpoena and failed to appear, and trial court found that testimony of police officers supplied sufficient guarantees of trustworthiness of statements. *State v Dillon* (1994, W Va) 447 SE2d 583.

Footnotes

Footnote 4. *State v Baird* (Fla) 572 So 2d 904, 15 FLW S 613.

Footnote 5. *Thompson v State*, 298 Ark 502, 769 SW2d 6; *State v Baird* (Fla) 572 So 2d 904, 15 FLW S 613; *Shea v Honolulu*, 67 Hawaii 499, 692 P2d 1158; *State v Getz*, 250 Kan 560, 830 P2d 5; *Stoker v Commonwealth* (Ky) 828 SW2d 619; *State v Ledger* (Me) 444 A2d 404; *Gray v Maxwell*, 206 Neb 385, 293 NW2d 90; *State v Gooden*, 133 NH 674, 582 A2d 607; *Roll v Keller* (ND) 356 NW2d 154; *State v Williams*, 38 Ohio St 3d 346, 528 NE2d 910, reh den 39 Ohio St 3d 717, 534 NE2d 93 and stay gr 40 Ohio St 3d 703, 534 NE2d 844 and cert den 489 US 1040, 103 L Ed 2d 238, 109 S Ct 1176; *Commonwealth v Wharton*, 530 Pa 127, 607 A2d 710; *Soliz v State* (Tex App Houston (1st Dist)) 794 SW2d 110; *Caccitolo v State*, 69 Wis 2d 102, 230 NW2d 139; *Van Duser v State* (Wyo) 796 P2d 1322.

A wife's testimony as to conversations between her husband and one of his treating physicians was not hearsay where offered to show that the wife did not recall the husband having expressed to the doctor anything related to his having engaged in certain activities since his accident. *CSX Transp., Inc. v Battiste* (Ala) 578 So 2d 1065.

A letter was not hearsay where offered to show that the recipient received a copy of the information in the letter on a particular date. *Roll v Keller* (ND) 356 NW2d 154.

Footnote 6. *United States v Pedroza* (CA2 NY) 750 F2d 187, 16 Fed Rules Evid Serv 1150, appeal after remand (CA2 NY) 790 F2d 254, 20 Fed Rules Evid Serv 848, cert den 479 US 842, 93 L Ed 2d 92, 107 S Ct 151; *United States v Moore* (CA5 Tex) 748 F2d 246, 16 Fed Rules Evid Serv 1341; *United States v Adkins* (CA5 Tex) 741 F2d 744, 16

Fed Rules Evid Serv 385, reh den, en banc (CA5 Tex) 747 F2d 1465 and cert den 471 US 1053, 85 L Ed 2d 478, 105 S Ct 2113; *United States v Wellington* (CA9 Cal) 754 F2d 1457, 17 Fed Rules Evid Serv 961, cert den 474 US 1032, 88 L Ed 2d 573, 106 S Ct 592, 106 S Ct 593.

Police officer's testimony that the declarant, when questioned about his whereabouts, told the police essentially the same story that the defendant had told the police specifically that they were together at a bar for most of the evening and had later gone to a hotel, was not hearsay where it was offered to show that the declarant gave a false alibi that was substantially similar to that given by the defendant, rather than being offered to prove that the defendant and the declarant actually were at a bar together or went to a hotel. *State v Esposito*, 223 Conn 299, 613 A2d 242.

Statements of a criminal defendant and the two individuals with whom he was arrested were not considered hearsay where they were admitted only to prove that all three gave conflicting and therefore false statements when arrested. *State v Hudson* (Minn) 281 NW2d 870.

A statement offered to prove that a particular party made it so that the state could later prove, by other admissible evidence, that the party fabricated the statement in order to support a false claim, was not hearsay. *State v Bastien* (ND) 436 NW2d 229.

Footnote 7. *Ryan v Kansas Power & Light Co.*, 249 Kan 1, 815 P2d 528.

Where the prosecution argued that the defendant's confession contained information which only the murderer could have known, then newspaper articles were admissible to show that details provided by the defendant could have been taken from news accounts of the murder. *Woods v State*, 101 Nev 128, 696 P2d 464.

Footnote 8. § 665.

Footnote 9. *United States v Abascal* (CA9 Cal) 564 F2d 821, 1 Fed Rules Evid Serv 694, cert den 435 US 942, 55 L Ed 2d 538, 98 S Ct 1521 and cert den 435 US 953, 55 L Ed 2d 804, 98 S Ct 1583.

In a narcotics prosecution, a witness' testimony that she was approached by an unidentified woman who handed her a canvas bag and told her to pack it with the things she was taking on her trip was admissible. *United States v Jackson* (CA5 Ala) 588 F2d 1046, 4 Fed Rules Evid Serv 245, 49 ALR Fed 461, reh den (CA5 Ala) 591 F2d 1343 and cert den 442 US 941, 61 L Ed 2d 310, 99 S Ct 2882.

Testimony by store clerk that the defendant's brother had telephoned and stated that he needed some money to get the defendant out of town was admissible in a prosecution for interstate transportation of stolen money orders, where the clerk removed the money orders from the safe before the defendant and his brother arrived and attempted to hide them, since this unusual behavior was worthy of clarification by reference to the phone call. *United States v Zamarripa* (CA8 Mo) 544 F2d 978, 1 Fed Rules Evid Serv 454, cert den 429 US 1111, 51 L Ed 2d 566, 97 S Ct 1149.

Footnote 10. *United States v Day*, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 11. United States v Snow (CA9 Ariz) 517 F2d 441 (tape with lettering spelling out name of defendant on a briefcase in which unregistered firearm was found was admissible as tending to prove that case belonged to defendant).

Footnote 12. United States v Mejias (CA2 NY) 552 F2d 435, 1 Fed Rules Evid Serv 1328, cert den 434 US 847, 54 L Ed 2d 115, 98 S Ct 154 (hotel receipts and travel agency business card connecting defendant to hotel and travel agency).

Footnote 13. United States v Watkins, 171 US App DC 158, 519 F2d 294.

Footnote 14. United States v Day, 192 US App DC 252, 591 F2d 861, 3 Fed Rules Evid Serv 1523.

Footnote 15. § 666.

Footnote 16. § 667.

§ 665 --Verbal acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

There is a category of nonhearsay designated as verbal acts or verbal conduct in which the utterance of the words is, in itself, an operative fact which gives rise to legal consequences. 17 Verbal acts may be considered nonhearsay when they comprise the operative events at issue, 18 as in cases of fraud, 19 perjury, 20 price fixing, 21 gambling, 22 prostitution, 23 or republication of libel. 24 Such statements may also be made in the process of collective bargaining. 25 Ballots cast in an election are not hearsay because the casting of a vote is a verbal act in which the statement itself has a legal effect. 26

Many crimes involve verbal acts, 27 and the words of coconspirators, if not admissible as an admission by a party-opponent, 28 may in some circumstances be admitted as verbal acts probative of the operation of a conspiracy. 29

Similarly, out of court statements may be offered to show that an agreement or contract was formed by the making of the statements, because the making of the statements gives rise to legal consequences, and the mere fact of utterance is relevant to the issue of whether or not there was an express agreement. 30

§ 665 --Verbal acts [SUPPLEMENT]

Case authorities:

The trial court did not err in a negligence action by a railroad arising from a crossing accident by admitting into evidence the bill for damages which plaintiff- railroad sent to

defendant. The document was admitted only for illustrative purposes, not to prove the truth of the matter asserted, and was not hearsay. *Southern Ry. v Biscoe Supply Co.* (1994) 114 NC App 474, 442 SE2d 127.

Footnotes

Footnote 17. *Zeigler v State* (Fla) 402 So 2d 365, cert den 455 US 1035, 72 L Ed 2d 153, 102 S Ct 1739; *Re Estate of Raketti* (ND) 340 NW2d 894; *State v Blevins* (Franklin Co) 36 Ohio App 3d 147, 521 NE2d 1105, motion overr.

Footnote 18. *Venus v Goodman* (WD Wis) 556 F Supp 514, 12 Fed Rules Evid Serv 1605.

Footnote 19. *United States v McDonnel* (CA5 Tex) 550 F2d 1010, cert den 434 US 835, 54 L Ed 2d 96, 98 S Ct 123; *State v Shaw* (Mo) 847 SW2d 768, cert den (US) 126 L Ed 2d 212, 114 S Ct 260, reh den (US) 126 L Ed 2d 488, 114 S Ct 591.

Footnote 20. *United States v Anfield* (CA9 Or) 539 F2d 674.

Footnote 21. *United States v Miller* (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647.

Footnote 22. *United States v Southard* (CA1 RI) 700 F2d 1, 12 Fed Rules Evid Serv 545, cert den 464 US 823, 78 L Ed 2d 97, 104 S Ct 89; *Thompson v State*, 298 Ark 502, 769 SW2d 6.

Footnote 23. *United States v Monaco* (CA10 Colo) 700 F2d 577, 12 Fed Rules Evid Serv 1126.

Footnote 24. *Luster v Retail Credit Co.* (CA8 Ark) 575 F2d 609, 3 Fed Rules Evid Serv 277.

Annotation: Liability of publisher of defamatory statement for its repetition or republication by others, 96 ALR2d 373.

Footnote 25. *NLRB v J. P. Stevens & Co., Gulistan Div.* (CA5) 538 F2d 1152, 93 BNA LRRM 2265, 79 CCH LC ¶ 11622, 1 Fed Rules Evid Serv 337; *NLRB v Custom Excavating, Inc.* (CA7) 575 F2d 102, 98 BNA LRRM 2259, 83 CCH LC ¶ 10585.

Footnote 26. *Local 512, Warehouse & Office Workers' Union v NLRB* (CA9) 795 F2d 705, 122 BNA LRRM 3113, 42 CCH EPD ¶ 36793, 105 CCH LC ¶ 12005, on remand 291 NLRB 373, 129 BNA LRRM 1314, 1988-89 CCH NLRB ¶ 15171.

Footnote 27. *United States v Calvert* (CA8 Mo) 523 F2d 895, 1 Fed Rules Evid Serv 41, cert den 424 US 911, 47 L Ed 2d 314, 96 S Ct 1106.

Footnote 28. FR Evid, Rule 801(d)(2)(E).

As to admissions generally, see § 754.

Footnote 29. *Anderson v United States*, 417 US 211, 41 L Ed 2d 20, 94 S Ct 2253; *United States v Boyd* (CA5 Ala) 566 F2d 929, 2 Fed Rules Evid Serv 938; *United States v Fried* (CA9 Cal) 576 F2d 787, 3 Fed Rules Evid Serv 1091, cert den 439 US 895, 58 L Ed 2d 241, 99 S Ct 255.

Footnote 30. *Re Estate of Starcher* (ND) 447 NW2d 293.

A witness could testify as to telephone conversations he had with someone purporting to be the defendant where the conversations dealt with purchasing guns because the telephone conversation represented a verbal act which formed the basis for the witness' subsequent action in securing guns and delivering them to the defendant. *Zeigler v State* (Fla) 402 So 2d 365, cert den 455 US 1035, 72 L Ed 2d 153, 102 S Ct 1739.

§ 666 --State of mind of listener

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue. 31

When a person's knowledge or state of mind is at issue, evidence that he has heard or read a statement may be relevant, and it lies beyond reach of a hearsay objection. 32 Where reasonableness of a party's conduct is at issue, knowledge of certain statements may have probative value regardless of the truth of the statements. 33 Thus, an out-of-court statement may be offered to explain responsive conduct. 34 An out of court declaration by a third party to a police officer which is offered at trial merely to explain the officer's conduct in the investigation of a crime is usually admissible because it is not offered for the truth of the matter stated. 35 The conduct to be explained should be relevant, in need of explanation, and contemporaneous with the statements. 36 But the trial judge must sometimes exclude such proof where it contains accusations so damaging to the accused that the risk the jury will consider the words for their truth outweighs their probative value as an explanation of official conduct. 37 However, where the substance of the conversations heard by the officer could in no way go to prove any matter relevant to the trial, it is not error for part of the substance of a conversation to be revealed. 38 Further, the officer's testimony as to the substance of the motorist's tip, as opposed to only permitting the officer to state that he had information, is appropriate where the defendant has cast doubts on the officer's reasons for approaching the defendant when he did. 39

Evidence which would otherwise be hearsay may be admissible, as bearing on the state of mind of the defendant, if it is not offered for the truth of the statement. This nonhearsay use has been invoked with respect to the issue of duress, 40 authorization, 41 volition, 42 motive, 43 good faith, 44 and knowledge or belief, or the absence of knowledge. 45

§ 666 --State of mind of listener [SUPPLEMENT]**Case authorities:**

Sexual molestation victim's testimony about what she told police officer in out-of-court interview was inadmissible hearsay and since case was close because it was dependent almost entirely on victim's testimony, which was at times unclear and inconsistent, its admission, together with improper prosecutorial vouching by arguing that victim's testimony was consistent with her earlier out-of-court statements, was reversible error. *United States v Frederick* (1996, CA9 Ariz) 78 F3d 1370, 96 CDOS 1473, 96 Daily Journal DAR 2526, 43 Fed Rules Evid Serv 1156.

Testimony by an assault victim that defendants' companion yelled "shoot the mother f---er" just before defendants drew their guns and began shooting was not inadmissible hearsay since the testimony was admitted to establish why defendants began shooting and to show the context in which the shooting began. Even if the statement was hearsay, it was admissible under the "excited utterance" exception to the hearsay rule where it was made when someone with whom the companion had been arguing came toward him holding a bar chair in the air. *State v Reid* (1994) 335 NC 647, 440 SE2d 776.

The trial court did not err in a prosecution for first-degree murder and conspiracy by admitting testimony concerning statements made in defendant's presence from a witness who was present but did not participate and from a woman who gave the participants a ride afterwards. The statements were offered not to prove the truth of any matter asserted therein, but to explain the subsequent conduct of the defendant and his accomplices and the context in which the murder occurred. *State v Morston* (1994) 336 NC 381, 445 SE2d 1.

The trial court did not err in a noncapital first-degree murder prosecution by admitting the testimony of an S.B.I. agent that defendant's wife had said that defendant was at his father's home on the day defendant had promised to give the agent his gun. The testimony was not offered to prove the truth of the matter asserted but rather to explain the agent's actions after he was unable to retrieve the gun from defendant although defendant had promised to deliver the gun to the police that morning. *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

The trial court did not err in a first-degree murder prosecution in admitting hearsay statements by the victim that she was afraid of the defendant. The conversations between the victim and the five witnesses related directly to the victim's fear of defendant and were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of the victim's relationship with the defendant and the impact of defendant's behavior on the victim's state of mind prior to her murder. The trial court carefully weighed the probative value of the testimony against its prejudicial effect and defendant has not demonstrated any abuse of discretion. GS § 8C-1, Rule 803(3). *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

In a murder prosecution wherein two teenage girls testified that defendant was one of the two shooters, testimony that, prior to the shooting, Corey Best had threatened to kick the girls if he found them again in the vicinity where the shooting occurred was not inadmissible hearsay because it was not offered to show that the declarant was going to hurt the girls but to explain why the girls had left the scene before the shooting and thus

could not identify defendant as one of the shooters. Therefore, the trial court erred by excluding this testimony, but the error was not prejudicial where defendant was allowed to present this evidence through the testimony of other witnesses that the two girls were not at the scene during the shooting because of an argument with Corey Best. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

Footnotes

Footnote 31. *State v Hernandez* (App) 170 Ariz 301, 823 P2d 1309; *People v Algee* (5th Dist) 228 Ill App 3d 401, 169 Ill Dec 497, 591 NE2d 1001, app den 146 Ill 2d 633, 176 Ill Dec 805, 602 NE2d 459.

Contents of recorded telephone conversations could be admitted not to prove the truth of any assertions made, but to corroborate the allegations of one of the parties that the statements were in fact made to her and to establish whether or not they had an effect on the voluntariness of her subsequent actions. *Gray v Maxwell*, 206 Neb 385, 293 NW2d 90.

Footnote 32. *United States v Lynn* (CA5 Tex) 608 F2d 132, 5 Fed Rules Evid Serv 472; *Ex parte Bunn* (Ala) 611 So 2d 399, on remand, remanded (Ala App) 611 So 2d 401; *Breedlove v State* (Fla) 413 So 2d 1, cert den 459 US 882, 74 L Ed 2d 149, 103 S Ct 184, reh den 459 US 1060, 74 L Ed 2d 627, 103 S Ct 482; *State v Mecier*, 145 Vt 173, 488 A2d 737; *State v Curbello-Rodriguez* (App) 119 Wis 2d 414, 351 NW2d 758 (statement not hearsay where offered to establish that it was said, that the crime victims heard it, and that they were intimidated by the statement).

Evidence was not inadmissible as hearsay in Hobbs Act prosecution where it was offered to show that victim of extortion reasonably believed that defendant had power by virtue of his official position to influence judicial disposition of cases, and was thus not offered to prove the truth of the matter asserted. *United States v Blackwood* (CA7 Ill) 768 F2d 131, 18 Fed Rules Evid Serv 1090, cert den 474 US 1020, 88 L Ed 2d 554, 106 S Ct 569.

Testimony of defendant's father and of a sheriff's deputy who were present when defense counsel informed defendant that the trial judge would sentence defendant to a maximum sentence if the defendant did not plead guilty to murder was admissible to show the circumstances under which the defendant accepted a plea bargain. *People v Algee* (5th Dist) 228 Ill App 3d 401, 169 Ill Dec 497, 591 NE2d 1001, app den 146 Ill 2d 633, 176 Ill Dec 805, 602 NE2d 459.

Footnote 33. *Gibbs v State Farm Mut. Ins. Co.* (CA9 Cal) 544 F2d 423, 1 Fed Rules Evid Serv 566.

A letter stating that an individual had approached an inmate in jail to request that he arrange to have the defendant killed would be admissible by the defendant for the limited purpose of proving that his knowledge of the contents of the letter contributed to his fear of the individual and kept him from coming forth with the truth about the crimes. *State v Esposito*, 223 Conn 299, 613 A2d 242.

Footnote 34. *State v Mitchell* (Iowa) 450 NW2d 828.

In a murder prosecution, a witness' testimony that he had heard an unknown person say that unnamed others were going to beat up the victim was properly admitted as nonhearsay where it was offered only to explain what the witness did next and not for the truth of the matter asserted. *State v Hernandez* (App) 170 Ariz 301, 823 P2d 1309.

Footnote 35. *People v Jones*, 153 Ill 2d 155, 180 Ill Dec 68, 606 NE2d 1145; *McGowan v State* (Ind) 599 NE2d 589; *State v Johnson*, 253 Kan 75, 853 P2d 34; *State v Niemszyk* (Me) 551 A2d 842; *Commonwealth v LaVelle*, 414 Mass 146, 605 NE2d 852; *State v Dunn* (Mo) 817 SW2d 241, cert den (US) 118 L Ed 2d 403, 112 S Ct 1689.

Testimony by customs agent that he acted on information supplied by computer and decided to subject defendant to strip search was not hearsay because it was not offered to prove the truth of the response of the computer. *United States v Brown* (CA9 Ariz) 522 F2d 10.

Police officer's testimony about information he received from witnesses pertaining to the serial numbers of stolen money and the exchange of some of that money at a bank was admissible as non-hearsay because it was offered to demonstrate the investigatory process and not for the truth of the matter asserted. *Ruppee v Commonwealth* (Ky) 821 SW2d 484.

An officer was permitted to testify that he was told by a passing motorist that there was a person asleep, passed out or even dead behind the wheel of a van in a parking lot where the motorist's statement is offered to show not that the defendant in the case was asleep, passed out or dead, but was offered to prove that the officer thought he had reason to approach the defendant's van. *State v Beattie*, 157 Vt 162, 596 A2d 919.

Footnote 36. *United States v Vitale* (CA5 La) 596 F2d 688, 4 Fed Rules Evid Serv 466, cert den 444 US 868, 62 L Ed 2d 93, 100 S Ct 143; *State v Blevins* (Franklin Co) 36 Ohio App 3d 147, 521 NE2d 1105, motion overr.

Footnote 37. *Moore v United States*, 429 US 20, 50 L Ed 2d 25, 97 S Ct 29, on remand (CA5 Tex) 546 F2d 657 (out-of-court declaration of unidentified informant that accused lived in apartment where heroin was found was not admissible); *Re J.L.* (Ind App) 599 NE2d 208, transfer den (Dec 17, 1992); *State v Mount* (Iowa) 422 NW2d 497; *State v Johnson*, 253 Kan 75, 853 P2d 34; *Commonwealth v Yates*, 531 Pa 373, 613 A2d 542.

Footnote 38. *People v Jones*, 153 Ill 2d 155, 180 Ill Dec 68, 606 NE2d 1145.

Footnote 39. *State v Beattie*, 157 Vt 162, 596 A2d 919.

Footnote 40. *United States v Herrera* (CA5 Tex) 600 F2d 502, 4 Fed Rules Evid Serv 760.

Footnote 41. *Curreri v International Brotherhood of Teamsters, etc., Local 251* (CA1 RI) 722 F2d 6, 114 BNA LRRM 3423, 99 CCH LC ¶ 10582, 14 Fed Rules Evid Serv 1101; *United States v Rubin* (CA5 Fla) 591 F2d 278, 4 Fed Rules Evid Serv 486, cert den 444 US 864, 62 L Ed 2d 87, 100 S Ct 133.

Footnote 42. *United States v Wright*, 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.

Footnote 43. *United States v Cline* (CA8 SD) 570 F2d 731, 2 Fed Rules Evid Serv 976.

Witness' testimony that a victim was threatening to go to the authorities to reveal damaging information about the defendant was admissible and was not hearsay where it was offered to show the existence of a motive to kill the victim. *State v Williams* (Iowa) 360 NW2d 782.

Footnote 44. *United States v Wellendorf* (CA5 Tex) 574 F2d 1289, 78-2 USTC ¶ 9510, 42 AFTR 2d 78-5216; *United States v Makhoul* (CA9 Cal) 790 F2d 1400, 20 Fed Rules Evid Serv 1367; *United States v McLennan* (CA9 Or) 563 F2d 943, 2 Fed Rules Evid Serv 750, cert den 435 US 969, 56 L Ed 2d 60, 98 S Ct 1607.

Footnote 45. *United States v Southland Corp.* (CA2 NY) 760 F2d 1366, 85-1 USTC ¶ 9368, 17 Fed Rules Evid Serv 1083, 55 AFTR 2d 85-1385, cert den 474 US 825, 88 L Ed 2d 67, 106 S Ct 82; *Walter N. Yoder & Sons, Inc. v NLRB* (CA4) 754 F2d 531, 118 BNA LRRM 2706, 102 CCH LC ¶ 11359; *United States v Diehl* (SD Tex) 460 F Supp 1282, affd (CA5 Tex) 586 F2d 1080, 79-1 USTC ¶ 9146, 43 AFTR 2d 79-495; *United States v Norwood* (CA7 Wis) 798 F2d 1094, 21 Fed Rules Evid Serv 446, cert den 479 US 1011, 93 L Ed 2d 711, 107 S Ct 656; *United States v Conley* (CA8 Mo) 523 F2d 650, cert den 424 US 920, 47 L Ed 2d 327, 96 S Ct 1125; *United States v Kutas* (CA9 Or) 542 F2d 527, 1 Fed Rules Evid Serv 1199, cert den 429 US 1073, 50 L Ed 2d 790, 97 S Ct 810; *United States v Lambinus* (CA10 NM) 747 F2d 592, 17 Fed Rules Evid Serv 161, cert den 471 US 1067, 85 L Ed 2d 500, 105 S Ct 2143; *Hernandez v United States* (CA10 NM) 608 F2d 1361, 5 Fed Rules Evid Serv 93; *Benford v Richards Medical Co.* (CA11 Ala) 792 F2d 1537, CCH Prod Liab Rep ¶ 11065, 21 Fed Rules Evid Serv 193.

§ 667 --State of mind of declarant

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the state of mind of the declarant is at issue, statements indicating intent and offered for the forward-looking purpose of showing conduct in conformity with that intent are admissible. 46 But with respect to statements indicating knowledge and offered for the backward-looking purpose of showing memory of a fact, it must be shown that the statement of fact is not hearsay because the matter asserted and the matter sought to be proved are not the same. 47 Alternatively, such a statement offered for a backward-looking purpose may be admitted as circumstantial evidence of the declarant's state of mind regardless of its truth. 48 When a declaration is admitted only to prove a relevant state of mind, it does not matter whether it was admitted on the grounds that it is not hearsay because it is not offered to prove the truth of the matter asserted 49 or under the exception for declarations of state of mind. 50

§ 667 --State of mind of declarant [SUPPLEMENT]

Case authorities:

Insurance company purchaser's correspondence with investors was properly excluded, although he had offered it to corroborate his own testimony that he was actively seeking investment financing, in attempt to rebut government's contention that he had bought company with sole intention of diverting its funds, since it was not relevant to his state of mind at time of purchase and diversion of assets 4 months prior and was cumulative and unprejudicial. *United States v Newman* (1995, CA1 RI) 49 F3d 1.

Testimony of sister that murder victim, as he was leaving her apartment after hanging out on night of murder, told her that he was going out to meet co- defendant will be admitted, where statement will be allowed to function as part of larger array of evidence before jury so that they may decide for themselves what weight to give it, because it constitutes statement of then existing mental or emotional condition under FRE 803(3). *United States v Houlihan* (1994, DC Mass) 871 F Supp 1495.

Wife's testimony regarding her deceased husband's telephone conversation which she overheard, in which he expressed his intent to make her beneficiary of his insurance policy, was admissible as evidence of insured's then- existing state of mind. *Phoenix Mut. Life Ins. Co. v Adams* (1994, CA4 SC) 30 F3d 554.

Testimony of decedent's wife that she overheard decedent telling unidentified person on telephone that he wanted to change beneficiary of his life insurance policy to wife are admissible in action between wife and son over proceeds of decedent's life insurance policy, because decedent's statements clearly indicated desire to change beneficiary of life insurance policy and were therefore statements of decedent's then existing state of mind. *Phoenix Mut. Life Ins. Co. v Adams* (1993, DC SC) 828 F Supp 379.

Witness's testimony about victim's suicide threats in months preceding her death should have been admitted under state of mind exception, even though conceivably cumulative, since exclusion violated defendants' right to put on defense, i.e., that victim who died in house fire committed suicide. *United States v Veltmann* (1993, CA11 Fla) 6 F3d 1483.

In prosecution of Coast Guard reserve officer for violation of conflict of interest statute, testimony about advice he had received from district legal officer and designated ethics officer was offered to show defendant's state of mind, not for truth of matter asserted, hence was not hearsay. *United States v Baird* (1994, App DC) 29 F3d 647.

A homicide victim's statements may be material and admissible under the state-of- mind exception to the hearsay rule, when the defendant claims self- defense and the victim's statements that he feared the defendant tend to rebut the claim, when the defendant claims the victim committed suicide and the defense can be rebutted by showing the victim's statements are inconsistent with suicide, and when the defendant claims the death was accidental and the defense can be rebutted by the victim's statements that he feared the instrument of death. *Peterka v State* (1994, Fla) 640 So 2d 59, 19 FLW S 232, petition for certiorari filed (Nov 2, 1994).

The trial court did not err in a noncapital first-degree murder prosecution by admitting testimony that the victim had said before her death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that she was "tired of

his junk." The statements were evidence of the victim's state of mind and her state of mind regarding her relationship with defendant was relevant to show that the victim and defendant were having problems in their relationship. *State v Jones* (1994) 337 NC 198, 446 SE2d 32.

The trial court did not err in a first- degree murder prosecution by admitting a letter from the victim where defendant contended that the letter was erroneously admitted under the residual exception to the hearsay rule, but the letter was admissible under the state-of-mind exception to show the status of the victim's relationship with defendant. GS § 8C-1, Rule 803(c). *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the state of mind exception to the hearsay rule set forth in GS § 8C-1, Rule 803(3) since the statement referred to defendant's actions rather than his state of mind. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

In a prosecution of defendant for the murder of her husband, testimony by two witnesses repeating statements about defendant's drug use and problems in his marriage made to them by the victim shortly before his death were admissible under the state-of-mind exception to the hearsay rule and were relevant to rebut defendant's earlier testimony characterizing her marital relationship with the victim as "fine" and "excellent." GS § 8C-1, Rule 803(3). *State v Lambert* (1995) 341 NC 36, 460 SE2d 123.

In an action to have a deed declared void on the ground that it was obtained by undue influence, statements made by plaintiff, who was deceased at the time of trial, were not inadmissible hearsay, since evidence of declarations of the testator which disclosed his state of mind at the time of the execution of the paper writing on the circumstances under which it was executed, tending to show that he did or did not act freely and voluntarily, is competent as substantive proof of undue influence, and all the challenged testimony here concerned plaintiff's state of mind regarding defendant and tended to show that plaintiff did not freely and voluntarily deed the remainder interest in the property to defendant. *Caudill v Smith* (1994) 117 NC App 64, 450 SE2d 8, review den (NC) 1995 NC LEXIS 75.

In action brought by plaintiff seeking to recover pension benefits as beneficiary under deceased mother's employee benefit plan under which benefits were payable as long as participant lived but ceased upon death, plaintiff's husband could not testify as to conversations he had with decedent who allegedly told plaintiff's husband that she wanted plaintiff to be beneficiary under plan which would have paid monthly benefits to named beneficiary for remainder of ten-year term after participant died, since statements constituted inadmissible hearsay because plaintiff sought to use them for truth of matter asserted, and statements did not fit state-of-mind or statement- of-recent perception exceptions to hearsay rule. *Roebke v Newell Co.* (1993, App) 177 Wis 2d 624, 503 NW2d 295, review den (Wis) 508 NW2d 423.

Footnotes

Footnote 46. FR Evid, Rule 803(3); Uniform Rules of Evidence, Rule 803(3).

Footnote 47. *Bloom v Waste Management, Inc.* (ED Pa) 615 F Supp 1002, affd without op (CA3 Pa) 800 F2d 1131 and affd without op (CA3 Pa) 800 F2d 1131 and affd without op (CA3 Pa) 800 F2d 1142 and affd without op (CA3 Pa) 800 F2d 1142; *United States v Postal* (CA5 Fla) 589 F2d 862, 4 Fed Rules Evid Serv 277, cert den 444 US 832, 62 L Ed 2d 40, 100 S Ct 61; *United States v Bobo* (CA5 Ala) 586 F2d 355, 3 Fed Rules Evid Serv 1622, cert den 440 US 976, 59 L Ed 2d 795, 99 S Ct 1546, reh den 441 US 957, 60 L Ed 2d 1062, 99 S Ct 2188 and (disapproved on other grounds by *Oregon v Kennedy*, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083) as stated in *United States v Singleterry* (CA5 Tex) 683 F2d 122, cert den 459 US 1021, 74 L Ed 2d 518, 103 S Ct 387.

It was not hearsay for a witness to testify that the defendant told him that the murder victim set him up where the statement was not admitted for the truth of the matter it contained, but instead was offered to establish a motive of the defendant to contract for the death of the victim. *State v Davis*, 62 Ohio St 3d 326, 581 NE2d 1362, reh den 62 Ohio St 3d 1509, 583 NE2d 1321 and cert dismd (US) 121 L Ed 2d 6, 113 S Ct 302.

Footnote 48. *United States v Bankston* (CA5 Tex) 603 F2d 528, 4 Fed Rules Evid Serv 1515; *Bell v Milwaukee* (CA7 Wis) 746 F2d 1205, 16 Fed Rules Evid Serv 279; *United States v Westinghouse Electric Corp.* (ND Cal) 471 F Supp 532, 200 USPQ 514, 1978-2 CCH Trade Cases ¶ 62351, affd in part and revd in part on other grounds (CA9 Cal) 648 F2d 642, 1981-1 CCH Trade Cases ¶ 64112, 31 FR Serv 2d 952; *United States v Mills* (CA11 Ga) 704 F2d 1553, 13 Fed Rules Evid Serv 396, cert den 467 US 1243, 82 L Ed 2d 825, 104 S Ct 3517; *State v Blades*, 225 Conn 609, 626 A2d 273; *Taylor v State* (Ind) 587 NE2d 1293, reh den (May 7, 1992) (statement admissible when offered not for the truth of the matter asserted but to show the victim's state of mind towards the defendant).

Declarant's diary entry indicating that the defendant had given the declarant a confession and also indicating whether the declarant believed or did not believe the confession was admissible at trial not for the purpose of proving the matters in the confession were true, but as evidence of the declarant's belief in the confession where the defendant had already put the declarant's belief in issue. *State v Williams*, 133 Ariz 220, 650 P2d 1202.

Footnote 49. FR Evid, Rule 801(c); Uniform Rules of Evidence, Rule 801(c).

Footnote 50. *United States v Southland Corp.* (CA2 NY) 760 F2d 1366, 85-1 USTC ¶ 9368, 17 Fed Rules Evid Serv 1083, 55 AFTR 2d 85-1385, cert den 474 US 825, 88 L Ed 2d 67, 106 S Ct 82.

3. Statements Which are "Not Hearsay" [668-678]

§ 668 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under certain circumstances, the prior statements of a witness fall outside the definition of hearsay and are treated as substantive evidence with respect to prior inconsistent statements, 51 prior consistent statements, 52 and prior statements of identification. 53 The common requirement for admission of these prior statements is that the declarant must testify at the trial or hearing, and that the declarant must be subject to cross-examination concerning the statement. 54

In addition, admissions by a party opponent are excluded from the scope of the hearsay rule. 55

§ 668 ----Generally [SUPPLEMENT]

Case authorities:

Contemporaneous identifications are given much more credence than in-court identifications, in fact considered reliable enough to justify their exclusion from the hearsay rule, even when witness is unable to repeat identification in courtroom. *Samuels v Mann* (1993, CA2 NY) 13 F3d 522 (among conflicting authorities noted in *Ayala v Leonardo* (CA2 NY) 1994 US App LEXIS 6643).

District court in prosecution of defendant for racketeering, murder, extortion, firearms offenses and conspiracy did not err in admitting under catch-all exception hearsay testimony regarding outbreak of shooting phase of organized crime families' conflict since district court concluded that testimony provided great assurance of verity because declarants were in middle of life and death battle. *United States v Orena* (1994, CA2 NY) 32 F3d 704, subsequent app sub nom *United States v Sessa* (1994, CA2 NY) 1994 US App LEXIS 29805.

Out-of-court statements made by nontestifying codefendant which incriminated defendant charged with causing another to travel in interstate commerce with intent that murder for hire be committed were properly admitted, since they could reasonably be construed as part of attempt to induce inmate to whom they were made to help fabricate defense to charges and help them find someone to kill witness who cooperated with government in building case against defendants. *United States v Shores* (1994, CA4 SC) 33 F3d 438.

Murder victims' statements in months before their murders about defendant's alleged embezzlement were not hearsay because not admitted to prove truth of matter asserted, but to prove defendant's motive for hiring hit man to kill them. *United States v Levine* (1993, CA7 Ind) 5 F3d 1100, petition for certiorari filed (Dec 27, 1993).

Exclusion of out-of-court exculpatory statement of witness who failed to appear at trial was proper since statement was insufficiently corroborated, and lacked trustworthiness, given fact that witness gave several conflicting statements, most of which contradicted offered statement. *United States v Groce* (1993, CA7 Wis) 999 F2d 1189.

Although child sexual abuse victim's statements to physician about how she got hurt and who hurt her fell within medical treatment exception, similar statement to social worker did not since social worker's questions about identify of abuser were aimed at ensuring child's safety, not treating or diagnosing child's physical or psychological needs. *Territory of Guam v Ignacio* (1993, CA9 Cal) 10 F3d 608, 93 CDOS 8509, 93 Daily Journal DAR

Rule 801's provision that party's own admission is not hearsay does not eliminate Rule 602's requirement that witness have personal knowledge of subject matter of testimony. *Gross v Burggraf Constr. Co.* (1995, CA10 Wyo) 53 F3d 1531, 68 BNA FEP Cas 88.

In prosecution for sexual assault, solicitation to commit first- degree intentional homicide, and other crimes, trial court properly admitted statements of assault victim made to coworkers within few hours after victim suffered repeated and aggravated sexual assault and was threatened with death, where statements were made to first people victim talked to following incident, and people to whom victim spoke testified that victim appeared frightened, upset, and agitated. *State v Boshcka* (1992, App) 178 Wis 2d 628, 496 NW2d 627.

In wrongful death action by widow against hospital, hospital's internal investigative report of patient's death and written statements of hospital employees made shortly after patient's death were properly admitted into evidence, where although hospital argued that report and statements constituted hearsay and that report was privileged, statements were made by hospital employees, concerned matters within scope of their employment, and were made during their employment and, therefore, were not hearsay; and Louisiana Supreme Court had previously decided that hospital's internal investigative report was not privileged. *Smith v Louisiana Health & Human Resources Admin.* (1994, La App 4th Cir) 637 So 2d 1177.

Footnotes

Footnote 51. FR Evid, Rule 801(d)(1)(A); Uniform Rules of Evidence, Rule 801(d)(1)(i).

Footnote 52. FR Evid, Rule 801(d)(1)(B); Uniform Rules of Evidence, Rule 801(d)(1)(ii).

Footnote 53. FR Evid, Rule 801(d)(1)(C); Uniform Rules of Evidence, Rule 801(d)(1)(iii).

Footnote 54. FR Evid, Rule 801(d)(1).

Footnote 55. FR Evid, Rule 801(d)(2); Uniform Rules of Evidence, Rule 801(d)(2).

For a discussion of admissions by parties opponent, generally, see § 754.

§ 669 Declarant must be subject to cross-examination

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Before the prior statement of a witness may be admitted as a nonhearsay statement, the declarant must be subject to cross-examination concerning the statement while testifying

at the trial or hearing. 56 A witness is regarded as subject to cross-examination when the witness is placed on the stand, is under oath, and responds willingly to questions. 57 It has been held that the witness must be subject to cross examination at the same trial or hearing in which the prior inconsistent statement is offered. 58 However, other courts have held that the purpose of the rule is not to insure that the declarant is present at the same hearing, but that the opponent had a full and fair opportunity to cross examine the declarant as to the hearsay. 59 A witness' inability to testify at the trial or hearing concerning the underlying basis of a prior identification of a person due to memory loss does not preclude a meaningful opportunity to cross-examine the witness regarding the prior identification, and the statement is admissible where the witness recalls making the prior identification. 60

§ 669 ----Declarant must be subject to cross- examination [SUPPLEMENT]

Case authorities:

Testimonies of defendants at their own respective, separate state- court murder trials are admissible against themselves in subsequent, joint federal criminal trial of acquitted murderers for unlawful firearm possession, where testimonies were not coerced simply because defendants faced tactical choice between testifying or weakening their defense, because testimonies are not hearsay under FRE 801(d)(2)(A). *United States v Lombard* (1993, DC Me) 853 F Supp 543.

Bank robbery defendant was not denied opportunity to cross- examine police officer concerning failure of five eyewitnesses to identify defendant when shown photo array, since, once defendant made it clear that he would not be calling those witnesses to testify, district court correctly concluded that present sense exception to hearsay rule did not permit defendant to cross-examine officer about their failure to identify him; witnesses memories were at issue, which is why their statements of nonidentification did not come within Rule 803(1). *United States v Brewer* (1994, CA2 NY) 36 F3d 266.

Footnotes

Footnote 56. FR Evid, Rule 801(d)(1); Uniform Rules of Evidence, Rule 801(d)(1).

Where the defendant in a criminal case did not take the stand and was not a witness, he could not have his prior statements admitted into evidence. *Tennant v State* (Wyo) 786 P2d 339.

Footnote 57. *United States v Owens*, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193; *State v Jenkins*, 53 Wash App 228, 766 P2d 499, review den 112 Wash 2d 1016 (rule was satisfied where there was a full and fair opportunity for cross examination regarding the statement, even if no actual questions regarding the statement were asked).

Where a declarant was excused by the court as a witness prior to the offering of rebuttal testimony by the opposing party, then the declarant was not subject to cross-examination concerning the statement. *State v Daniels*, 210 Mont 1, 682 P2d 173.

Practice References Cross-examination of plaintiff's witness. 6 Am Jur Trials 201, Cross-examination of Plaintiff and Plaintiff's Witnesses § 49.

Footnote 58. Kaplan v State, 99 Nev 449, 663 P2d 1190 (declarant who did not testify at a second trial of defendant could not be impeached by prior inconsistent statements, even where the same declarant testified and was subject to cross-examination at defendant's first trial).

Footnote 59. State v Jenkins, 53 Wash App 228, 766 P2d 499, review den 112 Wash 2d 1016 (did not matter that the declarant's cross examination as to her out-of-court declarations occurred at a previous mistrial and not at a subsequent retrial of the same issues).

Footnote 60. United States v Owens, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193.

§ 670 Prior inconsistent statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal Rules, a statement inconsistent with the declarant's testimony and given under oath subject to the penalty of perjury at a deposition, trial, hearing, or other proceeding is not hearsay. 61 In states adopting the Uniform Rules of Evidence, such a statement must have been given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition only if the statement is offered in a criminal proceeding. 62

A similar prior inconsistent statement exception exists in some jurisdictions under which a statement made in writing is admissible for substantive purposes where the declarant signs the statement, has personal knowledge of the facts stated, and testifies at trial on the subject at cross-examination. 63 The prior inconsistent statement is admissible as substantive evidence as well as for impeachment purposes. 64

The rule that a prior inconsistent statement may be used substantively, as well as for impeachment, applies in states which have not adopted the uniform rules, but which have similar rules regarding prior inconsistent statements. 65 Prior statements of the witness which are elicited through leading questions are admissible. 66 To satisfy the prerequisite that the statement be made under oath, it is incumbent upon the proponent of the statement to demonstrate that the individual who administered the oath had the legal authority to invoke the penalty of perjury. 67

§ 670 ----Prior inconsistent statements [SUPPLEMENT]

Case authorities:

Defendant's rape conviction was supported by sufficient evidence, notwithstanding victim's recantation at trial, since victim's prior inconsistent statement identifying defendant as perpetrator was reliable, as state court found, and in light of weak and incomplete explanation and evidence of outside pressure to change her story, trial court could reasonably find that victim's recantation at trial was not credible. *Ticey v Peters* (1993, CA7 Ill) 8 F3d 498.

Defense witness's statement to defense attorney in meeting shortly before trial that he saw only one gun on day of incident was not admissible as prior consistent statement since prosecution implied that statement was fabricated during meeting, hence did not meet requirement that it be made before witness had motive to fabricate. *United States v Patterson* (1994, CA7 Ill) 23 F3d 1239, reh, en banc, den (1994, CA7 Ill) 1994 US App LEXIS 17339.

Trial court in narcotics conspiracy prosecution did not abuse its discretion in admitting testifying coconspirator's prior inconsistent statement under catch-all hearsay exception; admission did not violate confrontation clause since coconspirator was on stand and subject to cross-examination, district court properly considered corroborating evidence, and prior inconsistent statements need not be introduced only under Rule 801(d)(a)(A) since existence of catch-all hearsay exception is clear indication that Congress did not want courts to admit hearsay only if it fits within one of enumerated exceptions. *United States v Valdez-Soto* (1994, CA9 Cal) 31 F3d 1467, 94 CDOS 6111, 94 Daily Journal DAR 11168.

Child molestation victim's prior statements were admissible, where statements to police were reliable and extremely relevant, court believed that victim's loss of memory was feigned and, although true purpose of offer of evidence was substantive, probative value outweighed its prejudicial effect. *State v Nevarez* (1993, Ariz App) 875 P2d 184, 155 Ariz Adv Rep 6.

Fundamental requirement of admissibility of prior statement is that statement in fact be inconsistent; normally, testimony that witness does not remember event is not inconsistent with witness's prior statement describing event, although rule is not applied mechanically. *People v Johnson* (1992) 3 Cal 4th 1183, 14 Cal Rptr 2d 702, 842 P2d 1, 92 CDOS 9582, 92 Daily Journal DAR 15971, reh den *People v Johnson* (1993, Cal) 1993 Cal LEXIS 221 and stay gr *People v Johnson* (1993, Cal) 1993 Cal LEXIS 2188 and petition for certiorari filed (May 20, 1993).

In prosecution for murder and related offenses, admission into evidence of transcript of witness' testimony at probable-cause hearing, after prosecution demonstrated unavailability of witness, which included prior inconsistent statement, did not implicate right to confrontation where testimony was given under oath, subject to criminal penalties for perjury, testimony was given before judicial tribunal that kept accurate judicial record of proceedings, and defense counsel tested statements at hearing in manner that was equivalent of significant cross-examination; however, prior inconsistent statement identifying defendant as assailant should not have been admitted, since witness did not testify at trial. *State v Williams* (1994) 231 Conn 235, 645 A2d 999.

In hearing to determine if trial of 14- year-old accused of murder should be transferred to regular criminal docket, prior inconsistent statements of 2 witnesses were properly admitted where: (1) one statement was given 2 days after crime, and not in response to leading questions; (2) statement was signed with each page initialed after witness read

them; (3) other witnesses' statements were made within 24 hours of crime; (4) witness handwrote statement; and (5) there was ample corroborative testimony. In re Bassel C. (1993) 33 Conn App 90, 633 A2d 733.

Court erred in refusing to admit evidence of prior consistent statement of alleged victim of child molestation and to instruct jury on prior consistent statements, and errors were not harmless since they affected finding of incredibility of trial testimony of victim and her corroborating witnesses. Harper v State (1994) 213 Ga App 505, 445 SE2d 548, 94 Fulton County D R 2107.

Where the State called a witness who was expected to give testimony that the defendant had "hung around" with an individual who had confessed to the crime charged and that, at about the time of the offense, she had seen the defendant with this individual and that the defendant had come to her, crying and upset, but where she denied all these propositions when questioned directly, the trial court abused its discretion in allowing the State to impeach the witness by introducing hearsay evidence of her prior inconsistent statements, since under these circumstances her testimony had been merely disappointing to the State rather than damaging. People v Cruz (1994) 162 Ill 2d 314, 205 Ill Dec 345, 643 NE2d 636.

Court properly refused to admit evidence of voided police arrest report where defendant had not elicited identity of person who made statements in report; statements could not possibly have met requirements of either business record or prior inconsistent statement exceptions to hearsay rule. People v Dananel (1992, 2d Dept) 183 AD2d 778, 584 NYS2d 485, app den 80 NY2d 902, 588 NYS2d 828, 602 NE2d 236.

Although the correct procedure would have been for the trial court to give defendant's requested limiting instruction with regard to a prior inconsistent statement at the time the request was made and in conjunction with the admission of the statement, because the trial court gave a correct limiting instruction in its charge, the error was not prejudicial. State v Williams (1995) 341 NC 1, 459 SE2d 208.

Prior inconsistent statement of witness to shooting was properly admitted as substantive evidence, after witness denied at trial he saw who fired shots, where (1) statement was given 12 days after shooting, at time when events had been fresh in witness' mind and when it had been less likely he had motive for falsification; (2) statement had been given under highly reliable circumstances, when witness had voluntarily gone with police to headquarters at time when he was not suspect, had not been restrained in any way, and had been treated well by police; and (3) statement had been reviewed by witness and changes made before he signed it. Commonwealth v Jones (1994, Pa Super) 644 A2d 177.

In murder prosecution, denial of defense counsel's attempt to question witness about prior inconsistent statement in which he had said, in reference to time he was in car, "where I was still shooting," was reversible error where witness had testified at trial that car's passengers were unarmed and surprised by attack. State v Doctor (1994, RI) 644 A2d 1287.

In murder prosecution, prior inconsistent statement of eyewitness was properly admitted as substantive evidence where police officer had reduced statement to writing as it was being made, and witness had then signed each page of written statement. Commonwealth v Ragan (1994, Pa) 645 A2d 811.

In negligence action, where defendant contended that one inconsistent sentence brought entire prior statement of witness within scope of rule irrespective of fact that rest of statement was consistent with witness' trial testimony, court of appeals held that defendant had made no showing that doctrine of completeness required admission of entire statement of witness because defendant had not demonstrated that any other portions of witness statement were relevant to portion admitted so that they ought in fairness be considered contemporaneously with it, as out-of-court statement that is inconsistent with declarant's trial testimony does not carry with it, like some evidentiary trojan horse, entire regiment of other out-of-court statements that might have been made contemporaneously (Stats §§ 901.07, 908.01(4)(a)1). *Wikrent v Toys "R" Us* (1993, App) 179 Wis 2d 297, 507 NW2d 130.

Where witness statement was clearly inconsistent with testimony at trial, pretrial statement was admissible as nonhearsay by virtue of rule, which permits receipt into evidence for substantive purposes out- of-court statements made by witness who testifies at trial and who is subject to cross- examination concerning statement, as long as statement is inconsistent with witness' trial testimony (Stats § 908.01(4)(a)1). *Wikrent v Toys "R" Us* (1993, App) 179 Wis 2d 297, 507 NW2d 130.

In prosecution of defendant for sexually related offenses, victim's original accusation, offered by state as prior inconsistent statement, was relevant and admissible to, inter alia, furnish context of charged crimes and relationship between defendant and victim. *State v McMahon* (1994, App) 186 Wis 2d 68, 519 NW2d 621.

Footnotes

Footnote 61. FR Evid, Rule 801(d)(1)(A).

Footnote 62. Uniform Rules of Evidence, Rule 801(d)(1)(i).

Footnote 63. *State v Buster*, 224 Conn 546, 620 A2d 110.

Footnote 64. *United States v Smith* (CA10 NM) 776 F2d 892, 19 Fed Rules Evid Serv 1551; *David v State*, 269 Ark 498, 601 SW2d 864; *Burlington N. R. Co. v Hood* (Colo) 802 P2d 458; *Moore v State* (Fla) 452 So 2d 559, appeal after remand (Fla App D4) 473 So 2d 686, 9 FLW 2591, approved, ctfd ques ans (Fla) 485 So 2d 1279, 11 FLW 157; *State v Charlo*, 226 Mont 213, 735 P2d 278; *State v Duran*, 107 NM 603, 762 P2d 890; *State v Pusyka* (RI) 592 A2d 850.

Annotation: Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases, 30 ALR4th 414.

Practice References 21 Am Jur POF2d 101, Impeachment of witness—prior inconsistent statements.

Footnote 65. *People v Hawthorne*, 4 Cal 4th 43, 14 Cal Rptr 2d 133, 841 P2d 118, 92 CDOS 9719, 92 Daily Journal DAR 16285, mod on other grounds, reh den (Cal) 1993 Cal LEXIS 417 and mod on other grounds 4 Cal 4th 910a, 93 CDOS 664, 93 Daily

Journal DAR 1279 and motion den (Cal) 1993 Cal LEXIS 3670 and cert den (US) 126 L Ed 2d 570, 114 S Ct 605, reh den (US) 127 L Ed 2d 451; State v Blankenship (Mo) 830 SW2d 1; State v Smith (SC) 424 SE2d 496.

However, it has been held that a prior inconsistent statement may not be used as substantive evidence any time that the witness is available at the trial for cross examination. State v Collins, 186 W Va 1, 409 SE2d 181.

Footnote 66. United States v Williams (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296, cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355.

Footnote 67. United States v Day (CA6 Tenn) 789 F2d 1217, 86-1 USTC ¶ 9394, 20 Fed Rules Evid Serv 955, 57 AFTR 2d 86-1471.

§ 671 --Given at deposition, trial, hearing, or other proceeding

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A witnesses' prior inconsistent statement is not hearsay and may be used as substantive evidence if it meets the following prerequisites: the statement must have been given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition; the statement must be inconsistent with the witnesses' testimony at trial; and the witness must be subject to cross-examination. 68 This approach is also taken in the Federal Rules of Evidence. 69 However, under the Uniform Rules of Evidence, the statement is only required to be given under oath and subject to the penalty of perjury at trial, hearing, or other proceedings, or in a deposition if it is offered in a criminal proceeding. 70

Other states omit the oath requirement. 71 It has been held that a proceeding contemplated by the rule is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right. 72 This requirement contemplates situations in which an official verbatim record is routinely kept, whether stenographically or by electronic means, and under legal authority so as to insure its reliability. 73 In particular, the requirement is satisfied by testimony given at a prior trial; 74 in a deposition; 75 at a preliminary hearing; 76 in a grand jury proceeding; 77 and at certain nonjudicial proceedings, such as an immigration interrogation. 78

When the circumstances surrounding the proceeding or recording of the statement militate against reliability and truthfulness, those proceedings will not come within the scope of the phrase "other proceeding." 79 Statements given under informal circumstances which may not be regarded as within the scope of the phrase "other proceeding," include the conversation of a declarant during an investigative interview conducted by Internal Revenue agents, 80 or postal agents; 81 and stationhouse or street-side declarations made to law enforcement agents, even if in the form of a sworn affidavit. 82

§ 671 --Given at deposition, trial, hearing, or other proceeding [SUPPLEMENT]

Case authorities:

Objection to prior inconsistent statement instruction was sufficient where, at jury instruction conference, counsel specified portion of instruction to which he objected and provided addendum, referred to applicable rule of evidence and specified witness to whom instruction applied, and stated clearly that he believed witness' prior testimony could be used for its truth. *United States v Martinez* (1993, CA7 Wis) 988 F2d 685, petition for certiorari filed (Jun 1, 1993) and petition for certiorari filed (Jun 2, 1993).

Footnotes

Footnote 68. *State v Williams*, 224 Neb 114, 396 NW2d 114, habeas corpus proceeding (DC Neb) 823 F Supp 1486; *State v Moore*, 186 W Va 23, 409 SE2d 490.

Footnote 69. FR Evid, Rule 801(d)(1)(A).

Footnote 70. Uniform Rule of Evidence, Rule 801(d)(1).

Footnote 71. *State v Charlo*, 226 Mont 213, 735 P2d 278.

Footnote 72. *State v Johnson*, 220 Neb 392, 370 NW2d 136.

Footnote 73. *United States v Livingston*, 213 US App DC 18, 661 F2d 239, 8 Fed Rules Evid Serv 1586.

Footnote 74. *United States v Librach* (CA8 Mo) 536 F2d 1228, cert den 429 US 939, 50 L Ed 2d 308, 97 S Ct 354; *United States v Smith* (CA10 NM) 776 F2d 892, 19 Fed Rules Evid Serv 1551.

Footnote 75. *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *Davis v Freels* (CA7 Ill) 583 F2d 337, 3 Fed Rules Evid Serv 1663; *United States v Morgan* (CA9 Wash) 555 F2d 238, 1 Fed Rules Evid Serv 1028.

Footnote 76. *United States v Plum* (CA10 Utah) 558 F2d 568, 2 Fed Rules Evid Serv 129.

Footnote 77. *United States v Coran* (CA1 Mass) 589 F2d 70, 3 Fed Rules Evid Serv 1397; *United States v Marchand* (CA2 Vt) 564 F2d 983, 2 Fed Rules Evid Serv 1130, cert den 434 US 1015, 54 L Ed 2d 760, 98 S Ct 732; *United States v Stockton* (CA4 Md) 788 F2d 210, 122 BNA LRRM 2408, 104 CCH LC ¶ 11896, 20 Fed Rules Evid Serv 695, 85 ALR Fed 785, cert den 479 US 840, 93 L Ed 2d 89, 107 S Ct 147, 143 BNA LRRM 3056; *United States v Bigham* (CA5 Tex) 812 F2d 943, 22 Fed Rules Evid Serv 1002, reh den, en banc (CA5 Tex) 816 F2d 677; *United States v Di Caro* (CA7 Ill) 772 F2d 1314, 18 Fed Rules Evid Serv 1027, cert den 475 US 1081, 89 L Ed 2d 716, 106 S Ct 1458; *United States v Williams* (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296,

cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355; United States v Russell (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906; United States v Champion International Corp. (CA9 Or) 557 F2d 1270, 1977-1 CCH Trade Cases ¶ 61442, 1 Fed Rules Evid Serv 716, cert den 434 US 938, 54 L Ed 2d 298, 98 S Ct 428, 98 S Ct 429; Moore v State (Fla) 452 So 2d 559, appeal after remand (Fla App D4) 473 So 2d 686, 9 FLW 2591, approved, ctfed ques ans (Fla) 485 So 2d 1279, 11 FLW 157; State v Smith, 97 Wash 2d 856, 651 P2d 207.

Footnote 78. United States v Castro-Ayon (CA9 Cal) 537 F2d 1055, 1 Fed Rules Evid Serv 243, 37 ALR Fed 848, cert den 429 US 983, 50 L Ed 2d 594, 97 S Ct 501.

Annotation: What is "other proceeding" under Rule 801(d)(1)(A) of Federal Rules of Evidence, excepting from hearsay rule prior inconsistent statement given "at a trial, hearing, or other proceeding", 37 ALR Fed 855.

Footnote 79. United States v Day (CA6 Tenn) 789 F2d 1217, 86-1 USTC ¶ 9394, 20 Fed Rules Evid Serv 955, 57 AFTR 2d 86-1471.

Interview of a prosecution witness in the office of the defense attorney does not qualify as a proceeding under the rule; such an interrogation, although related to the charge pending before the court, occurs in a setting and atmosphere which lacks the degree of formality and reliability required by the rule, namely the orderly conduct of activity before a judicial or quasi-judicial officer or board. State v Johnson, 220 Neb 392, 370 NW2d 136.

Footnote 80. United States v Day (CA6 Tenn) 789 F2d 1217, 86-1 USTC ¶ 9394, 20 Fed Rules Evid Serv 955, 57 AFTR 2d 86-1471.

Footnote 81. United States v Russell (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906; United States v Livingston, 213 US App DC 18, 661 F2d 239, 8 Fed Rules Evid Serv 1586.

Footnote 82. United States v Ragghianti (CA9 Or) 560 F2d 1376, 2 Fed Rules Evid Serv 725; State v Collins, 186 W Va 1, 409 SE2d 181 (prior statement of a witness, even if given under oath, during the course of a police interrogation is not a statement made subject to the penalty of perjury or during a trial, hearing, or other proceeding as required by the rule).

It has been held that affidavits given during a police station interrogation should be analyzed on a case by case basis to determine their admissibility; thus, for example, where minimal guarantees of truthfulness were met because the statement was attested to before a notary, under oath and subject to penalty for perjury, and where the witness wrote the statement in her own words then the court may find the statement sufficiently reliable to be used as a prior inconsistent statement. State v Smith, 97 Wash 2d 856, 651 P2d 207.

Prior statements not taken under any procedure specified in the rule, such as where the statements were taken by a state trooper in the witnesses' home, could only be used for impeachment purposes. State v Moore, 186 W Va 23, 409 SE2d 490.

§ 672 --Finding of inconsistency

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To impeach a witness with a prior inconsistent statement, counsel must ask him specifically about the statement at issue, with reference to the time and place at which he allegedly made it and the person to whom it was made, and give him an opportunity to admit or deny having made it. 83 The two statements must be sufficiently inconsistent to render the prior statement admissible. 84 After the declarant has testified, 85 the court may exercise its broad discretion in deciding the exact point at which a prior statement is sufficiently inconsistent with trial testimony to permit its use in evidence. 86 No explicit guidance for determining when statements are inconsistent for the purpose of admitting a prior inconsistent statement is necessary. 87 A court may determine an inconsistency has occurred as a result of the declarant's evasive answers, silence, or a change of position. 88

The required finding of inconsistency has been satisfied—

—when the prior statement directly contradicts the declarant's trial testimony. 89

—when at trial, the declarant is unable to recall or claims a faulty memory concerning the events related in the prior statement, 90 at least where the claimed inability to recall is disbelieved by the trial judge and the witness does not deny that the prior statement was in fact made. 91

—whenever the thrust of the prior statement differs significantly from the thrust of the declarant's trial testimony. 92

Evidence that a prior statement is inaccurate may not be sufficient to allow the prior statement to be admitted at trial. 93

Footnotes

Footnote 83. *Perry v Brakefield* (Ala) 534 So 2d 602; *State v Charlo*, 226 Mont 213, 735 P2d 278.

Footnote 84. *State v Pusyka* (RI) 592 A2d 850.

Footnote 85. *United States v Plum* (CA10 Utah) 558 F2d 568, 2 Fed Rules Evid Serv 129.

Footnote 86. *United States v Jones* (CA7 Ill) 808 F2d 561, 22 Fed Rules Evid Serv 290, cert den 481 US 1006, 95 L Ed 2d 203, 107 S Ct 1630; *United States v Russell* (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906; *United States v Morgan* (CA9 Wash) 555 F2d 238, 1 Fed Rules Evid Serv 1028; *State v Conlogue* (Me) 474 A2d 167, 43 ALR4th 1189; *State v Pusyka* (RI) 592 A2d 850.

Footnote 87. *United States v Bigham* (CA5 Tex) 812 F2d 943, 22 Fed Rules Evid Serv 1002, reh den, en banc (CA5 Tex) 816 F2d 677.

Whether an inconsistency exists between trial testimony and statements made prior to trial is to be determined by the whole impression and effect of what has been said and done. *State v Blankenship* (Mo) 830 SW2d 1.

Footnote 88. *United States v Williams* (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296, cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355; *United States v Russell* (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906.

Footnote 89. *United States v Coran* (CA1 Mass) 589 F2d 70, 3 Fed Rules Evid Serv 1397; *United States v Rivera* (CA2 NY) 513 F2d 519, cert den 423 US 948, 46 L Ed 2d 284, 96 S Ct 367 and (disapproved on other grounds by *Garcia v United States*, 469 US 70, 83 L Ed 2d 472, 105 S Ct 479); *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *United States v Long Soldier* (CA8 ND) 562 F2d 601, 1 Fed Rules Evid Serv 1070.

The prior trial testimony of an accident reconstruction expert regarding his conclusion that the defendant's car had been in the wrong lane for a short period of time prior to the impact with a motorcycle was found erroneously, although harmlessly, excluded from the second trial, because the expert's subsequent testimony was plainly inconsistent with the prior testimony, where the expert subsequently stated he could make no conclusion as to the car's position prior to impact. *United States v Smith* (CA10 NM) 776 F2d 892, 19 Fed Rules Evid Serv 1551.

Footnote 90. *United States v Marchand* (CA2 Vt) 564 F2d 983, 2 Fed Rules Evid Serv 1130, cert den 434 US 1015, 54 L Ed 2d 760, 98 S Ct 732; *United States v Bigham* (CA5 Tex) 812 F2d 943, 22 Fed Rules Evid Serv 1002, reh den, en banc (CA5 Tex) 816 F2d 677; *United States v Di Caro* (CA7 Ill) 772 F2d 1314, 18 Fed Rules Evid Serv 1027, cert den 475 US 1081, 89 L Ed 2d 716, 106 S Ct 1458; *United States v Russell* (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906.

Footnote 91. *United States v Williams* (CA7 Ill) 737 F2d 594, 15 Fed Rules Evid Serv 1296, cert den 470 US 1003, 84 L Ed 2d 377, 105 S Ct 1354, 105 S Ct 1355; *United States v Russell* (CA8 Mo) 712 F2d 1256, 13 Fed Rules Evid Serv 1906; *United States v Rogers* (CA8 Ark) 549 F2d 490, 1 Fed Rules Evid Serv 1270, 40 ALR Fed 605, cert den 431 US 918, 53 L Ed 2d 229, 97 S Ct 2182.

Witness who testified at a trial and claimed a lack of memory was considered subject to cross examination and his testimony deemed inconsistent with his earlier testimony on the same subject where it appeared the memory loss was not genuine. *Jones v State*, 283 Ark 308, 675 SW2d 825; *State v Anaya* (App) 165 Ariz 535, 799 P2d 876, 64 Ariz Adv Rep 47.

Where the court found that the witness's memory loss was genuine and not evasive, then the witness's trial testimony that he had a partial loss of memory as to some of the statements on which he was being questioned did not give rise to any inconsistency and therefor did not open the way for him to be impeached with his preliminary hearing testimony regarding those statements. *People v Hawthorne*, 4 Cal 4th 43, 14 Cal Rptr 2d 133, 841 P2d 118, 92 CDOS 9719, 92 Daily Journal DAR 16285, mod on other grounds, reh den (Cal) 1993 Cal LEXIS 417 and mod on other grounds 4 Cal 4th 910a, 93 CDOS

664, 93 Daily Journal DAR 1279 and motion den (Cal) 1993 Cal LEXIS 3670 and cert den (US) 126 L Ed 2d 570, 114 S Ct 605, reh den (US) 127 L Ed 2d 451; State v Hutchinson (App) 141 Ariz 583, 688 P2d 209; State v Anaya (App) 165 Ariz 535, 799 P2d 876, 64 Ariz Adv Rep 47.

Footnote 92. United States v Ragghianti (CA9 Or) 560 F2d 1376, 2 Fed Rules Evid Serv 725.

Footnote 93. United States v Stone (CA11 Fla) 702 F2d 1333, 83-1 USTC ¶ 9314, 13 Fed Rules Evid Serv 57, 52 AFTR 2d 83-5338, reh den (CA11 Fla) 709 F2d 716.

§ 673 --Timing of submission of statement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a preferred, but not mandated, practice to offer prior inconsistent statements while the declarant is still on the witness stand. 94 Further, the inconsistent statement can be introduced prior to giving declarant an opportunity or chance to explain. 95 Introduction of a prior inconsistent statement after the witness has been discharged is permissible where the opposing counsel has a full opportunity to cross-examine the witness regarding the prior statement. 96

Some courts have permitted the calling party to put into evidence a prior inconsistent statement of its witness. 97 Because the prior statement may be used as substantive evidence, the calling party may escape the objection that it is calling a witness solely for the purpose of introducing otherwise inadmissible evidence under the guise of impeachment. 98 However, it has also been held that hearsay rules should not be permitted to be circumvented by allowing a party to elicit a statement from its own witness that the witness had given an inconsistent statement before; it remains the duty of the opposing counsel to test the statement to determine whether there is indeed a relevant inconsistency and it is the obligation of the trial judge to make the appropriate ruling on the basis of his perception of the statement after an objection is made. 99

Footnotes

Footnote 94. Alexander v Conveyors & Dumpers, Inc. (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237.

Footnote 95. State v Johnson, 220 Neb 392, 370 NW2d 136.

Footnote 96. Alexander v Conveyors & Dumpers, Inc. (CA5 Miss) 731 F2d 1221, CCH Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237.

Footnote 97. United States v Stockton (CA4 Md) 788 F2d 210, 122 BNA LRRM 2408, 104 CCH LC ¶ 11896, 20 Fed Rules Evid Serv 695, 85 ALR Fed 785, cert den 479 US 840, 93 L Ed 2d 89, 107 S Ct 147, 143 BNA LRRM 3056; United States v Brighton

Bldg. & Maintenance Co. (CA7 Ill) 598 F2d 1101, 1979-1 CCH Trade Cases ¶ 62637, 4 Fed Rules Evid Serv 769, cert den 444 US 840, 62 L Ed 2d 52, 100 S Ct 79, 100 S Ct 80; Davis v Freels (CA7 Ill) 583 F2d 337, 3 Fed Rules Evid Serv 1663; United States v Long Soldier (CA8 ND) 562 F2d 601, 1 Fed Rules Evid Serv 1070; United States v Morgan (CA9 Wash) 555 F2d 238, 1 Fed Rules Evid Serv 1028.

Practice References Impeaching own witness by prior inconsistent statements. 5 Am Jur Trials 611, Presenting Plaintiff's Case §§ 34, 38.

Footnote 98. United States v Long Soldier (CA8 ND) 562 F2d 601, 1 Fed Rules Evid Serv 1070.

Footnote 99. Virgil v State, 84 Wis 2d 166, 267 NW2d 852.

§ 674 --Format of submission of statement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Establishing prior inconsistent statements by using an official transcript or recording, which may be submitted to the jury in the form of an exhibit, has been stated to be a preferred means of putting the statement into evidence. 1 When a witness admits to having made the prior inconsistent statement, it is proper to exclude a tape recording of the statement. 2 Further, the trial court may properly refuse to allow counsel to reread prior inconsistent statements of government witnesses during counsel's closing argument to the jury. 3

§ 674 --Format of submission of statement [SUPPLEMENT]

Case authorities:

The trial court did not err in allowing the State to introduce extrinsic evidence of a witness's prior inconsistent statement where the witness testified on direct examination that she had made the prior inconsistent statement, since the extrinsic evidence of this statement was thus admissible to corroborate this portion of the witness's testimony. State v Williams (1995) 341 NC 1, 459 SE2d 208.

Footnotes

Footnote 1. United States v Coran (CA1 Mass) 589 F2d 70, 3 Fed Rules Evid Serv 1397.

Footnote 2. United States v Greer (CA5 La) 806 F2d 556, 105 CCH LC ¶ 12133, 22 Fed Rules Evid Serv 174.

Footnote 3. United States v Librach (CA8 Mo) 536 F2d 1228, cert den 429 US 939, 50

L Ed 2d 308, 97 S Ct 354, later proceeding (CA8 Mo) 602 F2d 165, on remand (ED Mo) 476 F Supp 412, affd (CA8 Mo) 609 F2d 919, cert den 444 US 1080, 62 L Ed 2d 764, 100 S Ct 1032.

§ 675 Prior consistent statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, prior consistent statements of a witness are inadmissible hearsay. 4 However, a prior statement which is consistent with the declarant's current testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive is not hearsay, provided the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement. 5 The fabrication is the alleged fabrication underlying the witness' trial testimony and not any fabrication resulting in a prior inconsistent out-of-court statement. 6

A prior consistent statement need not have been given in a prior proceeding. 7 Any such statements which were given before a grand jury or other proceeding are admissible. 8

The prior consistent statements need not be elicited from the impeached witness; the statements may be introduced through the testimony of third parties with knowledge, 9 or by the use of documents. 10

Although it is generally not proper to introduce a prior consistent statement in anticipation of impeachment yet to come, 11 the subsequent occurrence of impeachment may cure any error in the earlier receipt of the statement. 12 A prior consistent statement is also admissible in some states where the witness is impeached by a charge of bias, interest, or corruption as long as the statement was made prior to the existence of the circumstances relied on to discredit the credibility of the witnesses' testimony. 13 It has also been held that where a witness whose veracity is at issue is present at trial, under oath, and subject to cross-examination, then a prior consistent out-of-court statement of that witness is admissible; any motive that the witness may have had to fabricate his story affects the weight and not the admissibility of the evidence. 14

§ 675 ----Prior consistent statements [SUPPLEMENT]

Practice Aids: Prior consistent statements and the Supreme Court, 213 New York LJ 46:3 (1995).

Case authorities:

Rape victim's prior consistent statement was properly admitted where victim's credibility on issues of consent and prior statements had been attacked by defense counsel on cross-examination. *Satterwhite v State* (1994) 212 Ga App 543, 442 SE2d 5, 94 Fulton

County D R 855, reconsideration dismd (Mar 23, 1994).

Where a witness testified at trial that defendant had stated that he was going to kill the victim, and defense counsel impeached the witness by questioning a detective about only a portion of a sentence in the witness's out-of-court statement to the effect that defendant never threatened the victim in her presence, the State was properly allowed to rebut the inference that the witness had made inconsistent statements by having the detective read the entire sentence stating that the victim had told the witness that defendant had threatened him but defendant had never threatened him in her presence, even if such testimony was hearsay. *State v Ratliff* (1995) 341 NC 610, 461 SE2d 325.

The court properly permitted the use of prior consistent statements of a prosecution witness to rehabilitate the witness after she was cross examined at great length as to her ability to perceive and recall events due to her high alcohol consumption; the cross examination focused on her credibility in the sense that alcohol severely limited her ability to observe and remember the events at issue and, therefore, the prior consistent statements were properly admitted. *Commonwealth v Paoello* (1995, Pa) 665 A2d 439.

Prior statement of child complainant in sexual abuse case was inadmissible as prior consistent statement, where complainant's testimony related to incident charged, while prior statement related to different incident that occurred 1 year earlier. *Kipp v State* (1994, Tex Crim) 876 SW2d 330.

Footnotes

Footnote 4. *Keller v State* (Fla App D5) 586 So 2d 1258, 16 FLW D 2532; *Faison v Hudson*, 243 Va 397, 417 SE2d 305.

Footnote 5. FR Evid, Rule 801(d)(1)(B); Uniform Rules of Evidence, Rule 801(d)(1)(ii).

Annotation: Admissibility of impeached witness' prior consistent statement—modern state civil cases, 59 ALR4th 1000.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases, 58 ALR4th 1014.

Footnote 6. *United States v Gwaltney* (CA9 Cal) 790 F2d 1378, 20 Fed Rules Evid Serv 1293, cert den 479 US 1104, 94 L Ed 2d 187, 107 S Ct 1337.

Footnote 7. *United States v Knuckles* (CA2 NY) 581 F2d 305, 3 Fed Rules Evid Serv 331, cert den 439 US 986, 58 L Ed 2d 659, 99 S Ct 581; *United States v Williams* (CA5 Tex) 573 F2d 284, 3 Fed Rules Evid Serv 234; *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054; *United States v Herring* (CA10 NM) 582 F2d 535 (disapproved on other grounds by *Payton v New York*, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371) as stated in *United States v Morgan* (CA6 Tenn) 743 F2d 1158, cert den 471 US 1061, 85 L Ed 2d 490, 105 S Ct 2126.

Annotation: Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness' prior consistent statement, 47 ALR Fed 639.

Footnote 8. *United States v Cifarelli* (CA5 Fla) 589 F2d 180, 4 Fed Rules Evid Serv 107.

Footnote 9. *United States v Khan* (CA2 NY) 821 F2d 90, 23 Fed Rules Evid Serv 511; *United States v Maultasch* (CA2 NY) 596 F2d 19; *United States v Gonzalez* (CA5 Tex) 700 F2d 196, 12 Fed Rules Evid Serv 1063, 78 ALR Fed 399; *United States v Majors* (CA5 Fla) 584 F2d 110, 4 Fed Rules Evid Serv 259; *United States v Lanier* (CA8 Mo) 578 F2d 1246, 4 Fed Rules Evid Serv 317, cert den 439 US 856, 58 L Ed 2d 163, 99 S Ct 169; *United States v Allen* (CA9 Wash) 579 F2d 531, 3 Fed Rules Evid Serv 470, cert den 439 US 933, 58 L Ed 2d 329, 99 S Ct 326.

Footnote 10. *United States v Brantley* (CA11 Ga) 733 F2d 1429, 15 Fed Rules Evid Serv 1353, cert den 470 US 1006, 84 L Ed 2d 383, 105 S Ct 1362.

Footnote 11. *United States v Smith* (CA6 Tenn) 746 F2d 1183, 17 Fed Rules Evid Serv 105; *Keller v State* (Fla App D5) 586 So 2d 1258, 16 FLW D 2532 (witnesses' testimony as to a declarant's prior consistent statements not admissible as a prior consistent statement where it is offered before a declarant has testified).

Footnote 12. *United States v Gonzalez* (CA5 Tex) 700 F2d 196, 12 Fed Rules Evid Serv 1063, 78 ALR Fed 399; *United States v Simmons* (CA7 Ill) 567 F2d 314, 2 Fed Rules Evid Serv 774; *United States v Allen* (CA9 Wash) 579 F2d 531, 3 Fed Rules Evid Serv 470, cert den 439 US 933, 58 L Ed 2d 329, 99 S Ct 326.

Footnote 13. *State v Damiano* (RI) 587 A2d 396; *Faison v Hudson*, 243 Va 397, 417 SE2d 305.

Footnote 14. *Carroll v State*, 261 Ga 553, 408 SE2d 412, 102-193 Fulton County D R 10B.

§ 676 --Rebutting charge of recent fabrication or improper influence or motive

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A prior consistent statement is not admissible as a nonhearsay statement unless the opposing party has attacked the witness' in-court testimony as a recent fabrication or as resulting from improper influence or motive. 15

The trial judge has wide discretion in determining whether the impeachment techniques used warrant the admission of a prior consistent statement. 16 Two kinds of impeaching evidence may be said to raise the charge of "recent fabrication or improper influence or motive." One is direct evidence of bias or motive, 17 and the other is prior inconsistent statements by the witness. 18 However, a prior inconsistent statement will not automatically raise a charge of recent fabrication or improper influence, 19 and mere challenges to a witness's credibility are insufficient to support the admission of a prior consistent statement unless the challenge is designed to also invoke a charge of

recent fabrication or improper influence. 20 Moreover, a contradiction in testimony does not necessarily give rise to an implied charge of fabrication, 21 or improper motive. 22

Prior consistent statements are admissible even where cross-examination fails to yield a specific inconsistent statement. 23 The prior consistent statement may be used as substantive evidence, whether the impeaching attack involves direct evidence of fabrication, influence, or motive; 24 or indirect evidence in the form of prior inconsistent statements. 25

An implied charge of fabrication may arise through the cross-examination of more than one witness. 26

§ 676 --Rebutting charge of recent fabrication or improper influence or motive [SUPPLEMENT]

Case authorities:

Testimony of six witnesses concerning child sexual abuse victim's out-of-court statements to them was admissible as not hearsay to rebut defense implication, arising from cross-examination of victim, that she had fabricated allegations in order to live with her mother. *United States v Tome* (1993, CA10 NM) 3 F3d 342, petition for certiorari filed (Nov 24, 1993).

In prosecution for various sexual offenses involving two minor step-daughters, testimony of psychiatric social worker was properly admitted regarding details of complaints related to her by victims where defense counsel asked both victims several questions implying that they had fabricated allegations against defendant. *Register v State* (1993, Ala App) 640 So 2d 3, affd (Ala) 640 So 2d 12.

In prosecution for rape of child by force and aggravated rape, trial court did not err in allowing victim to read, on redirect examination, entire five-page handwritten statement she had made for police shortly after incident, where defense counsel had, in cross-examination, obtained victim's admission that her written statement did not mention fact she had testified to on direct examination, that defendant had held knife to her throat during rapes. Prosecutor properly attempted to rehabilitate her on redirect by asking her to read passage from her statement that mentioned that defendant "had the knife and said 'I'd rather kill you than be on the run.'" Prosecutor was entitled to show jury that her statement had indeed contained reference to knife in context of defendant's assaults on her, to rebut suggestion that her testimony about knife was recent contrivance intended to strengthen Commonwealth's case against defendant. *Commonwealth v Graves* (1993) 35 Mass App 76, 616 NE2d 817, summary op at (Mass App) 21 M.L.W. 3223 and review den 416 Mass 1103, 22 M.L.W. 9 (statement was also admissible under "doctrine of completeness" and as fresh complaint).

In negligence action, where defendant argued that portions of out-of-court witness statement made to insurance adjuster should have been received under rule which rendered nonhearsay out-of-court declaration that was consistent with declarant's testimony and was offered to rebut express or implied charge against declarant of recent fabrication or improper influence or motive, court of appeals concluded that remainder of witness' statements to adjuster were properly excluded from evidence by trial court, as

trial court found there was no evidence in record that would allow court to infer that there was any recent fabrication by witness, nor that there was any improperly influence exerted over witness by any person, nor was there any evidence of motive produced that would induce witness to testify other than truthfully, and court of appeals noted that those facts were uncontradicted and were not, therefore, clearly erroneous (Stats §§ 805.17(2), 908.01(4)(a)2). *Wikrent v Toys "R" Us* (1993, App) 179 Wis 2d 297, 507 NW2d 130.

In action by former employee against his former employer to recover for constructive termination involving, inter alia, alleged age discrimination, trial court did not err in admitting, as prior consistent statement, plaintiff's diary, which was prepared when plaintiff was told that his next four months' salary should be considered severance pay, and he consulted attorney and was advised to start diary, where defendant's counsel charged that plaintiff's version of events was "fantasy and fabrication" and, during cross-examination of plaintiff and his wife, repeatedly challenged authenticity of their testimony as well as their preparation and alleged difference in three editions of plaintiff's diary, clearly implying recent editing and insinuating diary was recently fabricated or altered. To counter implication made by defendant's counsel, it was proper for plaintiff's counsel to permit him to refresh his recollection from diary itself (as well as to question him about prior deposition testimony given by plaintiff in same regard), and oral testimony having included practically entire diary, document itself was properly admitted. *Hunio v Tishman Construction Corp.* (1993, 2nd Dist) 14 Cal App 4th 1010, 18 Cal Rptr 2d 253, 93 CDOS 2449, 93 Daily Journal DAR 4065, review gr (Cal) 20 Cal Rptr 2d 787, 854 P2d 79, 93 CDOS 4784, 93 Daily Journal DAR 8004.

Footnotes

Footnote 15. *United States v Wilkinson* (CA2 NY) 754 F2d 1427, cert den 472 US 1019, 87 L Ed 2d 617, 105 S Ct 3482, post-conviction proceeding (SD NY) 1988 US Dist LEXIS 9174; *United States v Navarro-Varelas* (CA9 Cal) 541 F2d 1331, 1 Fed Rules Evid Serv 1189, cert den 429 US 1045, 50 L Ed 2d 759, 97 S Ct 751; *People v Battles*, 109 Mich App 487, 311 NW2d 779; *State v Packett*, 206 Neb 548, 294 NW2d 605.

Handwritten report by a Coast Guard officer detailing the arrest and pursuit of drug smuggling suspects was held inadmissible as a prior consistent statement, because cross-examination of the officer by defense counsel did not create an express or implied charge of fabrication, where counsel did not challenge the discovery of marijuana seeds on the defendant's boat, but instead challenged the officer on whether the seeds could have belonged to the boat's previous owner, and on whether the bales of marijuana discovered floating on the water belonged to the defendant where the seeds were destroyed before tests could be made as to the possible relationship of the seeds to the marijuana bales. *United States v Pendas-Martinez* (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142.

Annotation: Admissibility of impeached witness' prior consistent statement—modern state civil cases, 59 ALR4th 1000.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases, 58 ALR4th 1014.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of

a witness' prior consistent statement, 47 ALR Fed 639.

Footnote 16. *United States v McGrath* (CA2 NY) 558 F2d 1102, 77-2 USTC ¶ 9721, 2 Fed Rules Evid Serv 140, 40 AFTR 2d 77-5410, cert den 434 US 1064, 55 L Ed 2d 765, 98 S Ct 1239; *Breneman v Kennecott Corp.* (CA9 Ariz) 799 F2d 470, 41 BNA FEP Cas 1157, 41 CCH EPD ¶ 36560, 21 Fed Rules Evid Serv 335; *United States v Herring* (CA10 NM) 582 F2d 535 (disapproved on other grounds by *Payton v New York*, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371) as stated in *United States v Morgan* (CA6 Tenn) 743 F2d 1158, cert den 471 US 1061, 85 L Ed 2d 490, 105 S Ct 2126.

Footnote 17. *United States v Williams* (CA5 Tex) 573 F2d 284, 3 Fed Rules Evid Serv 234; *United States v Baron* (CA7 Ill) 602 F2d 1248, 4 Fed Rules Evid Serv 1215, cert den 444 US 967, 62 L Ed 2d 380, 100 S Ct 456; *United States v Stuart* (CA9 Cal) 718 F2d 931, 14 Fed Rules Evid Serv 631.

Footnote 18. *United States v Khan* (CA2 NY) 821 F2d 90, 23 Fed Rules Evid Serv 511; *United States v Stuart* (CA9 Cal) 718 F2d 931, 14 Fed Rules Evid Serv 631.

Footnote 19. *United States v Consolidated Packaging Corp.* (CA7 Ill) 575 F2d 117, 1978-1 CCH Trade Cases ¶ 61968; *People v McDaniel*, 81 NY2d 10, 595 NYS2d 364, 611 NE2d 265.

Footnote 20. *Christmas v Sanders* (CA7 Ill) 759 F2d 1284, 18 Fed Rules Evid Serv 531; *United States v Griggs* (CA11 Fla) 735 F2d 1318, 15 Fed Rules Evid Serv 1951; *Keller v State* (Fla App D5) 586 So 2d 1258, 16 FLW D 2532.

Footnote 21. *Breneman v Kennecott Corp.* (CA9 Ariz) 799 F2d 470, 41 BNA FEP Cas 1157, 41 CCH EPD ¶ 36560, 21 Fed Rules Evid Serv 335; *United States v Griggs* (CA11 Fla) 735 F2d 1318, 15 Fed Rules Evid Serv 1951.

Footnote 22. *United States v Quinto* (CA2 NY) 582 F2d 224, 78-2 USTC ¶ 9633, 3 Fed Rules Evid Serv 1097, 42 AFTR 2d 78-5601, 47 ALR Fed 621.

Footnote 23. *United States v Khan* (CA2 NY) 821 F2d 90, 23 Fed Rules Evid Serv 511.

Footnote 24. *United States v Knuckles* (CA2 NY) 581 F2d 305, 3 Fed Rules Evid Serv 331, cert den 439 US 986, 58 L Ed 2d 659, 99 S Ct 581; *United States v Snead* (ED Pa) 447 F Supp 1321, 3 Fed Rules Evid Serv 159, affd without op (CA3 Pa) 577 F2d 730, cert den 436 US 930, 56 L Ed 2d 775, 98 S Ct 2829 and cert den 439 US 851, 58 L Ed 2d 154, 99 S Ct 156 and cert den 441 US 909, 60 L Ed 2d 379, 99 S Ct 2003; *United States v Albert* (CA5 Tex) 595 F2d 283, 4 Fed Rules Evid Serv 750, reh den (CA5 Tex) 599 F2d 449 and cert den 444 US 963, 62 L Ed 2d 375, 100 S Ct 448; *United States v Lanier* (CA8 Mo) 578 F2d 1246, 4 Fed Rules Evid Serv 317, cert den 439 US 856, 58 L Ed 2d 163, 99 S Ct 169.

In a conspiracy prosecution, a government witnesses' prior consistent testimony before a grand jury and at trial of two other conspirators would be admissible to rebut the implication by the defense that the witness had altered his story to implicate an additional person, even though the prior testimony did not relate directly to the discrepancy that formed the basis of the claim of fabrication. *United States v Lombardi* (CA2 NY) 550 F2d 827, 1 Fed Rules Evid Serv 819.

Where cross-examination of correctional officer implied that he had not mentioned in his report a statement which he testified that defendant had made, it was proper thereafter to show that the officer had mentioned statement to second officer, because impeachment raised a charge of recent fabrication within the meaning of Rule 801(d)(1)(B). *United States v Zuniga-Lara* (CA5 Tex) 570 F2d 1286, cert den 436 US 961, 57 L Ed 2d 1128, 98 S Ct 3080.

Footnote 25. *United States v Scholle* (CA8 Minn) 553 F2d 1109, 1 Fed Rules Evid Serv 1374, cert den 434 US 940, 54 L Ed 2d 300, 98 S Ct 432; *United States v Allen* (CA9 Wash) 579 F2d 531, 3 Fed Rules Evid Serv 470, cert den 439 US 933, 58 L Ed 2d 329, 99 S Ct 326.

Footnote 26. *United States v Andrade* (CA8 Minn) 788 F2d 521, 20 Fed Rules Evid Serv 570, cert den 479 US 963, 93 L Ed 2d 408, 107 S Ct 462.

§ 677 --Whether prior statement must antedate motive to fabricate

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Some courts have ruled that prior consistent statements need not antedate a motive to fabricate in order to be admissible, ²⁷ but others hold that a prior consistent statement is not relevant to rebut an allegation of recent fabrication when made after a motive to fabricate arises because repetition of a statement while under the same motivation does not imply veracity. ²⁸ In certain jurisdictions, courts have indicated that prior consistent statements made after a motive to fabricate arises are inadmissible, ²⁹ at least in those circumstances where the prior statement is being offered as substantive evidence. ³⁰ Of the courts which require the offering party to demonstrate that the prior consistent statement antedates a motive to fabricate, some distinguish between the substantive use of a prior statement and its use for rehabilitative purposes and will allow the prior consistent statement to be introduced even if made after a motive to fabricate arises when the prior statement is used solely for the purposes of rehabilitating the witness. ³¹

Some courts have indicated that prior consistent statements must antedate a motive to fabricate before the statement is admitted for rehabilitative purposes. ³² In the Second Circuit, when there is a generalized attack on the credibility of a witness, a prior consistent statement offered solely for purposes of rehabilitation is admissible if the prior statement was made before the witness had a motive to fabricate. ³³ Prior consistent statements may be admissible for purposes of rehabilitation, subject to the discretion of the trial judge, even if the statements were made after a motive to fabricate arises—

—when the prior statement has a probative force beyond merely showing repetition of the statement, as when the prior statement is introduced to demonstrate whether a prior inconsistent statement was made, whether the impeaching statement is truly inconsistent with the witness' trial testimony.

—when the proper statement will amplify or clarify the alleged inconsistent statement. 34

In jurisdictions where it is required that the consistent statement predate the motive to falsify, rehabilitation with consistent statements may be impossible if the motive is alleged to exist from the outset. 35 Statements made when the declarant does not anticipate or fear prosecution are considered to have been made before a motive to fabricate arises. 36 Although postarrest statements made to law enforcement officers during plea negotiations in hopes of bettering the declarant's position may be inadmissible because the statement was made after the motive to fabricate arose, 37 statements made to law enforcement officers prior to the declarant entering into any cooperation agreement with the Government have been found admissible where there is no indication that the declarant expected leniency in exchange for the statement. 38 A motive to fabricate does not necessarily arise upon the arrest of the declarant. 39 Further, statements made during plea negotiations for a prior trial may be admissible in a subsequent trial on the ground that the declarant's motive to fabricate has expired. 40

**§ 677 --Whether prior statement must antedate motive to fabricate
[SUPPLEMENT]**

Case authorities:

When witness' testimony has been attacked on cross-examination, directly or by inference, as recent fabrication, witness may be permitted to show that he or she made similar statements at some earlier time when free from alleged bias; such prior consistent statements antedating motive to fabricate are not introduced to prove or disprove facts in issue, but to rehabilitate credibility of witness. *People v Seit* (1995) 86 NY2d 92, 629 NYS2d 998, 653 NE2d 1168.

Footnotes

Footnote 27. *United States v Parry* (CA5 Fla) 649 F2d 292, 8 Fed Rules Evid Serv 888; *United States v Williams* (CA5 Tex) 573 F2d 284, 3 Fed Rules Evid Serv 234; *United States v Hamilton* (CA6 Ky) 689 F2d 1262, 11 Fed Rules Evid Serv 1952, cert den 459 US 1117, 74 L Ed 2d 971, 103 S Ct 753 and cert den 459 US 1117, 74 L Ed 2d 971, 103 S Ct 754; *United States v Pendas-Martinez* (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142; *United States v Anderson* (CA11 Ga) 782 F2d 908, reh den, en banc (CA11 Ga) 788 F2d 1570 and reh den, en banc (CA11 Ga) 788 F2d 1570; *People v Koon* (Colo App) 724 P2d 1367 (rule regarding prior consistent statements encompasses statements made both before and after the time of the alleged impropriety or the time when the supposed motive to falsify arose; *People v Koon* (Colo App) 724 P2d 1367 (rule regarding prior consistent statements encompasses statements made both before and after the time of the alleged impropriety or the time when the supposed motive to falsify arose).

Law Reviews: Archer, Prior consistent statements: Temporal admissibility standard under Federal Rule of Evidence 801(d)(1)(B). 55 *Fordham L Rev* 759 (1987).

Annotation: Admissibility of impeached witness' prior consistent statement—modern state civil cases, 59 *ALR4th* 1000.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases, 58 ALR4th 1014.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness' prior consistent statement, 47 ALR Fed 639.

Footnote 28. *United States v Harris* (CA7 Ill) 761 F2d 394, 17 Fed Rules Evid Serv 1479; *United States v Bowman* (CA8 Minn) 798 F2d 333, 21 Fed Rules Evid Serv 476, cert den 479 US 1043, 93 L Ed 2d 856, 107 S Ct 906; *State v Tucker* (App) 165 Ariz 340, 798 P2d 1349, 57 Ariz Adv Rep 42; *Kitchen v State*, 271 Ark 1, 607 SW2d 345; *People v Noguera*, 4 Cal 4th 599, 15 Cal Rptr 2d 400, 842 P2d 1160, 92 CDOS 10409, 92 Daily Journal DAR 17480, reh den (Cal) 1993 Cal LEXIS 1279 and petition for certiorari filed (July 9, 1993); *Daly v State*, 99 Nev 564, 665 P2d 798; *People v McDaniel*, 81 NY2d 10, 595 NYS2d 364, 611 NE2d 265; *Faison v Hudson*, 243 Va 397, 417 SE2d 305.

Footnote 29. *United States v Vest* (CA1 Mass) 842 F2d 1319, 25 Fed Rules Evid Serv 320, cert den 488 US 965, 102 L Ed 2d 526, 109 S Ct 489; *Breneman v Kennecott Corp.* (CA9 Ariz) 799 F2d 470, 41 BNA FEP Cas 1157, 41 CCH EPD ¶ 36560, 21 Fed Rules Evid Serv 335; *United States v Sampol* (App DC) 204 US App DC 349, 636 F2d 621, 7 Fed Rules Evid Serv 481.

Footnote 30. *United States v Khan* (CA2 NY) 821 F2d 90, 23 Fed Rules Evid Serv 511; *United States v Quinto* (CA2 NY) 582 F2d 224, 78-2 USTC ¶ 9633, 3 Fed Rules Evid Serv 1097, 42 AFTR 2d 78-5601, 47 ALR Fed 621; *United States v Obayagbona* (ED NY) 627 F Supp 329, 20 Fed Rules Evid Serv 1194; *United States v Henderson* (CA4 Md) 717 F2d 135, 13 Fed Rules Evid Serv 1480, 76 ALR Fed 401, cert den 465 US 1009, 79 L Ed 2d 238, 104 S Ct 1006; *United States v Harris* (CA7 Ill) 761 F2d 394, 17 Fed Rules Evid Serv 1479; *United States v Feldman* (CA7 Ill) 711 F2d 758, 13 Fed Rules Evid Serv 1223, cert den 464 US 939, 78 L Ed 2d 317, 104 S Ct 352, later proceeding (CA7 Ill) 756 F2d 556; *United States v Bowman* (CA8 Minn) 798 F2d 333, 21 Fed Rules Evid Serv 476, cert den 479 US 1043, 93 L Ed 2d 856, 107 S Ct 906.

Footnote 31. *United States v Parodi* (CA4 NC) 703 F2d 768, 12 Fed Rules Evid Serv 1227; *United States v Harris* (CA7 Ill) 761 F2d 394, 17 Fed Rules Evid Serv 1479; *United States v Bowman* (CA8 Minn) 798 F2d 333, 21 Fed Rules Evid Serv 476, cert den 479 US 1043, 93 L Ed 2d 856, 107 S Ct 906.

Footnote 32. *United States v Quinto* (CA2 NY) 582 F2d 224, 78-2 USTC ¶ 9633, 3 Fed Rules Evid Serv 1097, 42 AFTR 2d 78-5601, 47 ALR Fed 621.

Footnote 33. *United States v Brennan* (CA2 NY) 798 F2d 581, 21 Fed Rules Evid Serv 358, habeas corpus proceeding (ED NY) 685 F Supp 883, affd (CA2 NY) 867 F2d 111, cert den 490 US 1022, 104 L Ed 2d 187, 109 S Ct 1750.

Footnote 34. *United States v Brennan* (CA2 NY) 798 F2d 581, 21 Fed Rules Evid Serv 358, habeas corpus proceeding (ED NY) 685 F Supp 883, affd (CA2 NY) 867 F2d 111, cert den 490 US 1022, 104 L Ed 2d 187, 109 S Ct 1750; *United States v Pierre* (CA2 NY) 781 F2d 329, 20 Fed Rules Evid Serv 372.

Footnote 35. *People v McDaniel*, 81 NY2d 10, 595 NYS2d 364, 611 NE2d 265.

Footnote 36. *United States v De Coito* (CA9 Hawaii) 764 F2d 690, 18 Fed Rules Evid Serv 640.

Footnote 37. *United States v Rohrer* (CA9 Cal) 708 F2d 429, 13 Fed Rules Evid Serv 796.

Footnote 38. *United States v Wilkinson* (CA2 NY) 754 F2d 1427, cert den 472 US 1019, 87 L Ed 2d 617, 105 S Ct 3482, post-conviction proceeding (SD NY) 1988 US Dist LEXIS 9174; *United States v Feldman* (CA7 Ill) 711 F2d 758, 13 Fed Rules Evid Serv 1223, cert den 464 US 939, 78 L Ed 2d 317, 104 S Ct 352, later proceeding (CA7 Ill) 756 F2d 556.

Footnote 39. *United States v Khan* (CA2 NY) 821 F2d 90, 23 Fed Rules Evid Serv 511; *United States v Henderson* (CA4 Md) 717 F2d 135, 13 Fed Rules Evid Serv 1480, 76 ALR Fed 401, cert den 465 US 1009, 79 L Ed 2d 238, 104 S Ct 1006.

Footnote 40. *United States v Rohrer* (CA9 Cal) 708 F2d 429, 13 Fed Rules Evid Serv 796.

§ 678 Statements of identification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The declarant's statement of identification of a person made after perceiving the person is not hearsay where the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement. 41 There is no requirement that the identifying witness perceive the person again after the event took place. 42 The rule is not limited to statements of identification made soon after the criminal incident, but applies also to statements of identification made soon after perceiving the suspect or his likeness in the identification process. 43 The requirement that the identification be made shortly after perception is consistent with the requirement under the Uniform Rules of Evidence. 44

One witness may testify regarding an identification made by another witness if the declarant also testifies and is available for cross-examination. 45

The rule excluding statements of identification from the definition of hearsay applies to prior statements of identification made in a wide range of circumstances, including statements made after the declarant's examination of a display of photographs, 46 of a sketch of the accused, 47 or to verbal identifications. 48 The identifier need not even have witnessed the event in question. 49

Unlike the exclusions for prior inconsistent or consistent statements, the operation of the exclusion for pretrial statements of identification is not related to the impeachment process. If the identifier's trial testimony is consistent with the pretrial statement, it does not matter whether the statement qualifies as a prior consistent statement, 50 nor does it matter whether the pretrial statement qualifies as a prior inconsistent statement if the

identifier's testimony differs from his pretrial identification. 51

Pretrial statements of identification are admissible where the identifier during the trial picks a person other than the accused as the culprit, 52 or where he testifies during the trial that he cannot say whether the accused is the culprit or not. 53

Testimony by the identifying witness concerning the pretrial identification may be corroborated by third persons present at the identification and to whom the identifier was speaking, 54 and the corroborative testimony may be received as substantive evidence. 55

In addition, it has been held that it is within the scope of a trial court's discretion to admit hearsay statements of identification of items in a manner analogous to admission of statements identifying people. 56

Footnotes

Footnote 41. FR Evid, Rule 801(d)(1)(C).

Footnote 42. *United States v Owens* (CA9 Cal) 789 F2d 750, 20 Fed Rules Evid Serv 807, cert gr 479 US 1084, 94 L Ed 2d 143, 107 S Ct 1284, motion gr 480 US 929, 94 L Ed 2d 756, 107 S Ct 1563 and revd on other grounds, remanded 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193, on remand (CA9) 844 F2d 701, 24 Fed Rules Evid Serv 1000, on remand (CD Cal) 699 F Supp 815, 27 Fed Rules Evid Serv 547, appeal after remand (CA9 Cal) 889 F2d 913, 28 Fed Rules Evid Serv 1546.

Footnote 43. *State v Williamson*, 84 Wis 2d 370, 267 NW2d 337 (ovrld on other grounds by *Manson v State*, 101 Wis 2d 413, 304 NW2d 729).

Footnote 44. Uniform Rules of Evidence, Rule 801(d)(1)(iii).

Footnote 45. *United States v O'Malley* (CA7 Ill) 796 F2d 891, 21 Fed Rules Evid Serv 92, postconviction proceeding (ND Ill) 1992 US Dist LEXIS 1458, affd (CA7) 1993 US App LEXIS 10175 (FBI agent's testimony of witness' prior identification of defendant from photospread was admissible as substantive evidence after the identifying witness recanted the prior identification in testimony given at the trial); *United States v Jarrad* (CA9 Cal) 754 F2d 1451, 17 Fed Rules Evid Serv 974, cert den 474 US 830, 88 L Ed 2d 78, 106 S Ct 96; *United States v Elemy* (CA9 Cal) 656 F2d 507, 9 Fed Rules Evid Serv 256; *Commonwealth v Ly*, 528 Pa 523, 599 A2d 613.

Police officer was permitted to testify as to an out of court identification where the identifying witness testified that he observed the perpetrator at a relevant time, observed the perpetrator on a subsequent occasion under constitutionally permissible circumstances and recognized that person as the one previously seen, but was unable to say on the basis of present recollection whether the defendant was the same person. *People v Quevas*, 81 NY2d 41, 595 NYS2d 721, 611 NE2d 760.

Third party testimony as to child's statement identifying the perpetrator of child abuse was not hearsay where it is shown that the child identifier, either at trial or at a hearing, was subject to cross-examination under oath concerning the identification statement and

the child responded willingly to questions about the previous identification and where the judge found the statement of prior identification reliable. *State v Boston*, 46 Ohio St 3d 108, 545 NE2d 1220.

Footnote 46. *United States v Owens*, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193; *United States v Di Tommaso* (CA2 NY) 817 F2d 201, 22 Fed Rules Evid Serv 1595; *United States v Marchand* (CA2 Vt) 564 F2d 983, 2 Fed Rules Evid Serv 1130, cert den 434 US 1015, 54 L Ed 2d 760, 98 S Ct 732; *Di Angelo v United States* (ED Pa) 406 F Supp 880, affd without op (CA3 Pa) 566 F2d 1168 and affd without op (CA3 Pa) 566 F2d 1168; *Anderson v Maggio* (CA5 La) 555 F2d 447, 2 Fed Rules Evid Serv 106; *United States v O'Malley* (CA7 Ill) 796 F2d 891, 21 Fed Rules Evid Serv 92, postconviction proceeding (ND Ill) 1992 US Dist LEXIS 1458, affd (CA7) 1993 US App LEXIS 10175; *United States v King* (CA8 Mo) 590 F2d 253, cert den 440 US 973, 59 L Ed 2d 790, 99 S Ct 1538; *United States v Jarrad* (CA9 Cal) 754 F2d 1451, 17 Fed Rules Evid Serv 974, cert den 474 US 830, 88 L Ed 2d 78, 106 S Ct 96; *United States v Hudson* (CA9 Cal) 564 F2d 1377, 2 Fed Rules Evid Serv 834; *United States v Ingram* (CA10 Colo) 600 F2d 260, 4 Fed Rules Evid Serv 679.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Admissibility of evidence as to extrajudicial or pretrial identification of accused, 71 ALR2d 449.

Footnote 47. *United States v Moskowitz* (CA2 NY) 581 F2d 14, 3 Fed Rules Evid Serv 476, cert den 439 US 871, 58 L Ed 2d 184, 99 S Ct 204.

A composite sketch was considered hearsay but was nevertheless admissible under the hearsay exception for prior identifications where it complied with the requirements of that rule. *State v Motta*, 66 Hawaii 254, 659 P2d 745.

As to what qualifies as a hearsay statement, see § 661.

Footnote 48. *State v Grover*, 55 Wash App 252, 777 P2d 22, review den 113 Wash 2d 1032, 784 P2d 531.

Footnote 49. *United States v Ingram* (CA10 Colo) 600 F2d 260, 4 Fed Rules Evid Serv 679 (identification of accused as person shown in bank surveillance photographs).

Footnote 50. *United States v Moskowitz* (CA2 NY) 581 F2d 14, 3 Fed Rules Evid Serv 476, cert den 439 US 871, 58 L Ed 2d 184, 99 S Ct 204.

Footnote 51. *United States v Lewis* (CA2 NY) 565 F2d 1248, 2 Fed Rules Evid Serv 815, cert den 435 US 973, 56 L Ed 2d 66, 98 S Ct 1618; *United States v O'Malley* (CA7 Ill) 796 F2d 891, 21 Fed Rules Evid Serv 92, post-conviction proceeding (ND Ill) 1992 US Dist LEXIS 1458, affd (CA7) 1993 US App LEXIS 10175.

For a discussion of prior inconsistent or consistent statements, see §§ 668 et seq.

Footnote 52. *United States v Lewis* (CA2 NY) 565 F2d 1248, 2 Fed Rules Evid Serv 815, cert den 435 US 973, 56 L Ed 2d 66, 98 S Ct 1618.

Footnote 53. *United States v Di Tommaso* (CA2 NY) 817 F2d 201, 22 Fed Rules Evid Serv 1595; *United States v Marchand* (CA2 Vt) 564 F2d 983, 2 Fed Rules Evid Serv 1130, cert den 434 US 1015, 54 L Ed 2d 760, 98 S Ct 732; *Anderson v Maggio* (CA5 La) 555 F2d 447, 2 Fed Rules Evid Serv 106; *United States v Hudson* (CA9 Cal) 564 F2d 1377, 2 Fed Rules Evid Serv 834; *United States v Ingram* (CA10 Colo) 600 F2d 260, 4 Fed Rules Evid Serv 679; *State v Garcia* (RI) 622 A2d 446.

Footnote 54. *United States v Lewis* (CA2 NY) 565 F2d 1248, 2 Fed Rules Evid Serv 815, cert den 435 US 973, 56 L Ed 2d 66, 98 S Ct 1618; *United States v Fritz* (CA10 Kan) 580 F2d 370, cert den 439 US 947, 58 L Ed 2d 338, 99 S Ct 340.

Footnote 55. *United States v Ingram* (CA10 Colo) 600 F2d 260, 4 Fed Rules Evid Serv 679; *Morris v United States* (Dist Col App) 398 A2d 333; *State v Motta*, 66 Hawaii 254, 659 P2d 745.

However, a police officer's attribution to a witness of a positive identification denied by the witness at trial was not admissible to prove the identification; its effect was limited to impeachment. *Commonwealth v Dinkins*, 415 Mass 715, 615 NE2d 570, summary op at (Mass) 21 M.L.W. 3076.

Footnote 56. *State v Jenkins*, 53 Wash App 228, 766 P2d 499, review den 112 Wash 2d 1016 (trial court did not err in permitting an individual to testify, where the individual was a detective investigating a burglary, to a witnesses' identification of a car that was similar to the car driven by a robber).

4. Hearsay Exceptions, Generally [679-703]

a. Availability of Declarant Immaterial [679-689]

(1). In General [679-682]

§ 679 Background

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though the declarant may be available. 57 The Federal and Uniform Rules of Evidence collect under one rule the exceptions for which the availability of the declarant is immaterial and provide that hearsay material meeting the stated requirements is not excluded by the hearsay rule even if the declarant is available as a witness. 58

Exceptions formerly lumped together under the *res gestae* doctrine, 59 which has not been adopted as such in the Federal Rules of Evidence, 60 but to which resort is still occasionally made, are treated under this rule. 61

Although there is no availability requirement under this rule, 62 borderline issues of admissibility may be swayed in favor of admissibility where the declarant is available, on the principle that prejudice from improperly admitted hearsay testimony is reduced when the out-of-court declarant is called as a witness, particularly where not only the declarant but the hearer of the statement and the opponent of the statement can testify. 63

◆ Practice guide: Under certain circumstances a defendant may object, on the ground of probable unreliability, to admission of a declaration of a nonwitness which is within an exception to the hearsay rule, because of the defendant's special rights under the confrontation clause of the Sixth Amendment. 64

§ 679 ----Background [SUPPLEMENT]

Practice Aids: Constitutional law – sixth amendment – the confrontation clause is not violated by the admission of evidence embraced by any firmly rooted hearsay exception regardless of an out of court declarant's availability at trial. *White v. Illinois* [116 L Ed 2d 848 (1992)], 70 U Det Mercy LR 989 (1993).

Footnotes

Footnote 57. Advisory Committee Notes to Federal Rules of Evidence, FRE 803.

Footnote 58. FR Evid, Rule 803; Uniform Rules of Evidence, Rule 803.

For a discussion of hearsay exceptions under Federal and Uniform Evidence rule 803(1)-(4) for statements categorized as present sense impressions, excited utterances, statements of then existing mental, emotional, or physical condition, or statements made for the purpose of medical diagnosis or treatment, see §§ 860 et seq.

For a discussion of the exception for records of regularly conducted business activity under Federal and Uniform Rule of Evidence 803(6), see §§ 1023 et seq.

For a discussion of admission of public records and reports; records of vital statistics; records of religious organizations; marriage, baptismal, and similar certificates; family records; statements and documents affecting an interest in property; statements in ancient documents; and market reports, or commercial publications under Federal and Uniform Rules of Evidence 803(8), (9), (11)-(17), see §§ 1023-1027.

For a discussion of hearsay exceptions for judgments of previous convictions, or as to personal, family or general history, or boundaries, under Federal and Uniform Rules of Evidence 803(22) and 803(23), see §§ 1343, 1282.

Footnote 59. *Miller v Keating* (CA3 Pa) 754 F2d 507, 17 Fed Rules Evid Serv 723; *Wabisky v D. C. Transit System, Inc.*, 114 US App DC 22, 309 F2d 317.

Law Reviews: Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale LJ 229 (1922).

Practice References Hunter, Federal Trial Handbook 3d § 54:2.

Jones on Evidence, 6th ed § 8:7.

Footnote 60. Hilyer v Howat Concrete Co., 188 US App DC 180, 578 F2d 422, 3 Fed Rules Evid Serv 1492, 48 ALR Fed 442.

Footnote 61. FR Evid, Rule 803(1)-(4); Uniform Rules of Evidence, Rule 803(1)-(4).

For a discussion of spontaneous statements and the res gestae exception, see §§ 860 et seq.

Footnote 62. David v Pueblo Supermarket of St. Thomas (CA3 VI) 740 F2d 230, 15 Fed Rules Evid Serv 2055.

Footnote 63. United States v Lawrence (CA5 La) 699 F2d 697, 12 Fed Rules Evid Serv 1133, cert den 461 US 935, 77 L Ed 2d 309, 103 S Ct 2103, habeas corpus proceeding (ED La) 1988 US Dist LEXIS 7302.

Footnote 64. United States v Harris (CA2 NY) 733 F2d 994, 15 Fed Rules Evid Serv 580.

§ 680 Reputation concerning personal or family history

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An exception to the hearsay rules permits admission of evidence of reputation among members of a person's family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history. 65 Reputation has been defined as the status resulting from the notoriety produced by cumulation of facts tending to prove the quality that a person enjoys in a family and in society; to ensure trustworthiness, that reputation must have arisen prior to the controversy. 66 Evidence of reputation is competent to prove a death, 67 status as an heir, 68 and an acknowledgment of paternity. 69 Evidence that the parties to an alleged marriage lived together, and acquired a general reputation as husband and wife, is always admissible for the purpose of proving the fact of marriage. 70

The Federal Rules and states adopting the Uniform Rules also recognize a similar exception for statements of personal or family history which are admissible when the declarant is unavailable. 71

Footnotes

Footnote 65. FR Evid, Rule 803(19); Uniform Rules of Evidence, Rule 803(19).

Footnote 66. State v Stringer (La App 2d Cir) 567 So 2d 758.

Footnote 67. Secrist v Green, 70 US 744, 3 Wall 744, 18 L Ed 153.

Practice References 4 Am Jur Proof of Facts 1, Death, Proof 5.

Footnote 68. Secrist v Green, 70 US 744, 3 Wall 744, 18 L Ed 153.

Annotation: Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Practice References Hunter, Federal Trial Handbook 3d § 55:33.

Louisell and Mueller, Federal Evidence § 467.

Footnote 69. McBride on behalf of McBride v Heckler (DC NJ) 619 F Supp 1554.

Footnote 70. Travers v Reinhardt, 205 US 423, 51 L Ed 865, 27 S Ct 563.

Practice References 3 Am Jur Proof of Facts 269, Common Law Marriage.

Footnote 71. § 691.

§ 681 Reputation concerning boundaries or general history

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community, state, or nation are admissible as an exception to the hearsay rule. 72 Generally, the reputation testimony must report a general consensus of opinion and not just an assertion of an individual's personal observation. 73 The reputation must arise before the controversy only with respect to boundaries of or customs affecting lands, 74 whereas the historical character of reputation concerning general history dispenses with the need that the reputation antedate the controversy. 75

The facts for which the opinion or reputation can be taken as trustworthy must be facts which have been of interest to all members of the community. 76 The constant exposure of facts to discussion by the community sifts out the possible errors and gives the residual facts generally accepted by the locality a trustworthiness which allows them to be presented as evidence in a court of law. 77

It is important that reputation be admissible to establish ancient boundaries, since

landmarks are frequently found to have been made of perishable materials which pass away with the generation in which they are made. 78 The recorded plat of the original plan of a city is admissible as the highest species of evidence of reputation as to the location and boundaries of the lots and streets in it. 79

Footnotes

Footnote 72. FR Evid, Rule 803(20); Uniform Rules of Evidence, Rule 803(20).

Annotation: Admissibility of evidence of reputation as to land boundaries or customs affecting land, under Rule 803(20) of Uniform Rules of Evidence and similar formulations, 79 ALR4th 1044.

Footnote 73. *Nature Conservancy v Nakila*, 4 Hawaii App 584, 671 P2d 1025, later proceeding 7 Hawaii App 565, 785 P2d 1325 (exclusion of testimony as hearsay is proper where the proffered evidence was not reputation testimony but was the witnesses testimony of what people she had talked to told her based on their observation and knowledge); *Goodover v Lindey's, Inc.*, 232 Mont 302, 757 P2d 1290, 79 ALR4th 1031 (witness' testimony as to the statements of a prior owner regarding the boundaries of the property could not be admitted where the statements were assertions of the prior owners individual personal observations).

Statement of a former property owner made during the time he was the owner of the property to the effect that he did not think that the fence line was on the true boundary between the two properties was simply a subjective statement of opinion and did not consist of reputation in the community as to the boundary. *Judd Family Ltd. Partnership v Hutchings (Utah)* 797 P2d 1088, 141 Utah Adv Rep 8.

Footnote 74. *Pan American World Airways, Inc. v Aetna Casualty & Surety Co.* (SD NY) 368 F Supp 1098, *affd* (CA2 NY) 505 F2d 989 (construing proposed rule).

Practice References Hunter, *Federal Trial Handbook* 3d § 55:34.

Agreement of Adjoining Landowners Fixing Common Boundary. 34 Am Jur POF2d 317, § 9.

Louisell and Mueller, *Federal Evidence* § 468.

Footnote 75. Advisory Committee Notes to Federal Rules of Evidence, FRE 803.

Footnote 76. *Shutte v Thompson*, 82 US 151, 15 Wall 151, 21 L Ed 123; *Kent County Rd. Com. v Hunting*, 170 Mich App 222, 428 NW2d 353, *app den* 432 Mich 914; *Goodover v Lindey's, Inc.*, 232 Mont 302, 757 P2d 1290, 79 ALR4th 1031.

Annotation: Comment Note.—Admissibility of evidence of reputation or declaration as to matter of public interest, 58 ALR2d 615.

Footnote 77. *Wally v United States*, 148 Ct Cl 371 (boundary); *Kent County Rd. Com. v Hunting*, 170 Mich App 222, 428 NW2d 353, *app den* 432 Mich 914; *Goodover v Lindey's, Inc.*, 232 Mont 302, 757 P2d 1290, 79 ALR4th 1031.

Footnote 78. Boardman v Lessees of Reed, 31 US 328, 6 Pet 328, 8 L Ed 415.

Footnote 79. Morris v Lessee of Harmer's Heirs, 32 US 554, 7 Pet 554, 8 L Ed 781, later proceeding (CCD Ohio) 5 McLean 313, 11 F Cas 551, No 6075.

§ 682 Reputation as to character

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of reputation of a person's character among his associates or in the community is admissible as an exception to the hearsay rule. 80 It has been said that in a complex urban society, a person's reputation among coworkers might be more significant than his reputation among his neighbors. 81 Testimony regarding a person's character can only relate what the witness has heard others say about the person's reputation and cannot relate specific instances of the person's conduct or the witness' personal opinion as to the person's character. 82 There is no requirement that the information come directly from those with personal knowledge or there be a showing that the community has, in fact, reached a general conclusion regarding the individual's reputation. 83 Character witnesses may testify as to a defendant's reputation in the community, as affected by particular allegations shown to have been the subject of public discussion in the community. 84 However, it has been held that the reputation opinion must be at least partially based on a discussion of matters other than the actions or offenses for which the defendant is being tried. 85

Footnotes

Footnote 80. FR Evid, Rule 803(21); Uniform Rules of Evidence, Rule 803(21).

Footnote 81. United States v Parker (CA7 Ill) 447 F2d 826.

Annotation: Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Practice References 49 Am Jur POF2d 649, General Reputation of Person in Community § 8.

Footnote 82. People v King, 158 Mich App 672, 405 NW2d 116; State v Marshall, 312 Or 367, 823 P2d 961; Turner v State (Tex Crim) 805 SW2d 423, reh den (Tex Crim) 1991 Tex Crim App LEXIS 51 and cert den (US) 116 L Ed 2d 162, 112 S Ct 202.

Footnote 83. Snow v Whitney Fidalgo Seafoods, Inc., 38 Wash App 220, 686 P2d 1090, review den 103 Wash 2d 1007.

Footnote 84. United States v Prevatt (CA5 Fla) 526 F2d 400, 76-1 USTC ¶ 9180, 37 AFTR 2d 76-657, reh den (CA5 Fla) 531 F2d 575.

As to the separate matter of impeachment by evidence of opinion and reputation bearing on character for truthfulness, see 81 Am Jur 2d, Witnesses §§ 895 et seq.

Practice Reference Hunter, Federal Trial Handbook 3d § 61:2.

Louisell and Mueller, Federal Evidence § 469.

Footnote 85. Turner v State (Tex Crim) 805 SW2d 423, reh den (Tex Crim) 1991 Tex Crim App LEXIS 51 and cert den (US) 116 L Ed 2d 162, 112 S Ct 202.

(2). Residual Exception [683-689]

§ 683 Admission of other statements having equivalent circumstantial guaranties of trustworthiness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Hearsay statements which do not fall within the scope of the established exceptions to the hearsay rule may still be admissible where they have circumstantial guarantees of trustworthiness equivalent to those of the established exceptions. 86 Basically, the same standards and evidentiary principles apply to this and the residual exception applicable to exceptions requiring the declarant to be unavailable. 87 Admission of the hearsay evidence must comply with the spirit, if not the letter, of the established exceptions. 88 Congress did not intend to create a broad new hearsay exception, and thus it is said that the residual exceptions may be used only in exceptional circumstances. 89 The purpose of the residual exception to the hearsay rule is to allow trustworthy hearsay evidence to be admitted, but this should happen only when it is both worthy of trust and necessary to effectuate justice. 90

In order for hearsay not covered by an established exception to be admitted, the court must determine that (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. 91 The residual exception has been cited in support of the admission of hearsay evidence such as—

—business records not admissible under the business records exception. 92

—government reports and publications not admissible as public records under the public records exception, in cases in which the government is a party 93 and in cases between private litigants. 94

—prior inconsistent statements not excepted from the definition of hearsay. 95

—prior grand jury testimony, if there are equivalent circumstantial guarantees of trustworthiness. 96

—a postmark to prove that a letter was mailed from a particular place. 97

—affidavits of purchasers of a product, in an FTC case. 98

—films. 99

—polls and surveys. 1

—other extrajudicial statements. 2

The residual exception does not, however, warrant the admission in evidence of untrustworthy hearsay, such as—

—certain business records. 3

—prior testimony, whether before a grand jury 4 or at a former trial. 5

◆ Caution: While it has been held that the residual exception cannot provide a basis for admitting testimony specifically addressed in another exception, 6 elsewhere the view has been taken that the hearsay exceptions are not mutually exclusive, thus a hearsay statement that is not admissible, for example, as a statement of a coconspirator, may still be admissible under the residual exception. 7 Under the latter view, the "Near Miss" theory, whereby hearsay evidence cannot be admitted under a catchall exception if it has been offered and rejected under the specific exception that most nearly describes it, has been rejected on the ground that appropriate limitations on residual exceptions should be found in the rules themselves and in their legislative history. 8

§ 683 ----Admission of other statements having equivalent circumstantial guaranties of trustworthiness [SUPPLEMENT]

Case authorities:

Written ratification falls under FRE 803(24) catchall hearsay exception and is admissible, where it is most important evidence to show timing of key assignments of interests in patent licensing agreement, because president of companies involved also submits explanatory affidavit, and there is no evidence that makes court doubt president's veracity in signing ratification. *Refac Fin. Corp. v Patlex Corp.* (1996, ED Pa) 912 F Supp 159.

Letter from trustee for bankrupt partnership to attorney for partnership, in which trustee acknowledged waiving attorney-client privilege on behalf of partnership, was properly admitted under residual hearsay exception. *United States v Campbell* (1996, CA5 Tex) 73 F3d 44, CCH Bankr L Rptr ¶ 76779.

On remand, three-year-old victim's statements to others that her mother burned her legs with cigarettes should be reassessed for admissibility under residual hearsay exception,

considering evidence of prior interrogation, prompting, or manipulation by adults. *United States v Barrett* (1993, CA8 Minn) 8 F3d 1296, 38 Fed Rules Evid Serv 398.

Videotaped recording of codefendant's testimony at prior state trial was properly admitted in federal trial under former testimony exception to hearsay rule where defendants had full and fair opportunity to cross-examine codefendant at state trial and there was no suggestion that either factual nature of case against defendants or defendants' motives for cross-examining codefendant had changed from first to second trial; all that changed was technology that defendants might have used to enhance videotape of underlying incident as basis for questions in cross-examination, but that did not undercut fact that defendants had opportunity to cross-examine codefendant. *United States v Koon* (1994, CA9 Cal) 34 F3d 1416, 94 CDOS 6346, 94 Daily Journal DAR 11624, 40 Fed Rules Evid Serv 1.

Pilot's statement in near mid-air collision report filed with FAA that "that was pretty close fella" was admissible as hearsay exception under 803(1) and (2) and statement referring to what had just happened as "near miss" was admissible under 803(2). *Bennett v National Transp. Safety Bd.* (1995, CA10) 55 F3d 495.

Statements in police report by witness to automobile accident were not admissible, although police reports generally were admissible as business records, since statements were hearsay, were not within any hearsay exception, and were not made by witness in course of business. *O'Shea v Mignone* (1994) 35 Conn App 828, 647 A2d 37, app den 231 Conn 938.

In prosecution for first degree criminal sexual conduct committed against nine-year-old boy, admission of victim's out-of-court statements to police officer and victim's therapist did not deny defendant his Sixth Amendment right to confrontation where victim had been determined to be unavailable and where statements were supported by "particularized guarantees of trustworthiness." Police officer's videotaped interview with victim contained guarantees of trustworthiness, namely, non-leading nature of most questions, use of age-appropriate language by victim, and his good memory of details. Guarantees in statement to therapist were even stronger since she did not anticipate hearing of abuse, but was treating victim because of complaints of his disruptive behavior at school, and victim initiated discussion of sexual abuse spontaneously and therapist asked few, if any, leading questions. *State v Lonergan* (1993, Minn App) 505 NW2d 349, review den (Minn) 1993 Minn LEXIS 711.

In prosecution for murder and other crimes, trial court did not err in admitting, under "catch-all" exception to hearsay rule, statement by witness regarding victim's feeling about anal intercourse where statement was offered as evidence of material fact, statement was more probative on point of whether victim consented to anal sex than any other evidence, and general interests of justice would best be served by admission of statement, circumstances surrounding it having indicated trustworthiness equivalent to evidence admitted under established hearsay exceptions. *State v Williams* (1994, NM) 874 P2d 12.

Statements made by defendant to a medical expert who stated an opinion that at the time of a killing defendant was so intoxicated that he was incapable of premeditation and deliberation were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in G.S. § 8C-1, Rule 803(4) where the statements were made by defendant ten months after the killing for the purpose of

preparing and presenting a defense to the crimes for which he stood accused rather than for the purpose of seeking treatment of a medical condition or a diagnosis of his condition to obtain treatment. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Statements made by defendant's mother and wife to defendant's medical expert were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in Rule 803(4) because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the residual exception to the hearsay rule found in GS § 8C-1, Rule 803(24) since the statement did not possess equivalent guarantees of trustworthiness in that it was a self-serving declaration, was not part of the *res gestae*, and was not available for corroborative purposes because defendant did not testify. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

Footnotes

Footnote 86. FR Evid, Rule 803(24); Uniform Rules of Evidence, Rule 803(24).

Practice References Hunter, *Federal Trial Handbook* 3d § 55:40.

Louisell and Mueller, *Federal Evidence* § 472.

Footnote 87. *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174.

As to the residual exception requiring the declarant to be unavailable, see § 701.

Annotation: Uniform Evidence Rule 803(24): the residual hearsay exception, 51 ALR4th 999.

Admissibility of statement under Rule 803(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 36 ALR Fed 742.

Footnote 88. *United States v Medico* (CA2 NY) 557 F2d 309, 2 Fed Rules Evid Serv 33, cert den 434 US 986, 54 L Ed 2d 480, 98 S Ct 614; *United States v Mandel* (CA4 Md) 591 F2d 1347, 5 Fed Rules Evid Serv 133, different results reached on reh, en banc (CA4 Md) 602 F2d 653, reh den, en banc (CA4) 609 F2d 1076, cert den 445 US 961, 64 L Ed 2d 236, 100 S Ct 1647; *Cook v Hoppin* (CA7 Ill) 783 F2d 684, 19 Fed Rules Evid Serv 1603; *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65.

Footnote 89. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797, later proceeding (ED Pa) 505 F Supp 1313, 7 Fed Rules Evid Serv 305, summary judgment gr (ED Pa) 513 F Supp 1100,

1981-1 CCH Trade Cases ¶ 64155, 8 Fed Rules Evid Serv 289, supp op (ED Pa) 513 F Supp 1334, 1981-1 CCH Trade Cases ¶ 64155, 31 FR Serv 2d 833 and affd in part and revd in part on other grounds (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by Pfeiffer v Marion Ctr. Area Sch. Dist. (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675); Land v American Mut. Ins. Co. (ED Mich) 582 F Supp 1484; United States v Love (CA8 ND) 592 F2d 1022, 4 Fed Rules Evid Serv 353, 61 ALR Fed 906 (disapproved on other grounds by Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1); State v Thompson (App) 167 Ariz 230, 805 P2d 1051, 68 Ariz Adv Rep 10; State v Plant, 236 Neb 317, 461 NW2d 253.

Senate Judiciary Committee Report No. 93-1277 (1974) 19, 20.

Footnote 90. Tennant v State (Wyo) 786 P2d 339.

Footnote 91. FR Evid, Rule 803(24); Uniform Rules of Evidence, Rule 803(24).

Footnote 92. Morgan Guaranty Trust Co. v Hellenic Lines, Ltd. (SD NY) 621 F Supp 198, 1986 AMC 626 (copies of minutes of board meetings); United States v Pfeiffer (CA8 Mo) 539 F2d 668, 1 Fed Rules Evid Serv 561 (theft of tires provable by records in possession of tire manufacturer which were prepared by common carriers who had transported tires, even assuming that carriers were not participants in regular business activity in question); Keyes v School Dist. (DC Colo) 439 F Supp 393, later proceeding (DC Colo) 474 F Supp 1265, later proceeding (DC Colo) 540 F Supp 399, later proceeding (DC Colo) 576 F Supp 1503, later proceeding (DC Colo) 609 F Supp 1491, later proceeding (DC Colo) 653 F Supp 1536, later proceeding (DC Colo) 670 F Supp 1513, affd, in part, remanded (CA10 Colo) 895 F2d 659, cert den 498 US 1082, 112 L Ed 2d 1040, 111 S Ct 951 and (disapproved on other grounds by Price v Austin Independent School Dist. (CA5 Tex) 945 F2d 1307) and (disapproved on other grounds by Daly v Hill (CA4 NC) 790 F2d 1071) (affidavits prepared by attorneys, for purpose of court award of fees, reconstructing hours they spent on case).

Although a report prepared by a corporation pursuant to an agreement with the SEC, which had initiated a complaint against the corporation, was not admissible under FRE 803(24) due to doubts as to its trustworthiness, portions of the report would be admissible where they showed a high degree of similarity with materials prepared by an accounting firm and found to be trustworthy. Osterneck v E.T. Barwick Industries, Inc. (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and affd 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1.

As to admission of statements under the business records exception, generally, see §§ 1300 et seq.

Annotation: Admissibility of statement under Rule 803(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 36 ALR

Footnote 93. *United States v American Cyanamid Co.* (SD NY) 427 F Supp 859, 1977-1 CCH Trade Cases ¶ 61408, 1 Fed Rules Evid Serv 672, later proceeding (SD NY) 556 F Supp 357, 1983-1 CCH Trade Cases ¶ 65400, 36 FR Serv 2d 152, later proceeding (SD NY) 556 F Supp 361, 1982-83 CCH Trade Cases ¶ 65152, *affd in part and revd in part* on other grounds (CA2 NY) 719 F2d 558, 1983-2 CCH Trade Cases ¶ 65656, 37 FR Serv 2d 1034, *cert den* 465 US 1101, 80 L Ed 2d 127, 104 S Ct 1596, later proceeding (SD NY) 598 F Supp 1516, 1985-1 CCH Trade Cases ¶ 66385, *amd* (SD NY) 1989-1 CCH Trade Cases ¶ 68517 (5-year-old letters to Justice Department); *United States v Simmons* (CA4 Md) 773 F2d 1455, 19 Fed Rules Evid Serv 526 (trace forms of Bureau of Alcohol, Tobacco, and Firearms); *United States v King* (CA8 Mo) 590 F2d 253, *cert den* 440 US 973, 59 L Ed 2d 790, 99 S Ct 1538 (certified documents of state tax department); *United States v Friedman* (CA9 Wash) 593 F2d 109, 4 Fed Rules Evid Serv 646 (written summary of official Chilean immigration records); *Branca v Security Ben. Life Ins. Co.* (CA11 Fla) 773 F2d 1158, 19 Fed Rules Evid Serv 832, 3 FR Serv 3d 1269, *mod, reh den, en banc* (CA11 Fla) 789 F2d 1511, 4 FR Serv 3d 827 (foreign court decree declaring insured presumptively dead); *Ark-Mo Farms, Inc. v United States*, 209 Ct Cl 116, 530 F2d 1384, 1 Fed Rules Evid Serv 215 (hydrological study prepared in part by experts other than authenticating witness).

As to admission of statements under the public records exception, generally, see § 1321.

Footnote 94. *Muncie Aviation Corp. v Party Doll Fleet, Inc.* (CA5 Ga) 519 F2d 1178, 1 Fed Rules Evid Serv 133 (advisory materials recommending landing procedures not having force of law but issued by Federal Aviation Administration).

Footnote 95. *United States v Leslie* (CA5 Ala) 542 F2d 285, 2 Fed Rules Evid Serv 614, *reh den* (CA5 Ala) 545 F2d 168 (impeachment of court's witnesses by prior statements considered trustworthy because witnesses admitted having made them); *United States v Popenas* (CA6 Mich) 780 F2d 545, 86-1 USTC ¶ 9169, 19 Fed Rules Evid Serv 960, 57 AFTR 2d 86-481, *appeal after remand, without op* (CA6 Mich) 815 F2d 706; *United States v Renville* (CA8 SD) 779 F2d 430, 19 Fed Rules Evid Serv 465.

As to admissibility of prior inconsistent statements, generally, see § 670 et seq.

Footnote 96. *United States v Donlon* (CA1 NH) 909 F2d 650, 30 Fed Rules Evid Serv 736.

Footnote 97. *United States v Cowley* (CA9 Cal) 720 F2d 1037, 14 Fed Rules Evid Serv 1274, *cert den* 465 US 1029, 79 L Ed 2d 692, 104 S Ct 1290.

Footnote 98. *FTC v Amy Travel Service, Inc.* (CA7 Ill) 875 F2d 564, 1989-1 CCH Trade Cases ¶ 68549, 27 Fed Rules Evid Serv 1214, 13 FR Serv 3d 1088, *cert den* 493 US 954, 107 L Ed 2d 352, 110 S Ct 366, later proceeding (ND Ill) 1990-2 CCH Trade Cases ¶ 69160 (affidavits admitted to show that actual consumer harm had resulted from defendant's activities, where affidavits were made under oath, affiants described facts about which they had personal knowledge, and it would be cumbersome and unnecessarily expensive to bring all consumers in for like testimony); *FTC v Kitco of Nevada, Inc.* (DC Minn) 612 F Supp 1282, 1985-2 CCH Trade Cases ¶ 66658.

Footnote 99. *Grimes v Employers Mut. Liability Ins. Co.* (DC Alaska) 73 FRD 607, 1

Fed Rules Evid Serv 600 (film of injured plaintiff performing clinical tests as probative on issues of pain and suffering).

Footnote 1. *Pittsburgh Press Club v United States* (CA3 Pa) 579 F2d 751, 78-1 USTC ¶ 9457, 3 Fed Rules Evid Serv 256, 42 AFTR 2d 78-5038, on remand (WD Pa) 462 F Supp 322, 79-1 USTC ¶ 9145, 43 AFTR 2d 79-508, revd on other grounds (CA3 Pa) 615 F2d 600, 80-1 USTC ¶ 9233, 45 AFTR 2d 80-812; *Brunswick Corp. v Spinit Reel Co.* (CA10 Okla) 832 F2d 513, 4 USPQ2d 1497, 23 Fed Rules Evid Serv 1272 (survey regarding confusion of over source of trademarked product).

In an action brought by students challenging state student assessment tests, although results of the tests were not themselves admissible under FRE 803(24), results could be admitted for the purpose of permitting an expert to explain the basis for his opinion that the test was valid. *Debra P. v Turlington* (MD Fla) 564 F Supp 177, 13 Fed Rules Evid Serv 1041, affd (CA11 Fla) 730 F2d 1405, 15 Fed Rules Evid Serv 1175.

Without an appropriate foundation for a survey, such as testimony of persons responsible for formulating parts of it, the survey is inadmissible. *Toys "R" Us, Inc. v Canarsie Kiddie Shop, Inc.* (ED NY) 559 F Supp 1189, 217 USPQ 1137, 13 Fed Rules Evid Serv 347 (survey conducted for purpose of establishing likelihood of product confusion).

Annotation: Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USCS §§ 1063, 1114, and 1125), 98 ALR Fed 20.

Footnote 2. *Nowell v Universal Electric Co.* (CA5 Miss) 792 F2d 1310, 20 Fed Rules Evid Serv 1306, cert den 479 US 987, 93 L Ed 2d 581, 107 S Ct 578 (decedent's statement to wife regarding what another person told him as to identity of barrels of varnish); *Atty. Gen. of United States v Irish People, Inc.* (DC Dist Col) 595 F Supp 114, 16 Fed Rules Evid Serv 1218, supp op (DC Dist Col) 612 F Supp 647, affd in part and revd in part on other grounds 254 US App DC 229, 796 F2d 520 (letters between officers of foreign principals of American newspaper); *State v Terrazas* (App) 162 Ariz 357, 783 P2d 803, 40 Ariz Adv Rep 34 (testimony by a police officer regarding statements made by a defendant on interrogation as interpreted by a Spanish language interpreter where the interpreter did not have sufficient memory of the interrogation to testify himself as to the defendant's responses); *State v Ortlepp* (Minn) 363 NW2d 39, 51 ALR4th 985 (statement by a defendant's accomplice where the accomplice admitted making the prior statement, there was no real dispute over whether he had made it or over what the statement contained, statement was against the accomplice's penal interest, and was consistent with all the other evidence the state introduced).

Footnote 3. *National American Corp. v Federal Republic of Nigeria* (SD NY) 448 F Supp 622, affd (CA2 NY) 597 F2d 314 (demurrage documents inadmissible where similar documents submitted for other vessels proved to be fraudulent).

Footnote 4. *Estate of Temple v Commissioner*, 65 TC 776, 1 Fed Rules Evid Serv 1095 (testimony by accountant of indicted taxpayer who was also subject to criminal liability for tax evasion was not trustworthy where there had been no opportunity to cross

examine and the testimony was ambiguous, indicated a lack of candor, and was tainted with possibility of self interest).

Footnote 5. *Arrow-Hart, Inc. v Covert Hills, Inc.* (ED Ky) 71 FRD 346, 1 Fed Rules Evid Serv 554, 22 FR Serv 2d 1485, *affd* (CA6 Ky) 552 F2d 711, 23 FR Serv 2d 636 (rule precluding a successor judge from considering a case by way of a transcript from a former trial over which a different judge, now deceased, presided is not to be evaded by resort to the residual hearsay exception in FRE 803(24)).

Footnote 6. *United States v Barrett* (DC Me) 598 F Supp 469, *affd* (CA1 Me) 766 F2d 609, 18 Fed Rules Evid Serv 1170, *cert den* 474 US 923, 88 L Ed 2d 264, 106 S Ct 258.

Footnote 7. *State v Durry*, 4 Hawaii App 222, 665 P2d 165.

Footnote 8. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, *revd* on other grounds, *remanded* 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, *cert den* 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

§ 684 Burden of proof; discretion of court

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In seeking to have hearsay evidence admitted under the residual exception, the proponent of the evidence has the burden of establishing the fundamental requirements for admission by a preponderance of the evidence. 9 Judicial discretion to admit otherwise inadmissible hearsay is not unfettered under the residual exception. 10 In jury trials, a preliminary hearing as to admissibility, at which the foundation facts for the residual exception must be established, should be held outside the presence of the jury. 11 When a court relies on the residual exception, on its own initiative or at the urging of counsel, for admission of hearsay evidence not coming within other exceptions, the court should state on its record the basis for its determination of trustworthiness, probative value, and necessity. 12

§ 684 ----Burden of proof; discretion of court [SUPPLEMENT]

Case authorities:

The trial court in a first-degree murder trial erred by admitting into evidence under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) a jail inmate's letter to a detective concerning statements allegedly made by defendant about the murder where (1) the trial court failed to make any particularized findings of fact or conclusions of law

regarding whether the letter possessed "equivalent guarantees of trustworthiness"; (2) the inmate had no personal knowledge of the events to which he referred in the letter; (3) the inmate was not motivated to speak the truth but rather to say what the police wanted to hear in order to make a deal; (4) while the inmate never recanted his statement, he refused to acknowledge at trial that he wrote the letter, that the letter was in his handwriting, or that he wrote the address on the envelope; (5) the inmate was unavailable because he refused to testify; (6) the letter contained many inaccuracies; (7) the inmate had the opportunity to obtain specific facts about the murder without actually talking with defendant because he was in the courtroom during defendant's probable cause hearing; and (8) the trial court improperly considered corroborating evidence to support the letter's trustworthiness. Since the author of the letter was not subject to full and effective cross-examination by defendant, defendant's rights under the Confrontation Clause were violated by its admission, and the State failed to show that this error was harmless beyond a reasonable doubt where the letter contained the only evidence of defendant's motive to kill the victim; the letter provided the greatest evidence of premeditation and deliberation; and the letter contained the most specific admission of defendant's guilt. *State v Swindler* (1994) 339 NC 469, 450 SE2d 907.

Footnotes

Footnote 9. *People v Bowers* (Colo App) 773 P2d 1093, *affd* (Colo) 801 P2d 511.

Footnote 10. *United States v Medico* (CA2 NY) 557 F2d 309, 2 Fed Rules Evid Serv 33, *cert den* 434 US 986, 54 L Ed 2d 480, 98 S Ct 614; *United States v Mandel* (CA4 Md) 591 F2d 1347, 5 Fed Rules Evid Serv 133, different results reached on *reh*, *en banc*, by split decision (CA4 Md) 602 F2d 653, *reh den*, *en banc* (CA4) 609 F2d 1076, *cert den* 445 US 961, 64 L Ed 2d 236, 100 S Ct 1647; *Cook v Hoppin* (CA7 Ill) 783 F2d 684, 19 Fed Rules Evid Serv 1603.

Advisory Committee Notes to Federal Rules of Evidence, FRE 803.

Footnote 11. *In Interest of C.B.* (Miss) 574 So 2d 1369; *Stanberry v State* (Okla Crim) 637 P2d 892.

Footnote 12. *State v Durry*, 4 Hawaii App 222, 665 P2d 165.

§ 685 Showing of trustworthiness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Hearsay evidence which is similar to an enumerated hearsay exception can be admitted under the residual exception under the hearsay rules 13 where the court finds that the time, content, and circumstances of this statement provides sufficient indicia of reliability before statements are admitted under the residual exception. 14 A higher level of reliability must be established where the declarant is available than if the declarant is

unavailable. 15 The trustworthiness requirement of the rule relates to the hearsay statement that is being testified to, not to the witness's testimony. 16 Factors to be considered in determining how reliable the evidence is include:

- (1) the declarant's incentive to speak truthfully or falsely; 17
- (2) factors bearing on the reliability of the reporting of the hearsay by the witness; 18
- (3) whether more than one person heard the statement; 19
- (4) whether the statements were made spontaneously; 20
- (5) timing of the declaration; 21 and
- (6) the relationship between the declarant and the witnesses. 22 Hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. 23

In specific instances, circumstantial guarantees of trustworthiness were found where—

—statements were received and assessed by defendant manufacturer's employees as valuable input and were produced directly from manufacturer's corporate files. 24

—a public document, which was filed under oath, notarized by the defendant, and prepared and filed, as required by law, by the defendant's own reelection committee, was offered against the defendant, an elected public official, in a prosecution for failure to report a campaign contribution. 25

A statement may be found inadmissible under the residual exception where it is highly self-serving in character, 26 or where the circumstances raise questions as to the accuracy of the declarant's recollection. 27

Such guarantees of trustworthiness were not present where—

—only parties present during taking of decedent's plaintiff's statement had interests adverse to defendant and where the unsworn statement was highly self-serving in character. 28

—a mother's testimony that her doctor stated to her in 1952 that he was giving her DES was self-serving and lacked corroboration. 29

—letters were summaries of payroll records supplied by personnel of a company and compiled for litigation purposes in response to administrative subpoenas issued by the Department of Labor, and the company was a party to an action against a city seeking unpaid wages. 30

—an analysis of the record of the trial court disclosed that at the time the court ruled on the admissibility on certain evidence under this exception, it knew that the declarant had made two different statements to another. 31

—in identifying the perpetrator of a sexual abuse crime against a child, the child identified five different perpetrators which made the identification of the perpetrator ambiguous. 32

§ 685 ----Showing of trustworthiness [SUPPLEMENT]

Case authorities:

Hearsay exception for statement authorized by party does not contemplate that statement be shown to have been made by employee at instance of employer, only that declarant's statement concern matters within scope of her agency or employment. *Woodman v Haemonetics Corp.* (1995, CA1 Mass) 51 F3d 1087, 67 BNA FEP Cas 838, 66 CCH EPD ¶ 43520.

Written ratification falls under FRE 803(24) catchall hearsay exception and is admissible, where it is most important evidence to show timing of key assignments of interests in patent licensing agreement, because president of companies involved also submits explanatory affidavit, and there is no evidence that makes court doubt president's veracity in signing ratification. *Refac Fin. Corp. v Patlex Corp.* (1996, ED Pa) 912 F Supp 159.

Statements made by murder for hire victim after initial shooting, in which he named number of persons other than defendants as his likely assailants, were properly rejected since they bore no indicia of reliability because victim changed his story on more than one occasion. *United States v Winters* (1994, CA6 Mich) 33 F3d 720, 1994 FED App 314P.

Shipping documents concerning stolen container of gloves were properly admitted under residual hearsay exception; documents had particularized guarantees of trustworthiness in that customs brokers and U.S. Customs regularly rely on accuracy of such documents, bill of lading was by shipper in exporting country and had to be accurate to load goods on ocean vessel, and customs broker testified that he had processed similar documents for same exporting company before and they had never been inaccurate. *United States v Bachsian* (1993, CA9 Cal) 4 F3d 796, 93 CDOS 6755, 93 Daily Journal DAR 11548, cert den (US) 1994 US LEXIS 1123.

Declarant's statement that defendant did not commit bank robbery and that he would take responsibility for it if government needed fall guy was properly excluded as lacking sufficient indicia of trustworthiness since declarant provided no details about robbery, his bald assertion that defendant was not involved was otherwise unsubstantiated, in short, declarant offered no specific information inculcating himself and exculpating defendant. *United States v Spring* (1996, CA10 Utah) 80 F3d 1450.

In action seeking damages for injuries bicyclist sustained when defendant's car allegedly struck him on his bicycle, trial court erred in admitting in evidence unredacted version of medical record that contained statement: "Patient was not wearing a helmet and accidentally ran into a stationary car," where there was no evidence linking statement to bicyclist and other declarants beside bicyclist—particularly witnesses at scene or even defendant—could have provided description of accident to ambulance personnel who then may have conveyed what they heard to hospital staff, who recorded it in bicyclist's medical records. *Barrera v Wilson* (1995, Dist Col App) 668 A2d 871.

Statements made by defendant to a medical expert who stated an opinion that at the time of a killing defendant was so intoxicated that he was incapable of premeditation and deliberation were not admissible as substantive evidence under the medical diagnosis and

treatment exception to the hearsay rule set forth in G.S. § 8C-1, Rule 803(4) where the statements were made by defendant ten months after the killing for the purpose of preparing and presenting a defense to the crimes for which he stood accused rather than for the purpose of seeking treatment of a medical condition or a diagnosis of his condition to obtain treatment. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Statements made by defendant's mother and wife to defendant's medical expert were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in Rule 803(4) because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Testimony of wife of deceased and insurance agent offered to prove probable intent of deceased with regard to primary beneficiary of life insurance policy was proper under residual hearsay exception where wife and agent were only two people present at time decedent designated beneficiaries of policy, agent gained nothing from admitting that he filled out application and neglected to write wife's name in space for primary beneficiary, and all other claimants to proceeds, two children of deceased by prior marriage and two children of wife by prior marriage, were named as contingent beneficiaries. *United Investors Life Ins. Co. v Alexander* (1995, La App 2d Cir) 662 So 2d 831.

Footnotes

Footnote 13. *Mitchell v State*, 84 Wis 2d 325, 267 NW2d 349.

Footnote 14. *State v Plant*, 236 Neb 317, 461 NW2d 253; *Stanberry v State* (Okla Crim) 637 P2d 892; *State v Frey*, 43 Wash App 605, 718 P2d 846; *Tennant v State* (Wyo) 786 P2d 339.

Footnote 15. *State v Swallow* (SD) 405 NW2d 29.

Footnote 16. *State v Durry*, 4 Hawaii App 222, 665 P2d 165.

Footnote 17. *People v District Court of El Paso County* (Colo) 776 P2d 1083; *State v Conklin* (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262; *State v Plant*, 236 Neb 317, 461 NW2d 253; *Stanberry v State* (Okla Crim) 637 P2d 892; *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990); *State v Ryan*, 103 Wash 2d 165, 691 P2d 197; *State v Jagielski* (App) 161 Wis 2d 67, 467 NW2d 196, appeal after remand (Wis App) 1992 Wisc App LEXIS 1059; *Tennant v State* (Wyo) 786 P2d 339.

In an action seeking a declaration as to the date on which a licensing agreement would expire, brought by the licensor of television rights to certain films, a District Court did not err in admitting a registration statement, because the standard of due diligence applied by securities lawyers with regard to registration statements was sufficient to guarantee the requisite circumstantial trustworthiness. *Hal Roach Studios, Inc. v Richard Feiner & Co.* (CA9 Cal) 896 F2d 1542.

Footnote 18. *People v District Court of El Paso County* (Colo) 776 P2d 1083; *State v*

Conklin (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262; State v Plant, 236 Neb 317, 461 NW2d 253; Stanberry v State (Okla Crim) 637 P2d 892; State v Ryan, 103 Wash 2d 165, 691 P2d 197; State v Jagielski (App) 161 Wis 2d 67, 467 NW2d 196, appeal after remand (Wis App) 1992 Wisc App LEXIS 1059; Tennant v State (Wyo) 786 P2d 339.

Footnote 19. People v District Court of El Paso County (Colo) 776 P2d 1083; State v Ryan, 103 Wash 2d 165, 691 P2d 197.

Footnote 20. People v District Court of El Paso County (Colo) 776 P2d 1083; State v Conklin (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262; Norris v State (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990); State v Ryan, 103 Wash 2d 165, 691 P2d 197.

Social worker was properly permitted to testify to her observations of a sexual abuse victim's younger sister's manipulation of anatomically correct dolls where social worker asked virtually no questions and testified that child's demonstration was spontaneous. United States v Ellis (CA1 Mass) 935 F2d 385, 33 Fed Rules Evid Serv 196, cert den (US) 116 L Ed 2d 160, 112 S Ct 201.

Footnote 21. People v District Court of El Paso County (Colo) 776 P2d 1083; State v Conklin (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262; State v Ryan, 103 Wash 2d 165, 691 P2d 197; State v Jagielski (App) 161 Wis 2d 67, 467 NW2d 196, appeal after remand (Wis App) 1992 Wisc App LEXIS 1059.

Footnote 22. State v Ryan, 103 Wash 2d 165, 691 P2d 197; State v Jagielski (App) 161 Wis 2d 67, 467 NW2d 196, appeal after remand (Wis App) 1992 Wisc App LEXIS 1059.

Footnote 23. State v Plant, 236 Neb 317, 461 NW2d 253.

Footnote 24. Re A.H. Robins Co. (DC Kan) 575 F Supp 718.

Footnote 25. State v Nowakowski, 67 Wis 2d 545, 227 NW2d 697 (ovrld on other grounds by State v Petrone, 161 Wis 2d 530, 468 NW2d 676).

Footnote 26. Land v American Mut. Ins. Co. (ED Mich) 582 F Supp 1484 (statement of plaintiff's decedent as to how she was injured while operating power cutting machine, in products-liability action); Bulthuis v Rexall Corp. (CA9 Cal) 777 F2d 1353, 19 Fed Rules Evid Serv 596, 3 FR Serv 3d 962, amd on other grounds (CA9 Cal) 786 F2d 368, withdrawn by publisher, reported in full (CA9 Cal) 789 F2d 1315 and amd (CA9 Cal) 4 FR Serv 3d 835.

Footnote 27. United States v Beltran (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40.

Footnote 28. Land v American Mut. Ins. Co. (ED Mich) 582 F Supp 1484.

Footnote 29. Bulthuis v Rexall Corp. (CA9 Cal) 777 F2d 1353, 19 Fed Rules Evid Serv 596, 3 FR Serv 3d 962, amd on other grounds (CA9 Cal) 786 F2d 368, withdrawn by publisher, reported in full (CA9 Cal) 789 F2d 1315 and amd (CA9 Cal) 4 FR Serv 3d 835.

Footnote 30. Hunter v Bozeman, 216 Mont 251, 700 P2d 184, 27 BNA WH Cas 819, 102

Footnote 31. Tennant v State (Wyo) 786 P2d 339.

Footnote 32. State v Taylor (App) 103 NM 189, 704 P2d 443.

§ 686 Advance notice to adverse party

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The proponent of a statement under the residual exception must notify the adverse parties sufficiently in advance of the trial or hearing of his intention to offer the statement in order to provide the adverse party with a fair opportunity to prepare. 33 It has been held that the advance notice requirement must be strictly enforced. 34 The requirement is not satisfied by motions made under other provisions of the evidence rules, 35 nor will the exception be available on appeal to justify the admission of certain hearsay erroneously admitted under another exception. 36 Pretrial notice should be given if at all possible; only in those situations where requiring pretrial notice is wholly impracticable should flexibility be accorded. 37 On the other hand, it has been held that the requirement is not inflexible and that some latitude must be permitted in situations where the need for the hearsay evidence does not become apparent until after the trial has commenced, as long as the adverse party is granted sufficient opportunity to challenge the trustworthiness of the hearsay statement. 38

The notice requirement is satisfied where the opposing party brings a pretrial motion in limine to exclude the evidence in question. 39 In addition, it has been held that formal notice is not necessarily required if the opposing party knew the proponent planned to offer the evidence under the residual exception. 40

Footnotes

Footnote 33. FR Evid, Rule 803(24); Uniform Rules of Evidence, Rule 803(24).

Footnote 34. National American Corp. v Federal Republic of Nigeria (SD NY) 448 F Supp 622, affd (CA2 NY) 597 F2d 314; United States v Hogan (CA5 Tex) 763 F2d 697, 18 Fed Rules Evid Serv 450, corrected, reh den, in part (CA5 Tex) 771 F2d 82, 18 Fed Rules Evid Serv 1385, appeal after remand (CA5 Tex) 779 F2d 296; United States v Cowley (CA9 Cal) 720 F2d 1037, 14 Fed Rules Evid Serv 1274, cert den 465 US 1029, 79 L Ed 2d 692, 104 S Ct 1290; Re Estate of Severns, 217 Neb 803, 352 NW2d 865; Stanberry v State (Okla Crim) 637 P2d 892.

District Court abused its discretion when it admitted under the residual hearsay exception a record of toll telephone calls made from defendant's residence where defendant received no pretrial notice of the existence of the record or of the government's intention to offer it into evidence. United States v Benavente Gomez (CA1 Puerto Rico) 921 F2d 378, 31 Fed Rules Evid Serv 1502.

It was error for a court to overrule an objection to hearsay evidence offered under the residual exception where it did not affirmatively appear that the notice of intention to use the statement was timely given to the defendant by the state. *State v Reed*, 201 Neb 800, 272 NW2d 759.

Annotation: Admissibility of statement under Rule 803(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 36 ALR Fed 742.

Footnote 35. *United States v One 1968 Piper Navajo Twin Engine Aircraft* (CA5 Tex) 594 F2d 1040, 4 Fed Rules Evid Serv 906 (motion for self-authentication of foreign public documents under Rule 902(3)).

Footnote 36. *United States v Guevara* (CA7 Ill) 598 F2d 1094, 4 Fed Rules Evid Serv 910.

Footnote 37. *United States v Iaconetti* (CA2 NY) 540 F2d 574, 1 Fed Rules Evid Serv 301, 36 ALR Fed 734, cert den 429 US 1041, 50 L Ed 2d 752, 97 S Ct 739, reh den 430 US 911, 51 L Ed 2d 589, 97 S Ct 1186.

Footnote 38. *United States v Iaconetti* (CA2 NY) 540 F2d 574, 1 Fed Rules Evid Serv 301, 36 ALR Fed 734, cert den 429 US 1041, 50 L Ed 2d 752, 97 S Ct 739, reh den 430 US 911, 51 L Ed 2d 589, 97 S Ct 1186; *United States v Evans* (CA5 Tex) 572 F2d 455, 3 Fed Rules Evid Serv 1120, reh den (CA5 Tex) 576 F2d 931 and cert den 439 US 870, 58 L Ed 2d 182, 99 S Ct 200; *United States v Leslie* (CA5 Ala) 542 F2d 285, 2 Fed Rules Evid Serv 614, reh den (CA5 Ala) 545 F2d 168.

Footnote 39. *FTC v Kitco of Nevada, Inc.* (DC Minn) 612 F Supp 1282, 1985-2 CCH Trade Cases ¶ 66658.

Footnote 40. *State v Robinson*, 153 Ariz 191, 735 P2d 801 (notice requirement was satisfied even in absence of formal notice where the same statements were admitted in the defendant's first trial and where the defendant's counsel was aware that the state intended to use the statements in a second trial; *M.N.D. v B.M.D.* (Minn App) 356 NW2d 813 (opposing party received adequate notice that the statements would be used where opposing party received copies of all the material long before the hearing and introduced most of the same statements himself).

§ 687 Statements of child victims of abuse

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The residual hearsay exceptions are an appropriate method to admit children's statements from sexual assault cases if the statements are otherwise proven sufficiently trustworthy.

41 The residual exception has been held to justify the admissibility of statements by child abuse victims to law enforcement officials or social workers. 42 The interests of justice are served by the admission into testimony of such statements because it is of debatable propriety to require extremely young victims of abuse to take the stand as the only method for putting before the jury what is in all probability the only firsthand account, other than that of the defendant, of the circumstances of abuse. 43 The matter of determining whether to admit hearsay should be kept from the jury; this legal determination that the court makes should be done before the evidence is presented to the jury. 44

§ 687 ----Statements of child victims of abuse [SUPPLEMENT]

Practice Aids: Alabama's child hearsay exception, 47 Ala LR 1:215 (1995).

Case authorities:

Child sexual abuse victims' statements to social workers had ample guarantees of trustworthiness and thus were admissible under catchall exception to hearsay rule; social workers all had extensive experience interviewing abused children, two initial interviewers used interview techniques based on open- ended, nonsuggestive questions to determine whether abuse had occurred, children were young and used age- appropriate language during their interviews, interview in one case followed closely upon abuse and although other did not it was corroborated by and consistent with interview close in time to incident, and victims' descriptions of incidents were essentially consistent. *United States v Juvenile NB* (1995, CA8 SD) 59 F3d 771, reh, en banc, den (1995, CA8) 1995 US App LEXIS 25292.

Alleged child sexual abuse victim's statements to member of hospital's child protective committee was not admissible under medical- diagnosis exception to hearsay rule since there was no evidence indicating that child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. *United States v Faciane* (1994, CMA) 40 MJ 399.

Whether hearsay statements by a young victim of an alleged sex offense are reliable enough to be admitted under the statutory hearsay exception depends on an evaluation of the totality of the circumstances surrounding the making of the statements; and some factors which are important in making this determination include the child's spontaneous and consistent repetition of the incident, the child's mental state, use of terminology unexpected of a child of similar age, and the lack of motive to fabricate. *People v West* (1994) 158 Ill 2d 155, 198 Ill Dec 393, 632 NE2d 1004.

There was no error in a prosecution for multiple counts of first- degree sexual offense and taking indecent liberties with a child where defendant contended that the court erred in allowing a detective to testify regarding statements made by a victim in an interview with a social worker but defendant introduced the entire videotape. *State v Parker* (1995) 119 NC App 328, 459 SE2d 9.

Footnotes

Footnote 41. *State v Harris*, 247 Mont 405, 808 P2d 453; *State v Jagielski* (App) 161 Wis 2d 67, 467 NW2d 196, appeal after remand (Wis App) 1992 Wisc App LEXIS 1059.

For a discussion of circumstantial guarantees of trustworthiness under the residual exception, see § 685.

Footnote 42. *United States v Dorian* (CA8 SD) 803 F2d 1439, 21 Fed Rules Evid Serv 1147; *United States v Renville* (CA8 SD) 779 F2d 430, 19 Fed Rules Evid Serv 465; *United States v Cree* (CA8 ND) 778 F2d 474, 19 Fed Rules Evid Serv 415.

Footnote 43. *United States v Cree* (CA8 ND) 778 F2d 474, 19 Fed Rules Evid Serv 415.

Footnote 44. *People v Bowers* (Colo) 801 P2d 511; *People v Mitchell*, 155 Ill 2d 344, 185 Ill December 528, 614 NE2d 1213; *State v Conklin* (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262; *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990).

§ 688 --Special factors in determining trustworthiness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In addition to the factors generally considered in determining a statement's trustworthiness for admission, 45 in cases involving child victims of abuse courts have considered—

—possible suggestiveness created by leading questions, particularly by a parent or close authority figure. 46

—whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate. 47

—whether the child made the statements spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults. 48

—whether the child's statement is clear and unambiguous and rises to the needed level of certainty. 49

—whether the statement describes an event that the child of the victim's age could not be expected to fabricate. 50

—whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement. 51

The individual statements are the proper focus of the inquiry and it is error for the trial court to admit all statements of a particular child based on its assessment of the child's reliability rather than its assessment of the reliability of each statement. 52 Further,

adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out of court statement and not from subsequent corroboration of the criminal act; the circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rules are based are those that existed at the time the statement was made and do not include those that may be added in using hindsight. 53 Admissibility has been considered particularly clear where the victim testifies at trial, is subject to cross-examination, and is given an opportunity to explain to the jury any changes in his account of the incidents in question. 54

In some jurisdictions and under the Uniform Rules of Evidence, 55 a special exception has been created specifically permitting the admission of statements made by child victims of abuse where those statements have circumstantial guarantees of trustworthiness similar to those required for admission under the residual exceptions. 56 It has been held that a child victims statute constitutes the exclusive basis for admitting a child victim's hearsay statement of a sexual act committed against the child when the hearsay statement is not otherwise admissible under any other specific hearsay exception created by the statute or court rule; thus the residual hearsay exception is not available as a backup to the child victim statute. 57 In contrast, under the Uniform Rules of Evidence, the requirements for admissibility of a statement under this rule do not preclude admissibility of the statement under any other exception to the hearsay rule. 58

§ 688 --Special factors in determining trustworthiness [SUPPLEMENT]

Case authorities:

Statements made by child abuse victim to social worker should not have been admitted under exception for statements made to diagnose treatment for emotional or psychological injuries since interview took place in automobile around which other children were playing so that child had to hide anatomical pictures from other children in answering social worker's questions regarding where defendant allegedly touched him, social worker never explained her role and purpose to child, child himself did not seek her help, and there was no evidence he thought he was talking to medical professional. *United States v White* (1993, CA8 SD) 11 F3d 1446.

The trial court in a sexual abuse case did not err in admitting hearsay testimony of witnesses concerning statements that the victim made to them which identified defendant as the person who sexually abused her, since the victim's limited testimony showed that she was neither cooperative nor responsive and was therefore "unavailable" for purposes of testifying at trial; given her unavailability and the evidentiary importance of her statements, the hearsay testimony of the witnesses was "necessary"; and defendant did not dispute that the State established the inherent trustworthiness of the original declaration. *State v Ward* (1995) 118 NC App 389, 455 SE2d 666.

Statements made by six-year-old sexual assault victim to child abuse counselor three hours after assault were admissible in alleged perpetrator's trial, since statements were made in response to counselor's very open-ended questions, victim had sustained overwhelming emotional trauma and significant physical injuries, and facts recited by victim were corroborated in every essential respect. *State v Smith* (1995, Utah) 909 P2d 236, 280 Utah Adv Rep 6.

Footnotes

Footnote 45. § 685.

Footnote 46. *People v District Court of El Paso County* (Colo) 776 P2d 1083; *State v Conklin* (Minn) 444 NW2d 268, reh den, en banc (Minn) 1989 Minn LEXIS 262.

Footnote 47. *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990).

Footnote 48. *State v Robinson*, 153 Ariz 191, 735 P2d 801; *People v District Court of El Paso County* (Colo) 776 P2d 1083; *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990).

Footnote 49. *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990).

Footnote 50. *D.A.H. v G.A.H.* (Minn App) 371 NW2d 1; *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990).

Circumstantial guarantees of reliability were not shown where statements of a child accusing another of sexually abusing her were not spontaneous and where the child's past history raised the possibility that her particular knowledge of intimate sexual acts as described in the hearsay statement could have come from sources other than the accused and where there was evidence tending to show that the child might have had improper motivations to make her accusations against the accused. *State v Allen*, 157 Ariz 165, 755 P2d 1153, 9 Ariz Adv Rep 8.

Footnote 51. *People v District Court of El Paso County* (Colo) 776 P2d 1083.

Footnote 52. *State v Stevens*, 58 Wash App 478, 794 P2d 38, review den 115 Wash 2d 1025, 802 P2d 128.

Footnote 53. *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24; *State v Ryan*, 103 Wash 2d 165, 691 P2d 197.

Footnote 54. *United States v Renville* (CA8 SD) 779 F2d 430, 19 Fed Rules Evid Serv 465.

Footnote 55. Uniform Rules of Evidence, Rule 807.

Footnote 56. *People v Bowers* (Colo) 801 P2d 511; *Norris v State* (Tex App Dallas) 788 SW2d 65, petition for discretionary review ref (September 12, 1990); *State v Stevens*, 58 Wash App 478, 794 P2d 38, review den 115 Wash 2d 1025, 802 P2d 128.

See also 13 ULA, Uniform Rules of Evidence Rule 807, Comment to 1986 Amendment, listing rules or legislation modifying the hearsay rule to permit the introduction of extrajudicial statements and testimony of children who are the victims of sexual abuse or who witnessed violent or sexual acts committed against others.

Footnote 57. *People v Bowers* (Colo) 801 P2d 511.

§ 689 --Showing of probative value

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where the trial court determines that the alleged victim of child abuse is unable or unwilling to testify fully, whether by reason of age, experience, or emotional state, hearsay evidence may be more probative than that available from the declarant. 59

§ 689 --Showing of probative value [SUPPLEMENT]

Case authorities:

Defendant's statements made to another state legislator were properly excluded as hearsay in prosecution for making false statements to FBI since statements made 24 hours after interview with FBI were not probative of defendant's state of mind on previous day. *United States v LeMaster* (1995, CA6 Ky) 54 F3d 1224, 1995 FED App 157P, reh, en banc, den (1995, CA6 Mich) 1995 US App LEXIS 19703.

Footnotes

Footnote 59. *United States v St. John* (CA8 SD) 851 F2d 1096, 26 Fed Rules Evid Serv 64 (District Court did not err in admitting hearsay statements made by 10-year old child sex abuse victim to social worker and clinical psychologist, notwithstanding that government had elicited testimony directly from child since child victim's testimony is not always more probative than prior hearsay statements he or she may have made in more relaxed environs of doctor's or social worker's office); *State v Robinson*, 153 Ariz 191, 735 P2d 801 (young child's spontaneous out-of-court statements regarding sexual abuse may be more trustworthy or probative than incourt testimony given months later, after innumerable interviews, and interrogations may have distorted the child's memory); *State v Thompson* (App) 167 Ariz 230, 805 P2d 1051, 68 Ariz Adv Rep 10, later proceeding (App) 169 Ariz 471, 820 P2d 335, 98 Ariz Adv Rep 53.

The catch all exception was not available where the child was available to testify, seemed inclined to bring up the matter on her own initiative, and was not reluctant to discuss it; the child appeared to be available to provide more probative testimony directly in court. *In Interest of C.B. (Miss)* 574 So 2d 1369.

Determination that out-of-court statements were more probative on the point for which they were offered then was the testimony of the victim at trial due to the difficulty the victim had in testifying was not justified where the court failed to consider that the older brother of the victim was present and also testified as to the substance of the out-of-court

statements where the brother was also an eyewitness to the alleged abuse. State v Nelson (Utah) 777 P2d 479, 113 Utah Adv Rep 29.

b. Declarant Unavailable [690-703]

(1). In General [690, 691]

§ 690 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal and Uniform rules collect and treat, under one rule, a series of exceptions to the hearsay rule that apply only where the declarant is shown to be unavailable, and provide that hearsay evidence meeting the requirements of those exceptions is not excluded by the hearsay rule. 60 Under this rule, where the declarant is shown to be unavailable, testimony as to statements which fall in to the following categories may be admissible:

- (1) the former testimony of a witness; 61
- (2) statements made by a declarant under belief of impending death; 62
- (3) statements against interest; 63 and
- (4) statements of personal or family history. 64

§ 690 ----Generally [SUPPLEMENT]

Case authorities:

In prosecution for sexual offenses, involving several boys that defendant had taken into his home, in which defendant sought to introduce grand jury testimony of allegedly unavailable witness under prior recorded testimony exception to hearsay rule, government had requisite opportunity to cross-examine witness when he appeared before grand jury, and prosecutor's actual questioning of witness before grand jury comported with principal purpose of cross-examination. Accordingly, since two other requisite elements under prior recorded testimony exception were met—witness' grand jury testimony was given under oath and there was identity of issues in two proceedings—trial judge abused his discretion in excluding transcript of testimony, unless witness had not been shown to be unavailable to testify at trial. Although trial judge appeared to accept defense counsel's proffer of witness' unavailability, he did not make explicit finding. Feaster v United States (1993, Dist Col App) 631 A2d 400.

In prosecution for criminal vehicular operation and driving while intoxicated, arising out of fatal accident involving defendant's van, trial court did not abuse its discretion in excluding report that had been prepared by expert, who had been hired by defendant's insurance company to examine van, although expert had removed van's motor mounts and prepared report stating that defective motor mounts could have caused uncontrollable acceleration, and although expert died before trial and his supervisor inadvertently threw away motor mounts, where expert was not under oath and there was no opportunity for state to cross-examine him at time he prepared report. Whether witness was under oath, how close in time statement was made to incident giving rise to statement and ability of opposing party to cross-examine witness at time of statement are factors to consider in determining whether statements by unavailable witness are sufficiently trustworthy to justify admission under Rule 804(b)(5). *State v Jaworsky* (1993, Minn App) 505 NW2d 638, review den (Minn) 1993 Minn LEXIS 674.

Trial court did not abuse its discretion in admitting police officer's videotaped interview with nine-year-old victim at defendant's second trial on sexual abuse charges, where (1) victim was unavailable to testify at second trial, (2) videotaped interview contained guarantees of trustworthiness, namely, non-leading nature of most questions, use of age-appropriate language by boy, and his good memory of details, and (3) moreover, officer testified at both trials, as well as at omnibus hearing, and defense thus had ample opportunity to cross-examine officer and expose weaknesses in victim's report of sexual abuse. Moreover, court did not abuse its discretion in admitting videotaped testimony of victim's sister alleging that defendant had also abused her; court concluded that sister's videotaped testimony was clear and convincing evidence of another crime committed by defendant and was relevant to show opportunity and common scheme. *State v Lonergan* (1993, Minn App) 505 NW2d 349, review den (Minn) 1993 Minn LEXIS 711.

The trial court made a sufficient preliminary finding that the declarant (a murder victim) was unavailable to testify for the admission under Rule 804 of hearsay testimony by various witnesses who related statements of the victim about threats defendant made against her and her fear of him where ample evidence about the victim's death was presented by the State before the testimony of any of these witnesses; the trial court stated that the issue was "the believability of the declarant . . . [w]ho is unavailable"; and written orders admitting the testimony specified that the statements were those "of the decedent." N.C.G.S. § 8C-1, Rule 804. *State v Baker* (1994) 338 NC 526, 451 SE2d 574.

The trial court's conclusion that a murder victim's statements to six witnesses concerning defendant's threats and her fear of defendant possessed circumstantial guarantees of trustworthiness was supported by the court's findings that a confidential and trusting relationship existed between the victim and five of the witnesses and that the sixth witness was a law officer acting in the performance of his duty when the victim made the statements to him. *State v Baker* (1994) 338 NC 526, 451 SE2d 574.

The trial court's omission of the rule number from its written orders admitting a murder victim's hearsay statements to certain witnesses was harmless where it is clear from the transcript and nearly identical findings and conclusions in all of the written orders that the testimony was admitted pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5). *State v Baker* (1994) 338 NC 526, 451 SE2d 574.

In personal injury action by employee against employer, trial court properly admitted deposition testimony of employer's witness, where witness was more than 100 miles from place of trial, and where witness ignored subpoena to testify at trial. *Riggi v Control*

Footnotes

Footnote 60. FR Evid, Rule 804; Uniform Rules of Evidence, Rule 804.

Advisory Committee Notes to Federal Rules of Evidence, FRE 804.

Practice References Hunter, Federal Trial Handbook 3d § 56:1.

2 Jones on Evidence, 6th ed §§ 9:1-9:20, 9:22-9:29.

Louisell and Mueller, Federal Evidence §§ 485, 486.

Footnote 61. FR Evid, Rule 804(b)(1); Uniform Rules of Evidence, Rule 804(b)(1).

For a discussion of former testimony, generally, see §§ 906 et seq.

Footnote 62. FR Evid, Rule 804(b)(2); Uniform Rules of Evidence, Rule 804(b)(2).

For a detailed discussion of statements made under belief of impending death, see §§ 829 et seq.

Footnote 63. FR Evid, Rule 804(b)(3); Uniform Rules of Evidence, Rule 804(b)(3).

For a detailed discussion of statements against interest, see §§ 785 et seq.

Footnote 64. § 691.

§ 691 Statements of personal or family history

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is a long established pedigree exception to the hearsay rule with regard to declarations of deceased members of a family offered as proof of genealogical and other issues connected with the history of the family, such as the legitimacy or parentage of a child. 65 This exception is codified in the Federal and Uniform rules of Evidence, and applies not only where the declarant is deceased, but also where he or she is otherwise unavailable within the rule. 66 Thus, where the declarant is unavailable, a statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history is admissible even though the declarant had no means of acquiring personal knowledge of the matter stated. 67 Further, declarations as to another person's pedigree or other fact of personal or family history may be admitted if the declarant is related to the other by blood, adoption, or marriage or is so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

68 The statements encompassed by this rule relate only to matters of pedigree, such as date of birth, marriage, death, and the fact and degree of family relationships. 69 However, evidence as to highly debatable or complex matters such as motive or purpose is not within the scope of this exception, which is concerned with facts. 70 It is no longer required that a declaration in this area must have been made before the litigation, since such a concern bears more on weight than admissibility. 71 The alleged relationship does not have to be shown by other evidence in addition to the statement of the alleged relative. 72

Footnotes

Footnote 65. *Patterson v Gaines*, 47 US 550, 6 How 550, 12 L Ed 553; *Wong You Henn v Brownell*, 93 US App DC 43, 207 F2d 226.

Annotation: Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 ALR2d 989.

Practice References 12 Am Jur POF2d 459, Determination of Heirship § 28.

Hunter, *Federal Trial Handbook* 3d § 56:5.

Louisell and Mueller, *Federal Evidence* § 490.

Footnote 66. FR Evid, Rule 804(b)(4); Uniform Rules of Evidence, Rule 804(b)(4).

Footnote 67. FR Evid, Rule 804(b)(4)(A); Uniform Rules of Evidence, Rule 804(b)(4)(i).

Footnote 68. FR Evid, Rule 804(b)(4)(B); Uniform Rules of Evidence, Rule 804(b)(4)(ii).

Footnote 69. *People v Raffaelli* (Colo App) 701 P2d 881 (fact that a baby died, the dates of the baby's death and birth, and the parentage of the baby would be admissible under this exception, but statements relating to the condition of the baby, events and circumstances leading up to the baby's death, or circumstances surrounding the birth would not be admissible); *Humphries v Louisiana Dept. of Public Works, Div. of Transp.* (La App 3d Cir) 545 So 2d 610, cert den (La) 548 So 2d 1249 (daughter of decedent permitted to testify to information contained in the family bible as to her mother's birth date as well as to mother's maiden name and names of her maternal grandparents and their place of birth).

Footnote 70. *United States v Carvalho* (CA4 Va) 742 F2d 146, 16 Fed Rules Evid Serv 453 (affidavit, by wife indicating that her motive for marrying husband was to obtain residence for him, was inadmissible on the ground that FRE 804(b)(4) is concerned with facts, not complex issues of motives).

Footnote 71. Advisory Committee Notes to Federal Rules of Evidence, FRE 804.

Footnote 72. *Re Estate of Egbert*, 105 Mich App 395, 306 NW2d 525 (rule used to admit photograph supposedly of individual claiming to be niece of a decedent where on the back is the alleged handwriting of the deceased stating that the photograph included a picture of his sister and her daughter).

(2). Definition of Unavailability [692-700]

§ 692 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A declarant is considered unavailable as a witness under the hearsay rule in five specific situations. 73 The determination of unavailability is a question for the court and is reviewable on appeal only for abuse of discretion. 74 The proponent of hearsay evidence has the burden of proving the unavailability of the witness. 75 A showing of unavailability must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered. 76

"Witness unavailable" hearsay exceptions do not apply when unavailability of witnesses is due solely to limit imposed by court. 77 In addition, the unavailability of an individual to testify cannot be premised solely on fact that proponent of testimony does not feel the declarant's presence is necessary. 78

§ 692 ----Generally [SUPPLEMENT]

Practice Aids: The admission of hearsay evidence where defendant misconduct causes the unavailability of a prosecution witness, 43 Am U LR 995 (1994).

New hearsay use at trial allowed: Witness intimidation provides exception, 213 New York LJ 59:1 (1995).

Case authorities:

In action by car rental company for damages to rental car in Hawaii, out-of-state deposition of company's management employee was not admissible as substantive evidence under rule pertaining to unavailable witnesses, where company could have produced witness to testify at trial simply by agreeing to provide transportation; similarly, deposition of company's expert witness was not admissible, since it had not been videotaped and there was no suggestion that company was unable to obtain accident reconstruction expert in New Jersey. *Avis Rent-A- Car v Cooper* (1994, App Div) 273 NJ Super 198, 641 A2d 570.

There was no error in a first- degree murder prosecution where the court determined that a witness from defendant's first trial was unavailable where the witness had been hospitalized in a psychiatric wing after she testified at the prior trial; she got out of her mother's car at an intersection on the way to testify at this trial and was found by the police hiding at a friend's house; a doctor testified that she would become more depressed

if she testified and that her depression could lead to suicide; the witness was located and brought into court; and she told the judge that she did not want to testify and would refuse to do so if ordered. N.C.G.S. § 8C-1, Rule 804(a)(4). *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Footnotes

Footnote 73. FR Evid, Rule 804(a)(1)-(5), and Uniform Rules of Evidence Rule 804(a)(1)-(5), discussed in §§ 693 et seq.

Footnote 74. *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *Dres v Campoy* (CA9 Cal) 784 F2d 996, 20 Fed Rules Evid Serv 354; *State v Jordan*, 229 Neb 563, 427 NW2d 796.

Footnote 75. *Dartez v Fibreboard Corp.* (CA5 Tex) 765 F2d 456, CCH Prod Liab Rep ¶ 10873, 19 Fed Rules Evid Serv 137, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301 (deponent was not deemed unavailable where party made no attempt to establish that deponent was unavailable); *United States v Chanya* (CA5 Tex) 723 F2d 374, 14 Fed Rules Evid Serv 1210, cert den 466 US 943, 80 L Ed 2d 471, 104 S Ct 1925, reh den 467 US 1231, 81 L Ed 2d 886, 104 S Ct 2693; *United States v Fernandez-Roque* (CA5 La) 703 F2d 808, 12 Fed Rules Evid Serv 1781; *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *United States v Draiman* (CA7 Ill) 784 F2d 248, 20 Fed Rules Evid Serv 380, later proceeding (ND Ill) 640 F Supp 1322 (statement made by alleged accomplice and offered by defense was inadmissible, despite fact that neither defense nor prosecution knew whereabouts of accomplice at time of trial, where defense did not make showing that accomplice was actually unavailable); *United States v Acosta* (CA11 Fla) 769 F2d 721, 20 Fed Rules Evid Serv 91 (party did not carry burden of proving unavailability of his wife where he argued that his wife was unavailable because of illness of her child); *People v Cummings*, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, mod, reh den 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and time for gr or den reh extended (July 2, 1993); *Mitchell v State* (Miss) 572 So 2d 865; *State v Martinez* (App) 99 NM 48, 653 P2d 879, cert den 99 NM 47, 653 P2d 878; *State v Keairns*, 9 Ohio St 3d 228, 9 Ohio BR 569, 460 NE2d 245; *Software Clearing House, Inc. v Intrak, Inc.* (Hamilton Co) 66 Ohio App 3d 163, 583 NE2d 1056; *Williamson v State* (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325; *State v Drawn* (Utah App) 791 P2d 890, 133 Utah Adv Rep 24, review pending (Utah) 142 Utah Adv Rep 63 and cert den (Utah) 804 P2d 1232, 150 Utah Adv Rep 28; *Tennant v State* (Wyo) 786 P2d 339; *Williams v Collins Communications, Inc.* (Wyo) 720 P2d 880.

Footnote 76. *State v Keairns*, 9 Ohio St 3d 228, 9 Ohio BR 569, 460 NE2d 245; *Porier v State* (Tex Crim) 662 SW2d 602; *Porier v State* (Tex Crim) 662 SW2d 602 (unnotarized letter from the absent witness' doctor and testimony of district attorney at a pretrial hearing that absent witness had continuing heart problems which prevented her from leaving the house could not withstand the rigors of a trial insufficient to show unavailability).

Unavailability was not established by a witness' testimony that the absent individual told the witness he would not testify for fear of the repercussions of confessing his own crime where there was no evidence presented that a subpoena had been issued to secure the declarant's presence in court. *State v Jordan*, 229 Neb 563, 427 NW2d 796.

Footnote 77. *Secretary of Labor v DeSisto* (CA1 Mass) 929 F2d 789, 30 BNA WH Cas 345, 118 CCH LC ¶ 35467, 32 Fed Rules Evid Serv 723.

Footnote 78. *United States v Parcel of Real Property Known as 6109 Grubb Rd.* (CA3 Pa) 886 F2d 618, 28 Fed Rules Evid Serv 1463, 110 ALR Fed 553, reh, en banc, den (CA3) 890 F2d 659; *United States v Chanya* (CA5 Tex) 723 F2d 374, 14 Fed Rules Evid Serv 1210, cert den 466 US 943, 80 L Ed 2d 471, 104 S Ct 1925, reh den 467 US 1231, 81 L Ed 2d 886, 104 S Ct 2693 (trial judge did not abuse discretion in refusing to admit statements by declarant who was present at trial and available to testify but who was not called by either party).

§ 693 Exemption on ground of privilege

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If a court ruling exempts the declarant on the ground of privilege from testifying to the subject matter of the declarant's statement, the declarant is unavailable for the purposes of the hearsay rule. 79

◆ **Caution:** A court may decline to rule a witness unavailable where the party seeking to introduce the witness' hearsay statement does not make a record of his efforts to produce the witness and does not subpoena the witness or ask the court for a ruling as to unavailability on account of privilege or for an order to testify. 80

Generally, a witness is only considered unavailable when his or her claim of privilege has been sustained by the court; 81 mere advice by an attorney to invoke a privilege, 82 the witness' invocation of the privilege, 83 or the mere suggestion that the absent declarant might attempt to exercise a privilege against testifying, 84 is not sufficient absent a definitive ruling. 85 In addition, it is ordinarily necessary for the party seeking to invoke the privilege exception to the hearsay rule to first call the witness and ask the questions, thereby compelling the witness to make a formal claim of privilege. 86 However, it has been held these requirements need not be met where fulfillment would be a mere formalism and where it is clear from the record that the court assumed a proper claim of the privilege had been made. 87

Witnesses have been considered unavailable when exempted from testifying on the grounds, inter alia, of marital privilege 88 and the privilege against self-incrimination. 89 Once a witness claims he will invoke his Fifth Amendment privilege, the state in a criminal case does not have the duty of attempting to obtain a waiver of the privilege by granting the witness immunity, by plea negotiations, or by some other means, as a good-faith effort to make the witness available to testify; such a requirement is applicable to a witness who is physically absent, but not to one who has

exercised its Fifth Amendment. 90 The status of a witness as a codefendant renders the witness unavailable, even where he has entered a plea of nolo contendere, because the codefendant retains his Fifth Amendment rights until he is sentenced. 91

Footnotes

Footnote 79. FR Evid, Rule 804(a)(1); Uniform Rules of Evidence, Rule 804(a)(1).

Footnote 80. *United States v Fernandez-Roque* (CA5 La) 703 F2d 808, 12 Fed Rules Evid Serv 1781.

Footnote 81. *United States v Adams* (CA3 NJ) 759 F2d 1099, 17 Fed Rules Evid Serv 1244, cert den 474 US 906, 88 L Ed 2d 236, 106 S Ct 275 and cert den 474 US 971, 88 L Ed 2d 321, 106 S Ct 336 (ruling in chambers held sufficient); *United States v Toney* (CA6 Ohio) 599 F2d 787, 4 Fed Rules Evid Serv 901; *United States v Udey* (CA8 Ark) 748 F2d 1231, 17 Fed Rules Evid Serv 119, cert den 472 US 1017, 87 L Ed 2d 613, 105 S Ct 3477, 105 S Ct 3478; *United States v Oropeza* (CA9 Idaho) 564 F2d 316, 2 Fed Rules Evid Serv 1170, cert den 434 US 1080, 55 L Ed 2d 788, 98 S Ct 1276; *United States v Zamora* (CA10 NM) 784 F2d 1025, 19 Fed Rules Evid Serv 1696; *People v Rosenthal* (Colo App) 670 P2d 1254; *Brinson v State* (Fla App D2) 382 So 2d 322.

Footnote 82. *United States v Pelton* (CA8 Mo) 578 F2d 701, 4 Fed Rules Evid Serv 334, cert den 439 US 964, 58 L Ed 2d 422, 99 S Ct 451.

Footnote 83. *United States v Wood* (CA9 Wash) 550 F2d 435, 1 Fed Rules Evid Serv 492.

Footnote 84. *People v Rosenthal* (Colo App) 670 P2d 1254.

Footnote 85. *United States v Fernandez-Roque* (CA5 La) 703 F2d 808, 12 Fed Rules Evid Serv 1781 (prior testimony inadmissible where proponent did not make record of efforts to produce witness and did not ask judge for ruling as to unavailability).

Footnote 86. *People v Rosenthal* (Colo App) 670 P2d 1254; *State v Johnson*, 236 Neb 831, 464 NW2d 167.

Footnote 87. *United States v Young Bros., Inc.* (CA5 Tex) 728 F2d 682, 1984-1 CCH Trade Cases ¶ 65925, 15 Fed Rules Evid Serv 484, cert den 469 US 881, 83 L Ed 2d 184, 105 S Ct 246; *State v Richardson* (Minn) 393 NW2d 657; *State v Johnson*, 236 Neb 831, 464 NW2d 167 (defendant's spouse unavailable as witness where, during a sidebar conference before the statement was sought to be elicited, the court inquired if the spousal privilege was going to be waived and received a negative answer).

A court may decide not to require a party to actually produce a witness and obtain a formal ruling on an assertion of privilege against self-incrimination where the witness' attorney has stated in court that he would advise the witness to claim the privilege. *United States v Brainard* (CA4 NC) 690 F2d 1117, 11 Fed Rules Evid Serv 1434, appeal after remand (CA4 NC) 745 F2d 320, 16 Fed Rules Evid Serv 779, cert den 471 US 1099, 85 L Ed 2d 839, 105 S Ct 2320.

Footnote 88. *United States v Barlow* (CA6 Mich) 693 F2d 954, 11 Fed Rules Evid Serv 1720, cert den 461 US 945, 77 L Ed 2d 1304, 103 S Ct 2124 (grand jury testimony admissible where declarant married defendant following grand jury appearance and before trial, and where there was no indication on record that marriage was sham); *United States v Lilley* (CA8 ND) 581 F2d 182, 3 Fed Rules Evid Serv 293; *United States v Marchini* (CA9 Nev) 797 F2d 759, 86-2 USTC ¶ 9701, 21 Fed Rules Evid Serv 511, 58 AFTR 2d 86-5621, cert den 479 US 1085, 94 L Ed 2d 145, 107 S Ct 1288 (secretary of defendant was unavailable as witness, and her grand jury testimony was admissible, where secretary and defendant married after her testimony before grand jury).

Annotation: Applicability of marital privilege to written communications between spouses inadvertently obtained by third person, 32 ALR4th 1177.

Footnote 89. *United States v Rodriguez* (CA2 Conn) 706 F2d 31, 13 Fed Rules Evid Serv 594; *United States v Lieberman* (CA2 NY) 637 F2d 95, 7 Fed Rules Evid Serv 1396; *United States v Lang* (CA2 NY) 589 F2d 92; *United States v MacCloskey* (CA4 NC) 682 F2d 468, 10 Fed Rules Evid Serv 1206; *United States v Young Bros., Inc.* (CA5 Tex) 728 F2d 682, 1984-1 CCH Trade Cases ¶ 65925, 15 Fed Rules Evid Serv 484, cert den 469 US 881, 83 L Ed 2d 184, 105 S Ct 246; *Witham v Mabry* (CA8 Ark) 596 F2d 293, 4 Fed Rules Evid Serv 98; *United States v Kapnison* (CA10 NM) 743 F2d 1450, 16 Fed Rules Evid Serv 990, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017; *United States v Harrell* (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687; *State v Fisher*, 141 Ariz 227, 686 P2d 750, cert den 469 US 1066, 83 L Ed 2d 436, 105 S Ct 548; *People v Raffaelli* (Colo App) 701 P2d 881; *Brinson v State* (Fla App D2) 382 So 2d 322; *State v Kellogg* (Iowa) 385 NW2d 558; *State v Richardson* (Minn) 393 NW2d 657; *Re Marriage of Sarsfield*, 206 Mont 397, 671 P2d 595, appeal after remand 215 Mont 123, 695 P2d 473; *State v Doctor*, 306 SC 527, 413 SE2d 36.

Where a witness invoked her Fifth Amendment privilege on a partial basis, refusing to answer any questions about controlled substances, then because the witness was not able to testify meaningfully without mentioning drugs, she was unavailable for the purpose of the evidence rules. *State v Douglas*, 310 Or 438, 800 P2d 288.

Footnote 90. *State v Fisher*, 141 Ariz 227, 686 P2d 750, cert den 469 US 1066, 83 L Ed 2d 436, 105 S Ct 548; *State v Kellogg* (Iowa) 385 NW2d 558.

As to the requirement that a witness' presence be sought with due diligence, see § 697.

Footnote 91. *United States v Miller* (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647.

Annotation: Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

§ 694 Persistent refusal to testify

A witness is considered unavailable for the purpose of the hearsay rule when the witness is placed on the stand, and declines to testify despite a court order to do so. 92 The same rule applies under the Federal Rules of Evidence and in states adopting the Uniform Rules of Evidence. 93 An order by the court for the witness to testify is an essential prerequisite to the invocation of this rule. 94 No written order is necessary and an oral order, such as one given in the court's conversation with the witness out of the presence of the jury, is sufficient to meet the order requirement. 95 Where a witness claims a privilege but the court deems the privilege improperly invoked, the witness may be deemed unavailable after the court, outside the jury's presence, first directs the witness to testify and then admonishes him that his continued refusal to testify is punishable by contempt. 96 It is not required that the judge hold a witness in contempt for refusing to testify before finding that witness unavailable. 97 If the declarant refuses to testify despite a grant of use immunity 98 or a plea bargain given in return for expected testimony, 99 the declarant is unavailable, although the government does not have to go so far as to grant immunity to a declarant who has otherwise refused to testify, before seeking admission of a hearsay statement. 1 If the attorney for a prosecution witness charged with giving perjured testimony to obtain a conviction indicates that the witness would refuse to testify at a habeas corpus proceeding even if compelled to do so, such witness would be considered unavailable. 2

Footnotes

Footnote 92. *State v Oquendo*, 223 Conn 635, 613 A2d 1300; *State v Iverson* (Minn App) 396 NW2d 599 (witness refused to testify even after court order and contempt citation); *State v Martinez*, 99 NM 353, 658 P2d 428 (witness refused to testify despite court order and contempt citation); *State v Williams*, 38 Ohio St 3d 346, 528 NE2d 910, reh den 39 Ohio St 3d 717, 534 NE2d 93 and stay gr 40 Ohio St 3d 703, 534 NE2d 844 and cert den 489 US 1040, 103 L Ed 2d 238, 109 S Ct 1176 (witness refused to testify even after court order and contempt citation); *Williamson v State* (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325; *State v Grossi* (RI) 588 A2d 607 (witness unavailable where he invokes Fifth Amendment privilege, and refuses to testify even after grant of immunity and court order to testify); *State v Toomey*, 38 Wash App 831, 690 P2d 1175, review den 103 Wash 2d 1012 and cert den 471 US 1067, 85 L Ed 2d 501, 105 S Ct 2145, later proceeding (CA9 Wash) 876 F2d 1433, 50 BNA FEP Cas 437 (witness with pending criminal appeal refused to testify, claiming the privilege against self-incrimination, despite court order to testify); *State v Buelow* (App) 122 Wis 2d 465, 363 NW2d 255.

Practice References Proof of witness' refusal to testify. 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence § 32.

Footnote 93. FR Evid, Rule 804(a)(2); Uniform Rules of Evidence, Rule 804(a)(2).

Footnote 94. *United States v Zappola* (CA2 NY) 646 F2d 48, 8 Fed Rules Evid Serv 155, on remand (SD NY) 523 F Supp 362, affd (CA2 NY) 677 F2d 264, 10 Fed Rules Evid Serv 572, cert den 459 US 866, 74 L Ed 2d 122, 103 S Ct 145; *United States v Oliver*

(CA2 NY) 626 F2d 254, 6 Fed Rules Evid Serv 784.

Footnote 95. *United States v Bizzard* (CA11 Ga) 674 F2d 1382, 10 Fed Rules Evid Serv 687, cert den 459 US 973, 74 L Ed 2d 286, 103 S Ct 305.

A child was found unavailable based on her persistent refusal to testify where the child, who was 3 years old at the time of trial, when asked about the incident in question by the judge in chambers twice, on separate occasions, shook her head from side to side and refused to answer any further questions. *State v Boston*, 46 Ohio St 3d 108, 545 NE2d 1220.

Footnote 96. *United States v Zappola* (CA2 NY) 646 F2d 48, 8 Fed Rules Evid Serv 155, on remand (SD NY) 523 F Supp 362, affd (CA2 NY) 677 F2d 264, 10 Fed Rules Evid Serv 572, cert den 459 US 866, 74 L Ed 2d 122, 103 S Ct 145; *United States v Oliver* (CA2 NY) 626 F2d 254, 6 Fed Rules Evid Serv 784; *United States v MacCloskey* (CA4 NC) 682 F2d 468, 10 Fed Rules Evid Serv 1206.

Footnote 97. *Rychart v State* (Alaska App) 778 P2d 229.

Footnote 98. *United States v Monaco* (CA11 Fla) 702 F2d 860, 13 Fed Rules Evid Serv 248.

Footnote 99. *United States v Coachman*, 234 US App DC 194, 727 F2d 1293, 15 Fed Rules Evid Serv 54, later proceeding 243 US App DC 228, 752 F2d 685.

Footnote 1. *United States v Lang* (CA2 NY) 589 F2d 92; *State v Toomey*, 38 Wash App 831, 690 P2d 1175, review den 103 Wash 2d 1012 and cert den 471 US 1067, 85 L Ed 2d 501, 105 S Ct 2145, later proceeding (CA9 Wash) 876 F2d 1433, 50 BNA FEP Cas 437.

Footnote 2. *Lowery v Maryland* (DC Md) 401 F Supp 604, 1 Fed Rules Evid Serv 128, affd without op (CA4 Md) 532 F2d 750, cert den 429 US 919, 50 L Ed 2d 285, 97 S Ct 312.

Annotation: Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

§ 695 Lack of memory

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A witness is unavailable for the purpose of the hearsay exceptions where he testifies to a lack of memory on the subject of his statement. 3 Unlike the other four unavailability situations provided for by the rule, the declarant in this situation must establish by his own testimony his lack of memory and hence his unavailability as a witness with respect to the statement in question. 4 If the witness can remember the general subject matter of

a conversation, although not its details, he will not be deemed unavailable. 5 The crucial factor is not the unavailability of the witness but rather the unavailability of his testimony. 6

While the court may choose to disbelieve the declarant's testimony as to a lack of memory, 7 the witness' claim of a lack of memory will generally be deemed sufficient if supported by corroborating circumstances. 8 In some jurisdictions, it has been held that the rule applies even where it appears or the trial court believes that the witness is not telling the truth. 9

◆ Observation: It has been held that there is no internal inconsistency in an interpretation of the Federal Rules of Evidence which deems a witness who is unable to testify concerning the basis for a prior identification statement because of a memory loss both "subject to cross-examination" regarding his or her prior statements 10 and "unavailable" so that hearsay evidence may be used; 11 the characterization of a witness being subject to cross-examination and that of a witness being unavailable are made for two entirely different purposes and there is no expectation that they should coincide. 12

Footnotes

Footnote 3. FR Evid, Rule 804(a)(3); Uniform Rules of Evidence, Rule 804(a)(3).

Footnote 4. Advisory Committee Notes to Federal Rules of Evidence, FRE 804.

Compare the hearsay exception for recorded recollection of a witness with an unreliable memory, in FRE 803(5), which requires only insufficient recollection and not a lack of memory.

Footnote 5. *North Mississippi Communications, Inc. v Jones* (CA5 Miss) 792 F2d 1330, 1986-1 CCH Trade Cases ¶ 67160.

Footnote 6. *Walden v Sears, Roebuck & Co.* (CA5 Tex) 654 F2d 443, CCH Prod Liab Rep ¶ 9050, 8 Fed Rules Evid Serv 1657 (unavailability was shown where, although witness was physically available and had recall as to events immediately before and after accident, he had no memory of accident itself).

Footnote 7. House Judiciary Committee Report No. 93-650, p 15.

Footnote 8. *Walden v Sears, Roebuck & Co.* (CA5 Tex) 654 F2d 443, CCH Prod Liab Rep ¶ 9050, 8 Fed Rules Evid Serv 1657 (deposition taken 19 months after accident involving minor was admissible at trial 9 years after accident where minor testified that he could remember events immediately before and after accident but not events of accident itself, and where it was shown that physical complications involving brain function caused him to have difficulty with his memory); *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125 (loss of memory after car accident).

Footnote 9. *David v State*, 269 Ark 498, 601 SW2d 864 (witness who testified at a prior trial on the same subject testified at a later trial that he had no recollection of the subject

matter on which he was being questioned); *State v Houston* (Cuyahoga Co) 26 Ohio App 3d 26, 26 Ohio BR 195, 498 NE2d 188, motion overr (witness was considered unavailable where he initially claimed Fifth Amendment privilege but then, after the judge told him that the Fifth Amendment was not available, claimed that he did not remember the robbery and stated that he had not given a statement to the police).

Footnote 10. Under FRE 801(d)(1)(C), discussed in §§ 754 et seq.

Footnote 11. Under FRE 804(a)(3).

Footnote 12. *United States v Owens*, 484 US 554, 98 L Ed 2d 951, 108 S Ct 838, 24 Fed Rules Evid Serv 193, on remand (CA9) 844 F2d 701, 24 Fed Rules Evid Serv 1000, on remand (CD Cal) 699 F Supp 815, 27 Fed Rules Evid Serv 547, appeal after remand (CA9 Cal) 889 F2d 913, 28 Fed Rules Evid Serv 1546.

§ 696 Death or physical or mental infirmity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If the declarant is unable to be present or to testify at the hearing because of death ¹³ or then existing physical illness, mental illness, or infirmity, ¹⁴ the declarant is considered unavailable under the hearsay rules. ¹⁵ The existence of the infirmity should be established by the testimony of a medical witness ¹⁶ or by affidavit. ¹⁷ Thus, the prerequisite of unavailability is not established where the court finds that counsel has never spoken to the witness and there are no affidavits or other information supporting the assertion of medical disability other than counsel's allegation of physical infirmity. ¹⁸ The following factors are relevant to the determination of whether victim witness is unavailable because testifying will cause psychological trauma or disability: the probability of psychological injury as a result of testifying; the degree of anticipated injuries; the duration of the injury; and whether the expected psychological injury is substantially greater than the reaction of the average victim of a violent act. ¹⁹

Incompetency of a minor may also be an infirmity for which the witness will be considered unavailable. ²⁰ However, a child's out of court declaration is not automatically rendered inadmissible merely because the child was found not competent at the competency hearing. ²¹ The unavailability requirement can be met when the court makes a particularized finding that the child's emotional or psychological health will be substantially impaired if he or she were forced to testify and such impairment will be long standing rather than transitory in nature. ²² Mere inconvenience or discomfort at the prospect of testifying does not meet the statutory standard of unavailability. ²³ However, where the child's testimony is taken before the court with participation by both attorneys and video taped just as it would have been had the child been physically present at the trial, the introduction of the video tape is equivalent to the child's having personally testified. ²⁴

The trial court may consider the expected duration of the illness and grant an

adjournment if the witness can be expected to recover within a reasonable time. 25

§ 696 ----Death or physical or mental infirmity [SUPPLEMENT]

Case authorities:

Admission of absent witness' deposition testimony was proper where offering party stated belief that witness was dead and opposing party offered no evidence contesting assertion. *Horne v Owens- Corning Fiberglas Corp.* (1993, CA4 NC) 4 F3d 276, CCH Prod Liab Rep ¶ 13625.

Admission of grand jury testimony of witness who died before trial was proper where witness had testified consistently on two separate occasions before grand jury—once under grant of immunity and other time it was statement against penal interest. *Curro v United States* (1993, CA6 Mich) 4 F3d 436.

Footnotes

Footnote 13. *State v Hughes* (App) 120 Ariz 120, 584 P2d 584; *State v Bratt*, 250 Kan 264, 824 P2d 983; *State v Dorsey* (App) 98 Wis 2d 718, 298 NW2d 213, *affd* 103 Wis 2d 152, 307 NW2d 612.

Footnote 14. *State v Bratt*, 250 Kan 264, 824 P2d 983.

Practice References Proof of mental or physical inability to testify. 28 Am Jur POF2d 1, *Foundation for Offering Deposition or Other Former Testimony in Evidence* § 21.

Footnote 15. FR Evid, Rule 804(a)(4); Uniform Rules of Evidence, Rule 804(a)(4).

Footnote 16. *Parrott v Wilson* (CA11 Ga) 707 F2d 1262, 13 Fed Rules Evid Serv 1149, 36 FR Serv 2d 1070, *cert den* 464 US 936, 78 L Ed 2d 311, 104 S Ct 344.

Footnote 17. *Re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, *later proceeding* (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, *later proceeding* (CA3 Pa) 840 F2d 181, 1989 AMC 1025.

Footnote 18. *Re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, *later proceeding* (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, *later proceeding* (CA3 Pa) 840 F2d 181, 1989 AMC 1025.

Footnote 19. *State v Bratt*, 250 Kan 264, 824 P2d 983.

Footnote 20. *Haggins v Warden, Ft. Pillow State Farm* (CA6 Tenn) 715 F2d 1050, 13 Fed Rules Evid Serv 1527, *cert den* 464 US 1071, 79 L Ed 2d 217, 104 S Ct 980; *People v Diefenderfer* (Colo) 784 P2d 741; *State v Bounds*, 71 Or App 744, 694 P2d 566, *review den* 299 Or 732, 705 P2d 1157 (witness was unavailable where both the state and the defendant stipulated that the declarant was incompetent to testify because of her age).

It was not sufficient for a court to make general assumptions about all children of a certain age; the court was required to determine whether the particular child was constitutionally unavailable and was not justified in finding a 2 year old unavailable without interviewing the child, taking expert testimony regarding the capability of the child to testify in court, and making a specific finding that the child was physically or psychologically unavailable. *State v Webb* (Utah) 779 P2d 1108, 113 Utah Adv Rep 23 (criticized on other grounds by *State v Matsamas* (Utah) 808 P2d 1048).

Footnote 21. *People v District Court of El Paso County* (Colo) 776 P2d 1083; *Glendening v State* (Fla App D2) 503 So 2d 335, 12 FLW 317, substituted op, in part, reh den (Fla App D2) 12 FLW 721 and approved (Fla) 536 So 2d 212, 13 FLW 690, cert den 492 US 907, 106 L Ed 2d 569, 109 S Ct 3219.

Footnote 22. *People v Diefenderfer* (Colo) 784 P2d 741.

Child victim of abuse was unavailable due to the trauma resulting from the abuse, where a child psychologist who had been treating the declarant wrote a letter which was submitted to the court stating that the child would be traumatized by testifying. *State v Plant*, 236 Neb 317, 461 NW2d 253.

Footnote 23. *People v Diefenderfer* (Colo) 784 P2d 741.

Footnote 24. *Glendening v State* (Fla App D2) 503 So 2d 335, 12 FLW 317, substituted op, in part, reh den (Fla App D2) 12 FLW 721 and approved (Fla) 536 So 2d 212, 13 FLW 690, cert den 492 US 907, 106 L Ed 2d 569, 109 S Ct 3219; *State v Self*, 56 Ohio St 3d 73, 564 NE2d 446 (child victim of sexual abuse who was permitted to testify by videotape and subject to cross-examination pursuant to a state statute governing statements by a child victim of sexual abuse, was not considered unavailable to testify, because she did appear and gave testimony through the videotape).

Footnote 25. *United States v Faison* (CA3 NJ) 679 F2d 292, 10 Fed Rules Evid Serv 589, on remand (DC NJ) 564 F Supp 514, 13 Fed Rules Evid Serv 990, affd without op (CA3 NJ) 725 F2d 667 and affd without op (CA3 NJ) 725 F2d 671.

§ 697 Absent witness whose attendance proponent is unable to procure

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A declarant is considered unavailable as a witness for the purposes of the hearsay rules if the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. 26 Where an exception is invoked for statements made under belief of impending death, statements against interest, or statements of personal or family history, the declarant is considered unavailable where his attendance or his testimony cannot be procured. 27 The provision regarding procurement of the declarant's testimony is designed primarily to require that an attempt be made to depose a witness as a precondition to the witness being deemed unavailable. 28

This definition of unavailability is concerned with the absence of testimony rather than the physical absence of the declarant. Where the declarant's deposition is available, the declarant is not unavailable within the meaning of the rule. 29 An objection to admission of the hearsay on the ground of unavailability is sufficiently raised by mentioning the availability of the declarant's deposition. 30

The fact that a declarant is in the Federal Witness Protection Program may lead to a determination that the declarant is unavailable. 31 By contrast, where a court agrees to issue a writ of habeas corpus to secure the presence of a declarant who is incarcerated in a federal penitentiary, the unavailability requirement is no longer met. 32

Footnotes

Footnote 26. FR Evid, Rule 804(a)(5); Uniform Rules of Evidence, Rule 804(a)(5).

Footnote 27. FR Evid, Rule 804(a)(5); Uniform Rules of Evidence, Rule 804(a)(5).

As to statements made under belief of impending death, see §§ 829 et seq.

As to statements against interest, see §§ 785 et seq.

As to statements of personal or family history, see § 691.

Footnote 28. United States v Gabriel (CA10 Colo) 715 F2d 1447, 14 Fed Rules Evid Serv 24.

Advisory Committee Notes to Federal Rules of Evidence, FRE 804.

Footnote 29. Campbell v Coleman Co. (CA8 Mo) 786 F2d 892, 20 Fed Rules Evid Serv 363.

Footnote 30. Campbell v Coleman Co. (CA8 Mo) 786 F2d 892, 20 Fed Rules Evid Serv 363.

Footnote 31. Pacelli v Nassau County Police Dept. (ED NY) 639 F Supp 1382, 21 Fed Rules Evid Serv 1004.

Footnote 32. United States v Sebetich (CA3 Pa) 776 F2d 412, 19 Fed Rules Evid Serv 384, reh den, en banc (CA3) 828 F2d 1020 and cert den 484 US 1017, 98 L Ed 2d 673, 108 S Ct 725.

§ 698 --Showing of good faith effort to procure attendance or testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To take advantage of the hearsay exceptions requiring unavailability, the proponent must show a good-faith, genuine, and bona fide effort to procure the declarant's attendance. 33 This requirement is consistent with the recognized exception to the constitutional right of confrontation of witnesses. 34 The court will consider the timing of efforts to procure the declarant's attendance as an element of the reasonableness of the effort. 35 The court must be informed of when the prosecution learned that the witness might not appear and of the steps taken to secure the witness's presence after the likelihood of nonappearance became known. 36 However, the proponent's burden is to demonstrate diligent effort, not to do everything conceivable to secure the witness. 37 If reasonable efforts are made to find the declarant, 38 or if production of the declarant would be overly burdensome to the proponent, 39 the proponent is excused. The proponent will not be required to make efforts at procuring the declarant's attendance which obviously would be futile. 40 However, it has been held that the possibility of failure or of a formidable search does not justify a failure to go beyond cursory threshold inquiries. 41

The question whether due diligence was demonstrated is a factual question to be determined by the trial court according to the circumstances in each case. 42 The record should disclose with particularity what steps were taken to secure the presence of the witness before a finding of unavailability can be made based on the failure of reasonable efforts. 43 Generally, it is within the discretion of the trial court to accept or reject counsel's representations on unavailability. 44 The trial court's ruling will not be disturbed unless an abuse of discretion appears. 45

**§ 698 --Showing of good faith effort to procure attendance or testimony
[SUPPLEMENT]**

Case authorities:

There was no error in a first-degree murder prosecution where the court admitted the statement of an absent witness to officers. The evidence showed that the witness made a statement to officers and moved to Philadelphia; the prosecutor filed a petition and the court entered a motion several weeks before the trial that the witness be taken into custody and delivered to a North Carolina officer to assure her attendance at trial; an officer went to Philadelphia a few days before the trial and went to the address he had been given with an officer of the Philadelphia police department; the witness's mother told them that the witness had moved and that she did not know the new address or telephone number; and the officers searched the house but could not find the witness. The court could conclude from this evidence that the witness was absent from trial and that the State was unable to secure her presence by process or other reasonable means. GS § 8C-1, Rule 804(a)(5). *State v Bowie* (1995) 340 NC 199, 456 SE2d 771.

Footnotes

Footnote 33. *United States v Mann* (CA1 Puerto Rico) 590 F2d 361, 4 Fed Rules Evid Serv 339; *United States v Potamitis* (CA2 NY) 739 F2d 784, 15 Fed Rules Evid Serv

1747, cert den 469 US 918, 83 L Ed 2d 232, 105 S Ct 297 (prosecution made good-faith attempt to secure witness' testimony where it issued a material witness warrant when witness failed to appear, FBI then located witness in Canada, authorities induced witness to return to New York on promise that he would not be arrested and maintained close touch with him upon his return, but witness disappeared again on evening before scheduled appearance); *United States v Aitkens* (WD NY) 9 Fed Rules Evid Serv 1020 (government fell short of establishing reasonable, good-faith effort to secure alien's attendance at trial where charges against alien were dropped in exchange for her testimony against defendant and where alien was subject of deportation proceeding); *M. S. D., Inc. v United States* (ND Ohio) 434 F Supp 85, 77-1 USTC ¶ 9366, 39 AFTR 2d 77-1393, affd (CA6) 79-2 USTC ¶ 9712 (no showing by government of steps taken to secure declarants' appearance as witnesses); *United States v Sanchez-Santos* (CA9 Cal) 9 Fed Rules Evid Serv 1706; *United States v Vasquez-Ramirez* (CA9) 6 Fed Rules Evid Serv 779; *Bentley v State* (Alaska App) 706 P2d 1193; *State v Rivera*, 220 Conn 408, 599 A2d 1060; *Tutorship of Price v Standard Life Ins. Co.* (La App 2d Cir) 569 So 2d 261, cert den (La) 572 So 2d 91 and cert den (La) 572 So 2d 92; *State v Jordan*, 229 Neb 563, 427 NW2d 796; *State v Keairns*, 9 Ohio St 3d 228, 9 Ohio BR 569, 460 NE2d 245 (issuance of a subpoena alone does not constitute a sufficient effort when other reasonable methods are also available).

A witness who testified at a preliminary hearing is not unavailable at trial so as to dispense with the accused's right to confrontation, even though the witness was in a federal prison in another state so that the prosecution would have to request an exercise of discretion on the part of federal authorities in making the witness available, where the prosecution made no good-faith effort to obtain the witness' presence at the trial. *Barber v Page*, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318.

Witness was not unavailable where his absence was due to a breakdown in communication in the county attorney's office and where his presence could have been assured if the county attorney had confirmed service of the subpoena on its key witness; fact that first subpoena was returned to the court administrator indicating the witness was in jail at that point and that, after the trial was rescheduled for other reasons and after service of second subpoena, sheriff's department received letter indicating that the witness was still incarcerated but where the county attorney was unaware of this until the morning of the trial did not excuse attorney from good faith effort requirement. *State v Carlson* (Minn App) 408 NW2d 192.

Practice References Proof that witness' location is unknown. 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence § 29.

Footnote 34. *Motes v United States*, 178 US 458, 44 L Ed 1150, 20 S Ct 993, holding that the right of an accused to be confronted with the witnesses against him is violated by admitting former testimony when it does not appear that the witness was absent by the connivance or procurement of the accused but due to the negligence of the prosecution, the prosecution having released declarant who was in jail without bail in charge, not of an officer, but of another witness for the government.

Footnote 35. *Azalea Fleet, Inc. v Dreyfus Supply & Machinery Corp.* (CA8 Mo) 782 F2d 1455, 1987 AMC 371, 20 Fed Rules Evid Serv 794 (attempt by process server to locate witness 3 days and one day prior to trial, and then finding that witness had moved to another state without leaving forwarding address, was good-faith attempt to serve witness

where opposing party made no showing that earlier attempt to locate witness would have secured his presence at trial); *United States v Puckett* (CA10 Okla) 692 F2d 663, 10 Fed Rules Evid Serv 1348, cert den 459 US 1091, 74 L Ed 2d 939, 103 S Ct 579 and cert den 460 US 1024, 75 L Ed 2d 497, 103 S Ct 1276 (failure to attempt to subpoena witnesses, who had given testimony in earlier prosecution, until near end of second week of trial was insufficient to invoke unavailability exception to hearsay rule).

Due diligence was found where attempts were made to locate the witness more than a year before her testimony at trial was needed and where in spite of 22 unsuccessful attempts to locate the witness and one successful service of a subpoena, the witness still failed to appear. *People v Cummings*, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, mod, reh den 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and time for gr or den reh extended (July 2, 1993).

Footnote 36. *Ward v United States* (CA11 Fla) 694 F2d 654 (declarant had escaped from state custody).

Footnote 37. *Mitchell v State* (Miss) 572 So 2d 865.

Footnote 38. *United States v Potamitis* (CA2 NY) 739 F2d 784, 15 Fed Rules Evid Serv 1747, cert den 469 US 918, 83 L Ed 2d 232, 105 S Ct 297 (prosecution made good-faith effort to obtain presence of witness who had fled to Greece where it enlisted aid of United States Embassy in attempt to locate him, embassy representatives met with witness' brothers and left copies of subpoenas with them, and hired professional Greek process servers to locate witness); *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461 (plaintiff's counsel unable to obtain appearance of plaintiff whose claim was dismissed for failure to prosecute); *United States v Mathis* (CA4 Md) 550 F2d 180, 1 Fed Rules Evid Serv 443, cert den 429 US 1107, 51 L Ed 2d 560, 97 S Ct 1140 (witness inadvertently released from prison pursuant to court order requiring release of another prisoner bearing the same name); *Mechler v Procunier* (CA5 Tex) 754 F2d 1294, 17 Fed Rules Evid Serv 947; *United States v Smith* (SD Ohio) 577 F Supp 1232, 15 Fed Rules Evid Serv 644 (witness was unavailable where she refused to answer to subpoena, expressed fear of harassment if she appeared at trial, refused to give deposition, and indicated her intention to refuse to testify); *Ewing v Winans* (CA10 NM) 749 F2d 607, 17 Fed Rules Evid Serv 470; *Valenzuela v Griffin* (CA10 NM) 654 F2d 707 (statement by prosecutor that state had issued subpoena and bench warrant 3 months before trial, and "had been looking for her" was insufficient to establish predicate for admission of taped testimony).

Government used reasonable means to assure attendance of witnesses suspected of being illegal aliens where, after deposing them, it requested them to return for trial, instructed them how to return and how to obtain necessary monies to return and they promised to return but failed to do so; the fact that means utilized were unsuccessful does not mean that the government's efforts were not made in good faith. *United States v Eufrazio-Torres* (CA10 Kan) 890 F2d 266, 29 Fed Rules Evid Serv 369, cert den 494 US 1008, 108 L Ed 2d 482, 110 S Ct 1306.

Even where the proponent of the evidence does not send someone to another state or city to look for the missing witness, the proponent can satisfy the burden of showing unavailability where the proponent has contacted the FBI, Police Department, and Welfare Department in order to search for the individual, where the absent witness stated

that he had no address or phone number and that he was living in the streets; where none of the witness's friends or relatives knew where he was; where a one year search by a relative who was also a police officer proved unsuccessful; and where the witness strongly resisted revealing his location. *Mitchell v State* (Miss) 572 So 2d 865.

Witness was unavailable where the witness was the brother of the plaintiff and had allegedly assured the plaintiff of his presence at the trial but where the plaintiff testified that he was simply unable to locate his brother prior to and during the trial; the court accepted the plaintiff's argument that due diligence did not require the issuance of a subpoena because both the plaintiff and plaintiff's counsel believed that it would not be necessary to subpoena a family member to secure his attendance at trial. *Barrett v Asarco, Inc.*, 245 Mont 196, 799 P2d 1078, 117 CCH LC ¶ 56486.

Practice References Absence. 1 Am Jur POF 45.

Footnote 39. *United States v Jones* (ED Pa) 404 F Supp 529, *affd* without op (CA3 Pa) 538 F2d 321 (unreasonable to require government to bring drug enforcement agent back from special assignment overseas).

Footnote 40. *United States v Kehm* (CA7 Ind) 799 F2d 354, 21 Fed Rules Evid Serv 339 (deposition of witness was admissible where request to foreign government to produce witness would be futile in absence of new treaty); *United States v Winn* (CA9 Cal) 767 F2d 527, 18 Fed Rules Evid Serv 335 (it was reasonable for government to make no effort to find two illegal aliens for whom it had no addresses or any other information that would help locate them); *United States v Sines* (CA9 Ariz) 761 F2d 1434 (subpoena of witness, in foreign prison on 25-year sentence, was unnecessary where prosecutor represented that foreign government had indicated its unwillingness to permit witness to leave country to testify); *United States v Lopez* (CA10 NM) 777 F2d 543, 19 Fed Rules Evid Serv 1112 (witness had been indicted for bail jumping and federal authorities were unable to locate him); *Tutorship of Price v Standard Life Ins. Co.* (La App 2d Cir) 569 So 2d 261, *cert den* (La) 572 So 2d 91 and *cert den* (La) 572 So 2d 92 (sufficient showing made where unavailable witness was also primary suspect in a separate murder investigation and sheriff's office was unable to locate him); *State v Abourezk* (SD) 359 NW2d 137 (witness who was fugitive from justice was considered unavailable).

A permanent resident of Mexico, who returned to Mexico after giving a deposition, was unavailable for the purpose of the prosecution's proffer of the deposition where the return to Mexico was not initiated by the government and the government informed the witness by mail of the rescheduled trial date and sent a letter to the port of entry so the witness could reenter the U.S. for trial. *United States v Tovar-Gallardo* (CA9 Cal) 11 Fed Rules Evid Serv 1071.

Footnote 41. *State v Maben*, 132 NJ 487, 626 A2d 63.

Footnote 42. *People v Cummings*, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, *mod, reh den* 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and *time for gr or den reh extended* (July 2, 1993).

Footnote 43. *State v Keairns*, 9 Ohio St 3d 228, 9 Ohio BR 569, 460 NE2d 245.

Footnote 44. *State v Rivera*, 220 Conn 408, 599 A2d 1060; *Barrett v Asarco, Inc.*, 245

Mont 196, 799 P2d 1078, 117 CCH LC ¶ 56486; Brown v Harry Heathman, Inc. (Utah App) 744 P2d 1016, 69 Utah Adv Rep 36.

Footnote 45. People v Cummings, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, mod, reh den 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and time for gr or den reh extended (July 2, 1993); State v Rivera, 220 Conn 408, 599 A2d 1060.

§ 699 --Declarant outside court's jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the fact that the declarant is outside the reach of the court's process is a factor to be considered in determining whether an absent witness is unavailable under the hearsay exceptions, 46 even where the declarant is beyond the court's jurisdiction the proponent must show that it has made a diligent effort to secure his or her attendance. 47

The courts recognize that obtaining the presence of declarants who are outside the United States may involve particular difficulties. 48

◆ Observation: Prosecutors in states which have enacted the Uniform Act to Secure Attendance of Witnesses From Without the State face a dilemma in showing a good-faith effort to produce the presence of reluctant witnesses. Serving the witness with a subpoena may cause the witness to flee, while not serving the subpoena may be looked upon as a lack of bona fide effort to obtain the testimony. The remaining option, taking the material witness into custody, is constitutionally questionable where the custody is lengthy. In such cases, the better tactical course may be to use means other than the Uniform Act, such as relying on an informal agreement with the witness or with a parent of the witness to procure the testimony. 49 If, after a reasoned decision not to invoke the Uniform Act in the belief that the witness is more likely to testify on the basis of an informal agreement rather than under the compulsion of a subpoena, the witness nevertheless disappears before trial, subsequent efforts to locate him may be deemed by the court to be sufficient to show a bona fide effort to procure the witness' attendance. 50

Footnotes

Footnote 46. Re Screws Antitrust Litigation (DC Mass) 526 F Supp 1316, 1981-2 CCH Trade Cases ¶ 64416, 9 Fed Rules Evid Serv 1012 (witness unavailable where he is beyond subpoena power of court and has expressed unwillingness to testify voluntarily); United States v Terrazas-Montano (CA8 Neb) 747 F2d 467, 17 Fed Rules Evid Serv 876.

Practice References Proof that witness is outside jurisdiction. 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence § 24.

Footnote 47. *United States v Mann* (CA1 Puerto Rico) 590 F2d 361, 4 Fed Rules Evid Serv 339; *Government of Canal Zone v P. (Pinto)* (CA5 Canal Zone) 590 F2d 1344, 4 Fed Rules Evid Serv 15 (prosecution showed that victims were tourists scheduled to depart Canal Zone on day after assault by assailants identified at preliminary hearing); *Bentley v State* (Alaska App) 706 P2d 1193; *Muilenberg v Upjohn Co.*, 169 Mich App 636, 426 NW2d 767, app den 432 Mich 890 (even where expert witness who testified at an earlier trial moved to another country, court refused to find unavailability where witness' location was known absent a showing that the proponent of the testimony attempted in good-faith to obtain the witness's attendance at trial); *Mitchell v State* (Miss) 572 So 2d 865; *Rice v Janovich*, 109 Wash 2d 48, 742 P2d 1230 (showing insufficient where counsel represented that the witnesses were out-of-state, in federal prison, or employed as federal agents in other states, but where the record gave no indication that counsel made any effort to obtain the voluntary attendance of the witnesses); *Williams v Collins Communications, Inc.* (Wyo) 720 P2d 880 (out of state witness not unavailable where he was prevented from reaching the trial because he was involved in a car accident on the way to the trial, but where no other effort to obtain the evidentiary information was made).

Footnote 48. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 (resident in Japan unavailable within meaning of Rule 804); *United States v Kehm* (CA7 Ind) 799 F2d 354, 21 Fed Rules Evid Serv 339 (deposition of witness was admissible where request to foreign government to produce witness would be futile in absence of new treaty); *United States v Sines* (CA9 Ariz) 761 F2d 1434 (subpoena of witness, in foreign prison on 25-year sentence, was unnecessary where prosecutor represented that foreign government had indicated its unwillingness to permit witness to leave country to testify); *United States v Johnson* (CA9 Cal) 735 F2d 1200, 15 Fed Rules Evid Serv 1588 (trial court need not subpoena U.S. nationals living abroad, pursuant to 28 USCS § 1783, if, in its opinion, receiving a deposition would satisfy interests of justice, particularly where U.S. national is U.S. Ambassador involved in diplomatic matters of extreme sensitivity); *State v Alvarez*, 45 Wash App 407, 726 P2d 43, review den 107 Wash 2d 1022 (declarant was held unavailable where the declarant was in Mexico).

Annotation: Subpoena, under 28 USCS § 1783, of persons in foreign countries, 32 ALR Fed 894.

Footnote 49. *Dres v Campoy* (CA9 Cal) 784 F2d 996, 20 Fed Rules Evid Serv 354.

Footnote 50. *Dres v Campoy* (CA9 Cal) 784 F2d 996, 20 Fed Rules Evid Serv 354.

§ 700 Effect of proponent's wrongdoing

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The hearsay exceptions do not apply if the declarant is unavailable as a witness due to the procurement or wrongdoing of the statement's proponent by conduct designed to prevent the witness from attending or testifying. 51 The rule against the proponent's misconduct in securing a witness' unavailability does not apply unless the proponent's action was taken for the purpose of preventing testimony. 52 Aliens who have been deported prior to the prosecution of an accused for harboring illegal aliens are unavailable witnesses because the deportation is not procured by the government for the purpose of preventing them from testifying. 53 However, the government cannot point to an unqualified and unjustified refusal by the Immigration and Naturalization Service to stay the deportation of a witness as a sufficient reason for permitting the use of depositions in order to secure a conviction. 54

When a witness refuses to testify at trial on the ground that the government has breached a plea agreement with him, the witness' absence has not resulted from procurement or wrongdoing of the government for the purpose of preventing the witness from attending or testifying, because the government's actions to which the witness objects are not taken for the purpose of preventing the witness from testifying. 55

Footnotes

Footnote 51. FR Evid, Rule 804(a); Uniform Rules of Evidence, Rule 804(a).

A criminal defendant could not declare himself unavailable by invoking his Fifth Amendment privilege where such steps were taken in order to qualify himself as an unavailable witness and to make prior testimony of his admissible into evidence; because the declarant and the proponent of the evidence were the same individual, the proponent of the evidence was considered to be the cause of the unavailability of the witness. *State v Wiley*, 223 Neb 835, 394 NW2d 641; *People v Edwards*, 54 Cal 3d 787, 1 Cal Rptr 2d 696, 819 P2d 436, 91 Daily Journal DAR 14485, reh den (Cal) 1992 Cal LEXIS 319 and stay gr (May 13, 1992) and cert den (US) 121 L Ed 2d 80, 113 S Ct 125, reh den (US) 121 L Ed 2d 572, 113 S Ct 642 and stay gr (Cal) 1993 Cal LEXIS 418, motion den (Cal) 1993 Cal LEXIS 2925, habeas corpus den, motion den (Cal) 1993 Cal LEXIS 4800, stay den (Cal) 1993 Cal LEXIS 5831, petition for certiorari filed (December 14, 1993).

Footnote 52. *State v Dibley*, 38 Wash App 824, 691 P2d 209, review den 103 Wash 2d 1016 and (criticized on other grounds by *State v Monson*, 53 Wash App 854, 771 P2d 359) and (disapproved on other grounds by *State v Monson*, 113 Wash 2d 833, 784 P2d 485) (rule did not apply where state claimed witness was unavailable who, as a condition of his plea bargain, agreed to give information on the condition that he would not be called to testify at his brother's trial; state's reason for entering into the agreement was not for the purpose of preventing the witness's testimony).

Footnote 53. *United States v Seijo* (CA2 NY) 595 F2d 116, 4 Fed Rules Evid Serv 653.

Footnote 54. *United States v Aitkens* (WD NY) 9 Fed Rules Evid Serv 1020.

Footnote 55. *United States v Licavoli* (CA6 Ohio) 725 F2d 1040, 14 Fed Rules Evid Serv 1782, cert den 467 US 1252, 82 L Ed 2d 840, 104 S Ct 3535, habeas corpus proceeding (CA6 Ky) 854 F2d 830 (absent witness was government's star witness).

(3). Residual Exception [701-703]

§ 701 Admissibility of other statements having circumstantial guaranties of trustworthiness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Hearsay statements not covered by any of the specific exceptions to the hearsay rule are admissible where they have circumstantial guaranties of trustworthiness. 56

Basically, the same standards and evidentiary principles apply to the residual exception associated with exceptions where the declarant's availability is immaterial and the residual exception associated with the "declarant unavailable" exceptions. 57

Congress did not intend to create a broad new hearsay exception, and thus the residual exceptions may be used only in exceptional circumstances. 58 The residual exception cannot be employed as a means of circumventing requirements of other rules, such as to provide for admission of transcript of earlier criminal proceeding against the defendant, which is specifically covered under the former testimony exception. 59

A statement is admissible under the residual exception if the court determines that (1) the statement is offered as evidence of a material fact; 60 (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. 61

Courts will not admit evidence under the residual hearsay exception where it would not be difficult to go behind the proffered hearsay to obtain more solid evidence. 62 The testimony of live witnesses is preferred over hearsay, and may be preferred even where the live defendant is less credible than the deceased declarant. 63 On the other hand, the probativeness requirement does not mean that the evidence must be essential to be admissible; it is enough that it is the most probative evidence reasonably available. 64 Although the common-law exception for statements by persons in privity of estate, interest, or obligation is not included among the classes of admissions defined as nonhearsay, 65 there is some basis for admitting such statements under the residual exception. 66

◆ **Caution:** The constitutional right of confrontation of witnesses 67 is distinct from the rules of hearsay, and thus admissibility under the residual exception does not necessarily satisfy the Confrontation Clause. 68 The residual exception must be applied stringently in criminal cases because of confrontation concerns; guaranties of reliability are necessary to guard against admitting hearsay which is not subject to the usual safeguard of cross-examination at trial. 69 Thus, hearsay statements of an unavailable declarant which do not fall within a firmly rooted hearsay exception are admissible only if supported by particularized guaranties of trustworthiness so that they

don't violate the constitutional confrontation clause. 70 The admission of sworn grand jury testimony is not a violation of the confrontation clause if it bears sufficient guaranties of reliability and the circumstances supply a sufficient basis for the jury to assess its trustworthiness. 71

◆ Comment: The so-called "Near Miss" theory—under which hearsay evidence may only be offered under the exception that most nearly describes it and under which such hearsay evidence cannot be offered under the residual exception if it is excluded under the exception that most nearly describes it—has been rejected by a court which stated that the residual exception is not dependent on other exceptions for its meaning and that the "Near Miss" theory puts the federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them. 72

§ 701 ----Admissibility of other statements having circumstantial guaranties of trustworthiness [SUPPLEMENT]

Practice Aids: The residual exception to the hearsay rule: Form follows substance, 22 Col Law 1197 (1993).

The residual hearsay exception reconsidered, 20 Fla St U LR 787 (1993).

When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx). 125 ALR Fed 477.

Case authorities:

In prosecution for RICO offenses, tape recorded statement of witness, who was murdered before trial, allegedly exculpating defendants accused of particular burglary was not trustworthy enough to be admitted under residual hearsay rule, where statement was made at time witness was cooperating with government and wearing wire during continuing investigation, was not made shortly after robbery, and lacked corroboration. *United States v DeVillio* (1993, CA2 NY) 983 F2d 1185.

Testimony from codefendant's trial of witness who refused to testify at defendant's trial was improperly admitted under residual hearsay exception, even though witness testified under oath, where cross-examination of witness by codefendant's attorney did not satisfy rule, since codefendant was charged with same crimes as defendant and had an obvious incentive to implicate defendant, and no incentive to draw out any testimony that might exculpate defendant; fact that witness might have been defendant's friend did not guarantee trustworthiness, and witness' version of incident had not remained consistent from time of statement to police to time of testimony at codefendant's trial. *State v Luzanilla* (1994, Ariz) 880 P2d 611, 169 Ariz Adv Rep 24.

Hearsay evidence not admissible at the defendant's postconviction hearing on the basis of hearsay objections also was not admissible to satisfy due process considerations, where the defendant, who was convicted of first-degree murder and sentenced to death, attempted to present evidence that his former cellmates, who had testified against him at trial but were no longer available as witnesses, had acted in concert with the state to

obtain incriminating statements from the defendant and to testify falsely at trial, because the statements did not bear indicia of reliability, were not made spontaneously, were largely uncorroborated, and were not unquestionably against the witnesses' interest. *Lightbourne v State* (1994, Fla) 644 So 2d 54, 19 FLW S 331, cert den (US) 1995 US LEXIS 2312.

The trial court did not err by finding that hearsay statements made to an officer by an unavailable witness who refused to testify possessed sufficient guarantees of trustworthiness to be constitutionally admissible in a murder trial under Rule 804(b)(5) where the evidence tended to show that the witness described events about which only she could have known; the witness had no motivation other than to speak the truth; the only information supplied by the officer to the witness was the number of the trailer where the events occurred; the witness made statements against her penal interest wherein she referred to her use of illegal drugs and participation in prostitution; the witness was incarcerated for much of the time between the interview and the trial and never attempted to recant her statement during a two-year period; and the statement to the officer was recorded. GS § 8C-1, Rule 804(a)(2). *State v Peterson* (1994) 337 NC 384, 446 SE2d 43.

Two statements made by a murder victim's wife to a police detective possessed equivalent circumstantial guarantees of trustworthiness for their admission into evidence at defendant's murder trial under the residual hearsay exception set forth in Rule 804(b)(5) where the wife later died from AIDS; the wife gave her first statement only one week after the murder; she freely admitted the nature of her relationship with defendant and described how the victim armed himself with a knife before leaving her home when he learned that defendant was outside the home, which could support an inference that the victim provoked defendant; the wife was near death at the time of her second, tape-recorded statement; she could no longer work, was often bed-ridden, and believed in good faith she would not be strong enough to testify even if she were alive at the time of the trial; and the statements mirrored each other in all respects. Furthermore, this evidence showed that the victim's wife was worthy of belief so that admission of the statements did not violate the Confrontation Clause of the Sixth Amendment. N.C.G.S. § 8C-1, Rule 804(b)(5). *State v Brown* (1994) 339 NC 426, 451 SE2d 181, petition for certiorari filed (Mar 29, 1995).

Statements made by a murder victim to a witness and in a letter to defendant concerning abuse she suffered from defendant were properly admitted in defendant's murder trial under the residual exception to the hearsay rule set forth in G.S. § 8C-1, Rule 804(b)(5). The trial court properly found that the statements were probative of a material fact in that they were evidence of motive, identity and intent. Error by the trial court in failing to make findings of fact to support its conclusion that the statements possessed the requisite trustworthiness was harmless beyond a reasonable doubt where the record sustains the court's conclusion and contains overwhelming evidence of defendant's guilt, including his confession, DNA test results, and blood-type matching. *State v Daughtry* (1995) 340 NC 488, 459 SE2d 747.

There was no error in a prosecution for two first-degree murders where a fire inspector was allowed to read to the jury a statement from a vagrant who could not be located at the time of the trial and who had been living in a vacant house where one of the victims was found. The statement contained sufficient indicia of reliability to be admissible in that the vagrant had personal knowledge of the underlying event, there is no evidence that he had any reason to tell the fire inspector anything other than the truth, and there is

no evidence that he ever recanted this statement. Even if the admission of this testimony was erroneous, defendant cannot show prejudice in light of his incriminating remarks to several others stating that he killed this victim. *State v Chapman* (1995) 342 NC 330, 464 SE2d 661.

In prosecution for theft and burglary, trial court did not err in refusing to admit into evidence, under Rule 804(b)(5), affidavit prepared by defendant's father-in-law prior to his death which stated that he saw defendant at his residence on night of burglaries. In view of fact that defendant's wife testified at least five times that she saw and heard defendant, and defendant provided testimony from four other witnesses concerning his whereabouts on night in question, trial court did not abuse its discretion in determining that father-in-law's affidavit was not more probative than any other evidence that defendant could reasonably obtain. *State v Horton* (1993, Utah App) 848 P2d 708, 207 Utah Adv Rep 48.

Footnotes

Footnote 56. FR Evid, Rule 804(b)(5); Uniform Rules of Evidence, Rule 804(b)(6).

Similar exceptions exist in states not following the Uniform Rules of Evidence for hearsay evidence not admissible under established exceptions where there is a reasonable necessity for admission of the statement and where the statement is supported by equivalent guaranties of reliability and trustworthiness. *State v Oquendo*, 223 Conn 635, 613 A2d 1300 (necessity is met when facts contained in statement may be lost unless the statement is admitted, either because the declarant is dead or otherwise unavailable, or because the assertion is of such nature that the evidence of the same value cannot be obtained from the same or other sources); *Roper v State*, 263 Ga 201, 429 SE2d 668, 93 Fulton County D R 1965.

Annotation: Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5), 75 ALR4th 199.

Footnote 57. *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174.

Annotation: Admissibility of statement made to government agent by unavailable witness, under Rule 804(b)(5) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 61 ALR Fed 915.

Practice References Hunter, Federal Trial Handbook 3d § 56:6.

Louisell and Mueller, Federal Evidence § 491.

Footnote 58. *Huff v White Motor Corp.* (CA7 Ind) 609 F2d 286, 4 Fed Rules Evid Serv 1185; *United States v Love* (CA8 ND) 592 F2d 1022, 4 Fed Rules Evid Serv 353, 61 ALR Fed 906; *Williams v Collins Communications, Inc.* (Wyo) 720 P2d 880.

Footnote 59. *United States v Barrett* (DC Me) 598 F Supp 469, affd (CA1 Me) 766 F2d 609, 18 Fed Rules Evid Serv 1170, cert den 474 US 923, 88 L Ed 2d 264, 106 S Ct 258,

postconviction proceeding (DC Me) 763 F Supp 658, affd (CA1 Me) 965 F2d 1184.

As to hearsay exception permitting admission of former testimony, see §§ 890 et seq.

Footnote 60. *State v Norgaard*, 201 Mont 165, 653 P2d 483 (testimony was properly excluded under the residual exception where it was only tangentially related to the critical question of who committed the murder).

Footnote 61. FRE, Rule 804(b)(5); Uniform Rules of Evidence, Rule 804(b)(6).

Footnote 62. *United States v Heyward* (CA4 SC) 729 F2d 297, 84-1 USTC ¶ 9380, 15 Fed Rules Evid Serv 346, 53 AFTR 2d 84-913, cert den 469 US 1105, 83 L Ed 2d 772, 105 S Ct 776 (testimony of bank officer would be more probative of defendant's possession of money than file memorandum written by decedent attorney who procured his information through telephone call).

Footnote 63. *United States v Welsh* (CA4 W Va) 774 F2d 670, 19 Fed Rules Evid Serv 1102.

Footnote 64. *United States v Howard* (CA7 Ill) 774 F2d 838, 19 Fed Rules Evid Serv 475 (in vote fraud case, statement by decedent voter that defendant had placed false name tag on his door was admissible over defense argument that government should have examined name tag itself for fingerprints or handwriting).

Footnote 65. §§ 754 et seq.

Footnote 66. *Huff v White Motor Corp.* (CA7 Ind) 609 F2d 286, 4 Fed Rules Evid Serv 1185 (deathbed statements by plaintiff's decedent were admissible against the plaintiff as bearing on the cause of an accident, because statement was trustworthy as clear recitation of recent events and as contrary to decedent's pecuniary interest).

Footnote 67. US Const, Amend VI.

Footnote 68. *United States v Bailey* (CA3 Pa) 581 F2d 341, 3 Fed Rules Evid Serv 371; *United States v Yates*, 173 US App DC 308, 524 F2d 1282 (self-serving statement made in police car by burglary suspect's companion who was unavailable for trial because government declined to grant him use immunity); *State ex rel. Mack v Purkett* (Mo) 825 SW2d 851; *State v Martinez* (App) 99 NM 48, 653 P2d 879, cert den 99 NM 47, 653 P2d 878; *Hagenkord v State*, 100 Wis 2d 452, 302 NW2d 421.

Footnote 69. *State v Pacheco* (App) 110 NM 599, 798 P2d 200.

Footnote 70. *State v Robinson*, 153 Ariz 191, 735 P2d 801.

Footnote 71. *United States v Garner* (CA4 Va) 574 F2d 1141, 2 Fed Rules Evid Serv 1276, cert den 439 US 936, 58 L Ed 2d 333, 99 S Ct 333; *United States v West* (CA4 Va) 574 F2d 1131, 2 Fed Rules Evid Serv 980, 50 ALR Fed 833.

Footnote 72. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶

67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

§ 702 Showing of trustworthiness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The main requirement of the residual exception is that the hearsay statement have circumstantial guaranties of trustworthiness equivalent to those of the firmly established hearsay exceptions. 73 The evidence should be reliable within the spirit rather than in the letter of similar exceptions. 74 The trial court has discretion in determining the trustworthiness of statements admitted under the residual exception, 75 although the discretion is not unfettered but is designed to deal with unanticipated situations which demonstrate trustworthiness within the spirit of the specifically stated exceptions. 76

The question of trustworthiness does not involve whether the witness's statement is trustworthy, but instead whether the declarant's statement as reported by the witness is trustworthy. 77 The particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief; the circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight. 78 It has been held that corroborative evidence of the truth of a hearsay statement is irrelevant to the consideration of its admissibility as trustworthy evidence under the residual exception, because corroboration is irrelevant in the case of specific exceptions and the residual exception requires an equivalent guaranty of trustworthiness. 79 Further, to be admissible under the Confrontation Clause, hearsay evidence offered in a criminal trial must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to corroborating evidence at trial, where the use of corroboration to support a hearsay statement's particularized guarantees of trustworthiness would permit the admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial. 80

In determining a statement's trustworthiness, the court must also consider the circumstances in which the declarant made the statement, the incentive he had to speak truthfully or falsely, and factors bearing on the reliability of the reporting of the hearsay by the witness. 81 Other indications of reliability include the relative contemporaneousness of the statement to the event in question; 82 the presence of oath or cross examination; the ability of a declarant to perceive clearly, and the amount of time between event and declaration. 83 The fact that the declarant is a disinterested party does not by itself satisfy the requirements of circumstantial guarantees of trustworthiness. 84

In determining whether grand jury testimony possesses circumstantial guarantees of

trustworthiness justifying its admission under the residual exception, the court will consider the declarant's relationship with both the government and the defendant, the declarant's motivation to testify before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination. 85

The statements of unavailable witnesses have been held admissible upon a finding of trustworthiness where—

- government agents took elaborate steps to assure themselves that a narcotics informant was not deceiving them, despite his prior criminal record. 86

- an account of a cocaine transaction in which the declarant participated indicated no reliance upon potentially erroneous secondary information. 87

- statements were made by a deceased federal agent 30 minutes after the events in question, the time frame indicated a lack of confusion, and circumstances showed that the declarant had every incentive to report truthfully because his life and the lives of fellow agents were at stake. 88

- the decedent told disinterested third parties, as well as his wife and police investigators, that the defendant had threatened to kill him. 89

- the declarant's statements before a grand jury were given under a grant of immunity, thereby giving the witness no motive to implicate the defendant and exculpate herself, were offered for the limited purpose of refuting the defendant's alibi, and concerned events about which the witness had personal knowledge. 90

- the statements were provided by a witness under a grant of immunity who had a civil suit pending against the defendant, which would have been compromised by inconsistent statements before the grand jury. 91

- the mere fact that the declarant volunteered to testify before a grand jury after her marriage to defendant deteriorated to the point of divorce did not call her credibility into question to such an extent that admission of her testimony was erroneous. 92

On the other hand, the trustworthiness requirement has been held not satisfied by grand jury testimony drawn from the witness by the prosecutor's leading questions and threats of a contempt citation. 93

The trustworthiness requirement has also been held to be not satisfied in cases where—

- a declarant who had been subpoenaed by a grand jury and had been informed that the grand jury was investigating the crime in which he was implicated made a secretly tape-recorded statement offered by 3 codefendants in which the declarant denied knowledge of the crime in question. 94

- an interview was given under a grant of use immunity, on the ground that the grant of immunity may have encouraged the conscious or unconscious embellishment of the recollection of the witness. 95

—a letter allegedly written by a district sales manager denying discriminatory remarks was offered but there were no assurances that the sales manager in fact wrote or authorized the disputed letter and the defendant did not attempt to establish the letter's authenticity. 96

—an affidavit was contradicted by oral statements and where, despite the affiant's long association with the defendant, the affidavit was tentative in its description of him. 97

—the statement consisted of a written confession by an accomplice, implicating the defendant and made during plea bargaining. 98

§ 702 ----Showing of trustworthiness [SUPPLEMENT]

Case authorities:

In prosecution for RICO offenses, tape recorded statement of witness, who was murdered before trial, allegedly exculpating defendants accused of particular burglary was not trustworthy enough to be admitted under residual hearsay rule, where statement was made at time witness was cooperating with government and wearing wire during continuing investigation, was not made shortly after robbery, and lacked corroboration. *United States v DeVillio* (1993, CA2 NY) 983 F2d 1185.

Victim's statements to sister, ICU nurse, and detective, in form of headshakes due to inability to speak because of life-support tube in throat, and indicating identity of alleged murderer, were improperly admitted under residual hearsay exception, in that they were not inherently trustworthy, independent of other evidence at trial, where there was no showing that deceased victim had adequate opportunity to observe who committed crime. *State v Jacob* (1993) 242 Neb 176, 494 NW2d 109.

The trial court did not err by finding that hearsay statements made to an officer by an unavailable witness who refused to testify possessed sufficient guarantees of trustworthiness to be constitutionally admissible in a murder trial under Rule 804(b)(5) where the evidence tended to show that the witness described events about which only she could have known; the witness had no motivation other than to speak the truth; the only information supplied by the officer to the witness was the number of the trailer where the events occurred; the witness made statements against her penal interest wherein she referred to her use of illegal drugs and participation in prostitution; the witness was incarcerated for much of the time between the interview and the trial and never attempted to recant her statement during a two-year period; and the statement to the officer was recorded. GS § 8C-1, Rule 804(a)(2). *State v Peterson* (1994) 337 NC 384, 446 SE2d 43.

Footnotes

Footnote 73. *Sallinger v Wegerdt* (DC Mass) 19 Fed Rules Evid Serv 1724; *Toys "R" Us, Inc. v Canarsie Kiddie Shop, Inc.* (ED NY) 559 F Supp 1189, 217 USPQ 1137, 13 Fed Rules Evid Serv 347 (survey in trademark infringement case not admissible where trial judge was not satisfied that it reflected sufficient indicia of trustworthiness); *Johnson v Pacific Lighting Land Co.* (CA9 Ariz) 817 F2d 601, 1987-1 CCH Trade Cases ¶ 67565,

22 Fed Rules Evid Serv 1700, cert den 484 US 1062, 98 L Ed 2d 985, 108 S Ct 1020, appeal after remand (CA9 Ariz) 878 F2d 297, 13 FR Serv 3d 1469, cert den 493 US 965, 107 L Ed 2d 373, 110 S Ct 407 (no equivalent circumstantial guaranties of trustworthiness where declarant was not under oath, was responding to questions of his attorney which would normally elicit favorable responses, and where there would be subtle pressures to be in accord with other witnesses present in attorney's office at time statements were made).

Footnote 74. *State v Robles*, 135 Ariz 92, 659 P2d 645.

Footnote 75. *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174.

Footnote 76. *United States v Medico* (CA2 NY) 557 F2d 309, 2 Fed Rules Evid Serv 33, cert den 434 US 986, 54 L Ed 2d 480, 98 S Ct 614; *State v Robles*, 135 Ariz 92, 659 P2d 645.

Advisory Committee Notes to Federal Rules of Evidence, FRE 804.

Footnote 77. *Re Estate of Severns*, 217 Neb 803, 352 NW2d 865.

In examining the trustworthiness of a hearsay statement under the necessity exception, the self-interest of the propounding witness is not relevant to the admissibility of the declaration in question; however, the self-interest of the declarant in making the statement is relevant. *Swain v Citizens & Southern Bank*, 258 Ga 547, 372 SE2d 423.

Footnote 78. *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24.

Footnote 79. *Huff v White Motor Corp.* (CA7 Ind) 609 F2d 286, 4 Fed Rules Evid Serv 1185.

Footnote 80. *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24.

Footnote 81. *United States v Bailey* (CA3 Pa) 581 F2d 341, 3 Fed Rules Evid Serv 371; *State v Allen*, 157 Ariz 165, 755 P2d 1153, 9 Ariz Adv Rep 8.

Hearsay statements of a child victim of sexual abuse who did not testify at trial were not admissible through the child's therapist because the nature of the relationship between a therapist and a child client had a negative impact on the trustworthiness of the hearsay statement where the statements were not made spontaneously but were made in response to questioning by the therapist, which could involve leading questions. *State v Harris*, 247 Mont 405, 808 P2d 453.

A report was not reliable where the witness who reported the statements was not under oath when she was interviewed, the interview took place sometime after the incident, the statement was made during an investigation in which the statements could not be tested by cross-examination and where she admitted not paying much attention to the discussion she was reporting, and where, at the time the statement was made, she was separated from her husband who was one of the subjects of the discussion and where her desire to give the statement was strongly motivated by a monetary award associated with giving

information. *State v Hansen* (Minn) 312 NW2d 96.

In the prosecution of a man for the murder of his former wife, the trial court did not err in admitting an affidavit by the former wife which had been filed in the couple's divorce action; the former wife's death was caused by manual strangulation; the affidavit was dated approximately 4 months before the former wife's death; and the affidavit was drawn under the supervision of an attorney and related in part to the use of physical violence on the former wife by the husband. *State v Kerkhove* (SD) 423 NW2d 160.

Footnote 82. *United States v Vretta* (CA7 Wis) 790 F2d 651, 20 Fed Rules Evid Serv 829, cert den 479 US 851, 93 L Ed 2d 115, 107 S Ct 179; *Pink Supply Corp. v Hiebert, Inc.* (DC Minn) 612 F Supp 1334, 1985-1 CCH Trade Cases ¶ 66603, affd (CA8 Minn) 788 F2d 1313, 1986-1 CCH Trade Cases ¶ 67046 (statement made in August regarding event in May was not contemporaneous).

Footnote 83. *State v Robles*, 135 Ariz 92, 659 P2d 645.

Footnote 84. *State v La Pier*, 208 Mont 106, 676 P2d 210.

Footnote 85. *United States v Barlow* (CA6 Mich) 693 F2d 954, 11 Fed Rules Evid Serv 1720, cert den 461 US 945, 77 L Ed 2d 1304, 103 S Ct 2124.

A district court abused discretion in relying solely on the nature of a grand jury proceeding to supply necessary circumstantial guarantees of trustworthiness where witness was serving 2 concurrent life sentences at the time the testimony given so that the threat of any additional sanction would not necessarily deter him from misrepresenting or embellishing the facts. *United States v Snyder* (CA7 Ill) 872 F2d 1351, 27 Fed Rules Evid Serv 1328.

While there is no per se ban on admission of grand-jury testimony under the residual hearsay exception, a district court erred in admitting grand-jury testimony of a witness, who died of natural causes 5 months after testifying, where the testimony had been given under a grant of immunity, the witness had responded to pregnant questions put by the U.S. attorney, and evidence as to his credibility showed him to be an almost comically unreliable character. *United States v Fernandez* (CA11 Fla) 892 F2d 976, 29 Fed Rules Evid Serv 209, cert dismd 495 US 944, 109 L Ed 2d 527, 110 S Ct 2201.

Footnote 86. *United States v West* (CA4 Va) 574 F2d 1131, 2 Fed Rules Evid Serv 980, 50 ALR Fed 833.

Footnote 87. *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174.

Footnote 88. *United States v Rouco* (CA11 Fla) 765 F2d 983, 19 Fed Rules Evid Serv 493, reh den, en banc (CA11 Fla) 772 F2d 918 and cert den 475 US 1124, 90 L Ed 2d 190, 106 S Ct 1646.

Footnote 89. *United States v Vretta* (CA7 Wis) 790 F2d 651, 20 Fed Rules Evid Serv 829, cert den 479 US 851, 93 L Ed 2d 115, 107 S Ct 179.

Footnote 90. *United States v Barlow* (CA6 Mich) 693 F2d 954, 11 Fed Rules Evid Serv 1720, cert den 461 US 945, 77 L Ed 2d 1304, 103 S Ct 2124.

Footnote 91. *United States v Thevis* (ND Ga) 84 FRD 57, *affd* (CA5 Ga) 665 F2d 616, 9 Fed Rules Evid Serv 1025, *reh den* (CA5 Ga) 671 F2d 1379 and *reh den* (CA5 Ga) 671 F2d 1379 and *cert den* 456 US 1008, 73 L Ed 2d 1303, 102 S Ct 2300 and *cert den* 458 US 1109, 73 L Ed 2d 1370, 102 S Ct 3489 and *cert den* 459 US 825, 74 L Ed 2d 61, 103 S Ct 57.

Footnote 92. *United States v Guinan* (CA7 Ill) 836 F2d 350, 24 Fed Rules Evid Serv 650, *cert den* 487 US 1218, 101 L Ed 2d 907, 108 S Ct 2871.

Footnote 93. *United States v Gonzalez* (CA5 Tex) 559 F2d 1271, 2 Fed Rules Evid Serv 469.

Annotation: Admissibility of testimony before grand jury of unavailable witness under Rule 804(b)(5), Federal Rules of Evidence, providing for admission of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 50 ALR Fed 848.

Footnote 94. *United States v Ferri* (CA3 Pa) 778 F2d 985, 19 Fed Rules Evid Serv 976, *cert den* 476 US 1172, 90 L Ed 2d 983, 106 S Ct 2896 and *cert den* 479 US 831, 93 L Ed 2d 63, 107 S Ct 117.

Footnote 95. *Re Corrugated Container Antitrust Litigation* (CA5 Tex) 756 F2d 411, 1985-1 CCH Trade Cases ¶ 66525, 17 Fed Rules Evid Serv 1049.

Footnote 96. *Perryman v Johnson Products Co.* (CA11 Ga) 698 F2d 1138, 31 BNA FEP Cas 93, 31 CCH EPD ¶ 33381, 12 Fed Rules Evid Serv 1187, 35 FR Serv 2d 1506, on remand (ND Ga) 580 F Supp 1015.

Footnote 97. *United States v McCall* (CA4 Va) 740 F2d 1331.

Footnote 98. *United States v Bailey* (CA3 Pa) 581 F2d 341, 3 Fed Rules Evid Serv 371.

§ 703 Advance notice of intention to use residual exception

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Before a statement may be admitted under the residual exception, the proponent must make known to the adverse party the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. 99 Notice must be given sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. 1 The adverse party must be given a fair opportunity to prepare. 2 Although some jurisdictions have rigidly applied the pretrial notice requirement, 3 most courts have interpreted the requirement somewhat flexibly, in light of its express policy of providing the opposing party with a fair opportunity to meet the proffered evidence. 4 The requirement is not an inflexible barrier when peculiar circumstances militate against its invocation. 5

Thus, the failure to give pretrial notice has been excused if the proffering party was not at fault because that party could not have anticipated the need to use the evidence and if the adverse party has been deemed to have had sufficient opportunity to prepare for and contest the use of the evidence, for example because the adverse party was offered a continuance, did not request a continuance, or had the statement in advance. 6 The failure to give notice of intention to offer hearsay evidence under the residual exception may be cured by obtaining the trial court's grant of a continuance in the proceedings to permit the party entitled to advance notice an opportunity to prepare to meet newly offered evidence discovered under circumstances whose practical realities prevent compliance with the letter of the notice requirement. 7

Footnotes

Footnote 99. FRE, Rule 804(b)(5); Uniform Rules of Evidence, Rule 804(b)(6).

Footnote 1. FRE, Rule 804(b)(5); Uniform Rules of Evidence, Rule 804(b)(6).

Footnote 2. *United States v Vretta* (CA7 Wis) 790 F2d 651, 20 Fed Rules Evid Serv 829, cert den 479 US 851, 93 L Ed 2d 115, 107 S Ct 179 (requirement satisfied by government's letter to defense counsel stating that it intended to introduce evidence of threats made by decedent victim); *Lloyd v Professional Realty Services, Inc.* (CA11 Ala) 734 F2d 1428, 15 Fed Rules Evid Serv 1340, cert den 469 US 1159, 83 L Ed 2d 922, 105 S Ct 908 (testimony properly excluded due to proponent's failure to comply with notice requirement, notwithstanding fact that there was no possibility that such testimony would come as surprise to opposing party).

Footnote 3. *United States v Ruffin* (CA2 NY) 575 F2d 346, 78-1 USTC ¶ 9269, 2 Fed Rules Evid Serv 1307, 41 AFTR 2d 78-1021; *United States v Oates* (CA2 NY) 560 F2d 45, 1 Fed Rules Evid Serv 718, on remand (ED NY) 445 F Supp 351, affd without op (CA2 NY) 591 F2d 1332; *State v Boppre*, 234 Neb 922, 453 NW2d 406, later proceeding 243 Neb 908, 503 NW2d 526 (it was not enough that adverse party was aware of the unavailable declarant's statements; *State v Boppre*, 234 Neb 922, 453 NW2d 406, later proceeding 243 Neb 908, 503 NW2d 526 (it was not enough that adverse party was aware of the unavailable declarant's statements).

Footnote 4. *Furtado v Bishop* (CA1 Mass) 604 F2d 80, cert den 444 US 1035, 62 L Ed 2d 672, 100 S Ct 710; *United States v Bailey* (CA3 Pa) 581 F2d 341, 3 Fed Rules Evid Serv 371 (continuance held sufficient to permit the party against whom the evidence is to be offered to prepare, where proponent of the evidence is without fault in failing to give pretrial notice); *United States v Leslie* (CA5 Ala) 542 F2d 285, 2 Fed Rules Evid Serv 614, reh den (CA5 Ala) 545 F2d 168; *United States v Lyon* (CA8 Mo) 567 F2d 777, 2 Fed Rules Evid Serv 1198, cert den 435 US 918, 55 L Ed 2d 510, 98 S Ct 1476; *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174 (accused was already aware of substance of grand jury testimony by witness who, upon eve of trial, disobeyed court order to testify and was held in contempt); *Lloyd v Professional Realty Services, Inc.* (CA11 Ala) 734 F2d 1428, 15 Fed Rules Evid Serv 1340, cert den 469 US 1159, 83 L Ed 2d 922, 105 S Ct 908.

Footnote 5. *United States v Bailey* (CA3 Pa) 581 F2d 341, 3 Fed Rules Evid Serv 371

(continuance held sufficient to permit the party against whom the evidence is to be offered to prepare, where proponent of the evidence is without fault in failing to give pretrial notice); *United States v Vretta* (CA7 Wis) 790 F2d 651, 20 Fed Rules Evid Serv 829, cert den 479 US 851, 93 L Ed 2d 115, 107 S Ct 179 (adequate notice found where government notified defendant that it intended to introduce evidence of death threats against victim where, prior to trial, government sent letter to defense counsel stating that it intended to introduce evidence of threats against "health and well being" of victim and listed names and addresses of witnesses government intended to call); *United States v Carlson* (CA8 Minn) 547 F2d 1346, 1 Fed Rules Evid Serv 1247, cert den 431 US 914, 53 L Ed 2d 224, 97 S Ct 2174 (accused was already aware of substance of grand jury testimony by witness who, upon eve of trial, disobeyed court order to testify, and was held in contempt); *Lloyd v Professional Realty Services, Inc.* (CA11 Ala) 734 F2d 1428, 15 Fed Rules Evid Serv 1340, cert den 469 US 1159, 83 L Ed 2d 922, 105 S Ct 908.

Footnote 6. *Furtado v Bishop* (CA1 Mass) 604 F2d 80, cert den 444 US 1035, 62 L Ed 2d 672, 100 S Ct 710.

Footnote 7. *SEC v Scott* (SD NY) 565 F Supp 1513, CCH Fed Secur L Rep ¶ 99236, affd (CA2 NY) 734 F2d 118, CCH Fed Secur L Rep ¶ 91476; *United States v Heyward* (CA4 SC) 729 F2d 297, 84-1 USTC ¶ 9380, 15 Fed Rules Evid Serv 346, 53 AFTR 2d 84-913, cert den 469 US 1105, 83 L Ed 2d 772, 105 S Ct 776.

5. Collateral Matters [704-707]

§ 704 Hearsay within hearsay

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. 8 The phrase "multiple hearsay" or "hearsay within hearsay" refers to hearsay that contains within it another level or levels of hearsay, for example a police report containing a bystander statement. 9 For instance, if the factual findings in a public document otherwise admissible are based upon hearsay, the underlying hearsay must also fit within a hearsay exception. 10 The double hearsay problem also arises when the source of the information for a business record is an outsider to the business. 11 Further, it has been held that a statement was hearsay within hearsay where a police officer sought to testify as to an interpreter's translation of a defendant's statements made while the officer was interrogating the defendant where the officer and the defendant spoke different languages. 12 In contrast, it has also been held that testimony of an IRS agent about statements made through an interpreter by the defendant's father-in-law in Greece was not inadmissible as multiple hearsay because the interpreter was no more than a language conduit and, therefore, the translation did not create an additional layer of hearsay. 13

A statement otherwise admissible as the admission of a party's agent is to be excluded if it consists primarily of a reiteration of the statement of another person who is unknown.

14 Hearsay within hearsay has been admitted as fitting within a hearsay exception of its own in cases where—

—computerized records prepared by a drug company and included in records of state human resources department were excepted as business records. 15

—a statement included in a Department of Labor report was within the hearsay exception for admissions by party opponent. 16

—an entry on a police booking card as to the defendant's place of birth incorporated three out-of-court statements admissible under separate hearsay exceptions: (1) a defendant's statement, deemed not hearsay as a statement of party against whom the statement was offered, under the exception for admissions by a party opponent; (2) a translation of a statement, excepted under the present sense impression exception; and (3) a police officer's notation, excepted as a business record. 17

—a coconspirator's translation of the defendant's statements constituting an admission of a party was admissible under the exception for coconspirators' statements. 18

—hearsay within coconspirator's statements was statement of other coconspirator. 19

◆ Observation: The admission of double hearsay is suspect under the Confrontation Clause of the Sixth Amendment, because a defense attorney cannot even cross-examine a witness concerning the reliability of the source, which relies upon the hearsay statement of another. Testimony referring to an unidentified informant's account of various hearsay statements is nonetheless admissible despite the grave possibilities for abuse. 20

Footnotes

Footnote 8. FR Evid, Rule 805; Uniform Rules of Evidence, Rule 805.

Practice References Hunter, Federal Trial Handbook 3d § 53:4.

2 Jones on Evidence, 6th ed § 8:8.

Louisell and Mueller, Federal Evidence §§ 495, 496.

Footnote 9. State v Montano, 136 Ariz 605, 667 P2d 1320 (statement contained multiple hearsay where the statement consisted of a report of a crimestop call placed by an individual who stated that he had overheard another individual claiming to have killed a person and put the body out on the highway); State v Terrazas (App) 162 Ariz 357, 783 P2d 803, 40 Ariz Adv Rep 34; Eisbrenner v Stanley, 106 Mich App 357, 308 NW2d 209 (double hearsay where witness stated her sister-in-law called her and told her that a doctor had said that he did not think a child had a particular disease); Reguero v Teacher Standards & Practices Com., 312 Or 402, 822 P2d 1171.

Footnote 10. Fraley v Rockwell International Corp. (SD Ohio) 470 F Supp 1264, 4 Fed Rules Evid Serv 1172.

As to hearsay exception for public documents, see §§ 1321 et seq.

Footnote 11. § 1308.

Footnote 12. *State v Terrazas* (App) 162 Ariz 357, 783 P2d 803, 40 Ariz Adv Rep 34.

Footnote 13. *United States v Koskerides* (CA2 Conn) 877 F2d 1129, 89-1 USTC ¶ 9381, 28 Fed Rules Evid Serv 393, 64 AFTR 2d 89-5072.

Footnote 14. *Cedeck v Hamiltonian Federal Sav. & Loan Asso.* (CA8 Mo) 551 F2d 1136, 14 BNA FEP Cas 1571, 13 CCH EPD ¶ 11593, 1 Fed Rules Evid Serv 889.

As to admissions of a party's agent, see §§ 815 et seq.

Footnote 15. *United States v Sanders* (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv 1274.

As to hearsay exception for business records, see §§ 1300 et seq.

Footnote 16. *Williams v Tri-County Growers, Inc.* (CA3 Pa) 747 F2d 121, 26 BNA WH Cas 1519, 102 CCH LC ¶ 34600, 17 Fed Rules Evid Serv 60.

As to admissions by a party opponent, see §§ 760 et seq.

Footnote 17. *United States v Abell* (DC Me) 586 F Supp 1414.

As to admissions by a party opponent, see §§ 760 et seq.

As to present sense impression exception, see §§ 864 et seq.

As to business records exception, see §§ 1300 et seq.

Footnote 18. *United States v Aboumoussallem* (CA2 NY) 726 F2d 906, 14 Fed Rules Evid Serv 1403.

Footnote 19. *United States v Lenfesty* (CA8 Minn) 923 F2d 1293, 32 Fed Rules Evid Serv 538, cert den 499 US 968, 113 L Ed 2d 665, 111 S Ct 1602.

Footnote 20. *United States v Daniels* (CA5 La) 572 F2d 535, 3 Fed Rules Evid Serv 580.

§ 705 Attacking and supporting credibility of declarant

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

When a hearsay statement, or when a statement which is not hearsay but consists of certain admissions by a party opponent, has been admitted in evidence, the credibility of

the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. 21 The rule does not apply to statements admissible as statements by the party opponent himself or statements of which he has manifested his adoption because the credibility of the party opponent is always subject to attack. 22 The purpose of this rule is to permit impeachment of a declarant whose out of court statement has been admitted into evidence; it also permits cross-examination by a party calling a declarant as a witness after a hearsay statement has been admitted against that party; however the rule is limited in its application and it has no prospect for justifying the admissibility of a hearsay statement offered in the absence of these circumstances. 23

The rule extends the privilege of impeaching declarative hearsay statements but does not obliterate the rules of evidence governing how impeachment is to proceed; rather it says opposite, that counsel may use any evidence which would be admissible if declarant had testified as witness. 24 Evidence attacking the credibility of a witness is an attack on the character of the witness for truthfulness or untruthfulness; thus testimony of a witness on deposition which contradicts a declarant's other out-of-court statements but does not attack his credibility is not admissible. 25

If the accused refuses to testify, but his counsel brings out by examination of another witness the accused's consistent denial of any involvement in the alleged crime, the admission of such hearsay statements make the accused's credibility an issue in the case, thereby inviting impeachment of him by introducing evidence of his prior conviction. 26

If a party seeks to introduce a hearsay statement whose declarant is unknown, the opposing party's right to cross-examine is significantly diminished, and a court may place a heavier burden on the proponent of the evidence to satisfy the requirement of the particular exception. 27

The credibility of a defendant seeking to establish the defense of insanity will be open to attack where his statements to the psychiatrist called to establish the defense are admitted under the hearsay exception for statements made for the purpose of medical diagnosis or treatment. 28 In turn the trial court must admit testimony offered by the defense by way of rehabilitation. 29

The credibility of an out-of-court declarant, after it has been attacked, may be rehabilitated by introducing prior consistent statements relevant to repel the attack. 30

◆ Caution: When an out-of-court statement is offered for a nonhearsay purpose, so that the credibility of the declarant does not affect the probative worth of the statement, and is not within the purview of the applicable rules dealing with admissions by an opponent, 31 the adverse party is not entitled to attack the credibility of the declarant. 32

§ 705 ----Attacking and supporting credibility of declarant [SUPPLEMENT]

Practice Aids: Evidence Rule 806 and the problem of impeaching the nontestifying declarant, 56 Ohio State LJ 2:495 (1995).

Case authorities:

Although the State is not required to corroborate a victim's testimony, when the key witness's credibility has been put in issue, it cannot be doubted that corroborating testimony may play a substantial role in the jury's weighing of the evidence, where accused was convicted of armed burglary, 3 counts of sexual battery with a deadly weapon, and armed robbery with a firearm, and the alleged victim's credibility as to the use of a weapon was attacked by the defense, and the State sought to bolster its case by introducing impermissible hearsay testimony from a police dispatch report and victim's examining physician. *Conley v State* (1993, Fla) 620 So 2d 180, 18 FLW S 298.

Footnotes

Footnote 21. FRE, Rule 806; Uniform Rules of Evidence, Rule 806.

As to admissions of a party opponent under FRE 801(d)(2)(C), FRE 801(d)(2)(D), or FRE 801(d)(2)(E), and Uniform Rule 801(d)(2)(iii), Uniform Rule 801(d)(2)(iv), or Uniform Rule 801(d)(2)(v), see §§ 831 et seq.

Footnote 22. Senate Judiciary Committee Report No. 93-1277 (1974) p 22.

As to statements made or adopted by the party opponent, under FRE 801(d)(2)(A) and FRE 801(d)(2)(B), and Uniform Rule 801(d)(2)(i) and Uniform Rule 801(d)(2)(ii), see § 796.

Footnote 23. *State v Kline* (Huron Co) 11 Ohio App 3d 208, 11 Ohio BR 330, 464 NE2d 159; *Tennant v State* (Wyo) 786 P2d 339.

As to impeachment of witnesses, generally, see 81 Am Jur 2d, Witnesses §§ 862 et seq.

Footnote 24. *United States v Finley* (CA7 Ill) 934 F2d 837, 33 Fed Rules Evid Serv 148, companion case (CA7 Ill) 934 F2d 822, 33 Fed Rules Evid Serv 818 and postconviction proceeding (ND Ill) 783 F Supp 1123; *State v Heinisch*, 50 Ohio St 3d 231, 553 NE2d 1026.

Footnote 25. *State v Rochelt* (App) 165 Wis 2d 373, 477 NW2d 659.

Footnote 26. *United States v Lawson* (CA6 Tenn) 608 F2d 1129, 5 Fed Rules Evid Serv 131, cert den 444 US 1091, 62 L Ed 2d 779, 100 S Ct 1056; *United States v Noble* (CA7 Ill) 754 F2d 1324, 17 Fed Rules Evid Serv 455, cert den 474 US 818, 88 L Ed 2d 51, 106 S Ct 63 (evidence of prior counterfeiting conviction).

Impeachment by evidence of a prior conviction is discussed in 81 Am Jur 2d, Witnesses §§ 910 et seq.

Footnote 27. *Miller v Keating* (CA3 Pa) 754 F2d 507, 17 Fed Rules Evid Serv 723 (excited utterance under FRE 803(2)).

Footnote 28. *United States v Lechoco*, 177 US App DC 9, 542 F2d 84, 1 Fed Rules Evid Serv 338 (impeachment of psychiatric testimony by suggesting that defendant may have deceived psychiatric witnesses).

As to the hearsay exception for statements made for the purpose of medical diagnosis or treatment, see § 867.

Footnote 29. *United States v Lechoco*, 177 US App DC 9, 542 F2d 84, 1 Fed Rules Evid Serv 338 (defense offered testimony under Rule 608 that defendant enjoyed good reputation for truth and veracity).

Footnote 30. *United States v Bernal* (CA9 Nev) 719 F2d 1475, 14 Fed Rules Evid Serv 695 (criticized on other grounds by *United States v Tille* (CA9 Wash) 729 F2d 615, 15 Fed Rules Evid Serv 597) (after statement was admitted under coconspirator exception of FRE 801(d)(2)(E), inconsistent statement by same declarant was admitted; then third statement, consistent with first, was admitted as supporting declarant's credibility under FRE 806).

As to admission of prior consistent statements, see § 675.

Footnote 31. FRE 801(d)(2)(C), (D), or (E).

Footnote 32. *United States v Price* (CA11 Fla) 792 F2d 994, 20 Fed Rules Evid Serv 1371 (defendant could not impeach informant's statements contained in tape recorded conversation between informant and defendant because informant's statements were offered only to put defendant's statements into context, not to prove the truth of the matter stated; nor were defendant's statements adoptive admissions subjecting informant to impeachment since purpose for admitting statements was to give understandable context to statements made by defendant himself).

§ 706 --Impeachment using inconsistent statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is possible that impeachment of the declarant may involve the use of a subsequent inconsistent statement, 33 as distinct from the usual situation of impeachment by prior inconsistent statements. 34 In either situation, the proponent is precluded from satisfying the usual requirement that the inconsistent statement be brought to the attention of the declarant, unless the hearsay consists of former testimony or a deposition, when the possibility of calling the inconsistent statement to the attention of the witness or deponent is not ruled out. 35 Thus evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. 36

§ 706 --Impeachment using inconsistent statements [SUPPLEMENT]

Case authorities:

If a witness is cross-examined concerning a collateral or irrelevant matter, the cross-examiner must take the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point. *Caruso v State* (1994, Fla) 645 So 2d 389, 19 FLW S 508.

In prosecution for aggravated battery, witness' prior statement to police indicating that defendant was involved in attack on victim was properly admitted to impeach witness' claims at trial that defendant was not involved where witness vacillated and evaded prosecution's questions by claiming that she did not remember what she had said in prior statement. *State v Mayeux* (1994, La App 5th Cir) 639 So 2d 828.

Footnotes

Footnote 33. *Carver v United States*, 164 US 694, 41 L Ed 602, 17 S Ct 228 (reversal for exclusion of inconsistent statement subsequent to dying declaration).

Practice References Hunter, *Federal Trial Handbook* 3d § 53:8.

Louisell and Mueller, *Federal Evidence* §§ 500, 501.

Footnote 34. 81 Am Jur 2d, *Witnesses* §§ 929 et seq.

Footnote 35. Advisory Committee Notes to Federal Rules of Evidence, FRE 806.

Footnote 36. FRE, Rule 806; Uniform Rules of Evidence, Rule 806.

§ 707 --Impeachment of coconspirators' credibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, impeachment is permitted of the credibility of the declarant of a statement admitted as a coconspirator statement as if that declarant had testified as a witness. 37 If a defendant seeks to offer the testimony of a coconspirator from a prior trial in which the coconspirator was the defendant, the fact that the jury in the prior trial did not believe the coconspirator, who was convicted and serving several years in jail, may also be admitted to impeach the coconspirator's testimony. 38 However, problems may arise when the coconspirator declarant whose credibility is subject to attack by evidence of prior crimes is also a codefendant. There is a danger of prejudicing the presumption of innocence of that codefendant by admission of evidence of his prior crimes, such evidence being generally inadmissible under the rule dealing with evidence of prior crimes 39 to show the character or guilt of the codefendant. 40 Circumstances may be such that the court will find that the value to each codefendant of being able to impeach the credibility of the others is less than the prejudice to each defendant of having his criminal convictions before the jury. 41 In such situations, the trial judge has the difficult task of balancing the countervailing interests of all defendants and, if evidence

of prior convictions is admitted, the judge should instruct the jury that the convictions may only be used to discredit the out-of-court statements. 42

§ 707 --Impeachment of coconspirators' credibility [SUPPLEMENT]

Case authorities:

State is required, in order to support admission of conconspirator hearsay statements, to prove existence of conspiracy by fair preponderance of evidence, but need not do so by direct evidence. *Commonwealth v Mayhue* (1994, Pa) 639 A2d 421.

Footnotes

Footnote 37. FRE, Rule 806; Uniform Rules of Evidence, Rule 806.

As to admission of hearsay statements of a coconspirator, see §§ 831 et seq.

Footnote 38. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887.

Footnote 39. FRE 404(b), discussed in §§ 404 et seq.

Footnote 40. *United States v Robinson* (CA7 Wis) 783 F2d 64, 19 Fed Rules Evid Serv 1668, habeas corpus proceeding (CA7 Wis) 897 F2d 903.

Footnote 41. *United States v Robinson* (CA7 Wis) 783 F2d 64, 19 Fed Rules Evid Serv 1668, habeas corpus proceeding (CA7 Wis) 897 F2d 903.

Footnote 42. *United States v Bovain* (CA11 Ga) 708 F2d 606, 13 Fed Rules Evid Serv 1123, cert den 464 US 898, 78 L Ed 2d 238, 104 S Ct 251 and cert den 464 US 997, 78 L Ed 2d 690, 104 S Ct 497 and cert den 464 US 1018, 78 L Ed 2d 724, 104 S Ct 551.

B. Confessions [708-753]

Research References

18 USCS § 3501

FR Crim P, Rule 5(a)

FRE, Rule 104(c)

ALR Digests: Constitutional Law §§ 669.5, 676, 790; Criminal Law §§ 111-111.3; Evidence §§ 553, 971-983.5

ALR Index: Confessions and Admissions

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:592, 20:594-20:596, 20:598, 20:600, 20:908-20:911

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 246, 253; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 161, 164

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence §§ 23-26, 28, 30, 31, 101,

1. In General [708-713]

§ 708 Generally; definition of "confession"

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession is a statement by the accused that he engaged in conduct which constitutes a crime. 1 It is a direct acknowledgement of guilt on the part of the accused, either by a statement of the details of the crime or an admission of the ultimate fact. 2

The term "confession" as used in a federal statute pertaining to admissibility of confessions in criminal prosecutions brought by the United States or the District of Columbia, 3 means any confession of guilt of any criminal offense, or any self-incriminating statement made or given orally or in writing. 4 This definition does not encompass all statements, exculpatory and otherwise, 5 so that statements by an accused which are at best exculpatory or a denial of guilt do not constitute a confession within the meaning of the statute. 6

A confession may be distinguished from conduct of the accused which tends to establish his guilt. 7 Nor does the condition of the accused's person, discovered by a physician during a physical examination, constitute a confession. 8

There can be no such thing as a confession of guilt by silence in or out of court. Thus, the unanswered allegation by another of the guilt of a defendant is not a confession of guilt on the part of the defendant. 9

§ 708 ----Generally; definition of "confession" [SUPPLEMENT]

Case authorities:

Codefendants' confessions were properly excluded in murder defendant's trial as not reliable since portions arguably exculpating defendant did not inculcate codefendants and statements had been made before defendant's apprehension, by persons who had every reason to protect him since he was fellow gang member and brother of one of codefendants. *Carson v Peters* (1994, CA7 Ill) 42 F3d 384.

Statement is not confession unless it is full and direct acknowledgement of all elements of crime. *People v Kelly* (1993, Sup) 157 Misc 2d 554, 598 NYS2d 423.

In a murder prosecution, a witness was properly permitted to testify that the defendant attempted to rape her several hours after the murder and that he told her that she would get the same thing the murder victim got if she opened her mouth since the statement constituted a voluntary extrajudicial statement as it was made several hours before the

victim's body was found and showed peculiar knowledge regarding the murder.
Commonwealth v Simmons (1995, Pa) 662 A2d 621, application gr (Pa) 1995 Pa LEXIS 1336 and petition for certiorari filed (Dec 14, 1995).

Footnotes

Footnote 1. Shelton v State, 144 Ala 106, 42 So 30; People v Miller, 122 Cal 84, 54 P 523; State v Winslow, 2 Conn Cir 264, 197 A2d 778; Harrell v State, 108 Ga App 295, 132 SE2d 787; People v Sleezer, 9 Ill 2d 57, 136 NE2d 808; State v Olson, 260 Iowa 311, 149 NW2d 132; Whack v Commonwealth (Ky) 316 SW2d 856; State v O'Donnell, 131 Me 294, 161 A 802 (ovrld on other grounds by State v Brewer (Me) 505 A2d 774); Merchant v State, 217 Md 61, 141 A2d 487; State v Cunningkin (Mo) 261 SW2d 85; State v Dixon, 80 Mont 181, 260 P 138; State v Donato, 106 NJL 397, 148 A 776; State v Carson, 36 SC 524, 15 SE 588; Burk v State, 50 Tex Crim 185, 95 SW 1064; State v Carr, 53 Vt 37.

Footnote 2. People v Ellis (4th Dist) 31 Ill App 3d 666, 335 NE2d 23, holding that statements made by defendant to an officer concerning a burglary, for example, that defendant was a look out and that he had told the person who actually entered the building and removed the property that the place was "an easy hit," constituted a confession in that they amounted to voluntary declarations of defendant's agency and participation in the crime.

Footnote 3. 18 USCS § 3501.

For discussion of the requirement of voluntariness under such statute, see § 720.

Footnote 4. 18 USCS § 3501(e).

Footnote 5. As to the distinction between confessions and exculpatory statements generally, see 710.

Footnote 6. Ex parte Cobb (DC SC) 448 F Supp 886, affd without op (CA4 SC) 568 F2d 774; United States v Pauldino (CA10 Colo) 487 F2d 127, cert den 415 US 981, 39 L Ed 2d 878, 94 S Ct 1572.

Footnote 7. Rusher v State, 94 Ga 363, 21 SE 593; State v Turner, 82 Kan 787, 109 P 654.

Footnote 8. State v Height, 117 Iowa 650, 91 NW 935.

Footnote 9. People v Bigge, 288 Mich 417, 285 NW 5.

§ 709 Distinction from admission

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An admission is an acknowledgment by the accused of certain facts which tend, together with other facts, to establish his guilt, 10 while a confession is an acknowledgment of guilt itself. 11 An admission is something less than a confession and, unlike a confession, putting to one side the problem of corroboration, 12 an admission is not sufficient in itself to support a conviction. 13 Or as sometimes stated, while a confession is an admission of guilt by a party charged with a crime, it is a special kind of admission. 14 Furthermore, although every confession, is an admission, not every admission is a confession. 15

§ 709 ----Distinction from admission [SUPPLEMENT]

Case authorities:

In a prosecution of defendant for the murder of her husband, the trial court did not err in admitting defendant's statement, "Honey, why did you make me do it?" while she was viewing her husband's body at the funeral home, since the statement was too ambiguous to be incriminating and was an admission by a party opponent within the purview of GS § 8C- 1, Rule 801(d)(A); the statement was obviously relevant; and the admission, though prejudicial to defendant, was not unfairly so. *State v Lambert* (1995) 341 NC 36, 460 SE2d 123.

Footnotes

Footnote 10. As to admissions, generally, see §§ 754 et seq.

Footnote 11. *Fisher v United States* (CA8 Minn) 324 F2d 775, cert den 377 US 999, 12 L Ed 2d 1049, 84 S Ct 1935, reh den 379 US 873, 13 L Ed 2d 81, 85 S Ct 24; *Herring v State*, 242 Ala 85, 5 So 2d 104; *People v Cryder*, 90 Cal App 2d 194, 202 P2d 765; *McConnell v People*, 132 Colo 295, 287 P2d 659; *Montgomery v State*, 202 Ga 678, 44 SE2d 242; *People v Nash* (1st Dist) 90 Ill App 3d 612, 45 Ill Dec 683, 413 NE2d 16; *State v Gallagher*, 236 Iowa 123, 16 NW2d 604; *State v Robinson*, 182 Kan 505, 322 P2d 767; *Shepherd v Commonwealth*, 240 Ky 261, 42 SW2d 311; *State v Jones* (La App 2d Cir) 451 So 2d 35, cert den (La) 456 So 2d 171; *Ford v State*, 181 Md 303, 29 A2d 833; *People v Wise*, 134 Mich App 82, 351 NW2d 255; *Reed v State*, 229 Miss 440, 91 So 2d 269; *State v Stevens*, 60 Mont 390, 199 P 256; *Whomble v State*, 143 Neb 667, 10 NW2d 627; *State v Plunkett*, 62 Nev 258, 142 P2d 893; *State v Epes*, 209 SC 246, 39 SE2d 769.

Footnote 12. For a discussion of the corroboration of confessions and admissions, see § 753.

Footnote 13. § 754.

Footnote 14. *State v Callaghan*, 81 NJ Super 518, 196 A2d 245.

Footnote 15. *State v Callaghan*, 81 NJ Super 518, 196 A2d 245, also indicating that there may be an admission of some fact in issue without its being an admission of guilt of the

crime charge.

§ 710 Distinction from exculpatory statement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To give a statement the binding force of a confession, its distinctive feature must be an acknowledgement of guilt without any exculpating statement or explanation; 16 thus, a confession may be distinguished from an exculpatory statement of an accused. 17 For example, a statement that admits the commission of the act charged, but which also gives a legal justification or excuse, is not a confession. 18 However, a statement by a defendant containing an admission of facts which together constitute proof of the commission of the crime charged has been deemed to be a confession even though additional facts are asserted in the statement by way of justification of the crime, if the additional facts are insufficient as a matter of law to establish a defense. 19

§ 710 ----Distinction from exculpatory statement [SUPPLEMENT]

Case authorities:

Bank teller's prior statement to FBI agent, that robber's eyes were dark, was admissible as substantive evidence; fact that it was exculpatory of defendant, who had light hazel eyes, was irrelevant, since rule's plain language does not exclude exculpatory statements. United States v Brink (1994, CA3 Pa) 39 F3d 419.

In prosecution for murder and related offenses, taped conversation between defendant and girlfriend during which defendant denied any knowledge of murder victim or her disappearance should have been admitted as exculpatory statement made close in time to defendant's confession at police station; however, error did not require reversal. Crawford v Oklahoma (1992, Okla Crim) 840 P2d 627, appeal after remand (Okla Crim) 881 P2d 88.

Footnotes

Footnote 16. Tuttle v People, 33 Colo 243, 79 P 1035; State v Aguirre, 167 Kan 266, 206 P2d 118; People v Duby (Sup) 117 NYS2d 603.

Footnote 17. Neville v State, 148 Ala 681, 41 So 1011; People v Weber, 149 Cal 325, 86 P 671; Mora v People, 19 Colo 255, 35 P 179; Brown v State (Sup) 48 Del 427, 105 A2d 646; Owens v State, 120 Ga 296, 48 SE 21; State v Thomas, 135 Iowa 717, 109 NW 900, error dismd 209 US 258, 52 L Ed 782, 28 S Ct 487 and error dismd 215 US 591, 54 L Ed 340, 30 S Ct 407; State v Aspara, 113 La 940, 37 So 883; People v Case, 105 Mich 92, 62 NW 1017; State v Keeland, 39 Mont 506, 104 P 513; Burnett v State, 86 Neb 11, 124 NW 927; People v Reilly, 224 NY 90, 120 NE 113; State v McDowell, 129 NC 523,

39 SE 840; Parks v State, 46 Tex Crim 100, 79 SW 301; State v Blay, 77 Vt 56, 58 A 794; State v Royce, 38 Wash 111, 80 P 268; Goodwin v State, 114 Wis 318, 90 NW 170.

Footnote 18. Brown v State (Sup) 48 Del 427, 105 A2d 646.

Footnote 19. Brown v State (Sup) 48 Del 427, 105 A2d 646.

§ 711 Confession as judicial or extrajudicial

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A confession may be characterized as judicial or extrajudicial. 20 A confession is judicial when made by the accused in the court trying the crime charged, and is ordinarily called a plea of guilty; 21 and a confession is extrajudicial when made by the accused out of court. 22 A confession made before a magistrate, as on a preliminary examination, at an inquest—as at a coroner's inquest or a fire inquest—before a grand jury, or at the trial of another, cannot properly be designated as a judicial confession for the reason that the requisite authority to determine finally on the conviction or acquittal of the accused for the crime charged is lacking. Hence, such a quasi-judicial confession would fall under the head of extrajudicial confessions. 23

Footnotes

Footnote 20. State v Miller, 14 Del 564, 9 Houst 564, 32 A 137; State v Stevenson, 98 Or 285, 193 P 1030.

Footnote 21. Matthews v State, 55 Ala 187; Commonwealth ex rel. Hough v Maroney, 425 Pa 411, 229 A2d 913; Mularkey v State, 199 Wis 269, 225 NW 933.

A defendant's "judicial confession," as well as other evidence, was sufficient to support a plea of guilty to burglary of a building. Allison v State (Tex Crim) 618 SW2d 763.

As to guilty pleas, generally, see 21 Am Jur 2d, Criminal Law §§ 469-491.

Footnote 22. Kramer v State, 97 Okla Crim 36, 257 P2d 521 (superseded by statute on other grounds as stated in Goodwin v State (Okla Crim) 730 P2d 1202); State v Stevenson, 98 Or 285, 193 P 1030.

Footnote 23. Ziang Sung Wan v United States, 266 US 1, 69 L Ed 131, 45 S Ct 1; Indian Fred v State, 36 Ariz 48, 282 P 930; State v Pearson (Mo) 270 SW 347; State v Assenberg, 66 Utah 573, 244 P 1027; Enoch v Commonwealth, 141 Va 411, 126 SE 222; State v May, 62 W Va 129, 57 SE 366.

§ 712 Proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An oral confession may be proven by any person who heard it. 24 A written confession must be produced, with proof of its authorship, the same as any other form of documentary evidence. 25

In proving a confession, the prosecution is allowed to show the entire statement of the accused; and, if any part is omitted, the accused is allowed to supply it. 26 If the accused supplies an omitted exculpatory part, it is for the jury to determine the weight to be accorded to such part. 27

The testimony of a witness is not rendered inadmissible by the fact that he heard only a portion of the statement containing a confession, 28 or that he heard the entire statement but recalls only a portion thereof. 29

Admission of confessions showing the commission of another offense by the accused has been held to be error in certain instances. 30

§ 712 ----Proof [SUPPLEMENT]

Case authorities:

The trial court did not err in a murder prosecution in which defendant was convicted of being an accessory by admitting only a portion of defendant's confession where defendant offered the statement into evidence rather than the State, the judge excluded portions of the statement which he found to be immaterial and irrelevant, and defendant made no showing to the contrary. *State v Barnes* (1994) 116 NC App 311, 447 SE2d 478.

Footnotes

Footnote 24. *People v Cokahnour*, 120 Cal 253, 52 P 505; *Arthur v Commonwealth* (Ky) 307 SW2d 182; *State v Bickham*, 239 La 1094, 121 So 2d 207, cert den 364 US 874, 5 L Ed 2d 98, 81 S Ct 123; *Commonwealth v Storti*, 177 Mass 339, 58 NE 1021; *State v Schmidt*, 136 Mo 644, 38 SW 719; *Commonwealth v Epps*, 193 Pa 512, 44 A 570; *State v Green*, 48 SC 136, 26 SE 234.

Footnote 25. *Gordon v State*, 252 Ala 492, 41 So 2d 610; *People v Cokahnour*, 120 Cal 253, 52 P 505; *Wistrand v People*, 218 Ill 323, 75 NE 891; *State v Usher*, 126 Iowa 287, 102 NW 101; *Arthur v Commonwealth* (Ky) 307 SW2d 182; *Calloway v State*, 55 Tex Crim 262, 116 SW 575.

Where a typewritten confession contained a number of handwritten interlineations which were highly inculpatory, it was reversible error to admit such confession in evidence in the absence of a satisfactory showing when and by whom the interlineations were made. *United States v Williams* (DC Tex) 103 F 938.

As to documentary evidence, see § 246.

Footnote 26. *Puckett v State*, 213 Ala 383, 105 So 211; *Whitten v State*, 222 Ark 426, 261 SW2d 1; *People v Luis*, 158 Cal 185, 110 P 580; *State v Smith*, 14 Del 588, 9 Houst 588, 33 A 441; *Thalheim v State*, 38 Fla 169, 20 So 938; *Myers v State*, 97 Ga 76, 25 SE 252; *Hanrahan v People*, 91 Ill 142; *Mack v State*, 203 Ind 355, 180 NE 279, 83 ALR 1349; *State v Busse*, 127 Iowa 318, 100 NW 536; *Green v Commonwealth*, 26 Ky LR 1221, 83 SW 638; *State v Green (La)* 443 So 2d 531; *Walters v State*, 156 Md 240, 144 A 252; *Commonwealth v Russell*, 160 Mass 8, 35 NE 84; *People v Bowen*, 170 Mich 129, 135 NW 824; *Davis v State*, 230 Miss 183, 92 So 2d 359; *State v Lu Sing*, 34 Mont 31, 85 P 521; *State v Buster*, 23 Nev 346, 47 P 194; *People v Loomis*, 178 NY 400, 70 NE 919; *State v Knapp*, 70 Ohio St 380, 71 NE 705; *Foster v State*, 8 Okla Crim 139, 126 P 835; *State v Porter*, 32 Or 135, 49 P 964; *Commonwealth v Webb*, 252 Pa 187, 97 A 189; *State v Jeffords*, 121 SC 443, 114 SE 415; *State v West*, 24 SD 530, 124 NW 751; *Jones v State*, 29 Tex App 20, 13 SW 990; *State v Greene*, 38 Utah 389, 115 P 181; *Fertig v State*, 100 Wis 301, 75 NW 960; *Mortimore v State*, 24 Wyo 452, 161 P 766.

Footnote 27. *Webb v State*, 100 Ala 47, 14 So 865; *King v State*, 117 Ark 82, 173 SW 852; *People v Yeaton*, 75 Cal 415, 17 P 544; *Lowber v State*, 29 Del 353, 6 Boyce 353, 100 A 322, 2 ALR 1014; *McCandless v Commonwealth*, 170 Ky 301, 185 SW 1100; *State v Johnson*, 47 La Ann 1225, 17 So 789; *Truman v State*, 153 Neb 247, 44 NW2d 317; *State v Barnett*, 53 NJ 559, 252 A2d 33; *State v Porter*, 32 Or 135, 49 P 964; *Bonnard v State*, 25 Tex App 173, 7 SW 862; *Mortimore v State*, 24 Wyo 452, 161 P 766.

As to the weight and sufficiency of evidence, see §§ 1430 et seq.

Footnote 28. *Descripio v State*, 8 Ala App 85, 62 So 1004; *People v Luis*, 158 Cal 185, 110 P 580; *Woolfolk v State*, 85 Ga 69, 11 SE 814; *Diehl v State*, 157 Ind 549, 62 NE 51; *State v Millmeier*, 102 Iowa 692, 72 NW 275; *Green v Commonwealth*, 26 Ky LR 1221, 83 SW 638; *State v Desroches*, 48 La Ann 428, 19 So 250; *State v Miller*, 100 Mo 606, 13 SW 832; *State v Lu Sing*, 34 Mont 31, 85 P 521; *Fertig v State*, 100 Wis 301, 75 NW 960.

Footnote 29. *People v Luis*, 158 Cal 185, 110 P 580; *Green v Commonwealth*, 26 Ky LR 1221, 83 SW 638; *State v Natcisse*, 133 La 584, 63 So 182; *People v Bowen*, 170 Mich 129, 135 NW 824; *State v Berberick*, 38 Mont 423, 100 P 209; *Fertig v State*, 100 Wis 301, 75 NW 960.

Footnote 30. *State v Simpson*, 299 NC 335, 261 SE2d 818 (in prosecution for first-degree murder, first-degree burglary and assault with firearm with intent to kill, trial court erred in admitting evidence that defendant had committed sodomy with a dog, since evidence of the independent, unrelated crime was inadmissible to prove defendant's guilt of the crimes charged, even though that evidence was contained in defendant's confession to the crimes charged); *Alvarez v State (Tex Crim)* 511 SW2d 493 (in prosecution for murder with malice, admission of statement in defendant's confession that he always carried pistol with him because he shot and killed another man not too long ago and was afraid of his people, was reversible error where identity and intent were not in issue since defendant admitted both in confession and on direct testimony and on direct examination that he shot deceased, and fact that killing was not shown to be criminal offense did not render admission of statement harmless).

§ 713 Motion for suppression of confession

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An accused may, pursuant to the applicable court rule, move for suppression of a confession prior to trial on grounds that the confession was involuntary. 31 Furthermore, in the absence of a statutory prohibition or limitation, the trial court has jurisdiction to entertain a motion to suppress a confession obtained in violation of the accused's constitutional rights, and whether the motion should be entertained before trial is a matter within the discretion of the trial court. 32

◆ Practice guide: In some jurisdictions, where a defendant intends to appeal from a suppression motion denial, he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the applicable statute. 33

Footnotes

Footnote 31. *Commonwealth v Green*, 464 Pa 557, 347 A2d 682.

As to voluntariness, generally, see §§ 719 et seq.

Footnote 32. *Saidi-Tabatabai v Superior Court of Los Angeles County* (2nd Dist) 253 Cal App 2d 257, 61 Cal Rptr 510.

Pretrial hearings for suppression of confessions constitute a proper procedure within trial court's discretion. *Magley v State*, 263 Ind 618, 335 NE2d 811.

As to constitutional rights as affecting confessions, generally, see §§ 749 et seq.

Footnote 33. *State v Reynolds*, 298 NC 380, 259 SE2d 843, cert den 446 US 941, 64 L Ed 2d 795, 100 S Ct 2164.

2. Admissibility, In General; Form of Confession [714-718]

§ 714 Generally; extrajudicial confessions, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Extrajudicial confessions of the accused in a criminal case, if satisfactorily shown to have been made voluntarily, 34 without improper inducements, 35 and not in violation of his constitutional rights to counsel and to remain silent, 36 are generally admissible in evidence against the accused, 37 subject to pertinent constitutional requirements—such as the giving of Miranda rights and adequate representation of counsel during questioning—or the valid waiver of such rights, 38 and subject to other basic requirements, such as the requirement of corroboration and proof of the corpus delicti. 39

The admission of confessions as evidence against the accused is in a broad sense an exception to the rule which excludes hearsay testimony. But, while confessions are hearsay, they are considered reliable because the law presumes that no rational person would make admissions against his interest unless urged to do so by the promptings of his conscience to tell the truth. Thus, confessions generally have such a high degree of reliability that they can be taken out of the classification of unreliable hearsay. 40 But if such admissions are not understandingly made, are not voluntary, or are induced by fear or hope of benefit, they do not rest upon the honest and repentant conscience, and the element which raises the presumption of reliability is not present. 41

To be admissible, a confession must relate to the crime with which the accused is charged. 42 Even so, when a different crime confessed is a part of the same scheme as the crime charged, the confession would be admissible. 43

The fact that a confession was made under oath does not affect its admissibility, 44 as where the accused was a witness in a prior proceeding. 45

◆ Practice guide: While state statutes or rules of criminal procedure sometimes prohibit a jury from having a copy of any written confession by the defendant, it is generally not improper for a trial judge to permit documents or tape recordings containing confessions to be taken into the jury room in a criminal case. 46

§ 714 ----Generally; extrajudicial confessions, generally [SUPPLEMENT]

Case authorities:

Exclusion on hearsay grounds of codefendant's statements that tended to exculpate defendant did not violate defendant's rights to put reliable third party confessions before jury in order to determine guilt, where statements were not reliable and were made by fellow gang members to protect defendant. *Carson v Peters* (1994, CA7 Ill) 42 F3d 384.

It constituted unjustifiable circumvention of rule prohibiting admission of nontestifying codefendant's confession in evidence where, during cross-examination of defendant, prosecutor repeatedly framed his questions in such way as to render it obvious to jury that source of questions was accomplice's confession. *People v Manuel* (1992, 2d Dept) 182 AD2d 711, 582 NYS2d 735, app den 80 NY2d 834, 587 NYS2d 919, 600 NE2d 646.

There was no error in a first- degree murder prosecution where the court did not allow defendant to present an exculpatory statement made by defendant to an officer where defendant contended that the State opened the door when it introduced defendant's earlier remarks into evidence. Although it has been held that if the State submits parts of a defendant's confession the defendant must be allowed to present other parts of the statement even though they are self-serving, defendant's remarks here constituted two verbal transactions. The first remarks took place while defendant was being processed and fingerprinted, were unsolicited, and the conversation was terminated by the officer. The second remarks were made after a period of time had elapsed, after defendant had left one room and entered another, and after defendant had been given Miranda warnings and interrogation had begun. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

There was no error in a first- degree murder prosecution where the court did not allow defendant to present an exculpatory self- serving statement made by defendant because the State opened the door by asking the officer about earlier remarks. The State does not open the door for the introduction of another statement made later in the day by simply introducing an earlier statement by a defendant; a party is only entitled to introduce evidence that would have been inadmissible if offered initially where the other party introduces evidence as to a particular fact that is covered by the subsequent statement. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

Footnotes

Footnote 34. As to the voluntariness requirement, generally, see §§ 719 et seq.

Footnote 35. §§ 740 et seq.

Footnote 36. § 749.

Footnote 37. *Perovich v United States*, 205 US 86, 51 L Ed 722, 27 S Ct 456; *Bradford v State*, 104 Ala 68, 16 So 107; *Hammons v State*, 73 Ark 495, 84 SW 718; *Coffee v State*, 25 Fla 501, 6 So 493; *People v Schwartz*, 3 Ill 2d 520, 121 NE2d 758; *Mack v State*, 203 Ind 355, 180 NE 279, 83 ALR 1349; *State v Adams*, 85 Kan 435, 116 P 608; *Hills v State*, 61 Neb 589, 85 NW 836; *State v Gee Jon*, 46 Nev 418, 211 P 676, 30 ALR 1443, reh den 46 Nev 438, 217 P 587, 30 ALR 1451; *State v Foster*, 25 NM 361, 183 P 397, 7 ALR 417; *People v Scott*, 195 NY 224, 88 NE 35; *Choate v State*, 12 Okla Crim 560, 160 P 34; *State v Danelly*, 116 SC 113, 107 SE 149, 14 ALR 1420; *State v Wood*, 69 SD 249, 9 NW2d 151; *Cross v State*, 142 Tenn 510, 221 SW 489, 9 ALR 1354; *Harkey v State*, 90 Tex Crim 212, 234 SW 221, 17 ALR 1276; *State v Moore*, 41 Utah 247, 126 P 322; *McDaniel v Commonwealth*, 183 Va 481, 32 SE2d 667; *State v Scott*, 86 Wash 296, 150 P 423; *State v Glass*, 50 Wis 218, 6 NW 500.

Footnote 38. As to constitutional prerequisites to admissibility, see §§ 749 et seq.

Footnote 39. § 753.

Footnote 40. *Damas v People*, 62 Colo 418, 163 P 289; *People v Schwartz*, 3 Ill 2d 520, 121 NE2d 758.

Footnote 41. *People v Schwartz*, 3 Ill 2d 520, 121 NE2d 758.

Footnote 42. *Monk v State*, 258 Ala 603, 64 So 2d 588; *Pearrow v State*, 146 Ark 201, 225 SW 308; *Zuckerman v People*, 213 Ill 114, 72 NE 741; *State v Cowen*, 56 Kan 470, 43 P 687; *People v Williams*, 159 Mich 518, 124 NW 555; *State v Jones*, 171 Mo 401, 71 SW 680; *State v Wenzel*, 72 NH 396, 56 A 918; *State v Lawrence*, 74 Ohio St 38, 77 NE 266; *Drury v Territory*, 9 Okla 398, 60 P 101; *Commonwealth v Wilson*, 186 Pa 1, 40 A 283; *Pilgrim v State*, 59 Tex Crim 231, 128 SW 128; *State v Dalton*, 43 Wash 278, 86 P 590.

Footnote 43. *State v Cowen*, 56 Kan 470, 43 P 687; *State v Jones*, 171 Mo 401, 71 SW 680; *Silver v State*, 110 Tex Crim 512, 8 SW2d 144, 60 ALR 290, application den 110 Tex Crim 521, 9 SW2d 358, 60 ALR 297.

Footnote 44. *United States v Brown* (DC SC) 40 F 457; *Harshaw v State*, 94 Ark 343, 127 SW 745; *Commonwealth v Wesley*, 166 Mass 248, 44 NE 228; *State v White*, 27 NJ 158, 142 A2d 65; *People v Kennedy*, 159 NY 346, 54 NE 51; *Commonwealth v Spardute*, 278 Pa 37, 122 A 161; *Salas v State*, 31 Tex Crim 485, 21 SW 44; *State v Lyts*, 25 Wash 347, 65 P 530.

Footnote 45. *People v Mitchell*, 94 Cal 550, 29 P 1106; *Commonwealth v Wesley*, 166 Mass 248, 44 NE 228; *People v Butler*, 111 Mich 483, 69 NW 734; *State v Glass*, 50 Wis 218, 6 NW 500.

Footnote 46. 75B Am Jur 2d, Trial § 1672.

§ 715 Judicial confessions, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judicial confession which has been voluntarily made is generally admissible in evidence, whether the confession takes the form of a plea of guilty 47 —including a plea of guilty at a preliminary hearing before a committing magistrate 48 —or is found in other statements made in court in the course of legal proceedings, 49 including statements made before a grand jury 50 or a justice of peace. 51 A plea of guilty is properly admissible in evidence as a confession even though it is entered in a case other than the one at trial, where the crime charged to which the defendant pleaded guilty was substantially the same crime charged in the present indictment. 52 On the other hand, while there have been some exceptions, a plea of nolo contendere generally has no effect beyond a particular case, and cannot be used against the defendant as an admission of guilt in any other criminal case. 53

While there is authority to the effect that an offer to plead guilty to a lesser degree of a crime, or to compromise on punishment, is admissible in evidence, 54 in some jurisdictions, any communication relating to the plea bargaining process is privileged and inadmissible in evidence unless the accused has subsequently entered a plea of guilty which has not been withdrawn. 55 Furthermore, a withdrawn plea of guilty is generally not admissible, 56 and in some instances, statutes proscribing the admission in

evidence of a withdrawn plea of guilty have been applied to make inadmissible an offer by an accused to plead guilty to a less serious offense. 57

Footnotes

Footnote 47. *People v Green*, 17 Ill 2d 35, 160 NE2d 814, cert den 361 US 972, 4 L Ed 2d 551, 80 S Ct 605; *Roberts v State*, 145 Neb 658, 17 NW2d 666.

Footnote 48. *Wood v United States*, 75 US App DC 274, 128 F2d 265, 141 ALR 1318; *Johnson v State*, 196 Miss 402, 17 So 2d 446.

Footnote 49. *State v Thomas*, 78 Ariz 52, 275 P2d 408 (ovrld on other grounds by *State v Pina*, 94 Ariz 243, 383 P2d 167); *People v Green*, 17 Ill 2d 35, 160 NE2d 814, cert den 361 US 972, 4 L Ed 2d 551, 80 S Ct 605.

Footnote 50. *Bratton v State*, 213 Ark 537, 211 SW2d 428.

Footnote 51. *Harshaw v State*, 94 Ark 343, 127 SW 745.

Footnote 52. *State v Thomson*, 203 Or 1, 278 P2d 142.

Footnote 53. 21 Am Jur 2d, Criminal Law § 499.

Footnote 54. *State v Christian (Mo)* 245 SW2d 895.

Footnote 55. *Moulder v State*, 154 Ind App 248, 289 NE2d 522, 59 ALR3d 432.

Footnote 56. *Kercheval v United States*, 274 US 220, 71 L Ed 1009, 47 S Ct 582; *United States v Albano (SD NY)* 414 F Supp 67, 76-1 USTC ¶ 9474, 38 AFTR 2d 76-5269; *United States v Doamarel (DC Del)* 567 F Supp 254, affd without op (CA3 Del) 729 F2d 1449, cert den 467 US 1253, 82 L Ed 2d 843, 104 S Ct 3539; *Harris v Anderson (WD NC)* 364 F Supp 465; *United States v Martinez (CA5 Tex)* 536 F2d 1107, reh den (CA5 Tex) 541 F2d 282 and cert den 429 US 985, 50 L Ed 2d 597, 97 S Ct 505; *Heim v United States*, 47 App DC 485, cert den 247 US 522, 62 L Ed 1247, 38 S Ct 583; *State v Wright*, 103 Ariz 52, 436 P2d 601, reh den 103 Ariz 193, 438 P2d 759; *People v Quinn*, 61 Cal 2d 551, 39 Cal Rptr 393, 393 P2d 705; *People v Dykes (2nd Dist)* 243 Cal App 2d 572, 52 Cal Rptr 537; *Toth v State (Fla App D2)* 297 So 2d 53; *Mathis v State*, 145 Ga App 754, 245 SE2d 41; *People v Street*, 288 Mich 406, 284 NW 926; *People v George*, 69 Mich App 403, 245 NW2d 65, motion gr 399 Mich 638, 250 NW2d 491 and app den 399 Mich 857, 251 NW2d 258; *State v Reardon*, 245 Minn 509, 73 NW2d 192; *State v Wilson (Mo App)* 750 SW2d 560; *State v Boone*, 66 NJ 38, 327 A2d 661; *People v Moore*, 66 NY2d 1028, 499 NYS2d 393, 489 NE2d 1295; *People v Smith*, 94 Misc 2d 384, 404 NYS2d 947; *Commonwealth v Walls*, 261 Pa Super 321, 396 A2d 419.

FR Crim P, Rule 11(e)(6).

Annotation: Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 ALR2d 326 § 4.

§ 716 Oral and written confessions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession may be oral or written, or partly oral and partly written. 58 A written confession has greater evidentiary value than an oral one in the sense that a jury will tend to regard it as more reliable. 59

Absent a dispute as to the accuracy of a written confession, it does not matter whether it was written by the defendant or by a third person. 60

A written confession is not objectionable because: it fails to include the questions asked; 61 it is not dated; 62 it is in question and answer form; 63 the word "we" is frequently used, in the case of an individual confession; 64 it was prepared by another and adopted by the confessor by signature 65 or by an admission as to its correctness; 66 it was revised and edited before being signed; 67 it is of the same tenor as an earlier oral confession; 68 or it constitutes material evidence in another case growing out of the same transaction. 69

A written confession need not constitute a literal transcription of what the defendant said; the substance of what he said is sufficient. 70 Nor is it necessary that the written confession contain all that the confessor said. 71

§ 716 ----Oral and written confessions [SUPPLEMENT]

Case authorities:

Confessions are statements against the declarant's interest, which are permitted into evidence after a determination that they have been freely and voluntarily given. *Young v State* (1994, Fla) 645 So 2d 965, 19 FLW S 531.

Counsel may argue to a jury and to a judge as factfinder that the failure of the police to electronically record statements made in a place of custody should be considered in deciding the voluntariness of any statement, whether the defendant was properly advised of his rights, and whether any statement attributed to the defendant was made. *Commonwealth v Diaz*, 422 Mass 269, 661 NE2d 1326.

The court would decline to adopt or prescribe a rule of general superintendence or of common law suppressing statements taken from a defendant in custody in a police station unless those statements have been electronically recorded. *Commonwealth v Diaz*, 422 Mass 269, 661 NE2d 1326.

Court erred in permitting defendant's written and videotaped confessions, which

contained references to prior uncharged crimes, to be submitted for jury's consideration in their entirety, even though statements were descriptive of what could be considered one- night crime spree, where portions of statements which recited events that ultimately culminated in shooting were not so inextricably interwoven with description of shooting as to be admissible on that basis. *People v Jones* (1992, 2d Dept) 182 AD2d 708, 582 NYS2d 476, app den 80 NY2d 905, 588 NYS2d 830, 602 NE2d 238.

Footnotes

Footnote 58. *Thomas v United States* (CA8 Ark) 15 F2d 958; *State v Bickham*, 239 La 1094, 121 So 2d 207, cert den 364 US 874, 5 L Ed 2d 98, 81 S Ct 123; *Wells v State*, 236 Md 381, 203 A2d 912; *State v Rios*, 17 NJ 572, 112 A2d 247.

As to proof of oral and written confessions, see § 712.

Footnote 59. *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199; *People v Giro*, 197 NY 152, 90 NE 432; *Commonwealth v Insano*, 268 Pa 1, 110 A 248.

Footnote 60. *United States v Evans* (CA6 Mich) 320 F2d 482.

Footnote 61. *State v Brinte*, 20 Del 551, 4 Penne 551, 58 A 258 (disapproved on other grounds by *Jenkins v State* (Del Sup) 230 A2d 262).

Footnote 62. *Leal v State*, 106 Tex Crim 68, 291 SW 226.

Footnote 63. *Deiterle v State*, 98 Fla 739, 124 So 47; *State v Dewey* (La) 408 So 2d 1255.

Footnote 64. *Davis v State*, 120 Tex Crim 330, 49 SW2d 805.

Footnote 65. As to unsigned confessions, see § 717.

Footnote 66. *State v Schwenk*, 101 Kan 408, 167 P 743; *State v Donato*, 106 NJL 397, 148 A 776; *People v Giro*, 197 NY 152, 90 NE 432; *State v Morris*, 83 Or 429, 163 P 567.

It is not necessary that the statement of an accused be in his own handwriting or that the person taking the statement repeat the exact words of the accused; but a summary statement of an accused reduced to writing by another person is admissible against the accused where it was voluntarily made and was read to or by the accused, and signed or otherwise adopted by him as correct. Therefore, an officer's written summarization of defendant's statement to him was admissible where defendant adopted the statement as his own by reading it, circling a minor incorrect portion, and initialing it. *State v Boykin*, 298 NC 687, 259 SE2d 883, cert den 446 US 911, 64 L Ed 2d 264, 100 S Ct 1841.

Footnote 67. *State v Rose*, 3 NJ Misc 1002, 130 A 461.

Footnote 68. *King v State*, 108 Neb 428, 187 NW 934.

A written confession which corroborates most of what the officers as witnesses said that

defendant orally stated to them is admissible even though they had already given in their testimony their complete statement of the defendant's confession. *State v Adams*, 339 Mo 926, 98 SW2d 632, 100 ALR 838.

Footnote 69. *Thompson v State*, 90 Tex Crim 15, 234 SW 401.

Footnote 70. *Dennison v State*, 259 Ala 424, 66 So 2d 552; *State v Lefevre* (La) 419 So 2d 862; *State v Morris*, 83 Or 429, 163 P 567.

A written confession, each page of which was signed by the defendant, is not rendered inadmissible by the defendant's testimony, and the concession of the officers, that the writing did not reflect the defendant's dictation verbatim, the officers having testified that the writing fairly represented what he said, and that it was read to him and by him after it was written, and the defendant admitted that he "glanced over it" before the pages were signed. *State v Adams*, 339 Mo 926, 98 SW2d 632, 100 ALR 838.

Footnote 71. *State v Burrell*, 112 NJL 330, 170 A 843.

§ 717 --Unsigned confessions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A written confession is generally not rendered inadmissible by the fact that it was not signed, if it is otherwise proved to have been made by the accused. 72 In this regard, the fact that a page of the confession was not signed, through mere inadvertence, does not affect the admissibility of the entire confession. 73 Furthermore, a defendant's voluntary statement to the police was admissible, where police reduced the defendant's statement to writing and the defendant initialed each answer, even though he refused to sign the statement. 74

A confession which was made orally and put in written form by a stenographer may be admitted in evidence, even though not signed by the accused, where the accused acknowledges that it is correct, 75 or where the stenographer testifies that it is accurate. 76 However, a defendant's purported confession, handwritten by a police officer who questioned the defendant, is not admissible when it was never signed or orally acknowledged by defendant. 77 In addition, where an oral confession is taken down stenographically and then transcribed, but the transcript is neither shown nor read to the accused, it is not admissible in evidence. 78

Transcripts of tape-recorded confessions 79 have been deemed admissible even though unsigned, where the original tape-recording has been lost, 80 and the police officer who asked questions of the defendant and heard his answers has testified that he read the transcript and that it was an accurate record of the conversation. 81

Footnotes

Footnote 72. *Gordon v State*, 252 Ala 492, 41 So 2d 610; *People v Ashcraft* (2nd Dist) 138 Cal App 2d 820, 292 P2d 676; *Bosko v People*, 68 Colo 256, 188 P 743; *Freeman v State*, 230 Ga 85, 195 SE2d 416; *People v Reed*, 333 Ill 397, 164 NE 847; *State v Saltzman*, 241 Iowa 1373, 44 NW2d 24; *State v Foulds*, 127 NJL 336, 23 A2d 895; *People v Utley*, 77 Misc 2d 86, 353 NYS2d 301; *State v Fox*, 277 NC 1, 175 SE2d 561; *State v Landrum* (Cuyahoga Co) 96 Ohio App 333, 54 Ohio Ops 343, 113 NE2d 705, app dismd for want of debat q 160 Ohio St 358, 52 Ohio Ops 226, 116 NE2d 208; *Prather v State*, 76 Okla Crim 385, 137 P2d 249; *State v Folkes*, 174 Or 568, 150 P2d 17, cert den 323 US 779, 89 L Ed 622, 65 S Ct 189; *Commonwealth v Harper*, 485 Pa 572, 403 A2d 536, later proceeding 346 Pa Super 105, 499 A2d 331, app den 515 Pa 599, 528 A2d 955; *State v Haworth*, 24 Utah 398, 68 P 155; *State v Breznick*, 134 Vt 261, 356 A2d 540; *Kutchera v State*, 69 Wis 2d 534, 230 NW2d 750.

As to proof of confessions, generally, see § 712.

Law Reviews: Wolchover, *The Myth of the Unsigned Confession*, 136 New LJ 1007 (Oct, 1986).

Footnote 73. *State v Campuzano* (La) 404 So 2d 1217.

Footnote 74. *Kirkland v State*, 75 Md App 49, 540 A2d 490, cert den 313 Md 506, 545 A2d 1344.

Footnote 75. *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407; *Landsdown v United States* (CA5 La) 348 F2d 405; *Tiner v State*, 271 Ala 254, 122 So 2d 738; *Haines v State*, 158 Fla 9, 27 So 2d 414; *People v Varela*, 405 Ill 236, 90 NE2d 631, cert den 339 US 936, 94 L Ed 1354, 70 S Ct 662; *State v Saltzman*, 241 Iowa 1373, 44 NW2d 24; *Gray v Commonwealth*, 293 Ky 833, 170 SW2d 870; *State v Boudreau*, 67 Nev 36, 214 P2d 135; *State v Smith*, 27 NJ 433, 142 A2d 890; *People v Whalen*, 249 App Div 890, 292 NYS 570; *State v Landrum* (Cuyahoga Co) 96 Ohio App 333, 54 Ohio Ops 343, 113 NE2d 705, app dismd for want of debat q 160 Ohio St 358, 52 Ohio Ops 226, 116 NE2d 208; *State v Haworth*, 24 Utah 398, 68 P 155; *State v Young*, 65 Wash 2d 938, 400 P2d 374, cert den 382 US 963, 15 L Ed 2d 365, 86 S Ct 446.

Footnote 76. *Lowe v State*, 125 Ga 55, 53 SE 1038; *People v Perkins*, 17 Ill 2d 493, 162 NE2d 385; *Hall v State*, 223 Md 158, 162 A2d 751; *Prather v State*, 76 Okla Crim 385, 137 P2d 249.

Footnote 77. *People v Lee* (1st Dept) 159 App Div 2d 238, 552 NYS2d 218, app den 76 NY2d 791, 559 NYS2d 996, 559 NE2d 690.

Footnote 78. *State v Meharg*, 196 La 748, 200 So 25; *State v Harding*, 184 Neb 159, 165 NW2d 723; *State v Cleveland*, 6 NJ 316, 78 A2d 560, 23 ALR2d 907; *People v Lebron* (2d Dept) 46 App Div 2d 776, 360 NYS2d 468; *State v Walker*, 269 NC 135, 152 SE2d 133; *State v Folkes*, 174 Or 568, 150 P2d 17, cert den 323 US 779, 89 L Ed 622, 65 S Ct 189.

Footnote 79. As to recorded confessions, generally see § 718.

Footnote 80. *Boyd v State* (Ind) 430 NE2d 1146; *State v Goodwin*, 223 Kan 257, 573

P2d 999, habeas corpus dismissed (DC Kan) 812 F Supp 181, habeas corpus dismissed (DC Kan) 809 F Supp 853, affd (CA10) 1994 US App LEXIS 3439.

Footnote 81. *Boyd v State* (Ind) 430 NE2d 1146.

§ 718 --Confessions recorded by electronic means

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A sound recording ⁸² or a sound motion picture ⁸³ of a confession is admissible if properly identified and authenticated. A videotaped confession may also be admitted under proper circumstances. ⁸⁴

Under certain circumstances, transcripts of tape-recorded confessions may also be admitted where, for example, the original tape has been lost, and this is so even though the transcript has not been signed by the accused. ⁸⁵

◆ Observation: Use of videotape to record an accused's statement has been praised as a modern technique to protect a defendant's rights, which, to the extent possible, should be used to preserve all statements of defendants; such technique protects the accused in that if he is hesitant, uncertain or faltering, such facts will appear, and if he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, ⁸⁶ the tape will corroborate him in ways a typewritten statement would not. ⁸⁷

Footnotes

Footnote 82. *State v Alleman*, 218 La 821, 51 So 2d 83; *State v Perkins*, 355 Mo 851, 198 SW2d 704, 168 ALR 920; *Williams v State*, 93 Okla Crim 260, 226 P2d 989; *Commonwealth v Clark*, 123 Pa Super 277, 187 A 237; *State v Slater*, 36 Wash 2d 357, 218 P2d 329.

In prosecution for robbery of liquor store, trial court did not abuse its discretion in admitting into evidence tape recorded confession by defendant, even though portion of tape recording referred to defendant's attempt to rob another liquor store, where defendant's identification as robber was in issue and where similarities of two crimes and common participation by defendant and his accomplice established required relevancy on issue of identity. *State v Treadwell*, 223 Kan 577, 575 P2d 550.

◆ Practice guide: It is not error to permit the prosecution to play for the jury, during rebuttal, a tape recording of the defendant's confession, where the defense has referred to statements made by the defendant in the defendant's oral confession at several points in the trial, including the final argument. *Grassmyer v State* (Ind) 429 NE2d 248.

Footnote 83. *People v Dabb*, 32 Cal 2d 491, 197 P2d 1; *People v Higgins*, 89 Misc 2d

913, 392 NYS2d 800; Commonwealth v Roller, 100 Pa Super 125; State v Hunt, 53 Wis 2d 734, 193 NW2d 858.

For a discussion of the general evidentiary issues concerning the admission of motion pictures, see §§ 979-985.

Footnote 84. Woodward v State (Miss) 533 So 2d 418, cert den 490 US 1028, 104 L Ed 2d 202, 109 S Ct 1767, reh den 490 US 1117, 104 L Ed 2d 1041, 109 S Ct 3179 and remanded on other grounds (Miss) 1993 Miss LEXIS 442, reh den (Miss) 1993 Miss LEXIS 605, holding that videotaped confession was properly admitted in evidence even though defendant signed only that portion of waiver of rights form that acknowledged that he knew his rights, and did not sign portion of form that waived his rights, where evidence showed that after being administered his Miranda warnings, defendant acknowledged those rights and gave a voluntary statement.

As to the impact of *Miranda* on admissibility of confessions, generally, see § 749.

Footnote 85. § 717.

Footnote 86. As to voluntariness, generally, see §§ 719 et seq.

Footnote 87. Hendricks v Swenson (CA8 Mo) 456 F2d 503.

Annotation: Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution, 41 ALR4th 877.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

Admissibility of videotape film in evidence in criminal trial, 60 ALR3d 333.

3. Voluntariness [719-748]

a. Requirement, In General [719-727]

§ 719 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Due process requires that a confession be voluntarily made; 88 confessions are admissible as evidence when they are voluntarily given, 89 not as a result of threats, 90 promises, 91 violence, 92 or other improper inducements or influences. 93

Coercive police activity is a necessary predicate to the finding that a confession is not

voluntary within the meaning of the due process clause of the Fourteenth Amendment. 94

The test for determining whether a confession is voluntary is whether the defendant's will was overborne at the time he confessed; 95 or, as stated by the United States Supreme Court, if an individual's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because coerced. 96 Any questioning by a police officer which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. 97

◆ Observation: The test of voluntariness is not a "but-for" test. The question is not whether the confession would have been made in the absence of the interrogation. Few criminals are impelled to confess to the police purely of their own accord, without any questioning at all. Thus, it can almost always be said that the interrogation caused the confession. 98

Resolving the issue of a confession's voluntariness requires an independent examination of the entire record and a consideration of the totality of the circumstances. 99

Notwithstanding the totality of the circumstances test, it has been recognized that a confession which is the product of violence or the threat of violence is per se involuntary. 1 Nevertheless, psychological coercion does not render a confession per se involuntary, so that, in such circumstances, the totality of the circumstances test does apply. 2

§ 719 ----Generally [SUPPLEMENT]

Case authorities:

For purposes of the rule that a confession obtained during a period of detention by state or local officers must be suppressed if an accused can demonstrate the existence of improper collaboration between federal officers and the state or local officers, the action of a local sheriff's department in informing agents of the United States Secret Service that counterfeit currency had been found in an accused's possession is routine cooperation between local and federal authorities which by itself is wholly unobjectionable. *United States v Alvarez- Sanchez* (US) 128 L Ed 2d 319, 114 S Ct 1599.

Trial court did not err in admitting evidence of defendant's spontaneous confession when officers arrived to execute arrest warrant and initially mistook his brother for defendant; damage done to defense is not basis for exclusion, rather question is one of unfair prejudice, not prejudice alone. *United States v Munoz* (1994, CA1 Mass) 36 F3d 1229.

Incriminating statements made by defendant to police, in police van, in connection with investigation of accident were not result of custodial interrogation where defendant had not been told that he could not leave interview, police officers made no threats or promises, and it was standard procedure to have people involved in accident sit in police van and explain how accident occurred. *People v Fury* (1993, Colo App) 872 P2d 1280, reh den (Nov 4, 1993) and cert den (Colo) 1994 Colo LEXIS 450.

In prosecution for malice murder in which it was established that defendant, a mentally retarded 19- year- old, had killed her one-year-old child by means of repeated blows to his head with metal table leg, trial court properly determined that defendant's confession

was voluntary where officers who received defendant's statements testified that she was informed of her rights and appeared to understand them, that she never asked for counsel, that she volunteered to write out written statement and did so, that she was given opportunity to take break and make telephone call, and that her statements were made voluntarily. Though defendant was mentally retarded, it was not necessary to apply factors used for scrutinizing statements of juveniles. *Brown v State* (1993) 262 Ga 833, 426 SE2d 559, 92 Fulton County D R 976.

Suspect in suffocation death of infant was not in custody when he confessed to placing his hand over child's mouth, where suspect had agreed to allow investigating officer to photograph home, and had broken down and admitted killing without pointed questioning, notwithstanding that suspect subjectively feared that he was under arrest due to marijuana plants found growing at home, where officer assured suspect that marijuana matter would be taken up after funeral and would not result in immediate arrest. *Moses v State* (1994) 264 Ga 313, 444 SE2d 767, 94 Fulton County D R 2245.

State's failure to produce tape recording of preliminary hearing in response to defendant's requests for production did not require trial court to exclude recording under statute relating to disclosure of statements given "while in police custody." Person testifying before magistrate or other judicial officer in open court at preliminary hearing is not in "police custody" within contemplation of statute, but even if defendant's detention constituted police custody, tape recording of preliminary hearing contained no statement that was inculpatory or incriminating on its face; it became so only as result of his testimony at trial and was admitted for limited purpose of impeachment. *Maddox v State* (1993) 210 Ga App 526, 436 SE2d 730, 93 Fulton County D R 3761.

Voluntariness of defendant's confession may be attacked when state makes threats against family of accused, even when threats may be enforced. In order to prevail upon such challenge, however, defendant must present evidence of direct threats made by police. Mere explanations of possible consequences of defendant's spouse being charged, or contradictory evidence as to whether threats were made is insufficient to vitiate voluntariness of confession, absent proof that threats were made directly to defendant. *Cain v State* (1992, Ind App) 594 NE2d 835, on reh, remanded (Ind App) 599 NE2d 625.

Questioning by crisis-intervention officer of distraught subject who held rifle to his head and threatened suicide was not custodial interrogation, where officer, who had 20 years' experience in handling delicate situations, talked to subject about variety of things, gained his confidence, and disarmed him, and where officer did not know that body of subject's girlfriend had been discovered in nearby room at time subject confessed to shooting girlfriend. *State v Reimann* (1994) 19 Kan App 2d 431, 870 P2d 1346.

A statement made by the defendant would not be suppressed where (1) when the defendant was arrested, he was given Miranda warnings and signed an incriminating statement, (2) on the next day, the police decided to take his fingerprints and palmprints, (3) while an officer was taking the prints, the defendant blurted out "this is really going to fuck me up," (4) the officer asked "why," (5) the defendant said that he had handled one of the guns used in the murder at issue but that it had jammed, and (6) the officer stopped the defendant from saying anything further; the defendant's first statement was spontaneous, the officer's one word reply seemed to be a natural reflex and the defendant's second statement was volunteered and was not the product of improper probing questioning. *Commonwealth v Diaz*, 422 Mass 269, 661 NE2d 1326.

Police officer's asking generalized question of defendant, who was incarcerated for another offense, and defendant's cellmate, "Who does all this stuff belong to?", after officer discovered weapons in their cell was not custodial interrogation, since there was no lengthy interrogation, no unwary suspect, and no psychological coercion. *State v Baker* (1993, Mo App) 850 SW2d 944.

Defendant in murder prosecution was not in custody at any point during interview (in course of which defendant confessed) where defendant (1) had requested interview and drove himself to police station, (2) was not physically restrained in any way during interview, and he enjoyed freedom of movement throughout police station, and (3) was allowed to go home, without restriction, after interview. *State v Carroll* (1994, NH) 645 A2d 82.

Huntley ruling in murder prosecution achieved requisite finality on defendant's conviction, and thus lack of finality was no bar to People's assertion, in second murder prosecution, that defendant was collaterally estopped to relitigate issue of voluntariness of confession obtained during combined interrogation with regard to both murders. *People v Aguilera* (1993) 82 NY2d 23, 603 NYS2d 392, 623 NE2d 519.

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his statements to officers where the evidence shows that the defendant agreed to talk with law enforcement officers, including going to the Sheriff's Department on several occasions and agreeing to go to Asheville for a polygraph examination; defendant was repeatedly told he was not under arrest and was free to leave at any time; defendant was not handcuffed, nor was his freedom restrained; defendant indicated that he wanted to leave on several occasions and was allowed to leave or was taken home by law enforcement officers; defendant testified that the officers had left his apartment on one occasion when he had asked; and defendant also acknowledged that from prior experience he knew what his rights were and that he had knowingly waived them. Miranda warnings were not required, the trial court's findings support the conclusion that there were "no promises of reward or inducements" nor "threat or suggested threat of violence to persuade or induce the defendant to make the statement," and there is also substantial evidence to support the finding that defendant's mother voluntarily came to Graham County and that she was not acting as an agent of the State. *State v Rose* (1994) 335 NC 301, 439 SE2d 518.

There was ample evidence to support the trial court's findings of fact, and those findings support the court's conclusion that defendant voluntarily waived his juvenile and Miranda rights and that the statement that he gave thereafter to the police was freely, voluntarily, and understandingly given. *State v Reid* (1994) 335 NC 647, 440 SE2d 776.

The Supreme Court declined to reconsider its prior ruling upholding the admission of a second confession following a coerced confession in light of *Arizona v Fulminante* (1991) 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den 500 US 938, 114 L Ed 2d 472, 111 S Ct 2067. *State v Jones* (1994) 336 NC 229, 443 SE2d 48.

The trial court did not err in the denial of a juvenile defendant's motion to suppress an inculpatory statement he made to police officers where the trial court found from uncontroverted evidence that defendant was fully advised of his Miranda rights and his rights under G.S. § 7A-595(a), and the court also found that defendant "freely, knowingly, intelligently and voluntarily" waived his rights and that his statement was

made "freely, voluntarily and understandingly." The trial court's findings were not insufficient to support the ruling admitting defendant's confession into evidence because they did not include the precise words of G.S. § 7A- 595(d) that defendant "knowingly, willingly, and understandingly" waived his rights. *State v Gibson* (1995) 342 NC 142, 463 SE2d 193.

Although a defendant in a first- degree murder prosecution contended that the totality of circumstances surrounding his statement, the presence of psychological coercion, and his condition show that his statement should not have been admitted, the court found based on substantial evidence that no threats or promises induced defendant to make his statement, that defendant was not under the influence of alcohol, was not in need of medical attention, and did not request food or beverage, and these findings are based on substantial evidence and are binding. *State v Bowie* (1995) 340 NC 199, 456 SE2d 771.

The trial court in a prosecution in which defendant was convicted of being an accessory to murder correctly concluded that defendant's incriminating statement to officers was made voluntarily where she was never taken into custody or deprived of her freedom; she was not under arrest; officers had told her that she was free to leave at any time and that they were interviewing her as a witness; defendant went to the bathroom unescorted, indicating that she could have left the sheriff's office had she wanted to do so; after the interview, the officers told her that they wanted to talk to her again; although she later spoke to an attorney who advised her not to talk to the officers, she nevertheless drove to the sheriff's office by herself and spoke to the officers; at the conclusion of this interview, defendant left the sheriff's department unescorted; during neither interview did defendant, who has completed a couple of years of college, request an attorney or indicate that she did not want to talk to the officers; and there is no evidence that the officers made promises to defendant or coerced her in any way. *State v Barnes* (1994) 116 NC App 311, 447 SE2d 478.

Police officer's questioning defendant in interview room at police station was not custodial interrogation, where defendant had voluntarily gone to station and was eager to help police solve crime of which defendant was subsequently convicted. *Commonwealth v Foster* (1993) 425 Pa Super 61, 624 A2d 144.

Questioning of defendant in jail by pretrial services investigator was not custodial interrogation, since investigator was ascertaining only routine information required to process defendant's arrest. *Cruse v State* (1994, Tex App Houston (14th Dist)) 882 SW2d 50.

Requirement that defendant, who was incarcerated in county jail, fill out form "Request To Use Law Library" in order to be admitted to jail's law library did not amount to custodial interrogation, although form asked for "reasons" why defendant needed to use library, since there was no interrogation of defendant. *Watson v State* (1994, Tex App Fort Worth) 885 SW2d 222.

Footnotes

Footnote 88. *Brooks v Florida*, 389 US 413, 19 L Ed 2d 643, 88 S Ct 541; *United States ex rel. Johnson v Yeager* (CA3 NJ) 327 F2d 311, cert den 377 US 984, 12 L Ed 2d 751, 84 S Ct 1890; *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820; *Womack*

v State, 281 Ala 499, 205 So 2d 579; State v Crivellone, 138 Ariz 437, 675 P2d 697; Lee v State, 229 Ark 354, 315 SW2d 916, cert den 359 US 930, 3 L Ed 2d 633, 79 S Ct 616; People v Pineda, 182 Colo 385, 513 P2d 452; State v Rogers, 143 Conn 167, 120 A2d 409, cert den 351 US 952, 100 L Ed 1476, 76 S Ct 850; Frazier v State (Fla) 107 So 2d 16; Fairfield v State, 155 Ga 660, 118 SE 395; People v Nemke, 23 Ill 2d 591, 179 NE2d 825; Brown v State, 232 Ind 227, 111 NE2d 808; State v Williams, 245 Iowa 494, 62 NW2d 742; Andrews v Hand, 190 Kan 109, 372 P2d 559, cert den 371 US 880, 9 L Ed 2d 117, 83 S Ct 152; Bennett v Commonwealth, 226 Ky 529, 11 SW2d 437, appeal after remand 234 Ky 333, 28 SW2d 24; State v Hilliard, 227 La 208, 78 So 2d 835; Carey v State, 155 Md 474, 142 A 497; People v Dudgeon, 229 Mich 26, 201 NW 355; State v Biron, 266 Minn 272, 123 NW2d 392; State v Bradford (Mo) 262 SW2d 584; Morcumb v State, 125 Neb 42, 248 NW 807; State v Rios, 17 NJ 572, 112 A2d 247; State v Anderson, 24 NM 360, 174 P 215; State v Jones, 203 NC 374, 166 SE 163; Jasper v State (Okla Crim) 269 P2d 375; State v Atkins, 251 Or 485, 446 P2d 660; State v Fuller, 227 SC 138, 87 SE2d 287; Cross v State, 142 Tenn 510, 221 SW 489, 9 ALR 1354; Darnell v State, 101 Tex Crim 124, 274 SW 591; State v Rush, 108 W Va 254, 150 SE 740.

If the confession is involuntary, it is excluded not because it is unlikely to be true, but because the method used to obtain it offends the principle that ours is an accusatorial and not an inquisitorial system—a system in which the state must establish guilt by evidence independently and freely secured and may not by its own coercion prove its charge against an accused out of his own mouth. Rogers v Richmond, 365 US 534, 5 L Ed 2d 760, 81 S Ct 735.

It is a fundamental principle of criminal procedure that a confession must be voluntary. People v Melock, 149 Ill 2d 423, 174 Ill Dec 857, 599 NE2d 941, reh den (Oct 5, 1992).

For a general discussion of due process, see 21A Am Jur 2d, Criminal Law §§ 639-642, 825-830.

Footnote 89. §§ 719 et seq.

Footnote 90. As to threats, generally, see §§ 738 et seq.

Footnote 91. §§ 740 et seq.

Footnote 92. §§ 737 et seq.

Footnote 93. As to other improper inducements or influences, see §§ 740-743.

Footnote 94. Colorado v Connelly, 479 US 157, 93 L Ed 2d 473, 107 S Ct 515; United States v Moody (CA11 Ga) 977 F2d 1425, 6 FLW Fed C 1353, cert den (US) 123 L Ed 2d 653, 113 S Ct 1948; State v Combs, 62 Ohio St 3d 278, 581 NE2d 1071, reh den 62 Ohio St 3d 1503, 583 NE2d 974 and cert den (US) 119 L Ed 2d 573, 112 S Ct 2950.

Footnote 95. United States v Levy (CA7 Wis) 955 F2d 1098, 34 Fed Rules Evid Serv 1408, reh, en banc, den (CA7) 1992 US App LEXIS 2383 and cert den (US) 121 L Ed 2d 62, 113 S Ct 102; People v Ramey, 152 Ill 2d 41, 178 Ill Dec 19, 604 NE2d 275, cert den (US) 124 L Ed 2d 663, 113 S Ct 2446.

Footnote 96. Townsend v Sain, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in Joyner v King (CA5 La) 786 F2d 1317) and

(superseded by statute on other grounds as stated in *Blanco v Singletary* (CA11 Fla) 943 F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199).

Footnote 97. *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in *Joyner v King* (CA5 La) 786 F2d 1317) and (superseded by statute on other grounds as stated in *Blanco v Singletary* (CA11 Fla) 943 F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199).

Footnote 98. *United States v Miller* (CA9 Cal) 984 F2d 1028, 93 CDOS 658, 93 Daily Journal DAR 1295, cert den (US) 126 L Ed 2d 210, 114 S Ct 258.

Footnote 99. *Frazier v Cupp*, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420; *United States v Jackson* (CA1 Mass) 918 F2d 236; *United States v Rojas-Martinez* (CA5 Tex) 968 F2d 415, cert den (US) 121 L Ed 2d 698, 113 S Ct 828 and cert den (US) 122 L Ed 2d 146, 113 S Ct 995; *People v Melock*, 149 Ill 2d 423, 174 Ill Dec 857, 599 NE2d 941, reh den (Oct 5, 1992); *People v Tackett* (2d Dist) 246 Ill App 3d 622, 186 Ill Dec 501, 616 NE2d 691; *State v Rhiner* (Iowa) 352 NW2d 258.

Applying the totality of the circumstances test, it was concluded that the defendant's will was overborne in such a way as to render his confession the product of coercion, where (1) the defendant, because he was an alleged child murder, was in danger of physical harm at the hands of other inmates; (2) a government agent was aware that the defendant had been receiving rough treatment from such inmates; (3) using his knowledge of these threats, the government informant offered to protect the defendant in exchange for a confession to the child murder; and (4) in response to the government agent's offer of protection, the defendant confessed. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

In determining whether a particular confession is coerced, it is necessary to be mindful of all the surrounding circumstances, including the defendant's characteristics. *United States v Short* (CA10 Utah) 947 F2d 1445, 34 Fed Rules Evid Serv 326, cert den (US) 118 L Ed 2d 397, 112 S Ct 1680.

As to the particular factors bearing upon voluntariness, see §§ 731-747.

Footnote 1. §§ 737, 739.

Footnote 2. § 731.

§ 720 Requirement under federal statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Pursuant to federal statute, in any criminal prosecution brought by the United States or by the District of Columbia, a confession shall be admissible in evidence if it is voluntarily given. 3 In federal prosecutions, the trial judge, in determining the issue of voluntariness, shall take into consideration all the circumstances surrounding the giving of the confession. 4

The alleged falsity of certain statements in a confession goes to the question of credibility and is not pertinent to the question of voluntariness, which is the sole test for admissibility under 18 USCS § 3501. 5

§ 720 ----Requirement under federal statute [SUPPLEMENT]

Case authorities:

Defendant's confession was voluntary, as required by 18 USCS § 3501(a), where defendant incriminated himself approximately 10 hours after his arrest, which was not appreciably longer than six-hour "safe harbor" and was quite reasonable given fact that defendant was arrested in wee hours of Saturday morning. *United States v Pugh* (1994, CA8 Iowa) 25 F3d 669.

Defendant's confession was voluntary, as required by 18 USCS § 3501(a), where defendant incriminated himself approximately 10 hours after his arrest, which was not appreciably longer than six-hour "safe harbor" and was quite reasonable given fact that defendant was arrested in wee hours of Saturday morning. *United States v Pugh* (1994, CA8 Iowa) 25 F3d 669.

Footnotes

Footnote 3. 18 USCS § 3501(a).

Law Reviews: Gandara, Admissibility of Confessions in Federal Prosecutions: Implementation of § 3501 by Law Enforcement Officials and the Courts, 63 Geo LJ 305 (1974).

Footnote 4. 18 USCS § 3501(b).

For discussion of the particular factors considered to determine voluntariness under 18 USCS § 3501(b), see § 728.

Footnote 5. *United States v Shoemaker* (CA10 Okla) 542 F2d 561, cert den 429 US 1004, 50 L Ed 2d 616, 97 S Ct 537.

§ 721 --Relation to Bruton rule and Miranda doctrine

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although 18 USCS § 3501(a) states that a confession shall be admissible in evidence if it is voluntarily given,⁶ there are situations, involving the Bruton rule⁷ and the Miranda doctrine,⁸ in which an otherwise voluntary confession may still be inadmissible as a matter of constitutional law. A witness protected by the privilege against self-incrimination may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant, and absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.⁹

Separate from the issue of voluntariness recognized under 18 USCS § 3501 is the application of the Miranda doctrine excluding all confessions made by suspects undergoing custodial interrogation who have not received the Miranda warnings before making such a confession. Confessions may be excludible under the Miranda doctrine even though the statements might not be considered involuntary in traditional terms.¹⁰ Accordingly, it has been held that the statute is concerned only with the reliability of a confession as voluntarily given, and not with the extrinsic policy considerations of protecting the accused's constitutional rights and deterring future lawlessness by law enforcement personnel through the Miranda doctrine.¹¹ The Miranda decision advised that Congress was free to develop its own safeguards for the privilege against self-incrimination during custodial interrogation, so long as such safeguards were fully as effective as those described in the Miranda doctrine for informing accused persons of their right of silence and in affording a continuous opportunity to exercise it; where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them.¹²

The Miranda doctrine is viewed as more strict than the statute in its application; any statements held to be voluntary and admissible under the Miranda doctrine are automatically voluntary and admissible under 18 USCS § 3501.¹³

§ 721 --Relation to Bruton rule and Miranda doctrine [SUPPLEMENT]

Case authorities:

Statements elicited in noncompliance with the Miranda rule—requiring warnings, prior to custodial interrogation, as to the right to counsel and as to the privilege against self-incrimination—may not be admitted for certain purposes in a criminal trial. *Stansbury v California* (US) 128 L Ed 2d 293, 114 S Ct 1526.

Footnotes

Footnote 6. For a discussion of the admissibility of voluntary confessions under 18 USCS § 3501(a), see § 720.

Footnote 7. For a discussion of the Bruton rule, see § 751.

Footnote 8. As to Miranda, see § 749.

Footnote 9. *Minnesota v Murphy*, 465 US 420, 79 L Ed 2d 409, 104 S Ct 1136, reh den 466 US 945, 80 L Ed 2d 477, 104 S Ct 1932 and on remand (Minn) 348 NW2d 764, appeal after remand (Minn) 380 NW2d 766.

Footnote 10. *Michigan v Mosley*, 423 US 96, 46 L Ed 2d 313, 96 S Ct 321; *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

Assuming that there has been no break in the custody of the accused subsequent to the accused's assertion of the right to the assistance of counsel during custodial interrogation, if the police initiate an encounter with the accused in the absence of counsel subsequent to the accused's assertion of the right, the accused's statements made during the encounter are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the accused's statements would be considered voluntary under traditional standards. *McNeil v Wisconsin*, 501 US 171, 115 L Ed 2d 158, 111 S Ct 2204, 91 CDOS 4435, 91 Daily Journal DAR 6953.

As to the factors used to determine voluntariness under the traditional, due process standard, see §§ 728-748.

Footnote 11. *United States v Schipani* (ED NY) 289 F Supp 43, 68-2 USTC ¶ 9510, 22 AFTR 2d 5416, affd (CA2 NY) 414 F2d 1262, 69-2 USTC ¶ 9596, 24 AFTR 2d 69-5406, cert den 397 US 922, 25 L Ed 2d 102, 90 S Ct 902 and appeal after remand (CA2 NY) 435 F2d 26, 71-1 USTC ¶ 9243, 27 AFTR 2d 71-466, 22 ALR Fed 852, cert den 401 US 983, 28 L Ed 2d 334, 91 S Ct 1198 and (disapproved on other grounds by *Lego v Twomey*, 404 US 477, 30 L Ed 2d 618, 92 S Ct 619).

Footnote 12. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

Footnote 13. *United States v Vigo* (CA2 NY) 487 F2d 295 (disapproved on other grounds by *Arkansas v Sanders*, 442 US 753, 61 L Ed 2d 235, 99 S Ct 2586) as stated in *United States v Flippin* (CA9 Or) 924 F2d 163, 91 CDOS 431, 91 Daily Journal DAR 653, amd, reh den, en banc (CA9 Or) 91 CDOS 2138, 91 Daily Journal DAR 3252.

§ 722 --When confession does not result from custodial interrogation

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Nothing in the federal statute pertaining to admissibility of confessions in criminal

prosecutions brought by the United States or by the District of Columbia 14 bars the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention. 15 Thus, if a suspect approaches a police officer and, without any prompting, confesses to a crime, the confession is not inadmissible in the absence of any coercive police activity. 16

Accordingly, an informal statement volunteered by the accused to his cellmate, 17 or to a private person working undercover for the government 18 does not trigger the procedures mandated by 18 USCS § 3501, and no voluntariness hearing is required under the statute. 19 Moreover, the statute does not bar the admission of a confession not made under interrogation 20 –that is, spontaneous statements. 21 The accused is not under detention, and thus the statute is not applicable, when the accused makes incriminating statements while talking over the telephone to a federal agent. 22

The statute is consistent with the Miranda doctrine insofar as it does not apply to situations not involving interrogation 23 or at any time when the accused is not under arrest or otherwise in custody. 24 But the statute does not compromise the constitutional doctrine that surreptitious interrogations which elicit incriminating statements without the knowledge of the accused constitute a violation of the Sixth amendment right to counsel rendering the statements inadmissible. 25

§ 722 --When confession does not result from custodial interrogation [SUPPLEMENT]

Case authorities:

There was no prejudicial error in a first-degree murder prosecution where defendant alleged that he was improperly questioned after invoking his right to counsel and the trial court concluded that the statement made by defendant was spontaneous but did not make a specific finding as to who reinitiated conversation. Assuming that it was error for defendant's statements to have been admitted without an exact finding as to who reinitiated conversation, any error was harmless in light of his other statements, eyewitness testimony, and other corroborating testimony. *State v Walls* (1995) 342 NC 1, 463 SE2d 738.

Footnotes

Footnote 14. 18 USCS § 3501.

Footnote 15. 18 USCS § 3501(d).

For a discussion of custodial interrogation, see § 749.

Footnote 16. *Colorado v Connelly*, 479 US 157, 93 L Ed 2d 473, 107 S Ct 515.

Footnote 17. *United States v Lambros* (CA8 Minn) 564 F2d 26, 2 Fed Rules Evid Serv 505, cert den 434 US 1074, 55 L Ed 2d 779, 98 S Ct 1262.

Footnote 18. *United States v Infelise* (ND Ill) 773 F Supp 93.

Footnote 19. *United States v Diezel* (CA5 Fla) 608 F2d 204.

As to the federal statutory procedures for determining the voluntariness of a confession, including the requirement for a hearing, see § 724.

Footnote 20. *United States v Bailey* (CA7 Ind) 728 F2d 967, cert den 467 US 1229, 81 L Ed 2d 881, 104 S Ct 2686 (accused requested to speak with a specific DEA official, who did not ask any questions before receiving the confession).

Footnote 21. *United States v Colon* (CA2 NY) 835 F2d 27, cert den 485 US 980, 99 L Ed 2d 490, 108 S Ct 1279.

Footnote 22. *United States v Poschwatta* (CA9 Wash) 829 F2d 1477, 87-2 USTC ¶ 9565, 23 Fed Rules Evid Serv 929, 60 AFTR 2d 87-5794, cert den 484 US 1064, 98 L Ed 2d 989, 108 S Ct 1024.

Footnote 23. *Rhode Island v Innis*, 446 US 291, 64 L Ed 2d 297, 100 S Ct 1682 (dialogue between police officers which prompted the accused to disclose location of shotgun used in armed robbery held not to be interrogation requiring giving of Miranda warnings).

Footnote 24. As to the relationship between 18 USCS § 3501 and Miranda, see § 721.

Footnote 25. *United States v Henry*, 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183 (conversations with cellmate hired as government informant); *Massiah v United States*, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (conversation with codefendant fitted with radio transmitter by government agents).

As to the Sixth Amendment right to counsel, see § 750.

§ 723 Raising and determining voluntariness; hearing requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A defendant who claims a confession given by him was involuntary may move to suppress it. 26 If the motion alleges facts which, if true, show the involuntariness of the confession, the due process clause of the Fourteenth Amendment 27 requires that the trial judge conduct a hearing and independently resolve the issue. 28 A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. 29 This determination requires facing the voluntariness issue squarely, in illuminating isolation and unbecloved by other issues and the effect of extraneous but prejudicial evidence. 30 If the trial judge finds the confession involuntary, the confession is rejected and never comes to the attention of the jury. It is

only if the trial judge finds the confession voluntary that it may be considered by the jury.
31

◆ Comment: Where the facts are in dispute, and a state court fails, either at the time of trial or in a collateral proceeding, to hold a full and fair evidentiary hearing concerning the voluntariness of a confession, a federal habeas court 32 must hold an evidentiary hearing. A federal evidentiary hearing is required unless the state-court trier of fact has, after a full hearing, found the relevant facts. 33

Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession was voluntary must appear from the record with unmistakable clarity. 34

The separate hearing requirement of *Jackson v Denno* has no applicability in a bench trial setting, whether in state or federal court. 35

◆ Observation: *Jackson v Denno* was premised largely on the premise that lay jurors were unable to separate considerations going solely to the voluntariness of a confession from matters affecting its reliability as proof of the defendant's guilt or innocence. However, a trial judge, unlike a juror, is trained by learning and experience to segregate evidence bearing on a confession's voluntariness from evidence bearing on its reliability and the defendant's culpability. 36

It has been recognized that the Constitution does not require a voluntariness hearing absent some contemporaneous challenge to use of the confession voiced at trial, 37 that a trial court is not required, sua sponte, to provide a hearing on the voluntariness of a confession, 38 and that a trial court is not required to conduct a voluntariness hearing where defendant never challenged the voluntariness of his alleged confession. 39 However, it has also been determined that a trial judge has the responsibility, independent of a request by the defense counsel or the prosecutor, to immediately order voir dire on the voluntariness of a confession where the testimony disclosed that defendant had confessed to the police only after having been beaten. 40

◆ Practice guide: The defendant's testifying at the voluntariness hearing does not preclude him from refusing to testify at the trial proper. 41

Under the so-called "orthodox rule," the decision of the trial judge is final. Thus, if the trial judge finds the confession voluntary, this finding is binding upon the jury, in which case the jury may determine only whether the confession is truthful. 42 The decision in *Jackson v Denno* neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the Constitution requires submission of voluntariness claims to a jury as well as a judge. 43

Under the so-called "Massachusetts rule," the decision of the trial judge is not binding upon the jury. Thus, if the trial judge finds the confession voluntary, the jury is allowed to disagree and to ignore the confession. 44 Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not pose hazards to the rights of a defendant. 45

◆ Observation: The "orthodox" and "Massachusetts" rules are the same in requiring the trial judge independently to resolve the issue of voluntariness, and in allowing the confession to be submitted to the jury only if the trial judge finds the confession voluntary. The rules differ only with respect to the jury's role. Under the "orthodox rule," the jury may consider only the confession's truthfulness; while under the "Massachusetts rule," the jury may consider the confession's voluntariness as well as its truthfulness.

The United States Supreme Court has never squarely decided whether the voluntariness hearing must be conducted outside the presence of the jury. 46 However, under the applicable federal statute, voluntariness must be determined out of the presence of the jury. 47 Furthermore, some states have determined that the voluntariness hearing must be held outside of the presence of the jury. 48 But in some jurisdictions while a defendant is entitled to a hearing outside the presence of the jury to determine the voluntariness of his statements, he waives that right by failing to make a timely request. 49

§ 723 ----Raising and determining voluntariness; hearing requirement [SUPPLEMENT]

Case authorities:

There was no claim of coercion, defendant was advised at outset of interview that he was not under arrest, and throughout interview defendant continued his domestic activities, including watching television and preparing a meal. *State v Evans* (1993, Iowa) 495 NW2d 760.

At suppression hearing, defendant testified that his confession was coerced by threats and promises by police officer. Officer did not testify and State's witness did not controvert defendant's testimony, although confession did contain form recitals that it was given freely and voluntarily. Held, because defendant's allegations were not controverted, confession should have been suppressed. *Robinson v State* (1993, Tex App Houston (14th Dist)) 855 SW2d 107.

Determination of whether, considering countervailing evidence, defendant has knowingly and intelligently waived his Miranda rights should be made with regard for totality of circumstances. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

Where defendant filed motion to suppress statement that defendant claimed was not voluntary because of defendant's limited mental capacity, trial court was to determine whether state had shown by greater weight of credible evidence whether, considering totality of circumstances, defendant possessed awareness of state's intention to use statements to secure conviction and of defendant's right to stand mute and request lawyer such that defendant could validly weigh his Miranda rights. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

Footnotes

Footnote 26. *State v Trahan* (La) 416 So 2d 65 (motion to suppress inculpatory

statements properly denied where motion was not timely filed); *State v Gallegos* (App) 92 NM 336, 587 P2d 1347.

Forms: Affidavit—In support of motion to suppress evidence—Confession improperly obtained. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 253.

Footnote 27. As to the due process mandate that a confession be voluntarily made, see §§ 719 et seq.

Footnote 28. *State v James*, 141 Ariz 141, 685 P2d 1293, cert den 469 US 990, 83 L Ed 2d 332, 105 S Ct 398; *People v Monroe* (1st Dist) 95 Ill App 3d 807, 51 Ill Dec 130, 420 NE2d 544; *State v Narcisse* (La) 426 So 2d 118, cert den 464 US 865, 78 L Ed 2d 176, 104 S Ct 202, application den 464 US 957, 78 L Ed 2d 334, 104 S Ct 389 and reh den 464 US 1004, 78 L Ed 2d 702, 104 S Ct 515; *People v Jordan*, 413 Mich 944, 321 NW2d 13.

Footnote 29. *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205; *Church v Sullivan* (CA10 NM) 942 F2d 1501.

Footnote 30. *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205; *Church v Sullivan* (CA10 NM) 942 F2d 1501.

Footnote 31. *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205.

Although the trial judge ruled that defendant's confession was voluntary and hence admissible, he erred in precluding the defendant from introducing testimony about the physical and psychological environment in which the confession was obtained, since this kind of evidence is often highly relevant to its reliability and credibility. It was noted that the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial. *Crane v Kentucky*, 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142, 20 Fed Rules Evid Serv 801, on remand (Ky) 726 SW2d 302, cert den 484 US 834, 98 L Ed 2d 70, 108 S Ct 111, habeas corpus granted (WD Ky) 708 F Supp 163, affd (CA6 Ky) 889 F2d 715, cert den 493 US 1094, 107 L Ed 2d 1070, 110 S Ct 1168, appeal after remand (Ky) 833 SW2d 813, cert den (US) 122 L Ed 2d 167, 113 S Ct 1020.

Even if there was a flaw in the state trial court's procedure which resulted in a determination that the challenged confession was voluntary, *Jackson v Denno* was satisfied because the state court, in connection with defendant's second motion to vacate his sentence, unquestionably furnished a procedurally adequate evidentiary hearing. Moreover, it seemed that the finding of voluntariness was overwhelmingly supported. *Swenson v Stidham*, 409 US 224, 34 L Ed 2d 431, 93 S Ct 359, and on other grounds 410 US 904, 35 L Ed 2d 266, 93 S Ct 955 and on remand (CA8 Mo) 506 F2d 478, cert den 429 US 941, 50 L Ed 2d 311, 97 S Ct 358.

The rule of *Jackson v Denno*, that a jury is not to hear a confession until the trial judge has determined that it was freely and voluntarily given, is a constitutional rule binding upon the states and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed. *Sims v Georgia*, 385 US 538, 17 L Ed 2d 593, 87 S Ct 639.

◆ Comment: In prescribing this procedure, *Jackson v Denno* struck down the so-called "New York rule," and overruled *Stein v New York*, 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L Ed 362, 74 S Ct 13. Under the discredited "New York rule," the trial judge was permitted to exclude a confession only if in no circumstances could the confession be deemed voluntary. If a question of fact was presented, the confession would be submitted to the jury and it would determine the confession's voluntariness as well as its truthfulness.

Annotation: Comment Note: Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 ALR3d 1251.

Footnote 32. As to habeas corpus, generally, see 39 Am Jur 2d, Habeas Corpus.

Footnote 33. *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in *Joyner v King* (CA5 La) 786 F2d 1317) and (superseded by statute on other grounds as stated in *Blanco v Singletary* (CA11 Fla) 943 F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199); *Church v Sullivan* (CA10 NM) 942 F2d 1501 (federal district court acted within its discretion in refusing to grant evidentiary hearing because state-court trier of fact after full hearing reliably found relevant facts).

Footnote 34. *Sims v Georgia*, 385 US 538, 17 L Ed 2d 593, 87 S Ct 639.

If the trial judge rules that a confession was voluntary, his finding to that effect must appear in the record. *State v Costello*, 97 Ariz 220, 399 P2d 119; *State v Allen*, 239 Or 524, 398 P2d 477; *State v Moore*, 61 Wash 2d 165, 377 P2d 456.

A state statutory requirement that the trial court file its findings of fact and conclusions of law regarding the voluntariness of a confession whether or not the defendant objects to the absence of such omitted findings is no less compelling when the trial is to the court rather than to a jury. *Wicker v State* (Tex Crim) 740 SW2d 779, motion for rehearing on PDR denied (Nov 25, 1987) and cert den 485 US 938, 99 L Ed 2d 278, 108 S Ct 1117.

Footnote 35. *Allen v McCotter* (CA5 Tex) 804 F2d 1362, reh den, en banc (CA5 Tex) 808 F2d 1520; *United States ex rel. Placek v Illinois* (CA7 Ill) 546 F2d 1298.

As to federal statutory procedures for determining the voluntariness of a confession, see § 724.

Footnote 36. *Allen v McCotter* (CA5 Tex) 804 F2d 1362, reh den, en banc (CA5 Tex) 808 F2d 1520; *United States ex rel. Placek v Illinois* (CA7 Ill) 546 F2d 1298.

Footnote 37. *Selph v State*, 264 Ark 197, 570 SW2d 256.

Footnote 38. *State v Wheat* (Mo App) 573 SW2d 126.

Footnote 39. *Arnold v State* (Mo App) 632 SW2d 54, later proceeding (CA8 Mo) 725 F2d 81.

Footnote 40. *Commonwealth v Harris*, 371 Mass 462, 358 NE2d 982.

Footnote 41. *People v Walker*, 374 Mich 331, 132 NW2d 87.

Footnote 42. *Fincher v State*, 211 Ala 388, 100 So 657; *People v Salvador*, 189 Colo 181, 539 P2d 1273; *Graham v State (Fla)* 91 So 2d 662; *Caudill v State*, 224 Ind 531, 69 NE2d 549; *State v Holland*, 258 Iowa 206, 138 NW2d 86; *State v Seward*, 163 Kan 136, 181 P2d 478, adhered to 164 Kan 608, 191 P2d 743; *Bass v Commonwealth*, 296 Ky 426, 177 SW2d 386, cert den 323 US 745, 89 L Ed 596, 65 S Ct 64; *State v Wilson*, 217 La 470, 46 So 2d 738, affd 341 US 901, 95 L Ed 1341, 71 S Ct 611, reh den 341 US 934, 95 L Ed 1362, 71 S Ct 801; *People v Walker*, 374 Mich 331, 132 NW2d 87; *Andrews v State*, 220 Miss 28, 70 So 2d 40; *State v Ludwick*, 90 Mont 41, 300 P 558; *State v Lang*, 309 NC 512, 308 SE2d 317; *State v Kerns*, 50 ND 927, 198 NW 698; *State v Perry*, 14 Ohio St 2d 256, 43 Ohio Ops 2d 434, 237 NE2d 891; *State v Pursley (Tenn)* 547 SW2d 239, withdrawn by publisher, reported at (Tenn) 550 SW2d 949; *State v Ashdown*, 5 Utah 2d 59, 296 P2d 726, affd 357 US 426, 2 L Ed 2d 1443, 78 S Ct 1354; *McKinley v State*, 37 Wis 2d 26, 154 NW2d 344, 27 ALR3d 1172.

The procedure for the determination of the admissibility of a confession requires that the preliminary inquiry into the voluntary nature of the confession is for the trial court. Only the question of the credibility of a confession is submitted to the jury. A defendant is not entitled to relitigate the issue of voluntariness before the jury after the trial court has determined its admissibility. *People v Melock*, 149 Ill 2d 423, 174 Ill Dec 857, 599 NE2d 941, reh den (Oct 5, 1992).

Footnote 43. *Lego v Twomey*, 404 US 477, 30 L Ed 2d 618, 92 S Ct 619.

Footnote 44. *United States v Gravitt (CA5 Fla)* 484 F2d 375, cert den 414 US 1135, 38 L Ed 2d 761, 94 S Ct 879; *State v Owen*, 96 Ariz 274, 394 P2d 206; *Swagger v State*, 228 Ark 51, 305 SW2d 682; *Pistor v State*, 219 Ga 161, 132 SE2d 183, cert den 375 US 947, 11 L Ed 2d 277, 84 S Ct 357; *State v Evans*, 45 Hawaii 622, 372 P2d 365; *Duguay v State (Me)* 240 A2d 738, appeal after remand (Me) 309 A2d 234; *Barnhart v State*, 5 Md App 222, 246 A2d 280; *Commonwealth v Marshall*, 338 Mass 460, 155 NE2d 798; *State v Gower (Mo)* 418 SW2d 10; *State v Longmore*, 178 Neb 509, 134 NW2d 66; *State v Wolf*, 44 NJ 176, 207 A2d 670; *State v Vaisa*, 28 NM 414, 213 P 1038; *People v Huntley*, 15 NY2d 72, 255 NYS2d 838, 204 NE2d 179, on remand 46 Misc 2d 209, 259 NYS2d 369, affd (1st Dept) 27 App Div 2d 904, 281 NYS2d 970, affd 21 NY2d 659, 287 NYS2d 90, 234 NE2d 252, remittitur amd 21 NY2d 829, 288 NYS2d 912, 235 NE2d 915; *Davis v State (Okla Crim)* 437 P2d 271; *State v Brewton*, 238 Or 590, 395 P2d 874; *Commonwealth v Agoston*, 364 Pa 464, 72 A2d 575, cert den 340 US 844, 95 L Ed 619, 71 S Ct 9; *State v Benton (RI)* 413 A2d 104; *State v Lee*, 255 SC 309, 178 SE2d 652; *State v Harbaugh*, 132 Vt 569, 326 A2d 821; *McCoy v Commonwealth*, 206 Va 470, 144 SE2d 303; *State v Vance*, 162 W Va 467, 250 SE2d 146.

Footnote 45. *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205.

Footnote 46. *Pinto v Pierce*, 389 US 31, 19 L Ed 2d 31, 88 S Ct 192, reh den 389 US 997, 19 L Ed 2d 499, 88 S Ct 462 (noting that Supreme Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances).

Footnote 47. § 724.

Footnote 48. *Wallace v State*, 290 Ala 201, 275 So 2d 634; *Estep v State*, 244 Ark 843, 427 SW2d 535; *Jackson v United States* (Dist Col App) 404 A2d 911; *McDonnell v State* (Fla) 336 So 2d 553; *Schneider v State*, 130 Ga App 3, 202 SE2d 238; *People v Monroe* (1st Dist) 95 Ill App 3d 807, 51 Ill Dec 130, 420 NE2d 544; *Payne v State*, 168 Ind App 394, 343 NE2d 325; *State v Hansen*, 199 Kan 17, 427 P2d 627; *State v Collins* (Me) 297 A2d 620; *People v Switzer*, 135 Mich App 779, 355 NW2d 670; *Anderson v State* (Okla Crim) 510 P2d 998; *State v Blackford*, 16 Or App 217, 517 P2d 1196; *Commonwealth v Tabb*, 417 Pa 13, 207 A2d 884; *State v Pursley* (Tenn) 547 SW2d 239, withdrawn by publisher, reported at (Tenn) 550 SW2d 949; *Bonham v State* (Tex Crim) 644 SW2d 5, supp op (Tex Crim) 680 SW2d 815, reh den (Feb 20, 1985) and cert den 474 US 865, 88 L Ed 2d 153, 106 S Ct 184; *Raigosa v State* (Wyo) 562 P2d 1009.

Footnote 49. *State v Wargo* (App) 140 Ariz 70, 680 P2d 206, later proceeding (App) 145 Ariz 589, 703 P2d 533.

It was not reversible error for the trial court to hold a hearing on a motion to suppress a confession in the jury's presence, where the defense counsel made no objection and no evidence tended to indicate that the confession was involuntary. *Morris v State* (Fla App D1) 310 So 2d 757.

§ 724 --Procedures in federal court

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under federal statute, before a confession is received in evidence, the trial judge must, out of the presence of the jury, determine any issue as to voluntariness. 50 A federal trial court which determines the competency and admissibility of a confession in the presence of the jury does so at the risk of committing reversible error. 51 If the trial judge determines that the confession was voluntarily made, it will be admitted in evidence and the trial judge must permit the jury to hear relevant evidence on the issue of voluntariness, and must instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. 52 The requirement that a federal court make a pretrial determination of the voluntariness of the accused's confession does not undercut the accused's traditional prerogative to challenge the confession's reliability during the course of the trial, since questions of credibility are for the jury. Moreover, the defendant is entitled to have the jury consider evidence concerning the circumstances surrounding the confession, even if the defendant denies making any incriminating statements. 53

A hearing must be held if the voluntariness issue is raised. 54 The federal circuits are not all in accord regarding whether the statutory requirement of a hearing is waived if the defense makes no request for a hearing on the issue of voluntariness, or at least an objection to the admission into evidence of an incriminating statement or confession. Many circuits hold that a waiver occurs under these circumstances, 55 although

there is authority that a court should hold a voluntariness hearing on its own motion once the issue of voluntariness is clearly raised by the evidence. 56

◆ Caution: The fact that full Miranda warnings are given prior to a confession does not obviate the necessity of holding a voluntariness hearing pursuant to 18 USCS § 3501 if the issue of voluntariness is raised. 57

If a voluntariness hearing is required, the hearing must afford the accused an opportunity to testify regarding the inculpatory statement out of the jury's presence without prejudice to the accused's right not to take the stand at trial. 58 The hearing may be held even after the motion to suppress has been withdrawn. 59 Although the hearing should be held before admitting the confession in evidence, 60 a hearing after admitting the confession may cure the error in not conducting it in advance. 61

§ 724 --Procedures in federal court [SUPPLEMENT]

Case authorities:

Court did not commit plain error in failing to conduct hearing on voluntariness of defendant's alleged confession, and in failing to give jury instruction regarding alleged confession pursuant to 18 USCS § 3501(a), where defendant did not show that error had unfair prejudicial impact on jury's deliberations; district court gave general instruction on credibility of witnesses, defendant denied making any incriminating statements, confession testimony was strongly corroborated, and issue of voluntariness was downplayed. *United States v Iwegbu* (1993, CA5 Tex) 6 F3d 272.

Court did not commit plain error in failing to conduct hearing on voluntariness of defendant's alleged confession, and in failing to give jury instruction regarding alleged confession pursuant to 18 USCS § 3501(a), where defendant did not show that error had unfair prejudicial impact on jury's deliberations; district court gave general instruction on credibility of witnesses, defendant denied making any incriminating statements, confession testimony was strongly corroborated, and issue of voluntariness was downplayed. *United States v Iwegbu* (1993, CA5 Tex) 6 F3d 272.

Petitioner's coerced confession claim was procedurally barred as successive since petitioner raised coercion by interrogating officer in first petition and knew factual basis for claim then, even though affidavit of special prosecutor stating that interrogating officer admitting coercing petitioner was new. *Pickens v Lockhart* (1993, CA8 Ark) 4 F3d 1446, reh, en banc, den (CA8) 1993 US App LEXIS 28155 and petition for certiorari filed (Dec 9, 1993).

Footnotes

Footnote 50. 18 USCS § 3501(a).

The essence of the Supreme Court case of *Jackson v Denno* has been codified at 18 USCS § 3501. *United States v Santiago Soto* (CA1 Puerto Rico) 871 F2d 200, cert den 493 US 831, 107 L Ed 2d 66, 110 S Ct 103.

For discussion of *Jackson v Denno*, see § 723.

Hearings on the admissibility of confessions must in all cases be conducted out of the hearing of the jury. FRE, Rule 104(c).

Footnote 51. *United States v Caro* (CA10 Wyo) 965 F2d 1548, 35 Fed Rules Evid Serv 1306.

Footnote 52. 18 USCS § 3501(a).

As to the weight and sufficiency of evidence, generally, see §§ 1430 et seq.

Forms: Instruction for jury's consideration of defendant's confession—Weight to be accorded pretrial statement. 7A Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:908, 20:910.

Instruction for jury's consideration of defendant's confession—Jury to consider reliability and voluntariness in determining weight to be accorded pretrial statement. 7A Federal Procedural Forms, L Ed, Criminal Procedure § 20:909.

Instruction for jury's consideration of confession of defendant—Determination of voluntariness. 7A Federal Procedural Forms, L Ed, Criminal Procedure § 20:911.

Footnote 53. *United States v Wimberly* (CA8 Ark) 930 F2d 16.

Footnote 54. *United States v Moffett* (CA5 Tex) 522 F2d 1379; *United States v Janoe* (CA10 Kan) 720 F2d 1156, cert den 465 US 1036, 79 L Ed 2d 707, 104 S Ct 1310; *United States v Davidson* (CA11 Fla) 768 F2d 1266, reh den, en banc (CA11 Fla) 774 F2d 1179.

Footnote 55. *United States v Santiago Soto* (CA1 Puerto Rico) 871 F2d 200, cert den 493 US 831, 107 L Ed 2d 66, 110 S Ct 103; *United States v Stevens* (CA6 Ky) 445 F2d 304, cert den 404 US 945, 30 L Ed 2d 260, 92 S Ct 298; *United States v Yamashita* (CA9 Guam) 527 F2d 954; *United States v Hack* (CA10 Wyo) 782 F2d 862, cert den 476 US 1184, 91 L Ed 2d 549, 106 S Ct 2921.

Footnote 56. *United States v Iwegbu* (CA5 Tex) 6 F3d 272.

Footnote 57. *United States v Moffett* (CA5 Tex) 522 F2d 1379.

As to *Miranda* and its impact on confessions, generally, see §§ 749 et seq.

Footnote 58. *United States v Davidson* (CA11 Fla) 768 F2d 1266, reh den, en banc (CA11 Fla) 774 F2d 1179.

Footnote 59. *United States v Marvel* (CA5 Ala) 493 F2d 15, reh den (CA5 Ala) 496 F2d 1170.

Forms: Motion—To suppress defendant's confession—Evidentiary hearing as an alternative. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 246.

Footnote 60. 18 USCS § 3501(a).

Footnote 61. United States v Hathorn (CA5 Miss) 451 F2d 1337.

§ 725 Burden and standard of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The prosecution has the burden of proving the voluntariness of a confession by a preponderance of the evidence 62 or, in some jurisdictions, beyond a reasonable doubt. 63

◆ Observation: Although it has been held that the prosecution must prove at least by a preponderance of the evidence that a confession was voluntary, 64 it has been noted that states are free, pursuant to their own law, to adopt a higher standard. 65

§ 725 ----Burden and standard of proof [SUPPLEMENT]

Case authorities:

Before a defendant's inculpatory statement can be admitted for impeachment purposes, the state must show, by a preponderance of the evidence, that the statement was voluntarily made, and the voluntariness of the statement is determined by examining the totality of the circumstances surrounding the statement, including whether or not the defendant was read his rights. Willacy v State (1994, Fla) 640 So 2d 1079, 19 FLW S 258.

Whenever state bears burden of proof in motion to suppress statement that defendant claims was obtained in violation of Miranda, state must show only by greater weight of credible evidence that defendant's waiver was knowing and intelligent. State v Lee (1993, App) 175 Wis 2d 348, 499 NW2d 250.

Whenever state bears burden of proof in motion to suppress statement that defendant claims was obtained in violation of Miranda, state need prove waiver only by preponderance of evidence. State v Lee (1993, App) 175 Wis 2d 348, 499 NW2d 250.

When seeking admission of statements made during custodial questioning, separate showings which state must make are that defendant was informed of his Miranda rights, understood them and intelligently waived them and also that defendant's statement was voluntary. State v Lee (1993, App) 175 Wis 2d 348, 499 NW2d 250.

State met prima facie burdens for establishing admissibility of confession as, where police read defendant his Miranda rights and defendant indicated that he understood rights and was willing to make statement, state proved prima facie case that defendant voluntarily waived Miranda rights and, by showing that statement offered was made by

defendant and was not result of duress, threats, coercion or promises, state proved prima facie case that defendant's statements were voluntary. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

Even where evidence shows that there was no police coercion, law requires particular showing of knowing and intelligence in order for valid Miranda waiver to take place. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

When determining whether waiver of Miranda rights was knowing and intelligent, trial court is to apply objective standard under which validity of any Miranda waiver must be determined by court's inspection of particular circumstances involved, including education, experience and conduct of accused as well as credibility of police officers' testimony. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

In applying objective test to determine whether defendant's waiver of Miranda rights was knowing and intelligent, trial court should be mindful of federal constitutional distinction between two types of awareness under which first type of awareness involves knowing and understanding every possible consequence of waiver of First Amendment privilege which is not mental state necessary for valid Miranda waiver while second type of awareness which involves being cognizant at all times of state's intention to use statements to secure conviction and of fact that one can stand mute and request lawyer which is mental state necessary for valid Miranda waiver. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

To justify finding of involuntariness of confession, there must be some affirmative evidence of improper police procedures deliberately used to procure confession. *State v Schambow* (1993, App) 176 Wis 2d 286, 500 NW2d 362.

Footnotes

Footnote 62. *Lego v Twomey*, 404 US 477, 30 L Ed 2d 618, 92 S Ct 619; *United States v Jackson* (CA1 Mass) 918 F2d 236; *United States v Rojas-Martinez* (CA5 Tex) 968 F2d 415, cert den (US) 121 L Ed 2d 698, 113 S Ct 828 and cert den (US) 122 L Ed 2d 146, 113 S Ct 995; *United States v Church* (CA7 Ind) 970 F2d 401, cert den (US) 122 L Ed 2d 157, 113 S Ct 1009; *Duncan v State*, 278 Ala 145, 176 So 2d 840; *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421; *People v Shearer*, 181 Colo 237, 508 P2d 1249; *Pierce v State*, 238 Ga 126, 231 SE2d 744, cert den 431 US 930, 53 L Ed 2d 246, 97 S Ct 2635, reh den 433 US 916, 53 L Ed 2d 1102, 97 S Ct 2991; *State v Oliver* (Iowa) 341 NW2d 25; *People v Carigon*, 128 Mich App 802, 341 NW2d 803; *State v Nolan* (Mo) 423 SW2d 815; *State v La Freniere*, 163 Mont 21, 515 P2d 76; *State v Washington*, 57 NC App 309, 291 SE2d 270, petition den 306 NC 563, 294 SE2d 228; *Commonwealth ex rel. Butler v Rundle*, 429 Pa 141, 239 A2d 426; *State v Smith*, 268 SC 349, 234 SE2d 19; *Raigosa v State* (Wyo) 562 P2d 1009.

Footnote 63. *State v Loyd* (La) 425 So 2d 710, later proceeding (La) 459 So 2d 498, appeal after remand (La) 489 So 2d 898, stay gr (La) 491 So 2d 1348 and cert den 481 US 1042, 95 L Ed 2d 823, 107 S Ct 1984, reh den 483 US 1011, 97 L Ed 2d 749, 107 S Ct 3244; *Rhone v State* (Miss) 254 So 2d 750; *State v Phinney*, 117 NH 145, 370 A2d

1153; *State v Yough*, 49 NJ 587, 231 A2d 598; *People v Huntley*, 15 NY2d 72, 255 NYS2d 838, 204 NE2d 179, on remand 46 Misc 2d 209, 259 NYS2d 369, *affd* (1st Dept) 27 App Div 2d 904, 281 NYS2d 970, *affd* 21 NY2d 659, 287 NYS2d 90, 234 NE2d 252, *remititur* and 21 NY2d 829, 288 NYS2d 912, 235 NE2d 915; *State ex rel. Goodchild v Burke*, 27 Wis 2d 244, 133 NW2d 753, *cert den* 384 US 1017, 16 L Ed 2d 1039, 86 S Ct 1941.

Footnote 64. *Lego v Twomey*, 404 US 477, 30 L Ed 2d 618, 92 S Ct 619.

Footnote 65. *Lego v Twomey*, 404 US 477, 30 L Ed 2d 618, 92 S Ct 619; *State v Phinney*, 117 NH 145, 370 A2d 1153.

§ 726 Standard of review of voluntariness determination

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although great deference is normally given to the factual findings of a state court, the ultimate issue of voluntariness is a legal question requiring independent federal determination. 66

Whether a confession was voluntary is a question of law, and as such is subject to *de novo* review. 67

Although the ultimate issue of voluntariness is a legal question reviewable *de novo*, the trial court's rulings regarding subsidiary factual questions, such as whether the police intimidated or threatened a suspect 68 or whether the suspect was particularly susceptible to police coercion, are subject to review under the clearly erroneous standard. 69

It has been held that while a state court's finding that a confession was voluntary was a legal finding subject to *de novo* review by the district court in a habeas corpus proceeding, the state court's subsidiary factual findings are entitled to a presumption of correctness. 70

A trial court's factual determination, based on the totality of the circumstances, 71 concerning the voluntariness of a confession will not be reversed unless it is contrary to the manifest weight of all the evidence. 72 The credibility of the witnesses regarding the voluntariness of a statement is to be determined by the trial court, and that determination will not be reversed unless contrary to the manifest weight of the evidence. 73

Where a defendant appeals the denial of his motion to suppress a confession, the evidence is reviewed in the light most favorable to the government. 74

Where the defendant failed to object to the admission of alleged involuntary statements at trial, he waived all but plain error. 75

Footnotes

Footnote 66. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

Footnote 67. *United States v Church* (CA7 Ind) 970 F2d 401, cert den (US) 122 L Ed 2d 157, 113 S Ct 1009.

Whereas an allegation that a confession has been involuntary because of some element of police coercion implicates a defendant's due process rights under the Fourteenth Amendment, a review of his claim on appeal is de novo. *United States v Rigsby* (CA6 Tenn) 943 F2d 631, 33 Fed Rules Evid Serv 1417, cert den (US) 117 L Ed 2d 496, 112 S Ct 1269.

Footnote 68. Concerning the impact of threats on the voluntariness of a confession, see §§ 738, 739.

Footnote 69. *United States v Short* (CA10 Utah) 947 F2d 1445, 34 Fed Rules Evid Serv 326, cert den (US) 118 L Ed 2d 397, 112 S Ct 1680.

Footnote 70. *Bae v Peters* (CA7 Ill) 950 F2d 469 (applying 28 USCS § 2254(d), providing that, subject to certain exceptions, a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction shall be presumed to be correct, in a proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.

As to habeas corpus, generally, see 39 Am Jur 2d, Habeas Corpus.

Footnote 71. For a discussion that the voluntariness of a confession is based upon the totality of the circumstances, see § 719.

Footnote 72. *People v Ramey*, 152 Ill 2d 41, 178 Ill Dec 19, 604 NE2d 275, cert den (US) 124 L Ed 2d 663, 113 S Ct 2446.

As to the weight and sufficiency of evidence, see §§ 1403 et seq.

Footnote 73. *People v Ramey*, 152 Ill 2d 41, 178 Ill Dec 19, 604 NE2d 275, cert den (US) 124 L Ed 2d 663, 113 S Ct 2446.

Footnote 74. *United States v Short* (CA10 Utah) 947 F2d 1445, 34 Fed Rules Evid Serv 326, cert den (US) 118 L Ed 2d 397, 112 S Ct 1680.

Footnote 75. *State v Combs*, 62 Ohio St 3d 278, 581 NE2d 1071, reh den 62 Ohio St 3d 1503, 583 NE2d 974 and cert den (US) 119 L Ed 2d 573, 112 S Ct 2950 (admission of defendant's statement to nurse that he shot two bitches or whores not plain error where defendant conceded at trial that he had shot the two women and witnesses testified they saw him do so).

§ 727 --Application of harmless error rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admission at a state criminal trial, in violation of the Fourteenth Amendment's due process clause, 76 of a defendant's involuntary confession is subject to harmless-error analysis. 77

◆ Observation: Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. The court has the power to review the record de novo in order to determine an error's harmlessness. 78

◆ Caution: Where a defendant was motivated to confess to a government agent by a fear of physical violence at the hands of other inmates, 79 the risk that the confession was unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless. 80

§ 727 --Application of harmless error rule [SUPPLEMENT]

Case authorities:

Even if tape had not been admissible, admission would have been harmless error where state used tape to prove terroristic threat, for which defendant was acquitted, and defendant used tape in defense of both DWI and terroristic threat charges, even though defendant claimed he was harmed by his combative and abusive language, and fact that interpreter said words were slurred. *Vasquez Garza v State* (1990, Tex App Corpus Christi) 794 SW2d 530, reh overr (Aug 31, 1990) and petition for discretionary review ref (Jan 30, 1991).

Footnotes

Footnote 76. As to the due process requirement of voluntariness, see § 719.

Footnote 77. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067 (state failed to carry its burden of demonstrating that the admission of the confession did not contribute to defendant's conviction).

The admission of coerced confessions can constitute harmless error. *Pagan v Keane* (CA2 NY) 984 F2d 61.

For a discussion of the application of the harmless error rule to violations of the per se

mandates of *Miranda v Arizona* and *Edwards v Arizona*, see § 749.

Law Reviews: Ogletree, *Arizona v Fulminante* [111 S. Ct. 1246]: The Harm of Applying Harmless Error to Coerced Confessions, 105 Harv LR 152 (Nov 1991).

Footnote 78. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

As to the application of the harmless error rule in review, generally, see 5 Am Jur 2d, Appeal and Error §§ 776 et seq.

Annotation: Prejudicial effect of admitting at criminal trial evidence of confession or other self-incriminating statement obtained from accused in violation of Federal Constitution—Supreme Court cases, 113 L Ed 2d 757.

Footnote 79. As to the impact of violence on the voluntariness of a confession, see § 737.

Footnote 80. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

b. Particular Matters Affecting Voluntariness [728-748]

§ 728 Factors to be considered under federal statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A federal statute provides that the trial judge, in determining the issue of voluntariness, shall take into consideration all the circumstances surrounding the giving of the confession, 81 including five enumerated factors: (1) the time elapsing between the arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment; 82 (2) whether the defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession; (3) whether or not the defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him; (4) whether or not the defendant had been advised prior to questioning of his right to the assistance of counsel; 83 and (5) whether or not the defendant was without the assistance of counsel when questioned and when giving a confession. 84

◆ **Observation:** The substance of the *Miranda* warnings 85 is repeated as the final three factors for determining the voluntariness of a confession under 18 USCS §§ 3501(b)(3)-(5). 86

The presence or absence of any of the above-mentioned factors need not be conclusive on the issue of the voluntariness of the confession. 87 The statutory factors do not constitute a mandatory checklist which must be affirmatively established by the accused before a confession may be found involuntary. The statute does not purport to exhaust all the factors which may bear on the voluntariness of a confession viewed in the totality of the circumstances of a particular case. 88 It is the affirmative presence of factors indicating an overbearance of the accused's will 89 which is significant in determining the voluntariness of the confession. 90

Under the statute, 91 an accused need not be advised of the specific statute he is suspected of violating before confessing. 92

§ 728 ----Factors to be considered under federal statute [SUPPLEMENT]

Case authorities:

Motion to suppress is denied to criminal defendant with respect to statements made on first day of custody and is granted for statements made on second day, where Miranda warnings were given first day and not repeated on second day, since, in weighing factors under 18 USCS § 3501(b), length of detention, although reasonable, renders statements made on second day not voluntary. *United States v Copeland* (1993, SD NY) 830 F Supp 216.

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress inculpatory statements where the trial court found as fact that prior to the interview defendant was not arrested; he was given Miranda warnings, he understood those warnings, and he waived his rights; the interrogating officers wore civilian clothing, displayed no weapons, and the environment was not intimidating; defendant was calm and in control of his faculties; he was told that he was free to leave; he had experience with the criminal justice system; he was thirty-five and had worked in responsible managerial positions in different businesses; defendant stated that Agent Crawford was cordial during the interview and that he did not feel threatened; and the interview lasted thirty-six minutes. Although Agent Crawford conceded that some of his statements to defendant were untrue and several contained statements which defendant contends included implicit promises or threats, the untrue statements alone do not establish coercion, many were ambiguous, there were clearly times when Crawford was simply urging defendant to confess in order to ease his conscience, and defendant's voir dire testimony tends to belie the assertion that his confession was coerced. *State v Hardy* (1994) 339 NC 207, 451 SE2d 600.

Although a defendant in a first- degree murder prosecution contended that the totality of circumstances surrounding his statement, the presence of psychological coercion, and his condition show that his statement should not have been admitted, the court found based on substantial evidence that no threats or promises induced defendant to make his statement, that defendant was not under the influence of alcohol, was not in need of medical attention, and did not request food or beverage, and these findings are based on substantial evidence and are binding. *State v Bowie* (1995) 340 NC 199, 456 SE2d 771.

Footnotes

Footnote 81. § 720.

Footnote 82. As to the impact of delay in bringing the accused before a magistrate on voluntariness under 18 USCS § 3501.

Footnote 83. As to the Sixth Amendment right to counsel, see § 750.

With respect to the Fifth Amendment right to counsel during interrogation, derived from the Miranda decision, see §§ 649, 750.

Footnote 84. 18 USCS § 3501(b).

Footnote 85. As to the warnings required under Miranda, see § 649.

Footnote 86. For a discussion of the principle that whether warnings of the defendant's constitutional rights were given is a factor bearing upon the voluntariness of a confession, see § 748.

Footnote 87. 18 USCS § 3501(b).

Footnote 88. *United States v Brown* (CA6 Mich) 557 F2d 541, 2 Fed Rules Evid Serv 312 (disapproved on other grounds by *Colorado v Connelly*, 479 US 157, 93 L Ed 2d 473, 107 S Ct 515) as stated in *United States v Coleman* (CA6) 1991 US App LEXIS 5070.

Footnote 89. For a discussion that the test for voluntariness is whether the accused's will was overborne, see § 719.

Footnote 90. *United States v Brown* (CA6 Mich) 557 F2d 541, 2 Fed Rules Evid Serv 312 (disapproved on other grounds by *Colorado v Connelly*, 479 US 157, 93 L Ed 2d 473, 107 S Ct 515) as stated in *United States v Coleman* (CA6) 1991 US App LEXIS 5070.

Footnote 91. 18 USCS § 3501.

Footnote 92. *United States v Williams* (CA5 La) 616 F2d 759, 5 Fed Rules Evid Serv 1328, cert den 449 US 857, 66 L Ed 2d 72, 101 S Ct 156.

§ 729 Confession made to person in authority

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession is not ipso facto involuntary merely because it was made to a person in authority, 93 but where an inducement or promise is made to the accused, the authority of the person involved may have a bearing on whether the confession is deemed

§ 729 ----Confession made to person in authority [SUPPLEMENT]

Case authorities:

Incriminating statement made by defendant charged with leaving scene of automobile accident involving death was properly admitted where defendant was coherent and cooperative at time he waived Miranda rights, and he spoke clearly and without hesitation. *Lowe v State* (1993, Ala App) 627 So 2d 1127, reh den, without op (Ala App) 1993 Ala Crim App LEXIS 1169 and cert den, without op (Ala) 1993 Ala LEXIS 1392.

Delay in taking defendant before judicial officer did not require suppression of his two confessions. As to first confession, within hour of his arrest at 5 p.m., defendant asked to speak to police officer and officer met with him as soon as other matters were completed. Between midnight, when interview began, and 3:30 a.m., when it ended, defendant confessed to all crimes with which he was later charged except one. There was no basis to suppress this confession either for unnecessary delay or for causal connection between confession and lapse of time; defendant's confession appeared to have been entirely prompted by his own purposes. As to second confession at 5:30 p.m., want of appearance before judicial officer did not constitute unnecessary delay, particularly since defendant's medical problems necessitated his spending part of day at hospital. Although details of events were sketchy, inasmuch as defendant had been confined for less than 24 hours, it was not state's burden to disprove that any delay in arraignment was simply for sake of delay or was motivated by ill- will. Rather, it was defendant's burden to show that delay was precipitating cause of confession and there was no such proof in record. *Adams v State* (1993) 314 Ark 431, 863 SW2d 285.

Defendant, who voluntarily accompanied police officer to station and who, during interview, told officer what defendant had "heard," was not undergoing custodial interrogation. *Wilson v State* (1993) 208 Ga App 812, 432 SE2d 211, 93 Fulton County D R 1835, cert den (Ga) slip op.

Footnotes

Footnote 93. *Gallegos v Nebraska*, 342 US 55, 96 L Ed 86, 72 S Ct 141; *Tait v State*, 37 Ala App 130, 65 So 2d 208, cert den 259 Ala 16, 65 So 2d 212; *Roman v State*, 23 Ariz 67, 201 P 551; *Turnage v State*, 182 Ark 74, 30 SW2d 865; *Price v State*, 114 Ga 855, 40 SE 1015; *Manley v State*, 197 Ind 583, 151 NE 403; *State v Storms*, 113 Iowa 385, 85 NW 610; *State v Ralston*, 131 Kan 138, 289 P 409; *State v Lewis*, 175 La 696, 144 So 423; *State v McGuire*, 327 Mo 1176, 39 SW2d 523; *State v Daniels*, 134 NC 641, 46 SE 743; *Sholes v State*, 97 Okla Crim 158, 260 P2d 440; *Commonwealth v Cavalier*, 284 Pa 311, 131 A 229; *Bain v State* (Tex Crim) 74 SW 542; *State v Seablom*, 103 Wash 53, 173 P 721; *Esterra v State*, 196 Wis 104, 219 NW 349.

Footnote 94. § 741.

§ 730 Involuntariness of prior confession

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The fact that one confession is involuntary and hence inadmissible does not necessarily mean that a subsequent confession will be involuntary. 95 Whether the subsequent confession is voluntary depends in large part on whether there was a break in the stream of events sufficient to insulate the second confession from the earlier taint. 96 This question, in turn, depends upon a number of subsidiary factors, including the time that passed between the confessions, the change in the place of interrogations, and the change in identity of the interrogators. 97 Also relevant is whether a defendant received renewed Miranda warnings, 98 whether he remained in custody following the first confession and through the second, whether he was denied access to counsel, and whether he initiated contact with authorities before his second confession. 99

§ 730 ----Involuntariness of prior confession [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder prosecution by not excluding defendant's statement, which defendant claimed was tainted by an earlier statement which was excluded due to a violation of the juvenile code. A subsequent, valid waiver of rights is not tainted by an earlier, voluntary but improper waiver of these rights. *State v Bunnell* (1995) 340 NC 74, 455 SE2d 426.

Footnotes

Footnote 95. *Stroble v California*, 343 US 181, 96 L Ed 872, 72 S Ct 599, 1 Media L R 1169, reh den 343 US 952, 96 L Ed 1353, 72 S Ct 1039; *People v Levendoski* (3d Dist) 100 Ill App 3d 755, 55 Ill Dec 867, 426 NE2d 1241.

The fact that the police beat a confession out of a defendant does not permanently disable him from giving a voluntary statement at a later time. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Practice References Use of Inadmissible Confession–Subsequent Confessions. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 31.

Footnote 96. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

As to whether a Miranda violation taints a subsequent waiver of Miranda rights, see § 749.

Concerning whether an improper arrest, search, or other fourth amendment violation

taints a later confession under the "fruit of the poisonous tree" doctrine, see § 752.

Footnote 97. *Oregon v Elstad*, 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285; *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Footnote 98. As to the warnings required under the *Miranda* decision, see § 749.

Footnote 99. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Where a Drug Enforcement Administration agent coerced the defendant's first confession with improper tactics, nothing in the record suggested that the taint clinging to the first confession was dissipated, no significant time elapsed between the first questioning and when the defendant made his subsequent statement to another agent, the suspect was at all times in custody and under close police supervision with the same agents present on both occasions, the defendant's second statement was tainted by his first coerced confession and, therefore, was correctly suppressed. *United States v Anderson* (CA2 NY) 929 F2d 96.

§ 731 Psychological coercion, generally; advising or urging accused to tell truth

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession is involuntary whether coerced by physical intimidation ¹ or by psychological pressure. ² However, psychological coercion does not render a confession per se involuntary, so that, in such circumstances, the totality of the circumstances test to determine voluntariness ³ applies. ⁴ However, threats ⁵—such as threats of violence ⁶—and deception or trickery ⁷ may, under certain circumstances, render a confession involuntary and therefore inadmissible. Furthermore, excessive delay in bringing the accused before a magistrate, ⁸ or an abnormally prolonged interrogation, ⁹ are also factors that may result in a finding that a confession was involuntary.

A mere adjuration to speak the truth, however, does not in itself render a confession involuntary. ¹⁰ For example, an officer's statement to the defendant that "it would be better for him to tell the truth" did not render the defendant's confession inadmissible. ¹¹ Nor was an interrogating officer's statement to the defendant that he "would feel better if he got it off his chest" was not improper inducement rendering a confession inadmissible. ¹² And a defendant's confession was not rendered inadmissible because her boyfriend, in the presence of law officers, urged her to tell the truth. ¹³

§ 731 ----Psychological coercion, generally; advising or urging accused to tell truth [SUPPLEMENT]

Case authorities:

Defendant's statements made after her arrest to armed federal agent who had searched her house and taken her companion to jail were not voluntary, where police officer without making explicit threats suggested to her that exercise of right to remain silent might result in harsher treatment by court or prosecutor. *United States v Harrison* (1994, CA9 Cal) 34 F3d 886, 94 CDOS 6916, 94 Daily Journal DAR 12709.

The trial court properly concluded that defendant's statements to police officers were voluntarily and freely made where the detective did not accuse defendant of lying, but rather informed him of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him; at the time the detective made the statements defendant contended were coercive, the detective had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder; and defendant's contention that he was intimidated or coerced by the detective's profanity was without merit in light of defendant's own use of profanity. *State v McCullers* (1995) 341 NC 19, 460 SE2d 163.

In prosecution for promoting prostitution, trial court did not err in admitting, as substantive evidence, prior inconsistent statement of prostitute, implicating defendant, where it was clear that statement had been made voluntarily, and that witness neither had been coerced into making statement nor had any motive to lie in making it. *State v Nelson* (1994) 74 Wash App 380, 874 P2d 170, review den 125 Wash 2d 1002, 886 P2d 1134.

While finding that countervailing evidence showed that defendant's statement or Miranda waiver was involuntary was foreclosed by requirement that governmental coercion cause involuntariness and by fact state met prima facie showing that no coercion existed, defendant could still show countervailing evidence that waiver was not knowing and intelligent. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

Footnotes

Footnote 1. As to physical mistreatment of or use of violence against an accused as affecting the voluntariness of his or her confession, see §§ 736 and , see §§ 737.

Footnote 2. *United States v Tingle* (CA9 Cal) 658 F2d 1332.

Coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion. *Blackburn v Alabama*, 361 US 199, 4 L Ed 2d 242, 80 S Ct 274.

Footnote 3. As to the application of such test to determine voluntariness of confessions, generally, see § 719.

Footnote 4. *United States v Miller* (CA9 Cal) 984 F2d 1028, 93 CDOS 658, 93 Daily Journal DAR 1295, cert den (US) 126 L Ed 2d 210, 114 S Ct 258 (psychological coercion provokes no per se rule; in psychological coercion cases must consider totality of circumstances and their effect upon defendant's will).

Footnote 5. § 738.

Footnote 6. § 739.

Footnote 7. § 743.

Footnote 8. §§ 732 et seq.

Footnote 9. § 735.

Footnote 10. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Martin v United States* (CA4 Va) 166 F2d 76; *Murphy v United States* (CA7 Ill) 285 F 801, cert den 261 US 617, 67 L Ed 829, 43 S Ct 362; *Huffman v State*, 130 Ala 89, 30 So 394; *Laub v State*, 24 Ariz 175, 207 P 465; *People v Nelson* (1st Dist) 224 Cal App 2d 238, 36 Cal Rptr 385; *State v Tomassi*, 137 Conn 113, 75 A2d 67; *Frazier v State* (Fla) 107 So 2d 16; *Watkins v State*, 199 Ga 81, 33 SE2d 325; *People v Davis*, 10 Ill 2d 430, 140 NE2d 675, cert den 355 US 820, 2 L Ed 2d 35, 78 S Ct 25; *Benson v State*, 119 Ind 488, 21 NE 1109; *State v Kornstett*, 62 Kan 221, 61 P 805; *State v Petterway* (La) 403 So 2d 1157; *Ralph v State*, 226 Md 480, 174 A2d 163, cert den 369 US 813, 7 L Ed 2d 613, 82 S Ct 689; *State v Holden*, 42 Minn 350, 44 NW 123; *State v Tharp*, 334 Mo 46, 64 SW2d 249; *Heldt v State*, 20 Neb 492, 30 NW 626; *State v Boyle*, 49 Nev 386, 248 P 48; *Fouts v State*, 8 Ohio St 98; *State v Linn*, 179 Or 499, 173 P2d 305; *Commonwealth v Weiss*, 284 Pa 105, 130 A 403; *State v Habib*, 18 RI 558, 30 A 462; *State v Swygert*, 130 SC 91, 124 SE 636; *State v Allison*, 24 SD 622, 124 NW 747; *Barksdale v State*, 200 Tenn 322, 292 SW2d 193; *Brown v State*, 153 Tex Crim 381, 220 SW2d 476; *Kiefer v State*, 258 Wis 47, 44 NW2d 537.

Mere exhortations to tell the truth or to make a statement do not, without more, render a subsequent confession inadmissible. *People v Noe* (3d Dist) 86 Ill App 3d 762, 42 Ill Dec 105, 408 NE2d 483.

Footnote 11. *State v Raines*, 30 NC App 176, 226 SE2d 546, cert den 290 NC 780, 229 SE2d 35.

◆ Observation: It is permissible to elicit further statements by claiming not to believe an accused's denials that she committed the crime in question. *Jenner v Smith* (CA8 SD) 982 F2d 329, cert den (US) 126 L Ed 2d 49, 114 S Ct 81.

As to the effect of employing deception or trickery on the voluntariness of a confession, generally, see § 743.

Footnote 12. § 741.

Footnote 13. *State v Poole*, 44 NC App 242, 261 SE2d 10.

§ 732 Delay in arraignment; federal proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the case of *McNabb v United States*, the United States Supreme Court held that a confession of guilt, though not the result of coercion, physical or psychological, was inadmissible where made by one under arrest and detained in violation of law requiring one in custody to be brought before a United States Commissioner or judicial officer. 14 The current rule of criminal procedure, Rule 5(a) of the Federal Rules of Criminal Procedure, applicable in federal criminal prosecutions, is that an arrested person must be brought without unnecessary delay before the nearest available federal magistrate or, if a magistrate is not reasonably available, before a state or local judicial officer authorized by federal statute to arrest and imprison offenders for violations of federal law. 15 Thus, the *McNabb* rule was modified such that a confession made by one under arrest and detained too long in violation of Rule 5(a) is inadmissible in a federal criminal case. 16 The *McNabb* case has been followed in a number of cases decided in the United States Supreme Court and lower federal courts, and an illegal delay in arraignment has been held sufficient to render inadmissible a confession procured during the period of delay, 17 especially where it also appears that coercive measures were used to obtain confessions. 18

◆ Observation: The rule that a confession is inadmissible where obtained from an accused during an unlawful detention—unlawful because, after arrest, he was not brought before a magistrate "without unnecessary delay"—even though the confession otherwise appeared to be voluntary, has sometimes been referred to as the "McNabb-Mallory" rule. 19

Since the *McNabb* rule was predicated on the provision of Rule 5(a) of the Federal Rules of Criminal Procedure requiring commitment "without unnecessary delay," it follows that the legality of the detention, so far as a confession obtained during that period is concerned, depends upon whether it was or was not necessary. 20 In this respect, no hard and fast rule could be laid down as to what circumstances may constitute "unnecessary delay" rendering a confession inadmissible, since the circumstances varied greatly from case to case, and from area to area, and whether a confession should be excluded was a question of law to be determined by the district judge. 21 Rule 5(a)'s requirement that persons under arrest before a committing magistrate "without unnecessary delay" does not call for mechanical or automatic obedience, 22 and the *McNabb* case did not stand for the proposition that arresting federal officers have to make a beeline to the commissioner's office. 23

The rule in the *McNabb* case has been qualified to the extent that where the delay in the arraignment was not illegal, or was necessary and reasonable under the circumstances, 24 as where the delay was due to the unavailability of a magistrate or commissioner, 25 confessions obtained during the delay are not inadmissible, provided they are otherwise voluntary. But this does not mean that an extended delay resulting in a confession will be sanctioned as an exercise of the discretion of arresting officers in finding exceptional circumstances. 26

By federal statute the trial judge, in determining the issue of voluntariness, shall take into consideration all the circumstances surrounding the giving of the confession, 27 including five enumerated factors, 28 one of which is the time elapsing between the arrest and arraignment of the accused making the confession, if it was made after arrest and before arraignment. 29 Furthermore, the "McNabb-Mallory" rule has been liberalized and, at least to some extent, legislatively overruled by a statutory provision which, in its pertinent portion provides that, in any federal prosecution, a confession made while the defendant was under arrest or other detention will not be inadmissible solely because of delay in bringing him before a magistrate, if such confession is found by the trial judge to have been made voluntarily, if the weight to be given the confession is left to the jury, and if such confession was made within six hours immediately following his arrest or other detention. 30 However, under the statute, the 6-hour time limitation will not apply if the delay beyond the 6-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate. 31 Federal Rule of Criminal Procedure 5(a)'s prohibition against unreasonable delay must be read in conjunction with 18 USCS § 3501(c). 32 Under 18 USCS § 3501(c), delay alone does not make the confession inadmissible; rather, it is the voluntary character of the confession that constitutes the real test of its admissibility. 33

Generally speaking, it is the period between arrest and confession that is critical, rather than the period between arrest and the initial appearance before a magistrate; 34 if the confession is timely, any subsequent delay between confession and the appearance is not significant. 35 However, it has been held that there may be circumstances in which a voluntary in-custody confession, 36 made subsequent to arrest and prior to an appearance before a magistrate, may be suppressed solely because of the delay in bringing the accused before a magistrate. 37

Under the federal statute, 38 delay is to be measured from the beginning of an arrest or other detention for a violation of federal law. 39 Therefore, if a person is arrested and held on a federal charge by any law enforcement officer—federal, state, or local—that person is under arrest or other detention for purposes of 18 USCS § 3501(c) and its 6-hour safe harbor period. 40 If, however, the person is arrested and held on state charges, the federal statute 41 does not apply and the safe harbor period is not implicated, even if the arresting officers (who will almost certainly be agents of the state or one of its subdivisions) believe or have cause to believe that the person may also have violated federal law. 42

◆ Observation: The term delay presumes an obligation to act. Consequently, there can be no delay in bringing a person before a federal magistrate until the duty to do so arises. The duty to bring a person before a federal magistrate does not arise until the person has been arrested or detained for a federal offense. 43 An exception to the rule that only detention for a federal crime triggers the federal statute 44 may exist if the accused can show that there was a working arrangement between state and federal officers to aid and abet the federal officers in interrogating the accused in violation of Federal Rule of Criminal Procedure 5(a)'s requirement of prompt arraignment. 45 Any period during which the accused receives medical treatment at his own request is excluded in computing unnecessary delay. 46

§ 732 ----Delay in arraignment; federal proceedings [SUPPLEMENT]

Practice Aids: Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS sec. 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate 124 ALR Fed 263.

Rules:

FR Crim P, Rule 5 was amended in 1995 to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 USCS § 1073, when no federal prosecution is intended.

Case authorities:

There was no merit to defendant's contention that his confession should have been suppressed since he was interrogated for ten hours and confessed prior to being taken before a magistrate in violation of GS § 15A-501(2), since the officers fully advised defendant of his constitutional rights before the interrogation began; if defendant had been taken before a magistrate, he would have been advised of those same rights; and the court cannot hold that defendant would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer. *State v Littlejohn* (1995) 340 NC 750, 459 SE2d 629.

Footnotes

Footnote 14. *McNabb v United States*, 318 US 332, 87 L Ed 819, 63 S Ct 608, reh den 319 US 784, 87 L Ed 1727, 63 S Ct 1322.

Footnote 15. FR Crim P, Rule 5(a), discussed generally in 21 Am Jur 2d, Criminal Law § 421.

Practice References Proving Particular Facts—Unreasonable Detention; Sample Proof. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 107.

Footnote 16. *Mallory v United States*, 354 US 449, 1 L Ed 2d 1479, 77 S Ct 1356.

Forms: Motion and notice to suppress incriminating statements of defendant—Delay in bringing defendant before magistrate. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:592.

Motion—For suppression of evidence—Incriminating statements of defendant—Delay in bringing defendant before magistrate. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 161.

Affidavit—In support of motion to suppress defendant's incriminating statements—Delay in bringing defendant before magistrate. 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 164.

Footnote 17. *United States v Bayer*, 331 US 532, 91 L Ed 1654, 67 S Ct 1394, reh den 332 US 785, 92 L Ed 368, 68 S Ct 29 and (criticized on other grounds by *Oregon v Elstad*, 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285) as stated in *State v Smith* (Tenn) 834 SW2d 915; *Greenwell v United States*, 119 US App DC 43, 336 F2d 962.

Footnote 18. *Johnson v Pennsylvania*, 340 US 881, 95 L Ed 640, 71 S Ct 191; *Harris v South Carolina*, 338 US 68, 93 L Ed 1815, 69 S Ct 1354; *Turner v Pennsylvania*, 338 US 62, 93 L Ed 1810, 69 S Ct 1352, appeal after remand 367 Pa 403, 80 A2d 708, appeal after remand 371 Pa 417, 88 A2d 915, 32 ALR2d 346; *Watts v Indiana*, 338 US 49, 93 L Ed 1801, 69 S Ct 1347; *Haley v Ohio*, 332 US 596, 92 L Ed 224, 68 S Ct 302, 36 Ohio Ops 530.

A confession of guilt, though not the result of torture, physical or psychological, is inadmissible in evidence where made by one under arrest during a 30-hour period while he was being detained by the police for the purpose of interrogation, without being taken before the nearest available committing magistrate, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, requiring such commitment without unnecessary delay. *Upshaw v United States*, 335 US 410, 93 L Ed 100, 69 S Ct 170.

Where the detention is unreasonable in length and its purpose is not investigatory but to keep the accused in custody for an indefinite period until he confesses, statement taken may not be received in evidence at the later trial, particularly where the grounds for arrest or a warrant of arrest existed for some time before the accused confessed. *United States v Middleton* (CA2 NY) 344 F2d 78.

Annotation: Admissibility of confession or other statement made by defendant as affected by delay in arraignment—Modern state cases, 28 ALR4th 1121.

Prejudicial effect of admitting at criminal trial evidence of confession or other self-incriminating statement obtained from accused in violation of Federal Constitution—Supreme Court cases, 113 L Ed 2d 757.

Admissibility of pretrial confession in criminal case, 12 L Ed 2d 1340.

Footnote 19. *Wharton's Criminal Evidence* (14th ed) § 632.

Footnote 20. *Williams v United States* (CA9 Cal) 273 F2d 781, cert den 362 US 951, 4 L Ed 2d 868, 80 S Ct 862.

The time between the arrest and the confession is the critical period under the federal rule excluding a confession where there is a delay in the arraignment of a prisoner. *Jackson v United States*, 114 US App DC 181, 313 F2d 572.

The defendant's confession was admissible where there was no convincing evidence that the length of time between his arrest and arraignment amounted to such unnecessary delay as to have been operative in inducing his confession. *State v Lionberg* (RI) 533 A2d 1172, habeas corpus dismissed (DC RI) 779 F Supp 672.

Footnote 21. *Holt v United States* (CA8 Mo) 280 F2d 273, cert den 365 US 838, 5 L Ed 2d 747, 81 S Ct 750; *Williams v United States* (CA9 Cal) 273 F2d 781, cert den 362 US

951, 4 L Ed 2d 868, 80 S Ct 862.

Footnote 22. *Mallory v United States*, 354 US 449, 1 L Ed 2d 1479, 77 S Ct 1356.

Footnote 23. *Williams v United States* (CA9 Cal) 273 F2d 781, cert den 362 US 951, 4 L Ed 2d 868, 80 S Ct 862.

The words "without unnecessary delay" do not and cannot mean "instantly," but mean as quickly as possible after certain matters have been attended to, such as (a) booking of the suspect, (b) quick verification through third persons of the story volunteered by the accused, and (c) search of the arrested person. *Muldrow v United States* (CA9 Cal) 281 F2d 903.

Footnote 24. *United States v Vita* (CA2 NY) 294 F2d 524, cert den 369 US 823, 7 L Ed 2d 788, 82 S Ct 837 and cert den 369 US 866, 8 L Ed 2d 85, 82 S Ct 1032; *Rogers v United States* (CA5 Tex) 330 F2d 535, cert den 379 US 916, 13 L Ed 2d 186, 85 S Ct 265; *Symons v United States* (CA9 Cal) 178 F2d 615, 38 AFTR 1046, cert den 339 US 985, 94 L Ed 1388, 70 S Ct 1006; *Mares v Hill*, 118 Utah 484, 222 P2d 811, cert den 341 US 933, 95 L Ed 1361, 71 S Ct 799.

Footnote 25. *Symons v United States* (CA9 Cal) 178 F2d 615, 38 AFTR 1046, cert den 339 US 985, 94 L Ed 1388, 70 S Ct 1006; *Moore v State*, 207 Miss 140, 41 So 2d 368, cert den 338 US 844, 94 L Ed 516, 70 S Ct 93; *Williams v State*, 166 Tex Crim 368, 314 SW2d 308.

Footnote 26. *Mallory v United States*, 354 US 449, 1 L Ed 2d 1479, 77 S Ct 1356.

Footnote 27. As to the requirement that the voluntariness of a confession be determined in light of the totality of the circumstances, see § 719.

Footnote 28. As to the federal statutory factors which a trial judge is required to consider in arriving at a determination regarding the voluntariness of a confession, see § 728.

Footnote 29. 18 USCS § 3501(b).

Footnote 30. 18 USCS § 3501(c).

Footnote 31. § 733.

Footnote 32. *United States v Cruz Jimenez* (CA1 Puerto Rico) 894 F2d 1.

Footnote 33. *United States v Christopher* (CA6 Ky) 956 F2d 536, cert den (US) 120 L Ed 2d 875, 112 S Ct 2999; *United States v Van Lufkins* (CA8 SD) 676 F2d 1189, 10 Fed Rules Evid Serv 563; *United States v Halbert* (CA9 Ariz) 436 F2d 1226, 12 ALR Fed 360.

Annotation: Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS § 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in arraignment, 12 ALR Fed 377.

Footnote 34. *United States v Ramos* (SD NY) 605 F Supp 1057; *United States v Monroe* (DC Dist Col) 397 F Supp 726.

Statements made by the defendant to a state trooper within six hours of his initial detention would not be suppressed simply because the defendant was allegedly held for 17 hours after arrest before being taken for preliminary hearing before a United States Magistrate. *United States v Leland* (DC Del) 376 F Supp 1193.

Footnote 35. *United States v Mitchell*, 322 US 65, 88 L Ed 1140, 64 S Ct 896, reh den 322 US 770, 88 L Ed 1595, 64 S Ct 1257 (predates 18 USCS § 3501); *United States v Cruz Jimenez* (CA1 Puerto Rico) 894 F2d 1; *United States v Davis* (CA7 Ill) 532 F2d 22.

Where the delay in arraignment occurred after the confessions, it could not have affected the voluntariness of such confessions. *United States v Rojas-Martinez* (CA5 Tex) 968 F2d 415, cert den (US) 121 L Ed 2d 698, 113 S Ct 828 and cert den (US) 122 L Ed 2d 146, 113 S Ct 995 (defendants first confessed within six hours of arrest).

Footnote 36. As to custodial interrogation, see § 749.

Footnote 37. *United States v Alvarez-Sanchez* (CA9 Cal) 975 F2d 1396, 92 CDOS 7844, 92 Daily Journal DAR 12730, motion gr, cert gr (US) 126 L Ed 2d 247, 114 S Ct 299, 93 Daily Journal DAR 12889 and revd on other grounds, remanded (US) 94 CDOS 3059, 8 FLW Fed S 83.

Footnote 38. 18 USCS § 3501(c).

Footnote 39. *United States v Alvarez-Sanchez* (US) 94 CDOS 3059, 8 FLW Fed S 83.

Footnote 40. *United States v Alvarez-Sanchez* (US) 94 CDOS 3059, 8 FLW Fed S 83.

Footnote 41. 18 USCS § 3501(c).

Footnote 42. *United States v Alvarez-Sanchez* (US) 94 CDOS 3059, 8 FLW Fed S 83 (state authorities arrested defendant on state narcotics charges and informed United States Secret Service agents of their discovery of counterfeit Federal Reserve Notes in the defendant's home; while in custody on the state charges, the defendant waived his Miranda rights, admitted knowing that the notes were counterfeit to the federal agents and was then arrested for possession of counterfeit currency, a federal crime).

Footnote 43. *United States v Alvarez-Sanchez* (US) 94 CDOS 3059, 8 FLW Fed S 83.

Footnote 44. 18 USCS § 3501(c).

Footnote 45. *United States v Rollerson* (CA5 Tex) 491 F2d 1209; *United States v Davis* (CA6 Ky) 459 F2d 167; *United States v Carter* (CA7 Ill) 910 F2d 1524, 30 Fed Rules Evid Serv 1087, amd, reh den (CA7) 1990 US App LEXIS 17150 and cert den 499 US 978, 113 L Ed 2d 724, 111 S Ct 1628; *United States v Manuel* (CA9 Ariz) 706 F2d 908; *United States v Fallon* (CA10 NM) 457 F2d 15.

Footnote 46. *United States v Isom* (CA2 NY) 588 F2d 858.

§ 733 --Effect of delay in excess of federal statutory limit of 6 hours

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the federal statutory provision pertaining to confessions resulting from delay in arraignment, 47 in any federal prosecution, a confession made while the defendant was under arrest or other detention will not be inadmissible solely because of delay in bringing him before a magistrate, if such confession is found by the trial judge to have been made voluntarily, if the weight to be given the confession is left to the jury, and if such confession was made within 6 hours immediately following his arrest or other detention. 48

◆ **Reminder:** The federal statute 49 is applicable only when a person is arrested or detained for violating federal law. An arrest on state charges will generally not trigger the federal statute even if the person subsequently confesses to a federal crime. 50

However, the 6-hour time limitation will not apply if a delay beyond the 6-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate. 51 Even if the delay in bringing an accused before a magistrate or judicial officer is in excess of the statutory limit of 6 hours and such delay is unnecessary, the statute does not require a finding that the confession obtained was involuntary. 52 With respect to such post-6-hour confessions, it has been held that such delay is only one factor to be considered by the court in determining voluntariness. 53 Six hours is just the minimum period which will pass muster without further inquiry. 54 The court must be alert to the possibility that the delay was used to conduct an improperly coercive interrogation. 55 The court should scrutinize for reasonableness delays in excess of 6 hours which are not made necessary by transportation problems. 56 The court retains the discretion to exclude confessions due to an excessive delay, after considering such factors as the deterrent purpose of the exclusionary rule, the importance of judicial integrity, and the likelihood that admission of the confession would encourage constitutional violations. 57 If the government gives no legitimate excuse for not arraigning the defendant promptly, statements made after a lengthy period of confinement, and followed soon thereafter by the overdue appearance before the magistrate, are inadmissible. 58

A delay of more than 6 hours between arrest and arraignment has been found to be reasonable, thereby warranting admission of a confession obtained before arraignment, where the delay is due (1) to the unavailability of a magistrate, 59 (2) to routine processing of the arrest, 60 (3) to the routine procedure of allowing a defendant who is intoxicated upon arrest to stay in jail over night to regain sobriety, 61 and (4) to transporting the accused from the place of arrest to the nearest magistrate. 62

◆ **Comment:** The objective of the Supreme Court's decision in *County of Riverside v McLaughlin*, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1661, 91 CDOS 3503, 91 Daily Journal DAR 5506, holding that where an arrested individual does not receive a probable cause determination within 48 hours, the burden shifts to the government to

demonstrate the existence of a bona fide emergency or other extraordinary circumstance, 63 has been contrasted with the focus of 18 USCS § 3501. McLaughlin's 48-hour requirement arose out of a concern that, following a warrantless arrest, prolonged detention by a state based on incorrect or unfounded suspicion may unjustly imperil a suspect's job, interrupt his source of income, and impair his family relationships. On the other hand, 18 USCS § 3501 focuses on voluntariness and addresses the concern that a federal conviction be based on reliable evidence. Given these two distinct underlying purposes, the argument that, under McLaughlin, 60 hours between an arrest and confession is not tolerable was found to be without merit. 64

**§ 733 --Effect of delay in excess of federal statutory limit of 6 hours
[SUPPLEMENT]**

Practice Aids: Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS sec. 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate 124 ALR Fed 263.

Case authorities:

The language in 18 USCS § 3501(c)—which provides that a confession made by a person while under arrest or other detention in the custody of any law enforcement officer or law enforcement agency is not inadmissible in a federal criminal prosecution solely because of delay in bringing the person before a federal magistrate, if such confession was made or given within 6 hours after the person's arrest or detention—does not apply to statements made by a person who is being held solely on state criminal charges by state or local law enforcement authorities, because (1) the term "delay" in § 3501(c) presumes an obligation to act, and there can be no delay in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place, and (2) the term "arrest or other detention" in § 3501(c) refers to an arrest or detention for a violation of federal law, since a duty to present a person to a federal magistrate under Rule 5(a) of the Federal Rules of Criminal Procedure—which, as part of the scheme for initiating a federal prosecution, requires an initial appearance before a federal magistrate—does not arise until the person has been arrested for a federal offense; where a person has been arrested and held only on state charges, § 3501(c) does not apply even if the arresting officers, who almost certainly will be agents of the state or one of its subdivisions, believe or have cause to believe that the person also may have violated federal law. *United States v Alvarez-Sanchez* (US) 128 L Ed 2d 319, 114 S Ct 1599.

Footnotes

Footnote 47. 18 USCS § 3501(c).

Footnote 48. § 732.

Footnote 49. 18 USCS § 3501(c).

Footnote 50. § 732.

Footnote 51. 18 USCS § 3501(c).

Footnote 52. *United States v Perez* (CA2 NY) 733 F2d 1026.

Footnote 53. *United States v Campanile* (CA2 Vt) 516 F2d 288; *United States v Perez-Bustamante* (CA5 Tex) 963 F2d 48, cert den (US) 121 L Ed 2d 588, 113 S Ct 663 (rejecting argument that § 3501(c) renders inadmissible all confessions obtained more than 6 hours after arrest unless delay is occasioned by the means of transportation and the distance to be traveled to the nearest available magistrate); *United States v Christopher* (CA6 Ky) 956 F2d 536, cert den (US) 120 L Ed 2d 875, 112 S Ct 2999; *United States v Halbert* (CA9 Ariz) 436 F2d 1226, 12 ALR Fed 360; *United States v Short* (CA10 Utah) 947 F2d 1445, 34 Fed Rules Evid Serv 326, cert den (US) 118 L Ed 2d 397, 112 S Ct 1680.

Footnote 54. *United States v Hathorn* (CA5 Miss) 451 F2d 1337.

Footnote 55. *United States v Christopher* (CA6 Ky) 956 F2d 536, cert den (US) 120 L Ed 2d 875, 112 S Ct 2999.

Footnote 56. *United States v Christopher* (CA6 Ky) 956 F2d 536, cert den (US) 120 L Ed 2d 875, 112 S Ct 2999; *United States v Wilson* (CA9 Ariz) 838 F2d 1081.

Footnote 57. *United States v Gaines* (CA7 Ind) 555 F2d 618.

If the delay between arrest and arraignment is deliberate and for the sole purpose of obtaining a confession, 18 USCS § 3501(c) requires exclusion of confession; desire of federal officers to complete their interrogation is the most unreasonable excuse possible for delay in arraignment. *United States v Wilson* (CA9 Ariz) 838 F2d 1081.

Forms: Affidavit in support of motion to suppress incriminating statements of defendant—Delay in bringing defendant before magistrate. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:596.

Order suppressing defendant's statements—Unnecessary delay in bringing defendant before magistrate. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:600.

Footnote 58. *United States v Yong Bing-Gong* (ND NY) 594 F Supp 248, affd without op (CA2 NY) 788 F2d 4, cert den 479 US 818, 93 L Ed 2d 33, 107 S Ct 78 (20-hour delay); *United States v Rivera* (SD NY) 750 F Supp 614 (21-hour delay); *United States v Khan* (SD NY) 625 F Supp 868 (43-hour delay).

Footnote 59. *United States v Marrero* (CA2 NY) 450 F2d 373, cert den 405 US 933, 30 L Ed 2d 808, 92 S Ct 991.

Footnote 60. *United States v Johnson* (CA2 Conn) 467 F2d 630, cert den 410 US 932, 35 L Ed 2d 595, 93 S Ct 1382 and cert den 413 US 920, 37 L Ed 2d 1042, 93 S Ct 3069; *United States v Bear Killer* (CA8 SD) 534 F2d 1253, cert den 429 US 846, 50 L Ed 2d 118, 97 S Ct 129.

Footnote 61. *United States v Manuel* (CA9 Ariz) 706 F2d 908.

Footnote 62. *United States v Edwards* (CA9 Ariz) 539 F2d 689, 1 Fed Rules Evid Serv 307, 35 ALR Fed 599, cert den 429 US 984, 50 L Ed 2d 594, 97 S Ct 501; *United States v McCormick* (CA10 NM) 468 F2d 68, cert den 410 US 927, 35 L Ed 2d 588, 93 S Ct 1361.

Footnote 63. As to the requirement for a preliminary examination, see 21 Am Jur 2d, Criminal Law §§ 411-432.

Footnote 64. *United States v Perez-Bustamante* (CA5 Tex) 963 F2d 48, cert den (US) 121 L Ed 2d 588, 113 S Ct 663.

§ 734 --State proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Since the "McNabb-Mallory" rule that a confession is inadmissible where obtained from an accused during an unlawful detention—unlawful because, after arrest, he was not brought before a magistrate "without unnecessary delay"—even though the confession otherwise appeared to be voluntary, 65 was not constitutionally grounded, it was not binding upon the states. 66 Although most states have rejected or ignored the rule, 67 they have at least regarded an unreasonable delay in bringing an accused before a magistrate as a factor which, together with other circumstances, may produce an involuntary and hence inadmissible confession in violation of the due process clause of the Fourteenth Amendment. 68

Thus, depending upon the attendant circumstances, a confession may be admissible notwithstanding a delay, 69 or it may be inadmissible if it was the product of an unnecessary or unreasonable delay. 70 To justify the exclusion of a statement, the defendant must show that the delay in arraignment produced his admissions or that there was an essential connection between the illegal detention and the admissions of guilt. 71

Footnotes

Footnote 65. § 732.

Footnote 66. *Stroble v California*, 343 US 181, 96 L Ed 872, 72 S Ct 599, 1 Media L R 1169, reh den 343 US 952, 96 L Ed 1353, 72 S Ct 1039; *Smith v Heard* (CA5 Tex) 315 F2d 692, cert den 375 US 883, 11 L Ed 2d 113, 84 S Ct 154; *Palakiko v Harper* (CA9 Hawaii) 209 F2d 75, cert den 347 US 956, 98 L Ed 1101, 74 S Ct 683, reh den 347 US 979, 98 L Ed 1118, 74 S Ct 789; *Parker v State* (Ala App) 351 So 2d 927, cert quashed (Ala) 351 So 2d 938; *State v Sheffield*, 97 Ariz 61, 396 P2d 828; *Wilson v State*, 258 Ark 110, 522 SW2d 413, cert den 423 US 1017, 46 L Ed 2d 388, 96 S Ct 451; *People v Bashor*, 48 Cal 2d 763, 312 P2d 255; *State v Lasby* (Super) 54 Del 39, 174 A2d 323, affd (Sup) 55 Del 145, 185 A2d 271; *Montgomery v State* (Fla) 176 So 2d 331, cert den 384 US 1023, 16 L Ed 2d 1026, 86 S Ct 1955, reh den 385 US 892, 17 L Ed 2d 125, 87 S

Ct 22 and (criticized on other grounds by *Phillips v State* (Fla) 612 So 2d 557, 17 FLW S 712); *People v Brooks*, 51 Ill 2d 156, 281 NE2d 326; *Pearman v State*, 233 Ind 111, 117 NE2d 362; *State v Tharp*, 258 Iowa 224, 138 NW2d 78; *State v Stubbs*, 195 Kan 396, 407 P2d 215; *State v Reynolds*, 298 NC 380, 259 SE2d 843, cert den 446 US 941, 64 L Ed 2d 795, 100 S Ct 2164; *State v Cowans*, 10 Ohio St 2d 96, 39 Ohio Ops 2d 97, 227 NE2d 201; *Thacker v State* (Okla Crim) 309 P2d 306; *State v Sunderland*, 4 Or App 1, 468 P2d 900, adhered to 4 Or App 8, 476 P2d 563; *Commonwealth v Graham*, 408 Pa 155, 182 A2d 727; *Walker v State*, 162 Tex Crim 408, 286 SW2d 144, cert den 350 US 931, 100 L Ed 814, 76 S Ct 299; *State v Goyet*, 120 Vt 12, 132 A2d 623; *Campbell v Commonwealth*, 194 Va 825, 75 SE2d 468; *State v Hoffman*, 64 Wash 2d 445, 392 P2d 237; *State v Shoffner*, 31 Wis 2d 412, 143 NW2d 458.

Footnote 67. *Ingram v State*, 252 Ala 497, 42 So 2d 36; *Hightower v State*, 62 Ariz 351, 158 P2d 156; *Perkins v State*, 217 Ark 252, 230 SW2d 1; *People v Combes*, 56 Cal 2d 135, 14 Cal Rptr 4, 363 P2d 4; *Dawson v State* (Fla) 139 So 2d 408; *People v Melquist*, 26 Ill 2d 22, 185 NE2d 825, cert den 372 US 967, 10 L Ed 2d 130, 83 S Ct 1093; *Pearman v State*, 233 Ind 111, 117 NE2d 362; *State v Smith*, 158 Kan 645, 149 P2d 600; *Reed v Commonwealth*, 312 Ky 214, 226 SW2d 513; *State v Williams* (Mo) 369 SW2d 408; *State v Fouquette*, 67 Nev 505, 221 P2d 404, cert den 341 US 932, 95 L Ed 1361, 71 S Ct 799; *State v La Pierre*, 39 NJ 156, 188 A2d 10, cert den 374 US 852, 10 L Ed 2d 1073, 83 S Ct 1920; *State v Nagel*, 75 ND 495, 28 NW2d 665; *State v Lowder* (Stark Co) 79 Ohio App 237, 34 Ohio Ops 568, 72 NE2d 785, app dismd for want of debat q 147 Ohio St 530, 34 Ohio Ops 423, 72 NE2d 102; *Hendrickson v State*, 93 Okla Crim 379, 229 P2d 196; *Ford v State*, 184 Tenn 443, 201 SW2d 539; *Le Fors v State*, 161 Tex Crim 544, 278 SW2d 837, cert den 349 US 929, 99 L Ed 1260, 75 S Ct 772; *State v Gardner*, 119 Utah 579, 230 P2d 559; *State v Babich*, 258 Wis 290, 45 NW2d 660, cert den 341 US 954, 95 L Ed 1375, 71 S Ct 1004.

Footnote 68. *Clewis v Texas*, 386 US 707, 18 L Ed 2d 423, 87 S Ct 1338; *King v State*, 49 Ala App 111, 269 So 2d 130; *People v Watson* (1st Dist) 75 Cal App 3d 384, 142 Cal Rptr 134; *People v Robinson*, 192 Colo 48, 556 P2d 466; *Headrick v State* (Fla App D1) 366 So 2d 1190; *People v Johnson*, 44 Ill 2d 463, 256 NE2d 343, cert den 400 US 958, 27 L Ed 2d 266, 91 S Ct 356; *Ferry v State* (Ind) 453 NE2d 207; *State v Fryer* (Iowa) 243 NW2d 1; *Reeves v Commonwealth* (Ky) 462 SW2d 926, cert den 404 US 836, 30 L Ed 2d 69, 92 S Ct 124; *State v Dominick* (La) 354 So 2d 1316, habeas corpus proceeding (CA5 La) 796 F2d 108; *State v Collins*, 296 Md 670, 464 A2d 1028; *State v Schabert*, 218 Minn 1, 15 NW2d 585; *Harper v State*, 251 Miss 699, 171 So 2d 129; *State v Mudgett* (Mo) 531 SW2d 275, cert den 426 US 910, 48 L Ed 2d 835, 96 S Ct 2234; *Application of Sefton*, 73 Nev 2, 306 P2d 771, cert den 354 US 914, 1 L Ed 2d 1430, 77 S Ct 1301; *State v Taylor*, 46 NJ 316, 217 A2d 1, cert den 385 US 855, 17 L Ed 2d 83, 87 S Ct 103; *State v Ortiz*, 77 NM 316, 422 P2d 355; *People v Hopkins*, 58 NY2d 1079, 462 NYS2d 639, 449 NE2d 419; *State v Simpson*, 299 NC 335, 261 SE2d 818; *Fields v State* (Okla Crim) 284 P2d 442; *State v Broadsword*, 65 Or App 672, 672 P2d 366, review den 296 Or 712, 678 P2d 740; *Commonwealth v Van Cliff*, 483 Pa 576, 397 A2d 1173, cert den 441 US 964, 60 L Ed 2d 1070, 99 S Ct 2412; *Abbott v State*, 171 Tex Crim 28, 344 SW2d 166.

A delay in arraignment is but one factor in determining the voluntariness of a confession. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

For a discussion of the due process requirement of voluntariness, see § 719.

Annotation: Admissibility of confession or other statement made by defendant as affected by delay in arraignment—modern state cases, 28 ALR4th 1121.

Footnote 69. *Sovalik v State* (Alaska) 612 P2d 1003; *State v Everett*, 110 Ariz 429, 520 P2d 301, cert den 419 US 880, 42 L Ed 2d 120, 95 S Ct 144; *People v Gordon* (2nd Dist) 84 Cal App 3d 913, 149 Cal Rptr 91; *Headrick v State* (Fla App D1) 366 So 2d 1190; *People v Mallett*, 45 Ill 2d 388, 259 NE2d 241; *Richey v State* (Ind) 426 NE2d 389; *State v Johnson*, 222 Kan 465, 565 P2d 993; *State v Carter* (Me) 412 A2d 56; *Meyer v State*, 43 Md App 427, 406 A2d 427, cert den 446 US 938, 64 L Ed 2d 792, 100 S Ct 2159; *Commonwealth v Daniels*, 366 Mass 601, 321 NE2d 822; *People v White*, 392 Mich 404, 221 NW2d 357, cert den 420 US 912, 42 L Ed 2d 843, 95 S Ct 835; *Dickens v State* (Miss) 311 So 2d 650; *State v Smith* (Mo App) 588 SW2d 27; *State v Barry*, 86 NJ 80, 429 A2d 581, cert den 454 US 1017, 70 L Ed 2d 415, 102 S Ct 553; *People v Yarter* (3d Dept) 50 App Div 2d 1019, 377 NYS2d 271; *State v Hunter*, 305 NC 106, 286 SE2d 535; *State v Jenks*, 43 Or App 221, 602 P2d 681; *Commonwealth v Smith*, 487 Pa 626, 410 A2d 787; *State v Johnson*, 119 RI 749, 383 A2d 1012; *Maloy v State* (Tex Crim) 582 SW2d 125; *Briggs v State*, 76 Wis 2d 313, 251 NW2d 12; *Raigosa v State* (Wyo) 562 P2d 1009.

Since the defendant's confessions were made within 6 hours of arrest, they were admissible notwithstanding any delay in bringing the defendant before a magistrate. *Commonwealth v Hughes*, 521 Pa 423, 555 A2d 1264.

A juvenile's confession was admissible, notwithstanding his contention that he was not immediately taken before a magistrate after his arrest as required by a statute applicable to juveniles, where, though the time from his arrest until presentation before a magistrate was about 2 1/2 hours, he had begun reciting his first confession less than one hour after being arrested and after having been given Miranda warnings. *Re Mark E. P.*, 178 W Va 652, 363 SE2d 729.

Footnote 70. *State v Arnett*, 119 Ariz 38, 579 P2d 542, appeal after remand 125 Ariz 201, 608 P2d 778, habeas corpus proceeding (DC Ariz) 665 F Supp 1437 and post-conviction proceeding, en banc 158 Ariz 15, 760 P2d 1064, 13 Ariz Adv Rep 17; *People v Haydel*, 12 Cal 3d 190, 115 Cal Rptr 394, 524 P2d 866; *Hervey v People*, 178 Colo 38, 495 P2d 204; *People v Mrozek* (3d Dist) 52 Ill App 3d 500, 10 Ill Dec 330, 367 NE2d 783; *Gutierrez v State*, 270 Ind 639, 388 NE2d 520; *Shope v State*, 41 Md App 161, 396 A2d 282; *State v Benbo*, 174 Mont 252, 570 P2d 894; *People v Holland*, 48 NY2d 861, 424 NYS2d 351, 400 NE2d 293; *Commonwealth v McGeachy*, 487 Pa 25, 407 A2d 1300; *State v Mays*, 172 W Va 486, 307 SE2d 655.

A delay of two-and-one-half days from the defendant's arrest to his inculpatory statement did not require suppression of his statement, where the delay was necessitated by the defendant's intoxication, by intervention of the weekend, and by the need to return him to the county in which the offense took place. *Owens v State*, 300 Ark 73, 777 SW2d 205.

A four-day delay after the defendant's arrest was not an unnecessary delay requiring the suppression of his statements, where period included Saturday and Sunday, which were court holidays. *People v Travis* (4th Dist) 170 Ill App 3d 873, 121 Ill Dec 830, 525 NE2d 1137, app den 122 Ill 2d 590, 125 Ill Dec 232, 530 NE2d 260 and cert den 489 US

1024, 103 L Ed 2d 209, 109 S Ct 1149 and (criticized on other grounds by *People v Cardona* (1st Dist) 240 Ill App 3d 110, 181 Ill Dec 8, 608 NE2d 81).

A delay of 13 hours between an arrest and statement was proper where the police were occupied comparing stories given by three men, including the defendant, arrested in connection with the crime. *Commonwealth v Pinkney*, 267 Pa Super 288, 406 A2d 1045, app dismd 498 Pa 131, 445 A2d 101.

A delay of 27 hours was not unreasonable where the defendants were questioned only three times briefly before giving confessions. *State v Gilbert*, 273 SC 690, 258 SE2d 890, appeal after remand 277 SC 53, 283 SE2d 179, cert den 456 US 984, 72 L Ed 2d 863, 102 S Ct 2258, application den 456 US 1004, 73 L Ed 2d 1299, 102 S Ct 2294.

Footnote 71. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

A three-day delay between the defendant's return to the state, following extradition, and his appearance before the municipal court did not violate the rule providing that there should be no unnecessary delay in taking the arrested person before a judicial officer, where the statements were given when the defendant was first questioned and were completely unrelated to the delay. *Branscomb v State*, 299 Ark 482, 774 SW2d 426, later proceeding (Ark) 1992 Ark LEXIS 121.

Where, in a prosecution for sexual assault, the defendant was detained for seven hours before being taken to a magistrate, during which time he told an investigator about his personal history of being sexually abused and ultimately confessed, the defendant's confession was properly admitted into evidence, insofar as the delay in taking the defendant before a magistrate was easily explained by the defendant's voluntary discussion with the investigator and no evidence indicated any causal connection between the delay and the confession. *Sallings v State* (Tex App Dallas) 789 SW2d 408, petition for discretionary review ref (Sep 12, 1990).

A seven-hour delay between the inception of the defendant's interrogation and his being taken before a magistrate did not require the suppression of his confessions, where the murders to which the defendant confessed were old ones, it was necessary for the police officers to spend time finding and reviewing the files to corroborate the details of the confessions, and where, in any event, the delay was not causally connected to the confessions. *Niehuse v State* (Tex App Dallas) 761 SW2d 491.

The written confession to participation in triple murders during the robbery of drugstore was not involuntary as caused by the seven-day delay in bringing the defendant before magistrate, where on the evening of the initial arrest the officer informed the suspect that investigating officers had spoken to his friend and the suspect immediately indicated his desire to confess. *Johnson v State* (Tex App San Antonio) 651 SW2d 303.

Absent the showing of a causal connection between the defendant's jail cell confession to the sexual abuse of a child on the day following his arrest and the delay in taking the defendant before a magistrate, the validity of the confession was not affected by such delay. *Cummings v State* (Tex App Amarillo) 651 SW2d 14.

A confession should have been suppressed where there were nine hours between the

defendant's seizure and his presentment before a magistrate, since the confession was the direct result of prolonged, illegal, custodial interrogation. *State v Mays*, 172 W Va 486, 307 SE2d 655.

§ 735 Prolonged interrogation

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While the mere fact that a confession is made after a prolonged examination of the accused by police officers does not necessarily render the confession inadmissible as evidence against the accused on the theory that it is an involuntary confession, 72 and the Fourteenth Amendment does not prohibit a state from such detention and interrogation so long as the circumstances appear reasonable and non-coercive, 73 in certain instances, in the context of the totality of the circumstances, 74 interrogation by law enforcement officers may be so prolonged, either continuous or at intervals, as to render a confession involuntary. 75 An interrogation can be so prolonged and unrelenting, especially when accompanied by deprivation of refreshment, rest, or relief, as to accomplish extortion of an involuntary confession which is not admissible in evidence. 76

§ 735 ----Prolonged interrogation [SUPPLEMENT]

Case authorities:

Defendant was not entitled to suppression of confession on basis that he requested end to interrogation since, when defendant questioned need to name his accomplices during videotaped confession, he was merely questioning scope of interrogation and was not asking for end to interrogation, and answer to question by assistant district attorney was merely encouragement to answer and was not coercion. *People v Paltoo* (1992, 1st Dept) 186 AD2d 452, 589 NYS2d 19, app den 81 NY2d 765, 594 NYS2d 727, 610 NE2d 400.

Footnotes

Footnote 72. *Ashdown v Utah*, 357 US 426, 2 L Ed 2d 1443, 78 S Ct 1354; *State v Malm*, 142 Conn 113, 111 A2d 685; *Lyons v State*, 77 Okla Crim 197, 138 P2d 142, affd 322 US 596, 88 L Ed 1481, 64 S Ct 1208, reh den 323 US 809, 89 L Ed 645, 65 S Ct 26 and (ovrld on other grounds by *Hopper v State* (Okla Crim) 736 P2d 538).

Footnote 73. *Stein v New York*, 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L Ed 362, 74 S Ct 13 and (ovrld on other grounds by *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205) and (ovrld on other grounds by *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745).

Footnote 74. As to the totality of the circumstances test to determine voluntariness of confessions, generally, see § 719.

Footnote 75. *Darwin v Connecticut*, 391 US 346, 20 L Ed 2d 630, 88 S Ct 1488, conformed to 156 Conn 661, 243 A2d 82, appeal after remand 161 Conn 413, 288 A2d 422, motion gr 29 Conn Supp 423, 290 A2d 593; *Binns v State*, 233 Ark 259, 344 SW2d 841; *People v Williams*, 20 Cal 2d 273, 125 P2d 9; *Williams v State*, 156 Fla 300, 22 So 2d 821; *King v State*, 155 Ga 707, 118 SE 368, conformed to 30 Ga App 562, 118 SE 702; *People v Sweeney*, 304 Ill 502, 136 NE 687; *Claflin v State*, 154 Kan 452, 119 P2d 540; *State v Crittenden*, 214 La 81, 36 So 2d 645; *People v Brockett*, 195 Mich 169, 161 NW 991; *Ammons v State*, 80 Miss 592, 32 So 9; *State v Bradford (Mo)* 262 SW2d 584; *State v Biggs*, 224 NC 23, 29 SE2d 121; *Davis v State*, 165 Tex Crim 456, 308 SW2d 880.

Practice References Grounds for Suppression—Prolonged Questioning. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 26.

Footnote 76. *Gallegos v Colorado*, 370 US 49, 8 L Ed 2d 325, 82 S Ct 1209, 87 ALR2d 614, reh den 370 US 965, 8 L Ed 2d 835, 82 S Ct 1579; *State v Butts*, 349 Mo 213, 159 SW2d 790, 140 ALR 1177; *Sigler v State*, 139 Tex Crim 167, 139 SW2d 277.

A confession obtained following police interrogation conducted at various times extending over a 16-day period of confinement was determined to be the involuntary end product of coercive influences and was therefore constitutionally inadmissible in evidence, even though each interrogation session was of relatively short duration. *Davis v North Carolina*, 384 US 737, 16 L Ed 2d 895, 86 S Ct 1761.

But see *Harris v State (Fla)* 438 So 2d 787, cert den 466 US 963, 80 L Ed 2d 563, 104 S Ct 2181 criticized on other grounds as stated in *State v Grissom (Fla)* 492 So 2d 1324, 11 FLW 428 and criticized on other grounds as stated in *Mustelier v Dugger (Fla App D3)* 579 So 2d 353, 16 FLW D 1303, review den (Fla) 591 So 2d 183, holding that defendant's jailhouse confession to murder was properly admitted as voluntary, notwithstanding the fact that it was the product of a 6-hour interrogation conducted in a small room in the police station with defendant handcuffed elbow-to-wrist while seated in an aluminum chair, where defendant's allegations that he had been questioned against his will, refused food and drink, not permitted to go to the bathroom, and subjected to emotional and physical abuse, were countered by the officers in question, who denied that the accused had been mistreated or had made any complaint of discomfort, the stenographer who took the confession testified that she did not see or hear any abuse of defendant, and defendant had signed a written version of his confession after pointing out and initialing one correction.

As to physical mistreatment, generally, as a factor in determining the voluntariness of a confession, see § 736.

§ 736 Physical mistreatment; withholding of adequate facilities, food, rest, relief, or medication

[View Entire Section](#)

A confession is involuntary when coerced by physical intimidation. 77 Physical mistreatment is but one circumstance, albeit a circumstance which by itself weighs heavily, to be considered in determining if a confession is the product of a rational intellect and a free will. 78 Even so, where during the entire period preceding his confession the defendant was without adequate food, without counsel, 79 and without the assistance of family or friends, was, for all practical purposes, held incommunicado, and was physically weakened and in intense pain, this total combination of circumstances, 80 was so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. 81 Furthermore, deprivation of refreshment, rest, or relief, when combined with a prolonged and unrelenting interrogation, may result in the finding that a confession was involuntary and therefore, inadmissible. 82 A confession was also held involuntary, where the defendant had been thrown naked into a small punishment cell with two other men for 14 days, where the cell had no window, contained no bed or other furnishings or facilities, except a hole flush with the floor which served as a commode, and where he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water. 83 Similarly, a confession was determined to be involuntary, where the defendant had no counsel, and he had been deprived of food, sleep, and medication for his high blood pressure. 84 But, the defendants' contention that they had not slept or eaten before giving their confessions did not establish duress sufficient to invalidate such confessions, where any duress arising from the lack of sleep or food was not attributable to the law enforcement officers but to the defendants' own actions in trying to elude the police the previous night. 85

§ 736 ----Physical mistreatment; withholding of adequate facilities, food, rest, relief, or medication [SUPPLEMENT]

Case authorities:

The court would reject the contention that the defendant's confession to murder was not voluntary where (1) on February 6, the police were called to a location at which the defendant, who was a suspect in a murder prosecution, set himself afire, (2) the defendant was arrested and placed in intensive care in critical condition, (3) the police did not interview the defendant until February 15, when they were advised by physicians that he was well enough, and (4) during the interview, the defendant waived his Miranda rights and confessed to the murder; the defendant was stable, alert, coherent and cooperative and there was not evidence that he lacked the ability to exercise a reasoned choice at the time of his confession. *Commonwealth v Bracey* (1995, Pa) 662 A2d 1062, application gr (Pa) 1995 Pa LEXIS 1254.

Footnotes

Footnote 77. *United States v Tingle* (CA9 Cal) 658 F2d 1332.

Footnote 78. *Reck v Pate*, 367 US 433, 6 L Ed 2d 948, 81 S Ct 1541.

Written confession of accused was not voluntary or admissible where, among other things, defendant's faculties were impaired by inadequate food and sleep, sickness and long subjection to police custody with no conduct with anyone other than police. *Clewis v Texas*, 386 US 707, 18 L Ed 2d 423, 87 S Ct 1338.

Accused's confession was involuntary and inadmissible where, following his denial of charges at arraignment, 40 days after he was arrested, he was put in solitary confinement for eleven days in cold, unlighted cell with no windows, lived on bread and water and occasional bowl of soup, was handcuffed to iron bar which limited his movement, and where after signing confession, he was released. *Commonwealth ex rel. Donnell v Myers*, 208 Pa Super 57, 220 A2d 376.

Practice References Grounds for Suppression—Physical Abuse or Threats. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 23.

Footnote 79. As to the Sixth Amendment right to counsel, see § 750.

As to the fifth amendment right to counsel during custodial interrogation, derived from the Miranda decision, see §§ 749, 750.

Footnote 80. As to the totality of the circumstances test, see § 719.

Footnote 81. *Reck v Pate*, 367 US 433, 6 L Ed 2d 948, 81 S Ct 1541.

Footnote 82. § 735.

Footnote 83. *Brooks v Florida*, 389 US 413, 19 L Ed 2d 643, 88 S Ct 541 (conditions characterized as shocking display of barbarism).

Footnote 84. *Greenwald v Wisconsin*, 390 US 519, 20 L Ed 2d 77, 88 S Ct 1152, conformed to 38 Wis 2d 647, 158 NW2d 293.

Footnote 85. *State v Broadway* (La App 2d Cir) 440 So 2d 828.

§ 737 --Use of violence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession induced by violence, 86 as, for example, by striking or whipping the accused, 87 is involuntary, insofar as the confession was the result of the violence used. 88 In this regard, it has been held that, notwithstanding the totality of the circumstances test generally applied to determine voluntariness of a confession, 89 a confession which is the product of violence is per se involuntary. 90 However, the fact that, in answer to an officer's question, an accused makes a statement admitting the commission of a crime at gunpoint during his arrest does not necessarily render the

statement involuntary because of the circumstances, where the officer did not draw the gun for the purpose of his question, but based on the dangerousness of the suspect. 91

◆ Practice guide: The accused is allowed to show the jury the part of his body bearing marks of violence allegedly inflicted by law enforcement officers in obtaining a confession. 92

§ 737 --Use of violence [SUPPLEMENT]

Case authorities:

Voluntariness of defendant's statements to police was not impaired by arresting officers' use of force to apprehend him where officer used no more force than necessary to subdue him, and inculpatory statements sought to be suppressed were not made until some 20 minutes after scuffle and after defendant had waived his Miranda rights. *People v Alvarez* (1992, 1st Dept) 186 AD2d 56, 588 NYS2d 268.

Footnotes

Footnote 86. *Sims v Georgia*, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523, conformed to 224 Ga 36, 159 SE2d 290 (confession produced by violence is involuntary and cannot constitutionally be used against person giving it); *Stein v New York*, 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L Ed 362, 74 S Ct 13 and (ovrld on other grounds by *Jackson v Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205) and (ovrld on other grounds by *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745; *Brown v Mississippi*, 297 US 278, 80 L Ed 682, 56 S Ct 461, conformed to (Miss) 167 So 82; *United States v Jackson* (CA1 Mass) 918 F2d 236 (for confession to be voluntary it must not be extracted by any sort of violence); *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053 (axiomatic that confession extracted with violence is involuntary); *United States v Miller* (CA9 Cal) 984 F2d 1028, 93 CDOS 658, 93 Daily Journal DAR 1295, cert den (US) 126 L Ed 2d 210, 114 S Ct 258 (confession accompanied by physical violence is per se involuntary); *Bell v State*, 177 Ark 1034, 9 SW2d 238, appeal after remand 180 Ark 79, 20 SW2d 618; *State v Di Battista*, 110 Conn 549, 148 A 664; *Rowe v State*, 98 Fla 98, 123 So 523; *Hawkins v State*, 6 Ga App 109, 64 SE 289; *People v Davis*, 35 Ill 2d 202, 220 NE2d 222; *Dickson v Commonwealth*, 210 Ky 350, 275 SW 805; *State v Lewis*, 175 La 696, 144 So 423; *Ford v State*, 181 Md 303, 29 A2d 833; *People v Louzon*, 338 Mich 146, 61 NW2d 52; *White v State*, 129 Miss 182, 91 So 903, 24 ALR 699; *King v State*, 108 Neb 428, 187 NW 934; *State v Petrolia*, 21 NJ 453, 122 A2d 639; *Ross v State*, 48 Okla Crim 39, 289 P 358; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892; *Sigler v State*, 139 Tex Crim 167, 139 SW2d 277; *Jones v State*, 184 Wis 50, 198 NW 598.

A confession must not be extracted by any sort of violence. *United States v Tingle* (CA9 Cal) 658 F2d 1332.

Where the defendant, who was handcuffed with his hands behind him and whose face was covered with a towel, was interrogated in a room with the same officers who had beaten and threatened to kill him during his violent arrest only a few minutes earlier, and

where the defendant had stated that he was afraid during questioning, the defendant's confession was not freely and voluntarily given. *State v Tom* (App) 126 Ariz 178, 613 P2d 842.

Practice References Grounds for Suppression—Physical Abuse or Threats. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 23.

Footnote 87. *Sigler v State*, 139 Tex Crim 167, 139 SW2d 277.

Footnote 88. *Pyles v United States*, 124 US App DC 129, 362 F2d 959, cert den 385 US 994, 17 L Ed 2d 453, 87 S Ct 608.

Footnote 89. As to the totality of the circumstances test, generally, see § 719.

Footnote 90. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053 (confession extracted with violence is involuntary); *United States v Miller* (CA9 Cal) 984 F2d 1028, 93 CDOS 658, 93 Daily Journal DAR 1295, cert den (US) 126 L Ed 2d 210, 114 S Ct 258 (confession accompanied by physical violence is per se involuntary).

Footnote 91. *Pyles v United States*, 124 US App DC 129, 362 F2d 959, cert den 385 US 994, 17 L Ed 2d 453, 87 S Ct 608.

Footnote 92. *Tyson v State*, 237 Miss 149, 112 So 2d 563, 72 ALR2d 1319; *People v Alex*, 260 NY 425, 183 NE 906, 85 ALR 939.

Annotation: Right of accused to show body to jury as evidence of violence by police in securing confession, 72 ALR2d 1322.

Forms: Motion to obtain physical examination and photographs of incarcerated defendant based on allegation that his confession was obtained by physical violence. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:595.

§ 738 Threats

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A confession must not be extracted by any sort of threat; 93 in this regard, confessions induced by fear on the part of the accused as the result of a threat have been found to be involuntary. 94

Thus, for example, where accused police officers were warned that if they refused to answer certain questions they would be removed from office, their subsequent confessions were held involuntary. 95 However, a police officer's statement to the defendant that he would be taken upstairs and booked if he didn't want to talk did not constitute a threat, 96 and a confession has been deemed valid even though a police officer threatened to give the defendant a lie detector test if she did not tell the truth. 97

◆ Observation: An officer does not overreach by conducting an interview in full uniform, including a service revolver, unless he threatens the defendant. 98

Footnotes

Footnote 93. *United States v Tingle* (CA9 Cal) 658 F2d 1332.

As to threats of violence, see § 739.

Footnote 94. *Hardy v United States*, 186 US 224, 46 L Ed 1137, 22 S Ct 889; *Lewis v State*, 220 Ala 461, 125 So 802; *Roman v State*, 23 Ariz 67, 201 P 551; *Bullen v State*, 156 Ark 148, 245 SW 493; *People v Dye*, 119 Cal App 262, 6 P2d 313; *Osborn v People*, 83 Colo 4, 262 P 892; *State v Di Battista*, 110 Conn 549, 148 A 664; *Jackson v State*, 172 Ga 575, 158 SE 289; *State v Heinz*, 223 Iowa 1241, 275 NW 10, 114 ALR 959; *Andrews v Hand*, 190 Kan 109, 372 P2d 559, cert den 371 US 880, 9 L Ed 2d 117, 83 S Ct 152; *Whip v State*, 143 Miss 757, 109 So 697; *State v Anderson (Mo)* 384 SW2d 591; *Morcumb v State*, 125 Neb 42, 248 NW 807; *People v Barbato*, 254 NY 170, 172 NE 458; *Ross v State*, 48 Okla Crim 39, 289 P 358; *State v Jordan*, 146 Or 504, 26 P2d 558, adhered to 146 Or 524, 30 P2d 751; *Commonwealth v Brown*, 309 Pa 515, 164 A 726, 86 ALR 892; *Cross v State*, 142 Tenn 510, 221 SW 489, 9 ALR 1354; *State v Harvey*, 145 Wash 161, 259 P 21.

To determine voluntariness, it is necessary to look at the totality of the circumstances, including any promises or threats made by police officers or the prosecution, to see if the will of the accused was overborne. *United States v Jackson* (CA1 Mass) 918 F2d 236.

An accused's confession to stabbing his girlfriend was suppressed, where obtained pursuant to a six-hour interrogation following a "voluntary" submission to a polygraph examination, after which the defendant was told that he was lying and repeatedly threatened with prolonged incarceration unless he told the truth, and where the defendant's lengthy custodial investigation was without probable cause for arrest in violation of Fourth Amendment. *People v Johnson*, 112 Misc 2d 590, 447 NYS2d 341.

For a discussion of the totality of the circumstances test, see § 719.

As to the effects on voluntariness of confessions of: prolonged interrogation, see § 735; use of polygraph, see § 742.

Concerning when a fourth amendment violation taints a subsequent confession, see § 752.

As to the determination of probable cause for arrest, generally, see 5 Am Jur 2d, Arrest § 16.

Law Reviews: Kassin, McNall, Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication, 15 Law & Hum Behav 233 (June, 1991).

Practice References Grounds for Suppression—Physical Abuse or Threats. 5 Am Jur

Footnote 95. *Garrity v New Jersey*, 385 US 493, 17 L Ed 2d 562, 87 S Ct 616, also stating that the option to lose their means of livelihood or to pay the penalty of self-incrimination was the antithesis of free choice to speak out or to remain silent.

Footnote 96. *State v Istre* (La) 407 So 2d 1183.

Footnote 97. *State v Beck* (La App 2d Cir) 445 So 2d 470, cert den (La) 446 So 2d 315.

As to the impact of the use of a lie detector on the voluntariness of a confession, see § 742.

Footnote 98. *United States v Rojas-Martinez* (CA5 Tex) 968 F2d 415, cert den (US) 121 L Ed 2d 698, 113 S Ct 828 and cert den (US) 122 L Ed 2d 146, 113 S Ct 995.

§ 739 --Threats of violence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. 99 Thus, it has been recognized that a threat of violence to the person of the accused 1 —including threats of "mob violence" 2 —renders a confession induced thereby involuntary, so that such confession cannot constitutionally be used against the person giving it. 3 In some jurisdictions the rule is that, notwithstanding the totality of the circumstances test generally applicable to determine the voluntariness of a confession, 4 a confession which is the product of the threat of violence is per se involuntary. 5 However, where the threat of violence has not been specifically connected to the statements of the accused, a confession has nonetheless been held to have been made voluntarily. 6

◆ Observation: In determining whether a threat of violence has been made which constitutes coercion, it has been said that the defendant's subjective understanding of the statement or statements in question is irrelevant. 7 However, an accused's belief that a person suggesting that he could help the accused if the accused admitted a crime had authority to do so has sometimes been deemed valid in determining the voluntariness of a confession subsequently made, even though the person making the suggestion had no real authority to influence the subsequent course of events. 8

◆ Practice guide: Error in admitting into evidence an oral confession obtained by threatened physically coercive tactics on the part of an agent of the police is not subject to a harmless error analysis. 9

§ 739 --Threats of violence [SUPPLEMENT]

Case authorities:

Defendant's confession was coerced by government agent who lied to drug-dependent defendant by stating that he would be killed unless he told the informant what "really happened" since there was threat of immediate physical injury and defendant was frightened that government agent was about to kill him during car ride when he confessed. *United States v McCullah* (1996, CA10 Okla) 87 F3d 1136.

Footnotes

Footnote 99. *Arizona v Fulminante*, 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246, 91 CDOS 2209, 91 Daily Journal DAR 3530, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

The statement—"If you don't cooperate with us, ten years can be a long time in jail. Anything can happen and something can happen to your family, something can happen to your mother, your father."—did not, the defendant's subjective understanding aside, represent a credible threat against the defendant's family. *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

Footnote 1. *Sims v Georgia*, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523, conformed to 224 Ga 36, 159 SE2d 290; *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053 (axiomatic that confession extracted with the threat of violence is involuntary); *Rice v State*, 204 Ala 104, 85 So 437; *Harrison v State*, 152 Fla 86, 12 So 2d 307; *Coker v State*, 199 Ga 20, 33 SE2d 171; *Simmons v State*, 206 Miss 535, 40 So 2d 289; *Balding v State*, 77 Okla Crim 36, 138 P2d 132; *State v Middleton*, 69 SC 72, 48 SE 35; *Holt v State*, 151 Tex Crim 399, 208 SW2d 643.

Practice References Grounds for Suppression—Physical Abuse or Threats. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 23.

Footnote 2. *Rice v State*, 204 Ala 104, 85 So 437; *Thomas v State*, 169 Ga 182, 149 SE 871; *White v State*, 129 Miss 182, 91 So 903, 24 ALR 699; *State v Butts*, 349 Mo 213, 159 SW2d 790, 140 ALR 1177; *State v Hart*, 292 Mo 74, 237 SW 473; *Tramp v State*, 104 Neb 222, 176 NW 543.

Footnote 3. *Sims v Georgia*, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523, conformed to 224 Ga 36, 159 SE2d 290.

Footnote 4. As to the totality of the circumstances test, generally, see § 719.

Footnote 5. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Footnote 6. *United States v Rigsby* (CA6 Tenn) 943 F2d 631, 33 Fed Rules Evid Serv 1417, cert den (US) 117 L Ed 2d 496, 112 S Ct 1269 (notwithstanding that an alleged threat that the defendant's head would be "busted in" if he turned around was made at the time of his arrest, his confession was voluntarily and knowingly made, insofar as the

threat concerned his physical actions, not his statements, he was not interviewed by the agents until later in the day, the defendant did not allege that at any time during the interview he was physically threatened, and the agents offered to and did include the defendant's mother in the interview.

Footnote 7. *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

Footnote 8. § 741.

Footnote 9. *Gipson v State* (Tex App Dallas) 819 SW2d 890, affd 844 SW2d 738.

§ 740 Promises or inducements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession must not be obtained by any direct nor implied promises, however slight; 10 A confession induced by a promise to confer a benefit upon the accused has been recognized as involuntary. 11

Confessions have been determined to be involuntary when made in response to promises to release or not arrest relatives of the accused. 12 Furthermore, confessions induced by promises of immunity to the accused have been found to be involuntary, 13 as have confessions induced by promises of leniency. 14 A confession is involuntary where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess. 15 And a confession induced by a parole officer's promise to a suspect that the results of a lie detector test would not be made available to the police was involuntary and inadmissible. 16

However, in some instances, confessions have been found to be voluntary notwithstanding promises made to the accused. 17 An official who encourages cooperation with the government and who informs the defendant of realistically expected penalties for cooperation or noncooperation does not offer an illegal inducement. 18 In this regard, promises by detectives to help the accused with his collateral health problems, that he would receive help for his drug and alcohol problems, if he talked to them are far different from promises of leniency in the criminal proceeding. 19 A police officer's statement to the defendant that things would go easier for him if he confessed has been held to be innocuous and as not constituting an improper promise of leniency. 20 Nor was an interrogating officer's statement to the defendant that he "would feel better if he got it off his chest" an improper inducement rendering his confession inadmissible. 21 And, as distinguished from impermissible promises of leniency, expressions of sympathy by an officer are not coercive. 22 Likewise, the fact that a police officer agrees to make one's cooperation known to the prosecuting authorities and to the court does not render a confession involuntary. 23 It has also been held that allowing the defendant to speak with his girlfriend for five minutes is not a sufficient

§ 740 ----Promises or inducements [SUPPLEMENT]

Case authorities:

Defendant's incriminating statements made during search of his residence were not involuntary because officers informed defendant that United States Attorney would be apprised of his cooperation, since officer did not promise him leniency. *United States v Broussard* (1996, CA5 Tex) 80 F3d 1025.

Defendant was not entitled to suppression of his inculpatory statement to police on ground that it was made on promise of immunity and was therefore involuntary where officer testified that defendant requested immunity and that he told defendant that he did not have authority to grant immunity, and investigator testified that defendant did not request immunity in his presence; unsworn written statement in which defendant stated that he was told that immunity would be granted did not constitute admissible evidence of promise of immunity. *People v Secore* (1992, 4th Dept) 187 AD2d 1008, 591 NYS2d 126, app den 81 NY2d 847, 595 NYS2d 746, 611 NE2d 785.

The defendant's confession to selling marijuana was not rendered involuntary by a police offer to inform the district attorney if the defendant were willing to cooperate with future drug investigations; although an offer of lenient treatment in return for a defendant's cooperation in the investigation of the crime charged is an impermissible inducement and renders a confession involuntary, an offer of lenient treatment for potential cooperation in the investigation of unrelated crimes is permissible. *Commonwealth v Laatsch* (1995, Pa) 661 A2d 1365, reh den (Pa) 1995 Pa LEXIS 675.

In criminal prosecution where defendant was convicted of attempted first degree intentional homicide, party to crime, for attempted murder of her husband, fact that trial court expressly found defendant's incriminating statements to police to be voluntary and not product of improper pressures exercised by police and denied defendant's suppression motion indicated that court did not find credible defendant's assertions of police promises to induce incriminating statements. *State v Echols* (1993) 175 Wis 2d 653, 499 NW2d 631, cert den (US) 62 USLW 3251.

In criminal prosecution where defendant was convicted of attempted first degree intentional homicide, party to crime, for attempted murder of her husband, although trial court did not make specific finding concerning defendant's claim that promises were made to her to induce incriminating statements, factual findings of trial court on record supporting denial of defendant's suppression motion were not against great weight and clear preponderance of evidence where court determined that defendant's incriminating statements were voluntary because they were knowingly, understandingly and freely made and therefore statements were not induced by police promises. *State v Echols* (1993) 175 Wis 2d 653, 499 NW2d 631, cert den (US) 62 USLW 3251.

In criminal prosecution where defendant was convicted of attempted first degree intentional homicide, party to crime, for attempted murder of her husband, although trial court did not make specific finding concerning defendant's claim that promises were made to her by police to induce incriminating statements, implicit in trial court's finding that statements were knowingly, understandingly and freely made was finding that

promises were not made by police to coerce defendant into making statements. *State v Echols* (1993) 175 Wis 2d 653, 499 NW2d 631, cert den (US) 62 USLW 3251.

Footnotes

Footnote 10. *United States v Tingle* (CA9 Cal) 658 F2d 1332.

Footnote 11. *Hardy v United States*, 186 US 224, 46 L Ed 1137, 22 S Ct 889; *Mangum v United States* (CA9 Ariz) 289 F 213; *Lewis v State*, 220 Ala 461, 125 So 802; *State v Hensley*, 137 Ariz 80, 669 P2d 58, appeal after remand 142 Ariz 598, 691 P2d 689, post-conviction proceeding, en banc 160 Ariz 557, 774 P2d 1347, 33 Ariz Adv Rep 30; *Bullen v State*, 156 Ark 148, 245 SW 493; *People v Orloff*, 65 Cal App 2d 614, 151 P2d 288; *Cahill v People*, 111 Colo 29, 137 P2d 673, 148 ALR 536; *Jackson v State*, 172 Ga 575, 158 SE 289; *State v Jay*, 116 Iowa 264, 89 NW 1070; *State v Jackson* (La) 414 So 2d 310; *People v Cleveland*, 251 Mich 542, 232 NW 384; *Clash v State*, 146 Miss 811, 112 So 370; *State v Tharp*, 334 Mo 46, 64 SW2d 249; *State v Guie*, 56 Mont 485, 186 P 329; *Morcumb v State*, 125 Neb 42, 248 NW 807; *Re Ellis* (Okla Crim) 383 P2d 706; *State v Ellis*, 232 Or 70, 374 P2d 461; *Cross v State*, 142 Tenn 510, 221 SW 489, 9 ALR 1354; *Cordes v State*, 158 Tex Crim 529, 257 SW2d 704.

To determine voluntariness, it is necessary to look at the totality of the circumstances, including any promises or threats made by police officers or the prosecution, to see if the will of the accused was overborne. *United States v Jackson* (CA1 Mass) 918 F2d 236.

For a discussion of the totality of the circumstances test, generally, see § 719.

Practice References Grounds for Suppression—Promises or Inducements. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 24.

Footnote 12. *Crawford v United States* (CA5 Tex) 219 F2d 207, reh den (CA5 Tex) 220 F2d 352; *United States v Guaydacan* (CA9 Cal) 470 F2d 1173; *Brown v State*, 198 Ark 920, 132 SW2d 15; *People v Steger*, 16 Cal 3d 539, 128 Cal Rptr 161, 546 P2d 665, 83 ALR3d 1206; *Williams v State*, 156 Fla 300, 22 So 2d 821; *State v Hilpipe* (Iowa) 242 NW2d 306; *Barnes v State*, 199 Miss 86, 23 So 2d 405; *State v Longmore*, 178 Neb 509, 134 NW2d 66; *State v Lang*, 309 NC 512, 308 SE2d 317; *Foster v State* (Okla Crim) 657 P2d 166; *Walker v State* (Tex Crim) 626 SW2d 777; *Hammer v Commonwealth*, 207 Va 135, 148 SE2d 878; *State v Stotler*, 168 W Va 8, 282 SE2d 255.

A defendant's confession to robbery was induced by coercive behavior on the part of investigating officials and had to be suppressed, where the defendant's mother was incarcerated for the same robbery at the time of the defendant's interrogation, there was subtle reference to her plight during the interrogation, and she was released shortly after the defendant confessed. *State v Davis* (App) 115 Idaho 462, 767 P2d 837.

A statement by a police officer that, if the defendant cooperated and admitted to burglaries, he would charge the defendant's wife, who was seven-and-one-half months pregnant and had a young son, with a misdemeanor so she would not have to go to jail, constituted tactics overbearing the defendant's will. *People v Keene* (4th Dept) 148 App Div 2d 977, 539 NYS2d 214.

But see *State v Gonzales*, 46 Wash App 388, 731 P2d 1101, holding that a police detective's promise to a suspect that he would attempt to get the suspect's wife released from custody would not alone render the suspect's subsequent confession involuntary.

Annotation: Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Footnote 13. *People v Andrae*, 305 Ill 530, 137 NE 496; *Walker v State*, 249 Ind 551, 233 NE2d 483; *State v Foster*, 25 NM 361, 183 P 397, 7 ALR 417; *State v Ely*, 237 Or 329, 390 P2d 348.

Footnote 14. *State v Conn*, 137 Ariz 148, 669 P2d 581; *People v Brommel*, 56 Cal 2d 629, 15 Cal Rptr 909, 364 P2d 845 (ovrld on other grounds by *People v Cahill*, 5 Cal 4th 478, 20 Cal Rptr 2d 582, 853 P2d 1037, 93 CDOS 4902, 93 Daily Journal DAR 8304); *People v Lego*, 32 Ill 2d 76, 203 NE2d 875; *State v Kase (Iowa)* 344 NW2d 223; *State v Biron*, 266 Minn 272, 123 NW2d 392; *Johnson v State*, 89 Miss 773, 42 So 606; *State v Ball (Mo)* 262 SW 1043.

Where a promise of leniency has been made in exchange for a statement, an inculpatory statement would be the product of inducement, and thus not an act of free will. *Griffin v Strong (CA10 Utah)* 983 F2d 1540ec.

Footnote 15. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

Footnote 16. *People v Gordon (2nd Dist)* 84 Cal App 3d 913, 149 Cal Rptr 91.

As to the impact of the use of a lie detector on the voluntariness of a confession, see § 742.

Footnote 17. *Pharr v Gudmanson (CA7 Wis)* 951 F2d 117, holding that where accused was told that if he did not tell the truth he would be charged on a state charge of theft, and if he did tell the truth he would be written up by municipal citation for retail theft, accused's mistaken belief that officer's promise referred to all state charges was insufficient to render his confession involuntary and preclude admission of the confession in a trial for concealing stolen property, where promise concerned only charge of theft, in failing to advise accused of possible other state charge officer made no misrepresentations to him, and record was devoid of any trickery on part of officers involved.

Footnote 18. *United States v Mendoza-Cecelia (CA11 Fla)* 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

Footnote 19. *United States v McClinton (CA8 Mo)* 982 F2d 278, reh den (CA8) 1993 US App LEXIS 1387.

Footnote 20. *People v Carigon*, 128 Mich App 802, 341 NW2d 803.

Footnote 21. *State v Booker*, 306 NC 302, 293 SE2d 78, appeal after remand 309 NC 446, 306 SE2d 771.

Footnote 22. *United States v Rojas-Martinez* (CA5 Tex) 968 F2d 415, cert den (US) 121 L Ed 2d 698, 113 S Ct 828 and cert den (US) 122 L Ed 2d 146, 113 S Ct 995.

Footnote 23. *Maqueira v State* (Fla) 588 So 2d 221, 16 FLW S 599, cert den (US) 118 L Ed 2d 563, 112 S Ct 1961.

A statement by a police officer, in answer to an accused's question as to whether the officer could help him, that "we would see what we could do, we could not promise anything," is not a promise. *Brooks v State* (Del Sup) 229 A2d 833.

Footnote 24. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421, also stating that such an ephemeral benefit cannot reasonably be regarded as sufficient to cause a person to admit against his will the killing of another human being.

§ 741 --Effect of authority of person offering inducement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While a confession is not ipso facto involuntary merely because it was made to a person in authority, 25 where an inducement has been extended to the accused, the strength of the inducement may turn upon the power of the person offering it. 26 A relatively slight inducement held out by a person in authority may render a confession involuntary because the accused would have reason to believe that such a person is not only credible but also is in a position to give effect to the inducement. 27 The following are illustrative of persons in authority within the meaning of this rule: a law enforcement officer, 28 a prosecuting attorney, 29 including a private prosecutor; 30 a magistrate; 31 and a coroner. 32 Furthermore, a confession made after a polygraph examiner led the accused to believe that he could help the accused get his job back was properly excluded as involuntary. 33 However, a private detective is not a person in authority within the meaning of the rule. 34 Nor was a representative of the owner of stolen property, who prepared an inventory thereof and obtained defendant's signature thereto, a person in authority within the meaning of the rule. 35

◆ **Observation:** Despite the view that an accused's subjective understanding that a threat of violence has been made against him has been held not to be relevant in determining whether such a threat has actually been made and thus whether a subsequent confession is voluntary, 36 it has also been said that the fact that the person involved in making inducements to the accused has no actual power to initiate or terminate criminal proceedings against the accused is not the issue, but, rather, the important question is whether such person represented to the defendant that he had real or apparent authority to alter or influence a certain course of events in the event the defendant capitulated and whether the defendant reasonably believed that changing his statement was necessary to obtain preferential treatment. 37

Footnotes

Footnote 25. § 729.

Footnote 26. *Freeman v Brewster*, 93 Ga 648, 21 SE 165; *Commonwealth v Morey*, 67 Mass 461, 1 Gray 461; *People v Wolcott*, 51 Mich 612, 17 NW 78; *State v Force*, 69 Neb 162, 95 NW 42.

Practice References Grounds for Suppression—Promises or Inducements. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 24.

Footnote 27. *Ward v State*, 50 Ala 120; *People v Silvers*, 6 Cal App 69, 92 P 506; *People v Clarke*, 105 Mich 169, 62 NW 1117; *State v Holden*, 42 Minn 350, 44 NW 123; *State v Force*, 69 Neb 162, 95 NW 42; *State v Morgan*, 35 W Va 260, 13 SE 385; *Roszczyńska v State*, 125 Wis 414, 104 NW 113.

Footnote 28. *Hardin v State*, 66 Ark 53, 48 SW 904; *People v Thompson*, 84 Cal 598, 24 P 384; *State v Willis*, 71 Conn 293, 41 A 820; *Smith v State*, 88 Ga 627, 15 SE 675; *Manley v State*, 197 Ind 583, 151 NE 403; *State v Jay*, 116 Iowa 264, 89 NW 1070; *Bennett v Commonwealth*, 242 Ky 244, 46 SW2d 84; *State v Alexander*, 109 La 557, 33 So 600; *Commonwealth v Hudson*, 185 Mass 402, 70 NE 436; *People v McCullough*, 81 Mich 25, 45 NW 515; *McMaster v State*, 82 Miss 459, 34 So 156; *State v Meyer*, 293 Mo 108, 238 SW 457; *Bubster v State*, 33 Neb 663, 50 NW 953; *Bullock v State*, 65 NJL 557, 47 A 62; *State v Davis*, 125 NC 612, 34 SE 198; *Doublehead v State*, 27 Okla Crim 375, 228 P 170; *State v Wintzingerode*, 9 Or 153; *Commonwealth v Cavalier*, 284 Pa 311, 131 A 229; *State v Morgan*, 35 W Va 260, 13 SE 385.

A statement of the chief of detectives that the detectives who had been questioning the defendant would "treat him right" was not a prohibited promise or inducement for a subsequent confession. *State v Goodson* (La App 2d Cir) 444 So 2d 1337, review den (La) 449 So 2d 1027.

Footnote 29. *Corley v State*, 50 Ark 305, 7 SW 255; *People v Silvers*, 6 Cal App 69, 92 P 506; *People v Clarke*, 105 Mich 169, 62 NW 1117; *State v Hunter*, 181 Mo 316, 80 SW 955; *Esterra v State*, 196 Wis 104, 219 NW 349.

The promise of the prosecutor to recommend that a sentence be served outside of the state, upon which the defendant relied in making his confessions, was not an impermissible inducement, where the promise was solicited by the defendant. *State v Williams*, 136 Ariz 52, 664 P2d 202.

Footnote 30. *White v State*, 70 Ark 24, 65 SW 937; *People v Smith*, 15 Cal 408; *Rector v Commonwealth*, 80 Ky 468; *State v Foster*, 25 NM 361, 183 P 397, 7 ALR 417; *Rice v State*, 22 Tex App 654, 3 SW 791; *State v Walker*, 34 Vt 296.

Footnote 31. *Biscoe v State*, 67 Md 6, 8 A 571; *People v Clarke*, 105 Mich 169, 62 NW 1117; *Garrard v State*, 50 Miss 147.

Footnote 32. *Turnage v State*, 182 Ark 74, 30 SW2d 865; *State v Lewis*, 175 La 696, 144 So 423.

Footnote 33. *People v Sickley* (3d Dist) 114 Ill App 3d 167, 69 Ill Dec 894, 448 NE2d 612 (where examiner told accused, schoolteacher, among other things, that he could not make recommendation to school board unless defendant appeared apologetic and honest, that only way for accused to "straighten this out" was to admit it and then board would "work with him", and that school board was going to ask examiner's impression, and they wanted to believe accused but couldn't unless accused would admit it).

For discussion of the use of polygraph tests as affecting voluntariness of confessions, see § 742.

Footnote 34. *United States v Stone* (CC Tenn) 8 F 232; *Stone v State*, 105 Ala 60, 17 So 114; *Early v Commonwealth*, 86 Va 921, 11 SE 795.

Footnote 35. *Carnes v State*, 115 Ga App 387, 154 SE2d 781, cert den 389 US 928, 19 L Ed 2d 279, 88 S Ct 287.

Footnote 36. § 739.

Footnote 37. *People v Sickley* (3d Dist) 114 Ill App 3d 167, 69 Ill Dec 894, 448 NE2d 612.

§ 742 Use of polygraph

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession otherwise voluntary is not rendered inadmissible by reason of the fact that a lie detector was used during the accused's interrogation. 38 However, a confession is involuntary and hence inadmissible where the police use a polygraph examination in a coercive manner in an attempt to extract a confession from the defendant. 39

◆ Observation: It is not improper to inform an accused that her polygraph tests indicate deception, when that is the case, nor to resume questioning if the test results are adverse. 40

§ 742 ----Use of polygraph [SUPPLEMENT]

Case authorities:

Results of polygraph examination of defendant charged with criminal activities relating to dealings with savings institution were more prejudicial than probative and therefore properly excluded where examination was administered by defense- selected expert apparently without government's participation and defendant wished to present evidence before jury. *United States v Pettigrew* (1996, CA5 Tex) 77 F3d 1500.

District court did not abuse its discretion in limiting defendant's cross-examination of government witness concerning witness's untruthful statements made during polygraph examination given limited purpose of four test questions in polygraph examination which were designed to elicit untruthful answers to give examiner benchmark for comparing results and reactions to substantive questions, and fact that defendant was able to cross-examine witness as to prior false statements and bad acts. *United States v Dillard* (1994, CA7 Ill) 43 F3d 299.

In prosecution for dealing in drugs within 1000 feet of school, although solicitation of testimony by prosecutor that witness had agreed to take polygraph test as part of plea bargain was improper, error did not require reversal where (1) witness' testimony did not imply that he had passed polygraph test; (2) testimony, although important, was largely echoed by testimony of fellow informant; and (3) neither testimony of witness or informant was nearly as damaging as that of another witness, who had used defendant as supplier of LSD over period of months. *Lay v State* (1995, Ind) 659 NE2d 1005, reh den (Mar 7, 1996).

While evidence that defendant did, or did not, submit to polygraph examination was inadmissible, inadvertent remark by prosecution witness referring to defendant's having taken examination was not prejudicial, since there was no reaction from jury, and court sustained defense counsel's objection. *State v Weston* (1995, Mo App) 912 SW2d 96.

Police officer's telling defendant, when officer was questioning defendant at police station following defendant's having taken polygraph examination, that defendant had not done well on examination did not render defendant's subsequent confession involuntary, since defendant did not establish that statement was either untrue or actual cause of confession. *State v Farley* (1994, W Va) 452 SE2d 50.

Footnotes

Footnote 38. *Keiper v Cupp* (CA9 Or) 509 F2d 238; *Canada v State*, 56 Ala App 722, 325 So 2d 513, cert den 295 Ala 395, 325 So 2d 516; *Hamilton v State*, 262 Ark 366, 556 SW2d 884; *People v Coblenz* (2nd Dist) 123 Cal App 3d 477, 176 Cal Rptr 516; *Whalen v State* (Del Sup) 434 A2d 1346, cert den 455 US 910, 71 L Ed 2d 449, 102 S Ct 1258, appeal after remand (Del Sup) 492 A2d 552; *Roth v State* (Fla App D3) 359 So 2d 881, cert den (Fla) 367 So 2d 1126 and later proceeding (Fla App D3) 435 So 2d 274, later proceeding (Fla App D3) 479 So 2d 848, 11 FLW 20; *People v McCue* (2d Dist) 48 Ill App 3d 41, 6 Ill Dec 125, 362 NE2d 760, 89 ALR3d 223; *Grey v State*, 273 Ind 439, 404 NE2d 1348, post-conviction proceeding (Ind) 553 NE2d 1196; *State v Henry* (La) 352 So 2d 643; *Keyes v State*, 236 Md 74, 202 A2d 582; *People v Garrison*, 128 Mich App 640, 341 NW2d 170, app den 419 Mich 853; *Lee v State* (Miss) 338 So 2d 395; *People v McGuffin* (3d Dept) 55 App Div 2d 772, 389 NYS2d 478; *State v Clifton*, 271 Or 177, 531 P2d 256; *Commonwealth v Jones*, 341 Pa 541, 19 A2d 389; *Webb v State*, 163 Tex Crim 392, 291 SW2d 331; *Turner v State*, 76 Wis 2d 1, 250 NW2d 706.

Law Reviews: Furedy, Liss, Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses. 29 Crim LQ 91 (December, 1986).

Annotation: Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused, 92 ALR3d 1317.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Footnote 39. *People v Leonard* (2d Dept) 59 App Div 2d 1, 397 NYS2d 386, later proceeding (2d Dept) 113 App Div 2d 258, 497 NYS2d 28.

Footnote 40. *Jenner v Smith* (CA8 SD) 982 F2d 329, cert den (US) 126 L Ed 2d 49, 114 S Ct 81.

§ 743 Deception or trickery

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While deception weighs against a finding of voluntariness, and is relevant, it is but one factor to be considered within the totality of the circumstances in determining the voluntariness of a confession. 41 The fact that a confession was procured by deception or subterfuge does not invalidate the confession as a matter of law. 42

Whether deception renders a confession involuntary depends upon whether the deception interjected the type of extrinsic considerations that would overcome a defendant's will by distorting an otherwise rational choice of whether to confess or remain silent. 43

When the police told a female suspect that she was in jeopardy of losing her welfare benefits and the custody of her children, but offered to recommend leniency 44 if she would confess, this brand of police trickery was considered inherently coercive. 45

◆ Comment: It has been observed that this particular deceptive practice did more than affect the suspect's beliefs regarding her actual guilt or innocence, and judgments regarding the evidence connecting her to the crime. It also distorted the suspect's rational choice by introducing a completely extrinsic consideration—an empty but plausible threat 46 to take away something to which she and her children would otherwise be entitled. 47

Other illustrative forms of deception or trickery include: pretending that the state had certain evidence against the accused; 48 pretending that an accomplice had incriminated the accused or had confessed; 49 pretending that certain evidence favorable to the accused was nonexistent; 50 disguising an informer as a fellow prisoner; 51 pretending friendship or concern by a person in authority; 52 playing upon an accused's superstition; 53 and a promise of secrecy. 54

Of the numerous varieties of police trickery, however, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. 55

§ 743 ----Deception or trickery [SUPPLEMENT]

Case authorities:

Confession of defendant convicted of having sexual intercourse with mentally retarded woman was not rendered involuntary because during interview police purported to have evidence of sexual activity that incriminated defendant and falsely stated that there were bruises on complainant's arms and legs indicating that force had been used, where rule regarding use of deliberate falsehoods by police required that falsehoods intrinsic to facts of alleged offense would be treated as one of totality of circumstances surrounding confession; in this case deliberate misrepresentations were intrinsic and, from totality of circumstances, were not of type that would reasonably induce false confession. *State v Kelekolio* (1993) 74 Hawaii 479, 849 P2d 58.

In second degree murder prosecution, defendant was not entitled to suppression of statements made to police since ruse employed by detectives to get him outside his home was not so fundamentally unfair as to deny due process, and thus did not render his arrest unlawful, where detectives told him that they were from auto crimes unit and that they wished to speak with him about automobile, and he voluntarily left his apartment and accompanied detectives to precinct. *People v Rosario* (1992, 2d Dept) 186 AD2d 598, 588 NYS2d 393, app den 81 NY2d 794, 594 NYS2d 740, 610 NE2d 413.

Footnotes

Footnote 41. As to the totality of the circumstances test, generally, see § 719.

Footnote 42. *People v Melock*, 149 Ill 2d 423, 174 Ill Dec 857, 599 NE2d 941, reh den (Oct 5, 1992).

The fact that an officer misrepresented to a defendant the strength of the evidence against him, while insufficient by itself to make an otherwise voluntary confession inadmissible, is one factor to consider among the totality of circumstances in determining voluntariness. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Deception does not render a confession involuntary. As long as the decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary. *United States v Miller* (CA9 Cal) 984 F2d 1028, 93 CDOS 658, 93 Daily Journal DAR 1295, cert den (US) 126 L Ed 2d 210, 114 S Ct 258.

Where a detective told the defendant, subsequently convicted of first-degree murder, that he thought the defendant would be charged with second-degree murder and prepared a probable cause affidavit to that effect, but also told the defendant that the actual charge would be up to the state attorney, the argument that the defendant's statement should be suppressed because the detective misled him about the crime with which he would be charged was found to be without merit. *Young v State* (Fla) 579 So 2d 721, 16 FLW S 192, reh den (Fla) 16 FLW S 373 and cert den (US) 117 L Ed 2d 438, 112 S Ct 1198, reh den (US) 118 L Ed 2d 416, 112 S Ct 1710.

Footnote 43. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Questioning tactics such as deception on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. *Jenner v Smith* (CA8 SD) 982 F2d 329, cert den (US) 126 L Ed 2d 49, 114 S Ct 81.

As to the fact that a voluntariness determination is based upon whether the defendant's will was overborne, see § 719.

Footnote 44. With regard to promises of leniency, generally, see § 740.

Footnote 45. *Lynum v Illinois*, 372 US 528, 9 L Ed 2d 922, 83 S Ct 917.

Footnote 46. As to threats, see §§ 738, 739.

Footnote 47. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Footnote 48. *Green v Scully* (CA2 NY) 850 F2d 894, cert den 488 US 945, 102 L Ed 2d 363, 109 S Ct 374; *Santiago Ortiz v Kelly* (ED NY) 687 F Supp 64; *Gilder v State* (Ala App) 542 So 2d 1306; *People v Thompson*, 50 Cal 3d 134, 266 Cal Rptr 309, 785 P2d 857, reh den, stay gr (Cal) 1990 Cal LEXIS 2644 and cert den 498 US 881, 112 L Ed 2d 180, 111 S Ct 226, reh den 498 US 1043, 112 L Ed 2d 708, 111 S Ct 720; *State v Williams*, 16 Conn App 75, 546 A2d 943; *Baynard v State* (Del Sup) 518 A2d 682, later proceeding (Del Sup) 531 A2d 627; *Beasley v United States* (Dist Col App) 512 A2d 1007, cert den 482 US 907, 96 L Ed 2d 377, 107 S Ct 2485; *State v Cayward* (Fla App D2) 552 So 2d 971, 14 FLW 2678, review dismd (Fla) 562 So 2d 347; *Re T.S.* (4th Dist) 151 Ill App 3d 344, 104 Ill Dec 264, 502 NE2d 761; *State v Strauch*, 239 Kan 203, 718 P2d 613; *People v Albury* (2d Dept) 156 App Div 2d 370, 548 NYS2d 325, app den 75 NY2d 866, 553 NYS2d 298, 552 NE2d 877 and app den 75 NY2d 963, 556 NYS2d 248, 555 NE2d 620; *Snow v State* (Tex App Houston (1st Dist)) 721 SW2d 943; *State v Randle*, 179 W Va 242, 366 SE2d 750.

An officer's untruthful statement to a defendant that the police department had received a police report from another city indicating that a witness had seen the defendant's vehicle in an alley where the victim had been raped, and that the defendant would have to explain why his vehicle was there, interfered little, if at all, with his free and deliberate choice of whether to confess, for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

Footnote 49. *Sotelo v Indiana State Prison* (CA7 Ind) 850 F2d 1244; *Jacobs v State*, 133 Ga App 812, 212 SE2d 468; *Ward v State* (Ind App) 408 NE2d 140; *State v Churchill*, 231 Kan 408, 646 P2d 1049; *Commonwealth v Jackson*, 377 Mass 319, 386 NE2d 15; *State v Stubenrauch* (Mo App) 503 SW2d 136; *State v Stevenson*, 200 Neb 624, 264 NW2d 848; *People v Jackson* (3d Dept) 143 App Div 2d 471, 532 NYS2d 808; *State v Worley*, 179 W Va 403, 369 SE2d 706, cert den 488 US 895, 102 L Ed 2d 226, 109 S Ct 236.

A confession was held voluntary, even though the police had told the defendant falsely

that his associate had confessed, where the questioning was of short duration and the defendant was a mature person with normal intelligence. *Frazier v Cupp*, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420.

Footnote 50. *State v Rossell*, 113 Mont 457, 127 P2d 379.

Footnote 51. *Young v United States* (CA5 Tex) 107 F2d 490; *Dismukes v State* (Fla App D1) 324 So 2d 201; *People v Lipszczinska*, 212 Mich 484, 180 NW 617; *State v Fuller*, 203 Neb 233, 278 NW2d 756, supp op 204 Neb 196, 281 NW2d 749; *Spencer v State*, 48 Tex Crim 580, 90 SW 638.

Footnote 52. *United States ex rel. Lathan v Deegan* (CA2 NY) 450 F2d 181, cert den 405 US 1071, 31 L Ed 2d 803, 92 S Ct 1520; *Miller v Fenton* (CA3 NJ) 796 F2d 598, cert den 479 US 989, 93 L Ed 2d 587, 107 S Ct 585; *United States v Moreno-Flores* (CA9 Cal) 461 F2d 1001; *Rowe v State*, 41 Md App 641, 398 A2d 485; *People v Blasingame* (2d Dept) 65 App Div 2d 455, 412 NYS2d 153; *Commonwealth v Keysock*, 236 Pa Super 474, 345 A2d 767; *Anders v State* (Tex Crim) 445 SW2d 167, appeal after remand (Tex Crim) 471 SW2d 584, supp op (Tex Crim) 501 SW2d 665; *Macon v Commonwealth*, 187 Va 363, 46 SE2d 396.

Footnote 53. *Denmark v State*, 95 Fla 757, 116 So 757; *Johnson v State*, 107 Miss 196, 65 So 218; *State v Harrison*, 115 NC 706, 20 SE 175.

Footnote 54. *Fincher v State*, 211 Ala 388, 100 So 657; *People v Stadnick* (2nd Dist) 207 Cal App 2d 767, 25 Cal Rptr 30, 99 ALR2d 766; *People v Tanser* (2d Dist) 75 Ill App 3d 482, 31 Ill Dec 414, 394 NE2d 616; *Ford v State*, 181 Md 303, 29 A2d 833; *Commonwealth v Edwards*, 318 Pa 1, 178 A 20; *State v Thompson*, 38 Wash 2d 774, 232 P2d 87.

Footnote 55. *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

§ 744 Mental or physical condition or capacity of accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A defendant's history of emotional instability has been noted in a court's determination that his confession was involuntary and that its admission into evidence at trial therefore violated due process. ⁵⁶ Furthermore, where the evidence established by the strongest probability that the accused was insane and incompetent at the time of the confession, it has been held, particularly in view of other circumstances, ⁵⁷ such as the 8 to 9 hour sustained interrogation of the accused, ⁵⁸ the absence of friends relatives or legal counsel, ⁵⁹ and the composition of the confession by a deputy sheriff rather than the accused, that a pretrial confession by a defendant accused of robbery was involuntary and therefore that its admission into evidence was contrary to due process. ⁶⁰ However, even if a suspect's unsolicited confession to police was allegedly prompted by

mental illness, which supposedly interfered with his rational intellect and free will, the admission of the confession into evidence did not violate the due process clause of the Fourteenth Amendment where there was no evidence of coercive police conduct. 61

The subnormal intelligence of the accused is one factor which has been pointed to in support of the conclusion that an accused's pretrial confession was involuntary. 62 However, confessions have been found to be voluntary notwithstanding the accused's subnormal intelligence, in certain instances, 63 and, in this regard, it has been stated that subnormal mentality does not ipso facto make a confession involuntary, where the subnormality has not deprived the accused of the ability to understand the meaning and ramifications of his confession. 64

Where the accused was physically incapacitated at the time, 65 a confession has been found to be inadmissible. 66

A confession was held involuntary, where the defendant, who was in the prison hospital with a bullet wound in the leg, signed the confession after a morphine injection 67 when he was in a "kind of slumber," feverish, and in intense pain. 68

However, one who has suffered physical harm can still be competent to give a voluntary confession. 69

§ 744 ----Mental or physical condition or capacity of accused [SUPPLEMENT]

Case authorities:

In capital murder prosecution, trial court considered evidence of defendant's low I.Q. in determining voluntariness of incriminating statements made by defendant, but it properly admitted such statements where there was no evidence of coercive police activity. *Livingston v State* (1994) 264 Ga 402, 444 SE2d 748, 94 Fulton County D R 2234.

Defendant's confession given to FBI agent in hospital after he was in coma for 30 days following automobile accident was voluntary where defendant was confused as to all matters relating to time but otherwise was lucid in answering questions. *United States v Robertson* (1994, CA10 Kan) 19 F3d 1318.

The evidence on voir dire did not show that defendant lacked the mental capacity to waive his rights and confess, and the trial court did not err by concluding that defendant knowingly and understandingly waived his rights and that defendant's inculpatory statements were admissible in his murder trial, where defendant offered no evidence that tended to show that he was insane or that he did not voluntarily and understandingly waive his rights; an SBI agent testified that at the time defendant was being questioned, he responded appropriately and completely and did not appear to be under the influence of alcohol or drugs; defendant responded to the questions in a sensible manner and did not exhibit any bizarre or unusual behavior whatsoever; and during questioning, defendant chose not to answer certain questions and eventually decided on his own that he should not answer further questions without the assistance of an attorney. *State v Ingle* (1994) 336 NC 617, 445 SE2d 880.

The trial court did not err in denying defendant's motion to suppress an inculpatory statement defendant gave to police while she was in custody on the ground she lacked the

capacity to knowingly and voluntarily waive her rights, since defendant gave appropriate and responsive answers to officers' questions about defendant's age, date of birth, and place of residence, among other things; defendant could walk and climb stairs unassisted; defendant stated to the officer that she had consumed alcohol but was unimpaired by it; and, in the officer's opinion, defendant was not impaired to the extent that she did not understand what she was saying and what he was asking her. *State v Wilson* (1995) 340 NC 720, 459 SE2d 192.

There was no error in a first-degree murder prosecution in the admission of defendant's incriminating statements where defendant drank an organophosphate pesticide and told a friend shortly before losing consciousness that he had killed his father, and described the killing to his family after he regained consciousness in the hospital. The trial court's findings that defendant was conscious, alert and appeared in control of his faculties at the time the statements were made, that the organophosphates had metabolized when he made the statement to his family, and that the drugs with which he was treated rendered him more coherent and rational were supported by the record. Furthermore, defendant's psychiatric expert testified that defendant was awake and able to communicate with the medical staff prior to the statement to his family, that defendant had appeared coherent and engaged in logical conversation with her, and that his medication was having a positive effect on his cognitive abilities. The very fact that defendant not only remembers making the statements but testified as to his motivation for making those statements belies any claim that the statements were not voluntary based on his mental capacity. Finally, defendant makes no claim of coercion by his friend or family members and therefore had no basis for suppression of his statements. *State v Pleasant* (1995) 342 NC 366, 464 SE2d 284.

If police do not employ coercive tactics, fact that defendant is undergoing medical treatment or experiencing pain is not determinative on issue of voluntariness of confession. *State v Schambow* (1993, App) 176 Wis 2d 286, 500 NW2d 362.

Footnotes

Footnote 56. *Spano v New York*, 360 US 315, 3 L Ed 2d 1265, 79 S Ct 1202.

Concerning the due process requirement of voluntariness, see § 719.

Annotation: Validity or admissibility, under Federal Constitution, of accused's pretrial confession as affected by accused's mental illness or impairment at time of confession—Supreme Court cases, 93 L Ed 2d 1078.

Practice References Grounds for Suppression—Insanity, Mental Deficiency or Other Disability of Suspect. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 28.

Footnote 57. Concerning the totality of the circumstances test for determining the voluntariness of confessions, see § 719.

Footnote 58. Regarding prolonged interrogation, see § 735.

Footnote 59. As to the Sixth Amendment right to counsel, see § 750.

As to the Fifth Amendment right to counsel during interrogation, derived from the Miranda decision, see § 749.

Footnote 60. *Blackburn v Alabama*, 361 US 199, 4 L Ed 2d 242, 80 S Ct 274.

Law Reviews: A. Garcia, *Mental Sanity and Confessions: The Supreme Court's New Version of the Old "Voluntariness" Standard*. 21 Akr LR 275 (Winter 1988).

Footnote 61. *Colorado v Connelly*, 479 US 157, 93 L Ed 2d 473, 107 S Ct 515.

A defendant's schizophrenia did not render his statements inadmissible where his own witness testified that he was in remission at time he gave the statements. *State v West* (La) 408 So 2d 1302.

Although the defendant cried and trembled during her interrogation, the emotional distress did not affect the voluntariness of her confession. *State v Beck* (La App 2d Cir) 445 So 2d 470, cert den (La) 446 So 2d 315.

An officer's testimony that the defendant was nervous and upset and cried from time to time while making a statement did not render the defendant's statement inadmissible. *State v Lewis*, 298 NC 771, 259 SE2d 876.

Footnote 62. *Davis v North Carolina*, 384 US 737, 16 L Ed 2d 895, 86 S Ct 1761; *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in *Joyner v King* (CA5 La) 786 F2d 1317) and (superseded by statute on other grounds as stated in *Blanco v Singletary* (CA11 Fla) 943 F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199).

Minor burglary defendant's confession to police was involuntary where defendant's IQ of 49 made it impossible for him to comprehend Miranda rights or to make knowing waiver. *Eddings v State* (Ala App) 443 So 2d 1308, later proceeding (Ala App) 452 So 2d 1347.

A motion to suppress a confession obtained from a retarded juvenile suspected of robbery during a custodial interrogation lasting four hours should have been granted, where the proof established that the juvenile had a reduced mental ability involving visual perceptual disorder with brain damage and attention span problems, and that he had the reading ability of a first-grade student. *Fields v State* (Fla App D1) 402 So 2d 46.

The inculpatory statement made by a defendant who was 33 years old, with an I.Q. of 74, who had always lived with his grandmother who treated him as a child, was properly suppressed as involuntary. *Commonwealth v Reynolds*, 300 Pa Super 143, 446 A2d 270.

Annotation: Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 ALR4th 16.

Footnote 63. *Vance v Bordenkircher* (CA4 W Va) 692 F2d 978, cert den 464 US 833, 78 L Ed 2d 114, 104 S Ct 114 (murder confessions by 15-year-old boy with mental age of nine years an I.Q. of 62 voluntary); *People v Tackett* (2d Dist) 246 Ill App 3d 622, 186 Ill Dec 501, 616 NE2d 691.

In a prosecution for sodomy, the defendant's confession was properly admitted where the confession was voluntarily made, even though the defendant was slightly retarded and slow in school according to the testimony of his mother and a special education teacher. *Mitchell v State*, 162 Ga App 780, 293 SE2d 48.

The confession given by a defendant whose tested I.Q. was 55 was properly admitted as voluntary, where there was evidence that the low I.Q. test score was the result of the defendant's illiteracy in English and in Spanish, and where the defendant had many previous encounters with law officers. *Commonwealth v Hernandez*, 498 Pa 405, 446 A2d 1268.

Footnote 64. *People v Tackett* (2d Dist) 246 Ill App 3d 622, 186 Ill Dec 501, 616 NE2d 691.

Footnote 65. With regard to physical mistreatment, see § 736.

Footnote 66. *Sims v Georgia*, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523, conformed to 224 Ga 36, 159 SE2d 290; *People v Jones*, 402 Ill 231, 83 NE2d 579; *State v Mitchell* (La) 437 So 2d 264; *People v Hooks*, 112 Mich App 477, 316 NW2d 245; *State v Williams*, 59 NC App 15, 295 SE2d 493.

Footnote 67. Concerning the use of drugs and narcotics, see § 747.

Footnote 68. *Beecher v Alabama*, 389 US 35, 19 L Ed 2d 35, 88 S Ct 189.

Footnote 69. *State v Smith* (La) 409 So 2d 271.

A confession made by the defendant was properly admissible even though, prior thereto, he was taken to a hospital for treatment of a severe cut on his hand. *State v Edwards* (La) 412 So 2d 1029.

§ 745 Confession by minor

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although a confession is not inadmissible merely because the accused is a minor, ⁷⁰ the age of the child is a factor which, together with other circumstances, ⁷¹ may properly be considered. ⁷² Thus, a minor's confession has been held admissible, notwithstanding his or her age, on the ground that the particular circumstances involved showed that the confession was voluntary, ⁷³ although in other instances a minor's confession has not been held admissible because the minor's age, in conjunction with other circumstances involved, showed that the confession was not voluntary. ⁷⁴

Although it is preferable to have responsible adults present during the questioning of

juveniles, their absence does not necessitate a finding of involuntariness of the juvenile's statement. 75 However, in a prosecution for murder, the confessions of the defendants who were 16 and 17 years old were inadmissible, where the defendants' mother, with whom they lived, had gone to the police station twice requesting to see her sons and her requests had been denied. 76

◆ Observation: A minor's confession is inadmissible where it is obtained in violation of a juvenile code requiring a police officer taking a minor into custody to take him immediately and directly before the juvenile court or to deliver him to the juvenile officer or person acting for him. 77

§ 745 ----Confession by minor [SUPPLEMENT]

Case authorities:

Fifteen-year-old defendant was not entitled to suppression of statements made during questioning at precinct house on night following crime spree, despite isolation from his mother and other "supportive adults" who attempted to see him at station, where defendant deceived police by asserting that he was 16 years old and by using false identification to buttress his assertion, there was no evidence that police employed deception or trickery in order to isolate defendant, police made his precise location known to defendant's family, neither defendant nor anyone on his behalf requested assistance of counsel, and all police questioning ceased when fact of defendant's true age finally emerged from his mother and was verified. *People v Salaam* (1993) 83 NY2d 51, 607 NYS2d 899, 629 NE2d 371.

The trial court did not err in a first- degree murder prosecution by denying defendant's motion to suppress a statement he had given to SBI agent Murphy where defendant placed great emphasis on his age and on his testimony that the warnings concerning his constitutional rights did not mean anything to him when he waived them, but the trial court found that defendant wanted to talk to agent Murphy, that he told Murphy that he understood each right he was waiving, that the agent had applied no pressure or coercion to defendant, the physical surroundings were not coercive, there was no evidence of a display of weapons, officers took defendant and his girlfriend to Burger King; officers carefully went over the juvenile rights form with defendant; defendant had failed three grades in school, but had made them up during summer school and could read at a ninth grade level; there was no showing of subnormal intelligence; defendant had an opportunity to sleep and eat before he was questioned; and defendant recited his constitutional rights when Florida officers began to read them to him. *State v Bunnell* (1995) 340 NC 74, 455 SE2d 426.

Police officer's interview of 13- year- old in principal's office at juvenile's school was not custodial interrogation. *State ex rel. Juvenile Dep't v Loreda (In re Loreda)* (1993) 125 Or App 390, 865 P2d 1312.

Family court failed to make adequate findings in concluding that questioning at state trooper's vehicle was investigative detention where juvenile alleged that uncle who brought him to vehicle was acting as constable and took juvenile into custody to allow for interrogation by trooper, rather than state's view that uncle was helping juvenile, and questioning by trooper was brief investigative detention. *In re S.T.* (1994, Vt) 641 A2d

Footnotes

Footnote 70. *Makarewicz v Scafati* (CA1 Mass) 438 F2d 474, cert den 402 US 980, 29 L Ed 2d 145, 91 S Ct 1685; *United States ex rel. Brown v Rundle* (CA3 Pa) 450 F2d 517; *Miller v Maryland* (CA4 Md) 577 F2d 1158; *United States ex rel. McMath v Pate* (CA7 Ill) 435 F2d 174; *United States v Cheyenne* (CA8 SD) 558 F2d 902, cert den 434 US 957, 54 L Ed 2d 316, 98 S Ct 486; *United States v Indian Boy X* (CA9 Wash) 565 F2d 585, cert den 439 US 841, 58 L Ed 2d 139, 99 S Ct 131; *United States v Palmer* (CA10 NM) 604 F2d 64; *Carter v State* (Ala App) 356 So 2d 682, cert den (Ala) 356 So 2d 689, habeas corpus den (SD Ala) 1992 US Dist LEXIS 18869, adopted (SD Ala) 1992 US Dist LEXIS 18812; *Helmer v State* (Alaska) 608 P2d 38; *State v Valencia*, 121 Ariz 191, 589 P2d 434, appeal after remand 124 Ariz 139, 602 P2d 807, appeal after remand 132 Ariz 248, 645 P2d 239; *Leonard v State*, 269 Ark 146, 599 SW2d 138; *People v Johnson*, 70 Cal 2d 469, 74 Cal Rptr 889, 450 P2d 265; *State v Oliver*, 160 Conn 85, 273 A2d 867, cert den 402 US 946, 29 L Ed 2d 115, 91 S Ct 1637; *Re N.* (Dist Col App) 406 A2d 1275; *Doerr v State* (Fla) 383 So 2d 905; *Lane v State*, 247 Ga 19, 273 SE2d 397; *State v Dillon*, 93 Idaho 698, 471 P2d 553, cert den 401 US 942, 28 L Ed 2d 223, 91 S Ct 947; *People v Prude*, 66 Ill 2d 470, 6 Ill Dec 689, 363 NE2d 371, cert den 434 US 930, 54 L Ed 2d 291, 98 S Ct 418; *Shepard v State*, 273 Ind 295, 404 NE2d 1, later proceeding (Ind) 500 NE2d 1172; *State v Kelley*, 253 Iowa 1314, 115 NW2d 184; *State v Cross*, 223 Kan 803, 576 P2d 698; *State v Zoerner* (La) 418 So 2d 604; *King v State*, 36 Md App 124, 373 A2d 292; *State v Nunn* (Minn) 297 NW2d 752; *Saucier v State* (Miss) 328 So 2d 355; *In Interest of R.* (Mo) 603 SW2d 575, habeas corpus proceeding (CA8 Mo) 764 F2d 532; *State v Lytle*, 194 Neb 353, 231 NW2d 681, appeal after remand 224 Neb 486, 398 NW2d 705; *Re T.*, 99 Misc 2d 623, 416 NYS2d 976; *State v Miley*, 291 NC 431, 230 SE2d 537; *State v Davis*, 56 Ohio St 2d 51, 10 Ohio Ops 3d 87, 381 NE2d 641; *H. v State* (Okla Crim) 580 P2d 523; *State v Evans*, 21 Or App 122, 533 P2d 1392; *Commonwealth v Fogan*, 449 Pa 552, 296 A2d 755; *Re Williams*, 265 SC 295, 217 SE2d 719; *Braziel v State* (Tenn Crim) 529 SW2d 501; *Meza v State* (Tex Crim) 577 SW2d 705, cert den and app dismd 444 US 947, 62 L Ed 2d 317, 100 S Ct 417; *State v Hunt* (Utah) 607 P2d 297; *State v Watson*, 114 Vt 543, 49 A2d 174; *Harris v Commonwealth*, 217 Va 715, 232 SE2d 751; *Dutil v State*, 93 Wash 2d 84, 606 P2d 269; *State v Verhasselt*, 83 Wis 2d 647, 266 NW2d 342.

While youthful age is a factor to be considered, it will not render inadmissible a confession which is shown to have been made voluntarily. *Ross v State* (Fla) 386 So 2d 1191.

Annotation: Voluntariness and admissibility of minor's confession, 87 ALR2d 624.

Practice References *The Juvenile Suspect*. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 30.

Footnote 71. For a discussion of the fact that the determination as to the voluntariness of a confession is based upon the totality of the circumstances, see § 719.

Footnote 72. *Gallegos v Colorado*, 370 US 49, 8 L Ed 2d 325, 82 S Ct 1209, 87 ALR2d 614, reh den 370 US 965, 8 L Ed 2d 835, 82 S Ct 1579; *United States ex rel.*

Burgos v Follette (CA2 NY) 448 F2d 130, cert den 406 US 950, 32 L Ed 2d 338, 92 S Ct 2043; Watts v State (Ala App) 361 So 2d 1200; B. v State (Alaska) 614 P2d 786; State v Sanders, 101 Ariz 410, 420 P2d 281; Rouw v State, 265 Ark 797, 581 SW2d 313; Re G. (1st Dist) 110 Cal App 3d 576, 168 Cal Rptr 3; People v Maes, 194 Colo 235, 571 P2d 305; Re S. (Dist Col App) 391 A2d 255; Ross v State (Fla) 386 So 2d 1191; Lane v State, 247 Ga 19, 273 SE2d 397; People v Travis (1st Dist) 122 Ill App 3d 671, 78 Ill Dec 535, 462 NE2d 654; Moreno v State, 166 Ind App 441, 336 NE2d 675; In Interest of Thompson (Iowa) 241 NW2d 2; State v Young, 220 Kan 541, 552 P2d 905; State in Interest of Dino (La) 359 So 2d 586, cert den 439 US 1047, 58 L Ed 2d 706, 99 S Ct 722; State v Fernald (Me) 248 A2d 754; McCoy v State, 8 Md App 127, 258 A2d 611; People v King, 27 Mich App 619, 183 NW2d 843; State v Nunn (Minn) 297 NW2d 752; Coney v State (Mo) 491 SW2d 501; State v Smith, 203 Neb 64, 277 NW2d 441; Re P. (Anonymous) (2d Dept) 70 App Div 2d 68, 419 NYS2d 704; Re Mellott, 27 NC App 81, 217 SE2d 745; Garner v State (Okla Crim) 500 P2d 1340; Commonwealth v Hackett, 484 Pa 43, 398 A2d 651; Re Williams, 265 SC 295, 217 SE2d 719; State v Mares, 113 Utah 225, 192 P2d 861; State v Watson, 114 Vt 543, 49 A2d 174; State v Kramer, 72 Wash 2d 904, 435 P2d 970, cert den 393 US 833, 21 L Ed 2d 103, 89 S Ct 103.

A confession was inadmissible where it was made after continuous urging by police and by parents that the minor defendant make a statement. People v Saiz, 42 Colo App 469, 600 P2d 97.

A juvenile's tape-recorded confession to participation in burglaries was suppressed as involuntary under the totality of the circumstances, where the recording made it clear that the juvenile believed that he had been granted immunity by the police in exchange for information about several burglaries. In Interest of P. (Fla App D5) 382 So 2d 128, petition den (Fla) 389 So 2d 1114.

Footnote 73. United States ex rel. Smith v New Jersey (CA3 NJ) 323 F2d 146, cert den 377 US 1000, 12 L Ed 2d 1049, 84 S Ct 1927; De Souza v Barber (CA9 Cal) 263 F2d 470, cert den 359 US 989, 3 L Ed 2d 978, 79 S Ct 1118; People v Lara, 67 Cal 2d 365, 62 Cal Rptr 586, 432 P2d 202, cert den 392 US 945, 20 L Ed 2d 1407, 88 S Ct 2303; People v Magee (1st Dist) 217 Cal App 2d 443, 31 Cal Rptr 658, cert den 376 US 925, 11 L Ed 2d 620, 84 S Ct 688, reh den 376 US 967, 11 L Ed 2d 985, 84 S Ct 1126; Ross v State (Fla) 386 So 2d 1191; Green v State, 236 Md 334, 203 A2d 870; Bean v State, 234 Md 432, 199 A2d 773 (ovrld on other grounds as stated in Ryon v State, 29 Md App 62, 349 A2d 393, affd 278 Md 302, 363 A2d 243); State v Falbo (Mo) 333 SW2d 279; People v De Flumer (3d Dept) 21 App Div 2d 959, 251 NYS2d 814, affd 16 NY2d 20, 261 NYS2d 42, 209 NE2d 93, cert den 384 US 1018, 16 L Ed 2d 1040, 86 S Ct 1946, reh den 385 US 892, 17 L Ed 2d 124, 87 S Ct 20; State v Stewart, 176 Ohio St 156, 27 Ohio Ops 2d 42, 198 NE2d 439, cert den 379 US 947, 13 L Ed 2d 544, 85 S Ct 443 and (superseded by statute on other grounds as stated in State v Humphries, 51 Ohio St 2d 95, 5 Ohio Ops 3d 89, 364 NE2d 1354); Commonwealth v Cunningham, 471 Pa 577, 370 A2d 1172; State v Mares, 113 Utah 225, 192 P2d 861.

Annotation: 87 ALR2d 624 § 4.

Footnote 74. Gallegos v Colorado, 370 US 49, 8 L Ed 2d 325, 82 S Ct 1209, 87 ALR2d 614, reh den 370 US 965, 8 L Ed 2d 835, 82 S Ct 1579; United States v Morales (DC Mont) 233 F Supp 160; Re State in interest of Garland (La App 4th Cir) 160 So 2d 340.

Annotation: 87 ALR2d 624 § 5.

Footnote 75. *People v Young* (2d Dist) 115 Ill App 3d 455, 71 Ill Dec 259, 450 NE2d 947, later proceeding (2d Dist) 136 Ill App 3d 107, 90 Ill Dec 725, 482 NE2d 1008; *Commonwealth v Cunningham*, 471 Pa 577, 370 A2d 1172.

There is no requirement that a 17-year-old suspect have the opportunity to confer with or be in the presence of his parents before giving an incriminating statement. *State v Edwards* (La) 406 So 2d 1331, cert den 456 US 945, 72 L Ed 2d 467, 102 S Ct 2011.

A minor's confession was admissible where he made no request to see his parents or a counselor, and where he had previously been convicted. *People v Dunbar* (4th Dept) 71 App Div 2d 805, 419 NYS2d 356.

The confession of a 16-year-old girl was not rendered inadmissible because she was not permitted to visit with her parents or friends who were at the police station, where the defendant did not request that she be allowed to visit with them. *State v Poole*, 44 NC App 242, 261 SE2d 10.

A minor defendant's confession was admissible even though the defendant was not allowed to confer with his father, where the father was present but neither the father nor the defendant made any request for a conference. *M. v State* (Okla Crim) 599 P2d 426.

Footnote 76. *People v Rivera* (2d Dept) 78 App Div 2d 556, 431 NYS2d 1015.

Footnote 77. *State v Arbeiter* (Mo) 408 SW2d 26.

§ 746 Intoxication

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A confession is not involuntary and inadmissible merely because the accused was intoxicated; 78 proof that one who has confessed was intoxicated at the time of the confession generally goes to the weight and credibility accorded to the confession, but does not require that the confession be excluded from evidence. 79 The test is whether, by reason of the intoxication, the defendant's "will was overborne" or whether the statements were the "product of a rational intellect and a free will," 80 and, in this regard, in some instances courts have found, based on the particular facts involved, that an accused was so intoxicated at the time of the confession that the confession was rendered inadmissible because the confession could not be said to be the product of a rational and a free will. 81 For example, the accused may be so intoxicated that he could not understand the Miranda warnings given to him and thus could not waive them as a product of a rational intellect and a free will. 82

In some jurisdictions the rule is that intoxication will not, by itself, render a confession

involuntary and thus inadmissible unless the accused was intoxicated to the extent that he was unable to understand the meaning of his words, 83 or, as it is sometimes put, was in a state of "mania" 84 —variously described as such an impairment of the mind or will as would make him unconscious of the meaning of his words, 85 or as involving a situation where the accused was so intoxicated or influenced that he was unable to appreciate the consequences and nature of his statements. 86

◆ Practice guide: Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of a confession are questions of fact and a trial judge's conclusion on this issue will not be disturbed unless unsupported by the evidence. 87

§ 746 ----Intoxication [SUPPLEMENT]

Case authorities:

In rape prosecution, trial court did not err in refusing to suppress incriminating statement on grounds that defendant was intoxicated at time where, although defendant smelled of alcohol, defendant was able to acknowledge his understanding of each Miranda right, read waiver statement, and requested court-appointed counsel (after which interview was terminated, but then reopened on defendant's initiative). *Midgett v State* (1994) 316 Ark 553, 873 SW2d 165.

Statements were properly admitted in prosecution for reckless manslaughter, although defendant was very intoxicated and had blood alcohol between 0.23 and 0.25, where he was capable of communicating and was responsive in answering questions such as his name and age, indicating he knowingly and intelligently waived right to silence. *State v Warmbrun* (1994, App Div) 277 NJ Super 51, 648 A2d 1153.

There was no merit to defendant's contention that he was intoxicated and mentally impaired at the time he made an inculpatory statement and that officers engaged in coercive tactics by repeatedly telling defendant during interrogation that he failed the polygraph test, since officers had spoken to defendant prior to the date of his confession and noticed nothing out of the ordinary on the day he confessed; the only evidence of alcohol consumption was defendant's drinking from a beer can which was half-empty, when taken from defendant; and after defendant was informed that he failed the polygraph examination, he said nothing inculpatory and continued to deny any involvement in the crime. *State v Thibodeaux* (1995) 341 NC 53, 459 SE2d 501.

In prosecution of defendant for conspiracy and murder of wife, confession was properly admitted, even though defendant alleged he was intoxicated when he waived rights, where agent testified defendant was nervous and upset, but rational, and that defendant cried at least twice, but agent observed nothing to indicate defendant was drunk or heavily under influence of alcohol, and jailer testified he saw nothing leading him to believe defendant was drunk, even though defendant said he had drunk most of bottle of whiskey, and parents testified he was drinking heavily, was crying, and was irrational, and that they told officers at sheriff's department when they brought him there that son was drunk and emotional. *State v Stephenson* (1994, Tenn) 878 SW2d 530, related proceeding (Tenn Crim) 1994 Tenn Crim App LEXIS 366 and reh den (Tenn) 1994 Tenn LEXIS 203.

Police officer's administering roadside sobriety test to defendant after stopping defendant's vehicle did not constitute interrogation. *Raffaelli v State* (1994, Tex App Texarkana) 881 SW2d 714, petition for discretionary review ref (Nov 30, 1994).

Footnotes

Footnote 78. *United States v Smith* (CA4 NC) 608 F2d 1011; *United States v Brown* (CA8 Mo) 535 F2d 424; *Bogan v State* (Ala App) 529 So 2d 1029; *Mallott v State* (Alaska) 608 P2d 737; *State v Hicks*, 133 Ariz 64, 649 P2d 267; *Hart v State*, 296 Ark 290, 756 SW2d 451, post-conviction proceeding (Ark) 1989 Ark LEXIS 578; *People v Dorman*, 28 Cal 2d 846, 172 P2d 686; *Carroll v People*, 177 Colo 288, 494 P2d 80; *State v Madera*, 210 Conn 22, 554 A2d 263; *Hughes v State* (Fla App D3) 272 So 2d 21, cert den (Fla) 282 So 2d 877; *Blackwell v State*, 259 Ga 810, 388 SE2d 515; *State v Norris*, 244 Kan 326, 768 P2d 296; *State v Scoby* (La App 1st Cir) 536 So 2d 615, cert den (La) 540 So 2d 339; *Dempsey v State*, 277 Md 134, 355 A2d 455; *State v Tribou* (Me) 488 A2d 472, post-conviction proceeding (Me) 552 A2d 1262; *State v Buchanan* (Minn) 431 NW2d 542; *Johnson v State* (Miss) 511 So 2d 1360; *State v Mahaney* (Mo) 625 SW2d 112, 25 ALR4th 413, later proceeding (Mo App) 660 SW2d 774; *State v Graves* (Mont) 622 P2d 203; *Tucker v State*, 92 Nev 486, 553 P2d 951; *State v Bindhammer*, 44 NJ 372, 209 A2d 124; *People v Benyi* (3d Dept) 152 App Div 2d 864, 544 NYS2d 74, app den 74 NY2d 894, 548 NYS2d 427, 547 NE2d 954; *Moles v State* (Okla Crim) 520 P2d 822; *State v Robinson*, 3 Or App 200, 473 P2d 152; *Commonwealth v Cruz*, 489 Pa 559, 414 A2d 1032; *State v Arpin*, 122 RI 643, 410 A2d 1340; *State v Collins*, 266 SC 566, 225 SE2d 189; *State v Robinson* (Tenn Crim) 622 SW2d 62, cert den and app dismd 454 US 1096, 70 L Ed 2d 636, 102 S Ct 667; *Powell v State* (Tex App Fort Worth) 636 SW2d 863; *Yarborough v Commonwealth*, 217 Va 971, 234 SE2d 286; *State v Gardner*, 28 Wash App 721, 626 P2d 56, review den 95 Wash 2d 1027; *State v Hall*, 174 W Va 599, 328 SE2d 206; *State v Clappes*, 136 Wis 2d 222, 401 NW2d 759; *Griffin v State* (Wyo) 749 P2d 246.

A habeas corpus petitioner's confession was not rendered inadmissible by intoxication where, though he smelled of alcohol and had bloodshot eyes, he could walk without staggering and talk coherently, and was able to make detailed, rational, and legible exculpatory oral and written statements. *Boggs v Bair* (CA4 Va) 892 F2d 1193, reh den, en banc (CA4) 1990 US App LEXIS 770 and cert den 495 US 940, 109 L Ed 2d 521, 110 S Ct 2193 and stay den 497 US 1043, 111 L Ed 2d 818, 111 S Ct 2, later proceeding 498 US 891, 112 L Ed 2d 193, 111 S Ct 233.

A defendant's statements were properly admitted, even though the defendant had a blood-alcohol level of .26, had an open wound on his head which had not yet been sewn up, and an emergency room physician testified that the defendant was groggy and almost lethargic. *Palmer v State* (Ala App) 401 So 2d 266, cert den (Ala) 401 So 2d 270 and cert den 455 US 922, 71 L Ed 2d 463, 102 S Ct 1280.

A defendant's intoxication did not render his inculpatory statements inadmissible, where the odor of alcohol, though present, was mild, where his speech was understandable, and where he was able to walk. *People v Franklin* (1st Dist) 189 Ill App 3d 425, 136 Ill Dec 822, 545 NE2d 346.

The defendant's intoxication did not render his statement involuntary where he made the

statement two and one-half hours after the breathalyzer test, so that his blood alcohol level would have been substantially less than the .14 percent as measured by the test. *Tiller v State (Ind)* 541 NE2d 885.

With respect to the use of drugs and narcotics, see § 747.

Annotation: Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Footnote 79. *Bell v United States*, 60 App DC 76, 47 F2d 438, 74 ALR 1098 (criticized on other grounds by *Belton v United States*, 127 US App DC 201, 382 F2d 150); *People v Clouse* (2nd Dist) 222 Cal App 2d 562, 35 Cal Rptr 272; *State v Youngbear* (Iowa) 229 NW2d 728, cert den 423 US 1018, 46 L Ed 2d 390, 96 S Ct 455; *State v Kelly* (Me) 376 A2d 840; *State v Thresher* (Mo) 350 SW2d 1; *State v Logner*, 266 NC 238, 145 SE2d 867, cert den 384 US 1013, 16 L Ed 2d 1032, 86 S Ct 1983.

Footnote 80. *Yarborough v Commonwealth*, 217 Va 971, 234 SE2d 286.

Footnote 81. *Gladden v Unsworth* (CA9 Or) 396 F2d 373; *Collins v Sullivan* (DC Or) 319 F Supp 184; *State v Lowry*, 245 Or 565, 423 P2d 172; *State v Lloyd*, 22 Or App 254, 538 P2d 1278; *State v Smith*, 4 Or App 130, 476 P2d 802.

Confession is admissible so long as defendant is not so intoxicated as to render his statement involuntary or unreliable. *United States v Woody* (CA8 Mo) 690 F2d 678, cert den 459 US 1177, 74 L Ed 2d 1024, 103 S Ct 830.

Footnote 82. *State v Lloyd*, 22 Or App 254, 538 P2d 1278.

Marshall's statement that he believed accused understood what he was doing, in spite of his drunkenness, was insufficient to support finding of knowing advisement of Miranda rights and knowing waiver, so that admission of accused's incriminating statements was error requiring reversal in light of evidence that: accused had been discovered, "passed out" in his truck, it had taken marshall about two minutes to awaken him; accused had been unable to walk to patrol car without marshall's assistance; and breathalyzer test administered within forty-five minutes of encounter had registered .37%. *Williams v State (Ind)* 423 NE2d 598.

A person under the influence of alcohol waiving constitutional rights is legally competent to do so if, despite the degree of intoxication, he is aware and able to communicate with coherence and rationality. *State v Kelly* (Me) 376 A2d 840.

As to Miranda and its impact on admissibility of confessions, generally, see §§ 749 et seq.

Footnote 83. *State v Clark*, 110 Ariz 242, 517 P2d 1238; *Stewart v State*, 92 Nev 168, 547 P2d 320; *People v Durante* (3d Dept) 48 App Div 2d 962, 369 NYS2d 560.

Where the free and voluntary nature of a confession is challenged on the ground that defendant was mentally incompetent due to intoxication at the time of the confession, such confession will be rendered inadmissible only when the intoxication is of such a degree as to negate defendant's comprehension and to render her unconscious of the

consequences of what she is saying. *State v Meredith* (La) 400 So 2d 580.

Evidence of accused's drinking and intoxication was sufficient to raise legitimate jury issue as to voluntariness of confession where accused testified that he had been drinking continuously for two days prior to his arrest, that he could not remember what he and police officer discussed, and that his excessive drinking caused "blackout spells" which accounted for his inability to remember what occurred at police station. *Dempsey v State*, 277 Md 134, 355 A2d 455.

The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying. Proof of intoxication, short of rendering the accused unconscious of what he is saying, goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence. *State v Saxon*, 261 SC 523, 201 SE2d 114.

Footnote 84. *Hollis v State* (Ala App) 399 So 2d 935; *State v Hindman* (Mo App) 543 SW2d 278; *People v Durante* (3d Dept) 48 App Div 2d 962, 369 NYS2d 560.

Intoxication to the extent of incoherence or "mania" is recognized as an exception to the general principle that proof of intoxication does not go to the admissibility of incriminating statements, but to their weight and credibility, and as grounds for exclusion on the basis of either involuntariness or unreliability. *State v Youngbear* (Iowa) 229 NW2d 728, cert den 423 US 1018, 46 L Ed 2d 390, 96 S Ct 455.

It is only when intoxication reaches the state in which one has hallucinations or begins to confabulate to compensate for his loss of memory for recent events' that the truth of what he says becomes strongly suspect. Loss of inhibitions and muscular coordination, impaired judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it. "In vino veritas" is an expression that did not originate in fancy. If the court accepts the confessions of the stupid, there is no reason not to accept those of the drunk. *Britt v Commonwealth* (Ky) 512 SW2d 496.

Where record clearly showed that accused was in an acute, rampant state of intoxication equivalent to mania, such that, in his deranged and psychotic mental imbalance accused could not have rationally, voluntarily and intentionally waived his constitutional rights, trial judge did not abuse his discretion in excluding oral confession made by accused to judge. *State v Williams* (Miss) 208 So 2d 172.

Footnote 85. *Hollis v State* (Ala App) 399 So 2d 935.

Footnote 86. *State v Hindman* (Mo App) 543 SW2d 278.

Footnote 87. *State v Meredith* (La) 400 So 2d 580.

§ 747 Use of drugs and narcotics

Although a confession is not inadmissible merely because the accused was under the influence of drugs or narcotics, it is a factor 88 which may properly be considered. 89

The general standard that if an individual's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because coerced, 90 is applicable to a drug-induced statement. 91 It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a "truth serum." 92

◆ Observation: When the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, 93 a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession. 94

§ 747 ----Use of drugs and narcotics [SUPPLEMENT]

Case authorities:

In prosecution for growing marijuana, trial court properly determined that incriminating statements given by defendant to police officers following his arrest were voluntarily and understandingly made, despite fact that defendant had allegedly used cocaine throughout weekend preceeding arrest, where witnesses had testified that defendant appeared alert, lucid, and normal at time of his arrest, his speech was neither slurred nor unusual, and his appearance was normal. *United States v Benish* (1992, WD Pa) 782 F Supp 35.

Incriminating statements that defendant made to police after his arrest were not subject to suppression, despite his claim that he was suffering from cocaine intoxication at time he waived his Miranda rights and made statements. Government sustained its burden of proving both voluntariness and reliability of defendant's statements where defendant was attorney who appeared to be intelligent man, and where, although defendant had cocaine dependency and his actions in videotape made by police approximately 45 minutes before he was interviewed suggested that he was under influence of something, most probably cocaine, he nonetheless demonstrated complete coherence. *United States v Diggs* (1992, DC Kan) 801 F Supp 441.

The evidence supported the conclusion that the defendant's confession to murder and assault was voluntary, notwithstanding the defendant's contention that he still suffered from the effect of pills he ingested before admitting himself to the hospital, where (1) after learning that the defendant was at a hospital, officers spoke with a physician, who stated that the defendant could be discharged and that there was no reason to keep him hospitalized, (2) the officers then approached the defendant and stated that he was wanted for questioning in connection with crimes at issue, (3) the officers stated that the defendant did not appear to be under the influence of alcohol or drugs, (4) the defendant agreed to accompany the officers to police headquarters and was taken there without being handcuffed, (5) the defendant was interviewed about 1 1/2 hours later, and the interviewing officer stated that the defendant did not show signs of being under any sort

of mind altering substance during the interview, (6) the defendant stated that he had taken about 20 pills in an attempt at suicide, but that the pills only made him sick to his stomach, and (7) during the interview in which he confessed, the defendant stated only that he felt pretty miserable for what he did. *Commonwealth v Walker* (1995, Pa) 656 A2d 90, petition for certiorari filed (Jun 20, 1995).

Statements made by defendant charged with aggravated rape were properly admitted where, although defendant claimed that he was under influence of crack cocaine at time he waived Miranda rights, police testimony indicated that defendant appeared to be physically normal, responded appropriately to all questions, and appeared to know what he was doing. *State v Barker* (1993, La App 2d Cir) 628 So 2d 168, cert den (La) 1994 La LEXIS 804.

Footnotes

Footnote 88. For a discussion of the fact that the determination as to the voluntariness of a confession is based upon the totality of the circumstances, generally, see § 719.

Footnote 89. *Beecher v Alabama*, 389 US 35, 19 L Ed 2d 35, 88 S Ct 189; *Wolfrath v La Vallee* (CA2 NY) 576 F2d 965, cert den 439 US 933, 58 L Ed 2d 328, 99 S Ct 325; *Wade v Yeager* (CA3 NJ) 377 F2d 841, cert den 393 US 893, 21 L Ed 2d 173, 89 S Ct 218; *United States v Kreczmer* (CA5 Fla) 636 F2d 108; *United States ex rel. Townsend v Twomey* (CA7 Ill) 452 F2d 350, cert den 409 US 854, 34 L Ed 2d 98, 93 S Ct 190 and appeal after remand (CA7 Ill) 493 F2d 1325; *United States v Givens* (CA8 Minn) 712 F2d 1298, 13 Fed Rules Evid Serv 1782, cert den 465 US 1009, 79 L Ed 2d 237, 104 S Ct 1005; *United States v Lewis* (CA9 Cal) 833 F2d 1380, 24 Fed Rules Evid Serv 432; *Ex parte Kuczenska* (Ala) 378 So 2d 1186; *Stobaugh v State* (Alaska) 614 P2d 767; *State v Bravo*, 158 Ariz 364, 762 P2d 1318, 17 Ariz Adv Rep 26, cert den 490 US 1039, 104 L Ed 2d 413, 109 S Ct 1942, appeal after remand (App) 171 Ariz 132, 829 P2d 322, 96 Ariz Adv Rep 140; *People v Hernandez* (5th Dist) 204 Cal App 3d 639, 251 Cal Rptr 393, review den (Dec 1, 1989); *People v Fordyce*, 200 Colo 153, 612 P2d 1131; *State v Wynter*, 19 Conn App 654, 564 A2d 296, app den 213 Conn 802, 567 A2d 834; *Reddish v State* (Fla) 167 So 2d 858; *Blackwell v State*, 259 Ga 810, 388 SE2d 515; *People v Matthews* (1st Dist) 205 Ill App 3d 371, 150 Ill Dec 310, 562 NE2d 1113, app den 136 Ill 2d 550, 153 Ill Dec 380, 567 NE2d 338, habeas corpus den (ND Ill) 1992 US Dist LEXIS 9779; *Whitehead v State* (Ind) 511 NE2d 284, 71 ALR4th 173, cert den 484 US 1031, 98 L Ed 2d 773, 108 S Ct 761; *State v Rank* (Iowa) 214 NW2d 136; *State v Cook*, 224 Kan 132, 578 P2d 257; *Hamilton v Commonwealth* (Ky) 580 SW2d 208; *State v Narcisse* (La) 426 So 2d 118, cert den 464 US 865, 78 L Ed 2d 176, 104 S Ct 202, application den 464 US 957, 78 L Ed 2d 334, 104 S Ct 389 and reh den 464 US 1004, 78 L Ed 2d 702, 104 S Ct 515; *State v Franklin* (Me) 463 A2d 749, appeal after remand (Me) 478 A2d 1107; *Campbell v State*, 240 Md 59, 212 A2d 747; *Commonwealth v Gallagher*, 408 Mass 510, 562 NE2d 80; *People v Lumley*, 154 Mich App 618, 398 NW2d 474; *State v Hoskins*, 292 Minn 111, 193 NW2d 802; *Coulter v State* (Miss) 506 So 2d 282; *State v Mahaney* (Mo) 625 SW2d 112, 25 ALR4th 413, later proceeding (Mo App) 660 SW2d 774; *State v Noble*, 142 Mont 284, 384 P2d 504; *State v Prim*, 201 Neb 279, 267 NW2d 193; *Pickworth v State*, 95 Nev 547, 598 P2d 626; *State v Ortega*, 77 NM 7, 419 P2d 219; *State v Perdue*, 320 NC 51, 357 SE2d 345; *Smith v State* (Okla Crim) 736 P2d 531; *State v Goetjen*, 1 Or App 533, 464 P2d 837; *Commonwealth v Manning*, 495 Pa 652, 435 A2d 1207; *Dukes v State* (Tenn Crim) 578 SW2d 659,

post-conviction proceeding (Tenn Crim) 1989 Tenn Crim App LEXIS 271; Conner v State (Tex App Beaumont) 725 SW2d 457; Orange v Commonwealth, 191 Va 423, 61 SE2d 267; State v Sergeant, 27 Wash App 947, 621 P2d 209, review den 95 Wash 2d 1010; Schultz v State, 82 Wis 2d 737, 264 NW2d 245; State v Jones, 73 Wyo 122, 276 P2d 445.

A confession was held involuntary, where the defendant, who was in the prison hospital with a bullet wound in the leg, signed the confession after a morphine injection when he was in a "kind of slumber," feverish, and in intense pain. Beecher v Alabama, 389 US 35, 19 L Ed 2d 35, 88 S Ct 189.

Where the defendant never told his questioners that he felt too ill or groggy to answer questions, and where, despite the pain and the drugs, he not only conversed intelligently with his questioners but also tried to negotiate for advantages should he cooperate, it was concluded that the defendant's pain was not so great nor his mind so clouded by pain pills that he was unable to think and converse with the police freely and intelligently on several subjects. United States v Short (CA10 Utah) 947 F2d 1445, 34 Fed Rules Evid Serv 326, cert den (US) 118 L Ed 2d 397, 112 S Ct 1680.

Valium did not render the defendant's statement involuntary, where there was no showing that her mind was substantially impaired when she made the statement. Cross v State (Ala App) 536 So 2d 155.

In a prosecution for robbery, the defendant's custodial statement was properly admitted, although the detective taking the statement testified that the defendant appeared to pass out while in custody, where the statement indicated only that the defendant was under the influence of drugs at the time of the robbery, rather than at the time of giving the statement, and where, even if the defendant was under the influence of drugs while giving the statement, it was nonetheless admissible as the product of his rational intellect and free will. Johnson v State, 195 Ga App 56, 392 SE2d 280, cert den (Ga) 1990 Ga LEXIS 832.

The ingestion of 50 Percodan tablets by a heroin addict sometime prior to the police interrogation did not render his statements inadmissible in a subsequent robbery prosecution, where all the people who had contact with the defendant at time of the interrogation testified that he was lucid and rational. State v Ashe (Me) 425 A2d 191.

The defendant's confession was voluntary, although he showed signs of drug withdrawal during the interrogation, where he remained lucid and cooperative and seemed to understand the nature of the proceedings, and where he was alert enough to first deny the crime and then to bargain after seeing the incriminating evidence. People v Monzon (2d Dept) 167 App Div 2d 357, 561 NYS2d 494.

Annotation: Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Footnote 90. § 719.

Footnote 91. Townsend v Sain, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in Joyner v King (CA5 La) 786 F2d 1317) and (superseded by statute on other grounds as stated in Blanco v Singletary (CA11 Fla) 943

F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199).

Footnote 92. *Townsend v Sain*, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (superseded by statute on other grounds as stated in *Joyner v King* (CA5 La) 786 F2d 1317) and (superseded by statute on other grounds as stated in *Blanco v Singletary* (CA11 Fla) 943 F2d 1477) and (ovrld on other grounds by *Keeney v Tamayo-Reyes* (US) 118 L Ed 2d 318, 112 S Ct 1715, 92 CDOS 3785, 92 Daily Journal DAR 5862, 6 FLW Fed S 199), also stating that it was not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if those properties exist.

Footnote 93. As to intoxication, see § 746.

Footnote 94. *United States v Haddon* (CA7 Ill) 927 F2d 942.

§ 748 Warnings of constitutional rights

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Even when Miranda warnings are not required, 95 proof of whether some kind of warnings of the defendant's constitutional rights were given is relevant evidence on the issue of whether the questioning was in fact coercive. 96

Footnotes

Footnote 95. As to the warnings required under the Miranda decision and when these warnings must be given, see § 749.

Footnote 96. *Beckwith v United States*, 425 US 341, 48 L Ed 2d 1, 96 S Ct 1612, 76-1 USTC ¶ 9352, 37 AFTR 2d 76-1232; *People v Melock*, 149 Ill 2d 423, 174 Ill Dec 857, 599 NE2d 941, reh den (Oct 5, 1992).

The fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as required by Miranda, is a significant factor in considering the voluntariness of statements later made. *Davis v North Carolina*, 384 US 737, 16 L Ed 2d 895, 86 S Ct 1761 (interrogation of defendant predated Miranda decision).

4. Other Matters Affecting Admissibility; Constitutional Rights [749-753]

§ 749 Generally; Fifth Amendment rights; Miranda warnings

The admissibility of confessions and other types of admissions 97 is affected by numerous United States Supreme Court cases. In the landmark case of *Miranda v Arizona* 98 the Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from the custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards to secure the privilege against self-incrimination. 99 More specifically, as an absolute constitutional prerequisite to the admissibility of a confession or other incriminatory statement, the suspect must—in the absence of a clear, voluntary, knowing, and intelligent waiver of the constitutional rights involved 1 —be warned prior to questioning that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any question, if he so desires. 2 Each of the specified four warnings must be given. 3 Such warnings and waiver are not sufficiently demonstrated by a statement in the confession that the confession was voluntarily made by the accused with full knowledge of his legal rights and with the understanding that any statement made by him might be used against him. 4

The duty of police to inform a suspect of his rights under the privilege against self-incrimination and the corresponding right of the suspect to be informed, attaches when "custodial interrogation" begins. "Custodial interrogation" has been defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. 5

An effective advising of Miranda rights does not require an oral recitation, but presentation to a defendant of a written form which adequately lists his rights is sufficient. 6 The Miranda warnings need not be a virtual incantation of the precise language contained in the Miranda opinion; 7 the inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda. 8

Under the Edwards bright-line rule, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless, the accused himself initiates further communication, exchanges, or conversations with the police. 9

The admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored. 10

◆ Caution: When a defendant seeks to terminate an interrogation, the police must at a minimum give fresh Miranda warnings before recommencing questioning, and any statement made prior to the new warnings must be suppressed. 11

A second questioning is not rendered unconstitutional simply because it involved the same subject matter discussed during the first questioning. As long as new Miranda warnings are given to the person and the person's initial request to remain silent is scrupulously honored, statements from subsequent interrogations on the same subject are

admissible. 12

A suspect who has once responded to unwarned yet uncoerced questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. 13

A narrow public safety exception has been recognized to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence has been recognized in a situation where police officers ask questions reasonably prompted by a concern for the public safety, and the need for answers to questions in a situation posing a threat to the public safety outweighs the need for Miranda's prophylactic rule protecting the Fifth Amendment privilege against self-incrimination. The motivation of the officer involved in such instances is irrelevant. 14 An exception to Miranda has also been recognized under the so-called "rescue doctrine," a particular species of exigent circumstances, under which, where the interrogation of a suspect is undertaken by the police for the paramount reason that information is being sought to save a life, the interrogating officers are justified in not impeding their rescue efforts by informing the defendant of his rights to remain silent and to the assistance of counsel. 15

General on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by *Miranda*. 16 Similarly, the admissibility of volunteered statements of any kind is not affected by *Miranda*. 17

Voluntary, uncoerced statements obtained in violation of *Miranda*, although inadmissible to establish the prosecution's case in chief, may be used for impeachment, when their trustworthiness satisfies legal standards. 18 The jury, nevertheless, must be informed as to the restricted and limited purpose for which such statements may be considered. 19

Violations of *Miranda* and *Edwards* are subject to the harmless error rule. 20

§ 749 ----Generally; Fifth Amendment rights; Miranda warnings [SUPPLEMENT]

Case authorities:

For purposes of the assessment whether a person being interrogated by a police officer was in custody and thus entitled to *Miranda* warnings as to the right to counsel and as to the privilege against self-incrimination, the officer's views concerning the nature of the interrogation, or beliefs concerning the potential culpability of the interrogatee, may be one among many relevant factors, but only if the officer's views or beliefs were somehow manifested by words or deeds to the interrogatee and would have affected how a reasonable person in the interrogatee's position would perceive his or her freedom to leave; even a clear statement from an officer that an interrogatee is a prime criminal suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest; the weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. *Stansbury v California* (US) 128 L Ed 2d 293, 114 S Ct 1526.

A law enforcement officer's subjective and undisclosed view concerning whether a

person being interrogated by law enforcement officers is a criminal suspect is irrelevant to the assessment whether the interrogatee is in custody and thus entitled to Miranda warnings as to the right to counsel and as to the privilege against self-incrimination, because the initial determination as to the custody issue depends on the objective circumstances of the interrogation, not on the views harbored by either the interrogating officers or the interrogatee, where under *Miranda* (1) a police officer's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time, (2) the only relevant inquiry is how a reasonable person in the suspect's shoes would have understood the situation, and (3) save as they are communicated or otherwise manifested to the interrogatee, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, as one cannot expect the interrogatee to probe the officer's innermost thoughts. *Stansbury v California* (US) 128 L Ed 2d 293, 114 S Ct 1526.

A law enforcement officer's obligation to administer Miranda warnings—as to the right to counsel and as to the privilege against self-incrimination—attaches only where there has been such a restriction on a person's freedom as to render the person in custody; in determining whether an individual was in custody, a court must examine all the circumstances surrounding an interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v California* (US) 128 L Ed 2d 293, 114 S Ct 1526.

The applicability of the rigid prophylactic rule of *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880—to the effect that law enforcement officers must immediately cease questioning a suspect who, having received the Miranda warnings and having waived the rights to remain silent and to have counsel present during custodial interrogation, later clearly asserts the Miranda right to counsel—requires courts to determine whether an accused actually invoked the right to counsel; to avoid difficulty and to provide guidance to officers conducting interrogations, this is an objective inquiry; invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of desire for the assistance of an attorney; if a suspect makes a reference to an attorney that is ambiguous or equivocal, in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, then questioning is not required to cease, and therefore, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney, for (1) requiring immediate cessation of questioning when officers reasonably do not know whether a suspect wants a lawyer would (a) transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and (b) unduly hamper effective law enforcement, (2) while the requirement of a clear assertion may disadvantage some suspects, the primary protection afforded them is the Miranda warnings themselves, and (3) the United States Supreme Court is unwilling to add a third layer of prophylaxis to the Edwards rule, which prophylactically protects the Miranda right to counsel, which right in turn prophylactically protects the Federal Constitution's Fifth Amendment privilege against self-incrimination. (Souter, Blackmun, Stevens, and Ginsburg, JJ., dissented in part from this holding.) *Davis v United States* (US) 129 L Ed 2d 362, 114 S Ct 2351.

If a suspect, after receiving the Miranda warnings, effectively waives the Miranda right to have counsel present during custodial interrogation, then law enforcement officers are free to question the suspect; however, under the rule of *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880, if the suspect requests counsel at any time

during the interview, then the suspect is not subject to further questioning until a lawyer has been made available or the suspect reinitiates conversation; this second layer of prophylaxis for the Miranda right to counsel (1) is designed to prevent police from badgering a suspect into waiving previously asserted Miranda rights, (2) like other aspects of Miranda, is not itself required by the Federal Constitution's Fifth Amendment prohibition on coerced confessions, and (3) is instead justified only by reference to its prophylactic purpose. *Davis v United States* (US) 129 L Ed 2d 362, 114 S Ct 2351.

Defendant who came freely to court to testify on behalf of codefendants was not entitled to Miranda warnings prior to his testimony since he was neither in custody nor subject to official interrogation when he testified. *United States v Valdez* (1994, CA2 NY) 16 F3d 1324, petition for certiorari filed (May 13, 1994).

Defendant's counsel's filing of Immigration and Naturalization Service form entitled "Notice of Entry of Appearance as Attorney or Representative" did not amount to invocation by defendant of his right not to respond to custodial interrogation outside presence of counsel so as to render defendant's statements inadmissible, since form indicated only defendant's consent to disclosure to counsel of any record in INS recording system. *United States v Thompson* (1994, CA2 NY) 35 F3d 100.

Defendant's Fifth Amendment protection did not apply to his conversations with government informant where at time of conversations defendant was neither in police custody nor subjected to interrogation, was unaware of criminal investigation against him, and was unaware that informant was cooperating with government. *United States v Holmes* (1995, CA2 NY) 44 F3d 1150.

Murder suspect who, during custodial interrogation and after given Miranda warnings, asked police detective "Do you think I need a lawyer?" and then made incriminating statements did not make clear statement invoking Miranda right to have counsel present, and subsequent inculpatory statements were admissible. *Diaz v Senkowski* (1996, CA2 NY) 76 F3d 61.

Narcotics defendant's silence as to two questions while answering others during custodial interrogation did not constitute even equivocal invocation of his right to remain silent where defendant was given Miranda warnings twice and on each occasion acknowledged his understanding and agreed to speak with police officers. *United States v Ramirez* (1996, CA2 NY) 79 F3d 298.

Failure to provide Miranda warning does not warrant federal habeas relief for convicted robber, where police confronted with robbery in progress at social club involving holding of hostages identified robber as perpetrator and immediately garnered from him information that there were 2 more men that were with him inside club, because uncoerced obtaining of this information at once was urgently necessary for immediate public safety even though also potentially indicative of guilt. *Howard v Garvin* (1994, SD NY) 844 F Supp 173.

Drug defendant's incriminating statements made to federal agents in district attorney's office without Miranda warnings at meeting which defendant understood to be off-the-record proffer as to possible assistance defendant could give to state authorities were made involuntarily and were, therefore, inadmissible. *United States v Swint* (1994, CA3 Pa) 15 F3d 286.

Juvenile was not deprived of his right against self-incrimination by failure to administer Miranda warnings prior to psychiatric evaluations used in adult certification hearing, since use of evaluations at transfer hearing did not incriminate him. *United States v A.R.* (1994, CA3 Pa) 38 F3d 699.

Admission of defendant's answer to FBI agent's questions stating that there was weapon present in his apartment, which answer was made after Miranda warnings were given and after defendant claimed right to counsel, violated defendant's right against self-incrimination but was harmless error where defendant was sole occupant of apartment where gun was found, since public safety exception did not apply. *United States v Mobley* (1994, CA4 Va) 40 F3d 688.

Government's use of defendant's prior inconsistent nonverbal statements to government agent, obtained in violation of Miranda, to impeach defendant's testimony on direct examination was permissible since they were no longer protected by Miranda's shield and government was free to use agent's testimony for limited purpose of impeaching defendant's credibility. *United States v Gullett* (1996, CA4 W Va) 75 F3d 941.

Defendant who voluntarily appeared at police station where he gave statement to police officer and then left station of his own accord was not in custody so as to require Miranda warnings. *United States v Brown* (1993, CA5 Miss) 7 F3d 1155.

Narcotics defendant's confession was voluntary despite defendant's claim that he confessed because he saw co-defendant being beaten by task force officer of Drug Enforcement Agency, where there was evidence that defendant knowingly and voluntarily waived his Miranda rights when told that codefendant had confessed and that there were advantages in cooperation. *United States v Ornelas- Rodriguez* (1994, CA5 Tex) 12 F3d 1339, reh den (CA5 Tex) 1994 US App LEXIS 3490.

Defendant knowingly and intelligently waived his Miranda rights despite his contention that he was drunk when interrogated by federal agents following his arrest for drunk driving where agents testified that they gave defendant enough time to recover from his inebriation and that he did not appear drunk when they interviewed him. *United States v Andrews* (1994, CA5 Miss) 22 F3d 1328.

Seizure of cocaine from defendant airline passenger's suitcase after his arrest was not tainted nor was his voluntary abandonment of suitcase tainted by police officers' failure to give him Miranda warnings at time he was escorted from plane where there was probable cause to arrest him. *United States v Mendez* (1994, CA5 Tex) 27 F3d 126.

Defendant properly waived his Miranda rights where, after refusing to sign waiver-of-rights form, and after agent told him that he did not have to talk to him but could if he wanted to, defendant responded "Okay" and confessed, thus rendering his confession admissible. *United States v Collins* (1994, CA5 Tex) 40 F3d 95, reh den (1995, CA5 Tex) 1995 US App LEXIS 1567.

Federal agent who arrested defendant on robbery charges and gave him Miranda warnings did not violate defendant's Fifth Amendment right to counsel during custodial interrogation, where defendant orally waived such right, and where his Sixth Amendment right to counsel on state charges was insufficient to invoke his Fifth Amendment right on federal charges. *United States v Laury* (1995, CA5 Tex) 49 F3d 145.

Defendant was not in custody for Miranda purposes during roadside detention after which defendant simply followed sheriff in his own truck to border patrol station and was not transported there in sheriff's vehicle, since reasonable person would not have believed that his freedom of movement was sufficiently restrained. *United States v Garcia* (1996, CA5 Tex) 77 F3d 857.

Narcotics defendant's rights were not violated by failure to give Miranda warnings when during search of his residence he was interrogated for less than fifteen minutes in presence of other family members, since in view of brief detention and location of questioning he was not subjected to custodial interrogation. *United States v Douglas* (1996, CA5 Tex) 82 F3d 1315.

Defendant voluntarily and intelligently waived her Miranda rights to remain silent where she had been advised of her rights at least twice, signed a written waiver and later reaffirmed waiver after she initiated post-arraignment conversation with federal agents in which she made incriminating admissions. *United States v Mills* (1993, CA6 Ky) 1 F3d 414.

Defendant postal worker's rights under Fifth and Sixth Amendments were not violated by admission into evidence of his answer to postal inspector's question as to defendant's telephone number during post-arrest interview and before Miranda warnings had been given, since question fell within "routine booking question" exception to Miranda requirements. *United States v Broadus* (1993, CA6 Mich) 7 F3d 460.

Defendant's statements as to his income tax evasion and money laundering schemes made to Internal Revenue Service agents during noncustodial interview without prior Miranda warnings were admissible, even though failure to give such warnings violated IRS procedure. *United States v Bencs* (1994, CA6 Ohio) 28 F3d 555, 94-2 USTC ¶ 50347, 94 TNT 140-15, 1994 FED App 231P.

Evidence supported finding that police officers' question of defendant was noncustodial and that Miranda warnings were therefore unnecessary, even though questioning took place at county sheriff's department and lasted 90 minutes, where defendant himself chose place of questioning over other possibilities, and questioning occurred in squad room rather than in cramped interrogation room. *United States v Betts* (1994, CA7 Ill) 16 F3d 748, 38 Fed Rules Evid Serv 1070.

Drug defendant's questioning by police was noncustodial interrogation not requiring Miranda warnings where defendant voluntarily accompanied police officer from his home to sheriff's department, questioning there occurred in public squad room and lasted 90 minutes during which time defendant was permitted to smoke, and there was no restraint on his freedom. *United States v Betts* (1994, CA7 Ill) 16 F3d 748, 38 Fed Rules Evid Serv 1070.

Government's closing argument in narcotics prosecution stating that defendant's post-Miranda silence was "consistent" with behavior of confederate in crime violated defendant's privilege against self-incrimination since it was impermissible invitation to draw inference of guilt, as opposed to commentary on defendant's credibility, but comment was harmless given extent of other evidence. *United States v Gant* (1994, CA7 Ill) 17 F3d 935.

Murder defendant's statement, during police interrogation, that "I can't afford a lawyer

but is there anyway I can get one?", on its face, was not "clear request" for counsel, after which all interrogation should have ceased, where defendant had already confessed and agreed to assist police in searching for murder weapon, had been twice informed of his Miranda rights, and executed written waiver of those rights on both occasions. *Lord v Duckworth* (1994, CA7 Ind) 29 F3d 1216.

Defendant was not "in custody" for purposes of Miranda when he was questioned by police regarding arson in which two of his children died, where he had been incarcerated following revocation of his probation for unrelated crime, he voluntarily appeared at interview, room was well lit and unlocked, and he was told he was free to leave, since there was no added imposition on his freedom of movement nor any measure of compulsion beyond his imprisonment. *United States v Menzer* (1994, CA7 Wis) 29 F3d 1223.

Defendant who was detained for less than 10 minutes during execution of search warrant of her hotel room was not in custody for purposes of Miranda, where she was not handcuffed or physically restrained in any way, only two law enforcement officers conducted search, they did not brandish weapons, and they limited their questioning in scope and duration. *United States v Burns* (1994, CA7 Wis) 37 F3d 276.

Defendant who was questioned by FBI agents while in hospital after he was in coma following automobile accident was not "in custody" where FBI agent did not intend to place defendant in custody at time of interview and defendant was free to check himself out of hospital. *United States v Robertson* (1994, CA10 Kan) 19 F3d 1318.

Defendant's remark, "I don't got nothing to say," while refusing to sign waiver of rights form presented to him in back of squad car after his arrest did not amount to clear assertion of his right to remain silent but was merely angry response to waiver form in front of him, so that his subsequent interview in which he made incriminating statements was not in violation of Miranda. *United States v Banks* (1996, CA7 Ill) 78 F3d 1190, reh, en banc, den (1996, CA7 Ill) 1996 US App LEXIS 11365.

Suspect was "in custody" during interrogation for purposes of Miranda warnings when he was prevented from leaving during three- hour search of his house by armed officer assigned to guard him, despite familiarity of surroundings and presence of his mother. *Sprosty v Buchler* (1996, CA7 Wis) 79 F3d 635.

Evidence that drug defendant expressly stated he understood his Miranda rights, that he never requested an attorney at any time during questioning or asked that questioning be stopped and that defendant was very cooperative throughout entire incident supported finding that defendant voluntarily waived his right to have counsel present during custodial interrogation. *United States v Barahona* (1993, CA8 Mo) 990 F2d 412.

Fourth and Fifth Amendments did not apply when bank security officer and corporate auditor obtained confession from defendant that she had embezzled bank funds since they were private actors not acting as instruments of state, where government regulation merely directed bank to assist in apprehending any person committing crimes against bank. *United States v Garlock* (1994, CA8 Iowa) 19 F3d 441.

Miranda warning was not necessary under "public safety" exception when drug defendant, in answer to police officer's questions whether he had any drugs or needles on his person, answered "I don't use drugs, I sell them" since question represented

objectively reasonable attempt to ensure officer's personal safety from immediate danger from contact with syringes and toxic substances. *United States v Carrillo* (1994, CA9 Nev) 16 F3d 1046, 94 CDOS 1212, 94 Daily Journal DAR 2133.

Government agent's statement to arrestee that large quantity of cocaine had been seized and that arrestee was in serious trouble, made after arrestee had received Miranda warnings and had invoked his right to remain silent, did not constitute interrogation since statements were not express questions and did not call for incriminating response. *United States v Moreno-Flores* (1994, CA9 Ariz) 33 F3d 1164, 94 CDOS 6649, 94 Daily Journal DAR 12274.

By executing written acknowledgment that he understood his Miranda rights, by refusing to sign waiver form, and by stating that his attorney did not want him to speak to officials, defendant properly invoked his right to have his counsel present during custodial interrogation. *United States v Cheely* (1994, CA9 Alaska) 36 F3d 1439, 94 Daily Journal DAR 13898.

Drug defendant's statements to police officer were involuntary in absence of prior Miranda warnings where statements were made after he had been stopped while driving to shed containing marijuana and weapons, was forced out of his automobile at gun point and was forced to lay on ground. *United States v Perdue* (1993, CA10 Kan) 8 F3d 1455.

Drug defendant's privilege against self-incrimination was not violated by statements made at presentence interview where interview was not coercive since routine presentence interviews do not require Miranda warnings even if defendant is in custody and faces serious punishment. *United States v Washington* (1993, CA10 Kan) 11 F3d 1510, petition for certiorari filed (Jan 18, 1994).

Defendant was not "in custody" when he was detained inside living room of his house while FBI agents conducted search of house pursuant to valid warrant and thus could question him without giving requisite Miranda warnings; agents never held him at gunpoint, handcuffed him, or otherwise used force or threat of force. *United States v Ritchie* (1994, CA10 Colo) 35 F3d 1477.

Police officer's request to search defendant's automobile did not constitute interrogation under Miranda and officer may, following voluntary consent to search, search vehicle without first apprising automobile owner of his rights under Miranda. *United States v McCurdy* (1994, CA10 NM) 40 F3d 1111.

Nine year old boy who was interviewed in school principal's office by case worker about suspected sexual abuse committed by him was not in custody for Miranda purposes where interview involved none of characteristics of arrest or compulsion, although child believed that he could not leave principal's office. *Doe v Bagan* (1994, CA10 Colo) 41 F3d 571.

Admission of fingerprint card containing suspect's signature did not require prior Miranda warnings since signature was merely part of identification process and was not testimonial in nature or information elicited as part of custodial interrogation. *United States v Snow* (1996, CA10 Wyo) 82 F3d 935.

Motorists stopped for speeding did not have right to Miranda warnings while officer conducted cursory search of vehicle, where officer only asked general questions such as

who owned which piece of luggage and whether motorists had key to glove compartment of rented car, since motorists were not thus subjected to custodial interrogation. *United States v McKneely* (1993, DC Utah) 810 F Supp 1537.

Defendant was "in custody" for Miranda purposes when making incriminating statement where customs agents prevented airplane in which defendant was passenger from moving, forced defendant to lie on his stomach at gunpoint while searching plane and took possession of his suitcase and plane ticket. *United States v Adams* (1993, CA11 Fla) 1 F3d 1566, 7 FLW Fed C 819.

Statement by murder suspect after being told that police had evidence against him, that "if you got that against me, you might as well get me a lawyer," constituted unequivocal request for counsel, rendering confession obtained by subsequent questioning without lawyer present inadmissible under Miranda. *Craig v Singletary* (1996, CA11 Fla) 80 F3d 1509, 9 FLW Fed C 1041.

Defendant in murder prosecution was not in custody at time of making incriminating statement to police officer where defendant was in hospital at the time and had not been arrested; detention or restriction of movement of hospital patient-suspect must rise to level of de facto arrest before person is deemed "in custody" for Miranda purposes. *Nelson v State* (1993, Ala App) 623 So 2d 432, reh den, without op (Ala App) 1993 Ala Crim App LEXIS 1179 and cert den, without op (Ala) 1993 Ala LEXIS 1009.

Defendant's initial remark during interview with police officers regarding his mother's securing "high price" lawyer constituted mere bragging about his ability to secure high-priced legal representation for future proceedings, and was not request to consult with attorney during interrogation, and this interpretation was reinforced by his refusal or inability to give interrogating officer name of his lawyer. Moreover, defendant's second remark, "Maybe I ought to talk to a lawyer," which was followed by police officer's inquiry as to whether defendant wanted attorney and by defendant's subsequent request, "Tell me what you have and I might make you a proposition," did not constitute invocation of right to counsel in light of whole record, including defendant's overall conduct and demeanor during interrogation, ambiguous and tentative nature of his reference to attorney, police officer's immediate attempt to clarify defendant's remark, and defendant's refusal to respond thereto. *People v Johnson* (1993) 6 Cal 4th 1, 23 Cal Rptr 2d 593, 859 P2d 673, 93 CDOS 7745, 93 Daily Journal DAR 13149, reh den (Jan 12, 1994) and habeas corpus den (Cal) 1994 Cal LEXIS 18.

Molestation defendant was not custodially interrogated when he made incriminating statements to eight-year-old victim over telephone in recorded call set up by police with cooperation of victim and defendant's grandmother, since Miranda rule exists to deter use of official intimidation tactics and does not apply to statements made in apparent confidence to others than police. *People v Plyler* (1993, 1st Dist) 18 Cal App 4th 535, 22 Cal Rptr 2d 772, 93 CDOS 6592, 93 Daily Journal DAR 11235, review den *People v Plyler* (1993, Cal) 1993 Cal LEXIS 6285.

Detention of defendant for over hour in customs office at Mexican border did not constitute custodial interrogation, since defendant was detained in public area of office, and length of detention was due to wait for police officer to arrive so that officer could investigate possibility of defendant's intoxication while driving. *People v Forster* (1994, 4th Dist) 29 Cal App 4th 1746, 35 Cal Rptr 2d 705, 94 CDOS 8610, 94 Daily Journal DAR 15928.

Interrogation of defendant, charged with theft of computer from employer, was custodial where (1) interrogation was held at place of employment, (2) police officers repeatedly accused defendant of lying, and said that defendant should not make things worse by lying, that he would fail polygraph test, and that he looked and acted overly nervous, and (3) defendant was never informed that he was free to leave or was not in official custody. *People v LaFrankie* (1993, Colo) 858 P2d 702, petition for certiorari filed (Dec 28, 1993).

Defendant's request to speak with attorney was not ambiguous or equivocal, and statements he made to police officers thereafter were properly suppressed, where defendant was arrested, but police did not inform him of nature of charges other than to say he was being held regarding alleged sexual assault, where police advised defendant of his Miranda rights and he invoked his Miranda rights, requested attorney, and stated that he wished to discuss prior polygraph test with attorney, apparently under mistaken belief that investigation related to incident nearly 20 years earlier for which he had taken polygraph test, where police officer, who knew about prior incident, explained to defendant that they were not investigating that incident and that defendant did not need to discuss it with attorney because statute of limitations had expired, and where, although officers did not specify topic of pending investigation, officer again asked defendant if he wanted attorney and whether he would answer some questions, and defendant finally agreed to waive his right to have attorney present. Moreover, even if defendant's request was ambiguous, subsequent statements by interviewing officers failed to meet limited inquiry test, that is, limited inquiry designed to clarify ambiguous statement or accused's wishes regarding presence of counsel. *People v Kleber* (1993, Colo) 859 P2d 1361.

Trial court in prosecution for cultivation and possession of marijuana properly suppressed evidence seized at defendant's residence under consent given after defendant had been arrested, where defendant consented less than half-hour after arrest, before Miranda rights were explained, and in context of handcuffed custodial interrogation in which officers claimed inevitable discovery would result from eventual warrant. *People v Breidenbach* (1994, Colo) 875 P2d 879.

Defendant was not in custody when he made incriminating statements where defendant spoke to police officers on crowded street, was friendly and responsive, was not threatened or coerced by police, and allowed officers to use their flashlights to check his hands and clothing for signs of blood; record was devoid of evidence supporting conclusion that defendant had not been free to leave when he wanted to. *State v Williams* (1993) 227 Conn 101, 629 A2d 402.

In prosecution for operating motor vehicle while under influence of intoxicating liquor and assault with motor vehicle, defendant was not subjected to custodial interrogation requiring Miranda warnings, where, following automobile accident, state trooper questioned defendant at hospital emergency room, trooper did not restrain or order medical personnel to restrain defendant, trooper did not take advantage of inherently coercive situation created by ambulance attendants, trooper did not create police-dominated atmosphere, and trooper remained in view of witnesses who were not police officers, reducing likelihood that officer would use oppressive or abusive tactics. *State v DesLaurier* (1994) 230 Conn 572, 646 A2d 108.

Miranda warnings were not required to be given, where during defendant's trial for murder and robbery defendant initiated a conversation with bailiffs during which he

admitted to taking part in the murders after bailiffs asked him who shot the victims, but he subsequently sought to suppress his statements on the ground that the bailiffs were law enforcement officers who wrongfully elicited the statements without first giving him Miranda warnings, because the bailiff's question was not asked as the result of circumstances in which mutually reinforcing pressures were present so as to weaken defendant's will. *Christmas v State* (1994, Fla) 632 So 2d 1368, 19 FLW S 35.

Bailiffs were law enforcement officers for purposes of determining whether Miranda warnings should have been given before questioning a defendant, where during defendant's prosecution for murder and robbery defendant engaged bailiffs in conversation during which he admitted to taking part in the murders, but he subsequently sought to suppress his statements on the ground that the bailiffs were law enforcement officers who wrongfully elicited the statements without first giving him Miranda warnings, while the state contended that the bailiffs were not law enforcement officers. *Christmas v State* (1994, Fla) 632 So 2d 1368, 19 FLW S 35.

Miranda warnings must be given whenever custodial interrogations take place owing to the coercive conditions that are inherent when suspects are questioned by captors, who appear to control the suspect's fate, and who may create mutually reinforcing pressures that the court has assumed will weaken the suspect's will. *Christmas v State* (1994, Fla) 632 So 2d 1368, 19 FLW S 35.

Custodial communications made by defendant to court-appointed mental health expert generally constitute custodial interrogation. *Hittson v State* (1994, Ga) 449 SE2d 586, 94 Fulton County D R 3588, and (Ga) 94 Fulton County D R 4001.

Defendant was not in custody for purposes of rule requiring Miranda warning, even though defendant was suspect, where defendant was interviewed in her home by sheriff; thus, statement made to officer was admissible in prosecution for child abuse. *Carroll v State* (1993) 208 Ga App 316, 430 SE2d 649, 93 Fulton County D R 1550, cert den (Ga) 1993 Ga LEXIS 872.

Where defendant arrested for armed robbery requested to speak to attorney after being advised of Miranda rights and attempted to reach attorney by telephone but received no answer, defendant's actions constituted clear and unambiguous request for counsel. *People v Carlson* (1992, 2d Dist) 224 Ill App 3d 1034, 167 Ill Dec 96, 586 NE2d 1368.

In murder prosecution, defendant's statement to police was involuntary and inadmissible on Fifth Amendment grounds, where interrogator misled defendant about meaning and consequences of "waiver" and such behavior by interrogator led to subsequent statement. *Lynch v State* (1994, Ind) 632 NE2d 341.

Defendant in murder prosecution, who was between 15 and 16 years of age at time of his arrest, made knowing and intelligent waiver of Miranda rights despite having verbal I.Q. of 70 and overall I.Q. of 80, where (1) there was no evidence that police officers ever threatened defendant, promised him anything, or told him he could go home if he gave them statement, (2) defendant never asked to see his attorney or his parents, and (3) defendant never appeared bewildered or unable to understand officers' questions. *State v Rhomberg* (1994, Iowa) 516 NW2d 803.

Inmate was entitled to Miranda rights where correctional officers escorted him in restraints to health-care unit and later to small office room nearby; inmate was

handcuffed when he was in office, and was surrounded by several police officers and guards; inmate was taken to unused part of penitentiary, and correctional officer persisted in questioning him after inmate said on three occasions he did not want to talk; and fact that prison guard was interrogating did not insulate state from requirements of Miranda. *State v Deases* (1994, Iowa) 518 NW2d 784.

Defendant's questioning by his father, who was chief of police, at police station was not custodial interrogation, since defendant voluntarily accompanied father to station, defendant was not physically restrained, and interview lasted only 15 minutes, even though father employed his parental role in interview. *State v Hince* (1995, Minn) 540 NW2d 820.

Trial court in murder prosecution properly found that defendant was in custody from point at which he admitted strangling victim in attempt to render victim unconscious, where defendant had been removed from transit bus by officer and taken to police station, questioned for several hours without Miranda warnings, and could not reasonably have felt free to leave after admitting involvement in serious crime. *State v Champion* (1994, Minn App) 517 NW2d 350, review gr (Minn) 1994 Minn LEXIS 704.

Murder defendant's statement to police, after receiving Miranda warning and making incriminating statements, that he "ought to talk to an attorney" did not constitute unambiguous invocation of right to counsel. *State v Parker* (1994, Mo) 886 SW2d 908, petition for certiorari filed (Feb 21, 1995).

Murder suspect's conditional request for counsel, after he had been advised of his Miranda rights, that, "I ain't did nothing. If you think I did something, then I'm, I'm shutting up, and I want to see a lawyer, you know," did not constitute unambiguous invocation of right to counsel, and did not preclude police from continuing with their interrogation of suspect. It was evident that suspect elected proceed without counsel, his "condition subsequent" request notwithstanding. *State v Figgins* (1992, Mo App) 839 SW2d 630.

Statement made by defendant to paramedic in ambulance while riding to hospital was properly admitted in murder prosecution, where defendant was not in custody, was not being questioned, and paramedic was not acting on behalf of police officer in administering tests on defendant to determine whether defendant was feigning unconsciousness, and thus coercive aspects of custodial interrogation requiring Miranda warnings were not present. *State v Middleton* (1993, Mo App) 854 SW2d 504.

There was no merit to defendant's claim that he arguably invoked his right to counsel by signing "Miranda Warning & Waiver" form in two places, (1) on appropriate signature line to indicate waiver and (2) on appropriate signature line to confirm invocation of various Miranda rights, where defendant testified that he had signed form without reading it. *State v Cooks* (1993, Mo App) 861 SW2d 769.

Statement of defendant made before defendant was advised of his capital and Miranda rights was properly admitted in prosecution for receipt of stolen property, where defendant contacted police department and voluntarily made statements that were not in response to any questions asked by officer. *State v Jaroma* (1993) 137 NH 143, 625 A2d 1049.

Defendant's conversation with police officer in police vehicle, which occurred after

officers arrived to execute search warrant at defendant's residence, was not custodial interrogation, since officer informed defendant that, after search of his person, he would be free to leave. *State v Johnson* (1995) 140 NH 573, 669 A2d 222.

Murder arrestee's comments regarding attorney were not request for counsel, where arrestee, after having been Mirandized and interviewed, referred to his representation by attorney in related civil matters against relatives of victim and indicated that he could not afford to pay lawyer. *State v Cardona* (1993, App Div) 268 NJ Super 38, 632 A2d 845.

Where, over 5 hours after defendant in murder prosecution was taken into custody, his blood alcohol level was almost four times higher than level at which person was presumed to be under influence of intoxicating liquor for driving purposes, trial court should have considered evidence of intoxication in determining whether defendant knowingly and intelligently waived Miranda rights before making incriminating statements to police; under circumstances presented, fact that defendant seemed to be speaking coherently and to have intellectual facilities fairly unimpaired was insufficient basis for finding of voluntariness. *State v Young* (1994, NM App) 875 P2d 1119, cert den (NM) 877 P2d 579 and cert den (NM) 877 P2d 579.

Prison inmate was entitled to new determination of facts as to whether questioning conducted by prison official within basement area of prison constituted "custodial interrogation" within meaning of Miranda rule where hearing court erroneously considered whether inmate was subjected to "inherently coercive" pressures, and court also made speculative factual assumption that official's "taking" of inmate to basement was somehow mutually agreed upon to obtain privacy; on de novo hearing, circumstances under which inmate was taken to basement for questioning should be fully explored, particularly in light of regulations requiring inmate to comply with directions of correction officer relating to movement within facility. *People v Alls* (1993) 83 NY2d 94, 608 NYS2d 139, 629 NE2d 1018, cert den (US) 128 L Ed 2d 474.

Harmless error rule would not apply to statements made by prison inmate who was questioned in isolated area of prison without being given Miranda warnings, and thus his assault conviction would not be affirmed, where jury acquitted him of sodomy charge, which made it readily inferable that jury did not fully credit complaining witness' testimony and that it was influenced by inmate's admissions solely to having committed assault. *People v Alls* (1993) 83 NY2d 94, 608 NYS2d 139, 629 NE2d 1018, cert den (US) 128 L Ed 2d 474.

Application of Miranda rule for prison inmate interrogations is not limited to those instances where circumstances of case show "danger" of coercion from "the interaction of custody and official interrogation" since such test requires fact-intensive, individualized inquiry as to whether particular prisoner interrogation was conducted in coercive manner, or whether questioning took place in inherently coercive atmosphere, which is inconsistent with prophylactic function of Miranda rule. *People v Alls* (1993) 83 NY2d 94, 608 NYS2d 139, 629 NE2d 1018, cert den (US) 128 L Ed 2d 474.

Questioning of inmate in correctional facility is not, per se, custodial interrogation under Miranda rule; however, when circumstances of detention and interrogation of prison inmate are no longer analogous to those kinds of detentions found not custodial in nonprison settings, but instead entail added constraint that would lead inmate reasonably to believe that there has been restriction on his freedom over and above that of ordinary confinement in facility, Miranda warnings are necessary. *People v Alls* (1993) 83 NY2d

94, 608 NYS2d 139, 629 NE2d 1018, cert den (US) 128 L Ed 2d 474.

Defendant was not entitled to suppression of statements given after waiver of Miranda rights, even though interrogating officer had spoken to defendant about accountability to higher authority when he recognized that defendant was being untruthful about certain details, where defendant was treated with courtesy, allowed ample opportunity for rest, was supplied with cigarettes, soft drinks, and food, and where he repeated that he wished to tell truth and "get it out of [his] mind." *People v Torres* (1992, 1st Dept) 182 AD2d 587, 583 NYS2d 797, app den 80 NY2d 897, 587 NYS2d 927, 600 NE2d 654.

Defendant voluntarily waived his Miranda rights, even though he answered "no" to 2 questions on Miranda form written in Spanish as to whether he understood his rights to counsel, where he signed statement at bottom of form indicating that he understood all rights set forth in form and that he wanted to speak to officers without lawyer present; moreover, on 2 occasions he indicated orally to police interpreter that he understood his rights and wished to waive them. *People v Rivas* (1992, 2d Dept) 182 AD2d 722, 582 NYS2d 727, app den 81 NY2d 793, 594 NYS2d 740, 610 NE2d 413.

Questioning conducted by officer following defendant's arrest constituted interrogation for which Miranda warning was required where (1) officers saw defendant hand vial filled with white substance to another in exchange for money, (2) they approached him and saw him throw bag to ground, (3) they grabbed him and asked what he was doing there, to which he replied that he had been smoking marijuana, and (4) after placing him under arrest, officers then asked him whether bag on ground was his; officers' questioning after arrest, while not extensive, transcended boundary between attempt to clarify situation and attempt to elicit statement. *People v Soto* (1992, 2d Dept) 183 AD2d 926, 584 NYS2d 160.

Statement by defendant to police officer while he was locked in "crack spot" to sell drugs, in response to inquiry as to how he had entered premises which was locked on outside, would not be suppressed as product of custodial interrogation in absence of Miranda warnings, where (1) defendant's confinement in 3-foot square space was not brought about by police or exploited by them to obtain incriminating statement, and (2) there was no interrogation designed to obtain inculpatory statement, but merely question to clarify defendant's predicament. *People v Turner* (1991) 150 Misc 2d 671, 569 NYS2d 901.

Defendant was entitled to suppression of statements made to officer where (1) he was arrested for driving while intoxicated and read his Miranda warnings, (2) he did not waive his right to be silent and refused to answer questions, and (3) only 5 minutes later, and without repeating Miranda warnings, officer began to ask him questions to complete intoxicated drivers examination form, including material that could not be characterized as pedigree information; defendant's refusal to answer questions was not scrupulously honored, and brief interlude between refusal to answer and inception of questioning was not pronounced break between invocation of right to remain silent and commencement of interrogation. *People v Ferrara* (1993, City Crim Ct) 158 Misc 2d 671, 602 NYS2d 86.

Fifth Amendment privilege against self-incrimination, protected by Miranda warnings, did not apply where private security guard employed at public water treatment plant questioned defendant, since there was no showing of clear nexus between police and private investigation, notwithstanding that land where alleged offense took place was publicly owned. *People v Huff* (1993, City Crim Ct) 159 Misc 2d 366, 604 NYS2d 1024.

Assuming arguendo that the trial court in a first-degree murder prosecution erred by failing to sustain defendant's objection and grant his motion to strike testimony by an F.B.I. agent who arrested defendant for unlawful flight to avoid prosecution that he asked defendant "if he was willing to make a statement, at which time he said he wanted to consult with an attorney before talking about the arresting matter," this error was harmless beyond a reasonable doubt where (1) any violation of defendant's rights was de minimis because the testimony was not solicited by the prosecutor, was offered by the F.B.I. agent simply to explain why he discontinued questioning of the defendant, and was not further emphasized by additional questions or comments; (2) the State did not refer in closing arguments to defendant's exercise of his rights to remain silent and to request counsel during interrogation, defendant was not cross-examined on the matter, and no other witness made any reference to defendant's invocation of his rights; and (3) the evidence against defendant was overwhelming, and the record reveals that the sources of defendant's credibility problems were his flight from this state, his efforts to conceal his identity from police, and the fact that his testimony that he shot the victim in defense of himself and another person was contradicted by all other evidence in the case, including testimony by the person in whose defense defendant testified that he acted. *State v Elmore* (1994) 337 NC 789, 448 SE2d 501.

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to suppress the clothes he was wearing at the time of the murder, which were recovered in some woods following defendant's statement to officers, on the ground that defendant's Miranda warnings had grown stale. Even if the warnings had grown stale, defendant's argument would fail because he seeks to exclude physical evidence and not the statements given by him; moreover, the record reveals that there was no interrogation of defendant which led to this discovery. *State v Hardy* (1994) 339 NC 207, 451 SE2d 600.

The trial court did not err in a noncapital first degree murder prosecution by determining that defendant waived his rights knowingly, intelligently and voluntarily where the evidence showed that defendant had only a third-grade education in Vietnam; there was no evidence that he had had any formal training in English or that he was required to speak it at his job; although an interpreter was provided who was fluent in both Vietnamese and English, the defendant's native language was Dega, the language of the Montagnard region of Vietnam; defendant had not been placed under arrest, nor had he been handcuffed, shackled, or restrained in any way when the statement was given; when the waiver of rights form was read to defendant both in English and in Vietnamese, he was asked if he understood his rights and he answered "yes" in English; defendant did not indicate at any time that he did not understand the questions; and a review of the written transcript of the statement itself indicates that defendant was able to respond logically and appropriately to the questions presented to him in English. *State v Ysut Mlo* (1994) 335 NC 353, 440 SE2d 98.

A confession by a defendant in a burglary, rape, and murder prosecution was admissible even though defendant had been arrested in his home without a warrant, even assuming that the arrest was illegal, where defendant was fully advised of his rights at the police station. *State v Worsley* (1994) 336 NC 268, 443 SE2d 68.

Any error in the admission of defendant's in-custody statement in a first-degree murder trial without a finding that he reinitiated the questioning following invocation of his right to silence was harmless beyond a reasonable doubt in light of the overwhelming evidence

of defendant's guilt, including testimony by six eyewitnesses, evidence that police officers chased defendant from the crime scene and caught him splattered with blood and with a bloody knife still in his hand, and evidence that defendant made several spontaneous incriminating statements after his arrest. *State v Eason* (1994) 336 NC 730, 445 SE2d 917.

Defendant's in-custody statement was not improperly obtained after defendant invoked his right to an attorney where there was ample evidence to support the trial court's finding that defendant never requested an attorney after he had been given the Miranda warnings. *State v Eason* (1994) 336 NC 730, 445 SE2d 917.

Defendant initiated further communication with the sheriff after he had earlier asserted his right to counsel, and his confession to the sheriff was admissible in this capital trial, where the sheriff allowed defendant's brother to visit defendant in jail; defendant's brother then went to the sheriff's office and told the sheriff that defendant wanted to talk with him; the sheriff had defendant brought to his office; the sheriff began the conference by asking defendant whether he wanted to talk with him in regard to what had happened; and defendant answered that he wanted to do so. *State v Harris* (1994) 338 NC 129, 449 SE2d 371.

Where defendant had been properly advised of his Miranda rights and had asserted his right to counsel approximately twelve hours before he initiated communications with the sheriff, the sheriff was not required to again advise defendant of his Miranda rights before interrogating him, and defendant's subsequent confession to the sheriff was not inadmissible because the sheriff failed to advise defendant that if he decided to answer questions he could stop at any time and failed to ask defendant if he wanted a lawyer at that time. *State v Harris* (1994) 338 NC 129, 449 SE2d 371.

The trial court did not err in a first-degree murder prosecution by not suppressing defendant's statement to an officer where a psychiatrist testified concerning defendant's history of manic episodes but could not give an opinion as to whether defendant understood his rights at the time he gave his inculpatory statement to the officer, and a nurse who saw defendant several hours after he was arrested testified that he was upset, tense, and nervous and in her opinion delusional and could not have understood his rights, but also testified that he was able to understand the questions asked of him and that he responded in a reasonable manner to those questions. There was substantial competent evidence to support the trial court's finding that the defendant understood his constitutional rights at the time he waived them. *State v Perry* (1994) 338 NC 457, 450 SE2d 471.

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements where defendant contended that the statements were not made knowingly, intelligently, or voluntarily, but none of the evidence presented suggests that defendant's mental capacity was in any way impaired, that his will was overpowered, or that the officers attempted to physically or psychologically torture defendant to evoke a confession, the court found that "defendant was never promised anything, was never threatened, and had no offers of reward or of assistance with any prosecution in the event he did cooperate with the officers," and defendant made a correction in the written statement. Applying the totality of the circumstances standard, there was no error in concluding that defendant's constitutional rights were not violated and that the statements were admissible. *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

The trial court did not err in the denial of a juvenile defendant's motion to suppress an inculpatory statement he made to police officers where the trial court found from uncontroverted evidence that defendant was fully advised of his Miranda rights and his rights under G.S. § 7A-595(a), and the court also found that defendant "freely, knowingly, intelligently and voluntarily" waived his rights and that his statement was made "freely, voluntarily and understandingly." The trial court's findings were not insufficient to support the ruling admitting defendant's confession into evidence because they did not include the precise words of G.S. § 7A- 595(d) that defendant "knowingly, willingly, and understandingly" waived his rights. *State v Gibson* (1995) 342 NC 142, 463 SE2d 193.

The trial court did not err in a first- degree murder prosecution by denying defendant's motion to suppress a statement to police and a knife obtained as a result thereof where defendant made no statement until he had been advised of his Miranda rights and had signed a Miranda rights waiver form; he responded affirmatively when he was asked if he understood his rights and wished to waive them; he was not restrained in any way, and the interrogation was conducted in an unlocked office; officers' weapons were never removed from their holsters in the presence of defendant or used to threaten him; defendant did not appear to be sleepy or under the influence of drugs or alcohol during the interrogation; he appeared to be calm, alert, and oriented, did not appear to be frightened, and was able to converse freely with the officers; an officer testified that he engaged defendant in casual conversation to develop rapport, denied threatening defendant or making any promises to induce defendant's inculpatory statement, denied ever telling defendant that defendant needed to make a statement to save his life or avoid the death penalty, and denied telling defendant that he probably saved his life by confessing; another officer testified that he was present when defendant was read his Miranda rights and signed the waiver form; that defendant was oriented, did not smell of alcohol, and did not appear to be physically or mentally impaired; that he had engaged defendant in general conversation to develop rapport with defendant; denied threatening defendant in any way or making any promises to induce defendant's inculpatory statement; denied that defendant had been told to confess or else he would face the death penalty; and denied that defendant was told that he had probably just saved his own life by confessing; another officer testified that when defendant was arrested at his home in the early morning hours of 28 May 1992 before being taken to the police station, he was awake, oriented, and coherent; defendant's speech was not slurred, and he did not appear to be under the influence of alcohol. Upon a review of the totality of the circumstances, it is clear that defendant was not coerced or threatened into confessing his participation in this murder; and the trial court did not err in concluding that defendant freely, knowingly, and intelligently waived his Miranda rights and that defendant's inculpatory statement to the police was given voluntarily. *State v Knight* (1995) 340 NC 531, 459 SE2d 481.

Admission of testimony by a deputy regarding defendant's statements that she had "blacked out" and could not remember anything and the prosecutor's subsequent cross-examination of defendant about those statements did not violate defendant's Fifth Amendment right to silence, since defendant's statements, though made while she was in custody, were not the result of police interrogation; and defendant's statement that she could not remember anything did not invoke her right to silence but instead could only be construed as her indication that she would willingly have discussed the case had she been able to recall further information. *State v Lambert* (1995) 341 NC 36, 460 SE2d 123.

The trial court did not err in a first- degree murder prosecution in the admission of

statements made by defendant while he was being processed where the evidence showed that there is no material conflict as to whether defendant was being interrogated during his fingerprint processing. An officer simply told defendant that he would talk to him later and answer any questions he might have and, even after defendant made these remarks, told him that he would talk with defendant later. The officer's comments were not intended nor reasonably expected to elicit an incriminating response. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

The trial court did not err in a first- degree murder prosecution by denying defendant's motion to suppress statements made to a detective where defendant contended that the statements were the result of a custodial interrogation after he had invoked his right to remain silent and could not be spontaneous. While defendant was in custody, he was not interrogated: the court found that the detective asked defendant nothing further after defendant signed a paper that he no longer wished to make a statement, the detective asked defendant what had happened to his hand after he complained that it hurt during fingerprinting, defendant replied that he had hit a tree, the detective asked why, and defendant said, "I should have hit her a little harder so I could really hurt my hand." The detective had no reason to believe that his questions about defendant's hand were reasonably likely to evoke an incriminating response; defendant's remarks were volunteered statements and the detective's questions did not convert the conversation into an interrogation under *Miranda*. *State v Walls* (1995) 342 NC 1, 463 SE2d 738.

There was no error in a first- degree murder prosecution where the trial court concluded that defendant freely, knowingly, intelligently, and voluntarily waived his rights after finding that defendant was not under the influence of alcohol where a detective testified that defendant had told the detective that he was under the influence of beer but the detective stated that, although he could smell beer upon defendant and believed that defendant had been drinking, he was not of the opinion that defendant was under the influence. Furthermore, the detective testified that defendant remembered the first set of *Miranda* rights given him in the patrol car. The trial court's findings of fact were based upon competent evidence and therefore are binding on appeal and it cannot be said, viewed under the totality of the circumstances, that the trial court's conclusion of law was error. *State v Walls* (1995) 342 NC 1, 463 SE2d 738.

Defendant's statement to an officer after his arrest for drug offenses that he was not robbing or stealing but was "just trying to make a living" was admissible even though no *Miranda* warnings had been given where the statement was made voluntarily and not in response to any question by an officer. *State v Taylor* (1995) 117 NC App 644, 453 SE2d 225.

Based on defendant's attorney's extensive questions pertaining to defendant's willingness to cooperate with authorities and the reference to the "Voluntary Consent to Identification Procedures" form which indicated defendant was willing to take a polygraph test, it was not error for the trial court to allow the prosecution to subsequently elicit testimony from the investigator that, although defendant initially agreed to submit to a polygraph test, he refused some days later. *State v Cannada* (1995) 119 NC App 311, 458 SE2d 268.

There was no merit to defendant's contention that the trial court committed reversible error in denying his motion to suppress a statement given by him as a result of a polygraph examination because the statement was obtained in a coercive and oppressive manner, since defendant's first statement was made when defendant was not under arrest

but was free to leave, and it was made voluntarily; because defendant was not under arrest, he was not entitled to Miranda warnings before making the statement; his second statement was therefore not the fruit of an earlier illegally obtained statement; the second statement was voluntary in that defendant voluntarily came to the police station, voluntarily submitted to the polygraph, and was free to leave at any time; and neither the polygraph operator's asking questions off the polygraph nor questioning by officers vitiated defendant's waiver of his Miranda warnings with respect to the second statement. *State v Soles* (1995) 119 NC App 375, 459 SE2d 4.

In prosecution for first-degree felony murder, trial court committed reversible error in refusing to grant defendant's motion to suppress his confession where, after defendant received Miranda warnings, he was asked if he wanted to talk to police officers and he responded that he would rather talk to lawyer first, but police continued to interrogate defendant. *Booker v State* (1993, Okla Crim) 851 P2d 544.

In prosecution for first-degree felony murder, trial court committed reversible error in refusing to grant defendant's motion to suppress his confession where, after defendant received Miranda warnings, he was asked if he wanted to talk to police officers and he responded that he would rather talk to lawyer first, but police continued to interrogate him. Defendant's statement, "I would rather talk to a lawyer, first," was clear and concise request for counsel that should have acted as bar to further inquiry. *Booker v State* (1993, Okla Crim) 851 P2d 544.

Prior experience of the defendant with Miranda warnings suggested that his waiver of his Miranda rights was knowing and voluntary where he had a long history of arrests during which he frequently exercised his Miranda rights and testimony was also presented that the defendant had waived his Miranda rights on at least 3 earlier occasions. *Commonwealth v Miller* (1995, Pa) 664 A2d 1310, petition for certiorari filed (Nov 21, 1995).

Trial court did not err in refusing to suppress confession, even though defendant alleged that officers failed to inform him that attorney, employed by his father, was present at sheriff's department and asking to see him, where defendant voluntarily and knowingly waived rights prior to making confession. *State v Stephenson* (1994, Tenn) 878 SW2d 530, related proceeding (Tenn Crim) 1994 Tenn Crim App LEXIS 366 and reh den (Tenn) 1994 Tenn LEXIS 203.

Murder suspect who was informed of his Miranda rights before being interrogated by police did not implicitly request counsel by spontaneously shouting "read me my rights" and, on another occasion, by telling officer that he would not give his name but would talk to another officer. These remarks could reasonably be construed as request for counsel. Moreover, he did not implicitly request counsel by refusing to answer certain questions; merely refusing to answer questions, without more, could not reasonably be construed as request for counsel. *State v Allen* (1992, Utah) 839 P2d 291, 194 Utah Adv Rep 12.

Miranda warning was not required at inquest proceeding, because witness was not in police custody. *State v Tonzola* (1993) 159 Vt 491, 621 A2d 243.

Where murder suspect had been arrested, advised of his Miranda rights, and was being interrogated by police detective, suspect's question, "Do you think I need an attorney here," did not constitute unambiguous request for counsel, and detective's response in

shaking his head slightly from side to side while holding his arms out and his palms up in a shrug-like manner, stating, "You're just talking to us," did not invalidate suspect's earlier waiver of his Miranda rights. *Mueller v Commonwealth* (1992, Va) 422 SE2d 380, petition for certiorari filed (Feb 3, 1993).

Where, after being advised of Miranda rights, defendant asked, "Would it help out any" to "have a lawyer here," and interrogating officer answered, "Well, that depends on whether or not you want to tell the truth," court assumed *arguendo* that confession should have been excluded but nonetheless upheld defendant's murder conviction in view of defendant's having confessed many other times to many different persons; any conceivable error in admission of confession in question was "harmless beyond a reasonable doubt." *Jenkins v Commonwealth* (1992, Va) 423 SE2d 360, cert den (US) 123 L Ed 2d 483, 113 S Ct 1862.

Defendant's talking with police officer on telephone, both parties' locations being undisclosed by court, did not constitute custodial interrogation. *State v Mahoney* (1995) 80 Wash App 495, 909 P2d 949.

When seeking admission of statements made during custodial questioning, separate showings which state must make are that defendant was informed of his Miranda rights, understood them and intelligently waived them and also that defendant's statement was voluntary. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

In absence of countervailing evidence, once state has established *prima facie* case of waiver of Miranda rights and voluntariness of in-custody statement, statement should be admitted into evidence. *State v Lee* (1993, App) 175 Wis 2d 348, 499 NW2d 250.

In prosecution for larceny, defendant was not in custody for capital Miranda purposes, even though defendant was awakened and questioned by officers at approximately 3:20 a.m. in his room at community-based corrections facility, where officers gave no outward signs that defendant was not free to leave or ask police to leave nor any other indication that defendant was under arrest, defendant was in his "home" and where record contained no indication defendant was oppressed by visit; defendant was alert, cooperative, responsive and comfortable during interview and thus no objective manifestations of custodial setting were present. *Glass v State* (1993, Wyo) 853 P2d 972.

Inculpatory written statement that defendant gave to police shortly after his arrest was not obtained in violation of his right counsel under Fifth Amendment where defendant was advised of his Miranda rights three times before he gave statement to police officer; statement was reduced to written form, read back to defendant and, when officer asked him whether he would sign it, defendant asked, "Do I need to talk to a lawyer before I sign?"; officer told defendant that he could have lawyer if he wanted one, but defendant stated that he was willing to sign immediately without lawyer; out of abundance of caution, defendant was taken before magistrate who again explained defendant's Miranda rights, read his statement to him, asked if he wanted to sign statement without first consulting attorney; and defendant responded that he did want to sign without consulting attorney and did so. Defendant's "request" for counsel was equivocal at best; further questioning was limited to ascertaining his wishes regarding presences of counsel; and his knowing and intelligent waiver of counsel was shown as matter of law. *Robinson v State* (1991, Tex Crim) 851 SW2d 216, reh gr (Jul 3, 1991) and reh den (Tex Crim) 1993 Tex Crim App LEXIS 34.

Arrestee's admission that he used his hands to break into store was product of custodial interrogation, where arresting/investigating officer continued to ask arrestee questions intended to elicit incriminating statements after repeated Miranda warnings and arrestee's silence. *State v Fowlkes* (1994, La App 2d Cir) 634 So 2d 953.

Drug codefendant's subsequent statements made after police officers gave Miranda warnings twice and told her that she would be arrested immediately if she did not cooperate and that her cooperation would be made known to prosecutor was not involuntary under totality of circumstances analysis where codefendant was not handcuffed or subjected to physical or emotional coercion, no lengthy interrogation was conducted, and most statements were made in her own home. *United States v Mendoza* (1996, CA8 Iowa) 85 F3d 1347.

Drug defendant voluntarily waived his right against self- incrimination and to attorney during custodial interrogation where evidence supported finding that Miranda rights were read to him at beginning of interrogation, defendant understood English, and no deceptive or coercive statements were made. *United States v Navarro* (1996, CA7 Wis) 90 F3d 1245, reh den (1996, CA7 Wis) 1996 US App LEXIS 23007.

Footnotes

Footnote 97. As to admissions, generally, see §§ 754 et seq.

Footnote 98. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

Footnote 99. 21A Am Jur 2d, Criminal Law § 791.

Footnote 1. As to waiver of rights under Miranda, generally, see 21A Am Jur 2d, Criminal Law § 797.

Footnote 2. 21A Am Jur 2d, Criminal Law § 791.

Footnote 3. 21A Am Jur 2d, Criminal Law § 791.

Footnote 4. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

Footnote 5. 21A Am Jur 2d, Criminal Law § 793.

Footnote 6. *People v Nantelle*, 130 Mich App 51, 342 NW2d 627.

Footnote 7. *California v Prysock*, 453 US 355, 69 L Ed 2d 696, 101 S Ct 2806, on remand (5th Dist) 127 Cal App 3d 972, 180 Cal Rptr 15.

It has never been insisted that Miranda warnings be given in the exact form described in

that decision. *Duckworth v Eagan*, 492 US 195, 106 L Ed 2d 166, 109 S Ct 2875.

Footnote 8. *Duckworth v Eagan*, 492 US 195, 106 L Ed 2d 166, 109 S Ct 2875.

Footnote 9. *Minnick v Mississippi*, 498 US 146, 112 L Ed 2d 489, 111 S Ct 486, 90 CDOS 8818, 90 Daily Journal DAR 13674, on remand (Miss) 573 So 2d 792; *Arizona v Roberson*, 486 US 675, 100 L Ed 2d 704, 108 S Ct 2093; *Edwards v Arizona*, 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880, reh den 452 US 973, 69 L Ed 2d 984, 101 S Ct 3128.

As to the effect of request for, or failure to provide, counsel on an accused's rights under *Miranda*, generally, see 21A Am Jur 2d, Criminal Law § 796.

Annotation: Requirement, under Federal Constitution, that law enforcement officers' custodial interrogation of suspect cease after suspect requests assistance of counsel—Supreme Court cases, 83 L Ed 2d 1087.

Footnote 10. *Michigan v Mosley*, 423 US 96, 46 L Ed 2d 313, 96 S Ct 321; *United States v McClinton* (CA8 Mo) 982 F2d 278, reh den (CA8) 1993 US App LEXIS 1387.

Footnote 11. *State v Harvey*, 121 NJ 407, 581 A2d 483, cert den 499 US 931, 113 L Ed 2d 268, 111 S Ct 1336.

Footnote 12. *United States v McClinton* (CA8 Mo) 982 F2d 278, reh den (CA8) 1993 US App LEXIS 1387.

Footnote 13. *Oregon v Elstad*, 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285.

As to the required *Miranda* warnings, see § 721.

Footnote 14. *New York v Quarles*, 467 US 649, 81 L Ed 2d 550, 104 S Ct 2626, on remand 63 NY2d 923, 483 NYS2d 678, 473 NE2d 30.

Generally, as to the *Miranda* warning requirement as applicable in particular situations, see 21A Am Jur 2d, Criminal Law § 794.

Annotation: What circumstances fall within "public safety" exception to requirement that law enforcement officer give person *Miranda* warnings as to federal constitutional rights before conducting custodial interrogation, 81 L Ed 2d 990.

Footnote 15. *People v Willis* (2nd Dist) 104 Cal App 3d 433, 163 Cal Rptr 718, 9 ALR4th 578, cert den 449 US 877, 66 L Ed 2d 99, 101 S Ct 222; *State v Provost* (Minn) 490 NW2d 93, cert den (US) 122 L Ed 2d 694, 113 S Ct 1306; *State v Kunkel* (App) 137 Wis 2d 172, 404 NW2d 69.

Annotation: Concern for possible victim (rescue doctrine) as justifying violation of *Miranda* requirements, 9 ALR4th 595.

Footnote 16. 21A Am Jur 2d, Criminal Law § 793.

Footnote 17. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio

Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140.

Footnote 18. *Mincey v Arizona*, 437 US 385, 57 L Ed 2d 290, 98 S Ct 2408, appeal after remand 130 Ariz 389, 636 P2d 637, cert den 455 US 1003, 71 L Ed 2d 871, 102 S Ct 1638, appeal after remand 141 Ariz 425, 687 P2d 1180, cert den 469 US 1040, 83 L Ed 2d 409, 105 S Ct 521; *Oregon v Hass*, 420 US 714, 43 L Ed 2d 570, 95 S Ct 1215; *Harris v New York*, 401 US 222, 28 L Ed 2d 1, 91 S Ct 643.

Annotation: Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility—state cases, 14 ALR4th 676.

Footnote 19. *State v Routhier*, 137 Ariz 90, 669 P2d 68, cert den 464 US 1073, 79 L Ed 2d 221, 104 S Ct 985.

Footnote 20. *Killebrew v Endicott* (CA7 Wis) 992 F2d 660, reh den (CA7) 1993 US App LEXIS 13506 (any error in admitting defendant's incriminating statements obtained in violation of Miranda protections was harmless); *Desire v Atty. Gen. of California* (CA9 Cal) 969 F2d 802, 92 CDOS 6089, 92 Daily Journal DAR 9644, amd, reh, en banc, den (CA9 Cal) 92 CDOS 7852, 92 Daily Journal DAR 12779 (given probative value of accused's confession, its admission in violation of Edwards not harmless).

In collateral review of Miranda warnings the relevant inquiry is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v Abrahamson* (CA7 Wis) 944 F2d 1363, reh, en banc, den (CA7) 1991 US App LEXIS 27404 and affd (US) 123 L Ed 2d 353, 113 S Ct 1710, 93 CDOS 2881, 93 Daily Journal DAR 5003, 7 FLW Fed S 179, reh den (US) 124 L Ed 2d 698, 113 S Ct 2951.

§ 750 Sixth Amendment rights; right to counsel

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under *Escobedo v Illinois*, 21 where an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the suspect has been denied the assistance of counsel in violation of the Sixth Amendment, so that no statement elicited by the police during the interrogation could be used against him at a criminal trial. 22

◆ **Caution:** Although *Escobedo* does not require the commencement of an adversary judicial criminal proceeding for the Sixth Amendment right to counsel to attach, it stands virtually alone in this regard. The overwhelming weight of authority holds that the initiation of such a proceeding is necessary for the attachment of the Sixth

Under *Massiah v United States* it was held that the defendant is denied his right to counsel under the Sixth Amendment, and that confessions or other incriminating statements are not admissible, where they have been deliberately elicited from an accused by federal agents after he has been indicted and in the absence of counsel. 24

◆ Observation: The primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the Sixth Amendment is not violated whenever, by luck or happenstance, the state obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit the incriminating remarks. 25

The clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. 26 Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment. 27

Furthermore, the accused's right to counsel has been extended to certain "critical" pretrial proceedings, 28 as a result of the recognition that at those proceedings, the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality. 29 The need for the assistance of counsel at the pretrial stage has been characterized as vital. 30

Once the right to counsel has attached and has been asserted, the state must honor it. This means more than simply that the state cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment imposes on the state an affirmative obligation to respect and preserve the accused's choice to seek this assistance. 31

Incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the state violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel. 32

However, incriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached are, of course, admissible at a trial of those offenses. 33 To exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. 34 The continuing investigation of uncharged offenses does not violate the Sixth Amendment. 35

◆ Observation: Although the decision of *Edwards v Arizona* 36 that an accused, having expressed his desire to deal with the police only through counsel, is not subject

to further interrogation by the authorities until counsel has been made available to him, unless, the accused himself initiates further communication, exchanges, or conversations with the police, 37 rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the reasoning of Edwards applies with even greater force to Sixth Amendment cases. Whereas Edwards is grounded in the understanding that the assertion of the right to counsel is a significant event, and that additional safeguards are necessary when the accused asks for counsel, the assertion is no less significant and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. Accordingly, if police initiate interrogation, after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid. 38 However, the police are not barred from initiating a postindictment interrogation meeting with an accused who has not sought to exercise his Sixth Amendment right to counsel. 39

§ 750 ----Sixth amendment rights; right to counsel [SUPPLEMENT]

Case authorities:

Defendant's Sixth amendment right to counsel did not attach at time police officer refused his request to speak with his attorney before deciding whether to take blood/alcohol test where filing of criminal complaint against him for drunk driving did not occur until after he refused to submit to test. *Roberts v Maine* (1995, CA1 Me) 48 F3d 1287.

Trial court's failure to suppress tape recordings made by codefendant on government's behalf concerning certain burglary after defendants' right to counsel had attached with respect to earlier burglary did not violate defendants' Sixth Amendment rights under *Massiah v United States* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199, where defendants had not been charged with later burglary as substantive offense. *United States v DeVillio* (1993, CA2 NY) 983 F2d 1185.

Bank robbery defendant raised colorable claim that government violated his Sixth amendment right to counsel by placing him in jail cell with known informant who may have been acting as government agent and who testified that defendant told him that he committed bank robbery; therefore, because District Court declined to hold evidentiary hearing and record was inadequate to resolve claim, case was remanded to District court for such a hearing, since such conduct, if proven, could have violated defendant's Sixth amendment rights. *United States v Brink* (1994, CA3 Pa) 39 F3d 419.

Government's tape recording of telephone conversations between defendant and his former attorney did not violate defendant's Sixth Amendment right to counsel where, although defendant was target of criminal investigation and was represented by counsel, he had not yet been indicted. *United States v Heinz* (1993, CA5 Tex) 983 F2d 609, reh, en banc, den (CA5) 1993 US App LEXIS 5849.

Defendant's Sixth amendment right to counsel attached to federal charges where he was under indictment at time of his arrest. *United States v Laury* (1995, CA5 Tex) 49 F3d 145.

Defendant's Sixth amendment right to counsel on state charges for armed robbery of

grocery store was insufficient to invoke his Fifth Amendment right to counsel during custodial interrogation on federal charges of violating Hobbs Act by robbing grocery stores. *United States v Laury* (1995, CA5 Tex) 49 F3d 145.

Government had right to use defendant's uncounseled statement obtained by FBI agent during custodial interrogation in violation of Sixth amendment to impeach defendant. *United States v Laury* (1995, CA5 Tex) 49 F3d 145.

Murder defendant's incriminating statements to undercover FBI agents who were placed in cells near defendant's to elicit statements regarding murder that was unrelated to one for which he was incarcerated and before he was charged with murder in question were admissible in evidence and did not violate defendant's Sixth Amendment right to counsel. *United States v Clark* (1993, CA6 Tenn) 988 F2d 1459, petition for certiorari filed (May 12, 1993).

Murder defendant's incriminating statements to undercover police cellmate made while defendant was in jail on different charges did not violate his Sixth Amendment right to counsel where he had not yet been charged with murder when he made incriminating statements. *Salkil v Delo* (1993, CA8 Mo) 990 F2d 386.

Defendant knowingly and voluntarily waived his Sixth Amendment right to counsel, and inculpatory statements he made during interview with Forest Service agent were admissible in evidence, despite fact that he was not informed that he had been indicted and was not under arrest, where he signed written waiver of his rights after being given Miranda warnings; agent's statement to defendant that his cooperation would "help" him did not invalidate waiver where statement occurred after waiver was signed. *United States v Chadwick* (1993, CA8 Ark) 999 F2d 1282.

Capital felony murder defendant was competent to waive his Sixth Amendment right to counsel at time he was questioned by law enforcement officers, and he was properly found to have knowingly and voluntarily waived that right, where state hospital report had found him to be mildly mentally retarded but competent at time of offense and competent to stand trial and he received Miranda warning and signed rights waiver form before officers questioned him. *Branscomb v Norris* (1995, CA8 Ark) 47 F3d 258.

Any violation of defendant's Sixth Amendment right to counsel that may have resulted from excluding defense counsel for about 10 minutes from witness preparation stage of pretrial lineup was harmless where counsel monitored rest of lineup procedure after witnesses were given preliminary instructions, counsel testified that she did not notice anything unusual about actual lineup, and later during trial she had opportunity to reconstruct all aspects of lineup and related statements between witnesses and police. *Jordan v Ducharme* (1993, CA9 Wash) 983 F2d 933, 93 CDOS 199, 93 Daily Journal DAR 464.

Provision for admission of voluntary confession or any self-incriminating statement in 18 USCS § 3501 does not trump Edwards, which provides that defendant is not subject to further interrogation after he has invoked his right to counsel, and thus defendant's incriminating statements, which were unconstitutionally elicited after he had invoked his right to counsel, were not admissible under § 3501. *United States v Cheely* (1994, CA9 Alaska) 36 F3d 1439, 94 Daily Journal DAR 13898.

Defendant had no standing to challenge disqualification of attorneys for codefendants on

ground that disqualification deprived codefendants of their right to counsel of choice, since Sixth amendment right to counsel is personal right. *United States v Jones* (1995, CA10 Wyo) 44 F3d 860.

Motorist had no right to appointed counsel in prosecution for speeding violation for which small fines were only sanction imposed, since that right attaches only in prosecutions where defendant is actually sentenced to jail. *Elliott v City of Wheat Ridge* (1995, CA10 Colo) 49 F3d 1458, reh den (Apr 7, 1995).

Admission in evidence of testimony of murder defendant's fellow inmate did not violate Sixth amendment where inmate testified that he was not agent of any law enforcement officer or agency, that he did not question defendant, and that defendant "more or less volunteered" information concerning murder in question. *Baxter v Thomas* (1995, CA11 Ga) 45 F3d 1501.

Defendant did not knowingly and intelligently waive right to counsel during interrogation, where there was ambiguity as to whether he invoked right to counsel when he stated that he did not "have the money to buy" legal representation, which detective failed to clarify before continuing interrogation. *State v Hoey* (1994) 77 Hawaii 17, 881 P2d 504.

Suspect's statement, "I'm not sure what I want to do," when asked if he understood his rights, did not constitute invocation of his right to counsel, even though police officer did not follow up with any inquiry to clarify comment, where statement was ambiguous, and fact that suspect had counsel appointed for him on another state's charges did not prevent interrogation outside presence of counsel for crimes unrelated to charge for which counsel had been appointed. *State v Morris* (1994) 255 Kan 964, 880 P2d 1244.

Defendant's refusal to affirmatively waive rights when asked to sign waiver portion of rights form, coupled with statement that he did not know what he should do, was not equivocal and ambiguous assertion of right to counsel, where defendant never discussed subject of obtaining lawyer at that time, and statements made in police car, as well as statement about gas chamber, were exchanges initiated by defendant. *State v Sahakian* (1994, Mo App) 886 SW2d 178.

Any error in the admission of defendant's in-custody statement in a first-degree murder trial without a finding that he reinitiated the questioning following invocation of his right to silence was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt, including testimony by six eyewitnesses, evidence that police officers chased defendant from the crime scene and caught him splattered with blood and with a bloody knife still in his hand, and evidence that defendant made several spontaneous incriminating statements after his arrest. *State v Eason* (1994) 336 NC 730, 445 SE2d 917.

Defendant's in-custody statement was not improperly obtained after defendant invoked his right to an attorney where there was ample evidence to support the trial court's finding that defendant never requested an attorney after he had been given the Miranda warnings. *State v Eason* (1994) 336 NC 730, 445 SE2d 917.

In murder prosecution, defendant's having asked, "Do I need an attorney?" or "Do you think I need an attorney?" at some point during interrogation of defendant did not rise to level of equivocal request for counsel, where defendant was of at least average

intelligence, had completed his GED, and had some writing ability, and there was no indication of mental problems. *Mitchell v State* (1994, Okla Crim) 884 P2d 1186.

Capital murder defendant sought to suppress statements on ground that he was denied Sixth Amendment right to counsel. At time statements were made, defendant had been arrested for theft of car stolen in course of robbery-murder, but he had not been formally charged with capital murder. Sixth Amendment is offense-specific, and does not attach to an offense for which no adversarial proceedings have begun. Nevertheless, Sixth amendment was deemed to have attached to the subsequent capital murder charge for several reasons. First, defendant had been arrested for an offense, the theft, that was to become an important element of the later capital murder prosecution. Second, the theft was so closely related to the capital murder with which defendant was subsequently charged that it was eventually used to aggravate murder to capital murder. Third, declining to hold that Sixth Amendment had attached in this case might encourage police in such cases circumvent Sixth amendment by arresting defendant for predicate crimes for purpose of questioning him in connection with aggravated crime. *Upton v State* (1993, Tex Crim) 853 SW2d 548, reh den (May 26, 1993).

In narcotics prosecution, defendant's having asked, "Do you think I need an attorney?" following her signing of Miranda form did not constitute unequivocal request for counsel; question appeared to be nothing more than request by defendant for advice, and equivocal question is insufficient to invoke right to counsel. *State v Walkowiak* (1994) 183 Wis 2d 478, 515 NW2d 863.

Footnotes

Footnote 21. *Escobedo v Illinois*, 378 US 478, 12 L Ed 2d 977, 84 S Ct 1758, 4 Ohio Misc 197, 32 Ohio Ops 2d 31.

Footnote 22. 21A Am Jur 2d, Criminal Law § 790.

As to the right of an accused to assistance of counsel, generally, see 21A Am Jur 2d, Criminal Law §§ 732 et seq.; §§ 788 et seq. (right with regard to pretrial interrogations, lineups, etc.)

Footnote 23. *Brewer v Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232, reh den 431 US 925, 53 L Ed 2d 240, 97 S Ct 2200; *United States v Gouveia*, 467 US 180, 81 L Ed 2d 146, 104 S Ct 2292; *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477.

Footnote 24. *Massiah v United States*, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199.

The Sixth Amendment right to counsel was not violated where, after the accused's arraignment, a police informant in the same cell listened to and reported the accused's incriminating statements, but did not question the accused. *Kuhlmann v Wilson*, 477 US 436, 91 L Ed 2d 364, 106 S Ct 2616, on remand (CA2) 800 F2d 304.

Where the defendant made incriminating statements to his codefendant, who, after arranging a deal with the police whereby no further charges would be brought against him if he cooperated, wore a body recorder while meeting with the defendant ostensibly

to plan defense strategy for the upcoming trial, the defendant's Sixth Amendment right to counsel was violated, insofar as the police knowingly circumvented the defendant's right to have counsel present at a confrontation between the defendant and a police agent and the confrontation occurred after indictment. *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477.

Ruling that Massiah was controlling, and that the accused's incriminating statements, made after indictment and while in custody to his cellmate, a government informant, were inadmissible, it was determined that by intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, the government had violated his Sixth Amendment right to counsel. *United States v Henry*, 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183.

Law Reviews: Tomkovicz, An Adversary System Defense of the Right to Counsel against Informants: Truth, Fair Play, and the Massiah [*Massiah v United States*, 84 S. Ct. 1199] Doctrine, 22 UC Davis LR 1 (Fall 1988).

Footnote 25. *Kuhlmann v Wilson*, 477 US 436, 91 L Ed 2d 364, 106 S Ct 2616, on remand (CA2) 800 F2d 304.

Footnote 26. *Brewer v Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232, reh den 431 US 925, 53 L Ed 2d 240, 97 S Ct 2200.

Footnote 27. *Brewer v Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232, reh den 431 US 925, 53 L Ed 2d 240, 97 S Ct 2200.

Footnote 28. For a discussion of what constitutes a "critical stage," see 21A Am Jur 2d, Criminal Law § 972.

Footnote 29. *United States v Gouveia*, 467 US 180, 81 L Ed 2d 146, 104 S Ct 2292; *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *Powell v Alabama*, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527.

Footnote 30. *Brewer v Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232, reh den 431 US 925, 53 L Ed 2d 240, 97 S Ct 2200.

Footnote 31. *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477.

Footnote 32. *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477.

Footnote 33. *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477; *Alexander v Connecticut* (CA2 Conn) 917 F2d 747, cert den (US) 115 L Ed 2d 1000, 111 S Ct 2831; *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991

Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

Footnote 34. *Maine v Moulton*, 474 US 159, 88 L Ed 2d 481, 106 S Ct 477.

Footnote 35. *People v Morris*, 53 Cal 3d 152, 279 Cal Rptr 720, 807 P2d 949, 91 CDOS 2303, 91 Daily Journal DAR 3869, reh den (Cal) 1991 Cal LEXIS 2280 and stay gr (Cal) 1991 Cal LEXIS 4004 and cert den (US) 116 L Ed 2d 441, 112 S Ct 421.

Footnote 36. *Edwards v Arizona*, 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880, reh den 452 US 973, 69 L Ed 2d 984, 101 S Ct 3128.

Footnote 37. § 749.

Footnote 38. *Michigan v Jackson*, 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404.

Footnote 39. *Patterson v Illinois*, 487 US 285, 101 L Ed 2d 261, 108 S Ct 2389.

§ 751 --Use of nontestifying codefendant's confession– Bruton rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admission at a joint trial of a nontestifying codefendant's confession, which inculpatates the other codefendant being tried with the declarant, violates the other codefendant's Sixth Amendment right to confront the witnesses against him. 40 Use of a nontestifying codefendant's confession at a joint criminal trial violates the other codefendant's Sixth Amendment confrontation rights even if the accused's allegedly interlocking incriminating statements, corroborating the codefendant's confession, are also introduced at the trial. 41 Nevertheless, the admission of a codefendant's confession does not violate the accused's Sixth Amendment confrontation rights, even though the accused is linked to the nontestifying codefendant's confession by other evidence properly admitted against the accused at the trial, where the nontestifying codefendant's confession is redacted to eliminate not only the accused's name, but any reference to the accused's existence, and the jury is given a proper limiting instruction not to use the codefendant's confession against the accused. 42 Moreover, a confession of a nontestifying codefendant which is redacted to substitute a neutral pronoun or other general word for the name of another codefendant does not violate *Bruton rule* unless it compels a direct implication of the complaining other codefendant. 43 For example, if a redacted confession describes a codefendant's participation in the crime, it remains clearly inculpatory and therefore inadmissible, if the jury would logically conclude from the other evidence in the record that the neutral pronoun or general word indeed represented the codefendant. 44

The rule that a nontestifying codefendant's confession which inculpatates another codefendant may not be used at the joint trial of the defendants, referred to as the *Bruton rule*, does not apply at a bench trial, 45 to the statements of an accomplice who is not tried as a codefendant, 46 or to a codefendant who takes the stand and denies making

such a statement. 47 The *Bruton rule* also does not apply if the statement does not inculcate the codefendant who objects to its admission. 48

When the *Bruton rule* is applicable, the government has three alternatives if it wishes to put in evidence the nontestifying codefendant's confession. The government may resort to redaction of the confession, deleting all references to the other codefendants from the declarant's statement, 49 severance of the joint trial, 50 or to a multiple-jury procedure. 51

The constitutional error committed by admitting in evidence at a joint trial a nontestifying codefendant's confession which inculcates the other codefendant is rendered harmless beyond a reasonable doubt where the evidence supplied through the confession is merely cumulative and other evidence of the accused's guilt is overwhelming. 52

§ 751 --Use of nontestifying codefendant's confession– Bruton rule [SUPPLEMENT]

Case authorities:

Even if defendant Littlejohn's confession implicated defendant Dayson in the crime charged, Dayson was not prejudiced since the confession was largely corroborated by other evidence, including eyewitness testimony and Dayson's own testimony that he went armed to the crime scene and participated in an armed robbery in which the victim was killed. *State v Littlejohn* (1995) 340 NC 750, 459 SE2d 629.

Testimony regarding an out-of- court statement by the codefendant in which he implicated himself and the defendant in a murder was properly admitted into evidence, notwithstanding that the codefendant chose not to testify, since there were strong indicia of the reliability of the statement where (1) the statement was spontaneous and against the penal interest of the codefendant, and (2) the defendant failed to deny the statement, even though it was made in his presence. *Commonwealth v Cull* (1995, Pa) 656 A2d 476.

Footnotes

Footnote 40. *Bruton v United States*, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620.

For a discussion of the right to confrontation, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

Law Reviews: Garcia, The Winding Path of *Bruton v United States* [88 S. Ct. 1620]: A Case of Doctrinal Inconsistency, 26 Am Crim LR 401 (Fall 1988).

Haddad, Agin, A Potential Revolution in *Bruton* [*Bruton v United States*, 88 S. Ct. 1620] Doctrine: Is *Bruton* Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?. 81 J Crim L 235 (Summer 1990).

Annotation: Supreme Court's application of rule of *Bruton v United States* (1968) 391

US 123, 20 L Ed 2d 476, 88 S Ct 1620, holding that accused's rights under confrontation clause of Federal constitution's Sixth Amendment are violated where codefendant's statement inculcating accused is admitted at joint trial, 95 L Ed 2d 892.

Footnote 41. *Cruz v New York*, 481 US 186, 95 L Ed 2d 162, 107 S Ct 1714, 22 Fed Rules Evid Serv 369.

Footnote 42. *Richardson v Marsh*, 481 US 200, 95 L Ed 2d 176, 107 S Ct 1702, 22 Fed Rules Evid Serv 378.

Footnote 43. *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

As to admissibility of evidence generally, see §§ 301 et seq.

Footnote 44. *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436.

Footnote 45. *Lee v Illinois*, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056, 20 Fed Rules Evid Serv 513 (ovrld on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105).

Footnote 46. *Dutton v Evans*, 400 US 74, 27 L Ed 2d 213, 91 S Ct 210.

Footnote 47. *Nelson v O'Neil*, 402 US 622, 29 L Ed 2d 222, 91 S Ct 1723.

Footnote 48. *United States v Gerry* (CA2 NY) 515 F2d 130, cert den 423 US 832, 46 L Ed 2d 50, 96 S Ct 54; *United States v Weston* (CA4 Va) 417 F2d 181, cert den 396 US 1062, 24 L Ed 2d 755, 90 S Ct 756; *United States v Mulligan* (CA9 Cal) 488 F2d 732, cert den 417 US 930, 41 L Ed 2d 233, 94 S Ct 2640.

Footnote 49. *United States v Knuckles* (CA2 NY) 581 F2d 305, 3 Fed Rules Evid Serv 331, cert den 439 US 986, 58 L Ed 2d 659, 99 S Ct 581; *Morrison v Duckworth* (CA7 Ind) 929 F2d 1180, 32 Fed Rules Evid Serv 1214; *Calloway v United States*, 130 US App DC 273, 399 F2d 1006, cert den 393 US 987, 21 L Ed 2d 448, 89 S Ct 464.

Footnote 50. *United States v Cleveland* (CA1 Mass) 590 F2d 24, 4 Fed Rules Evid Serv 237 (codefendant's tailored confession, accompanied by proper limiting instructions, insufficiently harmful to require severance); *United States v Mendoza-Cecelia* (CA11 Fla) 963 F2d 1467, 6 FLW Fed C 678, cert den (US) 121 L Ed 2d 356, 113 S Ct 436 (motion for severance denied where nontestifying codefendant's redacted confession only indirectly implicated other defendant).

Regarding severance or separate trials of codefendants in criminal cases, see 75 Am Jur 2d, Trial §§ 157-179.

Footnote 51. *United States v Rimar* (CA6 Mich) 558 F2d 1271, cert den 434 US 984, 54 L Ed 2d 478, 98 S Ct 609 and cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484 and cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484; *United States v Sidman* (CA9 Cal) 470 F2d 1158, cert den 409 US 1127, 35 L Ed 2d 260, 93 S Ct 948.

Footnote 52. *Schneble v Florida*, 405 US 427, 31 L Ed 2d 340, 92 S Ct 1056;

Harrington v California, 395 US 250, 23 L Ed 2d 284, 89 S Ct 1726.

The admission at a joint trial of the confession of a nontestifying codefendant, who could not be cross-examined because he invoked his Fifth Amendment right against self-incrimination, which made repeated references to another codefendant, who was convicted of aiding an attempted robbery, was harmless error, where the other codefendant conceded that several people he knew attempted the armed robbery in issue, seriously wounding one victim with a shotgun blast, and admitted that he called one of the eventual attackers to find out if he wanted to participate, approved the participation of another of the attackers, helped arrange transportation for the crime, provided the meeting place for the attackers at his home, told the attackers of the location of guns that they hoped to steal, and lead the attackers, one of whom was carrying a shotgun, to the victim's house as they talked about how they would divide their intended spoils. Because the codefendant admitted his crime, the Sixth Amendment violation at his trial could not have led any rational jury to a different verdict. *Morrison v Duckworth* (CA7 Ind) 929 F2d 1180, 32 Fed Rules Evid Serv 1214.

For a discussion of the application of the harmless error rule to involuntary confessions § 727.

As to the application of the harmless error rule to Miranda violations, see § 749.

§ 752 Fourth Amendment rights; fruit of poisonous tree doctrine

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Confessions or admissions made after the police confront a suspect with evidence obtained through an illegal search or seizure are fruits of the poisonous tree and must be suppressed. 53 Similarly, inculpatory statements obtained following a warrantless arrest without probable cause are inadmissible as a fruit of the unlawful arrest. 54

If officers illegally seize a shotgun in a suspect's room and ask the suspect for an explanation, the suspect's resulting statement is inadmissible as a fruit of the illegal search. 55 However, where a search was conducted in accordance with the specific standardized state police tow-in policy regulating inventory searches, 56 and where the defendant had not otherwise contested the validity of his arrest, the defendant's confession was not the fruit of an illegal search. 57 If there are facts which render a limited investigation reasonable, a suspect's voluntary statement 58 during the course of that preliminary investigation may not be suppressed. 59

In determining the voluntariness of a confession preceded by a Fourth Amendment violation, it must be decided whether the confession was sufficiently an act of free will to purge the primary taint of the illegal arrest. 60 The prosecution has the burden of showing admissibility. 61 While Miranda warnings 62 do constitute a factor to be considered in ascertaining whether a confession is obtained by utilizing an illegal arrest,

there are other facts to be examined, including the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct. 63

The Fourth Amendment exclusionary rule does not bar a state's use in a criminal trial of a written inculpatory statement made by a murder suspect at a police station, even though the statement was taken after the suspect was arrested by the police in his home without a warrant and without consent to their entry, in violation of the rule of *Payton v New York* 64 —that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest—where (1) the statement was not the product of being in unlawful custody, inasmuch as the police had probable cause to arrest the suspect; (2) the police had a justification to question the suspect prior to his arrest, so that the suspect's subsequent statement was not an exploitation of the illegal entry into the suspect's home; and (3) the statement was not the fruit of having been arrested in the home rather than someplace else. 65

A confession which is a product of an illegal arrest is not rendered admissible by being freely and voluntarily given, since the voluntariness of a confession for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. 66 Even in the absence of oppressive circumstances, a court may suppress a confession in order to deter police misconduct. 67

§ 752 ----Fourth Amendment rights; fruit of poisonous tree doctrine [SUPPLEMENT]

Case authorities:

Where defendant did not make an argument at trial for exclusion of his incriminating statement to the police based on the Fourth Amendment to the U.S. Constitution, he may not properly present an argument based thereon in the Supreme Court. *State v Daughtry* (1995) 340 NC 488, 459 SE2d 747.

Footnotes

Footnote 53. *United States v Marrese* (CA3 NJ) 336 F2d 501; *United States v Guana-Sanchez* (CA7 Ill) 484 F2d 590, cert gr 417 US 967, 41 L Ed 2d 1138, 94 S Ct 3169, cert dismd 420 US 513, 43 L Ed 2d 361, 95 S Ct 1344; *Ruiz v Craven* (CA9 Cal) 425 F2d 235.

As to whether an involuntary confession renders a subsequent confession involuntary, see § 749.

For a discussion of searches and seizures, generally, see 68 Am Jur 2d, Searches and Seizures

Annotation: Comment Note.—"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Practice References Evidence Obtained by Illegal Search and Seizure—When Pretrial

Motion Has Been Granted—Objecting to Offer of Fruits of Illegally Obtained Evidence; Sample. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 116.

Forms: Motion to suppress incriminating statements obtained as result of unlawful search or seizure. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:594.

Affidavit in support of motion to suppress incriminating statements obtained as result of an unlawful search. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:598.

Footnote 54. *Taylor v Alabama*, 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254.

For a discussion of arrest, generally, see 5 Am Jur 2d, Arrest.

Footnote 55. *United States v Marrese* (CA3 NJ) 336 F2d 501.

Footnote 56. For a discussion of inventory searches, generally, see 68 Am Jur 2d, Searches and Seizures § 199.

Footnote 57. *United States v Wilson* (CA7 Ill) 938 F2d 785, cert den (US) 117 L Ed 2d 115, 112 S Ct 946.

Footnote 58. As to the voluntariness of a confession generally, see § 719.

Footnote 59. *United States v Fallon* (CA10 NM) 457 F2d 15.

Footnote 60. *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254; *United States v Sanders* (CA4 SC) 954 F2d 227, appeal after remand (CA4 SC) 1994 US App LEXIS 314.

Footnote 61. *Brown v Illinois*, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254; *United States v Sanders* (CA4 SC) 954 F2d 227, appeal after remand (CA4 SC) 1994 US App LEXIS 314.

Footnote 62. Concerning the warnings required under *Miranda*, see § 749.

Footnote 63. *United States v Sanders* (CA4 SC) 954 F2d 227, appeal after remand (CA4 SC) 1994 US App LEXIS 314.

Footnote 64. *Payton v New York*, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371.

Footnote 65. *New York v Harris*, 495 US 14, 109 L Ed 2d 13, 110 S Ct 1640.

The defendant's arrest, arising from a warrantless, nonconsensual entry into a house where the defendant was an overnight guest, violated his Fourth Amendment rights. The state did not argue that, if the arrest was illegal, the defendant's inculpatory statement, made less than an hour after his arrest at police headquarters, was nevertheless not tainted by the illegality, and the state expressly disavowed any claim that the defendant's statement was not a fruit of the arrest. Therefore, the applicability of *New York v Harris* was not raised sua sponte. *Minnesota v Olson*, 495 US 91, 109 L Ed 2d 85, 110 S Ct

1684, motion den 495 US 955, 109 L Ed 2d 741, 110 S Ct 2558.

Footnote 66. Lanier v South Carolina, 474 US 25, 88 L Ed 2d 23, 106 S Ct 297.

Footnote 67. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

§ 753 Corroboration of confessions; corpus delicti doctrine; trustworthiness doctrine

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The corpus delicti, which is defined as the body or substance of the crime charged, has two components: (1) an unlawful injury, and (2) an individual's unlawful conduct as a source of that injury. 68 Establishing a corpus delicti requires proof that a specific injury, loss, or harm resulted, and that the injury was caused by a criminal agency rather than by an innocent or accidental one. 69 To establish a corpus delicti, the government need only prove that a crime has been committed. Identifying the defendant as the perpetrator of the crime is not required, and proof of the corpus delicti may be based on circumstantial evidence. 70

Historically, the corpus delicti doctrine incorporated the almost-universal American rule that in order to convict a defendant of a crime based upon an extrajudicial confession or admission, 71 the defendant's statement must be corroborated by some evidence of the corpus delicti. 72 The major purpose of this rule is to prevent errors in conviction based upon untrue confessions alone. 73

Most jurisdictions today follow the original corpus delicti doctrine requiring proof from another source that a crime has occurred. However, the federal courts and a number of state courts have adopted the trustworthiness doctrine that emphasizes the reliability of the defendant's confession over the independent evidence of the corpus delicti. 74 Under the trustworthiness doctrine, direct proof of the corpus delicti is not required, and the evidence may even be collateral to the crime itself. 75

The trustworthiness doctrine has been adopted as the "best rule." 76 Rejecting the original corpus delicti doctrine, it has instead been held that confessions, admissions, and exculpatory statements must be corroborated by substantial independent evidence which would tend to establish the trustworthiness of the statement. 77

◆ **Comment:** Emphasizing that admissions have the same possibilities for errors as confessions, it has been recognized that the need for corroboration extends beyond strict confessions to admissions. Further, exculpatory statements call for corroboration to the same extent as other statements. 78 It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. 79 Requiring the government to produce substantial independent evidence serves a dual function: it tends to make the admission or confession reliable, thus corroborating it, while also establishing independently the other necessary elements of

the offense. 80

The Supreme Court of the United States has held that a defendant's constitutional rights are violated if his conviction, in a federal or state court, is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity, and that this is so even if there is ample evidence aside from the confession to support the conviction. 81 Furthermore, use of a nontestifying codefendant's confession may violate the Sixth Amendment right to confrontation. 82

§ 753 ----Corroboration of confessions; corpus delicti doctrine; trustworthiness doctrine [SUPPLEMENT]

Case authorities:

After court has properly admitted evidence of confession and correctly tested sufficiency of evidence to support conviction, court has no obligation to instruct jury to determine that confession is trustworthy before considering it as evidence of guilt, although court does have discretion to determine that question of trustworthiness is such close one that it would be appropriate to instruct jury to conduct its own corroboration analysis. *United States v Singleterry* (1994, CA1 Me) 29 F3d 733.

After court has properly admitted evidence of confession and correctly tested sufficiency of evidence to support conviction, court has no obligation to instruct jury to determine that confession is trustworthy before considering it as evidence of guilt, although court does have discretion to determine that question of trustworthiness is such close one that it would be appropriate to instruct jury to conduct its own corroboration analysis. *United States v Singleterry* (1994, CA1 Me) 29 F3d 733.

The corpus delicti rule for confessions did not apply in a capital sentencing proceeding to render inadmissible defendant's uncorroborated statement to a witness that the victim had died a slow and painful death where defendant's plea of guilty to first-degree murder established that a crime had been committed. *State v Lee* (1994) 335 NC 244, 439 SE2d 547.

Footnotes

Footnote 68. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 69. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 70. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

As to the admissibility of circumstantial evidence, see §§ 313 et seq.

Footnote 71. Concerning extrajudicial confessions, see § 711.

With respect to admissions, see § 754.

Footnote 72. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 73. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 74. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 75. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 76. *Smith v United States*, 348 US 147, 99 L Ed 192, 75 S Ct 194, 54-2 USTC ¶ 9715, 46 AFTR 968; *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 77. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 78. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

For a discussion of the distinction between confessions and admissions, see § 709.

Concerning the distinction between confessions and exculpatory statements, see § 710.

Footnote 79. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308 (those facts plus other evidence besides admission must, of course, be sufficient to find guilt beyond a reasonable doubt); *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 80. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 81. *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11.

For discussion of the effect of *Miranda v Arizona* on confessions, generally, see § 749.

Footnote 82. § 751.

C. Admissions and Declarations [754-859]

Research References

15 USCS § 1692g(b); 18 USCS § 3500

FRE, Rules 801(d)(2), 804(b)(2), (3)

FR Civ P Rules 8(d), 36

FR Crim P Rules 11(e)(6), 16(a)(1)(A)

Uniform Rules of Evidence, Rules 801(d)(2), 804(b)(2), (3)

ALR Digests: Evidence §§ 948 et seq.

ALR Index: Confessions and Admissions; Declarations or Statements; Dying Declaration

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 91-93

1 Am Jur Proof of Facts 161, Admissions; 32 Am Jur POF2d 253, Admission by conduct or silence

20 Am Jur Trials 351, Handling the Defense in a Conspiracy Prosecution

1. In General [754-757]

§ 754 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A declaration is an unsworn statement made by a party to a transaction or by one having an interest in the existence of some fact in relation to the transaction. 83 A declaration is the assertion or statement of a fact, 84 whereas an admission is a voluntary acknowledgment made by a party of the existence or truth of certain facts 85 which are inconsistent with his or her claim in an action and, therefore, amount to proof against such party. 86 In other words, an admission is a position taken by an adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention being made in the litigation. 87 An admission has also been defined as a statement, oral or written, 88 or conduct of a party or his or her representative, 89 suggesting any inference as to any fact in issue, or which is relevant or is deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. 90

Although some courts use the terms "confession" and "admission" interchangeably, 91 and rules concerning voluntariness requirements apply to both, 92 as applied to criminal law, an admission is something less than a confession and is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction, 93 or acknowledgement of guilt, 94 and which tends only toward the proof of the ultimate fact of guilt. 95 Admissions may be expressed or may be implied from conduct. 96

An admission by a party may be used as evidence against that party, 97 either as substantive evidence, 98 or for purposes of impeachment. 99

◆ Observation: Admissions are no more competent than any other kind of evidence when offered for the purpose of contradicting written instruments and are not admissible for that purpose, but ambiguities in a written instrument may be explained

by admissions and declarations. 1 In addition, the contents of writings, recordings, or photographs may be proved by the written admission of the party against whom they are offered, without accounting for the nonproduction of the original. 2

While the Federal Rules of Evidence and the Uniform Rules of Evidence do not define "admission" or "declaration," they provide a definition for the term "statement." A statement is an oral or written assertion, or nonverbal conduct of a person as an assertion. 3

§ 754 ----Generally [SUPPLEMENT]

Practice Aids: Statements against interest: "He and I robbed the bank", 57 Tex BJ 11:1202 (1995).

Case authorities:

Photocopy of newspaper article indicating position of police vehicles on road prior to motorcycle crash out of which action arose was inadmissible hearsay, even if police chief was sole source of article's information so that his statements could be regarded as admissions of party opponent, since article itself constituted inadmissible out-of-court statements by unidentified persons, offered to prove truth of matter asserted. *Horta v Sullivan* (1993, CA1 Mass) 4 F3d 2, summary op at (CA1 Mass) 21 M.L.W. 3414.

Portions of taperecorded conversation between bank robbery defendant and former girlfriend in which he mentioned cash he received from robberies and car he bought with cash were nonhearsay admissions of crimes he was charged with committing, not evidence of other crimes or of bad acts; even if they needed rule to authorize their admission, they would tend to show his motive for robberies, which is one of reasons for admission under rule. *United States v DeAngelo* (1994, CA8 Minn) 13 F3d 1228, petition for certiorari filed (May 3, 1994).

Footnotes

Footnote 83. *Crawley v Selby*, 208 Ga 530, 67 SE2d 775.

Footnote 84. *A. G. Rushlight & Co. v Johnson*, 18 Wash 2d 383, 139 P2d 280.

Footnote 85. *Maltby v Chicago G. W. R. Co.*, 347 Ill App 441, 106 NE2d 879; *Harmon v Christy Lumber, Inc.* (SD) 402 NW2d 690; *A. G. Rushlight & Co. v Johnson*, 18 Wash 2d 383, 139 P2d 280.

As to distinction between admission and confession, see § 709.

Footnote 86. *Harmon v Christy Lumber, Inc.* (SD) 402 NW2d 690.

Contradictory statements of a party to a suit have been held admissible in evidence on the theory that they are admissions. *Kantor v Ash*, 215 Md 285, 137 A2d 661, 69 ALR2d 585.

Footnote 87. *Cox v Esso Shipping Co.* (CA5 Tex) 247 F2d 629.

Footnote 88. *ciPendell v Westland Life Ins. Co.*, 95 Cal App 2d 766, 214 P2d 392; *State v Hernandez* (Idaho App) 818 P2d 768.

Footnote 89. *State v Hernandez* (Idaho App) 818 P2d 768.

Footnote 90. *Pendell v Westland Life Ins. Co.*, 95 Cal App 2d 766, 214 P2d 392.

Footnote 91. *Davis v State* (Fla App D1) 582 So 2d 695, 16 FLW D 1696, holding that not all extrajudicial statements against interest are confessions, despite the fact that some courts use the words "confession" and "admission" interchangeably.

Footnote 92. §§ 719 et seq.

Footnote 93. *People v Ferdinand*, 194 Cal 555, 229 P 341; *Palmer v State*, 106 Fla 242, 145 So 69; *Burks v State* (Fla App D5) 589 So 2d 355, 16 FLW D 2814, ctfd ques ans, approved (Fla) 613 So 2d 441, 18 FLW S 71; *People v Gibbs*, 349 Ill 83, 181 NE 628; *Commonwealth v Bonomi*, 335 Mass 327, 140 NE2d 140; *Reed v State*, 229 Miss 440, 91 So 2d 269; *State v Behiter*, 55 Nev 236, 29 P2d 1000.

As to differences between admissions and confessions, generally, see § 709.

Footnote 94. *State v Bright*, 238 Neb 348, 470 NW2d 181.

A statement need not be an express acknowledgment of guilt to qualify as an admission. *State v Boyington* (Mo App) 831 SW2d 642.

Footnote 95. *Burks v State* (Fla App D5) 589 So 2d 355, 16 FLW D 2814, ctfd ques ans, approved (Fla) 613 So 2d 441, 18 FLW S 71; *State v Bright*, 238 Neb 348, 470 NW2d 181.

An admission is a statement of conduct from which guilt may be inferred when considered with other facts, but from which guilt does not necessarily follow. *People v Hemphill* (1st Dist) 230 Ill App 3d 453, 171 Ill Dec 759, 594 NE2d 1279, app den 146 Ill 2d 638, 176 Ill Dec 809, 602 NE2d 463 and app den 152 Ill 2d 568, 190 Ill Dec 899, 622 NE2d 1216.

An admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt. *People v Gist*, 190 Mich App 670, 476 NW2d 485, app den 439 Mich 866, 478 NW2d 92 and app den 442 Mich 913, 503 NW2d 452.

An admission is a statement by the accused, direct or implied, of facts pertinent to the issue intending, in connection with other facts, to prove his guilt. *Edwards v State* (Miss) 615 So 2d 590.

An admission is an acknowledgement of some fact or circumstance from which guilt may be inferred. *State v Johnson* (Utah) 821 P2d 1150, 173 Utah Adv Rep 3.

Footnote 96. *Edwards v State* (Miss) 615 So 2d 590 (admissions may be direct or implied); *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

As to adoption of statements as admissions by nonverbal conduct, see §§ 805 et seq.

As to adoption of statements as admissions by silence, see §§ 799 et seq.

Footnote 97. *LePage v Bumila*, 407 Mass 163, 552 NE2d 80.

Admissions are words and conduct of a party opponent offered as evidence against him. *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

Footnote 98. *Eaton v Eaton*, 119 NJ 628, 575 A2d 858; *Pankow v Mitchell* (Tenn App) 737 SW2d 293; *Kraemer Bros., Inc. v United States Fire Ins. Co.*, 89 Wis 2d 555, 278 NW2d 857.

Where a party admits to a material fact relevant to an issue in the case, the same is competent against such party as the substantive evidence of the fact admitted. *Benner v Johnson Controls, Inc.* (Mo App) 813 SW2d 16.

Footnote 99. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Footnote 1. *Stratton v Cartmell*, 114 Vt 191, 42 A2d 419.

As to the admissibility of evidence to contradict, vary, or explain the contents of written instruments, see §§ 1092 et seq.

Footnote 2. § 1052.

Footnote 3. FRE, Rule 801(a), Uniform Rules of Evidence, Rule 801(a).

§ 755 Construction of admissions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Ordinarily, the whole of an admission is to be taken and construed together. 4 The language of a party should be construed in view of the purpose for which it is used, and in connection with the surrounding circumstances and statements. 5 The statement will not be subjected to a strained construction in order to deduce therefrom an admission, nor will it be so construed as to include admissions of fact not reasonably inferable therefrom. 6

Footnotes

Footnote 4. *Harmon v Christy Lumber, Inc.* (SD) 402 NW2d 690.

Forms: Instruction to jury—Oral admissions of party—Consideration as a whole—Factors affecting weight. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 92.

Footnote 5. Harmon v Christy Lumber, Inc. (SD) 402 NW2d 690.

Footnote 6. Harmon v Christy Lumber, Inc. (SD) 402 NW2d 690.

§ 756 Relevancy of statements; facts that admission may prove

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The fundamental rule that evidence is not admissible unless it is relevant to the issue or issues in the case 7 applies to admissions and declarations to the same extent that it does to other kinds of evidence. 8 If otherwise competent, admissions and declarations are admissible where, and only where, they tend to prove a principal or ultimate fact in issue, 9 and are directed to the establishment of pertinent evidentiary facts. 10 Consequently, an admission is allowed in evidence if it tends in some way to connect the accused with the crime charged. 11 In addition, an admission may be allowed in evidence to prove an accused's guilty knowledge. 12 An admission may also be allowed into evidence to identify the accused as the person who committed the crime charged. 13

§ 756 ----Relevancy of statements; facts that admission may prove [SUPPLEMENT]**Case authorities:**

Copy of arrest complaint bearing narcotics distribution conspiracy defendant's threats against various informants and DEA agent who signed it was properly admitted, with government's allegations redacted, as plainly relevant to prove that he was member of conspiracy and played role that gave him sufficient familiarity with it to enable him to identify unnamed persons who could have provided information reflected in complaint. United States v Tracy (1993, CA2 Conn) 12 F3d 1186.

Footnotes

Footnote 7. § 304.

Footnote 8. Landsdown v United States (CA5 La) 348 F2d 405; Pendell v Westland Life Ins. Co., 95 Cal App 2d 766, 214 P2d 392; Maltby v Chicago G. W. R. Co., 347 Ill App 441, 106 NE2d 879; Katcher v Heidenwirth, 254 Iowa 454, 118 NW2d 52, 6 ALR3d 1293; Atlantic C. L. R. Co. v Bowen, 192 Va 162, 63 SE2d 804.

Footnote 9. Parker v Marsh, 221 Ark 229, 252 SW2d 624; Pendell v Westland Life Ins. Co., 95 Cal App 2d 766, 214 P2d 392; Atlantic C. L. R. Co. v Bowen, 192 Va 162, 63 SE2d 804.

Footnote 10. Parker v Marsh, 221 Ark 229, 252 SW2d 624; Atlantic C. L. R. Co. v

Bowen, 192 Va 162, 63 SE2d 804.

Footnote 11. *People v Garcia* (2nd Dist) 240 Cal App 2d 9, 49 Cal Rptr 146, 15 ALR3d 1352; *Beznos v Nelson*, 8 Mich App 669, 155 NW2d 241.

Footnote 12. *People v Hurley* (1st Dist) 151 Cal App 2d 339, 311 P2d 49.

Footnote 13. *Commonwealth v Rogers*, 351 Mass 522, 222 NE2d 766, cert den 389 US 991, 19 L Ed 2d 483, 88 S Ct 484, habeas corpus proceeding (DC Mass) 674 F Supp 365 and habeas corpus proceeding (CA1 Mass) 833 F2d 379, cert den 485 US 937, 99 L Ed 2d 276, 108 S Ct 1116 and (criticized on other grounds by *Commonwealth v Bray*, 407 Mass 296, 553 NE2d 538).

§ 757 Personal knowledge of declarant

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a number of cases it has been held that admissions or declarations otherwise admissible in evidence under an exception to the hearsay rule are not rendered inadmissible by reason of the fact that the declarant did not have personal knowledge of the subject matter, 14 although the lack of such knowledge affects the weight of such evidence. 15 It has been said that the personal knowledge requirement for witnesses 16 of the Federal Rules of Evidence does not pertain to admissions by party-opponents, 17 and a statement may qualify as an admission by a party regardless of personal knowledge. 18 Consequently, with respect to statements made by a party's agent or servant and offered against the party, the declarant need not have personal knowledge of the operative events. 19 In addition, some courts, but not all, 20 hold that coconspirator admissions under the coconspirator exception to the hearsay rule do not require personal knowledge. 21 It has been held that a coconspirator who testifies at trial to a description of events told to the coconspirator by a third party need not have personal knowledge of the events recounted, but that it is sufficient that the third party have personal knowledge of the events. 22 Although the Federal Rules of Evidence do not expressly incorporate a requirement that the declarant have personal knowledge of the facts to which the statement relates, such a requirement of firsthand knowledge has always been inherent in the statement against interest exception to the hearsay rule. 23 In addition, for an admission to be a judicial admission, it must be of a fact within the party's peculiar knowledge. 24

§ 757 ----Personal knowledge of declarant [SUPPLEMENT]

Case authorities:

Witness's testimony regarding events depicted in videotape did not have to be based on his personal knowledge of live events depicted in videotape since he was not testifying to his eyewitness account of those events but to his personal knowledge based on

examination of other videotape from which videotape in question was extracted. *United States v Begay* (1994, CA9 Ariz) 42 F3d 486, 94 CDOS 8501, 94 Daily Journal DAR 15718.

Footnotes

Footnote 14. *State Farm Mut. Auto. Ins. Co. v Porter* (CA9 Cal) 186 F2d 834, 52 ALR2d 499; *Casey v Burns* (2d Dist) 7 Ill App 2d 316, 129 NE2d 440, 54 ALR2d 1060; *Matthews v Carpenter*, 231 Miss 677, 97 So 2d 522; *Eakins v Nash* (Trumbull Co) 118 Ohio App 280, 25 Ohio Ops 2d 124, 194 NE2d 148; *Salvitti v Throppe*, 343 Pa 642, 23 A2d 445, 138 ALR 842; *Reid v Owens*, 98 Utah 50, 93 P2d 680, 126 ALR 55.

Annotation: Admissibility and weight of party's admissions as to tort occurring during his absence, 54 ALR2d 1069.

Footnote 15. *Casey v Burns* (2d Dist) 7 Ill App 2d 316, 129 NE2d 440, 54 ALR2d 1060; *Janus v Akstin*, 91 NH 373, 20 A2d 552; *Salvitti v Throppe*, 343 Pa 642, 23 A2d 445, 138 ALR 842.

Footnote 16. FRE, Rule 602.

Footnote 17. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474.

As to admissions of party-opponents, generally, see § 760.

Footnote 18. *Mahlandt v Wild Canid Survival & Research Center, Inc.* (CA8 Mo) 588 F2d 626, 3 Fed Rules Evid Serv 1585; *State v Harberts*, 315 Or 408, 848 P2d 1187.

Footnote 19. *Union Mut. Life Ins. Co. v Chrysler Corp.* (CA1 Mass) 793 F2d 1, 20 Fed Rules Evid Serv 1024; *Mahlandt v Wild Canid Survival & Research Center, Inc.* (CA8 Mo) 588 F2d 626, 3 Fed Rules Evid Serv 1585; *Re A.H. Robins Co.* (DC Kan) 575 F Supp 718.

As to admissions by agents and employees, generally, see §§ 815 et seq.

Footnote 20. *Commonwealth v Stocker*, 424 Pa Super 189, 622 A2d 333, stating that the proffered coconspirator statement must contain certain indicia of reliability, including personal knowledge of the assertions made in statements.

See *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467, stating that where the coconspirator himself has knowledge of the facts, and makes statements spontaneously about contemporaneous events in furtherance of the conspiracy while carrying out the intended criminal acts of the conspiracy, his statements may be admissible against all the conspirators.

Footnote 21. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659, 113 S Ct 1262.

In order to be admissible under the coconspirator exception to the hearsay rule, it is not necessary that the statements were made in the presence of, or with the knowledge of, the other conspirators. *State v Hoffman*, 123 Idaho 638, 851 P2d 934, petition for certiorari filed (Aug 24, 1993).

As to coconspirator statements, generally, see §§ 831 et seq.

Footnote 22. *United States v Stratton* (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562.

Footnote 23. *United States v Lang* (CA2 NY) 589 F2d 92.

As to statements against interest, generally, see §§ 785 et seq.

See *Breeden v Independent Fire Ins. Co.* (Tenn) 530 SW2d 769, stating that it must be shown that the declarant was in a position to have knowledge of the facts forming the subject of the declaration against interest.

Footnote 24. § 770.

2. Requirements of Proof [758, 759]

§ 758 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In order to prove an admission or declaration purported to be made by a party, it is not necessary to lay a foundation for its introduction by asking the declarant whether or not he or she made the statement in question. 25 Before a purported statement of a party is admissible against him or her, it is necessary to identify the declarant as the party, although this may be done by either direct or circumstantial evidence. 26

In proving oral utterances, verbal precision is not required, but the substance or effect is sufficient. 27 The reason for this rule is that the importance of single words in oral discourse is comparatively much less than in writings, and memory does not retain precise words, except of simple utterances and for a short time. 28 The admissibility of a statement does not depend upon the witnesses' ability to remember the exact words used; any inability to remember affects only the weight to be given the witnesses' testimony. 29 Nevertheless, a mere digest or summary is not sufficient to establish an oral statement. 30

Sound recordings have been utilized to show admissions and declarations in both criminal and civil proceedings. 31

Footnotes

Footnote 25. *Blackwell v State*, 264 Ala 553, 88 So 2d 347 (not followed on other grounds by *Campbell v State* (Ala App) 341 So 2d 735).

Footnote 26. *Kunk v Howell*, 40 Tenn App 183, 289 SW2d 874, 73 ALR2d 1304.

Footnote 27. *Edwards v State*, 198 Md 132, 81 A2d 631, 26 ALR2d 874, reh den 198 Md 152, 83 A2d 578, 26 ALR2d 886.

Footnote 28. *Edwards v State*, 198 Md 132, 81 A2d 631, 26 ALR2d 874, reh den 198 Md 152, 83 A2d 578, 26 ALR2d 886.

Footnote 29. *Gruber v State* (Tex App Corpus Christi) 812 SW2d 368, petition for discretionary review ref (Oct 16, 1991).

Footnote 30. *O'Neill v United States* (CA8 Neb) 19 F2d 322.

Footnote 31. *People v Porter*, 105 Cal App 2d 324, 233 P2d 102; *Paulson v Scott*, 260 Wis 141, 50 NW2d 376, 31 ALR2d 706.

Generally, as to the admissibility of sound recordings in evidence, see § 583.

As to sound recordings of confessions, see § 718.

§ 759 Proof of entire statement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If a statement is admissible in evidence as an admission or declaration, it is admissible as an entirety, including parts that are unfavorable, as well as those that are favorable, to the party offering it in evidence. 32 In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, 33 provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence, 34 and are equally trustworthy. 35 The fact that the additional and qualifying statements may be favorable to the party offering them—that is, may be self-serving—has been said to afford no basis for excluding them. 36 However, the general rule providing for the admissibility of all that was said by the declarant at the same time and upon the same subject matter does not extend to subjects which are remote and distinct from the object of inquiry at the trial. 37

The general principles discussed above apply in criminal as well as in civil cases. It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him or her, all that he or she said in that connection must also be permitted to go to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused. 38 The fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of the whole statement, provided they are relevant to, 39 and were made on the same occasion as the statements introduced by, 40 the prosecution. However, there is authority that a trial court, in considering the admissibility of an accused's statement, must excise or delete any reference to prior criminality that is not admissible under an exception to the general rule of exclusion, unless such excision would significantly impair the meaning and evidentiary value of the admissible parts of the accused's statement. 41 If the reference to prior criminality cannot be excised without impairing the meaning and evidentiary value of the admissible parts of the statement, the court may be required to instruct the jury on the limited purpose for which the evidence is being received. 42

§ 759 ----Proof of entire statement [SUPPLEMENT]

Case authorities:

Defendant's hearsay statement to his girlfriend on the same day he confessed to the police that he had shot a gun but had not shot anyone was not admissible under the principle that, when the State offers part of a confession, the accused may require the entire confession to be admitted into evidence where defendant's statement to his girlfriend was not made at the same time as the confession and was not a part of the confession, and the State did not attempt to introduce testimony concerning defendant's self-serving declaration and thus did not open the door to its admission. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

There was no merit to defendant's contention that his rights were violated by the introduction of a redacted confession and that, based on GS § 8C-1, Rule 106, when a part of his confession was introduced, he had a right to have the other part introduced, since defendant was in no way prejudiced by the redaction. *State v Littlejohn* (1995) 340 NC 750, 459 SE2d 629.

Footnotes

Footnote 32. *Rosenberg v Wittenborn* (2nd Dist) 178 Cal App 2d 846, 3 Cal Rptr 459; *Spani v Whitney*, 172 Neb 550, 110 NW2d 103; *State v Marchand*, 31 NJ 223, 156 A2d 245, 87 ALR2d 883; *Taylor v State*, 95 Okla Crim 98, 240 P2d 803; *State v Fischer*, 232 Or 558, 376 P2d 418.

Footnote 33. *Pierce v Heusinkveld*, 234 Iowa 1348, 14 NW2d 275; *Spani v Whitney*, 172 Neb 550, 110 NW2d 103; *Duncan v Western Refrigeration Co.*, 11 Utah 2d 19, 354 P2d 572; *Meyer v Mutual Service Casualty Ins. Co.*, 13 Wis 2d 156, 108 NW2d 278.

Footnote 34. *Curry v State*, 217 Tenn 257, 397 SW2d 179.

Footnote 35. Meyer v Mutual Service Casualty Ins. Co., 13 Wis 2d 156, 108 NW2d 278.

Footnote 36. Binion v Armentrout (Mo) 333 SW2d 87; Curry v State, 217 Tenn 257, 397 SW2d 179.

As to self-serving declarations, generally, see §§ 794 et seq.

Footnote 37. State v Marchand, 31 NJ 223, 156 A2d 245, 87 ALR2d 883.

Footnote 38. Carver v United States, 164 US 694, 41 L Ed 602, 17 S Ct 228; Connor v State, 225 Md 543, 171 A2d 699, 86 ALR2d 892, cert den 368 US 906, 7 L Ed 2d 100, 82 S Ct 186 and (criticized on other grounds by Beahm v Shortall, 279 Md 321, 368 A2d 1005); Commonwealth v Britland, 300 Mass 492, 15 NE2d 657, 118 ALR 132; Davis v State, 230 Miss 183, 92 So 2d 359.

Footnote 39. People v King (1st Dist) 240 Cal App 2d 389, 49 Cal Rptr 562, 21 ALR3d 706, cert den 385 US 923, 17 L Ed 2d 146, 87 S Ct 236; Davis v State, 230 Miss 183, 92 So 2d 359.

Footnote 40. Ballew v United States, 160 US 187, 40 L Ed 388, 16 S Ct 263; Davis v State, 230 Miss 183, 92 So 2d 359.

Footnote 41. Callis v People (Colo) 692 P2d 1045.

As to evidence of crimes, wrongs, or other acts, see §§ 404 et seq.

Footnote 42. Callis v People (Colo) 692 P2d 1045.

3. Party Admissions [760-784]

a. In General [760-769]

§ 760 Generally; admissions of party-opponent

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In both civil and criminal cases, according to some statutes, a statement of a party is not considered hearsay and may be used against the party. ⁴³ The Federal Rules of Evidence ⁴⁴ and the Uniform Rules of Evidence ⁴⁵ define as "not hearsay" the statement of a party that was made in the party's individual or representative capacity when that statement is offered against the party. Many states have similar statutes and rules. ⁴⁶

◆ Observation: Admissions by party-opponents are not limited to statements offered against a party and made in an individual or representative capacity by a party. Admissions by party-opponents also include statements offered against a party which are: (1) statements of which the party has manifested an adoption or belief in its truth; 47 (2) statements by a person authorized by the party to make a statement concerning the subject; 48 (3) statements by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; 49 or (4) statements by a coconspirator of a party during the course and in furtherance of the conspiracy. 50

Evidentiary admissions may be made in statements made pursuant to the Federal Rule of Evidence governing admissions of a party-opponent. 51 Admissions by a party-opponent are admissible as substantive evidence, 52 unless some other exclusionary rule applies, 53 or for impeachment purposes. 54 A party-opponent's declaration is admissible for any inference which the trial court can reasonably draw from the statement regarding any issues involved in the case. 55 Some courts state that it is not even necessary to call one's opponent as a witness or to introduce his or her deposition, before offering the admission of a party opponent. 56

Allowing such an admission into evidence is considered fair, as the party-opponent's case cannot be prejudiced by an inability to cross-examine himself or herself. 57 In addition, a party would presumably not state anything against his or her interest unless it were true. 58 A party's admission is considered to have special evidentiary value when offered against the party making the admission because that party is discredited, like a witness impeached by contradictory statements, by the party's own statements inconsistent with his or her present claim. 59

A statement by a party may qualify as an admission regardless of—

—the circumstances in which it was made. 60

—the concession of the party that he or she made it. 61

—general requirements applicable to exceptions to the hearsay rule, such as a foundation, 62 trustworthiness, 63 or personal knowledge. 64

—the nature of the statement as being too conclusory, 65 in the form of an opinion, 66 or as not being a statement against interest. 67

◆ Caution: Although admissible as "not hearsay," a party's admission may still be excluded on constitutional grounds, such as the privilege against self-incrimination, 68 or the associated doctrine of confessions, 69 or by reason of exclusionary provisions found elsewhere in the Federal Rules of Evidence. 70 In addition, admissions made by a party-opponent under a duty imposed by a statute which makes the communication confidential may be excluded under the Federal Rules. 71

◆ Practice guide: Since a party-opponent's admission may be offered only against that particular party, an out-of-court statement introduced as an admission of one party could not be considered as evidence adversely affecting the claims of other parties. 72 It has been suggested that the trial court take precautions to avoid adverse effects by excising references to other parties or giving cautionary instructions. 73

§ 760 ----Generally; admissions of party- opponent [SUPPLEMENT]

Practice Aids: The admissibility of inculpatory statements in Washington under the rule of declarations against interest, 70 Wash LR 3:859 (1995).

Admissibility as "not hearsay" of statement by party's attorney under Federal Rules of Evidence 801(d)(2)(C) or 801(d)(2)(D). 117 ALR Fed 599.

Case authorities:

Insurer has no duty to defend or indemnify driver of insured vehicle, where pursuit/collision incident occurred in October 1990 and insurer received no notice of it until August 1992, and insurer was prejudiced by delay, even though claimant contends that insurer's evidence of prejudice—driver's statements to investigator that are contained in investigator's affidavit—are inadmissible hearsay, because such statements are admissions by party- opponent and are not hearsay under FRE 801(d)(2). *State Farm Mut. Auto. Ins. Co. v Lucca* (1993, DC Me) 838 F Supp 670.

In terminated anesthesiologist's case alleging antitrust violations and state claims for breach of contract, defamation, and tortious interference with prospective economic advantage, statement by defense counsel in memorandum of law filed in support of defendants' motion to dismiss complaint in earlier related case was properly admitted as admission of party; statement admitting hospital's error in attributing two incidents of asystole to plaintiff was made in legal brief filed with court subject to penalty of sanctions and defense counsel was acting in authorized capacity when making assertion. *Purgess v Sharrock* (1994, CA2 NY) 33 F3d 134.

Police commissioner's statement that non-arrest policy in domestic violence incidents would amount to equal protection violation was not admission by county as to legality of its pre-existing policy; commissioner testified that he knew nothing about arrest policy under prior commissioner, his legal insights concerning legality of policy that may or may not have prevailed before he became commissioner did not amount to party admission, and his opinion would be inadmissible anyway because it was legal conclusion concerning ultimate issue. *Eagleston v Guido* (1994, CA2 NY) 41 F3d 865.

In personal injury action by customer who tried to push open locked glass door at store, evidence of person's statement in response to passerby's request for tie to bind customer's wounds that person in question lacked authority to give tie away but that passerby could buy one, was admissible under FRE 801(d)(2)(D), because evidence was relevant to establishing whether speaker was employee and had authority to speak for store. *Hill v F.R. Tripler & Co.* (1994, SD NY) 868 F Supp 593.

Jury was not subjected to fraud by plaintiff's use of defendant's First Answer to show his ownership of apartments, where tenant sued landlords for physical and emotional damages suffered when she was raped in apartment, even if First Answer was "admittedly false", because abandoned pleading is admissible as admission of party-opponent under FRE 801(d), and defendant should have rebutted assertion of ownership to cure alleged falsity. *Johnson v Goldstein* (1994, ED Pa) 864 F Supp 490.

In private governmental structure of condominium association, resident-members of

standing and ad hoc committees to which governing Board of Directors had delegated specific duties were involved in decisional process leading to age discrimination plaintiff's termination and thus association's agents for purposes of admitting their statements regarding plaintiff's age as consideration affecting her continued employment as admissions of party-opponent. *EEOC v Watergate at Landmark Condominium* (1994, CA4 Va) 24 F3d 635, 64 BNA FEP Cas 1408, 64 CCH EPD ¶ 43149, 39 Fed Rules Evid Serv 671, cert den, without op (1994, US) 115 S Ct 185, 65 BNA FEP Cas 1792.

Testimony regarding defendant's statements were properly admitted as admissions of party-opponent, not as coconspirator statements, since no conspiracy was charged, hence court did not err in not giving jury instruction regarding admission of coconspirator statements. *United States v Johnson-Wilder* (1994, CA7 Ill) 29 F3d 1100.

Terminated executive is entitled to admission of evidence in support of claim that company discriminated against him as Mexican-American, where evidence involves his conversations with other executives regarding expense account fraud and specifically practice of claiming reimbursement for business travel tickets purchased with frequent flier miles, for which executive was fired, because, assuming others' statements were made during existence of declarants' employment relationship, they can be attributed to company as admission under FRE 801(d)(2)(D) since they concerned matters within scope of employment. *Garduno v Quaker Oats Co.* (1994, ND Ill) 863 F Supp 676, 65 BNA FEP Cas 1689.

Motion to strike draft letter written by unknown agent of credit services corporation is denied, even though sentence being used to show that corporation classified certain client as "travel agent/tour operator" and unacceptable business was crossed out in letter, because crossed-out sentence is still "statement" or "assertion" of party offered against that party, and is admissible under FRE 801(d)(2). *South Cent. Bank & Trust Co. v Citicorp Credit Servs.* (1994, ND Ill) 863 F Supp 635.

Postal worker's affidavit constitutes admissible evidence and will be considered in federal tort claim case involving worker, victim, and worker's personal insurer, where worker asserts that insurance agent told her that "they have never had any problems" in providing coverage to postal rural route carriers, because such statement, although hearsay, qualifies as admission by party-opponent under FRE 801(d)(2)(D), excepting from hearsay rule statement offered against party that was made by party's agent concerning matter within scope of agency or employment and made during existence of relationship. *Pender v United States* (1994, ND Ind) 866 F Supp 1129.

The trial court did not err when trying defendant for the first-degree murder of his wife by allowing the State to question defendant about statements he had made to a co-worker in which he allegedly threatened to kill his wife. The prosecutor only once even arguably referred to a statement by the co-worker and there was no prejudice from that statement because there was plenary other evidence that defendant had threatened his wife's life on a number of occasions prior to shooting her. The defendant's comments concerning his own statements, to the extent they were hearsay, fall within the exception to the hearsay rule for admissions by a party opponent. GS § 8C-1, Rule 801(d)(A). *State v Collins* (1994) 335 NC 729, 440 SE2d 559.

Footnotes

Footnote 43. *State ex rel. Kalt v Board of Fire & Police Comrs.* (App) 145 Wis 2d 504, 427 NW2d 408.

Footnote 44. FRE, Rule 801(d)(2)(A).

Footnote 45. Uniform Rules of Evidence, Rule 801(d)(2)(i).

Footnote 46. *Burlington N. R. Co. v Hood* (Colo) 802 P2d 458; *State v Hernandez* (Idaho App) 818 P2d 768 (a statement is not hearsay if it is offered against a party and is his own statement); *Gayten v State* (Miss) 595 So 2d 409 (a party's statement when offered against him is admissible as a statement which is not hearsay, but rather the admission of a party-opponent); *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125; *State v Gibson*, 186 W Va 465, 413 SE2d 120.

The vast weight of authority, judicial, legislative, and scholarly, supports the admissibility without restriction of any statement of a party offered against that party at trial. *State v Rosado*, 218 Conn 239, 588 A2d 1066.

Admissions in the form of words or acts of a party-opponent may be offered as evidence against that party. *Briggeman v Albert*, 322 Md 133, 586 A2d 15.

Footnote 47. FRE, Rule 801(d)(2)(B), discussed at §§ 796 et seq.

Footnote 48. FRE, Rule 801(d)(2)(C), discussed at §§ 811, 812.

Footnote 49. FRE, Rule 801(d)(2)(D), discussed at §§ 815 et seq.

Footnote 50. FRE, Rule 801(d)(2)(E), discussed in §§ 831 et seq.

Footnote 51. § 772.

Footnote 52. *Bloomquist v ConAgra, Inc.*, 240 Neb 135, 481 NW2d 156; *Canterbury v West Virginia Human Rights Comm'n*, 181 W Va 285, 382 SE2d 338.

Footnote 53. *Canterbury v West Virginia Human Rights Comm'n*, 181 W Va 285, 382 SE2d 338.

Footnote 54. *Bloomquist v ConAgra, Inc.*, 240 Neb 135, 481 NW2d 156.

Footnote 55. *United States v Matlock*, 415 US 164, 39 L Ed 2d 242, 94 S Ct 988 (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) (citing proposed FRE, Rule 801(d)(2)(A)).

The admissions by a party to an action upon a material matter are admissible against him as original evidence. *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

Footnote 56. *Fisher v Duckworth* (Ky) 738 SW2d 810.

Footnote 57. *Briggeman v Albert*, 322 Md 133, 586 A2d 15.

The theory underlying this evidentiary rule is that if a person's own statements are offered against him, he cannot be heard to complain that he was denied an opportunity for cross-examination. *State v Gibson*, 186 W Va 465, 413 SE2d 120.

Footnote 58. *State v Gibson*, 186 W Va 465, 413 SE2d 120.

Footnote 59. *Burlington N. R. Co. v Hood* (Colo) 802 P2d 458.

Footnote 60. *United States v Rios Ruiz* (CA1 Puerto Rico) 579 F2d 670, 3 Fed Rules Evid Serv 64, 48 ALR Fed 911 (grand jury testimony and arrest report); *Callon Petroleum Co. v Big Chief Drilling Co.* (CA5 Miss) 548 F2d 1174, 1 Fed Rules Evid Serv 874, 57 OGR 50, reh den (CA5 Miss) 552 F2d 369 and reh den (CA5 Miss) 552 F2d 369 (field conversation between one party and representative of another); *United States v Cline* (CA8 SD) 570 F2d 731, 2 Fed Rules Evid Serv 976 (criticized on other grounds by *United States v Lashmett* (CA7 Ill) 965 F2d 179, 35 Fed Rules Evid Serv 1060) (out-of-court statement by defendant to person who had given defendant a gun to sell); *United States v Porter* (CA8 Mo) 544 F2d 936, 1 Fed Rules Evid Serv 424 (statements by accused to police detectives).

Footnote 61. *United States v Velarde* (CA9 Cal) 528 F2d 387, cert den 425 US 914, 47 L Ed 2d 765, 96 S Ct 1513.

Footnote 62. *United States v Robinson*, 174 US App DC 224, 530 F2d 1076, 2 Fed Rules Evid Serv 1092.

Footnote 63. *United States v Porter* (CA8 Mo) 544 F2d 936, 1 Fed Rules Evid Serv 424; *United States v Robinson* (CA9 Ariz) 546 F2d 309, cert den 430 US 918, 51 L Ed 2d 597, 97 S Ct 1333; *United States v Pinalto* (CA10 Okla) 771 F2d 457, 19 Fed Rules Evid Serv 864 (tape-recorded telephone conversations erroneously excluded from trial on the ground that the tapes were untrustworthy because the party recording the conversation had a motive to lie to the defendant).

Footnote 64. § 757.

Footnote 65. *United States v Porter* (CA8 Mo) 544 F2d 936, 1 Fed Rules Evid Serv 424; *State v Harberts*, 315 Or 408, 848 P2d 1187.

Footnote 66. *State v Harberts*, 315 Or 408, 848 P2d 1187.

Footnote 67. *United States v Rios Ruiz* (CA1 Puerto Rico) 579 F2d 670, 3 Fed Rules Evid Serv 64, 48 ALR Fed 911; *United States v Smith* (CA8 Neb) 578 F2d 1227, appeal after remand (CA8 Neb) 600 F2d 149; *Guam v Ojeda* (CA9 Guam) 758 F2d 403 (defendant's offer to compensate burglary victim for losses sustained ruled admissible, since party-admissions need only relate to the offense and need not be incriminating); *State v Bernier*, 157 Vt 265, 597 A2d 789.

As to the hearsay exception for declarations against interest, see §§ 785 et seq.

Footnote 68. *United States v Evans* (CA5 Tex) 572 F2d 455, 3 Fed Rules Evid Serv 1120, reh den (CA5 Tex) 576 F2d 931 and cert den 439 US 870, 58 L Ed 2d 182, 99 S

Ct 200 and (criticized on other grounds by *United States v Bailey* (CA7 Ill) 734 F2d 296) and (disapproved on other grounds by *Tague v Louisiana*, 444 US 469, 62 L Ed 2d 622, 100 S Ct 652) as stated in *United States v Charles* (CA5 Tex) 738 F2d 686 and (criticized on other grounds by *United States v Barnes* (CA5 Tex) 761 F2d 1026); *United States v Buttorff* (CA8 Iowa) 572 F2d 619, 78-1 USTC ¶ 9265, 2 Fed Rules Evid Serv 1038, 41 AFTR 2d 78-896, cert den 437 US 906, 57 L Ed 2d 1136, 98 S Ct 3095, reh den 439 US 884, 58 L Ed 2d 199, 99 S Ct 228.

As to privilege against self-incrimination, generally, see § 721.

Footnote 69. *United States v Porter* (CA8 Mo) 544 F2d 936, 1 Fed Rules Evid Serv 424.

Footnote 70. FRE, Rules 401-412 (relevancy).

FRE, Rule 501 (privileged communications).

Footnote 71. *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427 criticized on other grounds by *Hall v American S.S. Co.* (CA6 Ohio) 688 F2d 1062, 11 Fed Rules Evid Serv 933) (exclusion from hearsay rules inapplicable to recall campaign for defective equipment conducted under statute imposing no confidentiality upon recall communications between manufacturer and purchasers).

Footnote 72. *United States v Eubanks* (CA9, Ariz) 591 F2d 513.

Footnote 73. *United States v Weinrich* (CA5, Fla) 586 F2d 481, cert den 440 US 982, 60 L Ed 2d 243, 99 S Ct 1792 and cert den 441 US 927, 60 L Ed 2d 402, 99 S Ct 2041.

§ 761 Requirement that statement be made by party; statements made in representative capacity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In order for the admission of a party-opponent made in an individual or representative capacity 74 to be admissible, the out-of-court statement must have been made by a party to the litigation. 75 A declaration by one associated with the action, but not a party in it, is inadmissible. 76 Nevertheless, if the statement is offered against the party while acting in a representative capacity, there need be no inquiry as to whether the party was acting in that capacity when the statement was made to determine if the statement is a party admission; 77 the statement need only be relevant to the party's affairs as a representative. 78

§ 761 ----Requirement that statement be made by party; statements made in representative capacity [SUPPLEMENT]

Practice Aids: Evidence: Vicarious admission by a party opponent, 140 Chi Daily L

Bull 208:1 (1994).

Interpreter or translator as party's agent for purposes of "admission by party- opponent" exception to hearsay rule (Federal Rules of Evidence, Rules 801(d)(2)(C), 801(d)(2)(D)) 121 ALR Fed 611.

Case authorities:

Plaintiff suing for asbestos- related personal injuries should not have been permitted to introduce testimony of defendant's expert from unrelated state trial as admission of defendant, since it was hearsay because there was no finding that expert was agent of defendant and authorized to speak on behalf of defendant; because expert witness is charged with duty of giving expert opinion regarding matter before court, expert witness who is not agent of party who called him cannot be authorized to make admission for that party. *Kirk v Raymark Indus.* (1995, CA3 Pa) 51 F3d 1206, reh gr, vacated (1995, CA3 Pa) 1995 US App LEXIS 12529 and substituted op, on reh, remanded (1995, CA3 Pa) 1995 US App LEXIS 19940.

In former employee's age discrimination action against former corporate employer, statements of corporate managers that employees over age 50 or 55 received raises every 3 years while those under that age received annual raises are not admissible as statements by agents against their employer, where plaintiff presented no evidence that declarants were involved in deciding when and to whom raises were to be given, because declarants' statements did not concern matters within scope of their employment. *Campbell v Fasco Indus.* (1994, ND Ill) 861 F Supp 1385.

Out-of-court statements made by a prosecutor do not constitute admissions of a party opponent, and where a defendant offered testimony by his relatives as to remarks purportedly made to them by an assistant State's Attorney, the statements were properly excluded as hearsay. *People v McDaniel* (1995) 164 Ill 2d 173, 207 Ill Dec 304, 647 NE2d 266.

State court rule rendering plea bargaining evidence inadmissible provided no basis for defendant's introduction of evidence he rejected plea bargain, offered as proof of consciousness of innocence. *State v Woodsum* (1993) 137 NH 198, 624 A2d 1342.

Footnotes

Footnote 74. FRE, Rule 801(d)(2)(A).

Footnote 75. *Estate of Shafer v Commissioner* (CA6) 749 F2d 1216, 84-2 USTC ¶ 13599, 16 Fed Rules Evid Serv 1248, 55 AFTR 2d 85-1531 (executor of an estate is a party to the action within the meaning of FRE, Rule 801(d)(2)(A)); *ADP-Financial Computer Services, Inc. v First Nat. Bank* (CA11 Ga) 703 F2d 1261, 13 Fed Rules Evid Serv 38, reh den (CA11 Ga) 708 F2d 734; *Atty. Gen. of United States v Irish People, Inc.* (DC Dist Col) 595 F Supp 114, 16 Fed Rules Evid Serv 1218, supp op (DC Dist Col) 612 F Supp 647, affd in part and revd in part on other grounds 254 US App DC 229, 796 F2d 520.

Footnote 76. *Trist v First Federal Sav. & Loan Asso.* (ED Pa) 466 F Supp 578, 1979-2

The District Court properly excluded testimony of a cellmate of a co-defendant, relative to statements allegedly made by the co-defendant to the cellmate, since the admission sought to be introduced was made by a co-defendant who was not a party-opponent; rather, in criminal a prosecution, the government is party-opponent of both defendants. *United States v Gossett* (CA11 Fla) 877 F2d 901, 28 Fed Rules Evid Serv 826, cert den 493 US 1082, 107 L Ed 2d 1045, 110 S Ct 1141.

In an action brought against the publisher of a weekly newspaper for failing to register as an agent of a foreign principal within the scope of the Foreign Agents Registration Act of 1938, 22 USCS §§ 611 et seq., where it was alleged that the publisher was an agent of the Irish Northern Aid Committee (INAC), which was registered as an agent for the Irish Republican Army, letters authored by members of the INAC, which contained information that could be classified as admissions to the charges at hand because of the strong ties indicated between the INAC and the newspaper, did not meet the requirements of FRE, Rule 801(d)(2)(A), since despite its association with the publication and other parties, the INAC was not itself a party to the action. *Atty. Gen. of United States v Irish People, Inc.* (DC Dist Col) 595 F Supp 114, 16 Fed Rules Evid Serv 1218, supp op (DC Dist Col) 612 F Supp 647, affd in part and revd in part on other grounds 254 US App DC 229, 796 F2d 520.

Footnote 77. *Estate of Shafer v Commissioner* (CA6) 749 F2d 1216, 84-2 USTC ¶ 13599, 16 Fed Rules Evid Serv 1248, 55 AFTR 2d 85-1531.

Footnote 78. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 801.

§ 762 Requirement that admission be offered against party

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The hearsay barrier is removed only when the statement is offered against the party, not for the party. 79 However, an admission of a party-opponent under the Federal Rule of Evidence governing individual and representative admissions 80 is admissible even if the statement was not against the party's interest at the time the statement was made, providing the statement is contrary to the party's position at trial. 81 Moreover, since the Federal Rule requires only that the admission be contrary to the party's position at trial, the admission may be introduced against the party through the trial testimony of a co-defendant, who is testifying on his or her own behalf. 82

Footnotes

Footnote 79. *Coughlin v Capitol Cement Co.* (CA5 Tex) 571 F2d 290, 1978-1 CCH Trade Cases ¶ 61957, 3 Fed Rules Evid Serv 490; *Auto-Owners Ins. Co. v Jensen* (CA8 ND) 667 F2d 714, 9 Fed Rules Evid Serv 1369.

During a search of an automobile, the defendant's statement to police officers regarding the fact that the gym bag containing cocaine belonged to him, but that his co-defendant had put the bag in the automobile trunk, did not qualify as an admission of a party-opponent under FRE, Rule 801(d)(2)(A), since the defendant sought to introduce the statement on his own behalf. *United States v Phelps* (ED Ky) 572 F Supp 262, 14 Fed Rules Evid Serv 877.

Footnote 80. FRE, Rule 801(d)(2)(A).

Footnote 81. *United States v Phelps* (ED Ky) 572 F Supp 262, 14 Fed Rules Evid Serv 877; *Auto-Owners Ins. Co. v Jensen* (CA8 ND) 667 F2d 714, 9 Fed Rules Evid Serv 1369.

Footnote 82. *United States v Palow* (CA1 Mass) 777 F2d 52, 18 Fed Rules Evid Serv 1372, cert den 475 US 1052, 89 L Ed 2d 585, 106 S Ct 1277.

§ 763 Statements of accused in criminal case

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the criminal context, an admission can be a statement of a party that tends to incriminate or connect the party with the crime charged, or which manifests consciousness of guilt. 83 As in the case of confessions, 84 statements or declarations made by one accused of a crime which are relative to the crime from which, in connection with other evidence, an inference of guilt can be drawn, are admissible, 85 at least insofar as such statements have been made by the accused freely and voluntarily, without deprivation of constitutional rights. 86 Untrue denials can constitute admissions, 87 since exculpatory statements proven false evidence a consciousness of guilt and therefore bear directly on the issue of guilt or innocence. 88

In determining whether a defendant's statement constitutes an admission, the court must consider the defendant's statement in light of the surrounding circumstances. 89 Where there is conflicting evidence of the circumstances surrounding an incriminating statement or a confession, it is the duty of the trial judge to determine its admissibility, and if the trial judge decides it is admissible his or her decision will not be disturbed on appeal unless found to be manifestly contrary to the great weight of the evidence. 90 In federal criminal cases, the Federal Rule of Evidence pertaining to admissions by party-opponents in an individual or representative capacity 91 has been utilized in connection with a party's—

—inculpatory oral statements made to law enforcement officers, 92 including postarrest statements made during routine booking procedures, 93 and statements made to law enforcement officers working undercover. 94

—inculpatory statements made to other persons. 95

–inculpatory written statements. 96

Statements made in the context of plea bargaining constitute an exception to the general rule of admissibility. 97

◆ Comment: Some courts state that they perceive no meaningful distinction between a "confession" and an "inculpatory statement" for purposes of the right against self-incrimination. 98 The requirements that apply to confessions and other statements as to custodial interrogations, 99 voluntariness of statements 1 and Miranda warnings 2 also apply in the case of admissions.

§ 763 ----Statements of accused in criminal case [SUPPLEMENT]

Case authorities:

Defendant failed to raise issue of voluntariness of his statements to investigating officers below, and therefore waived right to raise issue on appeal; pretrial motion to suppress was based on Federal Rules of Evidence 609(b) and 804(b). *United States v Yannott* (1994, CA6 Mich) 42 F3d 999, cert den (1995, US) 130 L Ed 2d 1125, 115 S Ct 1172.

The defendant's statement to a former employer that he had killed 3 people and could kill again was admissible as an admission of a party as an exception to the hearsay rule. *Wyatt v State* (1994, Fla) 641 So 2d 1336, 19 FLW S 437.

The trial court did not err when trying defendant for the first- degree murder of his wife by allowing the State to question defendant about statements he had made to a co- worker in which he allegedly threatened to kill his wife. The prosecutor only once even arguably referred to a statement by the co- worker and there was no prejudice from that statement because there was plenary other evidence that defendant had threatened his wife's life on a number of occasions prior to shooting her. The defendant's comments concerning his own statements, to the extent they were hearsay, fall within the exception to the hearsay rule for admissions by a party opponent. GS § 8C-1, Rule 801(d)(A). *State v Collins* (1994) 335 NC 729, 440 SE2d 559.

The trial court did not err in a noncapital first-degree murder prosecution by admitting defendant's inculpatory statements where defendant contended that the statements were not made knowingly, intelligently, or voluntarily, but none of the evidence presented suggests that defendant's mental capacity was in any way impaired, that his will was overpowered, or that the officers attempted to physically or psychologically torture defendant to evoke a confession, the court found that "defendant was never promised anything, was never threatened, and had no offers of reward or of assistance with any prosecution in the event he did cooperate with the officers," and defendant made a correction in the written statement. Applying the totality of the circumstances standard, there was no error in concluding that defendant's constitutional rights were not violated and that the statements were admissible. *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

A statement in a prosecution for conspiracy and accessory to murder that the coconspirator brought up the discussions about killing the victims was hearsay, but was admissible under GS § 8C-1, Rule 801(a) as a party admission. *State v Johnson* (1995)

340 NC 32, 455 SE2d 644.

A "fantasy statement" made by defendant to another inmate while he was in Central Prison awaiting trial which detailed defendant's participation in the shooting of the male victim and the kidnapping, rape and murder of each of the two female victims was admissible as an admission of a party opponent. G.S. § 8C-1, Rule 801(d)(A).

Defendant's statement to the inmate clearly implicated defendant in the crimes charged, and his attempt to couch this confession in terms of make believe and fantasy does not render his inculpatory statement inadmissible hearsay. Furthermore, the statement was relevant under G.S. § 8C-1, Rule 401. *State v Gregory* (1995) 340 NC 365, 459 SE2d 638.

In a prosecution of defendant for the murder of her husband, the trial court did not err in admitting defendant's statement, "Honey, why did you make me do it?" while she was viewing her husband's body at the funeral home, since the statement was too ambiguous to be incriminating and was an admission by a party opponent within the purview of GS § 8C- 1, Rule 801(d)(A); the statement was obviously relevant; and the admission, though prejudicial to defendant, was not unfairly so. *State v Lambert* (1995) 341 NC 36, 460 SE2d 123.

Footnotes

Footnote 83. *State v Isa* (Mo) 850 SW2d 876.

Footnote 84. §§ 714 et seq.

Footnote 85. *On Lee v United States*, 343 US 747, 96 L Ed 1270, 72 S Ct 967, reh den 344 US 848, 97 L Ed 659, 73 S Ct 5 and (ovrld on other grounds by *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507) as stated in *Lee v State* (Miss) 489 So 2d 1382; *State v Romo*, 66 Ariz 174, 185 P2d 757; *State v Johnson*, 74 Idaho 269, 261 P2d 638; *State v Olson*, 260 Iowa 311, 149 NW2d 132; *State v Fields*, 182 Kan 180, 318 P2d 1018; *State v Farrell*, 223 NC 804, 28 SE2d 560.

Law Reviews: *Dix, Texas "Confession" Law and Oral Self-Incriminating Statements*, 41 Baylor LR 1 (Wint 1989).

Footnote 86. §§ 719 et seq.

Footnote 87. *State v Byrd* (Mo App) 815 SW2d 103.

Footnote 88. *State v Boyington* (Mo App) 831 SW2d 642.

False and improbable statements explaining suspicious circumstances are admissible as proof of guilt. *Thomas v State*, 312 Ark 158, 847 SW2d 695.

Footnote 89. *State v Isa* (Mo) 850 SW2d 876.

Footnote 90. *Ex parte Matthews* (Ala) 601 So 2d 52, cert den (US) 120 L Ed 2d 872, 112 S Ct 2996 and on remand, remanded (Ala App) 601 So 2d 55.

Footnote 91. § 760.

Footnote 92. *United States v Lam Lek Chong* (CA2 NY) 544 F2d 58, 2 Fed Rules Evid Serv 1102, cert den 429 US 1101, 51 L Ed 2d 550, 97 S Ct 1124; *United States v Nix* (CA5 Ala) 548 F2d 1159, 1 Fed Rules Evid Serv 692; *United States v Green* (CA6 Ohio) 548 F2d 1261, 2 Fed Rules Evid Serv 661; *United States v Porter* (CA8 Mo) 544 F2d 936, 1 Fed Rules Evid Serv 424; *United States v Velarde* (CA9 Cal) 528 F2d 387, cert den 425 US 914, 47 L Ed 2d 765, 96 S Ct 1513.

Annotation: Admissibility of party's own statement under Rule 801(d)(2)(A) of the Federal Rules of Evidence, 48 ALR Fed 922.

Footnote 93. *United States v Abell* (DC Me) 586 F Supp 1414 (statement of defendant's place of foreign birth made in response to personal history queries and recorded on jailhouse booking card was admissible in criminal conspiracy action where nationality was relevant).

Footnote 94. *United States v Kehm* (CA7 Ind) 799 F2d 354, 21 Fed Rules Evid Serv 339 (defendant's boasts about his past crimes as drug smuggler as made to undercover agents, who recorded the boasts on video tape); *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309 (audio-taped recording of conversation between the defendant and an undercover agent for the negotiation of the sale of stolen corporate bonds).

Footnote 95. *United States v Moore* (CA2 NY) 571 F2d 76, 2 Fed Rules Evid Serv 1230, 49 ALR Fed 915; *United States v Mandel* (CA4 Md) 591 F2d 1347, 5 Fed Rules Evid Serv 133, different results reached on reh, en banc, by split decision (CA4 Md) 602 F2d 653, reh den, en banc (CA4) 609 F2d 1076, cert den 445 US 961, 64 L Ed 2d 236, 100 S Ct 1647, later proceeding (DC Md) 672 F Supp 864 and disapproved on other grounds by *McNally v United States*, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875) as stated in *United States v Runnels* (CA6 Mich) 833 F2d 1183, 126 BNA LRRM 2789, 107 CCH LC ¶ 10228, 24 Fed Rules Evid Serv 107; *United States v Friedman* (CA9 Wash) 593 F2d 109, 4 Fed Rules Evid Serv 646 (not followed on other grounds by *United States v Hines* (AFCMR) 18 MJ 729).

In a conspiracy prosecution, the defendant's statement to an accomplice that as an attorney he had to be very careful but that given the right situation he might be interested was an admission of intention by the defendant outside the hearsay rule. *United States v Eisenberg* (CA2 NY) 596 F2d 522, cert den 444 US 843, 62 L Ed 2d 56, 100 S Ct 85. *United States v Raymond* (CA8 Mo) 793 F2d 928 (tape-recorded conversation between defendant and coconspirator, who had been arrested and was now cooperating with law enforcement officers); *United States v Yarns* (CA8 Mo) 811 F2d 454, 22 Fed Rules Evid Serv 881.

In a burglary action, the defendant's offer to compensate the victim for losses sustained if the criminal charges were dropped, and the declaration that the burglars used the defendant's vehicle, but that the defendant himself had never entered the home were party-admissions within the scope of FRE, Rule 801(d)(2)(A), since statements need not be incriminating to be admissions and offers to compensate may be construed as indicating a consciousness of guilt. *Guam v Ojeda* (CA9 Guam) 758 F2d 403.

Footnote 96. *United States v Rios Ruiz* (CA1 Puerto Rico) 579 F2d 670, 3 Fed Rules Evid Serv 64, 48 ALR Fed 911; *United States v Johnson* (CA8 Mo) 529 F2d 581, cert den 426 US 909, 48 L Ed 2d 835, 96 S Ct 2233.

Footnote 97. § 765.

Footnote 98. *State v Kelekolio*, 74 Hawaii 479, 849 P2d 58.

Practice References Generally; Confessions and Admissions. 5 Am Jur Trials 331, Excluding Illegally Obtained Evidence § 19.

Footnote 99. §§ 721 et seq.

Footnote 1. §§ 719 et seq.

Footnote 2. §§ 749 et seq.

§ 764 --Corpus delicti rule; necessity of independent corroboration

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, like confessions, 3 post-offense admissions require independent corroboration. 4 Admissions require corroboration, at least where the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and where the statement embraces an element vital to the Government's case. 5 Some courts state that it is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth, 6 and that the prosecution need not introduce independent evidence of every element of the crime. 7 Generally, the corpus delicti rule requires that independent of any post-crime admissions made by the defendant, the state must prove that the loss or injury occurred by the criminal conduct of another. 8 Some courts hold that the state must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred. 9 According to some courts, the state must also introduce independent evidence tending to establish the trustworthiness of the admissions, unless they are, by virtue of special circumstances, inherently reliable. 10 However, some courts hold that the corpus delicti rule no longer exists and independent evidence establishing trustworthiness is the only requirement. 11

The corpus delicti cannot be proven solely by an admission. 12 However, if the accused's extrajudicial statement enables the state to discover corroborating evidence of a particular crime confessed, the corroborating evidence need not be totally independent of the extrajudicial statement to establish complete proof that the crime has been committed. 13

◆ Comment: Pre-offense statements do not require corroboration because they contain none of the inherent weaknesses of admissions made after the fact. 14

Some courts state that the corpus delicti must be proved to a probable cause standard, 15 or a clear and convincing evidence standard, 16 while others state that only a prima facie showing is required and the corpus delicti may be proved by circumstantial evidence and inferences drawn from circumstantial evidence. 17 In such cases, it is for the trial court to determine that a prima facie showing has been made. 18

Despite the general rule, there is some authority that makes a distinction between confessions and admissions, for purposes of the corpus delicti rule. In states in which the corroboration rule is limited to confessions, an admission may corroborate an extrajudicial confession. 19 Thus, while confessions are inadmissible until the state presents prima facie evidence of the corpus delicti, admissions are admissible as prima facie evidence of the corpus delicti. 20

In jurisdictions that state the corpus delicti rule in terms of admissions, as well as confessions, the substantive part of the corpus delicti rule requires that the state first present evidence independent of the defendant's own statements which is adequate to prove both elements of corpus delicti to a probable cause standard, and, second, present evidence, including any post-crime admissions or confessions made by the defendant, which is adequate to establish the corpus delicti beyond a reasonable doubt. 21 The procedural part of the rule may leave to the discretion of the trial court the determination of the order of proof of the corpus delicti. 22 Once the state has established corpus delicti to a probable cause standard without reliance on the defendant's admissions, those admissions are appropriately considered by the court in determining whether the state, at the close of its case, has ultimately proved corpus delicti beyond a reasonable doubt. 23

Footnotes

Footnote 3. §§ 708 et seq.

Footnote 4. *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

An accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions, and corroboration should be required. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308.

The corroboration rule applies to admissions as well as confessions. *Commonwealth v Costello*, 411 Mass 371, 582 NE2d 938.

Although the rule traditionally concerns the after-the-fact confessions, the policy underlying the rule's application is equally applicable to admissions because they are subject to the same possibilities for error. *State v Johnson* (Utah) 821 P2d 1150, 173 Utah Adv Rep 3.

As to application of the corpus delicti rule in the case of confessions, see § 753.

Footnote 5. *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440,

113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

Footnote 6. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

Footnote 7. *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

Footnote 8. *State v Powers* (Me) 609 A2d 1167; *State v Benton* (Mo App) 812 SW2d 736.

The prosecution must present evidence apart from the defendant's own statements that tends to show the commission of the offense and that corroborates the facts related in the statement. *People v Howard*, 147 Ill 2d 103, 167 Ill Dec 914, 588 NE2d 1044, cert den (US) 121 L Ed 2d 154, 113 S Ct 215.

Before post crime inculpatory statements are admissible, the state must show by clear and convincing evidence that (1) the wrong was done and (2) such wrong was the result of criminal conduct. *State v Johnson* (Utah) 821 P2d 1150, 173 Utah Adv Rep 3.

Footnote 9. *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

Footnote 10. *United States v Lopez-Alvarez* (CA9 Cal) 970 F2d 583, 92 CDOS 6022, 92 Daily Journal DAR 9487, 36 Fed Rules Evid Serv 51, cert den (US) 121 L Ed 2d 440, 113 S Ct 504 and related proceeding (CA9 Cal) 94 CDOS 532, 94 Daily Journal DAR 924.

Footnote 11. *United States v Kerley* (CA7 Wis) 838 F2d 932, mod, reh gr, in part (CA7) 1988 US App LEXIS 4813.

Footnote 12. *Burks v State* (Fla) 613 So 2d 441, 18 FLW S 71.

Under the prevailing view, proof of the corpus delicti may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement. *People v Howard*, 147 Ill 2d 103, 167 Ill Dec 914, 588 NE2d 1044, cert den (US) 121 L Ed 2d 154, 113 S Ct 215.

Footnote 13. *State v Benton* (Mo App) 812 SW2d 736.

Footnote 14. *State v Atwood*, 171 Ariz 576, 832 P2d 593, 110 Ariz Adv Rep 3, cert den (US) 122 L Ed 2d 364, 113 S Ct 1058; *State v Johnson* (Utah) 821 P2d 1150, 173 Utah Adv Rep 3.

Footnote 15. *State v Powers* (Me) 609 A2d 1167.

Footnote 16. State v Johnson (Utah) 821 P2d 1150, 173 Utah Adv Rep 3.

Footnote 17. People v Pensinger, 52 Cal 3d 1210, 278 Cal Rptr 640, 805 P2d 899, 91 CDOS 1514, 91 Daily Journal DAR 2504, mod 53 Cal 3d 729a, 91 Daily Journal DAR 4745 and stay gr (Cal) 1991 Cal LEXIS 3318 and reh den, cert den (US) 116 L Ed 2d 290, 112 S Ct 351, 91 Daily Journal DAR 12909, reh den (US) 116 L Ed 2d 821, 112 S Ct 923.

The prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish guilt; a slight or prima facie showing is sufficient. State v Grissom, 251 Kan 851, 840 P2d 1142.

Footnote 18. State v Grissom, 251 Kan 851, 840 P2d 1142.

Footnote 19. State v Manzella, 306 Or 303, 759 P2d 1078.

Footnote 20. Davis v State (Fla App D1) 582 So 2d 695, 16 FLW D 1696.

Footnote 21. State v Cruz (Me) 594 A2d 1082.

Footnote 22. State v Cruz (Me) 594 A2d 1082.

Footnote 23. State v Cruz (Me) 594 A2d 1082.

§ 765 --Plea bargaining

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Various states hold that communications made in the course of plea bargaining are not admissible into evidence. 24 The Federal Rules of Evidence 25 and the Federal Rules of Criminal Procedure 26 state that, subject to certain limited exceptions, any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn is not admissible as evidence against a participant in the plea discussions. 27 The plea bargaining rule is an exception to the general rule that admissions by party defendants are admissible, and was established to encourage use of plea bargaining agreements. 28 Although such statements are not admissible even if the plea is later withdrawn, 29 they may be admissible if the defendant breaches the plea agreement and the statements were not involuntary. 30

The plea bargain rule seeks to promote negotiated dispositions of criminal cases by giving the defendant protection from involuntary self-incrimination at two ends of the plea-bargaining spectrum: while the defendant is negotiating over the disposition of the case and while the defendant is offering or entering a plea that is rejected or later withdrawn. 31 Consequently, statements made subsequent to a plea agreement are not protected by the plea bargaining rule. 32 In addition, it has been held that grand jury

testimony given after formalization of a plea agreement but before the defendant has entered the plea, where the defendant withdraws from the agreement and pleads not guilty instead, is not excluded by the rule. 33

However, every statement made as the result of a plea bargain is not inadmissible. 34 In order for such admissions to be excludable, criminal charges must be lodged against the defendant or such criminal charges must be imminent, and the admission must be part of some type of arrangement. 35 The statements must be made by someone expressly authorized to negotiate with the defendant. 36 The language of the federal rules provides no room to expand their scope from plea negotiations with government attorneys to cover discussions with law enforcement officers generally, unless perhaps a law enforcement officer with express authority from a government attorney enters into negotiations with a defendant. 37 Thus, a statement made by a defendant to an unauthorized agent some two weeks after the plea agreement was finalized was not made in connection with the negotiations for the plea bargain and was voluntary and admissible. 38 In addition, the statements must contain an offer to plead guilty or indicate a serious effort at negotiating such a plea. 39 Conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he or she is negotiating a plea, and that belief is reasonable under the circumstances. 40 Mere inquiry into possible defenses, 41 preliminary discussions prior to any specific plea bargains, 42 statements made to federal agents after arrest in hope of initiating a plea bargain, 43 or offers of cooperation and attendant admissions, 44 which are not plea bargaining, may be admissible. Moreover, the prosecution is not foreclosed from proving material, relevant facts from independent evidence and sources, even though those facts were discussed during plea negotiations. 45

Where the rule excluding admissions made during plea bargaining is violated, convictions may be reversed and the case remanded for a new trial. 46 However, under the doctrine of invited error, it may not be reversible error where the government cross-examines the accused about plea negotiations after the accused discusses a plea bargain situation in his or her direct testimony. 47

◆ Observation: There is some authority that the prohibition against the admissibility of statements made during plea negotiations is not generally subject to waiver. 48 Nevertheless, if a defendant fails to object at trial to the introduction of such testimony, he or she has implicitly waived the protection. 49

Footnotes

Footnote 24. *Wilson v State*, 253 Ark 10, 484 SW2d 82; *Hineman v State*, 155 Ind App 293, 292 NE2d 618; *Robinson v State*, 98 Nev 202, 644 P2d 514; *Dykes v State*, 213 Tenn 40, 372 SW2d 184.

Footnote 25. FRE, Rule 410.

Footnote 26. FR Crim P, Rule 11(e)(6).

Footnote 27. FR Crim P, Rule 11(e)(6), FRE, Rule 410, discussed in § 520.

Footnote 28. *State v Hansen*, 194 Mont 197, 633 P2d 1202.

Footnote 29. *Banks v United States* (Dist Col App) 516 A2d 524, cert den 484 US 975, 98 L Ed 2d 483, 108 S Ct 485.

Footnote 30. *Wright v State*, 307 Md 552, 515 A2d 1157, later proceeding 76 Md App 731, 548 A2d 161.

Footnote 31. *United States v Davis*, 199 US App DC 95, 617 F2d 677, 4 Fed Rules Evid Serv 1251; *State v Lewis* (La) 539 So 2d 1199, 90 ALR4th 1117.

Footnote 32. *United States v Moya* (ND Tex) 730 F Supp 35, affd without op (CA5 Tex) 968 F2d 16.

Footnote 33. *United States v Davis*, 199 US App DC 95, 617 F2d 677, 4 Fed Rules Evid Serv 1251.

Footnote 34. *State v Lewis* (La) 539 So 2d 1199, 90 ALR4th 1117.

Footnote 35. *United States v Arroyo-Angulo* (CA2 NY) 580 F2d 1137, 3 Fed Rules Evid Serv 421, cert den 439 US 913, 58 L Ed 2d 260, 99 S Ct 285 and cert den 439 US 1005, 58 L Ed 2d 681, 99 S Ct 618 and cert den 439 US 1131, 59 L Ed 2d 93, 99 S Ct 1052 (admissions which were not made as part of an arrangement and were made to stave off deportation for illegal entry into the United States were not excludible).

Footnote 36. *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840 criticized on other grounds by *United States v Penta* (CA1 Mass) 898 F2d 815, 29 Fed Rules Evid Serv 1325; *State v Lewis* (La) 539 So2d 1199, 90 ALR4th 1117.

Footnote 37. *United States v Sitton* (CA9 Cal) 968 F2d 947, 92 CDOS 5870, 92 Daily Journal DAR 9307, 36 Fed Rules Evid Serv 282, cert den (US) 121 L Ed 2d 384, 113 S Ct 478 and cert den (US) 122 L Ed 2d 695, 113 S Ct 1306 and related proceeding (CA9) 1993 US App LEXIS 16065.

Footnote 38. *United States v Grant* (CA8 Ark) 622 F2d 308, 6 Fed Rules Evid Serv 322, 60 ALR Fed 840; *State v Lewis* (La) 539 So2d 1199, 90 ALR4th 1117.

Footnote 39. *State v Kidder*, 32 Ohio St 3d 279, 513 NE2d 311 (criticized on other grounds by *State v Deem*, 40 Ohio St 3d 205, 533 NE2d 294) as stated in *State v Jones* (Ohio App, Franklin Co) 1990 Ohio App LEXIS 961, dismd, motion overr 53 Ohio St 3d 703, 558 NE2d 57.

Footnote 40. *United States v Sitton* (CA9 Cal) 968 F2d 947, 92 CDOS 5870, 92 Daily Journal DAR 9307, 36 Fed Rules Evid Serv 282, cert den (US) 121 L Ed 2d 384, 113 S Ct 478 and cert den (US) 122 L Ed 2d 695, 113 S Ct 1306 and related proceeding (CA9) 1993 US App LEXIS 16065; *United States v Guerrero* (CA9 Guam) 847 F2d 1363, 25 Fed Rules Evid Serv 1110.

Footnote 41. *Armes v State* (Tenn Crim) 540 SW2d 279.

Footnote 42. *United States v Penta* (CA1 Mass) 898 F2d 815, 29 Fed Rules Evid Serv 1325, cert den 498 US 896, 112 L Ed 2d 205, 111 S Ct 246 and (criticized on other

grounds by *United States v Cheek* (CA7 Ill) 3 F3d 1057, 93-2 USTC ¶ 50473, 93 TNT 183-18, 72 AFTR 2d 93-5727).

Footnote 43. *United States v Davidson* (CA11 Fla) 768 F2d 1266, reh den, en banc (CA11 Fla) 774 F2d 1179; *United States v Ceballos* (CA11 Fla) 706 F2d 1198, 13 Fed Rules Evid Serv 673 (criticized on other grounds by *United States v Manbeck* (CA4 SC) 744 F2d 360); *State v Lewis* (La) 539 So2d 1199, 90 ALR4th 1117.

Footnote 44. *United States v Levy* (CA2 NY) 578 F2d 896, 3 Fed Rules Evid Serv 886; *United States v Posey* (CA5 Ga) 611 F2d 1389, 5 Fed Rules Evid Serv 771.

Footnote 45. *Shriver v State* (Okla Crim) 632 P2d 420, cert den 449 US 983, 66 L Ed 2d 245, 101 S Ct 399.

Footnote 46. *Robinson v State*, 98 Nev 202, 644 P2d 514.

Footnote 47. *United States v Doran* (CA5 La) 564 F2d 1176, cert den 435 US 928, 55 L Ed 2d 524, 98 S Ct 1498.

As to invited error, generally, see 5 Am Jur 2d, Appeal and Error §§ 713-722; 75A Am Jur 2d, Trial § 584.

Footnote 48. *United States v Mezzanatto* (CA9 Cal) 998 F2d 1452, 93 CDOS 5188, 93 Daily Journal DAR 8698, 37 Fed Rules Evid Serv 296, petition for certiorari filed (Feb 22, 1994).

Footnote 49. *United States v Mezzanatto* (CA9 Cal) 998 F2d 1452, 93 CDOS 5188, 93 Daily Journal DAR 8698, 37 Fed Rules Evid Serv 296, petition for certiorari filed (Feb 22, 1994).

§ 766 Statements by parties to civil suit

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Oral 50 and written 51 statements bearing on civil liability qualify as party-admissions under the Federal Rules of Evidence 52 in federal civil actions, including statements of a decedent in actions to which the deceased's estate is a party. 53 Certain statements made in the course of court proceedings may also qualify as party-admissions, such as pleadings, 54 depositions, 55 and guilty pleas. 56

§ 766 ----Statements by parties to civil suit [SUPPLEMENT]

Case authorities:

In action by purchasers of building against vendor for negligent construction and fraud,

statements made during mediation were improperly admitted, in violation of statute prohibiting admission of statements made in course of mediation, where in mediation session parties reached oral agreement, parties later disagreed on terms of settlement, and no written agreement was executed. *Ryan v Garcia* (1994, 3rd Dist) 27 Cal App 4th 1006, 33 Cal Rptr 2d 158, 94 CDOS 6452, 94 Daily Journal DAR 11767.

Footnotes

Footnote 50. *Herdman v Smith* (CA5 La) 707 F2d 839, 13 Fed Rules Evid Serv 927 (statement to companions promoting concealment of the defendant's identity after committing an assault); *Callon Petroleum Co. v Big Chief Drilling Co.* (CA5 Miss) 548 F2d 1174, 1 Fed Rules Evid Serv 874, 57 OGR 50, reh den (CA5 Miss) 552 F2d 369 and reh den (CA5 Miss) 552 F2d 369; *Kenney v Lewis Revels Rare Coins, Inc.* (CA11 Ga) 741 F2d 378, 16 Fed Rules Evid Serv 612, 40 FR Serv 2d 184 (in personal injury action, the testimony of and a diagram drawn by a state trooper, which were based on statements made to the trooper at the scene of an accident by the driver).

Footnote 51. *Onujiogu v United States* (CA1 Mass) 817 F2d 3, 22 Fed Rules Evid Serv 1489 (mother's description of how boiling water spilled on herself and child as noted in hospital records); *Herdman v Smith* (CA5 La) 707 F2d 839, 13 Fed Rules Evid Serv 927 (sworn affidavit); *Estate of Shafer v Commissioner* (CA6) 749 F2d 1216, 84-2 USTC ¶ 13599, 16 Fed Rules Evid Serv 1248, 55 AFTR 2d 85-1531 (correspondence); *Ford v United States Dept. of Housing & Urban Development* (ND Ill) 450 F Supp 559; *Farner v Paccar, Inc.* (CA8 SD) 562 F2d 518, 2 Fed Rules Evid Serv 427 (criticized on other grounds by *Hall v American S.S. Co.* (CA6 Ohio) 688 F2d 1062, 11 Fed Rules Evid Serv 933); *United States v Williams* (CA11 Fla) 837 F2d 1009, 88-1 USTC ¶ 9265, 24 Fed Rules Evid Serv 1108, 61 AFTR 2d 88-632, cert den 488 US 965, 102 L Ed 2d 527, 109 S Ct 490 (income and expense reports reflecting proceeds and expenses of bingo games).

Annotation: Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 ALR2d 1027.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death, 1 ALR2d 365.

Footnote 52. As to party-admissions under the Federal Rules of Evidence, generally, see §§ 760 et seq.

Footnote 53. § 828.

Footnote 54. *Glaesman v Shop-Rite Foods, Inc.* (1971, CA10 Okla) 438 F2d 341.

Footnote 55. *In re Kelley* (1978, ED Va) 442 F Supp 525.

Footnote 56. *Bower v O'Hara* (1985, CA3 VI) 759 F2d 1117.

§ 767 Admissions by one of several coparties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Since a party-opponent's admission may be offered only against that particular party, an out-of-court statement introduced as an admission of one party could not be considered as evidence adversely affecting the claims of other parties. 57 There is authority that the admissions of a party are not admissible against his or her co-parties, unless they consent to it, adopt the admission as their own, 58 or there is privity 59 between the parties making the admission and the co-parties. 60 It has been suggested that the trial court take precautions to avoid adverse effects by excising references to other parties or giving cautionary instructions. 61 In the situation where a plaintiff presents to the court sufficient information from which a jury could reasonably find that an admission was made by one of a limited group of defendants, the admission should be received in evidence, and the jury should be instructed that it may consider the admission against each member of the group of defendants who fails to persuade the jury that he or she did not make the statement. 62

Footnotes

Footnote 57. *United States v Eubanks* (CA9 Ariz) 591 F2d 513.

Footnote 58. As to adoptive admissions, generally, see §§ 796 et seq.

Footnote 59. As to privity, generally, see §§ 824 et seq.

Footnote 60. *Fisher v Duckworth* (Ky) 738 SW2d 810.

Footnote 61. *United States v Weinrich* (CA5 Fla) 586 F2d 481, 4 Fed Rules Evid Serv 263, cert den 440 US 982, 60 L Ed 2d 243, 99 S Ct 1792 and cert den 441 US 927, 60 L Ed 2d 402, 99 S Ct 2041.

Footnote 62. *O'Neal v Morgan* (CA2 NY) 637 F2d 846, 7 Fed Rules Evid Serv 1069, cert den 451 US 972, 68 L Ed 2d 351, 101 S Ct 2050.

§ 768 Admissions by landowners of value of property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts often hold or recognize that evidence of unaccepted offers to sell are admissible against the offeror landowner as a party admission or an admission against interest, 63 unless the offer is too remote in point of time 64 or the landowner's valuation did not

substantially differ from the price contained in the option. 65 Likewise, in general, in eminent domain proceedings, offers of sale made by the owner, and other admissions as to the value of the property and the amount of damages, are competent evidence against the owner, if sufficiently near the time of the taking to be of service to the jury, and if not made as part of an attempt to compromise. 66 However, where an offer is made under circumstances of economic duress, the offer does not constitute an admission. 67 Consequently, it has been held that the price at which a landowner offers to sell land to a condemnor is not admissible as a party admission of the value of the property in question since the offer was made under the compulsion of condemnation. 68

Nevertheless, it is generally held that evidence of an unaccepted offer to sell property is not admissible in favor of the landowner or offeror as evidence of the value of the property, 69 but rather, may be excludable as a self-serving declaration. 70

Footnotes

Footnote 63. *United States v 114.64 Acres of Land* (CA9 Idaho) 504 F2d 1098; *Arkansas State Highway Com. v Hambuchen*, 243 Ark 832, 422 SW2d 688; *Kalb v International Resorts, Inc.* (Fla App D2) 396 So 2d 199, 25 ALR4th 977, petition den (Fla) 407 So 2d 1104 and petition den (Fla) 407 So 2d 1104; *Dekalb County v Noble*, 122 Ga App 373, 177 SE2d 117; *Lake County Forest Preserve Dist. v O'Malley* (2d Dist) 96 Ill App 3d 1084, 52 Ill Dec 117, 421 NE2d 980; *Shoemake v Murphy* (Mo) 445 SW2d 332; *Green Mountain Marble Co. v State Highway Board*, 130 Vt 455, 296 A2d 198.

Although market value is determined by actual sales and not by asking prices, an offer to sell property may be proved against its owner as an admission of its value at or near the time of the offer. *Timmons v School Dist.*, 173 Neb 574, 114 NW2d 386.

As to admissions against interest, see §§ 785 et seq.

Annotation: Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983 § 6.

Footnote 64. *Enid v Moyers*, 196 Okla 470, 165 P2d 818; *Durika v School Dist.*, 415 Pa 480, 203 A2d 474.

Where the offer to sell was contained within a lease of the condemned premises, which lease was entered into 15 years before the condemnation, the court held that, under the circumstances, the trial court was justified in finding that the offer contained within the lease was too remote to reflect the value of the land. *Commonwealth, Dept. of Transp. v Bellas*, 14 Pa Cmwlth 293, 321 A2d 418.

Footnote 65. *Arkansas State Highway Com. v Hambuchen*, 243 Ark 832, 422 SW2d 688.

Footnote 66. 27 Am Jur 2d, Eminent Domain § 423.

Footnote 67. *Maxey v Texas Commerce Bank* (Tex Civ App Amarillo) 571 SW2d 39, writ ref n r e (Tex) 580 SW2d 340, reh'g of writ of error overr (May 2, 1979), holding that a schedule of minimum values of property which was authorized by the landowner to be used in connection with the sale of lands in an effort to avoid foreclosure was not an

admission of the land's value.

Footnote 68. Dekalb County v Noble, 122 Ga App 373, 177 SE2d 117.

Footnote 69. United States v Smith (CA5 Ala) 355 F2d 807; United States v 158.24 Acres of Land (CA8 Ark) 696 F2d 559, 12 Fed Rules Evid Serv 428; Wentworth v Air Line Pilots Asso. (Dist Col App) 336 A2d 542; Dekalb County v Noble, 122 Ga App 373, 177 SE2d 117; Department of Conservation on behalf of People v Kyes (2d Dist) 57 Ill App 3d 563, 15 Ill Dec 34, 373 NE2d 304; State v Lincoln Memory Gardens, Inc., 242 Ind 206, 177 NE2d 655; Gault v Board of County Comrs., 208 Kan 578, 493 P2d 238; Urban Renewal & Community Development Agency v Monsky (Ky) 436 SW2d 77; Mississippi State Highway Com. v Robertson (Miss) 350 So 2d 1348; Petition of Union Free School Dist. (Sup) 225 NYS2d 430, affd (2d Dept) 19 App Div 2d 859, 245 NYS2d 993; North Carolina State Highway Com. v Helderman, 285 NC 645, 207 SE2d 720; Green Mountain Marble Co. v State Highway Board, 130 Vt 455, 296 A2d 198; Continental Pipe Line Co. v Irwin Livestock Co. (Wyo) 625 P2d 214, 25 ALR4th 607 (superseded by statute on other grounds as stated in L.U. Sheep Co. v Board of County Comm'rs (Wyo) 790 P2d 663).

Footnote 70. United States v Hayman (CA7 Wis) 115 F2d 599.

As to self-serving declarations, generally, see §§ 794 et seq.

§ 769 Effect of extrajudicial admissions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Extrajudicial admissions are only evidence of liability; they do not serve as conclusive proof of liability. 71 The weight and probable force of an extrajudicial admission are matters for the trier of fact. 72 When a party's out-of-court admissions are allowed into evidence, that party is entitled to explain the circumstances surrounding the admissions so that the trier may properly evaluate them. 73 Although some courts state that there is no reason to preclude the court from considering such evidence, at the summary judgment stage, to challenge the credibility of an individual's factual assertions in an affidavit, 74 other courts have provided that an extrajudicial admission is not a proper basis for summary judgment. 75

Footnotes

Footnote 71. Catherman v First State Bank (Tex App Austin) 796 SW2d 299.

Footnote 72. Catherman v First State Bank (Tex App Austin) 796 SW2d 299.

Forms: Instruction to jury—Oral admissions of party—Testimony pertaining thereto to be examined with caution. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 91.

Footnote 73. *Beinhorn v Saraceno*, 23 Conn App 487, 582 A2d 208, app den 217 Conn 809, 585 A2d 1233.

Footnote 74. *Gouger v Hardtke*, 167 Wis 2d 504, 482 NW2d 84.

Footnote 75. *Catherman v First State Bank* (Tex App Austin) 796 SW2d 299.

b. Judicial Admissions [770-784]

(1). In General [770-773]

§ 770 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judicial admission is a formal statement, either by party or his or her attorney, in course of judicial proceeding which removes an admitted fact from field of controversy. 76 It is a voluntary concession of fact by a party or a party's attorney during judicial proceedings. 77

Judicial admissions are used as a substitute for legal evidence at trial. 78 Admissions made in the course of judicial proceedings or judicial admissions waive or dispense with, the production of evidence, 79 and the actual proof of facts 80 by conceding for the purpose of litigation that the proposition of the fact alleged by the opponent is true. 81 Responses which are equivocal in nature do not dispense with a need for proof of facts submitted. 82 If a party, as a witness, unequivocally concedes a fact, such concession for the purposes of the trial has the force of a judicial admission. 83

A judicial admission is a deliberate, clear, unequivocal statement of a party 84 about a concrete fact within that party's peculiar knowledge, 85 not a matter of law. 86 Where the testimony of the party relates, not to a fact peculiarly within his or her own knowledge and as to which the party could not be mistaken, but is in the nature of an estimate or opinion as to which he or she may honestly be mistaken, the party does not unequivocally concede that the fact is in accord with the opinion expressed and there is no injustice in permitting the court to consider the other evidence in the court, and determine from all the evidence what the actual facts are. 87 In order to constitute a judicial admission, the statement must be one of fact, not opinion. 88 To be a judicial admission, a statement must be contrary to an essential fact or defense asserted by the person giving the testimony; it must be deliberate, clear and unequivocal; the giving of conclusive effect to the statement must be consistent with public policy upon which the rule is based; and the statement may not be destructive of the opposing party's theory of recovery. 89 The determination of whether a party's statement is sufficiently unequivocal to be considered a judicial admission is a question of law. 90

Judicial admissions are evidence against the party who made them, 91 and are

considered conclusive 92 and binding 93 as to the party making the judicial admission. A judicial admission bars the admitting party from disputing it. 94 The party who made a judicial admission may not controvert the admission on trial or on appeal, and may not create a question of fact for purposes of a summary judgment motion by trying to contradict a previous judicial admission. 95 However, there is authority that a judicial admission may only be revoked on the ground of an error of fact. 96

A judicial admission of fact may carry with it an admission of other facts necessarily implied from it. 97

Footnotes

Footnote 76. *Mobil Oil Co. v Dodd* (Tex Civ App Corpus Christi) 515 SW2d 351.

A judicial admission is a concession made by a party in the course of litigation for the purpose of withdrawing the fact from the realm of dispute. *State v McWilliams*, 177 W Va 369, 352 SE2d 120.

Footnote 77. *Cole v Planning & Zoning Comm'n*, 30 Conn App 511, 620 A2d 1324.

A judicial admission concedes for the purposes of litigation that a certain proposition is true. *Re Marriage of Maupin* (Mo App) 829 SW2d 125.

A judicial admission is an express waiver made in court by a party or his attorney conceding for the purposes of the trial the truth of some alleged fact. *Kohne v Yost*, 250 Mont 109, 818 P2d 360.

Practice References Admissions of fact. 20 Am Jur Trials 513, Damages for Wrongful Death of, or Injury to, Child § 82.

Footnote 78. *Harmon v Christy Lumber, Inc.* (SD) 402 NW2d 690; *Fletcher v Eagle River Memorial Hosp., Inc.*, 156 Wis 2d 165, 456 NW2d 788.

Footnote 79. *Pedersen v Vahidy*, 209 Conn 510, 552 A2d 419; *Goldsmith v Allied Bldg. Components, Inc.* (Ky) 833 SW2d 378; *Re Marriage of Maupin* (Mo App) 829 SW2d 125; *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

Footnote 80. *Hunter v Florida Board of Pharmacy* (Fla App D3) 162 So 2d 524; *McLean v Spirit Lake*, 91 Idaho 779, 430 P2d 670; *Bartolomucci v Clarke* (4th Dist) 60 Ill App 2d 229, 208 NE2d 616; *State v Shepard*, 247 Iowa 258, 73 NW2d 69 (ovrld on other grounds by *State v Jensen* (Iowa) 189 NW2d 919); *Gulley v National Life & Acci. Ins. Co.* (La App 2d Cir) 73 So 2d 341; *Beard v State*, 216 Md 302, 140 A2d 672, cert den 358 US 846, 3 L Ed 2d 81, 79 S Ct 72 and (superseded by statute on other grounds as stated in *King v State*, 55 Md App 672, 466 A2d 1292); *Clapp v Clapp*, 241 NC 281, 85 SE2d 153; *Foxton v Woodmansee*, 236 Or 271, 386 P2d 659, reh den 236 Or 282, 388 P2d 275; *Harmon v Christy Lumber, Inc.* (SD) 402 NW2d 690; *Fletcher v Eagle River Memorial Hosp., Inc.*, 156 Wis 2d 165, 456 NW2d 788.

A judicial admission relieves the opposing party's burden of proving the admitted fact.

Hill v Steinberger (Tex App Houston (1st Dist)) 827 SW2d 58.

Footnote 81. Re Interest of L.B., 235 Neb 134, 454 NW2d 285.

Forms: Instructions to jury—Admissions and stipulations as established facts. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 93.

Footnote 82. Burns v Michelotti (2d Dist) 237 Ill App 3d 923, 178 Ill Dec 621, 604 NE2d 1144, app den 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511.

Footnote 83. Pedersen v Vahidy, 209 Conn 510, 552 A2d 419.

Footnote 84. Sohaey v Van Cura (2d Dist) 240 Ill App 3d 266, 180 Ill Dec 359, 607 NE2d 253, app gr 151 Ill 2d 577, 186 Ill Dec 394, 616 NE2d 347 and affd, cause remanded (Ill) 1994 Ill LEXIS 21; Mapco, Inc. v Carter (Tex) 817 SW2d 686, reh'g of writ of error/cause filed (Nov 12, 1991); Fletcher v Eagle River Memorial Hosp., Inc., 156 Wis 2d 165, 456 NW2d 788.

Only deliberate, clear and unequivocal statements can constitute conclusive judicial admissions. Re Corland Corp. (CA5 Tex) 967 F2d 1069, 23 BCD 544, CCH Bankr L Rptr ¶ 74817.

Footnote 85. Sohaey v Van Cura (2d Dist) 240 Ill App 3d 266, 180 Ill Dec 359, 607 NE2d 253, app gr 151 Ill 2d 577, 186 Ill Dec 394, 616 NE2d 347 and affd, cause remanded (Ill) 1994 Ill LEXIS 21.

For judicial admission to be binding, it must be an unequivocal statement of fact. Kohne v Yost, 250 Mont 109, 818 P2d 360.

Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. Alford v Neal, 229 Neb 67, 425 NW2d 325, 7 UCCRS2d 1457.

Footnote 86. Fletcher v Eagle River Memorial Hosp., Inc., 156 Wis 2d 165, 456 NW2d 788.

Footnote 87. Pedersen v Vahidy, 209 Conn 510, 552 A2d 419.

Judicial admissions which are binding on the tendering party are limited to factual matters in issue and not to statements of legal theories or conceptions. Blinder, Robinson & Co. v Bruton (Del Sup) 552 A2d 466, on remand (Del Ch) 1990 Del Ch LEXIS 38.

Where a plaintiff qualified his statements with the phrases "as far as I can remember" and "to my best recollection" the plaintiff's statements were not definite and certain enough to be construed as judicial admissions. Palmer v Hobart Corp. (Mo App) 849 SW2d 135, CCH Prod Liab Rep ¶ 13550.

Footnote 88. Blinder, Robinson & Co. v Bruton (Del Sup) 552 A2d 466, on remand (Del Ch) 1990 Del Ch LEXIS 38; State v McWilliams, 177 W Va 369, 352 SE2d 120.

To be binding, a judicial admission must be one of fact and not merely the pleader's

opinion or conclusion as to law or fact. *Gunter v Hamilton Bank of Upper East Tennessee*, 201 Ga App 379, 411 SE2d 115, 102-199 Fulton County D R 20.

A judicial admission must concern a concrete fact and not be merely a matter of inference, opinion, estimate, or uncertain memory. *Caponi v Larry's* 66 (2d Dist) 236 Ill App 3d 660, 176 Ill Dec 649, 601 NE2d 1347, app withdrawn 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511.

Footnote 89. *Sepulveda v Krishnan* (Tex App Corpus Christi) 839 SW2d 132, writ granted (Tex) 36 Tex Sup Ct Jour 947 and cause set for submission (Oct 12, 1993).

Footnote 90. *Caponi v Larry's* 66 (2d Dist) 236 Ill App 3d 660, 176 Ill Dec 649, 601 NE2d 1347, app withdrawn 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511.

Footnote 91. *Huber v Black & White Cab Co.* (4th Dist) 18 Ill App 2d 186, 151 NE2d 641; *Gulley v National Life & Acci. Ins. Co.* (La App 2d Cir) 73 So 2d 341.

Footnote 92. *Pedersen v Vahidy*, 209 Conn 510, 552 A2d 419; *Lamb v Decatur Federal Sav. & Loan Assn.*, 201 Ga App 583, 411 SE2d 527, 102-200 Fulton County D R 11B, reconsideration den (Ga App) 102-214 Fulton County D R 19 (on motion for reconsideration); *Sohaey v Van Cura* (2d Dist) 240 Ill App 3d 266, 180 Ill Dec 359, 607 NE2d 253, app gr 151 Ill 2d 577, 186 Ill Dec 394, 616 NE2d 347 and affd, cause remanded (Ill) 1994 Ill LEXIS 21; *Alexis v Metropolitan Life Ins. Co.* (La) 604 So 2d 581; *Kohne v Yost*, 250 Mont 109, 818 P2d 360; *Hill v Steinberger* (Tex App Houston (1st Dist)) 827 SW2d 58; *Fletcher v Eagle River Memorial Hosp., Inc.*, 156 Wis 2d 165, 456 NW2d 788.

Footnote 93. *United Electrical Contractors, Inc. v Progress Builders, Inc.*, 26 Conn App 749, 603 A2d 1190; *Burns v Michelotti* (2d Dist) 237 Ill App 3d 923, 178 Ill Dec 621, 604 NE2d 1144, app den 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511; *Woods v Smith*, 297 NC 363, 255 SE2d 174; *Stemper v Stemper* (SD) 415 NW2d 159.

Footnote 94. *Goldsmith v Allied Bldg. Components, Inc.* (Ky) 833 SW2d 378; *Hill v Steinberger* (Tex App Houston (1st Dist)) 827 SW2d 58.

Footnote 95. *Sohaey v Van Cura* (2d Dist) 240 Ill App 3d 266, 180 Ill Dec 359, 607 NE2d 253, app gr 151 Ill 2d 577, 186 Ill Dec 394, 616 NE2d 347 and affd, cause remanded (Ill) 1994 Ill LEXIS 21.

Judicial admissions on issues of fact, including those made by counsel on behalf of a client during trial, are binding for the purpose of the case, including appeals. *Habecker v Clark Equipment Co.* (MD Pa) 797 F Supp 381.

Footnote 96. *Sinha v Dabezies* (La App 4th Cir) 590 So 2d 795, cert den (La) 592 So 2d 1315.

Footnote 97. *Caponi v Larry's* 66 (2d Dist) 236 Ill App 3d 660, 176 Ill Dec 649, 601 NE2d 1347, app withdrawn 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511.

§ 771 Contexts in which judicial admissions arise

Judicial admissions may occur at any point during the litigation process. 98 An admission in open court is a judicial admission. 99 Admissions in pleadings may also be considered judicial admissions. 1 In addition, admissions pursuant to requests to admit may be judicial admissions. 2

◆ Practice guide: The Federal Rules of Civil Procedure state that a party may serve on any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of discovery under the Rules 3 set forth in the request that relate to statements on opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. 4 Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. 5

There is authority that allegations in a petition, admitted in an answer, are judicial admissions on that issue. 6 Although statements made during a discovery deposition are normally treated only as evidentiary admissions, 7 which may be contradicted, such statements may be so deliberate, detailed, and unequivocal, as to matters with the party's personal knowledge that the statements will be held to be judicial admissions. 8 An admission in a defendant's answer to an allegation in a complaint may also be binding as a judicial admission. 9 There is also authority that judicial admissions may arise during opening statements and closing arguments. 10 However, where there is ambiguity or doubt it is presumed an attorney did not intend to make a judicial admission during argument. 11 In addition, statements of counsel's conception of the legal theories of the case are not binding judicial admissions. 12 However, some courts state that judicial admissions may be made in a brief. 13

There is authority that to determine whether a statement is a judicial admission depends upon the circumstances of each case. 14 Some courts state that the test for whether an admission should be treated as a judicial admission is whether the circumstances and conditions give rise to the probability of error in the party's own testimony. 15

Footnotes

Footnote 98. *Kohne v Yost*, 250 Mont 109, 818 P2d 360.

Footnote 99. *Lamb v Decatur Federal Sav. & Loan Assn.*, 201 Ga App 583, 411 SE2d 527, 102-200 Fulton County D R 11B, reconsideration den (Ga App) 102-214 Fulton County D R 19 (on motion for reconsideration); *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

Footnote 1. § 774.

Footnote 2. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

Footnote 3. FR Civ P, Rule 26(b) (governing scope of discovery).

Footnote 4. FR Civ P, Rule 36(a).

As to requests for admission, generally, see 23 Am Jur 2d, Depositions and Discovery §§ 314 et seq.

Footnote 5. FR Civ P, Rule 36(a).

Footnote 6. *Re Marriage of Maupin* (Mo App) 829 SW2d 125.

Footnote 7. As to evidentiary admissions, see § 772.

Footnote 8. *Caponi v Larry's* 66 (2d Dist) 236 Ill App 3d 660, 176 Ill Dec 649, 601 NE2d 1347, app withdrawn 149 Ill 2d 648, 183 Ill Dec 859, 612 NE2d 511.

Answers to interrogatories and testimony at evidence and discovery depositions may be treated as judicial admissions only when parties' testimony is unequivocal; consequently, the rule is inapplicable when the facts relate to a matter about which a party could be mistaken, such as swiftly moving events preceding a collision in which the party was injured. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

While statements made under oath in pretrial deposition have been repeatedly held sufficient to constitute a judicial admission, to be conclusive upon a party, such statements in the light of all the conditions and circumstances proven, must additionally not give rise to the probability of error in the party's own testimony. *Nolin Production Credit Asso. v Canmer Deposit Bank* (Ky App) 726 SW2d 693, 2 UCCRS2d 636.

Footnote 9. *United Electrical Contractors, Inc. v Progress Builders, Inc.*, 26 Conn App 749, 603 A2d 1190.

Footnote 10. *Kohne v Yost*, 250 Mont 109, 818 P2d 360.

Footnote 11. *Baxter v Gannaway* (NM App) 822 P2d 1128, cert den 113 NM 16, 820 P2d 1330.

Footnote 12. *Kohne v Yost*, 250 Mont 109, 818 P2d 360; *Baxter v Gannaway* (NM App) 822 P2d 1128, cert den 113 NM 16, 820 P2d 1330.

Footnote 13. *Bannister v State*, 202 Ga App 762, 415 SE2d 912, 103-29 Fulton County D R 23, adhered to, reconsideration den (Ga App) 103-37 Fulton County D R 16B, cert den (Ga) 1992 Ga LEXIS 358.

Footnote 14. *Kohne v Yost*, 250 Mont 109, 818 P2d 360.

The context of statements alleged to be judicial admissions must be considered. *Baxter v Gannaway* (NM App) 822 P2d 1128, cert den 113 NM 16, 820 P2d 1330.

Footnote 15. *Goldsmith v Allied Bldg. Components, Inc.* (Ky) 833 SW2d 378.

§ 772 Evidential admissions distinguished

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, evidential admissions are words or conduct admissible in evidence against the party making them, but subject to rebuttal or denial, 16 whereas judicial admissions are binding, 17 unless the court, in the exercise of its discretion, permits the admission to be withdrawn, explained, or modified. 18 Unlike judicial admissions, 19 evidentiary admissions may be controverted or explained by the party. 20 Evidentiary admissions may be made in, among other things, pleadings in a case other than the one being tried. 21 Evidentiary admissions may also be made in pleadings that have been superseded 22 amended, 23 or withdrawn, 24 answers to interrogatories, 25 and other statements made pursuant to the Federal Rule of Evidence 26 governing admissions by party-opponents. 27 An admission in an unverified answer may be an evidentiary admission, although it is superseded by an amended answer and has otherwise ceased to be part of the record. 28

Treatment of a declaration as a judicial admission, rather than an evidentiary admission, depends upon an evaluation of all the testimony, and not just a part of it and upon appraisal of the testimony in the light of the testimony of the other witnesses and a consideration of their respective opportunities to observe the facts about which they testify. 29

Footnotes

Footnote 16. *Woods v Smith*, 297 NC 363, 255 SE2d 174.

"Quasi" admissions may be disproved by the introduction of other evidence, while judicial admissions conclusively establish the fact in issue. *Goldsmith v Allied Bldg. Components, Inc. (Ky)* 833 SW2d 378.

Footnote 17. § 770.

Footnote 18. *United Electrical Contractors, Inc. v Progress Builders, Inc.*, 26 Conn App 749, 603 A2d 1190.

Footnote 19. § 770.

Footnote 20. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

Footnote 21. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232; *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Matters contained in pleadings in other cases are simple admissions, as opposed to judicial admissions. *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

As to the use of admissions in pleadings in subsequent proceedings, see §§ 781 et seq.

Footnote 22. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

As to admissions in pleadings that have been superseded, see § 779.

Footnote 23. *First Tennessee Bank, N.A. v Mungan* (Tenn App) 779 SW2d 798, 10 UCCRS2d 1318.

As to admissions in pleadings that have been amended, see § 779.

Footnote 24. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232; *First Tennessee Bank, N.A. v Mungan* (Tenn App) 779 SW2d 798, 10 UCCRS2d 1318.

As to admissions in pleadings that have been withdrawn, see § 780.

Footnote 25. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232; *BFGoodrich, Inc. v Taylor* (Miss) 509 So 2d 895, CCH Prod Liab Rep ¶ 11436.

Footnote 26. FRE, Rule 801(d)(2).

Footnote 27. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

As to admissions by party-opponents, generally, see § 760.

Footnote 28. *Lawry's Prime Rib, Inc. v Metropolitan Sanitary Dist.* (1st Dist) 205 Ill App 3d 1053, 150 Ill Dec 854, 563 NE2d 981.

Footnote 29. *Brummet v Farel* (5th Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232.

§ 773 Admissibility at subsequent trials

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is authority that judicial admissions are admissible at a subsequent trial of the same suit ³⁰ and in another civil or criminal proceeding involving the same issue. ³¹ However, according to some authorities, while judicial admissions are admissible in evidence on a subsequent trial, they are not binding in the subsequent trial upon the party who made them. ³² Other courts state that unless the circumstances virtually eliminate the possibility of error, a judicial admission in one action is not conclusive in another action. ³³ In addition, the Federal Rules of Civil Procedure state that any admission made by a party under the rule governing requests for admissions is for the purpose of the

pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding. 34

There is some authority that potentially incriminating testimony which is compelled in federal court may not be used in a subsequent state prosecution for a crime based on the same facts. 35 Likewise, testimony of a defendant would not be admissible as substantive evidence on retrial after reversal of a conviction, if the first trial court improperly denied suppression of the defendant's inculpatory statement obtained in violation of defendant's Miranda rights, in the absence of proof that defendant would have testified as he or she did, even if the illegally obtained statement had not been erroneously admitted. 36

Footnotes

Footnote 30. *Gulley v National Life & Acci. Ins. Co.* (La App 2d Cir) 73 So 2d 341.

As to admissibility of admissions in pleadings in subsequent proceedings, see § 781.

Footnote 31. *Fox v Schaeffer*, 131 Conn 439, 41 A2d 46, 157 ALR 132; *Hankins v Hankins*, 195 Okla 160, 155 P2d 720.

Footnote 32. *Hankins v Hankins*, 195 Okla 160, 155 P2d 720.

Footnote 33. *Goldsmith v Allied Bldg. Components, Inc.* (Ky) 833 SW2d 378.

Footnote 34. FR Civ P, Rule 36(b).

As to requests for admissions, generally, see 23 Am Jur 2d, *Depositions and Discovery* §§ 314 et seq.

Footnote 35. *State v Castonguay* (Me) 240 A2d 747, appeal after remand (Me) 263 A2d 727.

Footnote 36. *Zeigler v State* (Fla App D1) 471 So 2d 172, 10 FLW 1521, review den (Fla) 479 So 2d 118.

As to Miranda rights, generally, see §§ 749 et seq.

(2). Admissions and Declarations in Pleadings [774-784]

§ 774 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Some courts hold that a party's assertion of fact in a pleading is a judicial admission, 37 provided the party making the assertion fails to amend it 38 or withdraw it. 39

A statement of fact by a party in a pleading is an admission that the fact exists as stated, and as such is admissible against such party in favor of his or her adversary in the pending action, assuming that it is necessary to treat it as evidence at all. 40 Under the Federal Rules of Evidence, 41 in civil cases, statements made in the course of court proceedings, such as pleadings 42 or depositions, 43 may qualify as party-admissions. State courts may also find adverse pleadings admissible at trial as admissions of a party-opponent. 44 If the pleader is both a party and a witness and his or her testimony is inconsistent with a prior pleading, then the pleading may qualify as both an inconsistent statement and an admission. 45

Courts may consider such party-admissions in pleadings to be substantive evidence of the facts admitted. 46 Pleadings may also be used to impeach. 47 However, some jurisdictions do not allow impeachment by legal conclusions in pleadings, 48 or impeachment by certain types of alternative pleadings. 49

The Federal Rules of Civil Procedure state that averments in a pleading to which a responsive pleading is required, other than those as to amount of damage, are admitted when not denied in the responsive pleading. 50 However, averments in a pleading to which no responsive pleading is required or permitted are taken as denied or avoided. 51

◆ Observation: In accord with the general rule concerning self-serving declarations, 52 there is some authority that a self-serving statement or allegation in a pleading, such as a bill in equity 53 or a petition or complaint 54 is generally inadmissible in behalf of the pleader in the action in which it is filed.

§ 774 ----Generally [SUPPLEMENT]

Case authorities:

While evidence of defendant's statements made in course of plea bargaining is not admissible in prosecution's direct case, such evidence is admissible to impeach defendant. *People v Crow* (1994, 4th Dist) 28 Cal App 4th 440, 33 Cal Rptr 2d 624, 94 CDOS 7219, 94 Daily Journal DAR 13203.

The trial court did not err in refusing to permit plaintiff to introduce admissions made by defendant in the pleadings during the testimony of a witness who knew nothing about the matters admitted. *Haymore v Thew Shovel Co.* (1994) 116 NC App 40, 446 SE2d 865, CCH Prod Liab Rep ¶ 13984.

Footnotes

Footnote 37. *Schott Motorcycle Supply, Inc. v American Honda Motor Co.* (CA1 Me) 976 F2d 58; *Campbell v Sonat Offshore Drilling, Inc.* (CA5 La) 979 F2d 1115, 1993 AMC 1008, reh, en banc, den (CA5 La) 986 F2d 1420; *American Title Ins. Co. v Lacelaw Corp.* (CA9 Nev) 861 F2d 224 (criticized on other grounds by *Missouri Housing Dev. Com. v Brice* (CA8 Mo) 919 F2d 1306, 18 FR Serv 3d 427); *Brummet v Farel* (5th

Dist) 217 Ill App 3d 264, 160 Ill Dec 278, 576 NE2d 1232; First Tennessee Bank, N.A. v Mungan (Tenn App) 779 SW2d 798, 10 UCCRS2d 1318; Thompson v Thompson (Tex App Corpus Christi) 827 SW2d 563, writ den (Sep 23, 1992).

An admission in a pleading falls within the scope of a judicial confession and is full proof against the party making it. *Sinha v Dabezies* (La App 4th Cir) 590 So 2d 795, cert den (La) 592 So 2d 1315.

As to pleadings, generally, see 61A Am Jur 2d, Pleading §§ 1 et seq.

Footnote 38. *Wood v Allstate Ins. Co.* (ND Ind) 815 F Supp 1185; *First Tennessee Bank, N.A. v Mungan* (Tenn App) 779 SW2d 798, 10 UCCRS2d 1318.

As to admissions in pleadings that have been amended, see § 779.

Footnote 39. *First Tennessee Bank, N.A. v Mungan* (Tenn App) 779 SW2d 798, 10 UCCRS2d 1318.

As to admissions in pleadings that have been withdrawn, see § 780.

Footnote 40. *Ross v Philip Morris & Co.* (CA8 Mo) 328 F2d 3; *Graham v Vegetable Oil Products Co.*, 1 Ariz App 237, 401 P2d 242; *Lawrence v Tschirgi*, 244 Iowa 386, 57 NW2d 46; *Vachon v Todorovich*, 356 Mich 182, 97 NW2d 122, 72 ALR2d 1299; *Wilson Storage & Transfer Co. v Geurkink*, 242 Minn 60, 64 NW2d 9, 48 ALR2d 223; *Winn v Wiggins*, 47 NJ Super 215, 135 A2d 673.

Statements in a pleading are admissible against the party making them as proof of facts admitted therein. *Brenteson Wholesale, Inc. v Arizona Public Service Co.* (App) 166 Ariz 519, 803 P2d 930, 73 Ariz Adv Rep 13.

Factual statements contained in pleadings filed on behalf of a party may be considered as admissions. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Footnote 41. As to party-admissions under the Federal Rules of Evidence, generally, see § 760.

Footnote 42. *Pope v Allis*, 115 US 363, 29 L Ed 393, 6 S Ct 69; *Glaesman v Shop-Rite Foods, Inc.* (CA10 Okla) 438 F2d 341.

The pleadings of a party made in another action, as well as pleadings in the same action which have been superseded by amendment, withdrawn, or dismissed are admissible as admissions of the pleading party to the facts alleged therein, assuming that the usual tests of relevancy are met. *Continental Ins. Co. v Sherman* (CA5 Fla) 439 F2d 1294, 15 FR Serv 2d 930.

Admissions made in pleadings in prior litigation are admissible in evidence in a later case against the interest of the pleader and in favor of a stranger to the prior litigation. *Donald M. Drake Co. v United States*, 153 Ct Cl 433.

Footnote 43. *Aumiller v University of Delaware* (DC Del) 434 F Supp 1273; *Re Kelley* (ED Va) 442 F Supp 525.

Footnote 44. *Gouger v Hardtke*, 167 Wis 2d 504, 482 NW2d 84.

As to admissions by party-opponents, generally, see § 760.

Footnote 45. *Lewis v Wahl* (Mo) 842 SW2d 82.

As to prior inconsistent statements, generally, see §§ 670 et seq.

Footnote 46. *MCIC, Inc. v Zenobia*, 86 Md App 456, 587 A2d 531, CCH Prod Liab Rep ¶ 12886, cert gr 323 Md 308, 593 A2d 668 and vacated on other grounds 325 Md 420, 601 A2d 633, CCH Prod Liab Rep ¶ 13060, reconsideration den 325 Md 665, 602 A2d 1182.

Footnote 47. *Lewis v Wahl* (Mo) 842 SW2d 82.

Footnote 48. *Lewis v Wahl* (Mo) 842 SW2d 82.

Footnote 49. § 778.

Footnote 50. FR Civ P, Rule 8(d).

As to adoption of admissions by silence, see §§ 799 et seq.

As to admissions by failure to deny or plead, generally, see 61A Am Jur 2d, Pleading §§ 175, 176.

Footnote 51. FR Civ P, Rule 8(d).

Footnote 52. § 794.

Footnote 53. *Wright v Hulett*, 245 Ark 152, 431 SW2d 486.

Footnote 54. *Long v Knox*, 155 Tex 581, 291 SW2d 292, 6 OGR 476.

§ 775 Effect of admissions in pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Stipulations and admissions in the pleadings are generally binding on the parties and the court. 55 Admissions in the pleadings are sometimes considered to be conclusively established, 56 and factual statements in the pleadings are considered conclusive unless they are amended or withdrawn. 57 While they lose their conclusive character once they have been amended or withdrawn, they continue to be evidentiary admissions which may be refuted or explained by the party against whom they are used. 58 A party whose pleading is admitted as an admission against interest is entitled, if he or she can, to overcome by evidence the apparent inconsistency, 59 and it is competent for the party

against whom the pleading is offered to show that the statements were inadvertently made, were not authorized by him or her, or were made under a mistake of fact. 60 In addition, a party against whom a single clause or paragraph of a pleading is offered may have the right to introduce other paragraphs which tend to destroy the admission in the paragraph offered by the adversary. 61 However, explanations of inconsistency between a pleading and testimony go to the weight and not the admissibility of a pleading. 62

◆ Caution: Some courts have said that pleadings prepared and filed by counsel hired by a party are prima facie regarded as being authorized by the party. 63

§ 775 ----Effect of admissions in pleadings [SUPPLEMENT]

Case authorities:

The trial court did not err in refusing to permit plaintiff to introduce admissions made by defendant in the pleadings during the testimony of a witness who knew nothing about the matters admitted. *Haymore v Thew Shovel Co.* (1994) 116 NC App 40, 446 SE2d 865, CCH Prod Liab Rep ¶ 13984.

Footnotes

Footnote 55. *Wood v Allstate Ins. Co.* (ND Ind) 815 F Supp 1185.

Footnote 56. *Darnall Kemna & Co. v Heppinstall* (Alaska) 851 P2d 73, CCH Blue Sky L Rep ¶ 73829.

Footnote 57. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Footnote 58. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

As to evidentiary admissions, generally, see § 772.

Footnote 59. *Fox v Weissbach*, 76 Ariz 91, 259 P2d 258.

As to admissions against interest, generally, see §§ 785 et seq.

Footnote 60. *Anderson v Tway* (CA6 Ky) 143 F2d 95, cert den 324 US 861, 89 L Ed 1418, 65 S Ct 865; *Dolinar v Pedone*, 63 Cal App 2d 169, 146 P2d 237.

If a client did not have knowledge of the pleading or did not expressly authorize his attorney to file it, he may inform the jury of this fact as an explanation of the inconsistency between the pleading and his testimony. *Lewis v Wahl* (Mo) 842 SW2d 82.

Footnote 61. *Southall v Columbia Nat. Bank* (Mo App) 244 SW2d 577.

Footnote 62. *Lewis v Wahl* (Mo) 842 SW2d 82.

Footnote 63. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

As to authorized admissions of an attorney, generally, see § 812.

§ 776 Necessity of introducing pleading in evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, admissions in pleadings cannot be regarded as evidence unless the pleadings are introduced at the trial at the proper time and in the proper way. 64 In a case where a party to an action seeks the benefit of a statement in a pleading of his or her adversary as an admission against the interest of the adversary, 65 the statement in the pleading must be offered in evidence before it can be used as an admission. 66 An abandoned or superseded pleading is out of the case, so far as admissions by rule of pleading are concerned, and therefore, admissions in such may be taken advantage of only by introducing the pleading, or so much of it as contains the admission, in evidence. 67 However, some jurisdictions hold that the pleadings upon which the cause is tried are before the court for all proper purposes. 68

Footnotes

Footnote 64. *Martin v Yeoham* (Mo App) 419 SW2d 937.

Footnote 65. As to admissions against interest, generally, see §§ 785 et seq.

Footnote 66. *Lammers v Greulich* (Mo) 262 SW2d 861.

Footnote 67. *Lawrence v Tschirgi*, 244 Iowa 386, 57 NW2d 46; *Lammers v Greulich* (Mo) 262 SW2d 861; *Wahl v Cunningham*, 332 Mo 21, 56 SW2d 1052.

Footnote 68. *Koser v Hornback*, 75 Idaho 24, 265 P2d 988, 44 ALR2d 1015.

§ 777 Verified and unverified pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Pleadings are admissible as admissions of the verifying party. 69 In most instances, it has been held that if a party does not verify, authorize, or adopt a pleading, the pleading or its allegations are not admissible against such party. 70 However, there is some authority holding that such circumstances affect only the weight of the pleading and not its admissibility in evidence. 71

Footnotes

Footnote 69. *Harkins v Calumet Realty Co.*, 418 Pa Super 405, 614 A2d 699, CCH Prod Liab Rep ¶ 13447.

Footnote 70. *Fuller v King* (CA6 Mich) 204 F2d 586; *Christensen v Trotter* (CA9 Ariz) 171 F2d 66; *Fowler v United States* (CA10 Okla) 239 F2d 93.

Footnote 71. *Dolinar v Pedone*, 63 Cal App 2d 169, 146 P2d 237.

§ 778 Alternative pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, a statement made as part of an alternative fact pleading, which was made in good faith, cannot be used as an admission against the pleader. 72 The admissions made by a pleader in one count or plea are not admissible against the pleader on an issue raised by his or her denials or averments made in another count or plea. 73 In other words, where inconsistent counts or defenses are pleaded, the admissions in one of them cannot be used to destroy the effect of the other. 74 Consequently, a pleading may not be construed as a judicial admission against an alternative or hypothetical pleading in the same case. 75 This rule encourages parties to plead not only what they know is factually true, but also any fact, if they believe there is good ground to support it and it would tend to be defeated if allegations in the pleadings were admissible as evidence; parties would hesitate to make notice-giving allegations at the risk of their being used as evidence. 76 Pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission. 77 To allow such pleadings to operate as admissions would render their use ineffective and frustrate their underlying purpose. 78 Thus, under the rule, alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader. 79 The pleader states facts in the alternative because he or she is uncertain as to the true facts, so that the pleader is not "admitting" anything other than uncertainty, an essential objective of alternative pleading being to relieve the pleader of the necessity and therefore the risk of making a binding choice, which is no more than to say that the pleader is relieved of making an admission. 80 Consequently, some jurisdictions hold that one cannot impeach with an inconsistent pleading which includes alternative allegations against multiple parties or disjunctive specifications of negligence or fault against any party. 81

Footnotes

Footnote 72. *Dreyer Medical Clinic, S.C. v Corral* (2d Dist) 227 Ill App 3d 221, 169 Ill Dec 231, 591 NE2d 111.

As to pleading in the alternative, generally, see 61A Am Jur 2d, Pleading §§ 47 et seq.

Footnote 73. *Smith v Gale*, 144 US 509, 36 L Ed 521, 12 S Ct 674; *McCormick v Kopmann* (3d Dist) 23 Ill App 2d 189, 161 NE2d 720; *Johnson v Flex-O-Lite Mfg. Corp.* (Mo) 314 SW2d 75; *Hardwick v Kansas City Gas Co.*, 355 Mo 100, 195 SW2d 504, 166 ALR 556.

Footnote 74. *Smith v Gale*, 144 US 509, 36 L Ed 521, 12 S Ct 674; *Parrish v Atchison, T. & S. F. R. Co.* (DC Cal) 152 F Supp 158; *McCormick v Kopmann* (3d Dist) 23 Ill App 2d 189, 161 NE2d 720.

Footnote 75. *Schott Motorcycle Supply, Inc. v American Honda Motor Co.* (CA1 Me) 976 F2d 58.

As to judicial admissions, generally, see §§ 770 et seq.

Footnote 76. *Giannone v United States Steel Corp.* (CA3 Pa) 238 F2d 544.

Footnote 77. *Lytle v Stearns*, 250 Kan 783, 830 P2d 1197.

Footnote 78. *Lytle v Stearns*, 250 Kan 783, 830 P2d 1197.

Footnote 79. *McCormick v Kopmann* (3d Dist) 23 Ill App 2d 189, 161 NE2d 720.

As to admissions against interest, generally, see §§ 785 et seq.

Footnote 80. *McCormick v Kopmann* (3d Dist) 23 Ill App 2d 189, 161 NE2d 720.

Footnote 81. *Lewis v Wahl* (Mo) 842 SW2d 82.

§ 779 Superseded, amended, or abandoned pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although there is some authority to the contrary, 82 for instance, where a pleading is erroneously and inadvertently made, 83 generally a pleading containing an admission against the pleader, whether he or she is the plaintiff, 84 the defendant, 85 or an intervenor, 86 and which has been amended or abandoned, is admissible in evidence. A superseded pleading is admissible against the party on whose behalf it was originally filed if it contained admissions or statements of fact against the interest of such party. 87

Despite the general rule of admissibility, there is a division of authority as to whether a superseded pleading constitutes a judicial admission. Some courts state that a statement by a party in a superseded pleading may constitute a judicial admission, but only if it is made by a party to the action in which it is sought to be used; 88 while others state that the superseded part is not a judicial admission, but merely an admission which, while not conclusively binding on the pleader, may form the basis for a grant of a summary judgment if not denied by affidavit or otherwise. 89 There is authority, however, that evidentiary admissions may be made in pleadings that have been superseded. 90

Admissibility of amended or abandoned pleadings is particularly the case where the pleader has verified the pleading, 91 and while some courts hold that an unverified pleading does not have the effect of an admission, 92 in most jurisdictions the pleading is admissible whether verified by a party or not, at least where a proper foundation has been laid to show that the pleading offered was that of the party or was approved by the party. 93

Some cases recognize exceptions to the rule of admissibility where the pleading is signed or verified by counsel rather than by the party, 94 for instance, where the matter constituting an admission follows a general denial or is contained in inconsistent pleas or defenses, 95 or where it amounts to a conclusion of law. 96

Footnotes

Footnote 82. *Wright v Rogers* (2nd Dist) 172 Cal App 2d 349, 342 P2d 447; *Mendez v Goroff*, 25 Misc 2d 1013, 203 NYS2d 568, *affd* (2d Dept) 13 App Div 2d 705, 214 NYS2d 580, motion to dismiss *app den*, *app withdrawn* 12 NY2d 842, 236 NYS2d 619, 187 NE2d 471 (by implication).

Unverified, alternative pleadings of one plaintiff were not admissible for impeachment or as an admission against interests in suit by several plaintiffs to enjoin the defendant's obstruction of a road over which the plaintiffs claimed a prescriptive right to traverse. *King v Corsini* (3d Dist) 32 Ill App 3d 461, 335 NE2d 561.

Footnote 83. *De Armon v St. Louis* (Mo App) 525 SW2d 795 (criticized on other grounds by *Casada v Hamby Excavating Co.* (Mo App) 575 SW2d 851) as stated in *Tull v Housing Authority of Columbia* (Mo App) 691 SW2d 940, stating that, although the statement in an abandoned pleading that a contractor was "acting as agent, servant and employee of the defendant, city of St. Louis" was an admission of ultimate fact, not a conclusion of law, the trial court did not abuse its discretion in refusing to admit the statement where the statement was made erroneously and inadvertently, as demonstrated by the city's categorical denial of liability in the balance of abandoned pleading.

Footnote 84. *Andrews v Metro N. C. R. Co.* (CA2 Conn) 882 F2d 705, 28 Fed Rules Evid Serv 1044; *Herman v United Air Lines, Inc.* (DC Colo) 157 F Supp 65; *Cole v Louisville & N. R. Co.*, 267 Ala 196, 100 So 2d 684; *Foster v Feder*, 135 Colo 585, 316 P2d 576, 33 CCH LC ¶ 70880; *Dreier v Upjohn Co.*, 196 Conn 242, 492 A2d 164; *O'Connor v Bradford*, 94 Ga App 852, 96 SE2d 511; *Cloughley v Orange Transp. Co.*, 80 Idaho 226, 327 P2d 369; *Precision Extrusions, Inc. v Stewart* (1st Dist) 36 Ill App 2d 30, 183 NE2d 547; *Wilson Storage & Transfer Co. v Geurkink*, 242 Minn 60, 64 NW2d 9, 48 ALR2d 223; *Carlson v Fredsall*, 228 Minn 461, 37 NW2d 744; *Las Vegas Network, Inc. v B. Shawcross & Associates*, 80 Nev 405, 395 P2d 520; *Hughes v Anchor Enterprises, Inc.*, 245 NC 131, 95 SE2d 577, 63 ALR2d 685; *Edmonston v Holder*, 203 Okla 189, 218 P2d 905; *Klemgard v Wade Seed Co.*, 217 Or 409, 342 P2d 757; *Kirkwood & Morgan, Inc. v Roach* (Tex Civ App San Antonio) 360 SW2d 173, *writ ref n r e* (Dec 5, 1962) and *rehg of writ of error overr* (Jan 16, 1963).

Annotation: Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 ALR2d 516.

Footnote 85. *Sunkyoung International, Inc. v Anderson Land & Livestock Co.* (CA8 Mo) 828 F2d 1245, 9 FR Serv 3d 107; *Strozier v Simmons U. S. A. Corp.*, 192 Ga App 601, 385 SE2d 677; *Kleb v Wendling* (2d Dist) 67 Ill App 3d 1016, 24 Ill Dec 434, 385 NE2d 346; *De Shon v St. Joseph Country Club Village of Country Club* (Mo App) 755 SW2d 265; *Bauman v Royal Indem. Co.*, 36 NJ 12, 174 A2d 585, 91 ALR2d 535; *Estrada v Jaques*, 70 NC App 627, 321 SE2d 240; *Granchi v Finley* (App, Columbiana Co) 77 Ohio L Abs 285, 149 NE2d 178, app dismd; *Hopper v Rowntree* (Okla) 275 P2d 285; *Yates v Large*, 284 Or 217, 585 P2d 697; *Braceland v Hughes*, 184 Pa Super 4, 133 A2d 286.

A withdrawn answer admitting the date a highway was opened to the public, as alleged in a petition by a property holder for damages from the construction, was admissible as some evidence of the actual date, and while not conclusive against the defendant, was sufficient to support the denial of a motion for judgment notwithstanding the verdict. *Richmond County v Sibert*, 218 Ga 209, 126 SE2d 761.

Footnote 86. *State Farm Mut. Auto. Ins. Co. v Porter* (CA9 Cal) 186 F2d 834, 52 ALR2d 499.

In an action by the state to determine the ownership of a truck tractor, a superseded petition of intervention was not a judicial admission, but had to be introduced as any other admission before it could be considered as evidence. *Drake Ins. Co. v King* (Tex) 606 SW2d 812, reh'g of cause overr (Nov 12, 1980).

Footnote 87. *Fahy v Dresser Industries, Inc.* (Mo) 740 SW2d 635, CCH Prod Liab Rep ¶ 11585, cert den 485 US 1022, 99 L Ed 2d 891, 108 S Ct 1576 and (superseded by statute on other grounds as stated in *Wulfin v Kansas City Southern Industries, Inc.* (Mo App) 842 SW2d 133).

Footnote 88. *Futterleib v Mr. Happy's, Inc.*, 16 Conn App 497, 548 A2d 728.

As to judicial admissions, generally, see §§ 770 et seq.

Footnote 89. *McCormick v Stowe Lumber Co.* (Tex Civ App Austin) 356 SW2d 450, writ ref'n r'e (Jul 25, 1962) and reh'g of writ of error overr (Oct 3, 1962), error ref'n r'e.

When a pleading is amended, the superseded portion disappears from the record as a judicial admission, but exists as an utterance once seriously made by a party and, when admitted in evidence, may be properly considered by the court or jury as an item of evidence in the case. *Swanson v State*, 83 Idaho 126, 358 P2d 387 (involving allegation of complaint which was omitted when the complaint was amended).

Footnote 90. § 772.

Footnote 91. *Buehman v Smelker*, 50 Ariz 18, 68 P2d 946; *Bauman v Royal Indem. Co.*, 36 NJ 12, 174 A2d 585, 91 ALR2d 535.

Footnote 92. *Galiher v Spates* (4th Dist) 129 Ill App 2d 204, 262 NE2d 626, stating that a statement in a superseded answer did not have the effect of an admission where the answer was not verified.

Footnote 93. *State Farm Mut. Auto. Ins. Co. v Porter* (CA9 Cal) 186 F2d 834, 52 ALR2d

499; *Buehman v Smelker*, 50 Ariz 18, 68 P2d 946; *Carlson v Fredsall*, 228 Minn 461, 37 NW2d 744.

Footnote 94. *Tri-State Transit Co. v Miller*, 188 Ark 149, 65 SW2d 9, 90 ALR 1389.

Where an answer and cross petition are verified by the attorney of record only, and they are subsequently amended, the abandoned answer and cross petition are not admissible in evidence to show an admission of the defendant, in the absence of evidence tending to show that the defendant either authorized the allegations contained in the pleadings or had knowledge of them and consented thereto. *Byrum v Red Star Transit Co. (Cuyahoga Co)* 81 Ohio App 495, 37 Ohio Ops 331, 51 Ohio L Abs 240, 80 NE2d 616.

As to the admissibility of admissions in unverified pleadings, generally, see § 777.

Footnote 95. *Dallas R. & T. Co. v Hendricks*, 140 Tex 93, 166 SW2d 116.

Footnote 96. *Srednick v Sylak*, 343 Pa 486, 23 A2d 333.

§ 780 Withdrawn pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, a pleading containing an admission against the interest of the pleader, whether the plaintiff ⁹⁷ or the defendant, ⁹⁸ which has been subsequently withdrawn, is nevertheless admissible. In most jurisdictions the pleading is admissible whether verified by the party or not, at least where a proper foundation is laid to show that the pleading offered was that of the party or was approved by such party. ⁹⁹ The Federal Rules of Criminal Procedure and the Federal Rules of Evidence state an exception to the general rule of admissibility of withdrawn pleadings where a plea of guilty was later withdrawn. ¹ The Uniform Rules of Evidence also state this exception, but additionally refuse to admit an admission of the charge, or an offer to plead guilty. ² Qualifications of and exceptions to the rule of admissibility have sometimes been recognized as to withdrawn pleadings in the case of pleadings signed or verified by counsel rather than the party. ³

There is a division of authority as to whether withdrawn pleadings constitute judicial admissions. Some courts state that statements made by a party in a withdrawn pleading may constitute judicial admissions, but only if they are made by a party to the action in which they are sought to be used; ⁴ while others state that, when a pleading is withdrawn, the superseded portion disappears from the record as a judicial admission, but exists as an utterance once seriously made by a party and, when admitted in evidence, may be properly considered by the court or jury as an item of evidence in the case. ⁵ There is authority, however, that evidentiary admissions may be made in pleadings that have been withdrawn. ⁶

Footnotes

Footnote 97. Dreier v Upjohn Co., 196 Conn 242, 492 A2d 164; Stallings v Britt, 204 Ga 250, 49 SE2d 517; Bledsoe v Northside Supply & Development Co. (Mo) 429 SW2d 727, 35 ALR3d 599; State ex rel. State Highway Com. v Moore (Mo App) 565 SW2d 810.

Footnote 98. Stout v McNary, 75 Idaho 99, 267 P2d 625; Chambers v Appel, 392 Ill 294, 64 NE2d 511; Katcher v Heidenwirth, 254 Iowa 454, 118 NW2d 52, 6 ALR3d 1293 (withdrawn allegation of contributory negligence); Bauman v Royal Indem. Co., 36 NJ 12, 174 A2d 585, 91 ALR2d 535; American Tobacco Co. v Riggio Tobacco Corp., 37 Misc 2d 23, 234 NYS2d 51; Higgins v Higgins (Tex Civ App Eastland) 458 SW2d 498 (apparently recognizing rule).

A defendant's petition bringing in an additional defendant, although withdrawn before trial, was admissible against him both as substantive evidence of the matter under inquiry and to impeach his credibility, where the statements in the pleading contradicted his testimony at the trial. Monaco v Gula, 407 Pa 522, 180 A2d 893.

Footnote 99. Bauman v Royal Indem. Co., 36 NJ 12, 174 A2d 585, 91 ALR2d 535; Ford v Commercial Motor Freight, Inc. (Hamilton Co) 57 Ohio App 384, 10 Ohio Ops 202, 25 Ohio L Abs 564, 14 NE2d 354.

Footnote 1. FR Crim P, Rule 11(e)(6)(A), FRE, Rule 410, discussed in § 783.

Footnote 2. Uniform Rules of Evidence, Rule 410, discussed in § 783.

Footnote 3. Louisville & N. R. Co. v Tucker (CA6 Tenn) 211 F2d 325, reh den (CA6 Tenn) 215 F2d 227; Tri-State Transit Co. v Miller, 188 Ark 149, 65 SW2d 9, 90 ALR 1389.

Footnote 4. Futterleib v Mr. Happy's, Inc., 16 Conn App 497, 548 A2d 728.

As to judicial admissions, generally, see §§ 770 et seq.

Footnote 5. Swanson v State, 83 Idaho 126, 358 P2d 387.

Footnote 6. § 772.

§ 781 Admissibility in subsequent proceeding

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is authority that a party's pleadings in a prior case are admissible against that party in a subsequent action as an admission ⁷ or declaration ⁸ against interest, provided they are within the established bounds of relevancy. ⁹ Statements contained in pleadings filed in prior actions remain admissible even though the action in which they were filed has been withdrawn or dismissed. ¹⁰ They are also admissible even though the pleading in which they were contained was not verified. ¹¹ The prior pleadings,

however, must be indeed inconsistent with party's present position and must be drawn under the party's direction or with his or her consent, 12 and hypothetical inconsistent pleadings may not be used as admissions in other law suits. 13 However, in some jurisdictions which do not recognize the admissibility of a pleading containing an admission against the interest of the pleader where it has been amended or abandoned, an exception is made where such pleading is offered in evidence in a proceeding other than that in which the pleading was originally filed. 14

Statements made in prior pleadings may be considered evidential admissions, 15 and not conclusive. 16 The party who made the admission may give evidence that the pleading was filed on incorrect information without his or her actual knowledge. 17 However, this evidence goes only to the weight not to the admissibility, of the pleading. 18

◆ Observation: In deciding the admissibility of prior inconsistent pleadings, some courts have applied a balancing approach under the Federal Rules of Evidence 19 to determine whether the probative value of the prior pleading is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 20

Footnotes

Footnote 7. *Gulf Shores v Harbert Int'l* (Ala) 608 So 2d 348, reh den, without op (Ala) 1992 Ala LEXIS 1373; *In re Petition for Disciplinary Action against Perry* (Minn) 494 NW2d 290, related proceeding (1st Dept) 193 App Div 2d 282, 603 NYS2d 154; *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

A positive statement of an evidentiary fact made by a party in a pleading in another case may be sufficient to constitute an admission and to establish a fact as a verity, that is, as undisputed, on a motion for summary judgment. *Kraemer Bros., Inc. v United States Fire Ins. Co.*, 89 Wis 2d 555, 278 NW2d 857.

As to admissions against interest, generally, see §§ 785 et seq.

Footnote 8. *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125.

Footnote 9. *In re Petition for Disciplinary Action against Perry* (Minn) 494 NW2d 290, related proceeding (1st Dept) 193 App Div 2d 282, 603 NYS2d 154.

As to requirements for relevancy, generally, see §§ 307 et seq.

Footnote 10. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Footnote 11. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

As to verified and unverified pleadings, generally, see § 777.

Footnote 12. *Gulf Shores v Harbert Int'l* (Ala) 608 So 2d 348, reh den, without op (Ala)

1992 Ala LEXIS 1373.

Footnote 13. In re Petition for Disciplinary Action against Perry (Minn) 494 NW2d 290, related proceeding (1st Dept) 193 App Div 2d 282, 603 NYS2d 154.

As to admissions in alternative pleadings, generally, see § 778.

Footnote 14. State Farm Mut. Auto. Ins. Co. v Porter (CA9 Cal) 186 F2d 834, 52 ALR2d 499 (applying California law).

As to amended or abandoned pleadings, generally, see § 779.

Footnote 15. § 772.

Footnote 16. Pankow v Mitchell (Tenn App) 737 SW2d 293; State v Brazos River Harbor Navigation Dist. (Tex App Corpus Christi) 831 SW2d 539, writ den (Dec 9, 1992) and reh'g of writ of error overr (Jan 13, 1993).

Footnote 17. Pankow v Mitchell (Tenn App) 737 SW2d 293.

Footnote 18. Pankow v Mitchell (Tenn App) 737 SW2d 293.

Footnote 19. FRE, Rule 403.

Footnote 20. Vincent v Louis Marx & Co. (CA1 Mass) 874 F2d 36, 28 Fed Rules Evid Serv 209 (criticized on other grounds by Knowlton v Deseret Medical, Inc. (CA1 Mass) 930 F2d 116, CCH Prod Liab Rep ¶ 12804).

§ 782 --Strangers to original proceeding

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, a petition, complaint, or reply containing an admission is admissible against the pleader in another action, on behalf of a stranger to the former action. 21 In a number of cases, however, under the particular circumstances involved, it has been held or recognized that a pleading filed by the plaintiff, 22 or by the defendant, 23 was not admissible against the pleader, on behalf of a stranger to the former action. In some instances the admissibility of such pleadings has been denied for the reason that the pleadings were not verified, it being held that a pleading filed by the plaintiff or complainant, 24 or by the defendant, 25 which was not signed or verified by him or her but was signed or verified by his or her attorney, was not admissible. 26 In other cases, however, such pleadings have been held admissible even though not signed or verified by the plaintiff or complainant, 27 or by the defendant. 28

Footnotes

Footnote 21. *Pope v Allis*, 115 US 363, 29 L Ed 393, 6 S Ct 69; *Rogers v Edward L. Burton & Co.* (CA10 Utah) 137 F2d 284; *Frank R. Jelleff, Inc. v Braden*, 98 US App DC 180, 233 F2d 671, 63 ALR2d 400; *Redwing Carriers, Inc. v Stone*, 293 Ala 726, 310 So 2d 206; *Coyner Crop Dusters v Marsh*, 91 Ariz 371, 372 P2d 708; *Kucza v Stone*, 155 Conn 194, 230 A2d 559; *Bentley v Ayers*, 102 Ga App 733, 117 SE2d 633; *Carlson v New York Life Ins. Co.* (2d Dist) 76 Ill App 2d 187, 222 NE2d 363; *Katcher v Heidenwirth*, 254 Iowa 454, 118 NW2d 52, 6 ALR3d 1293; *Lakeshore Property Owners Asso. v Delatte* (La App 4th Cir) 524 So 2d 126, appeal after remand (La App 4th Cir) 579 So 2d 1039, cert den (La) 586 So 2d 560; *Nichols Media Consultants, Inc. v Ken Morehead Invest. Co.*, 1 NCA 796, 491 NW2d 368, 1992 Neb App LEXIS 125; *Ellis v Race* (Okla) 398 P2d 805; *Moudy v Boylan*, 219 Or 448, 347 P2d 983; *Dale Mfg. Co. v Workmen's Compensation Appeal Board*, 34 Pa Cmwlt 31, 382 A2d 1256, affd 491 Pa 493, 421 A2d 653; *Fant v Howell* (Tex Civ App Austin) 410 SW2d 294, writ dismissed (Apr 19, 1967) and reh'g of writ of error overruled (May 17, 1967).

In an action by the Federal Deposit Insurance Corporation, as manager of the Federal Savings and Loan Insurance Corporation, against an insurance company underwriter, seeking payment of a claim under a fidelity bond issued to a savings and loan association, pleadings of a prior action by the FSLIC suggesting that parties other than the savings and loan president were responsible for wrongdoing was admissible to impeach a witness, even though the FDIC could not be estopped from asserting in the present action that the president had committed fraud on the association. *Federal Deposit Ins. Corp. v CNA Casualty of Puerto Rico* (DC Puerto Rico) 786 F Supp 1082.

Annotation: Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed, 63 ALR2d 412.

Footnote 22. *Delaware County Comrs. v Diebold Safe & Lock Co.*, 133 US 473, 33 L Ed 674, 10 S Ct 399; *Brickley v Atlantic C. L. R. Co.*, 153 Fla 1, 13 So 2d 300; *Maney v Maney*, 340 Mass 350, 164 NE2d 146 (describing allegations of unliquidated damages as purely formal and without value as an admission or assertion); *Fischbach v Auto Boys, Inc.*, 279 App Div 1035, 112 NYS2d 283.

Footnote 23. *London Guarantee & Acci. Co. v I. C. Helmly Furniture Co.*, 153 Fla 453, 14 So 2d 848.

Footnote 24. *Delaware County Comrs. v Diebold Safe & Lock Co.*, 133 US 473, 33 L Ed 674, 10 S Ct 399.

Footnote 25. *Kentucky Rock Asphalt Co. v Helburn* (WD Ky) 20 F Supp 364, 37-2 USTC ¶ 9460, 20 AFTR 96, affd (CA6 Ky) 108 F2d 779, 40-1 USTC ¶ 9185, 24 AFTR 103.

An unsworn answer signed by the attorneys for defendants, admitting an allegation in a complaint for the death of an automobile owner that the owner was driving at the time of the collision with defendants, was inadmissible in a subsequent action to recover for the death of an automobile passenger, where the evidence showed that neither defendant knew who was driving the automobile and that any statement attributed to either of them would necessarily be based on opinion and not on actual knowledge, although the answer would have been admissible if it had been a sworn pleading. *Phillips v Dow Chemical Co.*, 247 Miss 293, 151 So 2d 199.

Footnote 26. As to the admissibility of admissions in verified and unverified pleadings, generally, see § 777.

Footnote 27. Dolinar v Pedone, 63 Cal App 2d 169, 146 P2d 237.

Footnote 28. Betts v Gilbert, 149 Kan 431, 87 P2d 637.

§ 783 --Guilty pleas; admissibility in subsequent civil actions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When relevant, the plea of guilty to a charge may be admitted into evidence in a subsequent civil action as an admission of the act charged. 29 When a guilty plea to a criminal charge is admitted in a subsequent civil action, it may be under the auspices of an admission by a party-opponent. 30 Under the Federal Rules of Evidence, in civil cases, statements made in the course of court proceedings, such as guilty pleas, may qualify as party-admissions. 31 In addition, in the absence of a statutory provision to the contrary, 32 the general rule is that the record in a criminal case showing a plea of guilty by the accused is admissible in a subsequent civil action against the accused arising out of the same offense, as his or her deliberate declaration or admission against interest, 33 insofar as the plea of guilty is relevant to the issues in the civil case. 34 However, although a guilty plea in a criminal proceeding may be admissible as a declaration against interest and may be considered by the trier of fact in a subsequent civil trial involving the same facts and occurrence as that out of which the criminal prosecution arose, it does not as a matter of law conclusively establish the truth of the facts upon which the judgment of guilt was rendered. 35 Thus, courts have refused to apply the doctrine of collateral estoppel where the defendant has pled guilty. 36

Although there is some authority that the withdrawal of a plea of guilty does not affect its admissibility as an admission against interest in a subsequent civil action turning upon the same facts, 37 both the Federal Rules of Criminal Procedure 38 and the Federal Rules of Evidence 39 provide that evidence of a plea of guilty which was later withdrawn or any statements made in the course of any proceedings regarding such plea, is not admissible in any civil proceeding against the defendant who made the plea or who was a participant in the plea discussions, unless another statement made in the course of the same plea has been introduced and the statement in all fairness ought to be considered contemporaneously with it. 40 The Uniform Rules of Evidence have a similar rule except that admissions of the charge or offers to plead guilty, or statements made in connection with either of these, are also not admissible, and the Uniform Rules make no provision for contemporaneous statements. 41

§ 783 --Guilty pleas; admissibility in subsequent civil actions [SUPPLEMENT]

Case authorities:

Cocaine distribution conspiracy defendant's prior state conviction for unlawful possession of cocaine was relevant to defendant's intent, which he placed in issue when he entered not guilty plea. *United States v Gadison* (1993, CA5 Tex) 8 F3d 186.

Government may not introduce guilty plea on distribution charge to impeach drug distributor pursuant to 28A USCS Rule 609(a), where distributor pleaded guilty in accordance with written plea bargain, distributor submitted altered tape and gave false testimony in order to obtain better deal, and government, upon learning of false testimony and altered tape, attempted to revoke plea bargain and added additional counts of perjury and obstruction of justice, because guilty plea lacks finality of verdict, since it might be withdrawn if bargain is revoked, and so it is not conviction within meaning of 28A USCS Rule 609(a). *United States v Franklin* (1993, MD Fla) 829 F Supp 1319, 7 FLW Fed D 377.

In prosecution for burglary and criminal attempt to commit sodomy, based on defendant's breaking into his sister-in-law's trailer and threatening to tie her up and take her into woods, trial court properly admitted evidence of defendant's guilty plea 10 years earlier to kidnapping and rape of another victim who had flat tire on interstate, where facts in cases were similar in certain details, particularly threat of kidnapping and violence used by defendant to attempt sodomy, and evidence had sufficient connection to current charges to be relevant and probative. *Hooks v State* (1994) 212 Ga App 878, 443 SE2d 532, 94 Fulton County D R 1561.

Footnotes

Footnote 29. *Patrons Mut. Ins. Asso. v Harmon*, 240 Kan 707, 732 P2d 741; *Safeco Ins. Co. v McGrath*, 42 Wash App 58, 708 P2d 657, review den 105 Wash 2d 1004.

Absent an express exclusionary rule, a guilty plea may be introduced in a civil action against a party, if relevant and material to the issues. *MacNeil v Singer* (Fla App D5) 389 So 2d 232.

As to the admissibility in a criminal case, as a confession, of a former plea of guilty, see §§ 715 et seq.

Footnote 30. *Briggeman v Albert*, 322 Md 133, 586 A2d 15.

As to admissions by party-opponents, generally, see § 760.

Footnote 31. *Bower v O'Hara* (CA3 VI) 759 F2d 1117; *Hooper v Guthrie* (WD Pa) 390 F Supp 1327; *Tom v Twomey* (ND Ill) 430 F Supp 160.

In a suit for wrongful death of plaintiff's wife resulting from negligent selection and administration of anesthetic, evidence that plaintiff had pleaded guilty to assault charge against the wife may be admissible as the admission of a party to a lawsuit under FRE, Rule 801(d)(2)(A). *Carlsen v Javurek* (CA8 SD) 526 F2d 202, 1 Fed Rules Evid Serv 100.

As to party-admissions under the Federal Rules of Evidence, generally, see § 760.

Annotation: Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287.

Footnote 32. *Jones v Talbot*, 87 Idaho 498, 394 P2d 316 (holding that evidence as to guilty plea was not admissible in view of a statute excluding evidence of a conviction).

Annotation: Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287 § 4.

Footnote 33. *M. F. A. Mut. Ins. Co. v Dixon* (WD Ark) 243 F Supp 806; *Pritchett v Freeman*, 36 Ala App 222, 54 So 2d 314 (assault and battery); *Monsma v Williams* (Alaska) 385 P2d 107; *Hays v Richardson*, 95 Ariz 263, 389 P2d 260; *Harbor v Campbell*, 235 Ark 492, 360 SW2d 758; *Miller v Blanton*, 213 Ark 246, 210 SW2d 293, 3 ALR2d 203; *Teitelbaum Furs, Inc. v Dominion Ins. Co.*, 58 Cal 2d 601, 25 Cal Rptr 559, 375 P2d 439, cert den 372 US 966, 10 L Ed 2d 130, 83 S Ct 1091; *Vaughn v Jonas*, 31 Cal 2d 586, 191 P2d 432; *Gancy v Dohna*, 25 Conn Supp 138, 198 A2d 66; *Boyd v Hammond* (Sup) 55 Del 336, 187 A2d 413; *Webb v May*, 91 Ga App 437, 85 SE2d 641 (plea of guilty admissible in negligence action against offender, where negligence based on violation of criminal statute); *Smith v Andrews* (2d Dist) 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210; *Dimmick v Follis*, 123 Ind App 701, 111 NE2d 486 (reckless driving, subsequent negligence action); *Johnson v Tucker* (Ky) 383 SW2d 325; *Smith v Southern Nat. Life Ins. Co.* (La App 4th Cir) 134 So 2d 337; *Lipman Bros., Inc. v Hartford Acci. & Indem. Co.*, 149 Me 199, 100 A2d 246 (admissible in action against party convicted); *Nichols v Blake* (Mo) 418 SW2d 188; *Ando v Woodberry*, 8 NY2d 165, 203 NYS2d 74, 168 NE2d 520; *O'Neill v Hamill* (2d Dept) 22 App Div 2d 691, 253 NYS2d 289; *Grant v Shadrick*, 260 NC 674, 133 SE2d 457; *Renner v Murray* (ND) 136 NW2d 794; *Clinger v Duncan*, 166 Ohio St 216, 2 Ohio Ops 2d 31, 141 NE2d 156 (allowing motor to run while vehicle standing in street; *Dover v Smith* (Okla) 385 P2d 287 (recognizing rule); *Lee v Lee*, 185 Pa Super 252, 137 A2d 827 (proceeding for divorce on grounds of desertion, plea of guilty to charge of adultery and bastardy); *Green v Boney*, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370; *Berlin v Berens*, 76 SD 429, 80 NW2d 79; *Isaacs v Plains Transport Co.* (Tex) 367 SW2d 152, reh of writ of error overr (May 15, 1963); *Billington v Schaal*, 42 Wash 2d 878, 259 P2d 634.

As to admissions against interest, generally, see §§ 785 et seq.

Footnote 34. *Koch v Elkins*, 71 Idaho 50, 225 P2d 457.

Footnote 35. *Nunez v Gonzalez* (Fla App D2) 456 So 2d 1336, 9 FLW 2181, holding that, in a dispute over life insurance proceeds, where the insured was killed by his ex-wife and primary beneficiary, the couple's minor son and assignee of the ex-wife's claim would not be barred from attempting to prove that the wife did not intentionally kill the decedent, despite her negotiated guilty plea to manslaughter.

Footnote 36. *Safeco Ins. Co. v McGrath*, 42 Wash App 58, 708 P2d 657, review den 105 Wash 2d 1004, later proceeding 50 Wash App 505, 749 P2d 178, review den 110 Wash 2d 1031, later proceeding (Wash App) 813 P2d 602, withdrawn by publisher, reported at 63 Wash App 170, 817 P2d 861, review den 118 Wash 2d 1010, 824 P2d 490.

As to collateral estoppel in the criminal context, generally, see 21 Am Jur 2d, Criminal Law §§ 321 et seq.

Footnote 37. Vaughn v Jonas, 31 Cal 2d 586, 191 P2d 432.

A plea of guilty by defendant to a charge of operating a motor vehicle while under the influence of intoxicating liquor at the time of an accident, though subsequently withdrawn by permission of the court, and followed by a plea of not guilty and a dismissal of the complaint after trial, has been held admissible in a civil case against defendant to recover damages for an injury sustained in the accident. Morrissey v Powell, 304 Mass 268, 23 NE2d 411, 124 ALR 1522.

Footnote 38. FR Crim P, Rule 11(e)(6).

Footnote 39. FRE, Rule 410.

Footnote 40. § 517.

As to inadmissibility of pleas of nolo contendere, see § 519.

Footnote 41. Uniform Rules of Evidence Rule 410, discussed in § 517.

§ 784 --Traffic violations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is some authority that guilty pleas to traffic offenses are admissible in civil actions arising from the same occurrence, although the pleading party may contest the admitted fact. 42 Similarly, there is authority that pleading guilty to a traffic citation constitutes an admission against interest, but does not conclusively establish the violation. 43 In some cases, however, a distinction has been drawn between a plea of guilty to an offense which involves conduct in issue in a civil case and statements made by one in the course of paying a traffic fine under a so-called "cafeteria" system for minor traffic offenses, the latter not constituting an admission of the fact that the declarant did the act charged in the traffic ticket. 44 In some jurisdictions, statutory provisions exclude evidence of pleas of guilty to traffic offenses. 45 The rationale for this approach is that the decision to pay a traffic citation and forgo a judicial appeal does not bear a sufficient relationship to whether the party acquiesces in or admits to the charges recited in the citation. 46 Common experience demonstrates that the payment of a traffic citation is simply a matter of expedience. 47 Some courts compare payment of a traffic fine or parking ticket to a plea of nolo contendere. 48 Consequently, some courts hold that an admission of guilt in the traffic court is admissible in evidence in a subsequent civil proceeding arising out of the same accident, but the submission of payment personally or by mail in satisfaction of a traffic fine is not the evidentiary equivalent of a guilty plea in open court. 49 In any event, a guilty plea to violation of a statute making it unlawful for driver of vehicle to negligently fail to maintain proper control has been found to be competent and admissible evidence, although not conclusive, on issue of negligence in civil trial. 50

Footnotes

Footnote 42. *Eaton v Eaton*, 119 NJ 628, 575 A2d 858.

Footnote 43. *Dartt v Berghorst* (SD) 484 NW2d 891.

As to statements against interest, generally, see §§ 785 et seq.

Footnote 44. *Hannah v Ike Topper Structural Steel Co. (Franklin Co)* 120 Ohio App 44, 28 Ohio Ops 2d 223, 201 NE2d 63; *Walker v Forrester* (Okla) 764 P2d 1337.

But see *Franklin v Friedrich* (Mo) 470 SW2d 474, holding that in a counterclaim for damages for personal injuries, the trial court did not err in receiving into evidence a traffic ticket wherein appellant was charged with careless and imprudent driving, which he admitted signing on reverse under plea of guilty and waiver.

Footnote 45. *Garver v Utyesonich*, 235 Ark 33, 356 SW2d 744; *Warren v Marsh*, 215 Minn 615, 11 NW2d 528.

A guilty plea to a noncriminal traffic infraction, which was automatically triggered when the fine was paid by mail, is not admissible in a civil action because of the express language of a statute; in addition, a plea to a charge of not having a lamp on the front of a bicycle cannot be used against the rider where the fine was paid by her mother without the defendant's consent or direction. *MacNeil v Singer* (Fla App D5) 389 So 2d 232.

Footnote 46. *LePage v Bumila*, 407 Mass 163, 552 NE2d 80.

Footnote 47. *LePage v Bumila*, 407 Mass 163, 552 NE2d 80.

Footnote 48. *Briggeman v Albert*, 322 Md 133, 586 A2d 15; *LePage v Bumila*, 407 Mass 163, 552 NE2d 80.

As to admissibility of pleas of nolo contendere, generally, see § 756.

Footnote 49. *Briggeman v Albert*, 322 Md 133, 586 A2d 15.

The court declined to find that paying a traffic ticket entitles the opposing side to introduce evidence of such as an admission against interest, and reaffirmed its position that the only proper evidence relating to a traffic violation conviction is a party's plea of guilty in open court. *Dedman v Porch*, 293 Ark 571, 739 SW2d 685.

Footnote 50. *Gregorie v Hartford Acci. & Indem. Co. (La App 3d Cir)* 348 So 2d 186, cert den (La) 350 So 2d 1210 and cert den (La) 350 So 2d 1213.

In a personal injury action by an automobile passenger, the driver's previous plea of guilty to a charge of failure to have his car under control was admissible as substantive proof of alleged negligence. *Morrow v Redd*, 257 Iowa 151, 131 NW2d 761.

4. Types of Admissions or Declarations [785-812]

a. Statements Against Interest [785-793]

(1). In General [785-787]

§ 785 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal Rules of Evidence 51 and the Uniform Rules of Evidence, 52 a statement by an unavailable declarant, which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, is not excluded by the hearsay rule if the declarant is unavailable as a witness. Under the Uniform Rules, statements against interest also include statements which so far tend to make someone an object of hatred, ridicule, or disgrace that a reasonable person in the declarant's position would not have made them unless he or she believed them to be true. 53 Various states provide that statements against interest are not excluded by the hearsay rule, 54 sometimes following standards similar to those set out in the Federal and Uniform Rules. 55

Although the Federal Rules of Evidence do not expressly incorporate a requirement that the declarant have personal knowledge of the facts to which the statement relates, such a requirement of firsthand knowledge has always been inherent in the statement against interest exception. 56 Moreover, for the statement to be admissible the declarant must have a conscious understanding that the statement is against his or her interest when made. 57 There must be a showing by either the inherent nature of the statement or by other proof that the declarant knowingly made statements which were against the declarant's interest when made. 58

In addition, the admissibility of a declaration against interest depends upon the declarant's knowledge of the facts stated. 59 Legal conclusions, which are not admissions of fact, are not admissible as admissions against interest. 60 Furthermore, the admissibility of a declaration against interest depends on a satisfactory showing that: (1) resort to such proof is necessary to the discovery of truth; and (2) the proffered evidence is reliable since, absent other motivations, a person ordinarily does not reveal facts that are contrary to his or her interest. 61 The declarant must have no motive to lie. 62

The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. 63 In determining whether a statement is truly against interest, and hence is sufficiently trustworthy to be admissible, the court may take

into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. 64 A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. 65

Declarations against interest are generally admitted without reference to the time at which they were made. 66 Both written and verbal declarations are within the rule which renders declarations against interest admissible. 67

◆ Observation: While some courts do not distinguish between declarations against interest and admissions, one court did on the basis that admissions are statements by a party, offered by a party opponent, while declarations are statements by nonparties, and applying this distinction, the statement against interest exception to the hearsay rule is not meant to apply to the statement of a party. 68

§ 785 ----Generally [SUPPLEMENT]

Practice Aids: Evidence—FRE 804(b)(3): The Williamson decision establishes a bright-line rule that invites injustice and cripples the hearsay exception for statements against penal interest, 30 Land & Wat LR 2:591 (1995).

Case authorities:

In plaintiffs' action against former employer alleging violation of Employee Retirement Income Security Act, only certain portion of affidavit of deceased executive of company is admitted, where affidavit purported to implicate affiant and plaintiffs and another person in plan to defraud another corporation, because only those portions of affidavit which describe potentially culpable conduct of affiant are admissible as statements against interest. *Ciccarelli v Gichner Sys. Group* (1994, MD Pa) 862 F Supp 1293.

District court's determination that defendant charged with conducting or aiding and abetting illegal gambling business adopted undercover informant's incriminating statements was not abuse of discretion since, from entire context of each conversation, including non-verbal cues jury could see in videotapes, along with defendant's failure to contest any incriminating statements, court and jury could find that defendant adopted informant's statements. *United States v Allen* (1993, CA7 Ind) 10 F3d 405, reh, en banc, den (CA7 Ind) 1993 US App LEXIS 33668.

Declarant's statements to defense investigator about his relationship with defendant were not admissible as declarations against interest since they did not tend to subject declarant to criminal liability. *United States v Rubio- Topete* (1993, CA9 Cal) 999 F2d 1334, 93 CDOS 4983, 93 Daily Journal DAR 8415.

In prosecution for possession of cocaine, court committed reversible error in admitting evidence that after defendant and passenger in automobile were arrested, and after they had been escorted to police station, passenger told trooper, of her own accord, that she and defendant had been smoking crack cocaine immediately before arrest, where rationale for exception to hearsay was no longer present since statement implicated another in criminal act; statement meets exception when it is against speaker's interest only. *Cofield v State* (1993, Tex App Corpus Christi) 857 SW2d 798, petition for

discretionary review gr (Nov 17, 1993).

Footnotes

Footnote 51. FRE, Rule 804(b)(3).

Annotation: What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence, 34 ALR Fed 412.

Footnote 52. Uniform Rules of Evidence, Rule 804(b)(3).

Footnote 53. Uniform Rules of Evidence, Rule 804(b)(3).

Footnote 54. *Burks v State* (Fla App D5) 589 So 2d 355, 16 FLW D 2814, ctfed ques ans, approved (Fla) 613 So 2d 441, 18 FLW S 71; *State v Bell*, 249 NJ Super 506, 592 A2d 657.

Footnote 55. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10; *Sanders v State*, 305 Ark 112, 805 SW2d 953, later proceeding 310 Ark 510, 838 SW2d 359; *State v Bates*, 70 Hawaii 343, 771 P2d 509; *State v Thoma*, 313 Or 268, 834 P2d 1020.

Footnote 56. § 757.

Footnote 57. *United States v Zirpolo* (CA1 Mass) 704 F2d 23, 12 Fed Rules Evid Serv 1502, cert den 464 US 822, 78 L Ed 2d 96, 104 S Ct 87 (affidavit untrustworthy where it was not signed in presence of affiant's counsel, and without full understanding that it was against his interest to sign document); *Roberts v Troy* (CA6 Mich) 773 F2d 720, later proceeding 170 Mich App 567, 429 NW2d 206, app dismd (Mich) 482 NW2d 761; *Pink Supply Corp. v Hiebert, Inc.* (DC Minn) 612 F Supp 1334, 1985-1 CCH Trade Cases ¶ 66603, affd (CA8 Minn) 788 F2d 1313, 1986-1 CCH Trade Cases ¶ 67046 (statement that allegedly implicated declarant in price-fixing conspiracy, exposing him to civil liability, was inadmissible as a statement against interest where there was no showing that declarant had any understanding of vertical price-fixing and evidence showed that he did not take any business law courses in college); *United States v Monaco* (CA9 Cal) 735 F2d 1173, 15 Fed Rules Evid Serv 1566 (prior testimony during bankruptcy proceedings was not admissible as statement against penal interest, notwithstanding fact that witness exposed himself to criminal liability for fraudulently transferring assets in contemplation of bankruptcy, where there was no evidence that witness knew, at time assets were transferred, that involuntary bankruptcy was imminent or that defendant might attempt to conceal assets).

Footnote 58. *Fisher v Duckworth* (Ky) 738 SW2d 810.

Footnote 59. *Filesi v United States* (CA4 Md) 352 F2d 339, 65-2 USTC ¶ 15663, 16 AFTR 2d 6271; *Laughlin v France* (2d Dist) 241 Ill App 3d 185, 180 Ill Dec 662, 607 NE2d 962, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336; *G.M. McKelvey Co. v General Casualty Co.*, 166 Ohio St 401, 2 Ohio Ops 2d 345, 142 NE2d 854, 65 ALR2d 626; *Carpenter v Carpenter*, 153 Or 584, 56 P2d 305, 105 ALR 386, reh den 153 Or 607, 57 P2d 1098, 105 ALR 397, modif den 153 Or 608, 58 P2d 507, 105 ALR 397 and (ovrld on other grounds by *Hofer v Hofer*, 244 Or 88, 415 P2d 753) as stated in *Re*

Marriage of Nickerson, 296 Or 516, 678 P2d 730, on remand 68 Or App 288, 680 P2d 1012.

Footnote 60. Fahy v Dresser Industries, Inc. (Mo) 740 SW2d 635, CCH Prod Liab Rep ¶ 11585, cert den 485 US 1022, 99 L Ed 2d 891, 108 S Ct 1576 and (superseded by statute on other grounds as stated in Wulfin v Kansas City Southern Industries, Inc. (Mo App) 842 SW2d 133).

Footnote 61. People v Maerling, 46 NY2d 289, 413 NYS2d 316, 385 NE2d 1245, later proceeding (2d Dept) 89 App Div 2d 1001, 454 NYS2d 318, appeal after remand (2d Dept) 96 App Div 2d 600, 465 NYS2d 254, affd 64 NY2d 134, 485 NYS2d 23, 474 NE2d 231.

Footnote 62. Laughlin v France (2d Dist) 241 Ill App 3d 185, 180 Ill Dec 662, 607 NE2d 962, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336; Breeden v Independent Fire Ins. Co. (Tenn) 530 SW2d 769 (no motive to misrepresent).

Footnote 63. People v Frierson, 53 Cal 3d 730, 280 Cal Rptr 440, 808 P2d 1197, 91 CDOS 3222, 91 Daily Journal DAR 5215, reh den (Cal) 1991 Cal LEXIS 2900 and cert den (US) 117 L Ed 2d 114, 112 S Ct 944.

Footnote 64. People v Frierson, 53 Cal 3d 730, 280 Cal Rptr 440, 808 P2d 1197, 91 CDOS 3222, 91 Daily Journal DAR 5215, reh den (Cal) 1991 Cal LEXIS 2900 and cert den (US) 117 L Ed 2d 114, 112 S Ct 944.

Footnote 65. People v Frierson, 53 Cal 3d 730, 280 Cal Rptr 440, 808 P2d 1197, 91 CDOS 3222, 91 Daily Journal DAR 5215, reh den (Cal) 1991 Cal LEXIS 2900 and cert den (US) 117 L Ed 2d 114, 112 S Ct 944.

Footnote 66. Beckwith v Bean, 98 US 266, 8 Otto 266, 25 L Ed 124.

Footnote 67. New Amsterdam Casualty Co. v First Nat. Bank (Tex Civ App) 134 SW2d 470, writ dism.

Footnote 68. People v Ward, 154 Ill 2d 272, 181 Ill Dec 884, 609 NE2d 252, cert den (US) 126 L Ed 2d 161, 114 S Ct 204.

As to admissions of party-opponents, generally, see § 760.

§ 786 Death or unavailability of declarant

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although there is some authority to the contrary, 69 generally, the admissibility of a declaration against interest depends not only upon its relevancy, 70 but the unavailability of the declarant as a witness. 71 The Federal Rules of Evidence and the

Uniform Rules of Evidence both require unavailability for statements against interest. 72 Thus, before an extrajudicial statement can be introduced as a declaration against interest, there must be showing that the witness is unavailable at the time of trial. 73 It is generally agreed that a declaration against interest which is relevant to the issues in the case is admissible in evidence where it is shown that the declarant has died, 74 and both the Federal and Uniform Rules state that unavailability includes situations where the declarant has died. 75 The Federal and Uniform Rules also state that unavailability includes those situations where the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance or testimony by reasonable means, and situations where the declarant persists in refusing to testify despite a court order to do so, 76 and some states provide that a declarant is unavailable as a witness when the declarant cannot or will not appear in court and testify to the substance of his or her statement made outside of court, 77 even despite an order of the court to do so. 78 In some jurisdictions, the condition of unavailability includes illness, 79 or insanity, 80 which precludes the declarant's appearance as a witness, either by personal presence or by deposition, 81 and the Federal and Uniform Rules also state that unavailability may be due to physical or mental illness. 82 Some states provide that absence from the jurisdiction, 83 may render a declarant unavailable. However, some courts require that the party offering the declaration against interest make a good faith effort to secure the attendance of the declarant, 84 and the Federal and Uniform Rules provide that a declarant is not unavailable if due to the wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. 85

In any event, declarations against interest are generally not admissible if the declarant is available as a witness, 86 unless he or she can properly refuse to testify, for instance, on the ground of possible self-incrimination. 87 Although a court may believe the better approach is having the declarant take the stand and assert the privilege, affording the trial judge an opportunity to rule formally on the matter, courts may hold that when it would be mere formalism to abjure the merits of the declarant's claim, in the exercise of its discretion, the court may find that declarant is unavailable, without the requisite formality. 88

The Federal and Uniform Rules 89 and state rules 90 provide that unavailability as a witness includes situations in which the declarant testifies to a lack of memory on the subject matter of the statement. Lack of memory must be established by the witness' own testimony which clearly contemplates the production and cross-examination of the person. 91

Declarations against interest are not admissible in a case involving a declarant who has actually testified, 92 except for the purpose of impeaching such witness. 93

Courts have said that whether a hearsay declarant is unavailable when the out-of-court statement is offered as a statement against penal interest under rule is a preliminary question to be determined by the trial judge. 94 The proponent of the evidence has the burden of establishing the unavailability of the witness by a preponderance of the evidence. 95 If the evidence in the records supports the trial court's ruling, taking into account the standard approved, the ruling will not be disturbed on appeal. 96

◆ Observation: According to some courts, the fact that there is adequate opportunity for cross-examination of the declarant is one of the indicia of the trustworthiness of an extrajudicial statement, not under oath, by the declarant that he or she, and not the

§ 786 ----Death or unavailability of declarant [SUPPLEMENT]

Case authorities:

Deceased's friend's affidavit that he had taken deceased to union office to file disability pension application, waited for him, and was told by deceased when he returned that he had filed for his pension was admissible as statement of declarant's then-existing plan to perform certain act, and therefore affidavit was competent evidence to dispute employer's assertion that deceased did not apply for benefits. *Shelden v Barre Belt Granite Employer Union Pension Fund* (1994, CA2 Vt) 25 F3d 74.

Footnotes

Footnote 69. *State v Jackson*, 244 Kan 621, 772 P2d 747 (it was not necessary for the defense to prove the unavailability of a declarant in order to admit the statement of a third party as a declaration against penal interest); *State v Bell*, 249 NJ Super 506, 592 A2d 657 (in the context of statements against penal interest, the unavailability of the declarant is no longer a prerequisite for admissibility).

Footnote 70. § 756.

Footnote 71. *Laughlin v France* (2d Dist) 241 Ill App 3d 185, 180 Ill Dec 662, 607 NE2d 962, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336; *Rau v First Nat. Stores*, 97 NH 490, 92 A2d 921; *G.M. McKelvey Co. v General Casualty Co.*, 166 Ohio St 401, 2 Ohio Ops 2d 345, 142 NE2d 854, 65 ALR2d 626; *State v Thoma*, 313 Or 268, 834 P2d 1020; *State v Mitchell* (1991) 117 Wash 2d 521, 817 P2d 398 (ovrld on other grounds by *State v Dent* (1994) 123 Wash 2d 467, 869 P2d 392).

In any analysis of the admissibility of a declaration against penal interest, one must first determine whether the declarant is unavailable. *State v Duntz*, 223 Conn 207, 613 A2d 224.

Footnote 72. § 692.

Footnote 73. *Fisher v Duckworth* (Ky) 738 SW2d 810.

Footnote 74. *Donnelly v United States*, 228 US 243, 57 L Ed 820, 33 S Ct 449, reh den 228 US 708, 57 L Ed 1035, 33 S Ct 1024 and (superseded on other grounds by statute as stated in *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154) and (superseded on other grounds by statute as stated in *United States v Silverstein* (CA7 Ill) 732 F2d 1338, 15 Fed Rules Evid Serv 1140) and (not followed on other grounds by *Chambers v Mississippi*, 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038) as stated in *Thomas v State* (Ind) 580 NE2d 224; *Re Forsythe's Estate*, 221 Minn 303, 22 NW2d 19, 167 ALR 1; *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, and on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968; *Gray v State Capital Life Ins. Co.*, 254 NC 286, 118 SE2d 909; *Fox v McCreary* (Adams Co) 103 Ohio App 73, 3 Ohio Ops 2d 155,

144 NE2d 546; State v Thoma, 313 Or 268, 834 P2d 1020; Carpenter v Carpenter, 153 Or 584, 56 P2d 305, 105 ALR 386, reh den 153 Or 607, 57 P2d 1098, 105 ALR 397, modif den 153 Or 608, 58 P2d 507, 105 ALR 397 and (ovrld on other grounds by Hofer v Hofer, 244 Or 88, 415 P2d 753) as stated in Re Marriage of Nickerson, 296 Or 516, 678 P2d 730, on remand 68 Or App 288, 680 P2d 1012; Tibbs v Ake (Tenn) 505 SW2d 232; Hullum v St. Louis S. R. Co. (Tex Civ App Tyler) 384 SW2d 163, writ ref n r e (Apr 7, 1965) and reh of writ of error overr (May 26, 1965) and cert den 382 US 906, 15 L Ed 2d 159, 86 S Ct 244, reh den 382 US 949, 15 L Ed 2d 357, 86 S Ct 387.

Footnote 75. § 696.

Footnote 76. § 698.

Footnote 77. State v Hammons (La) 597 So 2d 990.

Footnote 78. State v Pettingill (Me) 611 A2d 88.

Footnote 79. Straughan v Asher (Mo App) 372 SW2d 489; State v Thoma, 313 Or 268, 834 P2d 1020; Breeden v Independent Fire Ins. Co. (Tenn) 530 SW2d 769.

Footnote 80. Straughan v Asher (Mo App) 372 SW2d 489; Tibbs v Ake (Tenn) 505 SW2d 232; New Amsterdam Casualty Co. v First Nat. Bank (Tex Civ App) 134 SW2d 470, writ diss.

Footnote 81. Breeden v Independent Fire Ins. Co. (Tenn) 530 SW2d 769.

Despite the fact that mental illness or infirmity is within the definition of "unavailability" for purposes of the rule regarding admission of declarations against penal interest, a mental patient's admission that he started a fire was not admissible where plaintiffs failed to show that the mental patient was so incapacitated that he could not testify truthfully. Knight v State, 99 Mich App 226, 297 NW2d 889.

Footnote 82. § 696.

Footnote 83. Johnson v Sleizer, 268 Minn 421, 129 NW2d 761; Straughan v Asher (Mo App) 372 SW2d 489; People v Brensic, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968; G.M. McKelvey Co. v General Casualty Co., 166 Ohio St 401, 2 Ohio Ops 2d 345, 142 NE2d 854, 65 ALR2d 626; Breeden v Independent Fire Ins. Co. (Tenn) 530 SW2d 769.

Footnote 84. Breeden v Independent Fire Ins. Co. (Tenn) 530 SW2d 769.

Footnote 85. § 700.

Footnote 86. Donnelly v United States, 228 US 243, 57 L Ed 820, 33 S Ct 449, reh den 228 US 708, 57 L Ed 1035, 33 S Ct 1024 and (superseded on other grounds by statute as stated in United States v Barrett (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154) and (superseded on other grounds by statute as stated in United States v Silverstein (CA7 Ill) 732 F2d 1338, 15 Fed Rules Evid Serv 1140) and (not followed on other grounds by Chambers v Mississippi, 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038) as stated in Thomas v State (Ind) 580 NE2d 224; Sutter v Easterly, 354 Mo 282, 189 SW2d 284, 162

ALR 437; *Yellow Cab Co. v Eden*, 178 Va 325, 16 SE2d 625.

Footnote 87. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10 (a declarant who asserts a privilege not to testify, including a Fifth Amendment privilege, is unavailable); *Taylor v Commonwealth (Ky)* 821 SW2d 72; *State v Hammons (La)* 597 So 2d 990; *Sutter v Easterly*, 354 Mo 282, 189 SW2d 284, 162 ALR 437; *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, and 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968 (the declarant must be unavailable to testify, for instance, on the basis of refusal to testify on constitutional grounds); *State v Thoma*, 313 Or 268, 834 P2d 1020; *Breeden v Independent Fire Ins. Co. (Tenn)* 530 SW2d 769.

Exclusion of a government informant's out-of-court statements against penal interest was improper where the declarant was unavailable because she had invoked her privilege against self-incrimination and the statements were relevant to the defendant's entrapment defense. *United States v Slaughter (CA9 Nev)* 891 F2d 691, 29 Fed Rules Evid Serv 465, appeal after remand (CA9) 1992 US App LEXIS 3994.

The court rejected the proffer by appellant's attorney asserting that, if available, the declarant would assert his privilege against self-incrimination, since appellant's attorney had no authority to speak for the declarant. *Bond v State*, 92 Md App 444, 608 A2d 1260.

In a prosecution involving armed robbery, the trial court properly excluded a statement by a declarant stating that he and another person, not naming the defendant, had committed the crime, where at the time the defendant attempted to testify as to the declaration, there was no showing that the declarant would invoke his Fifth Amendment right not to testify, since the exception to the hearsay rule for declarations against penal interest by an unavailable witness was inapplicable. *State v McConnohie*, 121 Wis 2d 57, 358 NW2d 256.

As to unavailability due to privilege from testifying, generally, see § 693.

Annotation: Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413 §§ 3, 4[a].

Footnote 88. *Bond v State*, 92 Md App 444, 608 A2d 1260.

Footnote 89. § 695.

Footnote 90. *State v Pettingill (Me)* 611 A2d 88; *State v Thoma*, 313 Or 268, 834 P2d 1020.

Footnote 91. *State v Thoma*, 313 Or 268, 834 P2d 1020.

Footnote 92. *Alabama Power Co. v Ray*, 249 Ala 568, 32 So 2d 219; *Straughan v Asher (Mo App)* 372 SW2d 489.

Footnote 93. *People v Spriggs*, 60 Cal 2d 868, 36 Cal Rptr 841, 389 P2d 377; *Straughan v Asher (Mo App)* 372 SW2d 489.

Footnote 94. *State v Thoma*, 313 Or 268, 834 P2d 1020.

As to statements against penal interest, generally, see § 789.

Footnote 95. *State v Thoma*, 313 Or 268, 834 P2d 1020.

Footnote 96. *State v Thoma*, 313 Or 268, 834 P2d 1020.

Footnote 97. § 791.

§ 787 Admissibility of collateral statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some authority holds that a declaration against interest is admissible as an entirety, including parts not against interest, if the latter are substantially connected with the same subject matter as that covered by the part against interest. 98 Some courts permit the introduction of collateral statements contained within a declaration against penal interest inculcating the accused, which afford a reasonable assurance of trustworthiness. 99 It has been said that Congress did not intend to constrict the scope of a declaration against interest to the point of excluding collateral material that may fortify the statement's disserving aspects. 1 However, there is also authority holding that, to the extent a statement not against the declarant's interest is severable from other statements satisfying the requirements for statements against interest under the Federal Rules of Evidence, such statement should be excluded. 2

Footnotes

Footnote 98. *Dillenberg v Carroll*, 259 Wis 417, 49 NW2d 444.

Footnote 99. *State v Cook*, 135 NH 655, 610 A2d 800.

As to statements against interest inculcating the accused, generally, see § 793.

Footnote 1. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154.

Footnote 2. *United States v Porter* (CA10 Kan) 881 F2d 878, 28 Fed Rules Evid Serv 691, cert den 493 US 944, 107 L Ed 2d 336, 110 S Ct 348, holding that the District Court did not err in separating portions of a declarant's statement for purpose of determining which qualified as statements against interest admissible under Rule 804(b)(3), and did not abuse discretion in excluding proffered testimony regarding a statement exculpating the defendant while admitting testimony regarding the declarant's incriminating statement.

(2). Types of Interests [788-793]

§ 788 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admission against interest exception to the hearsay rule has encompassed declarations against the pecuniary³ or proprietary⁴ interest of the declarant. However, the Federal Rules of Evidence have extended the range of interests under the exception. The Federal Rules of Evidence also allow the admission of hearsay statements potentially subjecting the declarant to criminal liability⁵ or civil liability.⁶ Many states as well have expanded the admission against interest exception to include penal interests.⁷ Under the Uniform Rules of Evidence, statements against interest also include statements which so far tend to make someone an object of hatred, ridicule, or disgrace that a reasonable person would not have made them unless they were true,⁸ and some jurisdictions that have not enacted the rules also include under the admission against interest exception to the hearsay rule statements which create such a risk of making the declarant an object of hatred, ridicule or social disapproval in the community that a reasonable person in the declarant's position would not have made it unless it were true.⁹ However, other courts have not been persuaded that an admission against social interests enjoys the requisite indicia of reliability to qualify as an exception to the rule against hearsay.¹⁰

§ 788 ----Generally [SUPPLEMENT]

Case authorities:

In discrimination action by employee who was terminated after permitting stripper to perform at business meeting, district court did not err in excluding unaddressed, unsigned, handwritten letter suggesting that there be stripper at meeting since there was no showing that document was contrary to author's pecuniary or proprietary interest, rather language of document seemed to be self-serving. *Hargett v National Westminster Bank, USA* (1996, CA2 NY) 78 F3d 836, 70 BNA FEP Cas 539.

In action against golf school for injuries sustained by plaintiff when third person's tee shot went off at 90 degree angle and struck her, claimed admissions by third person, to effect that he rented clubs from defendant and that club broke at time he hit shot that struck plaintiff, were not admissible under exception to hearsay rule for admissions against interest since statements did not subject third person to civil liability. *Rabinowitz v Roland Stafford Golf Sch.* (1993, Sup) 157 Misc 2d 458, 596 NYS2d 991.

Footnotes

Footnote 3. *Laughlin v France* (2d Dist) 241 Ill App 3d 185, 180 Ill Dec 662, 607 NE2d

962, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336; *Thomas v State (Ind)* 580 NE2d 224; *State v Hammons (La)* 597 So 2d 990; *Heddings v Steele*, 514 Pa 569, 526 A2d 349.

Footnote 4. *Thomas v State (Ind)* 580 NE2d 224; *State v Hammons (La)* 597 So 2d 990; *Heddings v Steele*, 514 Pa 569, 526 A2d 349.

Declarations made after the declarant has ceased to have any pecuniary or proprietary interest in the matter are not declarations against interest, but mere inadmissible hearsay. *Wilson v Davis*, 110 Mont 356, 103 P2d 149.

Footnote 5. § 789.

Footnote 6. FRE, Rule 804(b)(3).

In a seaman's action against a maritime insurance company for alleged blacklisting, a statement by an insurance broker that he was discharging the plaintiff as skipper of his vessel because the plaintiff was on the blacklist was admissible as statement against interest under FRE, Rule 804(b)(3). *Pino v Protection Maritime Ins. Co. (CA1 Mass)* 599 F2d 10, 4 Fed Rules Evid Serv 1469, 27 FR Serv 2d 1444, cert den 444 US 900, 62 L Ed 2d 136, 100 S Ct 210 and on remand (DC Mass) 490 F Supp 277 (disapproved on other grounds by *Borges v Our Lady of Sea Corp. (CA1 Mass)* 935 F2d 436, 1991 AMC 2937) and (among conflicting authorities on other grounds noted in *China Trade & Dev. Corp. v M.V. Choong Yong (CA2 NY)* 837 F2d 33).

See, as an example of a declaration subjecting one to potential civil liability, *Smith v Updegraff (CA8 Iowa)* 744 F2d 1354, 16 Fed Rules Evid Serv 748 (after an action was filed alleging wrongful discharge, declarant acknowledged conspiracy and admitted that he was wrong to fire plaintiff).

Footnote 7. § 789.

Footnote 8. § 785.

Footnote 9. *State v Jackson*, 244 Kan 621, 772 P2d 747; *State v Bell*, 249 NJ Super 506, 592 A2d 657.

The fact that the defendant stated that his girlfriend bit him would not appear to create such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement. *State v Lozada*, 257 NJ Super 260, 608 A2d 407, certif den 130 NJ 595, 617 A2d 1218.

Footnote 10. *Heddings v Steele*, 514 Pa 569, 526 A2d 349.

§ 789 Penal interest

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In many criminal 11 and civil 12 cases, extrajudicial declarations of the commission of a criminal act have been held not to be admissible in evidence. The rationale for this exclusion has been that such confessions are untrustworthy 13 and might be fabricated. 14

However, in an increasing number of jurisdictions, declarations against penal interest are admissible, 15 both in civil cases 16 and criminal ones, 17 at least in special circumstances. Some courts which have not recognized the admissibility of extrajudicial confessions in criminal cases generally, have held admissible the declaration against penal interest of a third person where the state relied on circumstantial evidence alone to establish the guilt of the accused. 18 Moreover, there is authority that, in the case of a confession by one person which exculpates the accused, the exception for declarations against interest must be recognized as a matter of due process. The accused may introduce testimony of another person's confession related to the witness, and to preclude the accused from doing so by an application of the hearsay rule violates the accused's due process right to call witnesses in his or her own behalf. 19

Both the Federal Rules of Evidence 20 and the Uniform Rules of Evidence 21 provide in identical language, that statements against interest, admissible when the declarant is unavailable, include statements which so far tend to subject the defendant to criminal liability that a reasonable person in that position would not have made the statement unless the declarant believed it to be true, with the qualification that a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Some states have similar standards for admitting statements against penal interest. 22 This exception does not apply only to statements which amount to direct confessions of criminal responsibility, since otherwise Congress would not have used the phrase "tended to subject." 23

The statement need not be made directly to persons who the declarant knows can cause his or her prosecution. 24 A declaration against penal interest is a declaration against penal interest regardless of whether it is made to a judge, to a police officer, or to a neighbor over the back fence. 25 Its character is not altered by a change in interlocutors although its indicia of reliability may. 26

The possibility of criminal culpability must not be too remote, 27 and a statement that may be construed as against penal interest is nevertheless inadmissible where it is too ambiguous to subject the declarant to prosecution. 28 In order to qualify as a declaration against penal interest, there must be a direct link between the statement and the crime. 29

In determining whether a statement against the declarant's penal interest is admissible, some courts have stated that the minimal requirements that a proponent must show are:

(1) the statement must have been truly an admission of an unlawful act; 30

(2) the statement, at the time of its making, must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true; 31

(3) the statement is trustworthy; 32

(4) the corroborating circumstances clearly indicate the trustworthiness of the statement, 33 or, at least there are some corroborative circumstances or other evidence of trustworthiness; 34 and

(5) the declarant must be unavailable. 35

A grant of immunity withdraws the threat of prosecution and an otherwise inculpatory statement is then no longer against the declarant's interest. 36 De facto immunity, as where the declarant is already serving multiple life sentences, has a similar effect. 37 Similarly, a statement is not against penal interest where it is made after the declarant has pled guilty to some charges and all others have been dismissed pursuant to a plea bargain. 38 In order to be admissible, the statement must be against the declarant's interest at the time made. It is therefore not sufficient that it can be interpreted as evidence of a subsequent wrongdoing, 39 nor is it sufficient where the declarant's jeopardy has passed. 40 However, the fact that the declarant is terminally ill at the time the statement is made does not mean the statement is not against penal interest where there is no indication that the declarant will not be sentenced for the crimes to which he or she allocuted. 41

A statement which on its face is contrary to the declarant's penal interest and thus disserving to the declarant may be a self-serving statement when examined in context, 42 as when a suspect in custody admits guilt and implicates another person in order to curry favor with the authorities, 43 or admits criminal conduct in order to seek favorable treatment at a sentencing hearing. 44 Generally, if a declarant admits sole responsibility for a serious crime, the statement is generally prima facie against interest so as to satisfy this requirement of the rule. 45 Likewise, when the declarant unknowingly speaks to informants or undercover agents, the statement is usually admissible under the exception. 46 However, if the statement is clearly self-serving, as when the declarant is seeking favorable treatment in return for cooperation, the statement may be deemed not against his or her interest and thus may fall outside the exception. 47 In addition, statements that demonstrate that a defendant is sorry for his or her actions, and did not mean to commit the crime are statements for, rather than against, penal interest. 48

Statements which are in fact against penal interest are, nevertheless, inadmissible where they are in the declarant's pecuniary interest in that they are made in connection with a civil suit in which the declarant was a defendant. 49 Moreover, a confession to one crime which was made in order to support a defense against the charge of a more serious crime, although technically against interest, is in reality one for the declarant's penal interest, not against it. 50

◆ Observation: While many courts do not address the issue, some courts recognize that it is not against the declarant's penal interest to exculpate the accused, but nevertheless have ruled in favor of the admissibility of such exculpatory statements. 51

§ 789 ----Penal interest [SUPPLEMENT]

Case authorities:

Coconspirator's statement that another coconspirator would give witness something other than money, and other conspirator's telling witness that he would be delivering kilogram of cocaine were tantamount to admissions that they were dealing cocaine and therefore admissible as declarations against their penal interest. *United States v Saccoccia* (1995, CA1 RI) 58 F3d 754, subsequent app (1995, CA1 RI) 63 F3d 1.

In action by school boards against dairies alleging conspiracy to artificially raise price of milk supplied to schools, testimony of former general manager of dairy given as government witness in criminal action against dairies on price-fixing charges is not admissible to prove fraudulent concealment tolling statute of limitations, where manager testified under grant of use immunity, because testimony was not against his penal interest since he avoided prosecution by testifying, and it was not against his pecuniary or proprietary interest since he was not likely aware of possibility of antitrust action. *West Virginia ex rel. McGraw v Meadow Gold Dairies* (1994, WD Va) 875 F Supp 340, 1995-1 CCH Trade Cases ¶ 70866.

Coconspirator's statement upon arrest, that he had firearm because he had heard that people were sometimes robbed during drug deals and that there was lot of money involved in this deal, was admissible as statement against penal interest; declarant was unavailable because he was fugitive and statement was sufficiently trustworthy since it was made after he was advised of his Miranda rights and nothing indicated he made statement to curry favor with law enforcement officers. *United States v Sandoval- Curiel* (1995, CA7 Ill) 50 F3d 1389.

In plaintiffs' civil rights action against officer who shot and killed 12-year-old boy, testimony of juvenile during hearing at which he admitted to giving loaded weapon to close friend on playground about one hour before that friend was killed is admissible under T28 803(24), because although juvenile might not have been under oath at time he made statement, statement was against his penal interest and was made after juvenile was fully advised of his rights and seriousness of situation, and in presence of his parents and attorney. *Estate of Chlopek by Fahrforth v Jarmusz* (1995, ND Ill) 877 F Supp 1189.

Statements inculcating defendant which were made by declarant immediately after her arrest when she had been caught with two kilograms of cocaine were not sufficiently against her penal interest to be admissible under hearsay exception since her conviction was assured for all practical purposes and therefore she had nothing to lose by implicating another person, rather may have been motivated by desire to curry favor with officials. *United States v Hazelett* (1994, CA8 Mo) 32 F3d 1313, 40 Fed Rules Evid Serv 75.

Defendant's statements to a psychiatrist were not admissible as statements against penal interest pursuant to G.S. § 8C-1, Rule 804(b)(3), even if defendant may assert his own unavailability, because they were not so incriminating "that a reasonable man in his position would not have made the statement[s] unless he believed [them] to be true" where the incriminating statements defendant made to the psychiatrist were similar to statements he had already made to the police; the only additional incriminating information in the statements served only to reduce defendant's potential criminal liability; and the bulk of defendant's statements to the psychiatrist were exculpatory. *State v Harris* (1994) 338 NC 211, 449 SE2d 462.

Footnotes

Footnote 11. *Steadman v United States* (Dist Col App) 358 A2d 329; *Looney v State*, 240 Ga 691, 242 SE2d 86; *Partlow v State* (Ind) 453 NE2d 259, cert den 464 US 1072, 79 L Ed 2d 219, 104 S Ct 983; *Conner v State* (Iowa) 362 NW2d 449, habeas corpus proceeding (ND Iowa) 715 F Supp 925, affd (CA8 Iowa) 870 F2d 1384, cert den 493 US 953, 107 L Ed 2d 350, 110 S Ct 363; *Thompson v State* (Miss) 309 So 2d 533, cert den 423 US 924, 46 L Ed 2d 250, 96 S Ct 266; *State v Rogers* (Mo App) 758 SW2d 199, post-conviction proceeding (Mo App) 772 SW2d 16; *State v Madden*, 292 NC 114, 232 SE2d 656; *Petition of Winineger* (Okla Crim) 337 P2d 445; *State v Anderson*, 10 Or App 34, 497 P2d 1218.

Declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial, or to procure a new trial on the basis of newly discovered evidence. *Dunbar v State*, 205 Ga App 867, 424 SE2d 43, 92 Fulton County D R 2346, cert den (Ga) 1993 Ga LEXIS 280.

With regard to third-party confessions, or declarations against penal interests, the court perceives good reasons for distrusting and disfavoring them, and for not carving out a new exception to the hearsay rule. *Taggart v State*, 269 Ind 667, 382 NE2d 916.

Annotation: Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 ALR3d 1164.

Footnote 12. *Peninsular Fire Ins. Co. v Wells* (Fla App D1) 438 So 2d 46, petition dismd (Fla) 443 So 2d 980; *McGraw v Horn*, 134 Ind App 645, 183 NE2d 206; *American Hardware Mut. Ins. Co. v Fryer* (Ky App) 692 SW2d 278.

Annotation: Admissibility, as against interest, in civil case of declaration of commission of criminal act, 90 ALR3d 1173.

Footnote 13. *Partlow v State* (Ind) 453 NE2d 259, cert den 464 US 1072, 79 L Ed 2d 219, 104 S Ct 983.

Footnote 14. *State v Hammons* (La) 597 So 2d 990.

A person could subvert the ends of justice by admitting the crime to others and then absenting himself. *Dunbar v State*, 205 Ga App 867, 424 SE2d 43, 92 Fulton County D R 2346, cert den (Ga) 1993 Ga LEXIS 280.

Footnote 15. *State v Rivera*, 221 Conn 58, 602 A2d 571; *State v Bates*, 70 Hawaii 343, 771 P2d 509; *Thomas v State* (Ind) 580 NE2d 224 (to reject offered testimony merely because it could be false would be to reject all testimony); *State v Jackson*, 244 Kan 621, 772 P2d 747; *Dodson v Commonwealth* (Ky) 753 SW2d 548; *Bond v State*, 92 Md App 444, 608 A2d 1260; *State v Bell*, 249 NJ Super 506, 592 A2d 657; *Heddings v Steele*, 514 Pa 569, 526 A2d 349; *State v Howard*, 295 SC 462, 369 SE2d 132, cert den 490 US 1113, 104 L Ed 2d 1036, 109 S Ct 3174, reh den 492 US 932, 106 L Ed 2d 628, 110 S Ct 13 (an unavailable declarant's admission against penal interests is admissible under state law); *State v St. Pierre*, 111 Wash 2d 105, 759 P2d 383, later proceeding 118 Wash 2d 321, 823 P2d 492.

Law Reviews: Sharp, Military Rule of Evidence 804(b)(3)'s statement against penal interest exception: can the rule stand on its own?, 130 Mil LR 1 (Fall 1990).

Footnote 16. *Depew v Hanover Ins. Co.* (ED Tenn) 438 F Supp 358, 3 Fed Rules Evid Serv 500; *Peters v United States*, 187 Ct Cl 63, 408 F2d 719; *Reilly v Di Bianco*, 6 Conn App 556, 507 A2d 106, cert den 200 Conn 804, 510 A2d 192 and cert den 200 Conn 804, 510 A2d 193; *State Farm Auto. Ins. Co. v Great American Ins. Co.*, 164 Ga App 457, 297 SE2d 355; *Chute v Old American Ins. Co.*, 6 Kan App 2d 412, 629 P2d 734 (disapproved on other grounds by *Harper v Prudential Ins. Co.*, 233 Kan 358, 662 P2d 1264); *Tutorship of Price v Standard Life Ins. Co.* (La App 2d Cir) 569 So 2d 261, cert den (La) 572 So 2d 91 and cert den (La) 572 So 2d 92; *Agnew v State*, 51 Md App 614, 446 A2d 425; *Blake v Consolidated Rail Corp.*, 176 Mich App 506, 439 NW2d 914, app dismd (Mich) 1990 Mich LEXIS 242; *Sutter v Easterly*, 354 Mo 282, 189 SW2d 284, 162 ALR 437; *Re Estate of Schueren*, 162 Mont 417, 512 P2d 1283; *Band's Refuse Removal, Inc. v Fair Lawn*, 62 NJ Super 522, 163 A2d 465, cert den 33 NJ 387, 164 A2d 849 and supp op 64 NJ Super 1, 165 A2d 216, cert den 34 NJ 67, 167 A2d 55; *Estate of Bras v First Bank & Trust Co.* (Okla App) 821 P2d 387; *Movie Distributors Liquidating Trust v Reliance Ins. Co.*, 407 Pa Super 588, 595 A2d 1302, app den 529 Pa 658, 604 A2d 249; *Breeden v Independent Fire Ins. Co.* (Tenn) 530 SW2d 769; *Utica Nat. Ins. Co. v McDonald* (Tex App Fort Worth) 814 SW2d 234, writ den (Feb 26, 1992) and reh of writ of error overr (Apr 8, 1992).

Footnote 17. *People v Spriggs*, 60 Cal 2d 868, 36 Cal Rptr 841, 389 P2d 377; *State v Leong*, 51 Hawaii 581, 465 P2d 560; *Badelle v State* (Ind) 449 NE2d 1055; *State v Pink*, 236 Kan 715, 696 P2d 358 (ovrld on other grounds by *State v Van Cleave*, 239 Kan 117, 716 P2d 580) and post-conviction proceeding (Kan App) 1989 Kan App LEXIS 660; *Commonwealth v Gagnon*, 408 Mass 185, 557 NE2d 728; *Osborne v Purdome* (Mo) 250 SW2d 159; *Goff v State*, 88 Nev 264, 496 P2d 160; *State v Sejuelas*, 94 NJ Super 576, 229 A2d 659; *State v Self* (App) 88 NM 37, 536 P2d 1093; *People v Johnson*, 66 NY2d 398, 497 NYS2d 618, 488 NE2d 439; *State v Nichols*, 321 NC 616, 365 SE2d 561, 75 ALR4th 179; *Commonwealth v Brinkley*, 505 Pa 442, 480 A2d 980; *State v Howard*, 295 SC 462, 369 SE2d 132, cert den 490 US 1113, 104 L Ed 2d 1036, 109 S Ct 3174, reh den 492 US 932, 106 L Ed 2d 628, 110 S Ct 13; *State v Baker* (Tenn Crim) 751 SW2d 154, post-conviction proceeding (Tenn Crim) 1990 Tenn Crim App LEXIS 411; *State v Smith* (Tenn Crim) 639 SW2d 677, post-conviction proceeding (Tenn Crim) 757 SW2d 683, later proceeding (Tenn Crim) 1989 Tenn Crim App LEXIS 885, app gr (Tenn) 1990 Tenn LEXIS 341; *State v Sanders*, 27 Utah 2d 354, 496 P2d 270; *State v Valladares*, 99 Wash 2d 663, 664 P2d 508.

In a prosecution for leaving the scene of a personal injury accident and for criminal damage to property, the trial court erred in excluding evidence of a statement by an alleged passenger that he in fact had been the driver of the car at the time of the accident. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10.

Footnote 18. *Woodard v State* (Tex Crim) 463 SW2d 197; *Thornburg v State* (Tex App Houston (1st Dist)) 699 SW2d 918, 69 ALR4th 997.

Footnote 19. *Chambers v Mississippi*, 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038.

Footnote 20. FRE, Rule 804(b)(3).

In a prosecution for arson, the District Court did not err in admitting a police officer's testimony that a codefendant (the manager of a store which was burned) stated that only he had keys to the business on the night of the alleged arson, since such was admissible under Federal Rule 804(b)(3) as a statement against interest because the manager knew of the investigation of the fire by police, and had been arrested by police officers approximately two weeks earlier with gasoline in the trunk of his car. *United States v Candoli* (CA9 Cal) 870 F2d 496, 27 Fed Rules Evid Serv 1270.

Annotation: Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 ALR3d 1164.

Admissibility, as against interest, in civil case of declaration of commission of criminal act, 90 ALR3d 1173.

What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence, 34 ALR Fed 412.

Footnote 21. Uniform Rules of Evidence, Rule 804(b)(3).

Footnote 22. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10; *Jackson v United States* (Dist Col App) 605 A2d 45 (a statement tending to expose the declarant to liability and offered to exculpate the accused is admissible when the declarant is unavailable and the corroborating circumstances clearly indicate the trustworthiness of the statement); *State v Hammons* (La) 597 So 2d 990; *State v Thoma*, 313 Or 268, 834 P2d 1020; *State v Brings Plenty* (SD) 490 NW2d 261.

Footnote 23. *United States v Barrett* (CA1 Mass) 539 F2d 244, 1 Fed Rules Evid Serv 1154; *United States v Benveniste* (CA9 Cal) 564 F2d 335, 2 Fed Rules Evid Serv 793.

FRE, Rule 804(b)(3) is not limited to direct confessions of guilt, but encompasses disserving statements that would have probative value in a criminal trial against the declarant, such as statement implying the declarant had knowledge of crime, which would be inconsistent with plea of not guilty. *United States v Thomas* (CA5 Ala) 571 F2d 285, 3 Fed Rules Evid Serv 351.

FRE, Rule 804(b)(3) does not restrict the exception to the hearsay rule for statements against penal interest to those statements admitting felonies. *United States v Gotti* (ED NY) 641 F Supp 283, 22 Fed Rules Evid Serv 708.

Footnote 24. *United States v Katsougrakis* (CA2 NY) 715 F2d 769, 13 Fed Rules Evid Serv 1852, cert den 464 US 1040, 79 L Ed 2d 169, 104 S Ct 704 and (criticized on other grounds by *United States v Beldin* (CA5 Tex) 737 F2d 450, 16 Fed Rules Evid Serv 557) and (disapproved on other grounds by *Lee v Illinois*, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056, 20 Fed Rules Evid Serv 513) as stated in *United States v Flores* (CA5 Tex) 985 F2d 770, reh, en banc, den (CA5 Tex) 1 F3d 1239 (statement to wife prior to crime and confession to friend afterward); *United States v Harrell* (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687 (declarants were being secretly recorded when statements were made).

Footnote 25. *State v Alvarez*, 308 Or 143, 776 P2d 1283.

Footnote 26. *State v Alvarez*, 308 Or 143, 776 P2d 1283.

Footnote 27. *United States v Chalan* (CA10 NM) 812 F2d 1302, 22 Fed Rules Evid Serv 1200 (fact that defendant was intoxicated, and possibly too drunk to commit the crime, did not lead to conclusion that brother, who had made statement regarding defendant's intoxication, was necessarily guilty of the crime; connection between statement and penal interest was therefore too tenuous to permit admissibility).

Footnote 28. *United States v Ashfield* (CA3 NJ) 735 F2d 101, 84-2 USTC ¶ 9530, 15 Fed Rules Evid Serv 1362, 54 AFTR 2d 84-5339, cert den 469 US 858, 83 L Ed 2d 122, 105 S Ct 189 (statement by owner of accounting firm characterizing handling of defendant's loan repayments as "accounting error" was too general to assume responsibility).

Footnote 29. *State v Bell*, 249 NJ Super 506, 592 A2d 657.

Footnote 30. *State v Howard*, 12 Wash App 158, 529 P2d 21.

Footnote 31. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10; *Williford v State*, 300 Ark 151, 777 SW2d 839, later proceeding (Ark) 1991 Ark LEXIS 661; *Williford v State*, 300 Ark 151, 777 SW2d 839, later proceeding (Ark) 1991 Ark LEXIS 661; *State v Priest* (Me) 617 A2d 537; *State v Brings Plenty* (SD) 490 NW2d 261; *State v St. Pierre*, 111 Wash 2d 105, 759 P2d 383, later proceeding 118 Wash 2d 321, 823 P2d 492.

Footnote 32. § 791.

Footnote 33. § 792.

Footnote 34. *People v Coble* (5th Dist) 65 Cal App 3d 187, 135 Cal Rptr 199 (there must be indicia of reliability); *State v Howard*, 12 Wash App 158, 529 P2d 21 (alleged statement against declarant's penal interest was properly excluded where circumstances indicated lack of trustworthiness thereof).

Uncorroborated evidence that one inmate, since deceased, had admitted to another inmate that he was the real murderer was not admissible in the murder prosecution of the defendant. *State v Glaze* (Minn) 452 NW2d 655, habeas corpus den (CA8 Minn) 986 F2d 1192.

In determining the admissibility of an extrajudicial declaration by declarant that he, and not the defendant on trial, committed the crime, the question is whether the declaration was made under circumstances that provide "considerable assurance" of its reliability by objective indicia of trustworthiness. *People v Bowel*, 111 Ill 2d 58, 94 Ill Dec 748, 488 NE2d 995.

Although the third party's statements would normally have been admissible as statements against interest, they were properly excluded where the evidence did not draw a "sufficient link" between the declarant and the victim. *State v Koedatich*, 112 NJ 225, 548 A2d 939, cert den 488 US 1017, 102 L Ed 2d 803, 109 S Ct 813, appeal after remand 118 NJ 513, 572 A2d 622.

Footnote 35. § 786.

Footnote 36. *United States v Williams* (CA5 Tex) 809 F2d 1072, 22 Fed Rules Evid Serv 485, reh den (CA5 Tex) 817 F2d 1136 and reh gr, corrected (CA5 Tex) 828 F2d 1 and cert den 484 US 896, 98 L Ed 2d 187, 108 S Ct 228 and cert den 484 US 913, 98 L Ed 2d 216, 108 S Ct 259 and cert den 484 US 987, 98 L Ed 2d 504, 108 S Ct 506, later proceeding (CA5 Tex) 859 F2d 327; *People v Nally* (2d Dist) 216 Ill App 3d 742, 159 Ill Dec 281, 575 NE2d 1341, app den 142 Ill 2d 661, 164 Ill Dec 924, 584 NE2d 136 (where the declarant was granted immunity from prosecution, the statements were not in a very real sense self-incriminatory and unquestionably against interest).

The statement of a coconspirator before a grand jury was not admissible as a statement against interest after he has already been convicted and given immunity, especially where circumstances of the testimony indicated that the witness considered it clearly in his best interest to testify. *United States v Gonzalez* (CA5 Tex) 559 F2d 1271, 2 Fed Rules Evid Serv 469.

Footnote 37. *United States v Silverstein* (CA7 Ill) 732 F2d 1338, 15 Fed Rules Evid Serv 1140, cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and later proceeding (CA7 Ill) 768 F2d 790, 18 Fed Rules Evid Serv 1201, amd, reh den (CA7 Ill) 777 F2d 345 and cert den 475 US 1124, 90 L Ed 2d 191, 106 S Ct 1647.

Footnote 38. *United States v Rhodes* (CA9 Cal) 713 F2d 463, 13 Fed Rules Evid Serv 1843, cert den 464 US 1012, 78 L Ed 2d 715, 104 S Ct 535 and cert den 465 US 1038, 79 L Ed 2d 711, 104 S Ct 1314 and (criticized on other grounds by *United States v Barry* (CA9 Cal) 814 F2d 1400, 22 Fed Rules Evid Serv 1560) (statement made after declarant's plea of guilty and made for benefit of coconspirator was untrustworthy).

Footnote 39. *United States v Posner* (SD Fla) 594 F Supp 923, later proceeding (SD Fla) 594 F Supp 930, 11 Media L R 1560 and affd (CA11 Fla) 764 F2d 1535, 18 Fed Rules Evid Serv 868, later proceeding (CA11 Fla) 780 F2d 1536, motion den (SD Fla) 637 F Supp 456 and cert den 476 US 1182, 91 L Ed 2d 544, 106 S Ct 2915 (letter written by codefendant to business manager of college stating that appraisal of land to be donated to college was unrealistic was not admissible against defendant as declaration against penal interest where no tax deductions for donated land had been claimed at time letter was written).

Footnote 40. *United States v Albert* (CA1 Me) 773 F2d 386, 18 Fed Rules Evid Serv 831 (statement made by codefendant at time of sentencing and exculpating defendant was inadmissible because codefendant's penal interest was no longer at stake); *United States v Rhodes* (CA9 Cal) 713 F2d 463, 13 Fed Rules Evid Serv 1843, cert den 464 US 1012, 78 L Ed 2d 715, 104 S Ct 535 and cert den 465 US 1038, 79 L Ed 2d 711, 104 S Ct 1314 and (criticized on other grounds by *United States v Barry* (CA9 Cal) 814 F2d 1400, 22 Fed Rules Evid Serv 1560) (declarant made statement allegedly contrary to penal interest after pleading guilty to crime and after remaining charges had been dismissed pursuant to plea agreement).

Footnote 41. *United States v Scopo* (CA2 NY) 861 F2d 339, 26 Fed Rules Evid Serv 1499, later proceeding (CA2 NY) 868 F2d 524, 27 Fed Rules Evid Serv 868, cert den 491 US 907, 105 L Ed 2d 700, 109 S Ct 3192 and cert den 493 US 811, 107 L Ed 2d 24, 110 S Ct 56, post-conviction proceeding (CA2 NY) 964 F2d 172, post-conviction

proceeding (SD NY) 1992 US Dist LEXIS 11089, affd without op (CA2 NY) 990 F2d 623 and (criticized on other grounds by McIntyre v Trickey (CA8 Mo) 975 F2d 437) and cert den 490 US 1048, 104 L Ed 2d 426, 109 S Ct 1957, habeas corpus proceeding (SD NY) 1990 US Dist LEXIS 11899 and cert den 490 US 1022, 104 L Ed 2d 186, 109 S Ct 1750.

Footnote 42. United States v Williams (CA7 Ill) 738 F2d 172, 15 Fed Rules Evid Serv 1530 (statements tending to expose declarant to charge of theft but exculpating him from more serious mail fraud charges was not against penal interest); Goff v Nix (SD Iowa) 626 F Supp 736, affd in part and revd in part on other grounds, vacated, in part (CA8 Iowa) 803 F2d 358, reh den (CA8) 809 F2d 530 and cert den 484 US 835, 98 L Ed 2d 73, 108 S Ct 115 (testimony by warden that two inmates told him where knives were hidden was not admissible as statement against interest because inmates could have had motive to deceive warden in effort to preserve secrecy of another hiding place).

Although statements by husband subjected him to civil and criminal tax liability, in context they were self-serving claims of proprietary interest in shares of stock, which removed usual guaranty of trustworthiness, thus making the statements inadmissible against his wife under FRE, Rule 804(b)(3). United States v Diehl (SD Tex) 460 F Supp 1282, affd (CA5 Tex) 586 F2d 1080, 79-1 USTC ¶ 9146, 43 AFTR 2d 79-495.

As to self-serving statements, generally, see §§ 794 et seq.

Footnote 43. § 793.

Footnote 44. United States v Albert (CA1 Me) 773 F2d 386, 18 Fed Rules Evid Serv 831.

Footnote 45. State v Hammons (La) 597 So 2d 990.

Footnote 46. State v Hammons (La) 597 So 2d 990.

Footnote 47. State v Hammons (La) 597 So 2d 990.

As to self-serving statements, generally, see § 794.

Footnote 48. People v Atkins (Colo App) 844 P2d 1196, cert den (Colo) 1993 Colo LEXIS 77.

Footnote 49. United States v L'Hoste (CA5 La) 640 F2d 693, 7 Fed Rules Evid Serv 1832, reh den (CA5 La) 645 F2d 71.

Footnote 50. United States v Evans (CA4 Md) 635 F2d 1124, 7 Fed Rules Evid Serv 717, cert den 452 US 943, 69 L Ed 2d 958, 101 S Ct 3090.

Footnote 51. State v Bell, 249 NJ Super 506, 592 A2d 657.

§ 790 --Confrontation and reliability requirements

[View Entire Section](#)

Some courts state that a declaration against interest admissible under the Federal Rules of Evidence hearsay exception may still run afoul of the criminal defendant's right to confrontation of witnesses, 52 especially in the case of confessions by one person implicating a codefendant. 53 In addition, some courts have said that in order to satisfy statutory requirements and requirements of the confrontation clause, the declaration must be distinctly against the declarant's penal interest and must be clothed with indicia of reliability. 54 Some courts state that a statement's spontaneity is an important factor in determining reliability under the confrontation clause. 55 In addition, the relationship of a declarant and a witness as husband and wife may enhance the reliability of a statement against penal interest. 56

Footnotes

Footnote 52. US Const Amend 6.

As to confrontation, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

Footnote 53. *Bruton v United States*, 389 US 818, 19 L Ed 2d 70, 88 S Ct 126, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculcating accused is admitted at joint trial.

As to statements against penal interest offered to inculcate a defendant, generally, see § 793.

Footnote 54. *People v Coble* (5th Dist) 65 Cal App 3d 187, 135 Cal Rptr 199, stating that indicia of reliability are lacking where the declaration is made to authorities after the declarant has been arrested and charged with a serious offense or after he has already pleaded guilty to a lesser offense and is awaiting sentencing, and where the statement is exculpatory in the sense that the declarant has blamed a coparticipant for the commission of the greater offense while admitting complicity to some lesser degree.

But see, *United States v Seeley* (CA1 Mass) 892 F2d 1, 29 Fed Rules Evid Serv 767, stating that the Confrontation Clause does not require special proof that in-court witness is credible in order to admit into evidence testimony as to out-of-court statement against penal interest.

Footnote 55. *State v Cook*, 135 NH 655, 610 A2d 800 (statement did not rise to the level of an excited utterance).

Footnote 56. *State v Kiewert*, 135 NH 338, 605 A2d 1031.

§ 791 --Trustworthiness requirement

The trustworthiness of a hearsay statement against penal interest is a prerequisite to its admissibility. 57 Trustworthiness is not only determined by the existence of corroborating circumstances, 58 but also through examination of the time of the declaration and the party to whom the declaration was made, and the extent to which the declaration is really against the declarant's penal interest. 59 One indication of the trustworthiness of a statement is where the declarant admits individual responsibility for a criminal act 60 and does not attempt to shift culpability but frankly discloses his or her own involvement. 61 Another factor which supports trustworthiness is that the confessor makes a voluntary statement after being advised of his or her Miranda rights. 62

The determination as to whether a third party declaration against penal interest is trustworthy is left to the sound discretion of the trial court. 63 To determine if trustworthiness is sufficiently established, the trial judge should examine both the corroborating evidence and the contradictory evidence. 64 Absent an abuse of discretion, a court will not reverse the trial court's ruling on the admissibility of a statement against penal interest. 65

◆ Observation: According to some courts, relying on a Supreme Court case, 66 there are four indicia of the trustworthiness of an extrajudicial statement, not under oath, by the declarant that he or she, and not the defendant, committed the crime: (1) the statement is made spontaneously to a close acquaintance shortly after the crime occurs; (2) the statement is corroborated by other evidence; (3) the statement is self-incriminating and against the declarant's interest; and (4) there is adequate opportunity for cross-examination of the declarant. 67

§ 791 --Trustworthiness requirement [SUPPLEMENT]

Case authorities:

Taperecorded conversation between cooperating defendant and codefendant, implicating another codefendant, was properly admitted as statement against interest; implicated codefendant did not question whether codefendant's statements implicated his penal interest and that codefendant was unavailable as a witness because of his status as defendant, and trustworthiness of statement was established by evidence that codefendant had no knowledge that another party participated in setting fire, hence undermining implicated defendant's argument that codefendant had incentive to place blame on him to protect other party. *United States v Gio* (1993, CA7 Ill) 7 F3d 1279.

Statements made by a codefendant, Williams, proffered where defendant wished to use the statements to show that defendant was not an integral part of the plan to kill a police officer, were properly excluded; Williams, who had not yet been tried, repeatedly invoked the Fifth Amendment when called by defendant; and the trial court ruled that Williams was unavailable as a witness, that the statements were against his penal interest when made and that they were made voluntarily, but that they bore insufficient indications of trustworthiness. The trial court's determination that the statements made by

Williams were not trustworthy is well supported by the record. G.S. § 8C-1, Rule 804(b)(3). *State v Brown* (1994) 335 NC 477, 439 SE2d 589.

Footnotes

Footnote 57. *Taylor v Commonwealth* (Ky) 821 SW2d 72.

Footnote 58. § 792.

Footnote 59. *State v Rivera*, 221 Conn 58, 602 A2d 571 (the lateness of the declaration, approximately seven months after the shooting, militated against its trustworthiness); *Jackson v United States* (Dist Col App) 605 A2d 45; *Taylor v Commonwealth* (Ky) 821 SW2d 72.

Footnote 60. *United States v Briscoe* (CA5 Miss) 742 F2d 842, 16 Fed Rules Evid Serv 424 (arson); *United States v Carruth* (CA9 Cal) 699 F2d 1017, 83-1 USTC ¶ 9247, 12 Fed Rules Evid Serv 1049, 52 AFTR 2d 83-5647, cert den 464 US 1038, 79 L Ed 2d 164, 104 S Ct 698 (tax fraud).

Footnote 61. *United States v Coachman*, 234 US App DC 194, 727 F2d 1293, 15 Fed Rules Evid Serv 54, later proceeding 243 US App DC 228, 752 F2d 685.

Footnote 62. *United States v Garcia* (CA7 Ill) 986 F2d 1135, 38 Fed Rules Evid Serv 151, on remand (CD Ill) 818 F Supp 238.

As to Miranda rights, generally, see §§ 721, 749.

Footnote 63. *State v Rosado*, 218 Conn 239, 588 A2d 1066; *State v De Freitas*, 179 Conn 431, 426 A2d 799.

The trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration against penal interest was spoken under circumstances which render it highly probable that the declaration is truthful. *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 64. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10.

Footnote 65. *Sanders v State*, 305 Ark 112, 805 SW2d 953, later proceeding 310 Ark 510, 838 SW2d 359; *People v Nally* (2d Dist) 216 Ill App 3d 742, 159 Ill Dec 281, 575 NE2d 1341, app den 142 Ill 2d 661, 164 Ill Dec 924, 584 NE2d 136.

The court will not disturb the trial court's findings unless clearly erroneous. *Jackson v United States* (Dist Col App) 605 A2d 45.

The court will not disturb the trial court's finding that certain factors establish adequate indicia of reliability unless the court concludes that such a finding was clearly erroneous. *State v Cook*, 135 NH 655, 610 A2d 800.

Footnote 66. *Chambers v Mississippi* 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038.

§ 792 --Corroboration requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Federal Rules of Evidence provide that a statement tending to expose the declarant to criminal liability, which is offered to exculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. 68 The Uniform Rules of Evidence 69 and many states 70 also require that corroborative circumstances exist which clearly indicate the trustworthiness of the statement. The corroboration requirement for the admission of a third party statement against penal interests is generally significant and goes beyond minimal corroboration. 71

The corroboration requirement is to be construed in such a manner as to effectuate its purpose of circumventing fabrication. 72 The trial judge may look beyond the evidence offered in corroboration of the statement to evidence either directly contradicting the statement or contradicting the evidence offered to corroborate it. 73 Where corroboration is insufficient, and evidence indicates that a statement is not trustworthy, it will not be admitted under the Federal Rules of Evidence as a statement tending to expose the declarant to criminal liability. 74 While it has been held that in considering the admissibility of statements offered under the Federal Rules of Evidence as against penal interest, the court should be concerned with the trustworthiness of the declarant and not the credibility of the witness, 75 elsewhere the corroboration requirement has been construed to involve an assessment of the veracity of the witness as well as the reliability of the declarant. 76 The necessary corroboration has been found wanting in many cases of third-party confessions. 77

§ 792 --Corroboration requirement [SUPPLEMENT]

Practice Aids: When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx). 125 ALR Fed 477.

Case authorities:

Codefendant's statement during plea negotiations that defendants had not known of proposed drug exchange at time they entered motel room was not sufficiently corroborated to be admissible as statement against penal interest since codefendant's guilt did not preclude other defendants' involvement and he made many questionable claims during plea negotiations. United States v Dean (1995, CA5 Tex) 59 F3d 1479, reh den (1995, CA5 Tex) 1995 US App LEXIS 27955.

Footnotes

Footnote 68. FRE, Rule 804(b)(3).

See, for example, *United States v Ford* (CA2 NY) 771 F2d 60, 18 Fed Rules Evid Serv 863; *United States v Cruz* (CA2 NY) 797 F2d 90, 21 Fed Rules Evid Serv 239 (criticized on other grounds by *United States v Boney* (App DC) 298 US App DC 149, 977 F2d 624, 36 Fed Rules Evid Serv 1358); *Pina v Henderson* (ED NY) 586 F Supp 1452, 17 Fed Rules Evid Serv 91, rev'd on other grounds, remanded (CA2 NY) 752 F2d 47, 17 Fed Rules Evid Serv 94 (codefendant's admission that he and not defendant stole car is admissible where fact that codefendant was arrested as driver of stolen car provides sufficient corroborating circumstances for declaration against penal interest); *United States v Briscoe* (CA5 Miss) 742 F2d 842, 16 Fed Rules Evid Serv 424 (corroboration found where witness testified that declarant gave him boots at time of making statement, which boots had been stolen during crime in question); *United States v Rasmussen* (CA8 Iowa) 790 F2d 55, 20 Fed Rules Evid Serv 1015 (not followed by *United States v Sutton* (AFCMR) 1993 CMR LEXIS 618); *United States v Lopez* (CA10 NM) 777 F2d 543, 19 Fed Rules Evid Serv 1112 (testimony exculpating defendant should have been admitted where it was corroborated by fingerprint expert's testimony that codefendant's fingerprints, but not defendant's, were on boxes of narcotics); *United States v Harrell* (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687 (corroboration requirement met where ample testimony indicated trustworthiness of tape-recorded statements in which one defendant implicated himself and other defendants).

Footnote 69. Uniform Rules of Evidence, Rule 804(b)(3).

Footnote 70. *State v Lopez*, 159 Ariz 52, 764 P2d 1111, 22 Ariz Adv Rep 10; *Sanders v State*, 305 Ark 112, 805 SW2d 953, later proceeding 310 Ark 510, 838 SW2d 359; *State v Rivera*, 221 Conn 58, 602 A2d 571; *Jackson v United States* (Dist Col App) 605 A2d 45; *State v Bates*, 70 Hawaii 343, 771 P2d 509; *Thomas v State* (Ind) 580 NE2d 224; *State v Priest* (Me) 617 A2d 537; *State v McCord*, 251 Mont 317, 825 P2d 194; *Homick v State*, 108 Nev 127, 825 P2d 600; *State v Kiewert*, 135 NH 338, 605 A2d 1031; *State v Thoma*, 313 Or 268, 834 P2d 1020; *State v Doctor*, 306 SC 527, 413 SE2d 36; *State v Brings Plenty* (SD) 490 NW2d 261.

Footnote 71. *State v Rivera*, 221 Conn 58, 602 A2d 571.

Footnote 72. *United States v Hemmer* (CA1 Mass) 729 F2d 10, 15 Fed Rules Evid Serv 456, cert den 467 US 1218, 81 L Ed 2d 371, 104 S Ct 2666 (contradictions in statement indicated untrustworthiness); *United States v Silverstein* (CA7 Ill) 732 F2d 1338, 15 Fed Rules Evid Serv 1140, cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and cert den 475 US 1124, 90 L Ed 2d 191, 106 S Ct 1647 (statement confessing to murder for which defendants were charged was inadmissible as untrustworthy where sole corroborating evidence was not clearly corroborative, and medical evidence tended to refute confession); *United States v Ospina* (CA9 Cal) 739 F2d 448, 16 Fed Rules Evid Serv 111, cert den 469 US 887, 83 L Ed 2d 198, 105 S Ct 262 and cert den 471 US 1126, 86 L Ed 2d 274, 105 S Ct 2658 (statement not clearly corroborated and trustworthiness not clearly indicated where statement was made after all codefendants had been left together in detention room and

declarants thereafter specifically requested to talk with officer to make statement).

Footnote 73. *United States v Silverstein* (CA7 Ill) 732 F2d 1338, 15 Fed Rules Evid Serv 1140, cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and cert den 469 US 1111, 83 L Ed 2d 785, 105 S Ct 792 and cert den 475 US 1124, 90 L Ed 2d 191, 106 S Ct 1647.

Footnote 74. *United States v Hemmer* (CA1 Mass) 729 F2d 10, 15 Fed Rules Evid Serv 456, cert den 467 US 1218, 81 L Ed 2d 371, 104 S Ct 2666 (contradictions in statement indicated untrustworthiness).

Footnote 75. *United States v Katsougrakis* (CA2 NY) 715 F2d 769, 13 Fed Rules Evid Serv 1852, cert den 464 US 1040, 79 L Ed 2d 169, 104 S Ct 704 (role of trial judge is to scrutinize circumstances confirming trustworthiness of statement, and not to usurp jury's function of judging witness' credibility); *United States v Atkins* (CA3 NJ) 558 F2d 133, 2 Fed Rules Evid Serv 296, cert den 434 US 929, 54 L Ed 2d 289, 98 S Ct 416 and cert den 434 US 972, 54 L Ed 2d 462, 98 S Ct 524 and cert den 434 US 1071, 55 L Ed 2d 774, 98 S Ct 1254, habeas corpus proceeding (DC NJ) 1990 US Dist LEXIS 11310 (declarant's boasting to another male outside bar near where witness was standing).

Footnote 76. *United States v Alvarez* (CA5 Tex) 584 F2d 694; *United States v Rasmussen* (CA8 Iowa) 790 F2d 55, 20 Fed Rules Evid Serv 1015 (statement excluded where witness was disabled, unemployed, and in debt to alleged declarant).

Footnote 77. *United States v Guillette* (CA2 Conn) 547 F2d 743, 1 Fed Rules Evid Serv 486, cert den 434 US 839, 54 L Ed 2d 102, 98 S Ct 132; *Lowery v Maryland* (DC Md) 401 F Supp 604, 1 Fed Rules Evid Serv 128, affd without op (CA4 Md) 532 F2d 750, cert den 429 US 919, 50 L Ed 2d 285, 97 S Ct 312 (statement by imprisoned convict made more than three years after crime to which he confessed); *United States v Bagley* (CA5 Ga) 537 F2d 162, 1 Fed Rules Evid Serv 1179, 34 ALR Fed 403, cert den 429 US 1075, 50 L Ed 2d 794, 97 S Ct 816 and (criticized on other grounds by *United States v Katsougrakis* (CA2 NY) 715 F2d 769, 13 Fed Rules Evid Serv 1852); *United States v Hardrich* (CA8 Neb) 707 F2d 992, 12 Fed Rules Evid Serv 2036, cert den 464 US 991, 78 L Ed 2d 679, 104 S Ct 481; *United States v Rhodes* (CA9 Cal) 713 F2d 463, 13 Fed Rules Evid Serv 1843, cert den 464 US 1012, 78 L Ed 2d 715, 104 S Ct 535 and cert den 465 US 1038, 79 L Ed 2d 711, 104 S Ct 1314 and (criticized on other grounds by *United States v Barry* (CA9 Cal) 814 F2d 1400, 22 Fed Rules Evid Serv 1560); *United States v Satterfield* (CA9 Or) 572 F2d 687, 3 Fed Rules Evid Serv 358, cert den 439 US 840, 58 L Ed 2d 138, 99 S Ct 128; *United States v Carlin* (CA11 Ga) 698 F2d 1133, 12 Fed Rules Evid Serv 882, reh den (CA11 Ga) 705 F2d 471 and cert den 461 US 958, 77 L Ed 2d 1317, 103 S Ct 2431; *United States v Mackin*, 183 US App DC 65, 561 F2d 958, 2 Fed Rules Evid Serv 148, cert den 434 US 959, 54 L Ed 2d 319, 98 S Ct 490 and (criticized on other grounds by *United States v Taglia* (CA7 Ill) 922 F2d 413, 136 BNA LRRM 2235, 118 CCH LC ¶ 10558) (attempted corroboration by defendants who would be exculpated by declarant's statement).

§ 793 --Statement offered to inculcate defendant

[View Entire Section](#)

Some courts state that third party declarations against interest which inculcate rather than exculpate the defendant are inadmissible, 78 and the Uniform Rules of Evidence specifically state that statements or confessions offered against the accused in a criminal case, made by a codefendant or other person implicating both himself or herself and the accused, are not within the statement against interest exception. 79 However, other courts allow the admission of statements against interest tending to inculcate the accused provided there are corroborating circumstances which clearly indicate the trustworthiness of the statement. 80 Nevertheless, there is authority that such statements must be subjected to even more exacting standards than those offered by the defendant to exculpate himself or herself in recognition of the due process protections of defendant's charged with crime including the requirement that guilt be established beyond a reasonable doubt, 81 and some courts provide that the state must present the trial court with evidence that such confessions were so trustworthy that adversarial testing would add little to their reliability. 82 While the Federal Rules of Evidence 83 expressly only require corroboration where an inculpatory statement of the declarant is offered by the defendant to exculpate himself or herself, 84 and some courts provide that corroborating circumstances are only required if the evidence is submitted to exculpate the accused, and not if it is submitted to inculcate the accused, 85 other courts require corroboration of statements inculcating both the defendant and others, since these may be of questionable reliability. 86

The trial court must find that the interest compromised is of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify. 87 This standard raises a rebuttable presumption of unreliability when the inculpatory declaration is the result of custodial questioning because, in such circumstances, the declarant is likely to have a strong motive to falsify in order to curry favor, shift blame, receive immunity from prosecution or obtain a favorable plea bargain. 88 Indeed, some authorities hold that a third party's statements against penal interest obtained during custodial interrogation should never be received in evidence to inculcate a defendant. 89 When a suspect in custody admits guilt and implicates another person in order to curry favor with the authorities, the statements made are actually self-serving. 90 Moreover, it may be an abuse of discretion to admit against a defendant as a statement against penal interest a codefendant's statement which may be part of an agreement to reduce charges and which minimizes the codefendant's participation. 91 There are a number of reasons which cast doubt on the credibility of an inculpatory statement of a confessing co-defendant who has negotiated a plea bargain, for instance, (1) the confession is custodial and therefor made under potentially coercive circumstances that could not be examined at trial; (2) the desire of the confessor to curry favor from the arresting officer; (3) the confessor's attempt to alleviate the culpability by implicating others; (4) the confessor's feelings of enmity for others in a conspiracy gone awry; (5) the confessor's desire for revenge against a third person; and (6) the confessor's ability to ultimately entertain a favorable plea agreement. 92

In any event, where evidence of another's declaration against penal interest is offered by the State as direct evidence to inculcate a defendant, the statement must be subjected to exacting standards. 93 Some courts have said that it appears likely, as a general matter, that accusatory statements in a co-defendant's confession almost never properly qualify as statements against interest, 94 and some state rules are designed to prohibit

the introduction of a statement made by a nontestifying defendant which inculpatates him or her and a co-defendant. 95 However, there is some authority that the fact that a statement of a third-party declarant inculpatates not only himself or herself but also expressly implicates the accused in a criminal conspiracy is an indication of the trustworthiness of the statement, 96 and authority that a statement implicating the declarant in a criminal conspiracy is a statement against interest within the meaning of the Federal Rules. 97

When the state seeks to introduce the declaration against penal interests of an unavailable third party to inculcate a defendant, through the testimony of an in-court witness, and the defendant claims that such evidence is unreliable, the trial court should conduct a hearing, if there is any dispute concerning the circumstances, to determine whether the criteria for admissibility are actually satisfied. 98 If the court decides to allow such evidence, it should admit only the portion of that statement which is opposed to the declarant's interests since the guarantee of reliability contained in declarations against penal interests exists only to the extent the statement is disserving to the declarant. 99 Finally, when the trial court decides to admit a declaration against penal interest through the testimony of a third party, it should give a proper limiting instruction at the time such testimony is introduced and it should instruct on the use of the evidence during its final jury charge. 1 The evaluation of reliability is a matter entrusted to the trial court, and it is only after a determination of admissibility is made that the jury may assess the credibility of the third party witness. 2

◆ Caution: The Supreme Court has held that the confession of a nontestifying codefendant that directly inculpatates another defendant is not admissible at their joint trial. 3

§ 793 --Statement offered to inculcate defendant [SUPPLEMENT]

Case authorities:

Codefendant's testimony at his change of plea hearing was statement against his penal interest admissible as tending to exculpate defendant since all his statements—that he delivered package containing LSD for air transportation, intended to take it to concert in Milwaukee and to be involved in conspiracy to distribute it—were against his penal interest, and it was clear from record that codefendant was aware of his rights, had counsel present, and voluntarily made statement to court. *United States v Nagib* (1995, CA7 Wis) 56 F3d 798.

The trial court did not err by admitting defendant's inculpatory statements in a murder case even if they were the fruit of an attorney's statement to a deputy sheriff that defendant had come into his office to turn himself in for a shooting where defendant consulted the attorney for the sole purpose of his safe surrender to the authorities, the attorney did exactly what defendant requested, and no confidential information was disclosed. Furthermore, it was not error for the trial court to admit defendant's statements even if they disclosed the substance of the attorney's remark to the deputy. *State v McIntosh* (1994) 336 NC 517, 444 SE2d 438.

Footnotes

Footnote 78. *State v Boyd*, 214 Conn 132, 570 A2d 1125, cert den (US) 121 L Ed 2d 259, 113 S Ct 344.

Footnote 79. Uniform Rules of Evidence, Rule 804(d)(3).

Footnote 80. *United States v Alvarez* (CA5 Tex) 584 F2d 694; *United States v Taggart* (CA11 Ala) 944 F2d 837, 34 Fed Rules Evid Serv 242; *State v Anderson*, 107 Wash 2d 745, 733 P2d 517.

A confession was not any less a statement against the declarant's own penal interest simply because it also implicated another. *Taylor v Commonwealth* (Ky) 821 SW2d 72.

By requiring that hearsay implicating a person other than a declarant, which may otherwise be admissible against the declarant under an exception to the hearsay rule, possess particularized guarantees of trustworthiness before it is admissible as evidence against the other person, the court insures that the confrontation clause will never become a mere rule of evidence subject to change or even elimination. *State v Cook*, 135 NH 655, 610 A2d 800.

As to the corroboration requirement, generally, see § 792.

Footnote 81. *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 82. *State v Cook*, 135 NH 655, 610 A2d 800.

Footnote 83. FRE, Rule 804(b)(3).

Footnote 84. § 792.

Footnote 85. *United States v Harty* (CA7 Ill) 930 F2d 1257, 32 Fed Rules Evid Serv 1010, cert den (US) 116 L Ed 2d 215, 112 S Ct 262.

Footnote 86. *United States v Stratton* (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562.

Footnote 87. *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 88. *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 89. *People v Brensic*, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

But see *State v Black* (Minn) 291 NW2d 208, stating that, in a first-degree murder prosecution, statements made by the defendant's coconspirator to police after her arrest and her testimony at her own trial were properly introduced into evidence at the defendant's trial as declarations against penal interest; the contention that the defendant's right to confrontation was violated was without merit where the defendant forfeited that right by intimidating the coconspirator into silence.

Footnote 90. *United States v McClendon* (WD Pa) 454 F Supp 960, 3 Fed Rules Evid Serv 366, affd without op (CA3 Pa) 601 F2d 577, cert den 444 US 952, 62 L Ed 2d 323, 100 S Ct 427; *United States v Lilley* (CA8 ND) 581 F2d 182, 3 Fed Rules Evid Serv 293; *United States v Monaco* (CA9 Cal) 735 F2d 1173, 15 Fed Rules Evid Serv 1566 (declarant appeared to be currying favor with authorities, to avoid prosecution, by minimizing his own responsibility and directing responsibility to another); *United States v Johnson*, 256 US App DC 65, 802 F2d 1459, 21 Fed Rules Evid Serv 1166.

As to self-serving statements, generally, see §§ 794 et seq.

Footnote 91. *People v Morgan* (4th Dept) 151 App Div 2d 221, 547 NYS2d 711, app gr 75 NY2d 815, 552 NYS2d 566, 551 NE2d 1244 and app dismd without op 75 NY2d 815, 552 NYS2d 566, 551 NE2d 1244 and affd 76 NY2d 493, 561 NYS2d 408, 562 NE2d 485.

In a prosecution for various drug offenses, statements made by a suspected drug dealer (while in jail awaiting trial on robbery charges) to a narcotics agent identifying his associate was not admissible as a declaration against penal interest since the declarant had a powerful incentive to minimize the damage of an almost certain criminal conviction, and thus a reasonable person in the declarant's shoes may well have made the statements even if they were not true. *United States v Magana-Olvera* (CA9 Wash) 917 F2d 401, 31 Fed Rules Evid Serv 703 (criticized on other grounds by *United States v Sassi* (CA7 Ill) 966 F2d 283).

The tape recorded statements of codefendants made in custody in response to questioning were not admissible as declarations against penal interest where the codefendants attempted to minimize their own participation in a murder and to maximize the defendant's participation. *State v Whelchel*, 115 Wash 2d 708, 801 P2d 948.

Footnote 92. *United States v Sarmiento-Perez* (CA5 Tex) 633 F2d 1092, 7 Fed Rules Evid Serv 1121, appeal after remand (CA5 Tex) 667 F2d 1239, reh den (CA5 Tex) 673 F2d 1321 and cert den 459 US 834, 74 L Ed 2d 75, 103 S Ct 77; *Dodson v Commonwealth* (Ky) 753 SW2d 548.

A confession made by a person in custody and in the context of a plea bargain is untrustworthy; even though part of the statement on its face is against the declarant's interest, the statement may actually have been made to gain advantage. *State v St. Pierre*, 111 Wash 2d 105, 759 P2d 383, later proceeding 118 Wash 2d 321, 823 P2d 492.

Footnote 93. *People v Morgan* (4th Dept) 151 App Div 2d 221, 547 NYS2d 711, app gr 75 NY2d 815, 552 NYS2d 566, 551 NE2d 1244 and app dismd without op 75 NY2d 815, 552 NYS2d 566, 551 NE2d 1244 and affd 76 NY2d 493, 561 NYS2d 408, 562 NE2d 485.

Footnote 94. *People v Watkins*, 438 Mich 627, 475 NW2d 727, cert den (US) 117 L Ed

2d 105, 112 S Ct 933, habeas corpus den (ED Mich) 784 F Supp 390, affd without op (CA6 Mich) 983 F2d 1067, reported in full (CA6) 1992 US App LEXIS 33622 and cert den (US) 123 L Ed 2d 182, 113 S Ct 1624.

Footnote 95. State v Bell, 249 NJ Super 506, 592 A2d 657.

Footnote 96. United States v Cruz (CA2 NY) 797 F2d 90, 21 Fed Rules Evid Serv 239 (criticized on other grounds by United States v Boney (App DC) 298 US App DC 149, 977 F2d 624, 36 Fed Rules Evid Serv 1358); United States v Stratton (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562; United States v Katsougrakis (CA2 NY) 715 F2d 769, 13 Fed Rules Evid Serv 1852, cert den 464 US 1040, 79 L Ed 2d 169, 104 S Ct 704; United States v Harrell (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687; United States v Monaco (CA11 Fla) 702 F2d 860, 13 Fed Rules Evid Serv 248.

As to trustworthiness, generally, see § 791.

Footnote 97. United States v Cruz (CA2 NY) 797 F2d 90, 21 Fed Rules Evid Serv 239 (criticized on other grounds by United States v Boney (App DC) 298 US App DC 149, 977 F2d 624, 36 Fed Rules Evid Serv 1358); United States v Stratton (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562; United States v Harrell (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687.

As to coconspirator statements as exceptions to the hearsay rule, see §§ 831 et seq.

Footnote 98. People v Brensic, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 99. People v Brensic, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 1. People v Brensic, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 2. People v Brensic, 70 NY2d 9, 517 NYS2d 120, 509 NE2d 1226, amd on other grounds 70 NY2d 722, 519 NYS2d 641, 513 NE2d 1302, later proceeding (2d Dept) 136 App Div 2d 169, 526 NYS2d 968.

Footnote 3. § 751.

b. Self-Serving Declarations [794, 795]

§ 794 Generally; exclusionary rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Self-serving declarations—that is, statements favorable to the interest of the declarant—are not admissible in evidence as proof of the facts asserted. 4 A self-serving declaration is a declaration made at some time and place out of court, and does not include testimony which one gives as a witness at the trial. 5 One purpose of the rule excluding self-serving declarations is to prevent the manufacture of evidence. 6 Another reason for denying a defendant the right to introduce in evidence his or her exculpatory declaration is that if the defendant were permitted to do so the defendant would be presenting his or her testimony to the jury without taking the witness stand and running the risk of impeachment on cross-examination. 7 The rule which renders self-serving statements inadmissible is the same in criminal prosecutions as in civil actions. 8

The objection to the admission of this kind of evidence is its hearsay character; 9 the phrase "self-serving" does not describe an independent ground of objection. 10 Moreover, the fact that the declarant has since died does not alter the general exclusionary rule. 11

◆ Observation: A statement may be self-serving in one respect, but contrary to another interest. In such a case, the court must balance the competing interests to determine their predominant nature and ultimately the level of trustworthiness of the statement. 12

Footnotes

Footnote 4. *Cole v Ralph*, 252 US 286, 64 L Ed 567, 40 S Ct 321, 1 USTC ¶ 32a, 3 AFTR 3051; *State v Warren*, 242 Iowa 1176, 47 NW2d 221; *Evans v Buchanan*, 183 Md 463, 38 A2d 81; *Wachovia Bank & Trust Co. v Wilder*, 255 NC 114, 120 SE2d 404; *Engemann v Colonial Trust Co.*, 378 Pa 92, 105 A2d 347, 48 ALR2d 858.

As to self-serving statements or allegations in pleadings, see §§ 774 et seq.

Footnote 5. *Toney v Raines*, 224 Ark 692, 275 SW2d 771.

The rules pertaining to self-serving declarations apply only to extrajudicial declarations. *Crowell v Montgomery* (Ala App) 581 So 2d 1130.

Footnote 6. *Gregory v Padilla* (Alaska) 379 P2d 951.

If self-serving declarations were admissible, a defendant could make exculpatory statements, and thereby create his own favorable evidence. *People v Atkins* (Colo App) 844 P2d 1196, cert den (Colo) 1993 Colo LEXIS 77.

Footnote 7. *State v Hill* (La App 3d Cir) 610 So 2d 1080.

Footnote 8. *State v Cavener*, 356 Mo 602, 202 SW2d 869.

Footnote 9. *Wirthlin v Mutual Life Ins. Co.* (CA10 Utah) 56 F2d 137, 86 ALR 138; *People v Patterson*, 154 Ill 2d 414, 182 Ill Dec 592, 610 NE2d 16, cert den (US) 126 L Ed 2d 175, 114 S Ct 219; *Worth v Worth*, 48 Wyo 441, 49 P2d 649, 103 ALR 107, related proceeding 51 Wyo 488, 68 P2d 881.

Footnote 10. *Wachovia Bank & Trust Co. v Wilder*, 255 NC 114, 120 SE2d 404.

Footnote 11. *Toney v Raines*, 224 Ark 692, 275 SW2d 771; *Truitt v Truitt's Adm'r*, 290 Ky 632, 162 SW2d 31, 140 ALR 1127; *Wachovia Bank & Trust Co. v Wilder*, 255 NC 114, 120 SE2d 404.

Footnote 12. *State v Arnold* (Tex) 778 SW2d 68, on remand (Tex App Austin) 793 SW2d 305, holding that, in a case involving the forfeiture of an automobile under the Controlled Substances Act, a person's statements that he was the owner and that the automobile was registered in his brother-in-law's name to avoid forfeiture were more accurately characterized as statements against interest than as self-serving statements, since the statements tended to expose him to the possibility of losing the automobile and subjected him to civil liability under the forfeiture provisions of the Controlled Substances Act.

As to admissibility of declarations against interest, see § 785.

§ 795 Exceptions to rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule against the admissibility of self-serving declarations has a number of exceptions. Since the real objection to self-serving statements is their hearsay character, ¹³ and since even hearsay is admissible under exceptions to the general rule of exclusion, ¹⁴ declarations may be admitted in evidence under some circumstances even though self-serving. ¹⁵

Declarations of a party favorable to himself or herself are admissible to contradict evidence previously given. ¹⁶ Declarations made in explanation of stolen property in theft cases are admissible. ¹⁷ An accused in a homicide prosecution may be allowed to show, under a plea of self-defense, that at the time of arming himself or herself, the accused made statements indicating that the purpose was self-protection. ¹⁸ Similarly, an accused in a homicide prosecution may be allowed to prove that he or she made declarations before the shooting that he or she thought the gun was unloaded, but only where the facts support a charge on the legal principle of accident. ¹⁹ In addition, there is authority that where a lay fact finder could have concluded from the state's opening statement that the defendant had confessed to the crime, but the state failed to establish that the defendant had, in fact, confessed, the defendant was entitled to introduce statements made to police officers to show that he had not confessed. ²⁰ There is also authority that in a case where the fact in issue is whether particular act was performed, a

declaration indicating a present intention to do the particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible, not as part of the res gestae but is relevant to the fact in issue, to prove that the act was in fact performed. 21

Some cases state that declarations favorable to the party who made them are admissible if made in the presence of the other party. 22 However, there is other authority stating that self-serving declarations are not rendered admissible because they were made in the presence of, or in conversation or correspondence with, the opposing party or his agent. 23

Some jurisdictions hold that a statement, oral or written, made by a party at a time when no motive to misrepresent existed, is not inadmissible as a self-serving declaration. 24

Footnotes

Footnote 13. § 794.

Footnote 14. § 659.

Footnote 15. *Worth v Worth*, 48 Wyo 441, 49 P2d 649, 103 ALR 107, related proceeding 51 Wyo 488, 68 P2d 881.

Footnote 16. *Evans v Buchanan*, 183 Md 463, 38 A2d 81.

Footnote 17. *Johnson v State*, 165 Tex Crim 468, 308 SW2d 869.

In a prosecution for felonious possession of stereo speakers stolen from a church, a witness's testimony that he was attempting to obtain the stolen speakers in order to return them to the church and that he did not intend to keep them was not excludable as a self-serving declaration. *State v Harper*, 51 NC App 493, 277 SE2d 72.

Footnote 18. *McLaughlin v State* (Ala App) 586 So 2d 267 (rule did not apply because the appellant did not claim self-defense, the evidence did not support that theory, and the jury was not instructed on that issue).

Footnote 19. *McLaughlin v State* (Ala App) 586 So 2d 267.

Footnote 20. *People v Tenny* (1st Dist) 224 Ill App 3d 53, 166 Ill Dec 445, 586 NE2d 403, app den 144 Ill 2d 641, 169 Ill Dec 149, 591 NE2d 29.

Footnote 21. *Laughlin v France* (2d Dist) 241 Ill App 3d 185, 180 Ill Dec 662, 607 NE2d 962, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336.

Footnote 22. *Yates v Yates*, 214 Ga 843, 108 SE2d 330; *Evans v Buchanan*, 183 Md 463, 38 A2d 81; *Engemann v Colonial Trust Co.*, 378 Pa 92, 105 A2d 347, 48 ALR2d 858.

Footnote 23. *Toney v Raines*, 224 Ark 692, 275 SW2d 771.

Footnote 24. *Gregory v Padilla* (Alaska) 379 P2d 951.

c. Adoptive Admissions [796-810]

(1). Overview [796-798]

§ 796 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Federal Rules of Evidence ²⁵ and the Uniform Rules of Evidence, ²⁶ a statement is "not hearsay" when offered against a party who has manifested an adoption or belief in its truth. Some states also follow the rule that adoptive admissions are an exception to hearsay. ²⁷

Generally, courts consider adoptive admissions as dangerous, to be received with caution. ²⁸ The proponent of the evidence bears the burden of proving that the conduct of the nonoffering party was an adoption of the statement. ²⁹

The adoptive admissions doctrine may be invoked not only against private parties, but against the government as well. ³⁰ However, a statement by the government to the effect that third-party competitors of a corporation named in an antitrust suit are aligned in interest in the case does not demonstrate that the government has adopted every relevant document originating in the files of such competitors, and such files may not be admitted as adoptive admissions. ³¹

Footnotes

Footnote 25. FRE, Rule 801(d)(2)(B).

The District Court did not err in admitting a tape recording of a conversation between the defendant and a police informant arranging a cocaine transaction since, under the Federal Rules of Evidence, the defendant's statements were admissible as admissions made by party, and the statements made by the informant were admissible as adoptive admissions in light of the defendant's manifestation of belief in the truth of the statements. *United States v Rollins* (CA7 Ill) 862 F2d 1282, 27 Fed Rules Evid Serv 218, cert den 490 US 1074, 104 L Ed 2d 648, 109 S Ct 2084.

Footnote 26. Uniform Rules of Evidence, Rule 801(d)(2)(ii).

Footnote 27. *Whitley v Whitley* (Mo App) 778 SW2d 233; *State v Thompson*, 332 NC 204, 420 SE2d 395.

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of its content, has by

words or other conduct manifested his adoption or his belief in its truth. *People v Fauber*, 2 Cal 4th 792, 9 Cal Rptr 2d 24, 831 P2d 249, 92 CDOS 5218, 92 Daily Journal DAR 8252, reh den (Cal) 1992 Cal LEXIS 4484 and stay gr, application den (Cal) 1992 Cal LEXIS 5978 and cert den (US) 123 L Ed 2d 272, 113 S Ct 1651.

When a defendant clearly adopts the statement of another that is inconsistent with the defendant's position at trial, that statement is admissible against the defendant as an adoptive admission. *Robinson v United States* (Dist Col App) 606 A2d 1368.

Footnote 28. *Whitley v Whitley* (Mo App) 778 SW2d 233.

Footnote 29. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *United States v Giese* (CA9 Or) 597 F2d 1170, 4 Fed Rules Evid Serv 689, cert den 444 US 979, 62 L Ed 2d 405, 100 S Ct 480 and (criticized on other grounds by *United States v Perez* (CA9 Cal) 658 F2d 654, 9 Fed Rules Evid Serv 240) as stated in *United States v Monks* (CA9 Ariz) 774 F2d 945, 19 Fed Rules Evid Serv 717.

A newspaper article reporting that the defendant insurance beneficiary related how she planned and conducted her husband's murder was properly excluded as hearsay, despite the argument that it represented the defendant's adoptive admission, since the plaintiff-insurer did not offer a foundation for the court to consider whether the defendant had ever acquiesced in the newspaper account. *New England Mut. Life Ins. Co. v Anderson* (CA10 Kan) 888 F2d 646, 28 Fed Rules Evid Serv 1516.

As to adoptions by nonverbal conduct, see §§ 805 et seq.

As to adoptions by silence, see §§ 799 et seq.

Practice References 32 Am Jur POF2d 253, Admission by conduct or silence §§ 10, 11, 39 et seq.

Footnote 30. *United States v Moore* (CA9 Cal) 522 F2d 1068, 1 Fed Rules Evid Serv 147, cert den 423 US 1049, 46 L Ed 2d 637, 96 S Ct 775; *United States v Morgan*, 189 US App DC 155, 581 F2d 933, 3 Fed Rules Evid Serv 31, 48 ALR Fed 709.

Footnote 31. *United States v American Tel. & Tel. Co.* (DC Dist Col) 516 F Supp 1237, 1981-1 CCH Trade Cases ¶ 64118, 8 Fed Rules Evid Serv 893.

§ 797 Manner of adoption

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, adoption or acquiescence may be manifested in any appropriate manner. 32 Adoptive admissions may occur when a party—

- expressly agrees to or concurs in an oral statement made by another. 33
- hears the statement and later on essentially repeats it. 34
- utters an acceptance or builds upon the assertions of another. 35
- replies by way of rebuttal to some specific points raised by another, but ignores further points which he or she has heard the other make. 36
- reads and signs a written statement prepared by another. 37

Although there is some authority that the declarant does not have to be in the physical presence of the defendant, and that the proper focus is on the declarant's ability to hear and understand the statement being made, 38 some state courts have held that where a declarant's confessions are not made in a defendant's presence, any subsequent ratification of the confessions by the defendant does not constitute an adoptive admission. 39 In addition, a request for testing or for other information does not automatically establish an adoption of statements contained within the response. 40

Nonverbal responses may be construed as an adoptive admission. 41 Under certain circumstances, an adoption of a statement by another may be found by a party's silence or failure to respond, 42 or when a party uses information supplied from an outside source. 43 No adoptive admission will be found when a party makes clear the party's disagreement with a statement made in the party's presence. 44

Under limited circumstances, an attorney's opening statements to the jury in a prior criminal trial may qualify as an adoptive admission under the Federal Rule of Evidence 45 or an authorized admission of the client retaining the attorney under the Federal Rules of Evidence 46 and be offered in a subsequent criminal trial. 47 Proof of the formal relationship between the defendant and the defendant's attorney is insufficient, alone, to establish that the prior opening statement is the equivalent of a testimonial by the defendant. 48

§ 797 ----Manner of adoption [SUPPLEMENT]

Case authorities:

There was no error in a first- degree murder prosecution where defendant's attorney admitted in his opening statement, without getting defendant's consent, that defendant was guilty of second-degree murder or voluntary manslaughter but defendant consented on the record just prior to closing arguments to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter. Defendant's consent amounted to ratification of defense counsel's earlier statement and cured any possible error. *State v Basden* (1994) 339 NC 288, 451 SE2d 238.

The trial court did not err in a first- degree murder prosecution by denying defendant's motion to suppress a statement to police and a knife obtained as a result thereof where defendant made no statement until he had been advised of his Miranda rights and had signed a Miranda rights waiver form; he responded affirmatively when he was asked if he understood his rights and wished to waive them; he was not restrained in any way, and

the interrogation was conducted in an unlocked office; officers' weapons were never removed from their holsters in the presence of defendant or used to threaten him; defendant did not appear to be sleepy or under the influence of drugs or alcohol during the interrogation; he appeared to be calm, alert, and oriented, did not appear to be frightened, and was able to converse freely with the officers; an officer testified that he engaged defendant in casual conversation to develop rapport, denied threatening defendant or making any promises to induce defendant's inculpatory statement, denied ever telling defendant that defendant needed to make a statement to save his life or avoid the death penalty, and denied telling defendant that he probably saved his life by confessing; another officer testified that he was present when defendant was read his Miranda rights and signed the waiver form; that defendant was oriented, did not smell of alcohol, and did not appear to be physically or mentally impaired; that he had engaged defendant in general conversation to develop rapport with defendant; denied threatening defendant in any way or making any promises to induce defendant's inculpatory statement; denied that defendant had been told to confess or else he would face the death penalty; and denied that defendant was told that he had probably just saved his own life by confessing; another officer testified that when defendant was arrested at his home in the early morning hours of 28 May 1992 before being taken to the police station, he was awake, oriented, and coherent; defendant's speech was not slurred, and he did not appear to be under the influence of alcohol. Upon a review of the totality of the circumstances, it is clear that defendant was not coerced or threatened into confessing his participation in this murder; and the trial court did not err in concluding that defendant freely, knowingly, and intelligently waived his Miranda rights and that defendant's inculpatory statement to the police was given voluntarily. *State v Knight* (1995) 340 NC 531, 459 SE2d 481.

Footnotes

Footnote 32. *State v Thompson*, 332 NC 204, 420 SE2d 395.

Footnote 33. *United States v Costanzo* (CA2 NY) 581 F2d 28, 78-2 USTC ¶ 9575, 3 Fed Rules Evid Serv 1085, 42 AFTR 2d 78-5367, cert den 439 US 1067, 59 L Ed 2d 32, 99 S Ct 833; *United States v Young* (CA7 Ind) 814 F2d 392, 22 Fed Rules Evid Serv 940, cert den 484 US 838, 98 L Ed 2d 79, 108 S Ct 121; *United States v Handy* (CA8 Mo) 668 F2d 407, 9 Fed Rules Evid Serv 1210; *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767 (adopts or acquiesces in the statement of another).

In the case of a defendant convicted of robbery, the incriminating statement of a third person which the accused had admitted to be true was admissible in evidence against him as his own statement by adoption. *State v Greer*, 202 Kan 212, 447 P2d 837.

A defendant's confession, made both after arrest and outside the presence of a codefendant, which was verbally assented to by the codefendant after being repeated in his presence was admissible against both defendants. *State v Page*, 251 La 810, 206 So 2d 503.

Annotation: Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested his adoption or belief in its truth, 48 ALR Fed 721.

Footnote 34. *United States v Weaver* (CA8 Ark) 565 F2d 129, 2 Fed Rules Evid Serv

765, cert den 434 US 1074, 55 L Ed 2d 780, 98 S Ct 1263.

Footnote 35. *United States v Di Giovanni* (CA2 NY) 544 F2d 642, 1 Fed Rules Evid Serv 417; *United States v Smith* (CA8 Neb) 600 F2d 149; *United States v Coppola* (CA10 Kan) 526 F2d 764; *United States v Bolden*, 169 US App DC 60, 514 F2d 1301.

Footnote 36. *United States v King* (CA2 NY) 560 F2d 122, 2 Fed Rules Evid Serv 1121, cert den 434 US 925, 54 L Ed 2d 283, 98 S Ct 404 (failure of corporation president to respond to statement at directors' meeting that certain company property had been sold at below-market price).

Footnote 37. *United States v Johnson* (CA8 Mo) 529 F2d 581, cert den 426 US 909, 48 L Ed 2d 835, 96 S Ct 2233.

A seaman's signature on a sea service record was an unequivocal adoption of its contents, even though it was likely that the record, which is required by a Coast Guard regulation for seamen serving on merchant ships, had been prepared by a shipping company employee on the seaman's behalf. *McQueeney v Wilmington Trust Co.* (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1.

Footnote 38. *State v Thompson*, 332 NC 204, 420 SE2d 395.

Footnote 39. *State v Cook*, 135 NH 655, 610 A2d 800.

Footnote 40. *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

Footnote 41. *United States v Wiseman* (CA1 Mass) 814 F2d 826, 22 Fed Rules Evid Serv 1366; *Wickliffe v Duckworth* (ND Ind) 574 F Supp 979, 15 Fed Rules Evid Serv 647 (defendant's adoption of statements made during the declarant's bragging about events that resulted in the death of the victim was demonstrated by laughing along with the declarant, slapping hands with the declarant, and nodding at particular points); *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304; *United States v Champion* (CA11 Fla) 813 F2d 1154, 22 Fed Rules Evid Serv 1399.

Annotation: Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Footnote 42. As to admissions by silence, see § 799.

As to adoption by failure to respond to an averment in a pleading, see § 774.

Footnote 43. § 806.

Footnote 44. *United States v Lilley* (CA8 ND) 581 F2d 182, 3 Fed Rules Evid Serv 293 (written response of party contradicting accusatory statements).

Footnote 45. FRE, Rule 801(d)(2)(B).

Footnote 46. § 812.

Footnote 47. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409 (in a prior criminal trial, counsel argued in his opening statement to the jury that expert testimony would show the defendant's wife had not copied the false documents in question, whereas in the subsequent trial, counsel suggested in an opening argument that the wife had copied the documents at the request of her husband).

Footnote 48. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

§ 798 Determination by court or jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When resolving the preliminary questions for an adoptive admission, it is appropriate for the trial judge to conduct a hearing outside the presence of the jury. 49 In determining whether there has been an adoption of a statement, it is appropriate to examine the surrounding circumstances, and the nature of the underlying statement itself. 50 The failure of the trial judge to make express findings as to the foundational facts for adoptive admissions will not render the admission improper, where it appears from the record that the trial judge was concerned with the nature of the statements, and whether the party against whom the statement was offered had the ability to hear and understand. 51 The determination as to whether the accused heard and adopted the statement is a duty shared by the judge and jury. 52

Footnotes

Footnote 49. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409; *United States v Kilbourne* (CA4 Md) 559 F2d 1263, cert den 434 US 873, 54 L Ed 2d 152, 98 S Ct 220.

Footnote 50. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 51. *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (criticized on other grounds by *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063).

Footnote 52. *SEC v Geon Industries, Inc.* (CA2 NY) 531 F2d 39, CCH Fed Secur L Rep ¶ 95441.

(2). Adoption by Silence [799-804]

(a). In General [799-801]

§ 799 Oral communications

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In many jurisdictions, if a statement is made in the presence of a person in regard to facts affecting his or her rights and the person makes no reply, such silence may be construed as a tacit admission of the facts stated. 53 However, the uncertainty which attends interpreting a person's silence as an implied admission of the statement made has led the courts to consider such evidence as dangerous and to be received with caution, 54 and some jurisdictions do not allow tacit admissions. 55

Generally, a party's mere listening presence is not enough. 56 In admitting such evidence, it must be established that: (1) the party heard the statement; 57 (2) the matter asserted was within the party's knowledge, 58 or understanding, 59 (3) the individual was at liberty to deny the statement or reply to it; 60 and (4) the statement was of such a nature, 61 made under such circumstances, 62 and by such persons, 63 as naturally to call for a reply.

Depending on the circumstances, silence in the face of an accusation may be found to constitute, 64 or not to constitute 65 an admission. Whether the circumstances surrounding the making of the statement were such as to naturally call for a denial is a preliminary question for the trial court, to be determined in view of all the evidence in the case. 66 The trial court's decision, of course, does not determine finally whether or not the person's silence was an admission of the truth of the statement, but only whether a sufficient prima facie showing has been made to warrant the jury considering it in the light of all the circumstances. 67 Some courts state that, where the evidence leaves the matter in doubt, it is the jury's province to determine whether the remarks were heard and understood and to draw inferences from the person's silence. 68

The doctrine of assent by silence does not ordinarily apply to statements made in the course of judicial proceedings, 69 because it is not the right or duty of a party to interrupt the order of proceedings by denials or contradictions, and silence cannot, therefore, under such circumstances, be deemed an admission. 70

Footnotes

Footnote 53. *Casey v Burns* (2d Dist) 7 Ill App 2d 316, 129 NE2d 440, 54 ALR2d 1060; *Miller v Dyess*, 137 Tex 135, 151 SW2d 186, 137 ALR 578, cert den 314 US 691, 86 L Ed 553, 62 S Ct 360; *Tillman v Commonwealth*, 185 Va 46, 37 SE2d 768; *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State v Rivas*, 49 Wash App 677, 746 P2d 312).

As to failure to reply to oral statements incriminating one of a crime, see § 802.

Law Reviews: Schaitkin, "Negative Hearsay"—The Sounds of Silence. 84 Dick L Rev 605 (Summer 1980).

Practice References Proof of admission by failure to reply to oral statement. 1 Am Jur Proof of Facts 161, Admissions, Proof 1.

32 Am Jur POF2d 253, Admission by conduct or silence.

Footnote 54. State v Garcia, 83 NJ Super 345, 199 A2d 860.

Evidence of a party's silence must be received with caution because tacit admissions may be inferred only when the silence is improper or unnatural. State v Ludvigson (Iowa) 482 NW2d 419 (where a defendant sought to expose officials' silence as evidence of their conviction of his innocence).

Implied admissions are received with great caution. FCX, Inc. v Caudill, 85 NC App 272, 354 SE2d 767.

Footnote 55. Ex parte Marek (Ala) 556 So 2d 375, on remand (Ala App) 556 So 2d 383, holding the tacit admission rule abolished, both as to pre-arrest and post-arrest situations.

Footnote 56. United States v Lam Lek Chong (CA2 NY) 544 F2d 58, 2 Fed Rules Evid Serv 1102, cert den 429 US 1101, 51 L Ed 2d 550, 97 S Ct 1124.

Footnote 57. Wickliffe v Duckworth (ND Ind) 574 F Supp 979, 15 Fed Rules Evid Serv 647; United States v Monks (CA9 Ariz) 774 F2d 945, 19 Fed Rules Evid Serv 717; United States v Carter (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (criticized on other grounds by United States v Manganellis (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063); Whitley v Whitley (Mo App) 778 SW2d 233 (the statement was made in the presence and hearing of the party); State v Garcia, 83 NJ Super 345, 199 A2d 860; FCX, Inc. v Caudill, 85 NC App 272, 354 SE2d 767; Tillman v Commonwealth, 185 Va 46, 37 SE2d 768; Beck v Dye, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in State v Rivas, 49 Wash App 677, 746 P2d 312).

Footnote 58. United States v King (CA2 NY) 560 F2d 122, 2 Fed Rules Evid Serv 1121, cert den 434 US 925, 54 L Ed 2d 283, 98 S Ct 404; White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; United States v Sears (CA9 Cal) 663 F2d 896, 9 Fed Rules Evid Serv 988, cert den 455 US 1027, 72 L Ed 2d 148, 102 S Ct 1731; FCX, Inc. v Caudill, 85 NC App 272, 354 SE2d 767 (first-hand knowledge).

◆ Observation: Requiring that the factual matter in a written or verbal communication be within the nonoffering party's personal knowledge for purposes of establishing an admission by silence or nonresponse is not inconsistent with the general dispensation of the personal knowledge requirement in FRE, Rule 801, since it is considered unreasonable to expect a party to deny a matter of which the party is unaware. White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct

Footnote 59. *United States v Monks* (CA9 Ariz) 774 F2d 945, 19 Fed Rules Evid Serv 717; *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (criticized on other grounds by *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063).

Footnote 60. *State v Garcia*, 83 NJ Super 345, 199 A2d 860; *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State v Rivas*, 49 Wash App 677, 746 P2d 312).

Footnote 61. *United States v Flecha* (CA2 NY) 539 F2d 874, 1 Fed Rules Evid Serv 250; *Wickliffe v Duckworth* (ND Ind) 574 F Supp 979, 15 Fed Rules Evid Serv 647; *United States v Monks* (CA9 Ariz) 774 F2d 945, 19 Fed Rules Evid Serv 717; *United States v Sears* (CA9 Cal) 663 F2d 896, 9 Fed Rules Evid Serv 988, cert den 455 US 1027, 72 L Ed 2d 148, 102 S Ct 1731; *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (criticized on other grounds by *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063); *Whitley v Whitley* (Mo App) 778 SW2d 233 (statement would naturally call for a reply).

Footnote 62. *State v Garcia*, 83 NJ Super 345, 199 A2d 860; *Klever v Elliott*, 212 Or 490, 320 P2d 263, 70 ALR2d 1094; *Tillman v Commonwealth*, 185 Va 46, 37 SE2d 768; *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State v Rivas*, 49 Wash App 677, 746 P2d 312); *Smith v Beard*, 56 Wyo 375, 110 P2d 260.

Footnote 63. *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State v Rivas*, 49 Wash App 677, 746 P2d 312); *Smith v Beard*, 56 Wyo 375, 110 P2d 260.

Footnote 64. *United States v Williams* (CA2 NY) 577 F2d 188, 3 Fed Rules Evid Serv 921, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196 and (criticized on other grounds by *United States v Burkett* (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802) (assurance from coconspirator that accused was not yet implicated in conspiracy); *United States v Kilbourne* (CA4 Md) 559 F2d 1263, cert den 434 US 873, 54 L Ed 2d 152, 98 S Ct 220 (statement by friend pointing out discrepancy in accused's protestations of innocence); *United States v Hoosier* (CA6 Tenn) 542 F2d 687, 1 Fed Rules Evid Serv 1201 (girlfriend's reference to sacks of money in hotel after bank robbery); *United States v Monks* (CA9 Ariz) 774 F2d 945, 19 Fed Rules Evid Serv 717.

Footnote 65. *United States v Lam Lek Chong* (CA2 NY) 544 F2d 58, 2 Fed Rules Evid Serv 1102, cert den 429 US 1101, 51 L Ed 2d 550, 97 S Ct 1124; *United States v Flecha* (CA2 NY) 539 F2d 874, 1 Fed Rules Evid Serv 250 (post-arrest statement by alleged co-offender observing that he and accused had been "caught"); *United States v Moore* (CA9 Cal) 522 F2d 1068, 1 Fed Rules Evid Serv 147, cert den 423 US 1049, 46 L Ed 2d 637, 96 S Ct 775.

Footnote 66. *Klever v Elliott*, 212 Or 490, 320 P2d 263, 70 ALR2d 1094.

Footnote 67. *Klever v Elliott*, 212 Or 490, 320 P2d 263, 70 ALR2d 1094.

Footnote 68. *State v Thompson*, 332 NC 204, 420 SE2d 395.

Footnote 69. *Whitley v Whitley* (Mo App) 778 SW2d 233; *State v Garcia*, 83 NJ Super 345, 199 A2d 860.

Footnote 70. *State v Garcia*, 83 NJ Super 345, 199 A2d 860.

§ 800 --Particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The doctrine of assenting silence or tacit admission has been recognized with respect to the silence of a party to civil litigation after a statement has been made in his or her presence regarding the circumstances of an accident involved in such litigation. 71 As in the case of tacit admissions generally, a basic prerequisite to the admissibility of another's statement concerning an accident as against a party who failed to deny or contradict it is the requirement that it was actually heard and understood by such party, 72 and that it was made under such circumstances as to naturally call for a reply. 73

In addition, when a statement is made in the party's listening presence, the silence of a party has been found to constitute an admission when—

—a coconspirator states to other conspirators that the party will be taking over the unlawful enterprise. 74

—a codefendant brags of committing a murder and describes the events leading up to the death. 75

—third parties sit in the defendant's home and plan an arson. 76

Footnotes

Footnote 71. *Rooker v Checker Cab Co.* (La App 4th Cir) 145 So 2d 631; *Klever v Elliott*, 212 Or 490, 320 P2d 263, 70 ALR2d 1094; *Ross v Hayes*, 176 Or 225, 157 P2d 517, 158 ALR 452; *Burton v Horn & Hardart Baking Co.*, 371 Pa 60, 88 A2d 873, 63 ALR2d 731; *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State v Rivas*, 49 Wash App 677, 746 P2d 312).

Annotation: Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 ALR2d 1099.

Footnote 72. *Southers v Savage* (1st Dist) 191 Cal App 2d 100, 12 Cal Rptr 470.

Footnote 73. *Klever v Elliott*, 212 Or 490, 320 P2d 263, 70 ALR2d 1094; *Burton v Horn & Hardart Baking Co.*, 371 Pa 60, 88 A2d 873, 63 ALR2d 731; *Beck v Dye*, 200 Wash 1, 92 P2d 1113, 127 ALR 1022 (superseded by statute on other grounds as stated in *State*

v Rivas, 49 Wash App 677, 746 P2d 312).

In an action against a restaurant proprietor for bodily injuries sustained by a patron who slipped on interior steps which were slightly wet due to a recent washing, evidence of what was said shortly after the accident to the restaurant manager by a daughter of the injured person was not admissible on the ground of the manager's admission by his failure to answer the daughter, since the manager's silence may well have been motivated by a desire to avoid a dispute. *Burton v Horn & Hardart Baking Co.*, 371 Pa 60, 88 A2d 873, 63 ALR2d 731.

Footnote 74. *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906).

As to the coconspirator exception to the hearsay rule, generally, see §§ 831 et seq.

Footnote 75. *Wickliffe v Duckworth* (ND Ind) 574 F Supp 979, 15 Fed Rules Evid Serv 647.

Footnote 76. *United States v Manzella* (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457.

§ 801 Written communications

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As with verbal statements, 77 there must be an affirmative showing that a party's silence or nonresponse to a written document constitutes an adoption of the document. 78 If a written statement is handed to a party and read by the party in the presence of others, the party's failure to deny assertions contained in it, when under the circumstances it would be natural for the party to deny them if he or she did not acquiesce, may be received as an admission. 79

Proof that a document was received is insufficient, alone, to establish an adoption of the information contained in it. 80 Although a contrary position has been upheld, 81 mere possession of a written document does not necessarily constitute an adoption of the contents. 82 The failure to respond to a letter does not indicate an adoption unless it is reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions. 83 Consequently, some jurisdictions state that, where two parties have carried on correspondence in reference to a particular subject and one of the parties has written a letter to the other making statements concerning a subject, of which the other party has knowledge, and which he or she would naturally deny if not true, and the party fails to answer such letter, the omission is evidence tending to show that the statements in the letter are true. 84 However, the failure to reply to statements made in a letter which is not part of a mutual correspondence is not considered an implied admission of the truth of statements made. 85 Moreover, a self-serving declaration in an unanswered letter generally is not treated as admitted merely because

the letter was not answered. 86 At least this is so where the dispute is whether a contract was made between the parties, and an attempt is made to fix an admission by the adversary upon a failure to answer such a claim in a letter. 87

Footnotes

Footnote 77. § 799.

Footnote 78. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

As to adoption by failure to respond to an averment in a pleading, see § 774.

Footnote 79. *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

Footnote 80. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 81. *United States v Marino* (CA6 Mich) 658 F2d 1120, 8 Fed Rules Evid Serv 1386 (criticized on other grounds by *United States v Jefferson* (CA10 Wyo) 925 F2d 1242, 32 Fed Rules Evid Serv 916) (in an action for conspiracy to import cocaine, the possession of airline tickets, telephone numbers, documents from a foreign bank, and an air freight bill constituted an adoptive admission).

Footnote 82. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *United States v Mouzin* (CA9 Cal) 785 F2d 682, 20 Fed Rules Evid Serv 390, cert den 479 US 985, 93 L Ed 2d 577, 107 S Ct 574 and (criticized on other grounds by *United States v Bucey* (CA7 Ill) 876 F2d 1297) and (criticized on other grounds by *United States v McGlory* (CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124) and (criticized on other grounds by *United States v Breitzkreutz* (CA6 Tenn) 977 F2d 214, 36 Fed Rules Evid Serv 1072) and (criticized on other grounds by *United States v Hoac* (CA9 Cal) 990 F2d 1099, 93 CDOS 2196, 93 Daily Journal DAR 3855, 37 Fed Rules Evid Serv 558); *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

In many cases, the mere possession of a bill in no way constitutes an adoption of its contents. *United States v Jefferson* (CA10 Wyo) 925 F2d 1242, 32 Fed Rules Evid Serv 916, supp op (CA10 Wyo) 931 F2d 1396, cert den (US) 116 L Ed 2d 194, 112 S Ct 238, 112 S Ct 239.

Footnote 83. *Southern Stone Co. v Singer* (CA5 Ga) 665 F2d 698, 9 Fed Rules Evid Serv 1239.

Footnote 84. *Western Union Tel. Co. v Nix*, 73 Ga App 184, 36 SE2d 111.

Practice References Proof of admission by failure to answer written statement. 1 Am Jur Proof of Facts 161, Admissions, Proof 2.

32 Am Jur POF2d 253, Admission by conduct or silence.

Footnote 85. *Leach & Co. v Peirson*, 275 US 120, 72 L Ed 194, 48 S Ct 57, 55 ALR 457; *Western Union Tel. Co. v Nix*, 73 Ga App 184, 36 SE2d 111; *St. Joseph Lead Co. v Fuhrmeister*, 353 Mo 232, 182 SW2d 273; *Fentron Architectural Metals Corp. v Romagnino*, 69 NJ Super 410, 174 A2d 491, cert den 36 NJ 297, 177 A2d 341; *Commonwealth v Fusci*, 153 Pa Super 617, 35 A2d 93; *Stusser v Gottstein*, 178 Wash 360, 35 P2d 5.

Footnote 86. *Fidelity & Casualty Co. v Beeland Bros. Mercantile Co.*, 242 Ala 591, 7 So 2d 265; *State v Yurkiewicz*, 212 Minn 208, 3 NW2d 775.

One cannot make evidence for himself by writing a letter containing the statements that he wishes to prove, and he does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. *Leach & Co. v Peirson*, 275 US 120, 72 L Ed 194, 48 S Ct 57, 55 ALR 457.

As to self-serving declarations, generally, see §§ 794 et seq.

Footnote 87. *Fidelity & Casualty Co. v Beeland Bros. Mercantile Co.*, 242 Ala 591, 7 So 2d 265.

(b). Incriminating Accusations [802-804]

§ 802 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although some authority exists to the contrary, 88 as a general rule, when a statement tending to incriminate one accused of committing a crime is made in his or her presence and such statement is not denied, contradicted, or objected to by such person, both the statement and the fact of the failure to deny it are admissible in a criminal prosecution against the person, as evidence of acquiescence to its truth, 89 that is, as a tacit admission of the facts stated 90 or as indicative of a consciousness of guilt, 91 provided that the circumstances do not lend themselves to an inference that the accused was relying on the right to silence guaranteed by the Fifth Amendment. 92 The theory underlying this rule is that the natural reaction of an innocent person to an untrue accusation is to enter a prompt denial. 93 Consequently, some courts provide that the rule that an admission is implied from the failure of an accused to deny incriminating statements made in his or her presence and hearing does not apply to written statements 94 since a person would be likely to ignore such a communication if false in its statements of fact or unsound in its advice, as unworthy of serious consideration. 95 The

general rule also does not apply to admissions made in postarrest situations. 96

The uncertainty which attends interpreting an accused's silence as an implied admission of the statement made, or as exhibiting a consciousness of guilt, has led courts to consider such evidence as dangerous and to be received with caution. 97 Recognizing that at its best, the doctrine of assenting silence brings about the weakest assumption known to the law, the courts generally have imposed conditions upon the introduction of evidence that an alleged admission by silence has occurred. 98 Accordingly, one seeking to introduce evidence that an alleged admission by silence has occurred has been required to prove that:

- (1) the statement was extrajudicial; 99
- (2) it was incriminatory or accusative in import; 1
- (3) it was one to which an innocent person would in the situation and surrounding circumstances naturally respond; 2
- (4) it was uttered in the presence and hearing of the accused, 3 or the accused heard it; 4
- (5) the accused was capable of understanding the incriminatory meaning of the statement; 5
- (6) the accused had sufficient knowledge to reply to the statement; 6
- (7) the accused had an opportunity to reply; 7 and
- (8) he or she was at liberty to deny it or reply to it. 8

For the adoptive admission exception to apply, however, a direct accusation in so many words is not essential. 9

Under the adoptive admission exception to the rule against hearsay, a declarant's accusatory or incriminating statements are not admitted to prove the truth of matters asserted. 10 Such statements are admissible because they lay the foundation to show that the defendant acquiesced or admitted to the statement. 11 An adoptive admission avoids the confrontation problem because the words of the hearsay become the words of the defendant. 12

Failure to object or deny a co-defendant's statements at the time they were made is especially probative of the defendant's acquiescence if they are made in the presence of a third party who was not an accomplice in the crime. 13

◆ Observation: Although it is clear that there is no ground for invoking the doctrine of tacit admissions where an incriminatory statement is made in the presence of the accused and he or she denies it, 14 an evasive answer is another matter. An evasive answer, or one unresponsive to the statement made to the accused, may be tantamount to absolute silence, and both the statement and the unresponsive answer are admissible under the rule as to tacit admissions. 15

§ 802 ----Generally [SUPPLEMENT]**Case authorities:**

Response of defendant charged with structuring currency transactions to avoid reporting requirements, that he would have to research his records before responding to request to explain checks in question, was not admission by silence, since questioning by agent of state attorney general's office did not constitute accusation that defendant himself had committed crime of structuring to which he could have acquiesced. *United States v Hove* (1995, CA9 Cal) 52 F3d 233, 95 CDOS 2475.

In prosecution for murder, robbery, and armed criminal action, testimony of witness that husband told her in presence of defendant that he had accidentally shot victim and hoped she did not die was properly admitted under tacit admission rule where defendant was silent after husband made statement, then husband told defendant to unload gun, which defendant pulled from under shirt and unloaded, then divided approximately \$300 with husband. *State v Gibbs* (1994, Mo App) 875 SW2d 159.

The trial court in a capital resentencing hearing erred by permitting the State to elicit testimony from an SBI agent that, during interrogation after defendant had been advised of his Miranda rights and had been informed that he was under arrest, defendant had remained silent when faced with the agent's accusation that he murdered the victim, since this testimony amounted to an impermissible reference to defendant's exercise of his right to silence. The trial court also erred by permitting the State to cross-examine defendant about his silence in the face of the SBI agent's accusation of murder since this questioning allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence. *State v Quick* (1994) 337 NC 359, 446 SE2d 535.

Footnotes

Footnote 88. *Commonwealth v Dravec*, 424 Pa 582, 227 A2d 904, rejecting general rule on practical and constitutional grounds.

Evidential use of tacit admissions by an accused offends the proscription included in the Fifth Amendment against self-incrimination and is therefore no longer permissible in criminal trials. *State v Kelsey* (Iowa) 201 NW2d 921.

Footnote 89. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Egan v United States* (CA8 Mo) 137 F2d 369, cert den 320 US 788, 88 L Ed 474, 64 S Ct 195; *Simons v United States* (CA9 Wash) 119 F2d 539, cert den 314 US 616, 86 L Ed 496, 62 S Ct 78; *People v Fauber*, 2 Cal 4th 792, 9 Cal Rptr 2d 24, 831 P2d 249, 92 CDOS 5218, 92 Daily Journal DAR 8252, reh den (Cal) 1992 Cal LEXIS 4484 and stay gr, application den (Cal) 1992 Cal LEXIS 5978 and cert den (US) 123 L Ed 2d 272, 113 S Ct 1651; *State v Hoffman*, 73 Hawaii 41, 828 P2d 805; *People v Chaten*, 32 Ill 2d 416, 206 NE2d 697; *People v Goswami* (3d Dist) 237 Ill App 3d 532, 178 Ill Dec 497, 604 NE2d 1020; *State v Miles*, 191 Kan 457, 382 P2d 307; *Ewell v State*, 228 Md 615, 180 A2d 857; *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790; *Henry v State* (Miss) 209 So 2d 614; *Skidmore v State*, 59

Nev 320, 92 P2d 979; Commonwealth v Dodson, 174 Pa Super 421, 101 A2d 411; Knight v Commonwealth, 196 Va 433, 83 SE2d 738.

A narcotics defendant's silence during his sister's statement that she made entries in a ledger at the defendant's direction was properly admitted as an adoptive admission where the defendant conceded that he was not in custody at time and he had previously told police officers that his sister had made the entries. United States v Schaff (CA9 Or) 948 F2d 501, 91 CDOS 8470, 91 Daily Journal DAR 13102, 34 Fed Rules Evid Serv 448.

Where a statement accusing a defendant of a crime has been made and he has remained silent or given an equivocally evasive reply, the evidence of the statement and his conduct is admissible in evidence. People v Hicks (1st Dist) 128 Cal App 3d 423, 180 Cal Rptr 391.

Practice References 32 Am Jur POF2d 253, Admission by conduct or silence.

Footnote 90. Fausett v State, 219 Ind 500, 39 NE2d 728; Commonwealth v Burke, 339 Mass 521, 159 NE2d 856, 77 ALR2d 451 (disapproved on other grounds by Malloy v Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) as stated in Commonwealth v Brennan, 386 Mass 772, 438 NE2d 60 and (ovrld on other grounds by Commonwealth v Beldotti, 409 Mass 553, 567 NE2d 1219); Thurmond v State, 212 Miss 36, 53 So 2d 44; State v Garcia, 83 NJ Super 345, 199 A2d 860.

Practice References –Proof of admission by failure to reply to oral accusation. 1 Am Jur Proof of Facts 161, Admissions, Proof 1.

Footnote 91. People v Simmons, 28 Cal 2d 699, 172 P2d 18; State v Garcia, 83 NJ Super 345, 199 A2d 860.

Footnote 92. People v Fauber, 2 Cal 4th 792, 9 Cal Rptr 2d 24, 831 P2d 249, 92 CDOS 5218, 92 Daily Journal DAR 8252, reh den (Cal) 1992 Cal LEXIS 4484 and stay gr, application den (Cal) 1992 Cal LEXIS 5978 and cert den (US) 123 L Ed 2d 272, 113 S Ct 1651.

As to the right against self-incrimination, generally, see 21A Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq.; 81 Am Jur 2d, Witnesses §§ 80 et seq.

Footnote 93. People v Simmons, 28 Cal 2d 699, 172 P2d 18; Knight v Commonwealth, 196 Va 433, 83 SE2d 738.

Footnote 94. State v Yurkiewicz, 212 Minn 208, 3 NW2d 775; Commonwealth v Fusci, 153 Pa Super 617, 35 A2d 93.

Footnote 95. Commonwealth v Fusci, 153 Pa Super 617, 35 A2d 93.

Footnote 96. § 803.

Footnote 97. People v Simmons, 28 Cal 2d 699, 172 P2d 18; State v Garcia, 83 NJ Super 345, 199 A2d 860; State v Guffey, 261 NC 322, 134 SE2d 619; Plymale v Commonwealth, 195 Va 582, 79 SE2d 610 (ovrld on other grounds by Wooden v Commonwealth, 208 Va 629, 159 SE2d 623) and (ovrld on other grounds by Watkins v

Commonwealth, 238 Va 341, 385 SE2d 50).

A trial court should be most reluctant to credit mere silence, inherently ambiguous, as conduct sufficient for adoption of an inculpatory statement. *State v Hoffman*, 73 Hawaii 41, 828 P2d 805.

Footnote 98. *State v Garcia*, 83 NJ Super 345, 199 A2d 860.

Footnote 99. *State v Garcia*, 83 NJ Super 345, 199 A2d 860.

Footnote 1. *State v Garcia*, 83 NJ Super 345, 199 A2d 860; *State v Guffey*, 261 NC 322, 134 SE2d 619.

Footnote 2. *People v McFarland*, 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449 (superseded on other grounds by statute as stated in *People v Burns* (1st Dist) 157 Cal App 3d 185, 203 Cal Rptr 594) and (among conflicting authorities on other grounds noted in *People v Thompson* (5th Dist) 209 Cal App 3d 1075, 257 Cal Rptr 658); *State v Hoffman*, 73 Hawaii 41, 828 P2d 805; *People v Goswami* (3d Dist) 237 Ill App 3d 532, 178 Ill Dec 497, 604 NE2d 1020 (natural reaction of an innocent person would be to deny it); *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790; *Thurmond v State*, 212 Miss 36, 53 So 2d 44; *State v Garcia*, 83 NJ Super 345, 199 A2d 860; *State v Guffey*, 261 NC 322, 134 SE2d 619; *Dykeman v Commonwealth*, 201 Va 807, 113 SE2d 867.

Footnote 3. *Commonwealth v Burke*, 339 Mass 521, 159 NE2d 856, 77 ALR2d 451 (disapproved on other grounds by *Malloy v Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) as stated in *Commonwealth v Brennan*, 386 Mass 772, 438 NE2d 60 and (ovrld on other grounds by *Commonwealth v Beldotti*, 409 Mass 553, 567 NE2d 1219); *State v Guffey*, 261 NC 322, 134 SE2d 619.

Footnote 4. *People v Goswami* (3d Dist) 237 Ill App 3d 532, 178 Ill Dec 497, 604 NE2d 1020 (it is an element for admission that the defendant heard the accusative statement); *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790.

Footnote 5. *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790 (a requirement is that the defendant understood the statement); *State v Guffey*, 261 NC 322, 134 SE2d 619.

Footnote 6. *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790; *Commonwealth v Sindel*, 205 Pa Super 355, 208 A2d 894.

Footnote 7. *People v Goswami* (3d Dist) 237 Ill App 3d 532, 178 Ill Dec 497, 604 NE2d 1020.

Footnote 8. *Knight v Commonwealth*, 196 Va 433, 83 SE2d 738.

Footnote 9. *People v Fauber*, 2 Cal 4th 792, 9 Cal Rptr 2d 24, 831 P2d 249, 92 CDOS 5218, 92 Daily Journal DAR 8252, reh den (Cal) 1992 Cal LEXIS 4484 and stay gr, application den (Cal) 1992 Cal LEXIS 5978 and cert den (US) 123 L Ed 2d 272, 113 S Ct 1651.

Footnote 10. *State v Hoffman*, 73 Hawaii 41, 828 P2d 805.

Footnote 11. *State v Hoffman*, 73 Hawaii 41, 828 P2d 805.

Footnote 12. *State v Hoffman*, 73 Hawaii 41, 828 P2d 805.

As to confrontation of witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

Footnote 13. *Robinson v United States* (Dist Col App) 606 A2d 1368.

Footnote 14. *Ledet v United States* (CA5 Tex) 297 F2d 737; *People v Simmons*, 28 Cal 2d 699, 172 P2d 18.

Footnote 15. *People v Fauber*, 2 Cal 4th 792, 9 Cal Rptr 2d 24, 831 P2d 249, 92 CDOS 5218, 92 Daily Journal DAR 8252, reh den (Cal) 1992 Cal LEXIS 4484 and stay gr, application den (Cal) 1992 Cal LEXIS 5978 and cert den (US) 123 L Ed 2d 272, 113 S Ct 1651; *Commonwealth v Burke*, 339 Mass 521, 159 NE2d 856, 77 ALR2d 451 (disapproved on other grounds by *Malloy v Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489) as stated in *Commonwealth v Brennan*, 386 Mass 772, 438 NE2d 60 and (ovrld on other grounds by *Commonwealth v Beldotti*, 409 Mass 553, 567 NE2d 1219).

§ 803 Where accused is under arrest or in custody

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

No admission by silence may be inferred if a statement is made after the accused has been placed under arrest, after the police have read the accused Miranda rights, or after the accused has been so significantly deprived of his or her freedom that the accused is, in effect, in police custody. 16 When the accused stands mute or claims the privilege against self-incrimination while undergoing custodial interrogation, the Constitution precludes the use at trial of his or her silence in the face of oral accusations by law enforcement officers. 17 Moreover, there is authority that a codefendant and his or her attorney may not comment upon an accused's post-arrest silence to any greater extent than the prosecutor would be permitted to do. 18 Some courts state that the use of such evidence for impeachment purposes cannot be justified absent unusual circumstances, since the potential for prejudice in evidence of a defendant's post-arrest silence outweighs its marginal probative worth. 19 However, some courts state that the prosecutor may impeach a defendant with pre-arrest silence, provided the silence precedes Miranda warnings, even though the defendant remains silent on the advice of counsel, 20 and some courts hold that, even in post-arrest cases, the prosecutor must establish that Miranda warnings were not given prior to silence relied upon for impeachment purposes. 21 Nevertheless, other courts hold that an admission by the silence of the accused in failing to answer an accusation by police officers while in custody is inadmissible where the accused was not advised of his or her constitutional rights. 22

There is authority that it is reversible error to admit evidence of a defendant's silence at the time of his or her arrest²³ and reversal may be without consideration of the doctrine of harmless error despite the introduction into evidence after that testimony of an oral inculpatory statement subsequently made by defendant.²⁴ The reasons for this are that an accused ought not be penalized for exercising his or her constitutional rights.²⁵ In addition, statements of a third party made in the presence of defendant while he or she is in custody or under arrest, which are not denied, are inadmissible.²⁶

Despite the general rule prohibiting admission of post-arrest silence, if a defendant does not invoke his or her right to remain silent, but speaks on certain matters, the fact that the defendant omits to mention other relevant matters may be admissible.²⁷

§ 803 ----Where accused is under arrest or in custody [SUPPLEMENT]

Case authorities:

The trial court in a capital resentencing hearing erred by permitting the State to elicit testimony from an SBI agent that, during interrogation after defendant had been advised of his Miranda rights and had been informed that he was under arrest, defendant had remained silent when faced with the agent's accusation that he murdered the victim, since this testimony amounted to an impermissible reference to defendant's exercise of his right to silence. The trial court also erred by permitting the State to cross-examine defendant about his silence in the face of the SBI agent's accusation of murder since this questioning allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence. *State v Quick* (1994) 337 NC 359, 446 SE2d 535.

Footnotes

Footnote 16. *Commonwealth v Ferrara*, 31 Mass App 648, 582 NE2d 961, review den 411 Mass 1106, 587 NE2d 790.

It is fundamentally unfair for the government to induce silence through Miranda warnings and then later use this silence against the accused. *United States v Harris* (CA8 Mo) 956 F2d 177, reh, en banc, den (CA8) 1992 US App LEXIS 4739 and cert den (US) 121 L Ed 2d 48, 113 S Ct 85.

When a defendant is in custody and does not respond to a statement, that statement and the defendant's silence may not be used as evidence of the defendant's assent. *United States v Schaff* (CA9 Or) 948 F2d 501, 91 CDOS 8470, 91 Daily Journal DAR 13102, 34 Fed Rules Evid Serv 448.

The use of a defendant's post-arrest silence to impeach an exculpatory story told for the first time at trial violates the Fourteenth Amendment's mandate of due process if silence follows the giving of Miranda warnings. *United States v Massey* (CA10 Okla) 687 F2d 1348.

As to custodial interrogation, see §§ 721, 735, and , see §§ 749.

Footnote 17. *Doyle v Ohio*, 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (criticized on other grounds by *Jenkins v Anderson*, 447 US 231, 65 L Ed 2d 86, 100 S Ct 2124) as stated in *State v Johnson* (Me) 472 A2d 1367 and (criticized on other grounds by *Fletcher v Weir*, 455 US 603, 71 L Ed 2d 490, 102 S Ct 1309) as stated in *United States v Cardenas Alvarado* (CA5 Tex) 806 F2d 566 and (criticized on other grounds by *Greer v Miller*, 483 US 756, 97 L Ed 2d 618, 107 S Ct 3102) as stated in *United States v Carter* (CA5 Tex) 953 F2d 1449, 35 Fed Rules Evid Serv 121, reh, en banc, den (CA5 Tex) 959 F2d 969 and cert den (US) 119 L Ed 2d 598, 112 S Ct 2980 (silence of accused not to be used for impeachment purposes); *Miranda v Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11, appeal after remand, en banc 104 Ariz 174, 450 P2d 364, cert den 396 US 868, 24 L Ed 2d 122, 90 S Ct 140; *United States v King* (CA2 NY) 560 F2d 122, 2 Fed Rules Evid Serv 1121, cert den 434 US 925, 54 L Ed 2d 283, 98 S Ct 404.

In a federal robbery prosecution in which the defendant, who was convicted, had testified to explain how he had obtained cash found in his possession when arrested, the trial court committed prejudicial error in permitting cross-examination of the defendant as to his silence during police interrogation when asked where he got the money, and the defendant is thus entitled to a new trial, where: (1) just prior to the question at police interrogation, the defendant had been informed of his right to remain silent and the fact that anything he said could be used against him, (2) the defendant had repeatedly asserted his innocence at the trial, (3) the defendant was being questioned in a secretive forum, (4) the defendant had been the subject of eyewitness identification and had been arrested on suspicion of having committed the offense, thus being a "potential defendant," and (5) the defendant had no reason to think that any explanation he might make to the police would hasten his release, in view of the seemingly strong evidence against him, his prior contacts with the police, and his participation in a narcotics rehabilitation program; under these circumstances, the defendant's failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication, and thus the probative value of the defendant's pre-trial silence is outweighed by the prejudicial impact of admitting it into evidence. *United States v Hale*, 422 US 171, 45 L Ed 2d 99, 95 S Ct 2133.

For the Supreme Court's definition of "custodial interrogation," see § 749.

As to the privilege against self-incrimination, generally, see 21A Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq.; 81 Am Jur 2d, Witnesses §§ 80 et seq.

Annotation: Admissibility of inculpatory statements made in presence of accused to which he refuses to answer on advice of counsel, 77 ALR2d 463.

Footnote 18. *Webb v State* (Tex Crim) 763 SW2d 773.

Footnote 19. *People v Conyers*, 52 NY2d 454, 438 NYS2d 741, 420 NE2d 933.

Footnote 20. *Dean v Young* (CA7 Wis) 777 F2d 1239, cert den 475 US 1142, 90 L Ed 2d 339, 106 S Ct 1794.

Footnote 21. *United States v Cummiskey* (CA3 Pa) 728 F2d 200, 15 Fed Rules Evid Serv 41, supp op (CA3 Pa) 745 F2d 278, cert den 471 US 1005, 85 L Ed 2d 162, 105 S Ct 1869.

Footnote 22. *Lanier v State*, 219 Tenn 417, 410 SW2d 411.

Footnote 23. *Commonwealth v Greco*, 465 Pa 400, 350 A2d 826; *Roban v State* (Fla App D4) 384 So 2d 683, petition den (Fla) 392 So 2d 1378 and petition den (Fla) 392 So 2d 1379 and (disapproved on other grounds by *State v DiGuilio* (Fla) 491 So 2d 1129, 11 FLW 339) as stated in *Carr v State* (Fla App D5) 561 So 2d 617, 15 FLW D 1211 (improper comment upon the defendant's exercise of his right to remain silent required a reversal of the conviction).

But see, *Greer v Miller*, 483 US 756, 97 L Ed 2d 618, 107 S Ct 3102, reh den 483 US 1056, 97 L Ed 2d 819, 108 S Ct 30, where the sequence of events at a state criminal trial—beginning with a single question by a prosecutor to a defendant as to the defendant's silence at the time of arrest and after receiving Miranda warnings, but including the proper and immediate action by the trial court, and the failure by defense counsel to request more specific instructions—indicated that the prosecutor's question did not constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution by the use of the defendant's post-arrest silence against him at trial for impeachment purposes, because the prosecutor was not permitted to undertake impeachment or call attention to the defendant's silence, where: (1) the trial court explicitly sustained an objection to the only question that touched upon the defendant's post-arrest silence; (2) no further questioning or argument with respect to the defendant's silence occurred; (3) it was highly debatable whether the prosecutor got "full mileage" out of his improper question by stating, in his closing argument, that an alleged accomplice's testimony was credible because the accomplice had not remained silent after arrest, and defense counsel did not object to the prosecutor's argument on this ground; (4) at the conclusion of the presentation of evidence, the trial court specifically advised the jury that it should disregard any questions to which an objection was sustained; and (5) the fact of the defense's post-arrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.

In a criminal prosecution in which evidence was admitted as to the defendant's post-arrest silence, it was reversible error to refuse to grant the defendant's motion for mistrial even though the trial judge directed the jury to disregard the testimony. *Scott v State* (Fla App D5) 388 So 2d 243.

Footnote 24. *Roban v State* (Fla App D4) 384 So 2d 683, petition den (Fla) 392 So 2d 1378 and petition den (Fla) 392 So 2d 1379 and (disapproved on other grounds by *State v DiGuilio* (Fla) 491 So 2d 1129, 11 FLW 339) as stated in *Carr v State* (Fla App D5) 561 So 2d 617, 15 FLW D 1211.

Footnote 25. *Commonwealth v Greco*, 465 Pa 400, 350 A2d 826.

Footnote 26. *State v Penn* (Mo) 413 SW2d 281.

Footnote 27. *Leibold v State* (Fla App D3) 386 So 2d 17, holding that there was no error in a criminal prosecution as the result of testimony by the arresting officer that the defendant, when arrested for a traffic violation and given his Miranda warnings, did not provide any information about the killing which had taken place and which was then

unknown to the officer; the defendant's failure to make a statement was relevant to his guilt where he made a statement about the charge for which he was arrested but failed to give the further information that a shooting had occurred, under circumstances where an ordinary person would have been expected to speak.

Where the accused initially waives his right to remain silent and agrees to questioning, if the accused subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused. *United States v Harris* (CA8 Mo) 956 F2d 177, reh, en banc, den (CA8) 1992 US App LEXIS 4739 and cert den (US) 121 L Ed 2d 48, 113 S Ct 85.

§ 804 Determination by court or jury

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In regard to an admission by the failure of an accused person to reply to an oral incriminatory statement, there is a difference of opinion among the courts as to whether the trial court should preliminarily determine the admissibility of such evidence or whether the jury should determine whether the prerequisites for admissibility exist. In some courts it has been held that it is for the jury to determine whether the accused heard and understood the statements made, 29 and it is also generally held that it is for the jury to determine whether, under all the circumstances shown, the statements called for a disclaimer, whether the accused did reply to them, and whether, if he or she did not reply to them, such failure showed criminal intent or a consciousness of guilt. 30

On the other hand, there are courts which, with regard to the determination of the admissibility of admissions by reason of silent acquiescence, consider it to be the better procedure for the court, in the absence of the jury, to hear evidence pro and con bearing upon the competency of such evidence. 31 It has been held that the trial court should determine in the first instance whether the accused heard and understood the statement, 32 whether the accusation was made under such circumstances as to call for a reply, and whether the accused's conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. 33 In its preliminary determination, the court should consider whether any other explanation is equally consistent with silence. 34

§ 804 ----Determination by court or jury [SUPPLEMENT]

Case authorities:

The trial court in a capital resentencing hearing erred by permitting the State to elicit testimony from an SBI agent that, during interrogation after defendant had been advised of his Miranda rights and had been informed that he was under arrest, defendant had remained silent when faced with the agent's accusation that he murdered the victim, since this testimony amounted to an impermissible reference to defendant's exercise of his right

to silence. The trial court also erred by permitting the State to cross-examine defendant about his silence in the face of the SBI agent's accusation of murder since this questioning allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence. *State v Quick* (1994) 337 NC 359, 446 SE2d 535.

Footnotes

Footnote 28. As to prerequisites for admissibility, generally, see § 802.

Footnote 29. *Arpan v United States* (CA8 SD) 260 F2d 649.

Footnote 30. *State v Gulbrandsen*, 238 Minn 508, 57 NW2d 419.

Footnote 31. *State v Guffey*, 261 NC 322, 134 SE2d 619.

Footnote 32. *People v Simmons*, 28 Cal 2d 699, 172 P2d 18.

Footnote 33. *People v Simmons*, 28 Cal 2d 699, 172 P2d 18.

Although it is ordinarily for the jury to decide, in the light of all the surrounding facts and circumstances, whether the accused actually heard and understood the incriminating statement, the question whether the circumstances of the statement and its making were such as to serve as the inciting cause calling for a reply by the accused in the situation is a preliminary one for the court to decide. *Arpan v United States* (CA8 SD) 260 F2d 649.

Footnote 34. *State v Hoffman*, 73 Hawaii 41, 828 P2d 805.

(3). Adoption by Nonverbal Conduct [805-810]

§ 805 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The acts and conduct of a party may be as expressive as spoken or written statements, and they may, in some instances, be proved under the principles applicable to admissions. 35 An adoptive admission may be implied from conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person. 36 For party's conduct to be admissible as an admission, however, there must be a rational nexus between the conduct and what the conduct purportedly admits. 37 In criminal cases, an admission on the basis of a defendant's conduct may be allowed in evidence if the conduct tends in some way to connect the defendant to the crime charged. 38 Consciousness of guilt may be inferred from the intent of or an attempt by the accused to conceal, alter, or remove evidence of the crime. 39

Many types of acts or conduct may be received in evidence as admissions by a party, for example: the use of a document prepared by another; 40 the transfer or disposal of property after the occurrence of an accident or some other event that might render the transferor liable in damages; 41 the assumption of a false name following an accident; 42 refusal to submit to an examination; 43 issuance by a manufacturer of a recall letter concerning its product; 44 conformity of one's business, social, or other behavior to a certain restricted course of conduct over a period of time as a means of establishing an agreement; 45 departure from the jurisdiction by one on whom service of summons may have been expected, though evidence of such flight is merely corroborative in nature and is admissible only where there is other proof of wrongdoing on the defendant's part; 46 and attempts to influence witnesses. 47 A defendant's attempt to hide his or her identity may be admissible as bearing on the consciousness of guilt. 48 In addition, a person's nonverbal conduct in response to an accusation may constitute an admission. 49

Nevertheless, a defendant's decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not imply that only guilty people contact their attorneys. 50 Moreover, the failure of a consumer to dispute the validity of a debt under certain sections of the Fair Debt Collection Practices Act 51 may not be construed by a court as an admission of liability by the consumer. 52

§ 805 ----Generally [SUPPLEMENT]

Case authorities:

Defendant's conduct, in trembling and dropping his head, when he was asked question by police officer was too vague and ambiguous to constitute adoptive admission, but police officer could testify to his observation of such conduct. *Romano v State* (1995, Okla Crim) 909 P2d 92.

Footnotes

Footnote 35. *Casey v Burns* (2d Dist) 7 Ill App 2d 316, 129 NE2d 440, 54 ALR2d 1060; *Berry v Brunt*, 252 Miss 194, 172 So 2d 398; *Adrian v Brown*, 29 Tenn App 236, 196 SW2d 118; *State v Lew*, 26 Wash 2d 394, 174 P2d 291.

Practice References 32 Am Jur POF2d 253, Admission by Conduct or Silence §§ 6 et seq.

Footnote 36. *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

Footnote 37. *LePage v Bumila*, 407 Mass 163, 552 NE2d 80.

Footnote 38. *United States v Joshi* (CA11 Fla) 896 F2d 1303, 29 Fed Rules Evid Serv 1114, cert den 498 US 986, 112 L Ed 2d 534, 111 S Ct 523; *United States v Champion* (CA11 Fla) 813 F2d 1154, 22 Fed Rules Evid Serv 1399; *Jones v State*, 159 Tex Crim 399, 264 SW2d 106.

Footnote 39. *Camron v State* (Okla Crim) 829 P2d 47 (in a manslaughter prosecution, the

accused removed an exhibit, the shotgun, from the courtroom).

Footnote 40. § 806.

Footnote 41. § 808.

Footnote 42. Rich v Finley, 325 Mass 99, 89 NE2d 213, 12 ALR2d 669.

Footnote 43. § 807.

Footnote 44. Higgins v General Motors Corp., 250 Ark 551, 465 SW2d 898.

Annotation: Products liability: Admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Footnote 45. Hall v Pierce, 210 Or 98, 307 P2d 292, 65 ALR2d 316, reh den 210 Or 145, 309 P2d 997 and motion to dismiss app den 210 Or 148, 309 P2d 998.

Footnote 46. McManus v Donlin, 23 Wis 2d 289, 127 NW2d 22.

As to admissions against interest, generally, see § 785.

Evidence of a defendant's flight has long been admissible as tending to show a consciousness of guilt. Wills v State (Okla Crim) 636 P2d 372.

Footnote 47. § 809.

Footnote 48. Wills v State (Okla Crim) 636 P2d 372.

Footnote 49. § 802.

Footnote 50. Commonwealth v Person, 400 Mass 136, 508 NE2d 88.

Footnote 51. 15 USCS § 1692g(b).

Footnote 52. 15 USCS § 1692g(c).

§ 806 Adoption by use

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A party's use of a document supplied by another may be construed as representing the party's intended assertion of the truth of the information in it, and constitute an adoptive admission under the Federal Rules of Evidence. 53 Adoption by use comes into play in situations where a party forwards the written document to another in response to a request or perceived need for the information contained in the document. 54 Informal use of a document will not necessarily constitute an adoption of the contents, since

individuals and businesses regularly assimilate and utilize information received from a variety of outside sources, and it is unrealistic to presume that each such use constitutes an admission. 55

Proof of an intentional adoption by use may require the offering party to demonstrate some significant and direct reliance upon the specific information. 56 However, allegations that the information from the outside source is not trustworthy because it is not current is an inappropriate basis for an objection to an adoptive admission. 57

An adoption of the contents of a document prepared by another has been found in instances where the party had copies of the document made and then distributed to entities with whom the party does business, 58 or cross-referred to certain documents 59 as an answer to interrogatories. 60 A written statement may constitute an adoptive admission, when a party obtains the affidavit of another and offers it in a judicial proceeding in support of a request for a warrant, 61 or files a petition in bankruptcy, even though the statements therein are those of the bankrupt's attorney. 62 A corporation's submission of the minutes of another corporation's board meeting in an arbitration proceeding involving those two corporations was not binding on the submitting party in separate litigation with a third party, where the minutes were submitted as proof of a motive and not as an adoption of the factual assertions contained therein. 63

Footnotes

Footnote 53. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Business cards containing telephone numbers and room numbers of hotel where conspirators were staying and where the cocaine was eventually to be located were found admissible under FRE, Rule 801(d)(2)(B), since the defendant in possession of those business cards had been observed acting on the information by traveling to the address written on them to pick up the cocaine. *United States v Ospina* (CA9 Cal) 739 F2d 448, 16 Fed Rules Evid Serv 111, cert den 469 US 887, 83 L Ed 2d 198, 105 S Ct 262 and cert den 471 US 1126, 86 L Ed 2d 274, 105 S Ct 2658.

Footnote 54. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 55. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 56. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d

118, 109 S Ct 146, holding that a manufacturer's product status reports, which contained information submitted by distributors and dealers pursuant to a contractual duty to report information as to the status and sales of aircraft, were admissible, since the reporting practice had been in existence for a number of years and the manufacturer regularly used the information for planning future production schedules.

Footnote 57. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 58. *Wagstaff v Protective Apparel Corp.* (CA10 Okla) 760 F2d 1074, 18 Fed Rules Evid Serv 752.

Footnote 59. Pursuant to FR Civ P Rule 33(c).

Footnote 60. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675) (cross-references to certain documents as an answer to interrogatories, without stating that the party did not know or could not ascertain an answer, found to be an adoption of the information in the referenced documents).

Footnote 61. *United States v Morgan*, 189 US App DC 155, 581 F2d 933, 3 Fed Rules Evid Serv 31, 48 ALR Fed 709.

Footnote 62. *United States v Parsons* (CA8 Ark) 646 F2d 1275, 8 Fed Rules Evid Serv 39.

Footnote 63. *Brownko International, Inc. v Ogden Steel Co.* (SD NY) 585 F Supp 1432.

§ 807 Refusal to submit to examination

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The refusal of one involved in an accident to submit to a physical examination may be admissible in evidence as an admission relating to his or her injuries. 64 Similarly, the refusal of the accused in a criminal case to submit to a scientific test to determine the amount of alcohol in his or her system, where such question is otherwise relevant, 65 has been held admissible, in some cases, as an admission of guilt. 66

Footnotes

Footnote 64. *Levine v Scaglione*, 95 NJ Super 338, 231 A2d 229 (jury may infer that refusal shows plaintiff has consciousness of weakness of his cause).

As to the relevancy and materiality of the fact of a refusal to submit to a physical or medical examination, see § 544.

Footnote 65. As to the relevancy and materiality of the fact of a refusal to submit to an alcohol test, see § 545.

Footnote 66. *People v McGinnis*, 123 Cal App 2d Supp 945, 267 P2d 458.

There is no constitutional bar to the admission of evidence that the accused refused to submit to a blood test for intoxication. *State v Dugas*, 252 La 345, 211 So 2d 285, cert den 393 US 1048, 21 L Ed 2d 691, 89 S Ct 679.

Annotation: Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

§ 808 Transfer or disposal of property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, courts have recognized the admissibility of evidence that a person, after an accident, or the occurrence of some other event which might render such person liable, disposed of his or her property, since such evidence tends to show a consciousness of liability⁶⁷ and a purpose to evade satisfaction of liability.⁶⁸ However, evidence of such a transfer of property does not establish negligence as a matter of law.⁶⁹

Footnotes

Footnote 67. *Poston v Gaddis* (Ala) 372 So 2d 1099; *Bush v Jackson*, 191 Colo 249, 552 P2d 509; *Batick v Seymour*, 186 Conn 632, 443 A2d 471; *Johnson v O'Brien*, 258 Minn 502, 105 NW2d 244, 88 ALR2d 577; *Durocher's Ice Cream, Inc. v Peirce Constr. Co.*, 106 NH 293, 210 A2d 477; *Doub v Hauser*, 256 NC 331, 123 SE2d 821.

Annotation: Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 ALR3d 996.

Practice References –Proof of admission by disposition of property subject to possible judgment. 1 Am Jur Proof of Facts 161, Admissions, Proof 3.

Footnote 68. *Poston v Gaddis* (Ala) 372 So 2d 1099; *Bush v Jackson*, 191 Colo 249, 552 P2d 509.

Footnote 69. *Bush v Jackson*, 191 Colo 249, 552 P2d 509.

As to the relevancy and competency of evidence concerning a transfer of property after an accident, see § 527.

§ 809 Attempt to influence witnesses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A party's attempt to improperly, even illegally, influence a witness is thought to be an admission by conduct. 70 It may be shown that an accused attempted to influence, bribe, or cause the absence of a witness at trial. 71 In addition, evidence that a party to the respective action offered money to the witness in order to induce the witness to give testimony favorable to such party may be admissible. 72

In a criminal case, evidence of an attempt by a third person to suppress testimony is relevant and may be introduced into evidence on the issue of the defendant's guilt where it is established that the attempt was made with the authorization of the accused. 73 Consequently, if a person other than the accused threatens a witness to induce false testimony, then statements, questions, and testimony concerning such threats are clearly proper and admissible to establish the accused's guilt on the original charge and to show consciousness of guilt if it can be shown that the threats were made at the request of the accused or with his or her knowledge or consent. 74 Circumstantial evidence may be sufficient to show that a criminal defendant authorized the conduct of a third person in attempting to influence a prosecution witness or suppress testimony, making evidence of such an attempt admissible against the defendant. 75 However, absent additional evidence connecting the defendant with the attempt by a third person to influence a witness not to testify, or to testify falsely, the mere fact that the defendant and that person are related is not adequate proof of the authorization needed to make the attempt admissible in evidence on the issue of the defendant's guilt. 76 Similarly, an unsworn, out-of-court declaration attributable to a coconspirator, showing an attempt by the coconspirator in the defendant's absence to influence a witness' testimony, is not admissible in evidence on the issue of the defendant's own guilt where it was made not in furtherance of the conspiracy charged, but in furtherance of an alleged implied conspiracy aimed at preventing detection and punishment. 77

Even where the state presents evidence that threats were made with the defendant's knowledge, consent, or authorization, the trial court must consider whether the probative value of the evidence outweighs its prejudicial effect. 78

Footnotes

Footnote 70. *Wills v State* (Okla Crim) 636 P2d 372.

Any attempt by a party to suppress testimony is improper and may be shown by the adverse party. *Austin v Howard* (Tex Civ App) 158 SW2d 556, writ ref w o m.

Footnote 71. *Wills v State* (Okla Crim) 636 P2d 372.

As to the relevancy and competency of evidence of an attempt to influence a witness, see § 529.

Annotation: Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 ALR4th 769.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Footnote 72. *Bartosh v Ryan*, 344 Ill App 214, 100 NE2d 330; *Dix v Gross*, 278 Ky 348, 128 SW2d 753.

Footnote 73. *Stumpf v State* (Alaska App) 749 P2d 880, cert den 490 US 1070, 104 L Ed 2d 639, 109 S Ct 2075; *People v Moore*, 70 Cal App 2d 158, 160 P2d 857; *State v Price* (Fla) 491 So 2d 536, 11 FLW 319.

Evidence of threats against witnesses by third parties should not be admitted to show a defendant's consciousness of guilt unless the Commonwealth presents evidence that threats were made with the defendant's knowledge, consent, or authorization. *Commonwealth v Ciampa*, 406 Mass 257, 547 NE2d 314.

Annotation: Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Footnote 74. *State v Hicks* (Mo App) 535 SW2d 308.

Footnote 75. *People v Caruso* (2nd Dist) 174 Cal App 2d 624, 345 P2d 282, cert den 363 US 819, 4 L Ed 2d 1517, 80 S Ct 1259.

In a prosecution for murder and attempted robbery, the defendant's presence when a threat was made against a witness by a third party, and the fact that the defendant never expressed disapproval of the threat, indicated that the threat was made with defendant's knowledge and assent, and evidence of the threat was properly admitted into evidence on the issue of the defendant's guilt. *Saunders v State* (Fla App D3) 547 So 2d 193, 14 FLW 1436, jur discharged, review den (Fla) 562 So 2d 347, habeas corpus den (Fla App D3) 579 So 2d 397, 16 FLW D 1377, review den (Fla) 587 So 2d 1329.

Footnote 76. *United States v Culotta* (CA2 NY) 413 F2d 1343, cert den 396 US 1019, 24 L Ed 2d 510, 90 S Ct 586; *People v Hillery*, 62 Cal 2d 692, 44 Cal Rptr 30, 401 P2d 382, appeal after remand 65 Cal 2d 795, 56 Cal Rptr 280, 423 P2d 208, cert den 386 US 938, 17 L Ed 2d 810, 87 S Ct 958, reh den 386 US 1000, 18 L Ed 2d 355, 87 S Ct 1310 and cert den 389 US 986, 19 L Ed 2d 496, 88 S Ct 486, reh den 390 US 913, 19 L Ed 2d 887, 88 S Ct 822; *Saunders v State*, 28 Md App 455, 346 A2d 448, 79 ALR3d 1147.

In a robbery and murder case, the trial court erroneously admitted into evidence a portion of a witness' testimony where he alleged that when he appeared outside the grand jury room the defendant's mother, sister, and mother's boyfriend threatened to kill him if he testified, in the absence of evidence that defendant authorized the threats and where the

defense counsel did not open the door by asking the witness if the state had offered him any deals to testify. *Jackson v State* (Fla) 575 So 2d 181, 16 FLW S 151 (criticized on other grounds by *Fenelon v State* (Fla) 17 FLW S 101).

Footnote 77. *Krulewitch v United States*, 336 US 440, 93 L Ed 790, 69 S Ct 716.

As to the coconspirator exception to the hearsay rule, generally, see §§ 831 et seq.

Footnote 78. *Commonwealth v Ciampa*, 406 Mass 257, 547 NE2d 314.

§ 810 Nonverbal reaction to accusation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of a physical movement such as nodding or other head movement may be admitted ⁷⁹ under the adoptive admission exception to the hearsay rule, ⁸⁰ although there is authority to the contrary. ⁸¹ Similarly, some courts have admitted evidence of grinning and shrugging, ⁸² while others have held evidence of shrugging inadmissible. ⁸³ Courts have held that it could be shown that a defendant turned away from his or her accuser, ⁸⁴ or that a defendant pointed to and identified certain incriminating evidence. ⁸⁵ Other types of physical reactions have also been found admissible, for instance, smiling, ⁸⁶ laughing, ⁸⁷ snickering, ⁸⁸ crying, ⁸⁹ or stammering and looking surprised. ⁹⁰ Giving a codefendant a long look indicating that he or she should remain silent has also been held admissible. ⁹¹

Footnotes

Footnote 79. *United States v Joshi* (CA11 Fla) 896 F2d 1303, 29 Fed Rules Evid Serv 1114, cert den 498 US 986, 112 L Ed 2d 534, 111 S Ct 523; *People v Willmurth*, 77 Cal App 2d 605, 176 P2d 102; *State v Shoop* (Minn) 441 NW2d 475; *State v Bauers*, 25 Wash 2d 825, 172 P2d 279 (ovrld on other grounds by *State v Parr*, 93 Wash 2d 95, 606 P2d 263).

Where an individual stated that he loved the way the appellant beat and stabbed the victim, and the appellant responded by hand clapping, nodding his head, and grinning, the appellant made an adoptive admission. *Wickliffe v State* (Ind) 424 NE2d 1007, later proceeding (ND Ind) 574 F Supp 979, 15 Fed Rules Evid Serv 647 and post-conviction proceeding (Ind) 523 NE2d 1385 and habeas corpus den (ND Ind) 783 F Supp 389, post-conviction proceeding (Ind App) 576 NE2d 650 and affd (CA7 Ind) 953 F2d 646, reported in full (CA7) 1992 US App LEXIS 1414 and cert den (US) 118 L Ed 2d 310, 112 S Ct 1594, reh den (US) 119 L Ed 2d 580, 112 S Ct 2959 and reh, en banc, den (CA7) 1992 US App LEXIS 7564, habeas corpus den (ND Ind) 809 F Supp 618.

Annotation: Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Practice References 32 Am Jur POF2d 253, Admission by conduct or silence.

Footnote 80. As to adoptive admissions, generally, see §§ 796 et seq.

Footnote 81. *State v Carlson*, 311 Or 201, 808 P2d 1002 (defendant's reaction of hanging his head and shaking it back and forth was ambiguous and should not have been admitted as an adoptive admission of his wife's accusatory statement).

Footnote 82. *State v Taft*, 25 Conn App 149, 593 A2d 973, app den 220 Conn 918, 597 A2d 343, holding that, once the defendant waived the right to remain silent, he could not selectively invoke that right by shrugging and grinning in silence when asked whether he had known that the automobile was stolen; his reaction to the question was admissible.

Footnote 83. *Fuson v Jago* (CA6 Ohio) 773 F2d 55, 19 Fed Rules Evid Serv 707, cert den 478 US 1020, 92 L Ed 2d 739, 106 S Ct 3334, holding that noncommittal shrugging did not constitute an adoptive admission.

A new trial was warranted due to the erroneous admission of a detective's testimony that the defendant responded to queries about the commission of the crime with a noncommittal shrug of his shoulders, where the defendant did not understand English. *People v Lourido*, 70 NY2d 428, 522 NYS2d 98, 516 NE2d 1212.

Footnote 84. *State v Hendrick*, 232 NC 447, 61 SE2d 349.

Footnote 85. *Smith v Commonwealth* (Ky) 366 SW2d 902.

Footnote 86. *People v Silva*, 45 Cal 3d 604, 247 Cal Rptr 573, 754 P2d 1070, cert den 488 US 1019, 102 L Ed 2d 809, 109 S Ct 820, reh den 493 US 998, 107 L Ed 2d 551, 110 S Ct 555 and stay gr (Cal) 1989 Cal LEXIS 1562, stay gr 493 US 972, 107 L Ed 2d 497, 110 S Ct 493 and cert den 494 US 1039, 108 L Ed 2d 637, 110 S Ct 1502, holding, in a murder prosecution, that evidence that the defendant smiled while listening to an accomplice describe their participation in the murder was admissible under the adoptive admission exception to hearsay.

Footnote 87. *People v Browning* (2nd Dist) 45 Cal App 3d 125, 119 Cal Rptr 420 (ovrld on other grounds by *People v Williams*, 16 Cal 3d 663, 128 Cal Rptr 888, 547 P2d 1000).

Footnote 88. *State v Rice*, 37 Wis 2d 392, 155 NW2d 116, cert den 393 US 878, 21 L Ed 2d 152, 89 S Ct 180.

Footnote 89. *People v Banos* (3rd Dist) 209 Cal App 2d 754, 26 Cal Rptr 127.

Footnote 90. *State v Rupe*, 101 Wash 2d 664, 683 P2d 571, appeal after remand, en banc 108 Wash 2d 734, 743 P2d 210, cert den 486 US 1061, 100 L Ed 2d 934, 108 S Ct 2834, reh den 487 US 1263, 101 L Ed 2d 976, 109 S Ct 25, post-conviction proceeding 115 Wash 2d 379, 798 P2d 780, holding that the defendant's apparent embarrassment, including stammering and looking surprised, when told that he resembled the murderer being sought by authorities, constituted an admission by the defendant.

Footnote 91. *State v Hunt*, 325 NC 187, 381 SE2d 453.

d. Authorized Admissions [811, 812]

§ 811 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Federal Rules of Evidence define as "not hearsay" a statement offered against a party and made by a person whom the party has authorized to speak on that party's behalf regarding the subject. 92 The Uniform Rules of Evidence provide that a statement is "not hearsay" if offered against a party and is a statement by an individual authorized by the party to make a statement concerning the subject. 93 A statement made by a person, authorized by a party to make a statement concerning the subject, is considered an admission by that party. 94 The existence and limits of such authority should be determined in accordance with the substantive law of agency. 95 Often such "speaking authority" may be implied from the nature of the relationship and the task which the declarant is to perform, as in the case of attorneys, 96 interpreters, 97 and certain employees with managerial or supervisory responsibilities. 98 Otherwise speaking, authority must be proven by express grant or special circumstances. 99

Proof that an individual is an agent or employee of a party, without proof as to the extent of that individual's authority to speak on the issue in question, is inadequate to support the admission of the declarant's statement against the party-opponent. 1 A statement offered as an authorized admission under the Federal Rules cannot itself establish the existence or scope of the requisite speaking authority. 2 Proof of an authorization to speak on behalf of a party may be derived from circumstantial evidence. 3 Thus, evidence that the declarant is authorized to speak may be derived from a party's conscious reliance on an interpreter's translation abilities during a custodial interrogation, 4 or when a particular employee is assigned by the employer or the employer's representative to respond to a letter mailed to the employer by someone not associated with the company. 5

The declarant's mere repetition of assertions by others concerning the matter on which the declarant is authorized to speak may not qualify as an authorized admission of a party-opponent when the repetition is not an affirmative assertion by the declarant. 6 For assertions by outside sources which are repeated by a declarant to qualify as an authorized admission by a party, it has been noted that it should appear that there was some independent evaluation or assessment of those statements before they were reasserted by the declarant with authorization to speak for the party-opponent. 7 The Federal Rule of Evidence governing authorized admissions also encompasses statements made by the authorized declarant to the party against whom the statement is offered, as long as the statement relates to matters within the scope of the declarant's speaking authority. 8 In addition, a translation by an interpreter may qualify as an authorized admission. 9

Footnotes

Footnote 92. FRE, Rule 801(d)(2)(C).

Footnote 93. Uniform Rules of Evidence Rule 801(d)(2)(iii).

A statement made by a person, authorized by a party to make a statement concerning the subject, is not hearsay. *Portland Sav. & Loan Assoc. v Bernstein* (Tex App Corpus Christi) 716 SW2d 532, writ ref n r e (Jul 16, 1985) and reh'g of writ of error overr (Sep 18, 1985) and cert den 475 US 1016, 89 L Ed 2d 313, 106 S Ct 1200.

Footnote 94. *Portland Sav. & Loan Assoc. v Bernstein* (Tex App Corpus Christi) 716 SW2d 532, writ ref n r e (Jul 16, 1985) and reh'g of writ of error overr (Sep 18, 1985) and cert den 475 US 1016, 89 L Ed 2d 313, 106 S Ct 1200.

Footnote 95. *Baughman v Cooper-Jarrett, Inc.* (CA3 Pa) 530 F2d 529, 1976-1 CCH Trade Cases ¶ 60746, 1 Fed Rules Evid Serv 1111, cert den 429 US 825, 50 L Ed 2d 87, 97 S Ct 78 and on remand on other grounds (WD Pa) 79 FRD 520, 1978-1 CCH Trade Cases ¶ 62083, rev'd on other grounds (CA3) 583 F2d 1208, 1978-2 CCH Trade Cases ¶ 62168 and (ovrld on other grounds by *Croker v Boeing Co. (Vertol Div.)* (CA3 Pa) 662 F2d 975, 26 BNA FEP Cas 1569, 27 CCH EPD ¶ 32160, 32 FR Serv 2d 990).

As to creation and existence of agency, see 3 Am Jur 2d, Agency §§ 17 et seq.

Footnote 96. § 812.

Footnote 97. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40; *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217.

Footnote 98. *Baughman v Cooper-Jarrett, Inc.* (CA3 Pa) 530 F2d 529, 1976-1 CCH Trade Cases ¶ 60746, 1 Fed Rules Evid Serv 1111, cert den 429 US 825, 50 L Ed 2d 87, 97 S Ct 78 and on remand on other grounds (WD Pa) 79 FRD 520, 1978-1 CCH Trade Cases ¶ 62083, rev'd on other grounds (CA3) 583 F2d 1208, 1978-2 CCH Trade Cases ¶ 62168 and (ovrld on other grounds by *Croker v Boeing Co. (Vertol Div.)* (CA3 Pa) 662 F2d 975, 26 BNA FEP Cas 1569, 27 CCH EPD ¶ 32160, 32 FR Serv 2d 990) (freight terminal manager informed plaintiff of blacklist); *Kingsley v Baker/Beech-Nut Corp.* (CA5 Tex) 546 F2d 1136, 1 Fed Rules Evid Serv 790 (plaintiff's superior within defendant's sales division); *Mahlandt v Wild Canid Survival & Research Center, Inc.* (CA8 Mo) 588 F2d 626, 3 Fed Rules Evid Serv 1585; *Northwest Airlines, Inc. v Rowe* (CA8 Minn) 226 F2d 365 (letter by vice president of airline to plaintiff relating to cause of crash).

Footnote 99. *Gilmour v Strescon Industries, Inc.* (ED Pa) 66 FRD 146, 19 FR Serv 2d 1194, aff'd without op (CA3 Pa) 521 F2d 1398 and aff'd without op (CA3 Pa) 521 F2d 1398 (unauthorized comment on crane accident by minor employee); *Michaels v Michaels* (CA7 Ill) 767 F2d 1185, CCH Fed Secur L Rep ¶ 92203, 19 Fed Rules Evid Serv 176, cert den 474 US 1057, 88 L Ed 2d 774, 106 S Ct 797.

In a prosecution of an inspector for soliciting a bribe, evidence that the person the defendant approached had thereafter told his business partners of the solicitation was admissible under FR Evid, Rule 801(d)(2)(C). *United States v Iaconetti* (CA2 NY) 540 F2d 574, 1 Fed Rules Evid Serv 301, 36 ALR Fed 734, cert den 429 US 1041, 50 L Ed

2d 752, 97 S Ct 739, reh den 430 US 911, 51 L Ed 2d 589, 97 S Ct 1186.

Footnote 1. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 2. *Oberlin v Marlin American Corp.* (CA7 Ind) 596 F2d 1322, 4 Fed Rules Evid Serv 1422.

Annotation: Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Footnote 3. *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 4. *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217.

Footnote 5. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 6. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and affd 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in *Burt v Ware* (CA5 La) 14 F3d 256).

Footnote 7. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and affd 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in *Burt v Ware* (CA5 La) 14 F3d 256).

Footnote 8. *Kingsley v Baker/Beech-Nut Corp.* (CA5 Tex) 546 F2d 1136, 1 Fed Rules Evid Serv 790 (statement made to another agent of defendant corporation); *Mahlandt v Wild Canid Survival & Research Center, Inc.* (CA8 Mo) 588 F2d 626, 3 Fed Rules Evid Serv 1585 (minutes of board of directors' meeting); *Osterneck v E.T. Barwick Industries,*

Inc. (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and affd 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in Burt v Ware (CA5 La) 14 F3d 256).

Footnote 9. United States v Da Silva (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217.

As to admissibility of translations by interpreters, generally, see § 821.

§ 812 Attorneys

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Statements by a party's attorney may be admissible against the party if the statements are within the scope of representation, 10 that is, if the attorney has "speaking authority" as implied by the attorney-client relationship. 11 The client is not bound by casual statements of his or her attorney out of court. 12

An attorney of record may have the authority to admit a fact in the course of a trial for the purpose of obviating the need to prove it even though the fact admitted is against a defendant's interest, 13 and pleadings prepared and filed by counsel hired by a party are sometimes regarded, prima facie, as being authorized by the party. 14

Although pleadings composed by a party's attorney for a prior case may serve as evidentiary admissions in a subsequent proceeding where the attorney is authorized to act and speak on the party's behalf, 15 remarks contained in an appellate brief filed in unrelated litigation do not constitute party-admissions, absent highly unusual circumstances. 16 Under limited circumstances, counsel's opening statements in a prior criminal trial may qualify as an authorized admission of the client retaining the attorney and be offered in a subsequent criminal trial. 17

Before a prior opening statement may be admitted in a subsequent criminal trial under the Federal Rule governing authorized admissions, 18 the court, in a hearing held outside the presence of the jury, must determine that the statement involved an assertion of fact clearly inconsistent with similar assertions in the subsequent trial and not requiring the trier of fact to explore events at the prior trial, and that the statement was the equivalent of a testimonial statement by the defendant. 19 Further, some participatory role of the defendant in connection with the counsel's assertion in the opening argument must be evident either directly or inferentially. 20 In ruling on the admissibility of the opening statement, the court should determine by a preponderance of the evidence that the inference the prosecution seeks to draw from the inconsistency is fair, and where the evidence is equal or the preponderance favors an innocent explanation for the inconsistency, the prior opening statement should be excluded. 21 Speculation of counsel or advocacy regarding the credibility of witnesses contained in a prior opening statement is inadmissible. 22 Proof of the formal relationship between the defendant and

the defendant's attorney is insufficient, alone, to establish that the prior opening statement is the equivalent of a testimonial by the defendant. 23

◆ Comment: Although the Federal Rule of Evidence governing authorized admissions does not expressly state that opening statements by defense counsel in a prior criminal trial may be admitted only under limited circumstances, it has been held that the admission of opening statements to a jury in prior trial, while not barred per se, should be circumscribed due to other policy considerations, at least in criminal proceedings. Among the policy considerations courts have noted are the fact that free admission of prior opening statements may require the exploration of marginal matters, free use of jury argument may deter attorneys from vigorous advocacy, explanation of the inconsistency may infringe on other rights of the defendant, and free use of jury argument may lead to the disqualification of the attorney chosen by the defendant. 24

Footnotes

Footnote 10. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409; *United States v Blood* (CA4 Md) 806 F2d 1218, 7 EBC 2613, 22 Fed Rules Evid Serv 156; *Williams v Union Carbide Corp.* (CA6 Tenn) 790 F2d 552, 20 Fed Rules Evid Serv 964, cert den 479 US 992, 93 L Ed 2d 592, 107 S Ct 591 and (criticized on other grounds by *Vincent v Louis Marx & Co.* (CA1 Mass) 874 F2d 36, 28 Fed Rules Evid Serv 209).

Footnote 11. *Coughlin v Capitol Cement Co.* (CA5 Tex) 571 F2d 290, 1978-1 CCH Trade Cases ¶ 61957, 3 Fed Rules Evid Serv 490; *United States v Ojala* (CA8 Minn) 544 F2d 940, 76-2 USTC ¶ 9760, 1 Fed Rules Evid Serv 413, 38 AFTR 2d 76-6108.

As to admissions of an attorney as admissions of an agent or employee, see § 820.

Footnote 12. *Czuj v Toresco Enterprises*, 239 NJ Super 123, 570 A2d 1049.

Footnote 13. *United States v Dolleris* (CA6 Ky) 408 F2d 918, 69-1 USTC ¶ 9289, 23 AFTR 2d 69-1009, cert den 395 US 943, 23 L Ed 2d 461, 89 S Ct 2014; *Fowler v United States* (CA10 Okla) 239 F2d 93; *Wanzer v State*, 202 Md 601, 97 A2d 914; *State v Ham*, 238 NC 94, 76 SE2d 346.

A party is bound by a concession made during the trial by his attorney. *Cole v Planning & Zoning Comm'n*, 30 Conn App 511, 620 A2d 1324.

Admissions made by an attorney should bind a client. *General Motors Corp. v Herald* (Ky) 833 SW2d 804.

Footnote 14. § 775.

Footnote 15. *Williams v Union Carbide Corp.* (CA6 Tenn) 790 F2d 552, 20 Fed Rules Evid Serv 964, cert den 479 US 992, 93 L Ed 2d 592, 107 S Ct 591.

But see *Vincent v Louis Marx & Co.* (CA1 Mass) 874 F2d 36, 28 Fed Rules Evid Serv 209, holding that the admissibility of prior inconsistent pleadings would appear to be the type of situation that calls for a balancing approach to determine whether the probative

value of the pleading is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As to evidentiary admissions, generally, see § 772.

Footnote 16. *Hardy v Johns-Manville Sales Corp.* (CA5 Tex) 851 F2d 742, reh den, en banc (CA5 Tex) 860 F2d 437 and reh den, en banc (CA5 Tex) 860 F2d 437 and reh den, en banc (CA5 Tex) 860 F2d 437, 26 Fed Rules Evid Serv 833 and reh den, en banc (CA5 Tex) 860 F2d 437 and reh den, en banc (CA5 Tex) 860 F2d 438, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301 and (criticized on other grounds by *Vincent v Louis Marx & Co.* (CA1 Mass) 874 F2d 36, 28 Fed Rules Evid Serv 209) (statements pertaining to the progressive nature of injuries resulting from asbestos exposure, which were attributed to certain asbestos manufacturers and contained in appellate briefs filed in litigation involving the same manufacturers, but different plaintiffs, were improperly admitted as party-admissions in a personal injury action arising from asbestos exposure).

Footnote 17. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409; *United States v Blood* (CA4 Md) 806 F2d 1218, 7 EBC 2613, 22 Fed Rules Evid Serv 156.

Footnote 18. As to authorized admissions under the Federal Rules, generally, see § 811.

Footnote 19. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409 (in prior trial, counsel argued in his opening statement that expert testimony would show the defendant's wife had not copied the false documents in question, whereas in the subsequent trial counsel's opening argument suggested the wife had copied the documents at the request of her husband).

Footnote 20. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

Footnote 21. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

Footnote 22. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

Footnote 23. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

Footnote 24. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

5. Persons Making or Affected by Statement [813-856]

a. In General [813, 814]

§ 813 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An admission made by a party to an action is admissible against such party. 25 Moreover, if a party has appointed another to speak or act for him or her, the statements made by the person appointed, within the scope of such person's authority to so speak or act, are admissible against the party. 26 However, the statement of a third person is generally objectionable as hearsay where offered as proof of the fact asserted, unless it is within an exception to the rule excluding hearsay. 27 Furthermore, such a statement is not binding upon, or admissible against, a party as original evidence in the nature of an admission inconsistent with his or her assertion of a cause of action or defense, 28 unless it is made to appear that the party authorized the declarant to speak, 29 or adopted the statement sought to be introduced, 30 or that there is a privity of estate between the declarant and the party. 31 It is also recognized that the statements of one person may be rendered admissible against another by virtue of the existence between them of a common interest, 32 and this common interest exists, as a rule, between persons who act jointly or have joint rights or interests, 33 but not necessarily merely because there is a co-ownership of property, such as exists between tenants in common. 34

In other articles are discussions in reference to admissions or declarations of or involving guardians, 35 guardians ad litem, 36 partners, 37 spouses, 38 and principals and sureties. 39

Footnotes

Footnote 25. § 760.

Footnote 26. *Quaker Oats Co. v Davis*, 33 Tenn App 373, 232 SW2d 282; *King v Shawver* (Tex Civ App) 30 SW2d 930.

As to the admissibility of statements of agents, see §§ 815 et seq.

As to adoptive admissions, see §§ 796 et seq.

Footnote 27. § 661.

As to declarations of third persons against interest, see §§ 785 et seq.

Footnote 28. *Rumford Chemical Works v Hygienic Chemical Co.*, 215 US 156, 54 L Ed 137, 30 S Ct 45; *Glatstein v Grund*, 243 Iowa 541, 51 NW2d 162, 36 ALR2d 531.

Footnote 29. §§ 811 et seq.

Footnote 30. §§ 796 et seq.

Footnote 31. § 824.

Footnote 32. *Hitchman Coal & Coke Co. v Mitchell*, 245 US 229, 62 L Ed 260, 38 S Ct 65; *Geelen v Pennsylvania R. Co.*, 400 Pa 240, 161 A2d 595, 91 ALR2d 1.

Footnote 33. *McBriety v Phillips*, 180 Md 569, 26 A2d 400.

Where the defendants are jointly liable on a contract, the declaration of one respecting services rendered under it is admissible against both. *Forsyth v Doolittle*, 120 US 73, 30 L Ed 586, 7 S Ct 408.

Footnote 34. *Rafeedie v Seelye* (Mun Ct App Dist Col) 178 A2d 922.

Footnote 35. 39 Am Jur 2d, Guardian and Ward § 103.

Footnote 36. 42 Am Jur 2d, Infants § 184.

Footnote 37. 59A Am Jur 2d, Partnership §§ 754 et seq.

Footnote 38. 41 Am Jur 2d, Husband and Wife § 549.

Footnote 39. 74 Am Jur 2d, Suretyship § 150.

§ 814 Statements of coparties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, an admission by a party to the record is not evidence against others who may happen incidentally to be joined as parties to the suit. 40 Similarly, the declarations or admissions of nominal parties to a proceeding are not admissible against the real party, in the absence of privity of interest or special circumstances. 41 However, the declarations or admissions of the real party in interest are admissible against the nominal party, that is, the one representing the real party's interest. 42

Footnotes

Footnote 40. *Elms v Kansas City Public Service Com.* (Mo) 335 SW2d 26; *Gammon v Hyde*, 199 Va 918, 103 SE2d 221; *Yellow Cab Co. v Eden*, 178 Va 325, 16 SE2d 625.

In an action for bodily injuries sustained by a passenger in an automobile driven by one defendant on a divided highway, in a collision with a car which was driven by another defendant and which, approaching from the opposite direction, got out of control and crossed the dividing median, any admission by the latter defendant, if relevant, would be admissible only against him. *Palombizio v Murphy*, 146 Conn 352, 150 A2d 825, 73 ALR2d 1173.

Annotation: Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 ALR2d 1180.

Footnote 41. *Latronica v Royal Indem. Co.* (1st Dist) 8 Ill App 2d 337, 132 NE2d 16.

As to admissions by persons in privity, generally, see § 824.

Footnote 42. *Krebs Pigment & Chemical Co. v Sheridan* (CA3 Pa) 79 F2d 479; *Mayo v Owen*, 208 Ga 483, 67 SE2d 709.

b. Agents and Employees [815-823]

§ 815 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, all statements and declarations made by an agent within the scope of his or her employment and with the actual or apparent authority of the principal are binding upon the principal, and the principal is responsible for them. 43 This principle of the law of agency, though substantive in nature, operates in the law of evidence, in many instances, to render a statement made by one person admissible in evidence as an admission binding upon another person who is a party to an action. Whatever is said by an agent to a third person, during the course of the agent's duties and within the scope of the agent's authority, relative to business contemplated by the agency in which the agent is then engaged is in legal intendment said by the principal and is admissible in evidence against such principal. 44 Hence, an employee's admission against his or her own interest as to his or her negligence can result indirectly in liability being imposed upon the employer, if the employee is a party defendant. 45 The admission is not evidence that the employer was negligent, but it is evidence that the employee was negligent, and the employer may become liable under respondeat superior where that doctrine properly applies. 46

In addition, the hearsay bar is removed only if—

—the declarant is a servant or agent of the party against whom the statement is offered. 47

—the statement is made during the course of an employment or agency relationship, and not before the declarant entered into the relationship, 48 or after the termination of the relationship. 49

—the statement concerns matters within the scope of the declarant's agency or employment. 50

It has been held that essentially any statements made by a corporation's employees while in the employ of that corporation, concerning any aspect of the employees' involvement with the subject matter of the litigation, qualify for admission. 51

An agent or employee's mere repetition of assertions by others may not, in order to constitute admissions that may be offered against a litigating party, be enough to qualify those statements as affirmative assertions by the agent or employee. 52 It should appear that there was some independent evaluation or assessment of the information asserted by the outside source before it was asserted by the agent or employee. 53

The inability to specifically identify the sources from which a business document is compiled may prevent a determination that the document constitutes a party-admission of the principal or employer; 54 however, the document may be admissible where it may be reasonably inferred from the contents of the document that it was compiled by corporate agents and that the matters discussed were within the scope of their agency. 55

Where the declarant is an "agent" of the accused, but is not alleged or shown to be a party to any conspiracy, the government, in a criminal prosecution, may resort to the Federal Rule of Evidence pertaining to agency and employment, in lieu of the coconspirator exception to the hearsay rule. 56

§ 815 ----Generally [SUPPLEMENT]

Practice Aids: Employees' admissions in New York: Time for a change, 11 Touro LR 1:231 (1994).

Footnotes

Footnote 43. 3 Am Jur 2d, Agency § 277.

As to the admissibility of extrajudicial statements of a purported agent to prove the agency or his or her authority, see 3 Am Jur 2d, Agency § 367.

As to proof of the authority of corporate officers and agents, see 18B Am Jur 2d, Corporations § 1632-1634.

Footnote 44. Hitchman Coal & Coke Co. v Mitchell, 245 US 229, 62 L Ed 260, 38 S Ct 65; Northern Oil Co. v Socony Mobil Oil Co. (CA2 Vt) 347 F2d 81, 9 FR Serv 2d 15b.212, Case 1, appeal after remand (CA2 Vt) 368 F2d 384; Cox v Esso Shipping Co. (CA5 Tex) 247 F2d 629; State Farm Mut. Auto. Ins. Co. v Porter (CA9 Cal) 186 F2d 834, 52 ALR2d 499; General Foods Sales Co. v Smith, 105 Colo 305, 97 P2d 429; Oakland Meat Co. v Railway Express Agency, Inc. (1st Dist) 46 Ill App 2d 176, 196 NE2d 361, 4 ALR3d 987; County Department of Public Welfare v Morningstar, 128 Ind App 688, 151 NE2d 150; Randolph Foods, Inc. v McLaughlin, 253 Iowa 1258, 115 NW2d 868; Jameson v First Sav. Bank & Trust Co., 40 NM 133, 55 P2d 743, 103 ALR 1492; Branch v Dempsey, 265 NC 733, 145 SE2d 395; Rudzinski v Warner Theatres, Inc., 16 Wis 2d 241, 114 NW2d 466.

A loan officer's statement that a superior instructed him to cover up a diversion of funds

was not hearsay since, at the time, the loan officer was an agent of the bank discussing a matter within the scope of his employment. *Re Sunset Bay Assoc.* (CA9 Cal) 944 F2d 1503, 91 CDOS 7627, 91 Daily Journal DAR 11691, 26 CBC2d 572.

Where an employee testified that she was employed in the area where one party was installing a door and she made a statement to a worker, who was injured by a box on the conveyor system, that was, in essence, an apology in case she had been the one who pushed the box down the conveyor, the statement of the employee was admissible and relevant on the issues of the employer's knowledge of the other party's accident and as a statement of an agent of a party opponent that had a tendency to substantiate the other party's account of the accident. *Ashby v First Data Resources, Inc.*, 242 Neb 529, 497 NW2d 330.

Restatement, Agency 2d § 286, provides that in an action between the principal and a third person, statements of an agent to the third person are admissible in evidence against the principal to prove the truth of the facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any statements concerning the subject matter.

Annotation: Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

Footnote 45. *Madron v Thomson*, 245 Or 513, 419 P2d 611, 27 ALR3d 953, clarified 245 Or 527, 423 P2d 496, 27 ALR3d 964.

Footnote 46. *Madron v Thomson*, 245 Or 513, 419 P2d 611, 27 ALR3d 953, clarified 245 Or 527, 423 P2d 496, 27 ALR3d 964.

As to the doctrine of respondeat superior, generally, see 53 Am Jur 2d, Master and Servant § 417.

Annotation: Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

Footnote 47. *Pino v Protection Maritime Ins. Co.* (CA1 Mass) 599 F2d 10, 4 Fed Rules Evid Serv 1469, 27 FR Serv 2d 1444, cert den 444 US 900, 62 L Ed 2d 136, 100 S Ct 210 and on remand (DC Mass) 490 F Supp 277 (disapproved on other grounds by *Borges v Our Lady of Sea Corp.* (CA1 Mass) 935 F2d 436, 1991 AMC 2937) and (among conflicting authorities on other grounds noted in *China Trade & Dev. Corp. v M.V. Choong Yong* (CA2 NY) 837 F2d 33) (broker); *Gagliardi v Flint* (CA3 Pa) 564 F2d 112, 2 Fed Rules Evid Serv 395, 24 FR Serv 2d 1244, cert den 438 US 904, 57 L Ed 2d 1147, 98 S Ct 3122 and (criticized on other grounds by *Thomas v Shipka* (CA6 Ohio) 818 F2d 496) (police officer as agent of city); *United States v Mandel* (CA4 Md) 591 F2d 1347, 5 Fed Rules Evid Serv 133, different results reached on reh, en banc, by split decision (CA4 Md) 602 F2d 653, reh den, en banc (CA4) 609 F2d 1076, cert den 445 US 961, 64 L Ed 2d 236, 100 S Ct 1647, later proceeding (DC Md) 672 F Supp 864 and (disapproved on other grounds by *McNally v United States*, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875) as stated in *United States v Runnels* (CA6 Mich) 833 F2d 1183, 126 BNA LRRM 2789, 107 CCH LC ¶ 10228, 24 Fed Rules Evid Serv 107 and criticized on other grounds by *Overnite Transp. Co. v Truck Drivers, etc. Local No. 705* (CA7 Ill) 904 F2d 391, 134 BNA LRRM 2534, 115 CCH LC ¶ 10167 (admitting declarations by state

senator concerning defendant governor's views on veto override); *United States v Diehl* (SD Tex) 460 F Supp 1282, *affd* (CA5 Tex) 586 F2d 1080, 79-1 USTC ¶ 9146, 43 AFTR 2d 79-495 (ex-spouse not an agent after divorce); *Crawford v Garnier* (CA7 Wis) 719 F2d 1317, 14 Fed Rules Evid Serv 181 (criticized on other grounds by *Parrish v Johnson* (CA6 Mich) 800 F2d 600) and (criticized on other grounds by *Santiago-Negron v Castro-Davila* (CA1 Puerto Rico) 865 F2d 431, 13 FR Serv 3d 211); *United States v Ojala* (CA8 Minn) 544 F2d 940, 76-2 USTC ¶ 9760, 1 Fed Rules Evid Serv 413, 38 AFTR 2d 76-6108 (attorney).

Footnote 48. *Robinson v Audi Nsu Auto Union Aktiengesellschaft* (CA10 Okla) 739 F2d 1481, CCH Prod Liab Rep ¶ 10132, 16 Fed Rules Evid Serv 622, appeal after remand (CA10 Okla) 803 F2d 572, CCH Prod Liab Rep ¶ 11146, later proceeding (CA10) 940 F2d 1369, cert den (US) 117 L Ed 2d 408, 112 S Ct 1160.

Footnote 49. § 823.

Footnote 50. § 817.

Footnote 51. *Re A.H. Robins Co.* (DC Kan) 575 F Supp 718.

Footnote 52. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, *affd* (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and *affd* 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in *Burt v Ware* (CA5 La) 14 F3d 256).

Footnote 53. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, *affd* (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Re A.H. Robins Co.* (DC Kan) 575 F Supp 718; *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and *affd* 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in *Burt v Ware* (CA5 La) 14 F3d 256).

Footnote 54. *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert gr 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and *affd* 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in *Burt v Ware* (CA5 La) 14 F3d 256).

Footnote 55. *MCI Communications Corp. v American Tel. & Tel. Co.* (CA7 Ill) 708 F2d 1081, 1982-83 CCH Trade Cases ¶ 65137, 12 Fed Rules Evid Serv 590, mod, reh den (CA7 Ill) 1983-2 CCH Trade Cases ¶ 65520, cert den 464 US 891, 78 L Ed 2d 226, 104 S Ct 234 and appeal after remand (CA7 Ill) 748 F2d 799, 1984-2 CCH Trade Cases ¶ 66302 (report containing statements attributed to the corporation's high-level

management regarding the tactics to obstruct commercial rival's legitimate competitive progress by denying interconnections with the corporation's telephone lines was admissible notwithstanding the inability to identify which managers provided the information for the compilation).

Footnote 56. *United States v Mandel* (CA4 Md) 591 F2d 1347, 5 Fed Rules Evid Serv 133, different results reached on reh, en banc, by split decision (CA4 Md) 602 F2d 653, reh den, en banc (CA4) 609 F2d 1076, cert den 445 US 961, 64 L Ed 2d 236, 100 S Ct 1647, later proceeding (DC Md) 672 F Supp 864 and (disapproved on other grounds by *McNally v United States*, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875) as stated in *United States v Runnels* (CA6 Mich) 833 F2d 1183, 126 BNA LRRM 2789, 107 CCH LC ¶ 10228, 24 Fed Rules Evid Serv 107 and criticized on other grounds by *Overnite Transp. Co. v Truck Drivers, etc. Local No. 705* (CA7 Ill) 904 F2d 391, 134 BNA LRRM 2534, 115 CCH LC ¶ 10167 (governor's legislative aides); *United States v Summers* (CA5 Ala) 598 F2d 450, 4 Fed Rules Evid Serv 1146; *United States v Ziperstein* (CA7 Ill) 601 F2d 281, 4 Fed Rules Evid Serv 838, cert den 444 US 1031, 62 L Ed 2d 667, 100 S Ct 701 (employees of medical clinic charged with improper billing practices); *United States v Jones* (CA9 Nev) 766 F2d 412.

The coconspirator exception to the hearsay rule is discussed in §§ 835 et seq.

§ 816 Preliminary proof of agency

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The existence of an agency must be established before the declarations of an agent may be proved against the principal, 57 except in a case where the statement may be admissible under general rules of evidence without reference to the status of the declarant as an agent. 58 The existence of an agency relationship under the Federal Rule of Evidence governing statements by agents or employees 59 is to be determined in accordance with the substantive law of agency. 60 While there must be substantial evidence of the existence of an agency or employment relationship, it has been held that proof by a preponderance of the evidence is not required. 61 The alleged insanity of an agent is irrelevant to consideration of the hearsay objection once the agency relationship has been established. 62

Circumstantial evidence may be used to show the existence 63 and the scope 64 of the agency or employment relationship. For instance, when an organization receives an inquiry from a party outside the organization, the organization's referral of that inquiry to a particular employee has been found sufficient to show that the matter was within the scope of employment of that employee. 65 However, a statement offered under the rule of evidence governing statements arising out of agency or employment cannot itself establish the existence or scope of agency necessary for admission of the statement. 66 It is a well-established rule that the statements of an agent, other than the agent's testimony in the case in which the issue arises, are not admissible against the principal to prove the agency or the scope or extent thereof, and that an agent's authority to bind the principal may not be shown by evidence of the agent's extrajudicial statements. 67

It may be necessary to establish that the declarant is an agent, as opposed to an independent contractor. 68

Footnotes

Footnote 57. *First Unitarian Soc. v Faulkner*, 91 US 415, 1 Otto 415, 23 L Ed 283; *Exchange State Bank v Occident Elevator Co.*, 95 Mont 78, 24 P2d 126, 90 ALR 740; *Labor Hall Ass'n v Danielsen*, 24 Wash 2d 75, 163 P2d 167, 161 ALR 1079; *Harris v Richland Motors, Inc.*, 7 Wis 2d 472, 96 NW2d 840.

Footnote 58. *Jameson v First Sav. Bank & Trust Co.*, 40 NM 133, 55 P2d 743, 103 ALR 1492.

Footnote 59. FRE, Rule 801(d)(2)(D).

Footnote 60. *Prudential Ins. Co. v Curt Bullock Builders, Inc.* (ND Ill) 626 F Supp 159.

As to the creation and establishment of agency, generally, see 3 Am Jur 2d, Agency §§ 17-22.

Footnote 61. *United States v Jones* (CA9 Nev) 766 F2d 412.

Footnote 62. *United States v Buttram* (WD Pa) 432 F Supp 1269, 2 Fed Rules Evid Serv 77, *affd* without op (CA3 Pa) 568 F2d 770, *cert den* 435 US 995, 56 L Ed 2d 84, 98 S Ct 1646.

Footnote 63. *Pappas v Middle Earth Condominium Assn.* (CA2 NY) 963 F2d 534, 35 Fed Rules Evid Serv 828.

Footnote 64. *Pappas v Middle Earth Condominium Assn.* (CA2 NY) 963 F2d 534, 35 Fed Rules Evid Serv 828; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, *later proceeding* (WD Mo) 657 F Supp 687, *affd* (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, *cert den* 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Re A.H. Robins Co.* (DC Kan) 575 F Supp 718 (*videotaped depositions*).

Footnote 65. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, *later proceeding* (WD Mo) 657 F Supp 687, *affd* (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, *cert den* 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 66. *Seacoast Electric Co. v Franchi Bros. Constr. Corp.* (CA1 NH) 437 F2d 1247; *Pappas v Middle Earth Condominium Assn.* (CA2 NY) 963 F2d 534, 35 Fed Rules Evid Serv 828 (the statement may not itself be relied on to establish the alleged agency relationship); *United States v Jones* (CA9 Nev) 766 F2d 412.

Annotation: Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Footnote 67. 3 Am Jur 2d, Agency § 367.

Footnote 68. *Merrick v Farmers Ins. Group* (CA9 Idaho) 892 F2d 1434, 51 BNA FEP Cas 1391, 52 CCH EPD ¶ 39548, 29 Fed Rules Evid Serv 355, holding that the trial court properly excluded as hearsay the testimony of certain insurance agents since it was not established that they were "agents," as opposed to independent contractors.

But see *Smithson v United States Fidelity & Guar. Co.*, 186 W Va 195, 411 SE2d 850, stating that where an insurance agent who sold a policy to the insured was found to be an agent of the insurer, the plaintiff insured could testify about remarks the insurance agent made to him about the policy.

As to independent contractors, generally, see 41 Am Jur 2d, Independent Contractors §§ 1 et seq.

§ 817 Scope of agency, employment, or authority

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While some state courts still hold that agents must be acting within the scope of their authority in order for their statements to be attributable to the principal, 69 and that the admissibility of an agent's statements is predicated on a showing that the agent was authorized, expressly or impliedly, to make a statement or statements concerning the subject matter to which the statement pertains, 70 the Federal Rules of Evidence 71 and the Uniform Rules of Evidence 72 define as "not hearsay" certain statements offered against a party, and made by a party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship. Some states have adopted similar rules. 73 Agents are rarely given specific authority to make damaging statements, but the present trend is to admit the statement if it concerns matters within the scope of the agent's employment. 74 Thus, the declarant need not be authorized to speak as is required under the rule governing authorized admissions generally, 75 nor must the declarant have personal knowledge of the operative events. 76

◆ Caution: Proof that an individual is an agent or employee of a party, 77 without proof as to the extent that the statement is within the scope of the individual's employment, is inadequate to qualify a statement as a party-admission. 78

States which require authority to make a statement sometimes do not make a distinction as to whether the statement was one of fact or opinion as long as it was within the scope of the agent's authority. 79

Footnotes

Footnote 69. *Slade v Montgomery* (Ala) 577 So 2d 887; *Benner v Johnson Controls, Inc.*

(Mo App) 813 SW2d 16; Pankow v Mitchell (Tenn App) 737 SW2d 293.

Footnote 70. *Prairie State Bank v Hoefgen*, 245 Kan 236, 777 P2d 811.

A statement is not hearsay if the statement is offered against the party and is a statement by a person authorized by him to make a statement concerning the subject, or a statement by his agent or servant acting within the scope of his authority to make the statement for the party. *Lockwood v A C & S, Inc.*, 109 Wash 2d 235, 744 P2d 605, CCH Prod Liab Rep ¶ 11579.

Footnote 71. FRE, Rule 801(d)(2)(D).

Documents written by a senior vice president of the bank and offered to establish the existence of guaranteed payment arrangements between the bank and a medical supplier for supplies to be delivered to a financially troubled health care provider were properly admitted as statements by an agent of the bank, where the senior vice president had substantial authority to manage loans made to the health care provider. *Ries Biologicals, Inc. v Bank of Santa Fe* (CA10 NM) 780 F2d 888, 20 Fed Rules Evid Serv 237.

A racial slur made by an assistant supervisor during an interview with a prospective employee was found to be made within the scope of the declarant's employment, notwithstanding that the corporation's production superintendent traditionally was in charge of hiring and firing, since evidence indicated that the lines of authority with respect to hiring decisions were not clear-cut, that the assistant supervisor participated in hiring determinations made by the production superintendent, and that on more than one occasion the assistant supervisor had hired employees during the absence of the production superintendent. *Miles v M.N.C. Corp.* (CA11 Ala) 750 F2d 867, 36 BNA FEP Cas 1289, 36 CCH EPD ¶ 34953, 17 Fed Rules Evid Serv 393 (among conflicting authorities on other grounds noted in *Hopkins v Price Waterhouse*, 263 US App DC 321, 825 F2d 458, 44 BNA FEP Cas 825, 43 CCH EPD ¶ 37230).

Footnote 72. Uniform Rules of Evidence Rule 801(d)(2)(iv).

Footnote 73. *Klawock Heenya Corp. v Dawson Construction/Hank's Excavation* (Alaska) 778 P2d 219; *South Park Aggregates, Inc. v Northwestern Nat. Ins. Co.* (Colo App) 847 P2d 218; *Ruszyk v Secretary of Public Safety*, 401 Mass 418, 517 NE2d 152 (court adopted language of proposed rule); *McCallum v Department of Corrections*, 197 Mich App 589, 496 NW2d 361, app den, stay den 442 Mich 926, 503 NW2d 902; *Contractor's Crane Service, Inc. v Vermont Whey Abatement Authority*, 147 Vt 441, 519 A2d 1166; *Smithson v United States Fidelity & Guar. Co.*, 186 W Va 195, 411 SE2d 850.

A statement, concerning the quality of care given a patient, by a nurse who was an employee of a hospital which was a party to the action, and who was on duty the night a patient went to the hospital and who apparently provided the patient with nursing services, was within the scope of the agency exception to the hearsay rule. *Torrence v Kusminsky*, 185 W Va 734, 408 SE2d 684.

Footnote 74. *Miller v J.M. Jones Co.* (4th Dist) 225 Ill App 3d 799, 167 Ill Dec 385, 587 NE2d 654, app den 145 Ill 2d 635, 173 Ill Dec 6, 596 NE2d 630.

The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements

relate. *Pappas v Middle Earth Condominium Assn.* (CA2 NY) 963 F2d 534, 35 Fed Rules Evid Serv 828.

Footnote 75. *Hill v Spiegel, Inc.* (CA6 Ohio) 708 F2d 233, 31 BNA FEP Cas 1532, 32 CCH EPD ¶ 33628, 12 Fed Rules Evid Serv 2003; *Crawford v Garnier* (CA7 Wis) 719 F2d 1317, 14 Fed Rules Evid Serv 181 (criticized on other grounds by *Parrish v Johnson* (CA6 Mich) 800 F2d 600) and (criticized on other grounds by *Santiago-Negron v Castro-Davila* (CA1 Puerto Rico) 865 F2d 431, 13 FR Serv 3d 211); *Nekolny v Painter* (CA7 Ill) 653 F2d 1164, 8 Fed Rules Evid Serv 1592, cert den 455 US 1021, 72 L Ed 2d 139, 102 S Ct 1719 and (criticized on other grounds by *Santiago-Negron v Castro-Davila* (CA1 Puerto Rico) 865 F2d 431, 13 FR Serv 3d 211); *South Park Aggregates, Inc. v Northwestern Nat. Ins. Co.* (Colo App) 847 P2d 218.

As to authorized admissions, generally, see §§ 811 et seq.

Footnote 76. § 757.

Footnote 77. § 816.

Footnote 78. *Litton Systems, Inc. v American Tel. & Tel. Co.* (CA2 NY) 700 F2d 785, 1982-83 CCH Trade Cases ¶ 65194, 12 Fed Rules Evid Serv 1426, later proceeding (SD NY) 568 F Supp 507, 1983-2 CCH Trade Cases ¶ 65570, affd (CA2 NY) 746 F2d 168, 1984-2 CCH Trade Cases ¶ 66239 and (among conflicting authorities noted on other grounds in *Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.* (US) 123 L Ed 2d 611, 113 S Ct 1920, 93 CDOS 3198, 93 Daily Journal DAR 5465, 26 USPQ2d 1641, 1993-1 CCH Trade Cases ¶ 70207, 7 FLW Fed S 223) (statements of various employees as contained in investigation notes of company attorney); *Hill v Spiegel, Inc.* (CA6 Ohio) 708 F2d 233, 31 BNA FEP Cas 1532, 32 CCH EPD ¶ 33628, 12 Fed Rules Evid Serv 2003; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Re A.H. Robins Co.* (DC Kan) 575 F Supp 718 (videotaped depositions).

Footnote 79. *Lockwood v A C & S, Inc.*, 109 Wash 2d 235, 744 P2d 605, CCH Prod Liab Rep ¶ 11579.

§ 818 Statements showing knowledge of fact or condition

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Statements made by an agent prior to an injury may be admitted in evidence in an action for such injury for the purpose of showing the knowledge of the agent, and through the agent, of the principal, of the fact or condition revealed by such statements, where they were made during the course and within the scope of the agent's employment. 80 And some courts hold that testimony concerning extrajudicial statements of an agent made shortly after an accident are admissible in evidence in an action for personal injuries, at

least for the limited purpose of showing the knowledge of the agent, and through the agent, of the principal, of facts or conditions in instances where such knowledge is a material part of the case. 81

Footnotes

Footnote 80. *Wood v Canadian Imperial Dry, Inc.*, 296 Mass 80, 5 NE2d 8.

As to the role of knowledge of the danger in a premises liability case, see 62 Am Jur 2d, Premises Liability §§ 37 et seq.

Footnote 81. *Westman v Clifton's Brookdale, Inc.*, 89 Cal App 2d 307, 200 P2d 814; *Yazoo City v Loggins*, 145 Miss 793, 110 So 833; *State ex rel. S. S. Kresge Co. v Shain*, 340 Mo 145, 101 SW2d 14; *Jones v Raney Chevrolet Co.*, 217 NC 693, 9 SE2d 395; *Austin v Johnson* (Tex Civ App) 195 SW2d 222, writ ref n r e.

But see *Jordan v Robert Half Personnel Agencies, Inc.* (Mo App) 615 SW2d 574, stating that if the report of declarant's utterance is to show prior knowledge, it is hearsay and can only come in under some exception to the hearsay rule.

§ 819 Government agents and employees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Providing the prerequisites for admission under the rule admitting statements of agents and employees as admissions of a party-opponent are met, 82 statements of government agents or employees may be introduced as substantive evidence in civil actions as party-admissions of the United States government, 83 including statements by government attorneys. 84 Although it is not necessarily the case that every publication of every branch of the government of the United States can be treated as a party admission under the rule governing admissions by agents or servants, in certain cases, government manuals may be introduced. 85 Despite the general rule of admissibility in such cases, however, the Freedom of Information Act 86 protects the common-law evidentiary privilege that attaches to predecisional, deliberative communications within agency. 87 This privilege protects government agencies from exposure of advice and ideas which are expressed prior to the time the agency's decision is made and thereby promotes efficiency and frankness of agency deliberative process. 88

Statements by government agents and employees are not admissible, substantively, against the government in criminal prosecutions. 89 Government agents and employees stand in a different posture in criminal proceedings, since they stand in the same relationship to the government and the criminal defendant, as persons who have no connection to the success or development of the criminal prosecution. 90

◆ Comment: Some doubt has been expressed as to whether the drafters of the Federal

Rules of Evidence intended to exclude statements of government agents and employees from the operation of the Federal Rule governing statements by agents and employees in criminal cases; however, it has been suggested that support for excluding such statements may be found in the exclusion of public records and reports of law enforcement personnel from the hearsay exception set forth in another Federal Rule of Evidence, 91 which provides that certain records of public offices and agencies are excluded from the rule barring hearsay and may be admitted as evidence even when the declarant is available as a witness. 92

Footnotes

Footnote 82. Pursuant to FRE 801(d)(2).

Footnote 83. *Williams v Tri-County Growers, Inc.* (CA3 Pa) 747 F2d 121, 26 BNA WH Cas 1519, 102 CCH LC ¶ 34600, 17 Fed Rules Evid Serv 60 (criticized on other grounds by *Martin v Cooper Elec. Supply Co.* (CA3 NJ) 940 F2d 896, 30 BNA WH Cas 793, 119 CCH LC ¶ 35526) (statement of Department of Labor employee as contained in one of the Department's investigation files); *Clark v United States*, 8 Cl Ct 649, 16 ELR 20057, later proceeding (WD Wash) 660 F Supp 1164, 17 ELR 21178, *affd* (CA9 Wash) 856 F2d 1433 (a statement attributed to an Air Force base commander regarding a feasibility study for installation of a new water supply is admissible against the US Government as a statement of a government official concerning a matter within the official's scope of employment).

Footnote 84. *United States v D.K.G. Appaloosas, Inc.* (ED Tex) 630 F Supp 1540, *affd* (CA5 Tex) 829 F2d 532, 9 FR Serv 3d 83, *cert den* 485 US 976, 99 L Ed 2d 481, 108 S Ct 1270 (statements of government attorneys in civil action arising from forfeiture proceedings involving a horse ranch which had been seized as proceeds from a drug transaction).

As to statements by attorneys as statements by an agent or employee, see § 820.

Footnote 85. *United States v Van Griffin* (CA9 Nev) 874 F2d 634, 27 Fed Rules Evid Serv 1387, holding that, in a prosecution for DWI in a national recreation area, the court erred in refusing to admit, under FRE, Rule 801(d)(2)(D), the Department of Transportation pamphlet on sobriety testing.

Footnote 86. 5 USCS § 552(b)(5).

As to the Freedom of Information Act, generally, see 37A Am Jur 2d, Freedom of Information Acts.

Footnote 87. *Falcone v IRS* (ED Mich) 479 F Supp 985, 79-2 USTC ¶ 9683, 44 AFTR 2d 79-6042, later proceeding (ED Mich) 535 F Supp 1313, 82-2 USTC ¶ 9575, 50 AFTR 2d 82-5477, *affd* (CA6 Mich) 714 F2d 646, 83-2 USTC ¶ 9518, 52 AFTR 2d 83-5705, *cert den* 466 US 908, 80 L Ed 2d 162, 104 S Ct 1689, 84-1 USTC ¶ 9314, 53 AFTR 2d 84-1167.

Footnote 88. *Falcone v IRS* (ED Mich) 479 F Supp 985, 79-2 USTC ¶ 9683, 44 AFTR 2d 79-6042, later proceeding (ED Mich) 535 F Supp 1313, 82-2 USTC ¶ 9575, 50 AFTR 2d

82-5477, affd (CA6 Mich) 714 F2d 646, 83-2 USTC ¶ 9518, 52 AFTR 2d 83-5705, cert den 466 US 908, 80 L Ed 2d 162, 104 S Ct 1689, 84-1 USTC ¶ 9314, 53 AFTR 2d 84-1167.

Footnote 89. *United States v Durrani* (DC Conn) 659 F Supp 1183, 22 Fed Rules Evid Serv 1828, affd (CA2 Conn) 835 F2d 410, 24 Fed Rules Evid Serv 535 (report by special review board appointed by the President to investigate an arms-for-hostages exchange plan involving government agents, including documents written by the government agents, did not constitute party-admissions of the US Government for purposes of criminal prosecution against businessman for shipping missile parts); *United States v D.K.G. Appaloosas, Inc.* (ED Tex) 630 F Supp 1540, affd (CA5 Tex) 829 F2d 532, 9 FR Serv 3d 83, cert den 485 US 976, 99 L Ed 2d 481, 108 S Ct 1270; *United States v Pandilidis* (CA6 Ohio) 524 F2d 644, 75-2 USTC ¶ 9785, 36 AFTR 2d 75-6205, cert den 424 US 933, 47 L Ed 2d 340, 96 S Ct 1146 (Internal Revenue Service agent).

Footnote 90. *United States v Durrani* (DC Conn) 659 F Supp 1183, 22 Fed Rules Evid Serv 1828, affd (CA2 Conn) 835 F2d 410, 24 Fed Rules Evid Serv 535 (report by special review board appointed by the President to investigate an arms-for-hostages exchange plan involving government agents, including documents written by government agents involved in the plan, did not constitute party-admissions of the U.S. Government for purposes of criminal prosecution against businessman involved in transport of missile parts).

In a criminal prosecution, government employees are not servants of a party opponent for purposes of the admissions exception under FRE, Rule 801(d)(2)(D), because government agents are supposedly disinterested in the outcome of a trial, so that their statements seem less the product of the adversary process, hence less appropriately described as admissions of a party. *United States v Kampiles* (CA7 Ind) 609 F2d 1233, 5 Fed Rules Evid Serv 922, cert den 446 US 954, 64 L Ed 2d 812, 100 S Ct 2923 and (criticized on other grounds by *Bennett v Grand Prairie* (CA5 Tex) 883 F2d 400) and (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380).

Footnote 91. FRE, Rule 803(8).

Footnote 92. *United States v Morgan*, 189 US App DC 155, 581 F2d 933, 3 Fed Rules Evid Serv 31, 48 ALR Fed 709 (among conflicting authorities on other grounds noted in *United States v Ramirez* (CA2 Conn) 894 F2d 565, 29 Fed Rules Evid Serv 1400).

As to the exception from hearsay of certain records of public offices and agencies, see §§ 1351 et seq.

§ 820 Attorneys

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Statements made by an attorney concerning a matter within the scope of the attorney's representation of the client may be admitted against the client as substantive evidence under the rule of evidence admitting statements by agents and employees as admissions of a party-opponent. 93 Some states also provide that a statement made by an attorney concerning a matter within his or her employment may be admissible against the party retaining the attorney. 94 An attorney is the client's agent for the management of legal affairs, and, consequently, an attorney's factual statements made on a client's behalf in a letter, during pretrial proceedings, or at the trial itself have been found to be admissions. 95 Although there is some authority to the contrary, 96 there is authority that pleadings composed by an attorney in a prior case may be used as evidentiary admissions against the client, 97 as well as a statement to an IRS auditor regarding the client's additional income which the client allegedly thought was not reportable. 98 Nevertheless, there is authority that the unique nature of the attorney-client relationship demands that a trial court exercise caution in admitting statements that are a product of this relationship. 99 Absent highly unusual circumstances, remarks contained in appellate briefs filed in different cases do not constitute party-admissions. 1 Similarly, out-of-court statements made by an attorney during informal discussions of the client's business or status have been found inadmissible under the Federal Rule of Evidence governing statements by agents and employees. 2

Although, in civil cases, statements by government attorneys are admissible as a party-admission of the government, statements by prosecuting attorneys in criminal cases do not constitute party-admissions of the government, since the prosecution is considered personally disinterested in the outcome of the criminal proceeding. 3

◆ Caution: Admissions of criminal liability by a party's attorney might not be admissible against the client. 4 However, under limited circumstances, an attorney's opening statement in a prior criminal trial is admissible in a subsequent criminal trial against the client as an authorized admission 5 and as an adoptive admission. 6

The attorney-client privilege will protect assertions of the client when the statements are made with the intent that the information remain confidential; however, the privilege may be considered waived for information given with the intent to be voiced on the client's behalf. 7

§ 820 ----Attorneys [SUPPLEMENT]

Case authorities:

Communications between corporation's attorney and corporation's independent consultant were protected by attorney-client privilege where consultant possessed "significant relationship" to corporation and transaction in question. *In re Bieter Co.* (1994, CA8) 16 F3d 929, RICO Bus Disp Guide (CCH) ¶ 8490, partial summary judgment gr (DC Minn) 1994 US Dist LEXIS 4952 and reh, en banc, den (CA8) 1994 US App LEXIS 8898.

Communications between corporation's attorney and corporation's independent consultant were protected by attorney-client privilege where consultant possessed "significant relationship" to corporation and transaction in question. *In re Bieter Co.* (1994, CA8) 16 F3d 929, RICO Bus Disp Guide (CCH) ¶ 8490, partial summary

judgment gr (DC Minn) 1994 US Dist LEXIS 4952 and reh, en banc, den (CA8) 1994 US App LEXIS 8898.

Footnotes

Footnote 93. *United States v D.K.G. Appaloosas, Inc.* (ED Tex) 630 F Supp 1540, affd (CA5 Tex) 829 F2d 532, 9 FR Serv 3d 83, cert den 485 US 976, 99 L Ed 2d 481, 108 S Ct 1270; *Williams v Union Carbide Corp.* (CA6 Tenn) 790 F2d 552, 20 Fed Rules Evid Serv 964, cert den 479 US 992, 93 L Ed 2d 592, 107 S Ct 591; *United States v Harris* (CA7 Wis) 914 F2d 927, 31 Fed Rules Evid Serv 347, 117 ALR Fed 877, reh den, en banc (CA7) 1990 US App LEXIS 18671; *United States v Ojala* (CA8 Minn) 544 F2d 940, 76-2 USTC ¶ 9760, 1 Fed Rules Evid Serv 413, 38 AFTR 2d 76-6108.

In an action against a sheriff alleging discriminatory employment practices against women, the District Court erred in failing to admit statements made by the attorney representing the sheriff, in the context of the discrimination claim, relative to his policy of refusing to hire women, since the statement was admissible as an agent's statement under Rule 801(d)(2) where the statement did not expose either the sheriff or the attorney to criminal liability. *United States v Gregory* (CA4 Va) 871 F2d 1239, 50 BNA FEP Cas 1568, 49 CCH EPD ¶ 38902, 27 Fed Rules Evid Serv 1297, cert den 493 US 1020, 107 L Ed 2d 740, 110 S Ct 720, 51 BNA FEP Cas 1224, 52 CCH EPD ¶ 39540.

As to the rule of evidence governing statements by agents and employees, generally, see § 815.

As to admissions of party-opponents, generally, see § 760.

As to admissibility of statements by an attorney as authorized admissions, see § 812.

Footnote 94. *Contractor's Crane Service, Inc. v Vermont Whey Abatement Authority*, 147 Vt 441, 519 A2d 1166.

Footnote 95. *Pankow v Mitchell* (Tenn App) 737 SW2d 293.

Footnote 96. *Vincent v Louis Marx & Co.* (CA1 Mass) 874 F2d 36, 28 Fed Rules Evid Serv 209, holding that the admissibility of prior inconsistent pleadings is the type of question that calls for a balancing approach to determine whether the probative value of the prior pleading is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Footnote 97. *Williams v Union Carbide Corp.* (CA6 Tenn) 790 F2d 552, 20 Fed Rules Evid Serv 964, cert den 479 US 992, 93 L Ed 2d 592, 107 S Ct 591.

As to evidentiary admissions, generally, see § 772.

Footnote 98. *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922 (admission of additional income not considered admission of criminal liability because attorney qualified declaration by stating that client thought the income was not reportable).

Footnote 99. *United States v Harris* (CA7 Wis) 914 F2d 927, 31 Fed Rules Evid Serv 347, 117 ALR Fed 877, reh den, en banc (CA7) 1990 US App LEXIS 18671.

Footnote 1. *Dartez v Owens-Illinois, Inc.* (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301.

Statements contained in briefs submitted by a party's attorney in one case cannot routinely be used in another case as evidentiary admissions of the party, although such statements may achieve binding force in highly unusual circumstances. *Martel v Stafford* (CA1 Mass) 992 F2d 1244, summary op at (CA1 Mass) 21 M.L.W. 2631 and summary op at (CA1 Mass) 14 R.I.L.W. 208.

Footnote 2. *United States v Valencia* (CA2 NY) 826 F2d 169, 23 Fed Rules Evid Serv 1005 (statements regarding criminal defendant's innocence, made during informal discussions to negotiate bail, did not qualify as statements within the scope of attorney's representation of the defendant).

Footnote 3. *United States v D.K.G. Appaloosas, Inc.* (ED Tex) 630 F Supp 1540, affd (CA5 Tex) 829 F2d 532, 9 FR Serv 3d 83, cert den 485 US 976, 99 L Ed 2d 481, 108 S Ct 1270.

As to admissions by government agents and employees, see § 819.

Footnote 4. *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922.

Footnote 5. As to authorized admissions, see § 811.

Footnote 6. *United States v McKeon* (CA2 NY) 738 F2d 26, 15 Fed Rules Evid Serv 1409.

As to adoptive admissions, see §§ 796 et seq.

Footnote 7. *United States v Martin* (CA4 Md) 773 F2d 579, 85-2 USTC ¶ 9755, 19 Fed Rules Evid Serv 314, 56 AFTR 2d 85-5922.

As to the attorney-client privilege, see 81 Am Jur 2d, Witnesses §§ 337 et seq.

§ 821 Interpreters

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, under the rule of evidence admitting statements by agents and employees as admissions of a party-opponent, an interpreter is viewed as an agent of the party for whom they interpret, thus the translation may be considered a party-admission that qualifies as "not hearsay." 8 A party's conscious reliance on an interpreter's

translation may be construed as an authorization to speak on behalf of the party. 9

Unless there are circumstances that would negate a presumption of agency, interpreters will be considered agents if they have sufficient capacity to act as interpreters, and there is no apparent motive to misrepresent what is said. 10 Circumstances which may negate an inference of agency between the interpreter and the party against whom the translation is offered include instances where the interpreter seeks to shift suspicion to the accused and away from the interpreter or where the interpreter is shown to be incompetent. 11 The competency of an interpreter may be demonstrated through the interpreter's trial testimony that the interpreter had no trouble communicating with the party and that the party had no apparent problem understanding the interpreter. 12 The failure of an interpreter to take notes and to remember the specific questions or answers translated has been found not crucial to the admission of the translation of a defendant's responses, where the substance of the translation was related at trial by a law enforcement officer, who took simultaneous notes while the translation of questions and answers occurred. 13

That the interpreter is an employee of the government does not preclude the interpreter from being considered an agent of a criminal defendant for purposes of admitting the translation, 14 even when the party is unaware that the interpreter is a law enforcement agent. 15

Footnotes

Footnote 8. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40; *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217; *United States v Alvarez* (CA11 Fla) 755 F2d 830, 17 Fed Rules Evid Serv 1181, 77 ALR Fed 613, cert den 474 US 905, 88 L Ed 2d 235, 106 S Ct 274 and cert den 482 US 908, 96 L Ed 2d 380, 107 S Ct 2489 and (criticized on other grounds by *United States v Jim* (CA9 Nev) 865 F2d 211).

As to the rule of evidence admitting statements of an agent or employee as an admission of a party opponent, see § 815.

As to admissions of party-opponents, generally, see § 760.

As to translations by interpreters as authorized admissions, see § 811.

Annotation: Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 ALR4th 1016.

Footnote 9. *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217.

Footnote 10. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40; *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217; *United States v Alvarez* (CA11 Fla) 755 F2d 830, 17 Fed Rules Evid Serv 1181, 77 ALR Fed 613, cert den 474 US 905, 88 L Ed 2d 235, 106 S Ct 274 and cert den 482 US 908, 96 L Ed 2d 380, 107 S Ct 2489 and (criticized on other grounds by *United States v Jim* (CA9 Nev) 865 F2d 211).

Footnote 11. *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217.

Footnote 12. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40.

Footnote 13. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40.

Footnote 14. *United States v Beltran* (CA1 NH) 761 F2d 1, 18 Fed Rules Evid Serv 40; *United States v Da Silva* (CA2 NY) 725 F2d 828, 14 Fed Rules Evid Serv 1217 (US Customs agent's English translation of the defendant's Spanish responses to another law enforcement officer's interrogation questions, which were also translated into Spanish by the customs agent).

An interpreter provided by an undercover agent was a mere language conduit, or the narcotics defendant's agent, for purposes of conducting conversations with the undercover agent, so that admission of the agent's testimony as to the defendant's translated statements created neither confrontation clause nor hearsay problems where there was no motive to mistranslate even if the interpreter were biased toward the DEA, and both a confidential informant and the defendant took subsequent actions consistent with the agent's testimony as to content of the conversations. *United States v Nazemian* (CA9 Cal) 948 F2d 522, 91 CDOS 8383, 91 Daily Journal DAR 12903, 34 Fed Rules Evid Serv 188, cert den (US) 121 L Ed 2d 65, 113 S Ct 107.

As to statements by government agents and employees, generally, see § 819.

Footnote 15. *United States v Alvarez* (CA11 Fla) 755 F2d 830, 17 Fed Rules Evid Serv 1181, 77 ALR Fed 613, cert den 474 US 905, 88 L Ed 2d 235, 106 S Ct 274 and cert den 482 US 908, 96 L Ed 2d 380, 107 S Ct 2489 and (criticized on other grounds by *United States v Jim* (CA9 Nev) 865 F2d 211) (English translation of the defendant's Spanish conversation during a drug transaction, as translated by one law enforcement officer to another while both officers were working undercover).

§ 822 Corporate officers and agents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, the rules relative to the admissibility of statements of agents¹⁶ apply to statements by corporate officers or agents.¹⁷ The admissions and representations of the officers or agents of a corporation, made during the transaction of the business entrusted to them or within the actual or apparent scope of their authority, may be admissible in evidence against the corporation.¹⁸ Where there is a requirement that the employee be acting within the scope of his or her authority¹⁹ in order to render admissions of corporate officers or agents admissible against the corporation, they must have been made while such officers or agents were acting for the corporation and within the scope or apparent scope of their authority, and the declarations or admissions must be made in their official capacity, and not in their capacity as individuals.²⁰

Generally, declarations of employees are admissible regardless of whether the declarations are made by a management-level or low-level employee, providing the declaration is within the scope of employment. 21 However, some courts requiring that the employee be acting within the scope of his or her authority state that in order to be within the scope of authority, the employee usually must have some executive capacity. 22

Although, traditionally, a report from an agent to a principal, intended to be confidential, was not an admission, some courts state that intercorporate communications concerning matters relevant to the issue of the case may be admitted in evidence. 23 The Federal Rule of Evidence governing agency or employment 24 permits the receipt in evidence of a statement against an employer or principal, even when it is an internal statement made to the employer or principal by the employee or agent. 25 Warnings by members of management may be admissible as admissions by agents of an employer. 26 In addition, where an accountant's opinion results from a valuation done by him or her at the request of a corporation, it may constitute an admission by the corporation. 27

In some cases, it has been held that a corporation is not bound by the declarations of its officers or agents while on the witness stand, on the ground that while testifying they are not acting for the corporation, but for themselves individually. 28

◆ Observation: Extrajudicial statements by corporate employees may be admitted, under the Federal Rule of Evidence governing admissions by agents and employees, for use in civil suits against their superiors, as distinguished from the corporation itself, if the factors which normally make up an agency relationship are present between the employee and the superior. 29 However, federal courts will not impute the statements of a declarant to a party-opponent who is merely the declarant's co-employee. 30

◆ Practice guide: Although statements made by an agent or servant of a corporate party during a deposition of that agent or servant may later be held to be admissible against the corporate party pursuant to the Federal Rule of Evidence governing admissions by agents and employees, the rule was not intended to permit, for substantive purposes, the introduction of the entire deposition testimony of the defendant's employee as a substitute for having the employee testify at trial. 31

Footnotes

Footnote 16. § 815.

Footnote 17. *La Abra Silver Mining Co. v United States*, 175 US 423, 44 L Ed 223, 20 S Ct 168.

Footnote 18. *Layman v Ben Snyder, Inc.* (Ky) 305 SW2d 319; *Loyal's Auto Exchange v Munch*, 153 Neb 628, 45 NW2d 913; *Alexander v Seaboard A. L. R. Co.*, 221 SC 477, 71 SE2d 299; *Rudzinski v Warner Theatres, Inc.*, 16 Wis 2d 241, 114 NW2d 466.

Where, by contract, the amount due the plaintiff was to be determined by weigh bills which were in the possession of the bookkeeper, an officer of the defendant company, the reply of such officer in possession of them is competent testimony. *Anvil Mining Co. v*

Humble, 153 US 540, 38 L Ed 814, 14 S Ct 876.

A declaration made by an officer or agent of a corporation, in response to timely inquiries properly addressed to him and relating to matters under his charge, with respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation. *Xenia Bank v Stewart*, 114 US 224, 29 L Ed 101, 5 S Ct 845.

As to the power of a president or cashier of a bank to bind it by admissions or declarations, see 10 Am Jur 2d, Banks §§ 132, 152.

Footnote 19. § 817.

Footnote 20. *Mortgage Guarantee Co. v Chotiner*, 8 Cal 2d 110, 64 P2d 138, 108 ALR 1080; *Layman v Ben Snyder, Inc.* (Ky) 305 SW2d 319; *Saltmount Oil Corp. v Imperial Crown Royalty Corp.* (Tex Civ App) 98 SW2d 418, writ dismissed; *Griffith v Electrolux Corp.*, 176 Va 378, 11 SE2d 644.

A corporate employee's statement that another employee was responsible for a decision cutting off purchase orders a contractor had been receiving because the contractor had negotiated with unions outside the multi-employer bargaining process was hearsay and properly excluded where the declarant did not have authority to hire and fire the contractor. *Precision Piping & Instruments, Inc. v E.I. Du Pont de Nemours & Co.* (CA4 W Va) 951 F2d 613, 139 BNA LRRM 2194, 120 CCH LC ¶ 11110, 1991-2 CCH Trade Cases ¶ 69648, 34 Fed Rules Evid Serv 1011.

In an action for invasion of privacy against a telephone company, testimony of the plaintiff as to the substance of conversations between him and an official of the telephone company was hearsay and not admissible under the declaration against interest or admissions exception since admissions are received to show truth of the matter asserted and since it did not appear that the official was engaged in exercising authority conferred upon him by the phone company, that his declarations related to the company's then pending business, or that the declarations were made officially. *Southwestern Bell Tel. Co. v Ashley* (Tex Civ App Eastland) 563 SW2d 637, writ refused (Jul 26, 1978) and reh'g of writ of error overruled (Oct 25, 1978).

Footnote 21. *Union Mut. Life Ins. Co. v Chrysler Corp.* (CA1 Mass) 793 F2d 1, 20 Fed Rules Evid Serv 1024.

Footnote 22. *Benner v Johnson Controls, Inc.* (Mo App) 813 SW2d 16.

Footnote 23. *Haines Pipeline Constr., Inc. v Montana Power Co.*, 251 Mont 422, 830 P2d 1230.

Footnote 24. FRE, Rule 801(d)(2)(D).

Footnote 25. *Mahlandt v Wild Canid Survival & Research Center, Inc.* (CA8 Mo) 588 F2d 626, 3 Fed Rules Evid Serv 1585 (statement by educational director to organization's president); *Osterneck v E.T. Barwick Industries, Inc.* (ND Ga) 106 FRD 327, later proceeding (ND Ga) LEXIS slip op, later proceeding (CA11 Ga) 825 F2d 1521, CCH Fed Secur L Rep ¶ 93403, 8 FR Serv 3d 840, cert granted 486 US 1042, 100 L Ed 2d 618, 108 S Ct 2032 and affirmed 489 US 169, 103 L Ed 2d 146, 109 S Ct 987, CCH Fed Secur L

Rep ¶ 94190, 13 FR Serv 3d 1 (superseded by statute on other grounds as stated in Burt v Ware (CA5 La) 14 F3d 256).

Footnote 26. Hybert v Hearst Corp. (CA7 Ill) 900 F2d 1050, 52 BNA FEP Cas 1238, 53 CCH EPD ¶ 39897, 30 Fed Rules Evid Serv 249, reh den, en banc (CA7) 1990 US App LEXIS 8997 (in an age discrimination suit, a supervisor's statements that with an expected new publisher there would be a number of people in their sixties who would be replaced was admissible as admissions by an agent of the employer since they were direct warnings by a member of management).

Footnote 27. Vector Industries, Inc. v Dupre (Tex App Dallas) 793 SW2d 97.

See Haines Pipeline Constr., Inc. v Montana Power Co., 251 Mont 422, 830 P2d 1230, where an internal audit was admissible as an admission because it was relevant to the issue being resolved by the trial court.

Footnote 28. Fellowship Foundation, Inc. v Paul (Fla) 86 So 2d 808; Saltmount Oil Corp. v Imperial Crown Royalty Corp. (Tex Civ App) 98 SW2d 418, writ dism w o j.

Footnote 29. Lippay v Christos (CA3 Pa) 996 F2d 1490, 37 Fed Rules Evid Serv 625.

Footnote 30. Lippay v Christos (CA3 Pa) 996 F2d 1490, 37 Fed Rules Evid Serv 625.

Footnote 31. Kolb v County of Suffolk (ED NY) 109 FRD 125, 20 Fed Rules Evid Serv 599, 5 FR Serv 3d 601.

As to the Federal Rule of Evidence governing admissions by agents and employees, generally, see § 815.

§ 823 Statements relating to past transactions; statements after cessation of agency or employment

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One's statements made after his or her agency or employment has ceased are not binding on the principal or employer ³² and cannot be given in evidence against the principal or employer. ³³ Courts sometimes state that statements by one who was engaged by another to perform a special duty in respect to a particular act or transaction, made after the duty has been performed or after the occurrence of such act or transaction, are not admissible to bind the principal. ³⁴ The Federal Rule of Evidence pertaining to statements by agents or employees ³⁵ only lifts the hearsay bar if the statement is made during the course of an employment or agency relationship, and not after the termination of such relationship. ³⁶ However, post accident statements of an agent have frequently been held admissible against the principal for the purpose of showing the latter's knowledge of a fact or condition. ³⁷

Footnotes

Footnote 32. *Hook v Crary* (ND) 142 NW2d 140 (court syllabus).

Footnote 33. *Goetz v Bank of Kansas City*, 119 US 551, 30 L Ed 515, 7 S Ct 318; *Branch v Dempsey*, 265 NC 733, 145 SE2d 395.

Footnote 34. *Goetz v Bank of Kansas City*, 119 US 551, 30 L Ed 515, 7 S Ct 318; *State ex rel. Kroger Co. v Craig* (Mo App) 329 SW2d 804; *Bankers Fire Ins. Co. v Henderson*, 196 Va 195, 83 SE2d 424.

Footnote 35. FRE, Rule 801(d)(2)(D).

Footnote 36. *SEC v Geon Industries, Inc.* (CA2 NY) 531 F2d 39, CCH Fed Secur L Rep ¶ 95441; *United States v Summers* (CA5 Ala) 598 F2d 450, 4 Fed Rules Evid Serv 1146; *Crawford v Garnier* (CA7 Wis) 719 F2d 1317, 14 Fed Rules Evid Serv 181 (criticized on other grounds by *Parrish v Johnson* (CA6 Mich) 800 F2d 600) and (criticized on other grounds by *Santiago-Negron v Castro-Davila* (CA1 Puerto Rico) 865 F2d 431, 13 FR Serv 3d 211).

A bookkeeper's statements to the Securities Exchange Commission during an investigation of fraud were admissible as statements within the scope of the bookkeeper's employment, where the testimony concerned the bookkeeping records of the defendant's corporation, notwithstanding that at the time the statements were made the bookkeeper was no longer on the corporation's payroll, since the bookkeeper was still acting as the corporation's bookkeeper and the corporation's financial records were in the bookkeeper's possession. *United States v Chappell* (CA7 Ind) 698 F2d 308, 12 Fed Rules Evid Serv 411, cert den 461 US 931, 77 L Ed 2d 304, 103 S Ct 2095, later proceeding (CA7 Ind) 854 F2d 190, post-conviction proceeding (CA7 Ind) 878 F2d 384, reh den (CA7) 1989 US App LEXIS 15031 and motion gr 494 US 1054, 108 L Ed 2d 761, 110 S Ct 1520 and vacated on other grounds 494 US 1075, 108 L Ed 2d 931, 110 S Ct 1800, on remand on other grounds (CA7 Ind) 956 F2d 272, reported in full (CA7) 1992 US App LEXIS 3516 and cert den (US) 118 L Ed 2d 584, 112 S Ct 1986, reh den (US) 120 L Ed 2d 925, 112 S Ct 3061.

Joint income tax liability of a former husband and wife did not make any statement by one spouse a vicarious admission under FRE, Rule 801(d)(2)(D), where their divorce antedated the giving of testimony which the government considered to be an admission. *United States v Diehl* (SD Tex) 460 F Supp 1282, affd (CA5 Tex) 586 F2d 1080, 79-1 USTC ¶ 9146, 43 AFTR 2d 79-495.

Footnote 37. § 818.

c. Persons in Privity; Former Landowners [824-827]

§ 824 Generally

[View Entire Section](#)

The declarations of a third person are admissible against a party whenever privity of estate exists between the declarant and the party, 38 the term "privity of estate" generally denoting, in this respect, a succession in rights. 39 The declarations of the privity in estate are deemed in law to be the declarations of the party. 40 Thus, whenever a party claims under, or in the interest or right of, another, the declarations of such other person pertaining to the subject of the claim are admissible against such party. 41 Accordingly, a statement of a former owner in the nature of an admission against interest is, as to real property at least, admissible against his or her successors in title, 42 provided that the matter is one which may be proved by parol evidence 43 and that the declarant possessed a proprietary interest at the time he or she made the statement. 44 The general rule that admissions against interest, made by an owner of property, are admissible against persons claiming title to the property through him or her is applicable to admissions in pleadings. 45 In addition, an admission made by a person since deceased, if relevant, is admissible against any person claiming under the deceased. 46

◆ Comment: The "admissions-by-privies" doctrine has not been expressly adopted in the Federal Rules of Evidence. The very explicitness of the Federal Rule of Evidence on admissions by party-opponents 47 suggests that the persons drafting did not intend to authorize the courts to add new categories of admissions to those stated in the Rule, and thus the admissibility of privity-based admissions is governed not by that Rule but by the residual hearsay exceptions. 48 Moreover, it has been held that the Federal Rule of Evidence governing admissions by party-opponents rejects privity as a ground of admissibility, and thus a trustee in bankruptcy is not bound by statements of the bankrupt as a successor in interest. 49

Footnotes

Footnote 38. *Rumford Chemical Works v Hygienic Chemical Co.*, 215 US 156, 54 L Ed 137, 30 S Ct 45; *Katnig v Johnson* (Okla) 383 P2d 195, 19 OGR 205.

Footnote 39. *Vineberg v Hardison* (Fla App D3) 108 So 2d 922.

Footnote 40. *Vineberg v Hardison* (Fla App D3) 108 So 2d 922.

Footnote 41. *Steinbach v Stewart*, 78 US 566, 11 Wall 566, 20 L Ed 56; *Smith v Clark*, 219 Ark 751, 244 SW2d 776; *Taylor v Cory* (Fla) 53 So 2d 820; *Vineberg v Hardison* (Fla App D3) 108 So 2d 922; *Katnig v Johnson* (Okla) 383 P2d 195, 19 OGR 205; *Pavlovitch v Wommack*, 206 Okla 158, 241 P2d 1119.

Footnote 42. *Pearson v Mullins* (Okla) 369 P2d 825.

Footnote 43. *Maxwell Land Grant Co. v Dawson*, 151 US 586, 38 L Ed 279, 14 S Ct 458; *Bradstreet v Bradstreet*, 158 Me 140, 180 A2d 459.

As to the admissibility of parol evidence affecting writings, see §§ 1092 et seq.

Footnote 44. § 825.

Footnote 45. *Williams v Williams* (CA7 Ill) 61 F2d 257, cert den 288 US 612, 77 L Ed 986, 53 S Ct 404.

As to admissions in pleadings, generally, see §§ 774 et seq.

Footnote 46. *Hay v Wanner* (CA5 Fla) 204 F2d 355; *Jackson v Parker*, 153 Fla 622, 15 So 2d 451; *Reed v Philpot's Adm'r*, 235 Ky 429, 31 SW2d 709; *Re Forsythe's Estate*, 221 Minn 303, 22 NW2d 19, 167 ALR 1; *Fowler v Taylor*, 97 NH 294, 86 A2d 325; *Lubbering v Ellison* (Tex Civ App San Antonio) 342 SW2d 796 (superseded by statute on other grounds as stated in *Williams v Roberts* (Tex Civ App San Antonio) 621 SW2d 427).

A statement may not be hearsay if the statement is offered against a party and the statement is a statement by the declarant offered against the party in an action for damages arising from the death of that declarant. *Bordelon v Henderson* (La) 604 So 2d 950, reh den (La) 605 So 2d 1111.

As to admissions of decedents, generally, see §§ 828 et seq.

Footnote 47. FRE, Rule 801(d)(2).

As to admissions by party-opponents, generally, see §§ 760 et seq.

Footnote 48. *Huff v White Motor Corp.* (CA7 Ind) 609 F2d 286, 4 Fed Rules Evid Serv 1185 (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Hines* (AFCMR) 18 MJ 729.

Residual hearsay exceptions are discussed in §§ 683 et seq.

Footnote 49. *Calhoun v Baylor* (CA6 Tenn) 646 F2d 1158 (disapproved on other grounds by *Green v Bock Laundry Machine Co.*, 490 US 504, 104 L Ed 2d 557, 109 S Ct 1981, 27 Fed Rules Evid Serv 577).

§ 825 Time of statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One of the conditions under which the statement of a former owner against his or her interest is admitted in evidence against a successor as an admission binding on the successor is that the statement must be one made while the former owner had a proprietary interest in the property. 50 The declaration of a former owner made after a conveyance of the property ordinarily is not admissible against the grantee. 51 However, the rule which renders inadmissible the declarations of a former owner made after he or she has parted with all interest in the property does not have an unlimited application. It does not, for instance, operate to exclude evidence of declarations of a

grantor made soon after executing a deed, to show the grantor's mental condition at the time he or she executed it. 52 Another exception to the rule is made under certain conditions in actions to set aside conveyances or transfers as fraudulent. 53

Footnotes

Footnote 50. Greiner v Commonwealth, 334 Pa 299, 6 A2d 67.

Footnote 51. Grimes Dry Goods Co. v Malcolm, 164 US 483, 41 L Ed 524, 17 S Ct 158; Milligan v Milligan, 161 Neb 499, 74 NW2d 74.

A will in which the testator declares that a conveyance of property theretofore made by him was without consideration, and without any intention of surrendering title, and he thereupon proceeds to devise the property, is inadmissible upon the question whether the grantee took the title in trust. All v Prillaman, 200 SC 279, 20 SE2d 741, 159 ALR 981.

Footnote 52. 41 Am Jur 2d, Incompetent Persons § 134.

Footnote 53. 37 Am Jur 2d, Fraudulent Conveyances § 227.

§ 826 Subject matter of statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Declarations of a former owner, otherwise admissible in evidence, 54 are admitted against a successor in interest in respect to any material matter concerning the physical condition or use of the property. 55 The rule does not authorize the reception in evidence of statements which operate to destroy or defeat a title vested in the grantee or his or her successors by virtue of the former owner's deed. 56 In other words, the declarations of a former owner are generally not admissible in evidence against a grantee or the successors of a grantee in impeachment of the deed upon which their title rests. 57 On the other hand, the declarations of a former owner in support of a deed are admissible. 58

Footnotes

Footnote 54. §§ 824, 825.

Footnote 55. Liberty Nat. Bank & Trust Co. v Merchant's & Mfr's Paint Co., 307 Ky 184, 209 SW2d 828.

Footnote 56. Winchester & Partridge Mfg. Co. v Creary, 116 US 161, 29 L Ed 591, 6 S Ct 369; Bradstreet v Bradstreet, 158 Me 140, 180 A2d 459.

Footnote 57. Head v Head, 293 Ky 371, 169 SW2d 25; Milligan v Milligan, 161 Neb

499, 74 NW2d 74.

It is not competent to prove declarations made out of court by the predecessor in title of a party to an action in court, to the effect that a deed which appears to be sufficient in all respects, which is duly recorded and which a purchaser has been led to rely upon as one of the necessary links in its chain of title, from the fact of its being recorded, is not what it, and the record of it, purports to be. *Bradstreet v Bradstreet*, 158 Me 140, 180 A2d 459.

Footnote 58. *Milligan v Milligan*, 161 Neb 499, 74 NW2d 74.

§ 827 Statements of mortgagors and mortgagees

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In accordance with the general rule that one who acquires title to property is bound by statements against interest made by his or her predecessor in title in respect to the property, 59 any admissions by a mortgagee of real property, made while he or she owns the mortgage, are admissible against his or her assignee. 60 A different situation is presented, of course, where an admission is made by mortgagor after the execution of the mortgage. Generally, declarations of a mortgagor which are made subsequent to the execution of the mortgage and which disparage the mortgagor's title to the property are inadmissible against the mortgagee. 61

However, while declarations made by parties on the occasion of the execution of a conveyance, although relevant, have little probative value on the issue of mortgage or no mortgage, 62 utterances of the parties to a conveyance subsequent to its execution are generally regarded as admissible for the purpose of determining its character as a mortgage. 63

Footnotes

Footnote 59. § 824.

Footnote 60. *Fowler v Taylor*, 97 NH 294, 86 A2d 325.

Footnote 61. *Overton v Harband*, 6 Cal App 2d 455, 44 P2d 484.

Footnote 62. 55 Am Jur 2d, Mortgages § 62.

Footnote 63. 55 Am Jur 2d, Mortgages § 63.

d. Persons Since Deceased or Under Belief of Impending Death [828-830]

§ 828 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the absence of a statutory provision, the death of a declarant is not in itself a ground for invoking an exception to the hearsay rule. 64 Under certain circumstances, however, statements made by a person since deceased are admissible under an exception to such rule, 65 based on necessity. 66 Under some statutes, in actions by or against the representative of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence. 67 In addition, statements of a decedent in actions to which the decedent's estate is a party may qualify as party-admissions where they bear on civil liability. 68 Moreover, the general rule is that statements made against interest by a declarant since deceased are admissible, even between third parties. 69 Consequently, a decedent's declarations in disparagement of his or her title would be admissible as they negate the existence of a gift and are, therefore, against the decedent's pecuniary interest. 70 That such declarations are proffered by one who would benefit from their admission into evidence is not a valid ground for excluding them from the jury's consideration. 71 In order for the statement to be admissible, the declarant must have peculiar means of knowing the facts stated, and no interest to misrepresent. 72

In addition, under privity concepts, an admission made by a person since deceased, if relevant, is admissible against any person claiming under the deceased. 73 A witness may testify about the statements of the deceased agent when the suit is against the principal. 74 Declarations made by a person since deceased may also be admissible, under certain limitations and restrictions, in proof of matters of family history, relationship, and pedigree. 75 Statements of a person since deceased have also been held admissible, within limitations, upon questions of boundaries. 76

§ 828 ----Generally [SUPPLEMENT]

Practice Aids: Evidence: Dead man's act, medical malpractice, 140 Chi Daily L Bull 221:1 (1994).

The death of the Dead-Man's Act? 82 Ill BJ 11:620 (1994).

Footnotes

Footnote 64. *Lucas v United States*, 163 US 612, 41 L Ed 282, 16 S Ct 1168; *Colgrove v Goodyear*, 325 Mich 127, 37 NW2d 779, 10 ALR2d 1029; *Brown v General Ins. Co.*, 70 NM 46, 369 P2d 968.

In an action involving title to land purchased at a judicial sale, evidence of conversations at the home of a life tenant of a portion of the land on the day before the sale, in which the life tenant, since deceased, supposedly said that she had talked to the purchaser, also

since deceased, who had agreed to bid on the property for the benefit of her and her children, has been held to constitute inadmissible hearsay. *Swon v Huddleston* (Mo) 282 SW2d 18, 55 ALR2d 205.

Footnote 65. *Kelly v Bank of America Nat. Trust & Sav. Asso.*, 112 Cal App 2d 388, 246 P2d 92, 34 ALR2d 578; *Askins v Easterling*, 141 Colo 83, 347 P2d 126; *Head v Head*, 293 Ky 371, 169 SW2d 25.

In an action involving the genuineness of a signature on an unacknowledged and unwitnessed contract for the sale of realty by one since deceased, the latter's declarations made subsequently to the purported sale and wholly inconsistent with such a sale were admissible. *Fredricksen v Fullmer*, 74 Idaho 164, 258 P2d 1155, 41 ALR2d 567.

The only declarations by a person since deceased which are admissible as exceptions to the hearsay rule are dying declarations, statements against interests, and, in rare instances, statements pertaining to family history or relationships. *Hogan v McKeithen* (La App 2d Cir) 527 So 2d 982.

Footnote 66. *Finnegan v Metropolitan Life Ins. Co. (App, Mahoning Co)* 81 Ohio L Abs 417, 162 NE2d 216, motion overr (disapproved on other grounds by *Lohnes v Young*, 175 Ohio St 291, 25 Ohio Ops 2d 136, 194 NE2d 428).

Footnote 67. *Connecticut Nat. Bank & Trust Co. v Chadwick*, 217 Conn 260, 585 A2d 1189.

As to the effect of dead man statutes, see 81 Am Jur 2d, Witnesses § 558.

Footnote 68. *Estate of Shafer v Commissioner* (CA6) 749 F2d 1216, 84-2 USTC ¶ 13599, 16 Fed Rules Evid Serv 1248, 55 AFTR 2d 85-1531.

As to admissions of party-opponents, generally, see § 760.

As to statements by parties to a civil suit, generally, see § 766.

Footnote 69. §§ 785 et seq.

Footnote 70. *Cole v Cole*, 205 Ga App 332, 422 SE2d 230.

Footnote 71. *Cole v Cole*, 205 Ga App 332, 422 SE2d 230.

Footnote 72. *Cale v Napier*, 186 W Va 244, 412 SE2d 242.

Footnote 73. § 824.

Footnote 74. *Board of Educ. v Zando, Martin & Milstead, Inc.*, 182 W Va 597, 390 SE2d 796.

As to admissibility of statements of agents against a principal, see § 815.

Footnote 75. §§ 691 et seq.

Footnote 76. 12 Am Jur 2d, Boundaries § 107.

§ 829 Dying declarations; statements made under belief of impending death

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In criminal cases, in the absence of statutory provision, dying declarations are admissible where the prosecution is for homicide in which the death of the declarant is the subject of the charge and the circumstances of the death are the subject of the declarations. 77 However, generally, in the absence of statutory provision, dying declarations are not admissible in civil cases, 78 including civil actions to recover for wrongful death. 79 Even though many of the courts adhering to the rule have subjected it to criticism, they have felt that it is so firmly established that any change should be undertaken only by the legislature. 80 However, in some jurisdictions it is provided by statute that in actions for wrongful death the dying declarations of the deceased as to the cause of the death are admissible in evidence in like manner and under the same rules as the dying declarations of the deceased are received in criminal actions for homicide. 81 In certain other jurisdictions, declarations of a dying person respecting the cause of his or her death uttered under a sense of impending death are made admissible by statute in both civil and criminal cases, without reference to whether the party against whom they are offered is charged with responsibility for having caused the death of the declarant. 82

The Federal Rules of Evidence 83 and the Uniform Rules of Evidence 84 provide for the admission of a statement made by a declarant, who is unavailable as a witness, 85 while believing that death was imminent, concerning the cause or circumstances of what he or she believed to be impending death. Under the federal rules, such statements are admissible only in prosecutions for homicide or in civil actions or proceedings. 86 Besides the restriction to homicide prosecutions and civil cases, the dying declarations exception is restricted with respect to the consciousness of the declarant and the type of statement uttered. In civil actions, since a dying declaration must deal with the cause and circumstances of the declarant's anticipated death, statements of love and affection, which a plaintiff seeks to introduce for purposes of proving damages, do not fall within this rule. 87 In a homicide prosecution, the dying declaration must bear on the fact of the homicide and the person by whom it was committed. 88 Such statements must be made voluntarily and in good faith. 89 In addition, such statement must be made under a sense of impending death. 90 Although there is some authority to the contrary, 91 some jurisdictions also hold that a declarant's expression of an opinion or a conclusion is not admissible as evidence of a dying declaration. 92

The dying declaration exception to the general rule prohibiting the admission of hearsay statements at trial is based on the belief that persons making dying declarations are highly unlikely to lie. 93

Under a practice approved by some courts, the prosecution states the declaration that he or she expects to prove; thereupon the court determines whether any part of a dying declaration is admissible or inadmissible; however, some courts, while conceding to the court the province of determining, in the first instance, whether sufficient foundation has

been laid to make a prima facie case for the admission of a statement as a dying declaration, permit the jury to consider, upon the submission of the entire case to it, whether or not the necessary predicate for the admissibility of the declaration has been established, and thus determine whether the declaration was, in fact, a dying declaration, without reference to the action of the court in admitting the statement as such. 94 In any event, the weight of a dying declaration is determined by the jury in light of the circumstances surrounding the making of the declaration. 95 The question whether the jury should be excused during a preliminary inquiry made to determine the admissibility of a dying declaration is a matter entirely within the sound discretion of the court, and in the absence of any showing of an abuse of that discretion, the ruling will not be disturbed. 96

**§ 829 ----Dying declarations; statements made under belief of impending death
[SUPPLEMENT]**

Practice Aids: Musings on the dying declaration, 22 Anglo-American LR 42 (1993).

Case authorities:

Even though the trial court erred in allowing inadmissible hearsay concerning what the murder victim said about her will, defendant was not prejudiced where other similar evidence was properly admitted. *State v Cannada* (1995) 119 NC App 311, 458 SE2d 268.

Statement of victim, repeated several times, to officer that "Darryl did it," after being shot more than a dozen times, and after officer told victim he didn't look too good and might not make it, was dying declaration where medical examiner testified wounds were so grave he could have died in matter of minutes, although he lasted for 3 hours, even though victim told companion not to worry, that he wasn't going to die. *Commonwealth v Butler* (1994, Pa Super) 647 A2d 928.

Deceased demonstrated consciousness of impending death, so as to allow admission of statements to wife and child as dying declaration, where deceased said: "They hit me in the heart. I am dying." *Burks v State* (1994, Tex Crim) 876 SW2d 877, petition for certiorari filed (Aug 22, 1994).

Footnotes

Footnote 77. 40 Am Jur 2d, Homicide § 347.

Footnote 78. *Phillips v Dow Chemical Co.*, 247 Miss 293, 151 So 2d 199 (stating rule; *McCoy v Industrial Com. (App, Montgomery Co)* 58 Ohio L Abs 513, 97 NE2d 93 (workers' compensation proceeding).

Annotation: Admissibility of dying declaration in civil case, 47 ALR2d 526.

Footnote 79. 22A Am Jur 2d, Death § 460.

Footnote 80. *Cummings v Illinois C. R. Co.*, 364 Mo 868, 269 SW2d 111, 47 ALR2d

Footnote 81. A Am Jur 2d, Death § 460.

Footnote 82. Barsch v Hammond, 110 Colo 441, 135 P2d 519; McCredie v Commercial Casualty Ins. Co., 142 Or 229, 20 P2d 232, 91 ALR 557 (ovrld on other grounds by Metropolitan Casualty Ins. Co. v N. B. Leshner, Inc., 152 Or 161, 52 P2d 1133).

Evidence constituted a sufficient showing of consciousness of impending death where the victim was shot five times and, one hour later, he affirmatively indicated his belief that he was dying. Commonwealth v Gause, 459 Pa 595, 330 A2d 856.

Footnote 83. FRE, Rule 804(b)(2).

Footnote 84. Uniform Rules of Evidence Rule 804(b)(2).

Footnote 85. As to unavailability as a witness, generally, see §§ 690 et seq.

Footnote 86. FRE, Rule 804(b)(2).

Footnote 87. Ferguson v Williams, 101 NC App 265, 399 SE2d 389, review den 328 NC 571, 403 SE2d 510.

Footnote 88. Mattox v United States, 146 US 140, 36 L Ed 917, 13 S Ct 50, appeal after remand 156 US 237, 39 L Ed 409, 15 S Ct 337.

As to the admissibility of dying declarations in the prosecution for the death of a woman resulting from an abortion, see 1 Am Jur 2d, Abortion and Birth Control § 106.

Annotation: Admissibility of homicide victim's statements exculpating the accused, 95 ALR2d 637.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 ALR2d 905.

Footnote 89. Wisker on behalf of Wisker v Hart, 244 Kan 36, 766 P2d 168.

Footnote 90. § 830.

Footnote 91. Shuman v State, 94 Nev 265, 578 P2d 1183 (statute dispensed with fact/opinion distinction with regard to dying declaration exception to the hearsay rule).

Footnote 92. Bland v State, 210 Ga 100, 78 SE2d 51; Watts v State (Miss) 492 So 2d 1281; State v Mahone (Mo App) 699 SW2d 60; State v Hegel, 58 NJ 596, 279 A2d 681 (declaration that would be inadmissible as opinion or conclusion were the declarant living and present to testify, is not admissible merely because the declarant's death was imminent at the time the statement was made); People v Little, 83 Misc 2d 321, 371 NYS2d 726; Commonwealth v Perry, 364 Pa 537, 73 A2d 425.

But see, Silva v State (Tex Crim) 546 SW2d 618 (statement by declarant that certain men had planned an ambush for him, made after the declarant had told his wife that he was

not going to make it, was not inadmissible opinion, but was a shorthand rendition of facts which was admissible as a dying declaration); *Dean v State* (Ind) 432 NE2d 40, (dying victim's conclusion that he was shot in back with a revolver because "he had seen a gun in the guy's hand" was admissible in a first-degree murder prosecution).

Annotation: Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 ALR2d 905.

Footnote 93. *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24.

Fear of impending death is at least as conducive to producing the truth by a declarant as is an oath to tell the truth. *People v Acomb* (4th Dept) 87 App Div 2d 1, 450 NYS2d 632, app dismd (4th Dept) 56 NY2d 1034, 453 NYS2d 1030, 439 NE2d 404 and appeal after remand (4th Dept) 94 App Div 2d 978, 464 NYS2d 103, later proceeding (4th Dept) 104 App Div 2d 736, 480 NYS2d 312.

Footnote 94. 40 Am Jur 2d, Homicide §§ 373, 374.

Footnote 95. 40 Am Jur 2d, Homicide § 374.

Footnote 96. 40 Am Jur 2d, Homicide § 375.

§ 830 --Expectation of impending death

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The central issue in determining whether a statement is a dying declaration is whether the declarant believed he or she was dying. 97 To render a dying declaration admissible, the declarant must have uttered it under a sense of impending death. 98 A mere belief that death was possible, or even probable, is not sufficient; the declarant must be virtually certain that death is imminent. 99 There must be a settled, hopeless expectation that death is near at hand and no statements indicating a hope for recovery, 1 although a declarant's urgent request for an ambulance would not necessarily show that he or she entertained some hope of recovery. 2 Similarly, the fact that the declarant requested a doctor does not, in itself, render the declaration inadmissible. 3 In addition, if the declarant believed in his or her impending death at the time of the declaration, it does not matter that, after the declaration, hope was revived and the declarant believed that he or she would recover. 4

A declarant's statements are admissible to show a belief in impending death. 5 However, although there is some authority to the contrary, 6 some courts state that the dying person does not have to state expressly that he or she knows that he or she is going to die; rather, the use of any words which are equivalent to such a statement will suffice. 7 Apart from the statements of the declarant, his or her consciousness of impending death can be proved by surrounding circumstances, such as the nature of the injury, 8 or by conduct, such as sending for a priest. 9 Furthermore, although there is some

authority to the contrary, 10 there is authority that a statement by a physician or other attendant that the declarant was aware, 11 or was not aware, 12 of impending death is admissible in evidence. It is not necessary to show a statement by the declarant indicating belief that death was impending, if it is otherwise clear that the declarant did not expect to survive the injury. 13 In any event, the attendant circumstances should be carefully considered, not only to determine whether the declarant believed death was imminent, but also to confirm whether the declarant was sincere in entertaining such a belief. 14

Although it is immaterial that the declarant did not die until a significant period of time had elapsed after making the declaration, provided at the making of the declaration, the declarant believed death was impending, 15 the existence of delay may be a factor in determining whether the declarant did in fact believe that death was impending when he or she made the declaration. 16

Footnotes

Footnote 97. *People v House*, 141 Ill 2d 323, 152 Ill Dec 572, 566 NE2d 259.

Footnote 98. *Duke v State*, 205 Ga 106, 52 SE2d 455; *People v Beier*, 29 Ill 2d 511, 194 NE2d 280; *People v Acomb* (4th Dept) 87 App Div 2d 1, 450 NYS2d 632, app dismd (4th Dept) 56 NY2d 1034, 453 NYS2d 1030, 439 NE2d 404 and appeal after remand (4th Dept) 94 App Div 2d 978, 464 NYS2d 103, later proceeding (4th Dept) 104 App Div 2d 736, 480 NYS2d 312; *State v Bethea*, 241 SC 16, 126 SE2d 846.

A dying declaration must be uttered under the fixed belief and moral conviction of the person that his or her death is impending and certain to follow almost immediately. *People v House*, 141 Ill 2d 323, 152 Ill Dec 572, 566 NE2d 259.

Footnote 99. *People v Miller*, 270 App Div 107, 58 NYS2d 525; *State v St. Clair*, 3 Utah 2d 230, 282 P2d 323.

Footnote 1. *Shepard v United States*, 290 US 96, 78 L Ed 196, 54 S Ct 22 (ovrld on other grounds by *Chapman v California*, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065) as stated in *Adamson v Ricketts* (CA9 Ariz) 758 F2d 441, 18 Fed Rules Evid Serv 346.

A burn victim's statement that she would "get" the defendant for what he did to her was improperly admitted as a dying declaration where the victim had not been informed that she would die and her behavior did not indicate an acceptance of the inevitable. *People v Crayton* (4th Dist) 175 Ill App 3d 932, 125 Ill Dec 493, 530 NE2d 651, app den 124 Ill 2d 557, 129 Ill Dec 152, 535 NE2d 917.

A dying declaration is a statement made while the declarant was conscious of his or her impending death, and believed that there was no hope of recovery. *Wisker on behalf of Wisker v Hart*, 244 Kan 36, 766 P2d 168.

Repeated declarations of a gunshot victim to the effect of "Please don't let me die," "I do not want to die," and "Am I going to die?" while showing a fear of death, did not reflect a certainty of belief that he was about to die. *People v Acomb* (4th Dept) 87 App Div 2d

1, 450 NYS2d 632, app dismd (4th Dept) 56 NY2d 1034, 453 NYS2d 1030, 439 NE2d 404 and appeal after remand (4th Dept) 94 App Div 2d 978, 464 NYS2d 103, later proceeding (4th Dept) 104 App Div 2d 736, 480 NYS2d 312.

If one believes that he or she is going to die, one also believes that there is no hope of recovery. *State v Richardson*, 308 NC 470, 302 SE2d 799.

Annotation: Comment Note.—Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration, 53 ALR3d 785.

Footnote 2. *United States v Etheridge* (CA6 Tenn) 424 F2d 951, cert gr 400 US 991, 27 L Ed 2d 438, 91 S Ct 462, cert dismd 402 US 547, 29 L Ed 2d 102, 91 S Ct 2174, reh den 404 US 875, 30 L Ed 2d 122, 92 S Ct 32 and cert den 400 US 993, 27 L Ed 2d 442, 91 S Ct 463 and cert den 400 US 1000, 27 L Ed 2d 452, 91 S Ct 464, reh den 401 US 926, 27 L Ed 2d 830, 91 S Ct 885 (request indicative merely of a natural desire to be relieved of pain).

But see *Kidd v State* (Miss) 258 So 2d 423, 53 ALR3d 774, holding that statements, such as "Somebody help me get to the hospital," revealed that the declarant was in no fear of impending death.

Footnote 3. *Riddle v State*, 41 Ala App 682, 149 So 2d 465; *Patterson v State*, 199 Ga 773, 35 SE2d 504.

Footnote 4. *Commonwealth v Hoff*, 315 Mass 551, 53 NE2d 680; *State v Hamlette*, 308 NC 193, 302 SE2d 246.

Footnote 5. *Carson v State* (Ala App) 439 So 2d 1350; *Duckery v State*, 251 Ark 3, 471 SW2d 330, 53 ALR3d 1192; *People v Bagwell* (1st Dist) 38 Cal App 3d 127, 113 Cal Rptr 122; *People v Lagunas* (Colo App) 710 P2d 1145; *Teffeteller v State* (Fla) 439 So 2d 840, cert den 465 US 1074, 79 L Ed 2d 754, 104 S Ct 1430, appeal after remand (Fla) 495 So 2d 744, 11 FLW 435; *Kitchens v State*, 256 Ga 1, 342 SE2d 320; *People v Lewis* (1st Dist) 97 Ill App 3d 982, 53 Ill Dec 353, 423 NE2d 1157; *State v Vincent* (La) 338 So 2d 1376 (a murder victim's statement of events leading to his shooting, as he lay mortally wounded and awaiting the arrival of an ambulance, was admissible as a dying declaration, based upon evidence of his statement, when told to lie quietly and rest, that "No, I've got to tell it all while I can"); *State v Sprague* (Me) 394 A2d 253; *Commonwealth v Sowell*, 22 Mass App 959, 494 NE2d 1359, review den 398 Mass 1104, 498 NE2d 124, later proceeding 34 Mass App 229, 609 NE2d 492, review den 415 Mass 1105, 616 NE2d 469, 21 M.L.W. 2986 and review den 416 Mass 1101, 618 NE2d 71, 21 M.L.W. 3176; *Bishop v State*, 92 Nev 510, 554 P2d 266; *State v Garcia*, 99 NM 771, 664 P2d 969, cert den 462 US 1112, 77 L Ed 2d 1341, 103 S Ct 2464, (statement by a hospitalized correctional officer one month after a stabbing and two days before dying that he understood his chances of recovery as being "nil" demonstrated the officer's belief that his death was imminent); *People v Lopez* (2d Dept) 125 App Div 2d 498, 509 NYS2d 582; *State v Richardson*, 308 NC 470, 302 SE2d 799 (in a prosecution for murder, the court properly admitted into evidence statements that were made by the deceased, where police officers who interviewed the victim at a hospital testified that throughout interview, in which the victim recounted the attack made on him, he repeatedly stated to them "Oh God, I am dying."); *Commonwealth v Stickle*, 484 Pa 89,

398 A2d 957; *Herrera v State* (Tex Crim) 682 SW2d 313, reh den (Jan 16, 1985) and cert den 471 US 1131, 86 L Ed 2d 282, 105 S Ct 2665 (identification of defendant by victim was admissible hearsay evidence, where identification was made in hospital after victim had suffered fatal wound, victim knew he was in serious condition at time of identification, and had previously stated several times that he believed he was going to die); *State v Giffing*, 45 Wash App 369, 725 P2d 445, review den 107 Wash 2d 1015; *Kelly v State* (Wyo) 694 P2d 126 (the victim's statement that he did not believe he would ever return home, combined with the seriousness of the injuries received by the victim, due to a severe beating, and the fact that the victim's condition had steadily worsened following his admission to the hospital, showed the victim's consciousness of impending death).

Footnote 6. *Rodriguez v State* (Tex App San Antonio) 697 SW2d 463, holding that statements made by a shooting victim in an ambulance on the way to the hospital, and to a relative in the hospital 3 days before the victim's death, that "I don't believe I'm going to make it," "I'm trying to hang on," and "She came to kill me and it looks like she did," were insufficient to satisfy the consciousness of approaching death requirement of the dying declaration exception to the hearsay rule, where the victim never stated that he knew he was going to die.

Footnote 7. *Slone v Commonwealth* (Ky) 354 SW2d 497; *People v Bartelini*, 285 NY 433, 35 NE2d 29, 167 ALR 139.

Footnote 8. *Mattox v United States*, 146 US 140, 36 L Ed 917, 13 S Ct 50, appeal after remand 156 US 237, 39 L Ed 409, 15 S Ct 337 (three gunshot wounds); *United States v Mobley* (CA5 Ga) 421 F2d 345 (severe beating and gunshot wound); *United States v Etheridge* (CA6 Tenn) 424 F2d 951, cert gr 400 US 991, 27 L Ed 2d 438, 91 S Ct 462, cert dismd 402 US 547, 29 L Ed 2d 102, 91 S Ct 2174, reh den 404 US 875, 30 L Ed 2d 122, 92 S Ct 32 and cert den 400 US 993, 27 L Ed 2d 442, 91 S Ct 463 and cert den 400 US 1000, 27 L Ed 2d 452, 91 S Ct 464, reh den 401 US 926, 27 L Ed 2d 830, 91 S Ct 885 (five gunshot wounds); *United States v Barnes*, 150 US App DC 319, 464 F2d 828, cert den 410 US 986, 36 L Ed 2d 183, 93 S Ct 1514; *Lehr v State* (Ala App) 398 So 2d 791; *Barnes v State* (Del Sup) 352 A2d 409; *Mills v State* (Fla App D1) 264 So 2d 71 (deep slashing wound in throat and considerable loss of blood); *Kitchens v State*, 256 Ga 1, 342 SE2d 320 (multiple gunshot wounds); *People v Webb* (1st Dist) 125 Ill App 3d 924, 81 Ill Dec 134, 466 NE2d 936, habeas corpus proceeding (CA7 Ill) 922 F2d 390, 31 Fed Rules Evid Serv 1245; *People v Barnes* (1st Dist) 117 Ill App 3d 965, 73 Ill Dec 236, 453 NE2d 1371; *State v Thompson* (La App 1st Cir) 489 So 2d 1364, cert den (La) 494 So 2d 324; *State v Penny* (La App 1st Cir) 486 So 2d 879, cert den (La) 489 So 2d 245 (serious injuries to head); *State v Verrett* (La App 4th Cir) 467 So 2d 1290 (the trial court properly admitted statements made by a dying robbery victim, where the victim, bleeding heavily, staggered from his residence into the doorway of a neighboring coffee shop, the people in the shop asked who had robbed him and the victim named the defendant, there was great deal of blood between the residence and the coffee shop, and witnesses testified as to the victim's deteriorating condition and that he died within minutes of entering the coffee shop); *State v Chaplin* (Me) 286 A2d 325 (profuse bleeding from stab wound); *Chandler v State*, 7 Md App 646, 256 A2d 695 (shotgun blast causing wounds to several organs and limbs); *Ellis v State* (Miss) 558 So 2d 826; *Watts v State* (Miss) 492 So 2d 1281; *State v Boyd* (Mo App) 669 SW2d 232 (in a prosecution for second-degree murder, the trial court properly admitted a written dying declaration of the victim made while the victim was in an intensive care unit of the hospital, where the victim's numerous wounds were so severe that she was never able to leave intensive care, where a

marked change in the victim's condition was readily apparent to the victim, and where the physician informed her that there was very good chance she would die and she acknowledged that she understood); *People v Liccione* (4th Dept) 63 App Div 2d 305, 407 NYS2d 753, *affd* 50 NY2d 850, 430 NYS2d 36, 407 NE2d 1333; *State v Hamlette*, 60 NC App 306, 299 SE2d 769, *petition den* 308 NC 193, 302 SE2d 246 (victim had gunshot wounds to his chest, had not yet undergone surgery, was being administered blood transfusions, was in extreme pain, and appeared to have difficulty breathing); *Commonwealth v Miller*, 490 Pa 457, 417 A2d 128, *cert den* 449 US 1113, 66 L Ed 2d 842, 101 S Ct 924 and (among conflicting authorities noted on other grounds in *Commonwealth v McCormick*, 359 Pa Super 461, 519 A2d 442); *State v Pickering*, 88 SD 230, 217 NW2d 877; *State v Lunsford* (Tenn Crim) 603 SW2d 745 (bleeding profusely from gunshot wound in neck); *Hayes v State* (Tex App Dallas) 740 SW2d 887 (severity of wound, which ultimately proved fatal, was sufficient to establish victim's awareness of his impending death); *Clark v Commonwealth*, 3 Va App 474, 351 SE2d 42, *affd*, *en banc* 235 Va 287, 367 SE2d 483 (victim had been shot three times, with two wounds to chest, and was in pain and having trouble breathing).

Annotation: Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 ALR2d 733.

Footnote 9. *Carver v United States*, 164 US 694, 41 L Ed 602, 17 S Ct 228; *People v Liccione* (4th Dept) 63 App Div 2d 305, 407 NYS2d 753, *affd* 50 NY2d 850, 430 NYS2d 36, 407 NE2d 1333; *State v Penn*, 36 NC App 482, 244 SE2d 702.

Footnote 10. *People v Hall*, 260 App Div 421, 22 NYS2d 973.

Footnote 11. *Davis v State*, 204 Ga 467, 50 SE2d 604; *State v Martin* (La App 5th Cir) 562 So 2d 468, *cert den* (La) 566 So 2d 987 (court would affirm conviction for manslaughter, despite the defendant's contention that the trial court erred in admitting the victim's hearsay statement to a police officer that the defendant had poured gasoline on him and set him afire, since the victim's statement was properly admitted as a dying declaration, given that the attending physician stated at trial that the victim knew he had been critically injured and that he was in danger of death); *State v Proctor* (Mo) 269 SW2d 624, 48 ALR2d 724; *State v Rich*, 231 NC 696, 58 SE2d 717; *Crawford v State*, 197 Tenn 411, 273 SW2d 689.

Annotation: Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 ALR2d 733.

Footnote 12. *Fambro v State*, 139 Tex Crim 480, 141 SW2d 354.

Footnote 13. *Kissic v State*, 266 Ala 71, 94 So 2d 202, 67 ALR2d 530, *appeal after remand* 40 Ala App 178, 110 So 2d 327; *Lehr v State* (Ala App) 398 So 2d 791; *Duckery v State*, 251 Ark 3, 471 SW2d 330, 53 ALR3d 1192; *State v Onofrio*, 179 Conn 23, 425 A2d 560; *Barnes v State* (Del Sup) 352 A2d 409; *Mills v State* (Fla App D1) 264 So 2d 71; *Butts v State*, 126 Ga App 512, 191 SE2d 329; *People ex rel. Hatch v Elrod* (1st Dist) 190 Ill App 3d 1004, 138 Ill Dec 643, 547 NE2d 1264, *app den* 131 Ill 2d 566, 142 Ill Dec 888, 553 NE2d 402 and *cert den* 498 US 845, 112 L Ed 2d 96, 111 S Ct 128 (decedent's statement to police in the hospital emergency room telling them the circumstances of shooting and that the defendant was the assailant was properly admitted into evidence as a dying declaration where, from the victim's statement to the police, "I

know I'm in bad shape," and the seriousness of the injuries, the trial judge could properly have found that the decedent truly believed he was dying and that his death was imminent); *State v Thompson* (La App 1st Cir) 489 So 2d 1364, cert den (La) 494 So 2d 324; *Chandler v State*, 7 Md App 646, 256 A2d 695; *Commonwealth v Nolin*, 373 Mass 45, 364 NE2d 1224 (statement made while the victim was on the operating table after the doctor told him that he had no chance of living); *People v Siler*, 171 Mich App 246, 429 NW2d 865, app den (Mich) 1989 Mich LEXIS 1072 (the dying declaration of a victim was admissible where the victim called 911 for an ambulance after having been stabbed in the heart, and, during the conversation with the 911 operator, named the defendant as the assailant); *Ellis v State* (Miss) 558 So 2d 826; *Ennis v State*, 91 Nev 530, 539 P2d 114; *State v Quintana*, 98 NM 17, 644 P2d 531; *State v White*, 63 NC App 734, 306 SE2d 468, petition den 309 NC 825, 310 SE2d 357; *State v Achziger*, 10 Or App 198, 497 P2d 383, adhered to 11 Or App 574, 502 P2d 1162; *Commonwealth v Hawkins*, 448 Pa 206, 292 A2d 302; *State v Pickering*, 88 SD 230, 217 NW2d 877; *Hayes v State* (Tex App Dallas) 740 SW2d 887.

Footnote 14. *United States v Barnes*, 150 US App DC 319, 464 F2d 828, cert den 410 US 986, 36 L Ed 2d 183, 93 S Ct 1514; *Duckery v State*, 251 Ark 3, 471 SW2d 330, 53 ALR3d 1192; *Butts v State*, 126 Ga App 512, 191 SE2d 329; *Commonwealth v Hawkins*, 448 Pa 206, 292 A2d 302.

Footnote 15. *Ayers v State*, 215 Ga 325, 110 SE2d 669 (4 days); *Early v State*, 170 Ga App 158, 316 SE2d 527 (54 days); *State v Hamlette*, 60 NC App 306, 299 SE2d 769, petition den 308 NC 193, 302 SE2d 246 (several days).

Footnote 16. *Emmett v State*, 195 Ga 517, 25 SE2d 9, cert den 320 US 774, 88 L Ed 464, 64 S Ct 76 and (ovrld on other grounds by *Howard v State*, 237 Ga 471, 228 SE2d 860); *State v Gremillion* (La) 542 So 2d 1074 (17 days).

e. Coconspirator Statements [831-856]

(1). In General [831-834]

§ 831 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal Rules of Evidence 17 and the Uniform Rules of Evidence, 18 statements by a coconspirator made during the course and in furtherance of the conspiracy may qualify as nonhearsay. Some courts have stated this rule as: where two or more persons are alleged to have conspired to commit a crime or cause injury to another, any statement made by one, pursuant to or in furtherance of the conspiratorial purpose, is admissible in evidence against any other member of the conspiracy. 19 The rule covers the admissibility of statements, not actions, unless the action is intended by

the actor as an assertion. 20 Some courts state that certain statutes excepting coconspirator statements from the hearsay rule may only be used against a conspirator and are not a means by which a conspirator may introduce exculpatory evidence. 21

Evidence of coconspirator statements is admissible in civil cases, as well as criminal, where the conspiracy rule applies to tortfeasors acting in concert. 22 The preliminary requirements for introduction of coconspirator statements are the same for civil suits as in criminal actions. 23 To be admissible under the rule, the statement: (1) must have been made by a coconspirator of a party; 24 (2) must have been made during the course of the conspiracy; 25 (3) must have been made in furtherance of the conspiracy; 26 and (4) must be offered against a party-opponent. 27 Some states have additional requirements. For instance, they may require that the proffered statement contain certain indicia of reliability including personal knowledge of the assertions made in the statements, the absence of an apparent reason for the declarant to lie, spontaneity, and findings that the statement was against the declarant's penal interest. 28 However, there is also authority that neither unavailability, reliability or corroboration need be shown for the admission of coconspirator statements. 29 Moreover, the coconspirator exception is essentially unaffected by whether the statement is made in the presence or absence of the accused. 30

In a criminal prosecution, the Government is not a party against whom coconspirator statements may be offered. 31

◆ Practice guide: There are alternative methods for the introduction of a statement which is inadmissible under the coconspirator exception. Such a statement may be offered—

—for a nonhearsay use. 32

—to impeach the testimony of a coconspirator on the stand as a witness for the defense. 33

—on the ground that the defendant waived the hearsay objection by using hearsay statements otherwise inadmissible under the coconspirator exception during the presentation of his case. 34

—under other hearsay exceptions, such as the exception for declarations against interest, 35 or a statement of a declarant's then-existing mental, emotional, and physical condition. 36

§ 831 ----Generally [SUPPLEMENT]

Case authorities:

Heroin distribution coconspirator's statement that informant, not defendant, was source of heroin was not admissible as statement against penal interest since it was not against coconspirator's penal interest and bore no other indicia of reliability. *United States v Vegas* (1994, CA2 NY) 27 F3d 773, corrected (1994, CA2 NY) 1994 US App LEXIS 27621 and cert den (1994, US) 115 S Ct 284.

Plea agreements of Sherman Act defendant's coconspirators were properly admitted since

otherwise jury could not properly assess coconspirators' credibility as witnesses, which was relevant to establishing underlying facts that formed basis of defendant's conviction, and trial court sought to prevent any misunderstanding or misuse of pleas by giving jury detailed instructions. *United States v Gaev* (1994, CA3 Pa) 24 F3d 473, 1994-1 CCH Trade Cases ¶ 70578, reh, en banc, den (1994, CA3 Pa) 1994 US App LEXIS 12699.

In blind vendor's suit alleging that defendants' violation of his exclusive vending rights in state capital building deprived him of property without due process of law and that revocation of his license was in retaliation for exercise of his First Amendment rights, evidence that Director of Blind Services told plaintiff that it was his perception that certain state officials wished to have vendor removed was not admissible under coconspirator exception since it was plainly not made in furtherance of conspiracy. *Copsey v Swearingen* (1994, CA5 La) 36 F3d 1336, reh den (1994, CA5 La) 1994 US App LEXIS 34376.

Government's evidentiary proffer as to coconspirator statements is conditionally admitted pursuant to FRE 104(a), 104(b), and 801(d)(2)(E), subject to proof of conspiracy at trial, where government seeks to admit statements pertaining to, inter alia, membership and roles in conspiracy, methods by which cocaine was transported, and avoidance of detection by law enforcement, because proffer shows it is more likely than not that conspiracy existed, that defendants participated in it, and that statements were made during course of and in furtherance of it. *United States v Messino* (1994, ND Ill) 855 F Supp 973.

Coconspirator's statement that he had to travel to town where defendant lived before completing proposed drug deals was not inadmissible hearsay because evidence showed that declarant was joined with defendant in cocaine distribution conspiracy. *United States v Stierwalt* (1994, CA8 Mo) 16 F3d 282.

Bank robbery coconspirator's statement to testifying coconspirator that he had recruited defendants to carry out bank robbery was properly admitted under coconspirator exception since it was intended to promote conspiratorial objectives. *United States v Johnson* (1993, CA10) 4 F3d 904, petition for certiorari filed (Dec 2, 1993).

Although court was reluctant to condone substitution of written proffer of foundation for admission of coconspirator statements, district court did not err in ordering written proffer in instant case given its concern about potential unwieldiness of hearing, its invitation to parties to press continuing objections, and its contemporaneous rulings and limiting instructions during trial. *United States v Roberts* (1993, CA10 Wyo) 14 F3d 502.

District court properly admitted statements implicating defendant in drug conspiracy under coconspirator exception; it was evident from statements made by drug gang leader about loyalty and how it was enforced that conspiracy existed and that defendant was trusted member of it. *United States v Bazemore* (1994, CA11 Ga) 41 F3d 1431.

Footnotes

Footnote 17. FRE, Rule 801(d)(2)(E).

As to conspiracy, generally, see 16 Am Jur 2d, Conspiracy §§ 1 et seq.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 18. Uniform Rules of Evidence, Rule 801(d)(2)(v).

Footnote 19. *Deutch v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615.

Footnote 20. *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166.

Footnote 21. *Dunbar v State*, 205 Ga App 867, 424 SE2d 43, 92 Fulton County D R 2346, cert den (Ga) 1993 Ga LEXIS 280.

Because the statement was offered for, not against, the defendant, the coconspirator exception did not apply. *Guy v State*, 108 Nev 770, 839 P2d 578, cert den (US) 123 L Ed 2d 275, 113 S Ct 1656.

Footnote 22. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 23. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; *Paul F. Newton & Co. v Texas Commerce Bank* (CA5 Tex) 630 F2d 1111, CCH Fed Secur L Rep ¶ 97702, 7 Fed Rules Evid Serv 1080, reh den (CA5 Tex) 634 F2d 1355 and (criticized on other grounds by *Buhler v Audio Leasing Corp.* (CA9 Or) 807 F2d 833, CCH Fed Secur L Rep ¶ 93056) (holding that statements of an employee's coconspirators may be introduced against the corporate employer in a civil suit where the employee is a member of the conspiracy and his actions are attributable to the corporate employer); *United States v Coe* (CA7 Ill) 718 F2d 830, 14 Fed Rules Evid Serv 200; *Filco v Amana Refrigeration, Inc.* (CA9 Cal) 709 F2d 1257, 1983-1 CCH Trade Cases ¶ 65450, 13 Fed Rules Evid Serv 693, cert dismd 464 US 956, 78 L Ed 2d 331, 104 S Ct 385 and (disapproved on other grounds by *Monsanto Co. v Spray-Rite Service Corp.*, 465 US 752, 79 L Ed 2d 775, 104 S Ct 1464, 1984-1 CCH Trade Cases ¶ 65906) as stated in *Jeanery, Inc. v James Jeans, Inc.* (CA9 Or) 849 F2d 1148, 1988-1 CCH Trade Cases ¶ 67988; *United States v Barker* (DC Colo) 623 F Supp 823; *United States v Weisz*, 231 US App DC 1, 718 F2d 413, 14 Fed Rules Evid Serv 101, cert den 465 US 1027, 79 L Ed 2d 688, 104 S Ct 1285 and cert den 465 US 1034, 79 L Ed 2d 704, 104 S Ct 1305.

Law Reviews: Alarcon, Suspect evidence: admissibility of coconspirator statements and uncorroborated accomplice testimony. 25 Loy LA L Rev 629 (April 1992).

Footnote 24. § 835.

Footnote 25. § 837.

Footnote 26. § 842.

Footnote 27. FRE, Rule 801(d)(2)(E).

Uniform Rules of Evidence, Rule 801(d)(2)(v).

Footnote 28. *Commonwealth v Stocker*, 424 Pa Super 189, 622 A2d 333.

As to personal knowledge of declarants, generally, see § 757.

As to statements against penal interest, generally, see §§ 789 et seq.

Footnote 29. *State v Lynn*, 67 Wash App 339, 835 P2d 251.

Statements made in furtherance of a conspiracy carry independent indicia of reliability and do not require independent corroboration. *United States v Keats* (CA2 NY) 937 F2d 58, cert den (US) 116 L Ed 2d 348, 112 S Ct 399.

Footnote 30. *Lutwak v United States*, 344 US 604, 97 L Ed 593, 73 S Ct 481, reh den 345 US 919, 97 L Ed 1352, 73 S Ct 726.

Statements of a coconspirator made in furtherance of the conspiracy are admissible against coconspirators who were not present when the statements were made. *State v Leisure* (Mo App) 838 SW2d 49.

Annotation: Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court cases, 1 L Ed 2d 1780.

Footnote 31. *United States v Kapp* (CA3 Pa) 781 F2d 1008, 19 Fed Rules Evid Serv 1710, cert den 479 US 821, 93 L Ed 2d 40, 107 S Ct 87 (tape-recorded conversation between government informant and the defendant in a criminal prosecution arising from a conspiracy to receive and transport stolen vehicles could not be offered by the defendant against the prosecution to demonstrate the defendant's lack of knowledge that a certain vehicle was stolen).

Footnote 32. As to nonhearsay uses of out-of-court statements, see § 664.

Footnote 33. *United States ex rel. Kassin v Mulligan*, 295 US 396, 79 L Ed 1501, 55 S Ct 781.

Footnote 34. *United States v Lum* (DC Del) 466 F Supp 328, 4 Fed Rules Evid Serv 141, affd without op (CA3 Del) 605 F2d 1198 (waiver by defense counsel's direct examination of government undercover agent with respect to conversations between agent and a coconspirator of the defendant).

Practice References 20 Am Jur Trials 351, Handling the Defense in a Conspiracy Prosecution.

Footnote 35. *United States v Sullivan* (CA5 Fla) 578 F2d 121 (postarrest statements against interest by a coconspirator demonstrating her knowledge and participation in the already terminated conspiracy).

As to the exception for statements against interest, see §§ 785 et seq.

Footnote 36. *United States v Valentine* (SD NY) 637 F Supp 196, 22 Fed Rules Evid Serv 201.

As to the exception for statements of a declarant's then-existing mental, emotional, or physical condition, see § 866.

§ 832 Confrontation of witnesses

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Confrontation Clause of the Sixth Amendment of the Constitution does not require the court to conduct an independent inquiry as to the unavailability of the declarant, 37 or the reliability of coconspirator statements which qualify as nonhearsay before such statements may be admitted against a criminal defendant, 38 since the prerequisites for admission under the Federal Rules of Evidence are identical to the requirements of the Confrontation Clause. 39 Thus, under federal law, once conspiracy is established, a coconspirator's statement can come in as the declaration of coconspirator and if it is admitted in that way, there is no violation of Sixth Amendment Confrontation Clause. 40 Some states with a rule which is a counterpart to the federal coconspirator rule also hold that statements admissible under the state rule are admissible without violation of the federal confrontation clause. 41

Furthermore, some state courts have said that the reliability of an out-of-court statement for confrontation purposes can be inferred when it falls within a "firmly rooted" hearsay exception, and have found the coconspirator exception to be "firmly rooted." 42 Some states, however, require courts to determine whether the admission of the statements of a coconspirator would violate the defendant's right to confrontation, despite the fact that statements of a coconspirator made in furtherance of the conspiracy may be admissible against other coconspirators. 43 Thus, in order to satisfy confrontation requirements, some courts are required to determine that the declarant is unavailable and the statement bears some indicia of reliability sufficient to justify its admission, even in the absence of cross-examination. 44

§ 832 ----Confrontation of witnesses [SUPPLEMENT]

Case authorities:

Coconspirator's testimony at prior trial at which defendant was neither present nor represented was admissible under residual hearsay exception and did not violate confrontation clause; defendant's "near- miss" argument—that statement close to but not precise fit with recognized hearsay exception is not admissible under residual exception—would be rejected, and former testimony possessed sufficient circumstantial guarantees of trustworthiness to be admissible. *United States v Deeb* (1994, CA11 Fla) 13 F3d 1532, 38 Fed Rules Evid Serv 1087, 7 FLW Fed C 1211.

Footnotes

Footnote 37. *United States v Inadi*, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121, 19 Fed Rules Evid Serv 1009, on remand (CA3) 790 F2d 383, 20 Fed Rules Evid Serv 844.

As to confrontation of witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

Footnote 38. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231) and (not followed on other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174); *United States v Dugan* (CA7 Ind) 902 F2d 585, 30 Fed Rules Evid Serv 613, reh den, en banc (CA7) 1990 US App LEXIS 9684 and post-conviction proceeding (CA7) 1994 US App LEXIS 4235; *United States v Unruh* (CA9 Cal) 855 F2d 1363, 26 Fed Rules Evid Serv 860, cert den 488 US 974, 102 L Ed 2d 548, 109 S Ct 513, appeal after remand (CA9 Cal) 927 F2d 611, reported in full (CA9) 1991 US App LEXIS 3873.

Annotation: Federal constitutional right to confront witnesses—Supreme Court cases, 98 L Ed 2d 1115.

Footnote 39. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231) and (not followed on other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174); *United States v Morgan* (CA8 Mo) 997 F2d 433, reh den (CA8 Mo) 1993 US App LEXIS 19733; *United States v Rivera-Santiago* (CA1 Puerto Rico) 872 F2d 1073, cert den 492 US 910, 106 L Ed 2d 576, 109 S Ct 3227.

Footnote 40. *United States v Cruz* (CA3 Pa) 910 F2d 1072, 30 Fed Rules Evid Serv 925, cert den 498 US 1039, 112 L Ed 2d 698, 111 S Ct 709.

Where a coconspirator's out-of-court statements were admissible in evidence in a narcotics prosecution under Federal Rules of Evidence, the requirements of Confrontation Clause were automatically satisfied. *United States v Romero* (CA8 ND) 856 F2d 1020, reh den (CA8) 1988 US App LEXIS 14285 and cert den 488 US 1016, 102 L Ed 2d 800, 109 S Ct 811.

As to the use of a nontestifying codefendant's confession, see § 696.

Footnote 41. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 42. *State v Cornell*, 314 Or 673, 842 P2d 394, holding that the coconspirator exception to the hearsay rule has deep historical roots and is deeply rooted in satisfaction of the state confrontation clause.

Footnote 43. *People v Glenn* (4th Dept) 185 App Div 2d 84, 592 NYS2d 175.

Footnote 44. *People v Glenn* (4th Dept) 185 App Div 2d 84, 592 NYS2d 175.

§ 833 Evidential concept of conspiracy; difference from criminal concept

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Because the concept of conspiracy as used in an evidentiary rule is different from the concept of conspiracy as a crime, to obtain the admission of coconspirator statements it is therefore sufficient to demonstrate that the party-opponent was engaged in a joint venture with third parties and it is unnecessary to show the combination was criminal or otherwise unlawful. 45

The use of the term "conspiracy" in the Federal Rule of Evidence exempting coconspirator statements from the hearsay rule 46 is not limited to unlawful combinations, and the exclusion of certain coconspirator statements from rules governing hearsay is intended to apply to both civil actions 47 and criminal

prosecutions. 48 The coconspirator exception to the hearsay rule is applicable to any offense and is not limited to prosecutions for conspiracy. 49 Coconspirator statements that qualify as "not hearsay" are admissible against fellow conspirators, even when no conspiracy charges have been brought against the declarant or the accused, 50

or where the charged conspiracy is not as broad as the conspiracy alleged as the basis for receipt of the coconspirator's statement. 51 A person need not even be charged with or found guilty of the underlying crime in order to be a coconspirator. 52

A joint venturer has been considered to be a coconspirator for purposes of the coconspirator hearsay exception even though the particular conspiracy serving as the basis for the admission of the coconspirator's statement is not the conspiracy charged in the indictment, 53 or the charge of conspiracy was severed prior to trial. 54

**§ 833 ----Evidential concept of conspiracy; difference from criminal concept
[SUPPLEMENT]****Case authorities:**

Coconspirator's statement, made to police in defendant's absence after coconspirator's arrest and implicating both defendant and coconspirator in sexual assault, was admissible under "catch-all" exception to hearsay rule, where (1) no confrontation problem existed, in that coconspirator was present and available for cross-examination by defendant's counsel; (2) coconspirator's mental capacity at time of making of statement was established; (3) statement was against coconspirator's penal interest; and (4) details of statement were corroborated by victim's account of assault. *Oliver v State* (1993, Minn) 502 NW2d 775, reh den (Minn) 1993 Minn LEXIS 612.

Footnotes

Footnote 45. *Government of Virgin Islands v Brathwaite* (CA3 VI) 782 F2d 399, 19 Fed Rules Evid Serv 1535; *United States v Postal* (CA5 Fla) 589 F2d 862, 4 Fed Rules Evid

Serv 277, cert den 444 US 832, 62 L Ed 2d 40, 100 S Ct 61; *United States v McCullah* (CA6 Tenn) 745 F2d 350, 16 Fed Rules Evid Serv 1017; *United States v Coe* (CA7 Ill) 718 F2d 830, 14 Fed Rules Evid Serv 200; *United States v Martinez* (CA10 Colo) 825 F2d 1451, 23 Fed Rules Evid Serv 971; *United States v Weisz*, 231 US App DC 1, 718 F2d 413, 14 Fed Rules Evid Serv 101, cert den 465 US 1027, 79 L Ed 2d 688, 104 S Ct 1285 and cert den 465 US 1034, 79 L Ed 2d 704, 104 S Ct 1305.

The District Court correctly determined that coconspirator exception to the hearsay rule in the Federal Rules of Evidence applies to statements made during the course and in furtherance of any enterprise, whether legal or illegal, in which the declarant and the defendant jointly participated. *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988, cert den 489 US 1046, 103 L Ed 2d 244, 109 S Ct 1178.

The state coconspirator exception to the hearsay rule is not limited by its terms to criminal prosecutions or criminal conspiracies. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 46. FRE, Rule 801(d)(2)(E).

Footnote 47. *SEC v Tome* (SD NY) 638 F Supp 629 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231); *United States v Trowery* (CA3 Pa) 542 F2d 623, 1 Fed Rules Evid Serv 332, cert den 429 US 1104, 51 L Ed 2d 555, 97 S Ct 1132; *United States v Weisz*, 231 US App DC 1, 718 F2d 413, 14 Fed Rules Evid Serv 101, cert den 465 US 1027, 79 L Ed 2d 688, 104 S Ct 1285 and cert den 465 US 1034, 79 L Ed 2d 704, 104 S Ct 1305.

Footnote 48. *United States v Coe* (CA7 Ill) 718 F2d 830, 14 Fed Rules Evid Serv 200 (charge of criminal conspiracy is not a prerequisite for the invocation of the evidentiary rule); *United States v Weisz*, 231 US App DC 1, 718 F2d 413, 14 Fed Rules Evid Serv 101, cert den 465 US 1027, 79 L Ed 2d 688, 104 S Ct 1285 and cert den 465 US 1034, 79 L Ed 2d 704, 104 S Ct 1305.

Footnote 49. *Canaday v State* (Tex App Beaumont) 853 SW2d 810.

If a coconspirator is acting in concert to suppress evidence and the statement was made in furtherance of the defendants' efforts to do so, it is admissible whether the trial is a conspiracy trial or not. *Haney v State* (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297.

Footnote 50. *United States v Stratton* (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562; *United States v Doulin* (CA2 NY) 538 F2d 466, cert den 429 US 895, 50 L Ed 2d 178, 97 S Ct 256; *United States v Trowery* (CA3 Pa) 542 F2d 623, 1 Fed Rules Evid Serv 332, cert den 429 US 1104, 51 L Ed 2d 555, 97 S Ct 1132; *United States v Trowery* (CA3 Pa) 542 F2d 623, 1 Fed Rules Evid Serv 332, cert den 429 US 1104, 51 L Ed 2d 555, 97 S Ct 1132; *Joyner v United States* (CA4 Va) 547 F2d 1199, 1 Fed Rules Evid Serv 773; *United States v Dawson* (CA5 Ala) 576 F2d 656, 3 Fed Rules Evid Serv 563, cert den 439 US 1127, 59 L Ed 2d 88, 99 S Ct 1043; *United States v Horton* (CA6 Mich) 847 F2d 313, 25 Fed Rules Evid Serv 1285, reh den (CA6) 1988 US App LEXIS 14062;

United States v Pope (CA6 Ohio) 574 F2d 320, cert den 436 US 929, 56 L Ed 2d 774, 98 S Ct 2828 and cert den 436 US 949, 56 L Ed 2d 792, 98 S Ct 2856 and cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 195; United States v LeFevour (CA7 Ill) 798 F2d 977, 21 Fed Rules Evid Serv 391 (among conflicting authorities on other grounds noted in United States v Pendas-Martinez (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142) and habeas corpus proceeding (ND Ill) 748 F Supp 579; United States v Ziperstein (CA7 Ill) 601 F2d 281, 4 Fed Rules Evid Serv 838, cert den 444 US 1031, 62 L Ed 2d 667, 100 S Ct 701; United States v Lewis (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in United States v Nichols (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by Huddleston v United States, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in United States v Newton (CA8 Mo) 912 F2d 212 (drug ledger maintained by unindicted conspirator admissible against defendant); United States v Shursen (CA8 Minn) 649 F2d 1250, 8 Fed Rules Evid Serv 556; United States v Scavo (CA8 Minn) 593 F2d 837, 4 Fed Rules Evid Serv 62; United States v Williams (CA9 Mont) 989 F2d 1061, 93 CDOS 1994, 93 Daily Journal DAR 3590, 37 Fed Rules Evid Serv 545 (an individual need not be indicted to be considered a coconspirator for purposes of the hearsay exception); United States v Avila-Macias (CA9 Cal) 577 F2d 1384; United States v Avila-Macias (CA9 Cal) 577 F2d 1384; United States v Alfonso (CA10 Okla) 738 F2d 369, 16 Fed Rules Evid Serv 480; United States v Durland (CA10 Colo) 575 F2d 1306, 3 Fed Rules Evid Serv 1142; United States v Beckham (App DC) 296 US App DC 311, 968 F2d 47, 36 Fed Rules Evid Serv 70 (the government need not charge the declarant with conspiracy in order to admit hearsay statements into evidence under the coconspirator exception); United States v Weisz, 231 US App DC 1, 718 F2d 413, 14 Fed Rules Evid Serv 101, cert den 465 US 1027, 79 L Ed 2d 688, 104 S Ct 1285 and cert den 465 US 1034, 79 L Ed 2d 704, 104 S Ct 1305; State v Leisure (Mo App) 838 SW2d 49; Commonwealth v Fox, 422 Pa Super 224, 619 A2d 327, app den (Pa) 634 A2d 222; Commonwealth v Johnson, 419 Pa Super 625, 615 A2d 1322, app den 533 Pa 657, 625 A2d 1191.

It is not necessary to charge conspiracy in order to take advantage of the rule permitting admission of coconspirator statements that would otherwise be hearsay; it is enough to show that a criminal venture existed and that the statements took place during and in furtherance of that scheme. United States v Reynolds (CA7 Wis) 919 F2d 435, 91-1 USTC ¶ 50267, 67 AFTR 2d 91-779, cert den 499 US 942, 113 L Ed 2d 457, 111 S Ct 1402.

Rule 801(d)(2)(E) says nothing about whether a coconspirator must be indicted or unindicted in order to render rule applicable and the foundational requirements for admissibility of evidence under this rule do not require that coconspirator have been indicted. United States v Adkins (CA8 Mo) 842 F2d 210, 25 Fed Rules Evid Serv 533.

A person need not be charged with or found guilty of criminal conspiracy in order to be a coconspirator under the coconspirator exception to the hearsay rule. State v Cornell, 314 Or 673, 842 P2d 394.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 51. *United States v Green* (CA8 Neb) 600 F2d 154.

Footnote 52. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 53. *United States v Lyles* (CA2 NY) 593 F2d 182, 3 Fed Rules Evid Serv 928, cert den 440 US 972, 59 L Ed 2d 789, 99 S Ct 1537 and cert den 440 US 975, 59 L Ed 2d 794, 99 S Ct 1545 and cert den 444 US 847, 62 L Ed 2d 61, 100 S Ct 94; *United States v Gotti* (ED NY) 644 F Supp 370, 22 Fed Rules Evid Serv 722; *United States v Arce* (CA5 Tex) 997 F2d 1123, reh, en banc, den (CA5 Tex) 5 F3d 1493; *United States v Postal* (CA5 Fla) 589 F2d 862, 4 Fed Rules Evid Serv 277, cert den 444 US 832, 62 L Ed 2d 40, 100 S Ct 61.

It is not necessary for the indictment to charge a conspiracy in order to admit coconspirators' statements under the hearsay exception. *United States v Ortiz* (CA1 Puerto Rico) 966 F2d 707, 35 Fed Rules Evid Serv 1235, cert den (US) 122 L Ed 2d 154, 113 S Ct 1005.

But see, *United States v Alex* (ND Ill) 790 F Supp 798, later proceeding (ND Ill) 796 F Supp 354, motion gr (ND Ill) 823 F Supp 583, holding that collateral and uncharged conspiracy declaration evidence which had nothing to do with the charged conspiracy was inadmissible under the coconspirator hearsay exception.

Footnote 54. *United States v Stratton* (CA2 NY) 779 F2d 820, 19 Fed Rules Evid Serv 851, cert den 476 US 1162, 90 L Ed 2d 726, 106 S Ct 2285 and cert den 477 US 906, 91 L Ed 2d 567, 106 S Ct 3277, later proceeding (CA2 NY) 820 F2d 562.

§ 834 Effect of dismissal of conspiracy charges

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The dismissal of conspiracy charges does not inhibit the subsequent receipt of statements of coconspirators in connection with remaining substantive charges. 55 A joint venturer has been considered to be a coconspirator for purposes of the coconspirator hearsay exception even though a party has been acquitted of the conspiracy, 56 and the acquittal of the party or the declarant of conspiracy charges does not necessarily preclude, or indicate an error in, the receipt of a coconspirator's statement, 57 at least in criminal prosecutions, since the standard for determining guilt in a criminal conspiracy, namely proof beyond a reasonable doubt, is not the standard governing the admission of evidence. 58

§ 834 ----Effect of dismissal of conspiracy charges [SUPPLEMENT]

Case authorities:

Defendant's acquittal of conspiracy did not retroactively make admission of coconspirator

statements erroneous since, once court has determined that government has made requisite showing of conspiracy, admission of testimony under coconspirator exception to hearsay rule is not rendered retroactively improper by subsequent acquittal of alleged coconspirator. *United States v Hernandez-Miranda* (1996, CA11 Fla) 78 F3d 512, 9 FLW Fed C 947.

Footnotes

Footnote 55. *United States v Stanchich* (CA2 NY) 550 F2d 1294, 1 Fed Rules Evid Serv 575; *United States v McCullah* (CA6 Tenn) 745 F2d 350, 16 Fed Rules Evid Serv 1017; *United States v Durland* (CA10 Colo) 575 F2d 1306, 3 Fed Rules Evid Serv 1142.

Footnote 56. *Commonwealth v Anselmo*, 33 Mass App 602, 603 NE2d 227 (stating that even acquittal after a separate trial would not render a statement inadmissible); *Commonwealth v Johnson*, 419 Pa Super 625, 615 A2d 1322, app den 533 Pa 657, 625 A2d 1191.

Footnote 57. *United States v Krogstad* (CA3 NJ) 576 F2d 22, 78-1 USTC ¶ 9470, 41 AFTR 2d 78-1297; *United States v Blackshire* (CA4 Md) 538 F2d 569, 2 Fed Rules Evid Serv 204, cert den 429 US 840, 50 L Ed 2d 108, 97 S Ct 113; *United States v Cravero* (CA5 Fla) 545 F2d 406, 2 Fed Rules Evid Serv 223, cert den 429 US 1100, 51 L Ed 2d 549, 97 S Ct 1123 and cert den 430 US 983, 52 L Ed 2d 377, 97 S Ct 1679, reh den 431 US 960, 53 L Ed 2d 279, 97 S Ct 2689 and reh den 433 US 915, 53 L Ed 2d 1102, 97 S Ct 2990; *United States v Papia* (ED Wis) 409 F Supp 1307, affd (CA7 Wis) 560 F2d 827, 2 Fed Rules Evid Serv 414.

Footnote 58. *United States v Snider* (CA8 Mo) 720 F2d 985, 14 Fed Rules Evid Serv 796, cert den 465 US 1107, 80 L Ed 2d 142, 104 S Ct 1613.

The declarant's acquittal on a conspiracy charge relating to the use of explosives to destroy a building involved in interstate commerce did not retroactively undermine the trial court's prior determination that the declarant's statements were admissible under FRE, Rule 801(d)(2)(E) as against the other defendants, who were subsequently convicted on the conspiracy charge, since, at the time the declarant's statements were introduced, there was a preponderance of the evidence that the declarant was a conspirator. *United States v Xheka* (CA7 Ill) 704 F2d 974, 12 Fed Rules Evid Serv 1764, cert den 464 US 993, 78 L Ed 2d 682, 104 S Ct 486 and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Zambrana* (CA7 Ind) 841 F2d 1320, 25 Fed Rules Evid Serv 55, later proceeding (CA7 Ind) 864 F2d 494 and post-conviction proceeding (CA7) 1991 US App LEXIS 26515, reh, en banc, den (CA7 Ind) 1991 US App LEXIS 27058, habeas corpus den (ND Ind) 790 F Supp 838 and (criticized on other grounds by *United States v Durrive* (CA7 Wis) 902 F2d 1221).

As to standard of proof in proving the conspiracy and its participants, see § 850.

(2). Requirement That Statement be Made by Coconspirator [835, 836]

§ 835 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The coconspirator hearsay exception requires that the statement offered be made by a coconspirator, 59 and not be a statement made by a nonconspirator to a coconspirator. 60 Consequently, the statement of a confidential informant is inadmissible under the coconspirator hearsay rule. 61 However, statements of an unindicted conspirator are within the scope of the coconspirator rule. 62 Some courts, nevertheless, have refused to admit statements of a coconspirator who has been convicted of perjury under state statutes prohibiting the testimony of convicted perjurers. 63

If the other prerequisites for admission are met, a statement by a coconspirator will qualify as nonhearsay, whether the statement is a contemporaneous translation of a declaration by another coconspirator, or a subsequent recounting of what was said. 64 Proof that the translation was reliable has been found unnecessary in determining the admissibility of a translation under the coconspirator exception to the hearsay rule, on the ground that the accuracy of the coconspirator's translation is to be assessed by the jury on the basis of all the circumstances under which the statement was made. 65

◆ Caution: A defendant may not complain of the admission of statements which do not qualify as nonhearsay under the coconspirator exception to the hearsay rule, when the statements are received in evidence as a result of a tactical error by the defense counsel during the cross-examination of a government witness. 66

§ 835 ----Generally [SUPPLEMENT]

Case authorities:

Codefendant's testimony that defendant had told him that cocaine was coming from Colombia was properly admitted as hearsay statement of coconspirator. *United States v Ovalle-Marquez* (1994, CA1 Puerto Rico) 36 F3d 212.

In mail fraud prosecution arising out of insurance fraud scheme involving classic automobiles, coconspirator statements should not have been introduced against two defendants each charged with separate, single conspiracy since statements related to separate conspiracies with which defendants were not involved and there was no evidence that they had knowledge of overarching conspiracy. *United States v Morrow* (1994, CA1 RI) 39 F3d 1228.

Narcotics coconspirator's statements made before he joined conspiracy were admissible where there was evidence of his subsequent knowledge and willingness to participate in it. *United States v Gonzalez- Balderas* (1994, CA5 Tex) 11 F3d 1218, reh, en banc, den (CA5 Tex) 15 F3d 1081.

Drug ledgers seized from two cocaine distribution conspirators' house and from car

belonging to third conspirator were admissible as statements of coconspirators where their fingerprints were found on ledgers and there was other evidence of their involvement in conspiracy, including connections and activities with other defendants. *United States v Fierro* (1994, CA5 Tex) 38 F3d 761.

No error, much less plain error, occurred by trial court's admitting witness's testimony concerning conversation with person who was at defendant's place of business when cocaine shipment arrived since witness was coconspirator, hence his statement was not that of out-of-court declarant, and defendant never said anything in brief or oral argument about out-of-court statements of person who was at his place of business when cocaine arrived. *United States v South* (1994, CA7 Ill) 28 F3d 619.

In prosecution of former police officer for participating in gambling, drug dealing, and bribery at bar, bar owner's statement to his employee was properly admitted under coconspirator exception to hearsay rule since it was in furtherance of conspiracy; owner told employee that defendant had warned him of narcotics raid on bar and that employee should get drugs and drug dealers out of the bar. *United States v Stephens* (1995, CA7 Ind) 46 F3d 587, reh den (1995, CA7 Ind) 1995 US App LEXIS 5638.

Narcotics conspiracy defendant's coconspirators' statements were properly admitted against him even if they were made prior to his admitted involvement in conspiracy. *United States v Mkhsian* (1993, CA9 Cal) 5 F3d 1306, 93 CDOS 7225, 93 Daily Journal DAR 12273, 26 FR Serv 3d 1196.

Custodial confession of nontestifying coconspirator was not genuinely against his penal interest to extent it directly inculpated defendants and therefore was inadmissible; not only was coconspirator in custody, but his interrogators had just told him that he was facing life in prison and that U.S. Attorney would help him only if he provided substantial assistance, hence he had obvious incentive to spread blame and curry favor with authorities by implicating defendants. *United States v Costa* (1994, CA11 Ala) 31 F3d 1073, 8 FLW Fed C 654.

Spiral notebooks containing records of defendant's drug transactions was properly admitted as coconspirator statements since they documented ongoing series of transactions integral to conspiracy. *United States v Young* (1994, CA11 Ala) 39 F3d 1561, 8 FLW Fed C 893.

Footnotes

Footnote 59. *United States v McConnell* (CA5 La) 988 F2d 530; *United States v Liefer* (CA7 Ill) 778 F2d 1236, 19 Fed Rules Evid Serv 1169; *United States v Abrahamson* (CA8 Minn) 568 F2d 604, 2 Fed Rules Evid Serv 900 (statement by unidentified informant to coconspirator is inadmissible); *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470; *State v Marlow*, 334 NC 273, 432 SE2d 275.

Footnote 60. *United States v Liefer* (CA7 Ill) 778 F2d 1236, 19 Fed Rules Evid Serv 1169; *United States v Abrahamson* (CA8 Minn) 568 F2d 604, 2 Fed Rules Evid Serv 900 (statement by unidentified informant to coconspirator is inadmissible).

As to requirement of personal knowledge on the part of a coconspirator, see § 757.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 61. *United States v Felton* (CA7 Ill) 908 F2d 186, reh den (CA7) 1990 US App LEXIS 14544.

Footnote 62. *United States v Word* (CA6 Tenn) 806 F2d 658, 22 Fed Rules Evid Serv 118, cert den 480 US 922, 94 L Ed 2d 697, 107 S Ct 1383, post-conviction proceeding (CA6) 1993 US App LEXIS 15973; *United States v Montes-Cardenas* (CA11 Fla) 746 F2d 771, 17 Fed Rules Evid Serv 155.

Footnote 63. *Commonwealth v Zdrade*, 530 Pa 313, 608 A2d 1037.

Footnote 64. *United States v Aboumoussallem* (CA2 NY) 726 F2d 906, 14 Fed Rules Evid Serv 1403 (among conflicting authorities on other grounds noted in *United States v Perchitti* (CA11 Fla) 955 F2d 674, 6 FLW Fed C 179).

As to the admission of a translation as a statement of an agent, see § 821.

Footnote 65. *United States v Aboumoussallem* (CA2 NY) 726 F2d 906, 14 Fed Rules Evid Serv 1403 (among conflicting authorities on other grounds noted in *United States v Perchitti* (CA11 Fla) 955 F2d 674, 6 FLW Fed C 179).

Footnote 66. *United States v Miller* (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647; *United States v Rosenthal* (CA11 Ga) 793 F2d 1214, 21 Fed Rules Evid Serv 264, mod on other grounds, reh den, en banc (CA11 Ga) 801 F2d 378, cert den 480 US 919, 94 L Ed 2d 692, 107 S Ct 1377.

§ 836 Proof of declarant's identity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Before a statement is that of a coconspirator, there must be independent proof of the defendant's and the declarant's status as members of the same ongoing conspiracy. ⁶⁷ Documents which have been authenticated pursuant to particular Federal Rules of Evidence ⁶⁸ may constitute nonhearsay when the handwriting of the documents is identified as that belonging to alleged coconspirators. ⁶⁹ Although there is some authority to the contrary, ⁷⁰ some courts permit the introduction of written statements of alleged coconspirators, even though there is a lack of proof as to the identity of the author or authors of the document, where the evidence depicts the unidentified declarant as a coconspirator, ⁷¹ as when the contents of the written statement indicate the author or authors were familiar with the activities of the conspiracy, the contents relate to the operation of the conspiracy, and the statement is found on premises associated to the operations of the conspiracy. ⁷²

◆ Observation: In its determination that a ledger of drug transactions was inadmissible because the government failed to prove the identity of the author or authors of the ledger entries, one court rejected the suggestion that the foundational requirements under the coconspirator exception to the hearsay rule may be equated with the standards for authentication under the Federal Rules of Evidence 73 ruling that a separate foundational threshold must be satisfied before the coconspirator statement is admissible under the coconspirator exception. 74

Footnotes

Footnote 67. *United States v Mouzin* (CA9 Cal) 785 F2d 682, 20 Fed Rules Evid Serv 390, cert den 479 US 985, 93 L Ed 2d 577, 107 S Ct 574 and (criticized on other grounds by *United States v Bucey* (CA7 Ill) 876 F2d 1297) and (criticized on other grounds by *United States v McGlory* (CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124) and (criticized on other grounds by *United States v Hoac* (CA9 Cal) 990 F2d 1099, 93 CDOS 2196, 93 Daily Journal DAR 3855, 37 Fed Rules Evid Serv 558).

But see *United States v Breitreutz* (CA6 Tenn) 977 F2d 214, 36 Fed Rules Evid Serv 1072, stating that the precise identity of a declarant is not necessarily required for admission under the coconspirator exception to the hearsay rule.

Footnote 68. As to authentication of documents, see §§ 1032 et seq.

Footnote 69. *United States v Panza* (CA2 NY) 750 F2d 1141, 17 Fed Rules Evid Serv 339.

Footnote 70. *United States v Mouzin* (CA9 Cal) 785 F2d 682, 20 Fed Rules Evid Serv 390, cert den 479 US 985, 93 L Ed 2d 577, 107 S Ct 574 (holding that a ledger was inadmissible, where authorship of the ledger entries was never established, since knowledge of the identity of the declarant is essential to a determination that the declarant is a conspirator whose statements are integral to the activities of the alleged conspiracy); *United States v Ordonez* (CA9 Cal) 737 F2d 793, 15 Fed Rules Evid Serv 1972 (admissibility of statements in a drug ledger depends on their reliability under the Confrontation Clause, and there was no evidence of reliability where there was no evidence that the declarant had personal knowledge of the facts recorded, and since the declarant was not identified, the trier of fact could not determine whether the entries reflected clear or faulty recollection).

Footnote 71. *United States v De Gudino* (CA7 Ill) 722 F2d 1351, 14 Fed Rules Evid Serv 1692.

Footnote 72. *United States v Helm* (CA8 Iowa) 769 F2d 1306, 19 Fed Rules Evid Serv 397.

Unidentifiability may be important in some situations, but when the statement itself and the surrounding circumstances provide sufficient evidence of reliability, unidentifiability will not be particularly important. *United States v McGlory* (CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124, cert den (US) 121 L Ed 2d 339, 113 S Ct 415 and cert den (US) 121 L Ed 2d 559, 113 S Ct 627 and cert den (US) 122 L Ed 2d 763, 113 S Ct 1388.

Lists recording information concerning smuggling illegal aliens were held admissible, even though the author of those lists was not identified at trial, since the contents of the lists demonstrated that the unknown author was familiar with the workings of the conspiracy, and that the lists were utilized to maintain information necessary to continue the smuggling operation, where the lists were seized by law enforcement officers from the house considered the headquarters of the operation, and there was no evidence that the lists were made at anytime other than during the conspiracy or that the lists were made for reasons other than to further the conspiracy. *United States v De Gudino* (CA7 Ill) 722 F2d 1351, 14 Fed Rules Evid Serv 1692.

Footnote 73. As to methods of authentication under the Federal Rules of Evidence, see §§ 1040 et seq.

Footnote 74. *United States v Mouzin* (CA9 Cal) 785 F2d 682, 20 Fed Rules Evid Serv 390, cert den 479 US 985, 93 L Ed 2d 577, 107 S Ct 574 and (criticized on other grounds by *United States v Bucey* (CA7 Ill) 876 F2d 1297) and (criticized on other grounds by *United States v McGlory* (CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124) and (criticized on other grounds by *United States v Breitzkreutz* (CA6 Tenn) 977 F2d 214, 36 Fed Rules Evid Serv 1072) and (criticized on other grounds by *United States v Hoac* (CA9 Cal) 990 F2d 1099, 93 CDOS 2196, 93 Daily Journal DAR 3855, 37 Fed Rules Evid Serv 558).

(3). Requirement That Statement be Made During Course of Conspiracy [837-841]

§ 837 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The coconspirator hearsay exception requires that the coconspirator's statement be made during the course of the conspiracy. 75 Some courts state that there must be a showing that the statements or acts of the coconspirator were made while the conspiracy was active, that is after it was formed and before it ended. 76 There is other authority that a statement of an alleged coconspirator must be made during the course of the conspiracy as that time period is defined in the charging document. 77 However, approximate dates in an indictment are not controlling, and some courts provide that a conspiracy does not necessarily expire after the last act charged in the indictment; it expires after the last overt act whether charged or not. 78 Generally the duration of a conspiracy, for the purpose of applying the coconspirator exemption, is not limited by the commission of the elements of the underlying crime. 79 Conduct before or after the commission of the elements of the underlying crime are part of a conspiracy, if the conduct is either in planning, preparing for, or committing the crime, or in eluding detection for, or protecting the fruits of the crime. 80 Concealment may also occur during the course of the conspiracy. 81 The determination of whether the statement was made in the course of the conspiracy depends upon the scope of the agreement entered

into by the conspirators and is thus determined according to the facts in each case. 82 If it is shown that the coconspirator statement was made within the approximate timeframe of the conspiracy, then admission of a coconspirator statement will not be barred because of a failure to prove the exact date the statement was made 83 or by a failure to prove the exact date the alleged conspiracy began. 84 However, statements made long after the commission of a crime may not be admissible. 85

Although a preconspiracy statement falls outside the rule, 86 a statement by one coconspirator after the inception of the conspiracy is admissible against a party who at the time the statement was made had not yet joined the conspiracy, 87 as was true under common law. 88

With respect to written documents, dates and records of payments noted in the document itself may be used to prove that the document was compiled during the course of the conspiracy. 89 The failure to prove whether the transactions reflected in written documents or records occurred during the course of the alleged conspiracy may preclude the documents from being admissible against the party-opponent as a coconspirator statement. 90

§ 837 ----Generally [SUPPLEMENT]

Case authorities:

Heroin distribution ringleader's statement to coconspirator who ran street team that he got information about police patrols from his mother, who was police officer and coconspirator, was properly admitted under coconspirator exception since statement was part of flow of information between coconspirators which furthered conspiracy. *United States v Wesson* (1994, CA7 Ill) 33 F3d 788.

Heroin distribution coconspirator's statements were admissible despite defendant's claim that they were made prior to date of conspiracy, since statements of defendant and coconspirator supported conclusion that conspiracy did exist when statements were made. *United States v Williams* (1995, CA7 Ill) 44 F3d 614, reh, en banc, den (1995, CA7 Ill) 1995 US App LEXIS 6624, reported in full (1995, CA7 Ill) 44 F3d 614.

Coconspirators' statements are admissible in defendant's criminal trial under FRE 801(d)(2)(E), because government showed by preponderance of evidence (1) existence of conspiracy, (2) defendant's participation in conspiracy, and (3) that statements were made during course of and in furtherance of conspiracy. *United States v Sims* (1995, ND Ill) 879 F Supp 837.

Evidence of bank fraud co- defendant's statements were properly admitted under coconspirator exception to hearsay rule since there was sufficient evidence of conspiracy between defendant and declarant, and statements were made in furtherance of conspiracy as they related to terms and conditions of loan underlying criminal charges and who knew of its true nature. *Feingold v United States* (1995, CA8 Mo) 49 F3d 437.

Coconspirator's statement made prior to formation of conspiracy involving defendant should not have been admitted in prosecution for theft of goods in interstate commerce, but its admission was harmless since it was insignificant in case against him, which was strong. *United States v Garcia* (1994, CA11 Fla) 13 F3d 1464, 7 FLW Fed C 1217,

petition for certiorari filed (May 9, 1994).

In action by public entities that purchase repackaged chlorine for water treatment against distributors and repackagers of chlorine alleging price-fixing conspiracy, hearsay testimony of president of one of defendant corporations is inadmissible to prove conspiracy, because plaintiffs failed to show that statements by alleged coconspirator were made during course and in furtherance of conspiracy. *City of Tuscaloosa v Harcros Chems.* (1995, ND Ala) 877 F Supp 1504, 1995-1 CCH Trade Cases ¶ 70967.

Testimony regarding an out-of-court statement by the codefendant in which he implicated himself and the defendant in a murder was properly admitted into evidence under the co-conspirator exception to the hearsay rule where the statement was made only an hour after the murder at issue and in the course of a conversation in which the codefendant asked the witness to recommend a hotel where he and the defendant could stay until nightfall, after which they planned to travel to New York. *Commonwealth v Cull* (1995, Pa) 656 A2d 476.

Footnotes

Footnote 75. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659, 113 S Ct 1262; *United States v Arce* (CA5 Tex) 997 F2d 1123, reh, en banc, den (CA5 Tex) 5 F3d 1493; *United States v McConnell* (CA5 La) 988 F2d 530; *United States v Mackey* (CA7 Ind) 571 F2d 376, 78-1 USTC ¶ 9321, 2 Fed Rules Evid Serv 1284, 41 AFTR 2d 78-728; *United States v Morgan* (CA8 Mo) 997 F2d 433, reh den (CA8 Mo) 1993 US App LEXIS 19733; *United States v Arias-Villanueva* (CA9 Or) 998 F2d 1491, 93 CDOS 5481, 93 Daily Journal DAR 9291, cert den (US) 126 L Ed 2d 322, 114 S Ct 359 and cert den (US) 126 L Ed 2d 472, 114 S Ct 573 and cert den (US) 126 L Ed 2d 473, 114 S Ct 573; *Deutsh v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615 (statement must have been made during the pendency of the conspiracy); *State v Lycett* (App) 133 Ariz 185, 650 P2d 487; *Dixon v State*, 310 Ark 460, 839 SW2d 173; *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166; *Wiggins v State* (Fla App D1) 460 So 2d 483, 9 FLW 2562 (statement must be made during pendency of conspiracy); *Duffy v State*, 262 Ga 249, 416 SE2d 734, 92 Fulton County D R 844 (hearsay statements made by a coconspirator during the course of a conspiracy are admissible against all conspirators); *Dunbar v State*, 205 Ga App 867, 424 SE2d 43, 92 Fulton County D R 2346, cert den (Ga) 1993 Ga LEXIS 280 (declaration must be made during pendency of the criminal project); *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470 (act or declaration committed during pendency of conspiracy); *State v Ruiz* (Iowa App) 496 NW2d 789; *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103 (statements must be made "while participating in the conspiracy"); *People v Tran*, 80 NY2d 170, 589 NYS2d 845, 603 NE2d 950, reconsideration den 81 NY2d 784, 594 NYS2d 721, 610 NE2d 394; *State v Mahaley*, 332 NC 583, 423 SE2d 58; *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207; *Zajac on behalf of H & R Enterprises, Inc. v Great American Ins. Cos.* (ND) 410 NW2d 155; *State v Cornell*, 314 Or 673, 842 P2d 394; *Commonwealth v Zdrade*, 530 Pa 313, 608 A2d 1037; *Commonwealth v McDowell*, 460

Pa 474, 333 A2d 872 (statements were not allowed because not made during the existence of a conspiracy); Commonwealth v Stocker, 424 Pa Super 189, 622 A2d 333; Commonwealth v Johnson, 419 Pa Super 625, 615 A2d 1322, app den 533 Pa 657, 625 A2d 1191; State v Little (Tenn Crim) 854 SW2d 643; Canaday v State (Tex App Beaumont) 853 SW2d 810; Cox v State (Tex App El Paso) 843 SW2d 750, petition for discretionary review ref (May 5, 1993); Re of K. P. S. (Tex App Corpus Christi) 840 SW2d 706; State v Lynn, 67 Wash App 339, 835 P2d 251; Haskins v State, 97 Wis 2d 408, 294 NW2d 25.

Out-of-court statements by joint criminal venturers are admissible against the others if the statements are made during the pendency of the cooperative effort. Commonwealth v Angiulo, 415 Mass 502, 615 NE2d 155, summary op at (Mass) 21 M.L.W. 2881.

In order for the statements of one conspirator to be admissible against another, it must be shown that a conspiracy continued to exist at the time the statements were made and that they were in furtherance of the conspiracy. Palmer v Palmer, 23 Mass App 245, 500 NE2d 1354.

In order for a coconspirator statement to be admissible, the declaration must be made while the unlawful common purpose continues to exist. State v Madewell (Mo App) 846 SW2d 208.

Footnote 76. State v Marlow, 334 NC 273, 432 SE2d 275.

Footnote 77. Nelson v State (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166.

Footnote 78. United States v Lyon (CA8 Mo) 959 F2d 701, 35 Fed Rules Evid Serv 241, reh den (CA8) 1992 US App LEXIS 9839.

As to termination of conspiracy, see § 838.

Footnote 79. State v Cornell, 314 Or 673, 842 P2d 394.

Footnote 80. State v Cornell, 314 Or 673, 842 P2d 394.

Where proof of a conspiracy exists, any act or statement by an accused's coconspirator in the commission of the crime, done or made before the commission of the crime, during the existence of the conspiracy and in furtherance of a plan or design, is admissible against the accused. Haney v State (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297.

Footnote 81. § 841.

Footnote 82. United States v Xheka (CA7 Ill) 704 F2d 974, 12 Fed Rules Evid Serv 1764, cert den 464 US 993, 78 L Ed 2d 682, 104 S Ct 486 and (disapproved on other grounds by Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in United States v Zambrana (CA7 Ind) 841 F2d 1320, 25 Fed Rules Evid Serv 55, later proceeding (CA7 Ind) 864 F2d 494 and post-conviction proceeding (CA7) 1991 US App LEXIS 26515, reh, en banc, den (CA7

Ind) 1991 US App LEXIS 27058, habeas corpus den (ND Ind) 790 F Supp 838 and (criticized on other grounds by United States v Durrive (CA7 Wis) 902 F2d 1221); United States v Mackey (CA7 Ind) 571 F2d 376, 78-1 USTC ¶ 9321, 2 Fed Rules Evid Serv 1284, 41 AFTR 2d 78-728; United States v Silverstein (CA10 Kan) 737 F2d 864, 15 Fed Rules Evid Serv 2015.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 83. United States v Miller (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647.

Footnote 84. United States v Miller (CA5 Tex) 799 F2d 985, 21 Fed Rules Evid Serv 970 (criticized on other grounds by United States v Machor (CA1 Puerto Rico) 879 F2d 945, 28 Fed Rules Evid Serv 705).

Footnote 85. Brazel v State, 296 Ark 563, 759 SW2d 28 (the confession of a coconspirator made four weeks after the crime was inadmissible since it did not occur during the conspiracy or in furtherance of the conspiracy); Bryant v State, 132 Ga App 186, 207 SE2d 671 (confession of coconspirator made to police three months after the robbery was inadmissible at the trial of the other conspirator as being after the enterprise had ended); Williamson v State (Miss) 512 So 2d 868 (trial court erroneously admitted statements of coconspirators made weeks after the commission of the crime, where the statements did not relate to the coverup of a crime or other ongoing furtherance of conspiracy); State v Allison, 208 NJ Super 9, 504 A2d 1184 (statements made eleven months after the alleged conspiracy was terminated were not in the course and furtherance of the conspiracy).

Footnote 86. United States v Jannotti (CA3 Pa) 729 F2d 213, 15 Fed Rules Evid Serv 145, cert den 469 US 880, 83 L Ed 2d 182, 105 S Ct 243, 105 S Ct 244; United States v Coe (CA7 Ill) 718 F2d 830, 14 Fed Rules Evid Serv 200; United States v Johnson (CA8 Mo) 767 F2d 1259, 18 Fed Rules Evid Serv 625; United States v Morris (CA10 Colo) 623 F2d 145, cert den 449 US 1065, 66 L Ed 2d 609, 101 S Ct 793; United States v Tombrello (CA11 Ala) 666 F2d 485, 9 Fed Rules Evid Serv 1153, cert den 456 US 994, 73 L Ed 2d 1291, 102 S Ct 2279.

Footnote 87. United States v Murphy (CA1 Mass) 852 F2d 1, 26 Fed Rules Evid Serv 59, cert den 489 US 1022, 103 L Ed 2d 205, 109 S Ct 1145; United States v Badalamenti (CA2 NY) 794 F2d 821, 21 Fed Rules Evid Serv 232; United States v Jannotti (CA3 Pa) 729 F2d 213, 15 Fed Rules Evid Serv 145, cert den 469 US 880, 83 L Ed 2d 182, 105 S Ct 243, 105 S Ct 244 (videotape of meeting of conspirators involved in scheme to curry political favors with cash was admissible as evidence against defendants, who were not present at the meeting and did not join the conspiracy until a subsequent date); United States v Jennings (CA5 Tex) 527 F2d 862; United States v Davis (CA6 Mich) 809 F2d 1194, 22 Fed Rules Evid Serv 567, cert den 483 US 1007, 97 L Ed 2d 740, 107 S Ct 3234, post-conviction proceeding (CA6) 1991 US App LEXIS 2259, post-conviction proceeding (CA6) 1991 US App LEXIS 2472, post-conviction proceeding (CA6 Mich) 1993 US App LEXIS 31900, habeas corpus den (CA6 Mich) 1993 US App LEXIS 32663, motion den (CA6 Mich) 1994 US App LEXIS 4966 and (criticized on other grounds by United States v Thompson (CA9 Cal) 827 F2d 1254) and (criticized on other grounds by United States v Garrison (CA4 Md) 849 F2d 103, 25 Fed Rules Evid Serv

1140) and (among conflicting authorities on other grounds noted in *Williams v Chrans* (CA7 Ill) 957 F2d 487); *United States v Balistrieri* (CA7 Wis) 778 F2d 1226, cert den 477 US 908, 91 L Ed 2d 573, 106 S Ct 3284; *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212; *United States v Smith* (CA8 Neb) 600 F2d 149; *United States v Anderson* (CA9 Cal) 532 F2d 1218, cert den 429 US 839, 50 L Ed 2d 107, 97 S Ct 111 and (criticized on other grounds by *United States v Baines* (CA1 Me) 812 F2d 41).

Even if the statements are made in the embryonic stages of the conspiracy, they are admissible against those who join the conspiracy later, so long as the statements are made during the course of, and in furtherance of the conspiracy. *United States v Alex* (ND Ill) 790 F Supp 798, later proceeding (ND Ill) 796 F Supp 354, motion gr (ND Ill) 823 F Supp 583.

Footnote 88. *United States v United States Gypsum Co.*, 333 US 364, 92 L Ed 746, 68 S Ct 525, 76 USPQ 430, reh den 333 US 869, 92 L Ed 1147, 68 S Ct 788 and (criticized on other grounds by *Ker v California*, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623, 24 Ohio Ops 2d 201) as stated in *Quinn v Robinson* (CA9 Cal) 783 F2d 776, cert den 479 US 882, 93 L Ed 2d 247, 107 S Ct 271 and (criticized on other grounds by *Amadeo v Zant*, 486 US 214, 100 L Ed 2d 249, 108 S Ct 1771) as stated in *Re Petition of Sherburne*, 154 Vt 596, 581 A2d 274; *United States v Baines* (CA1 Me) 812 F2d 41.

Footnote 89. *United States v De Gudino* (CA7 Ill) 722 F2d 1351, 14 Fed Rules Evid Serv 1692 (criticized on other grounds by *United States v Ordonez* (CA9 Cal) 737 F2d 793, 15 Fed Rules Evid Serv 1972); *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212.

Footnote 90. *United States v Attardi* (CA9 Hawaii) 796 F2d 257.

§ 838 Termination of conspiracy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Incriminating declarations of coconspirators made in the absence of or without the knowledge of the accused, after the conspiracy has come to an end, are inadmissible. 91 A coconspirator's statement made after the termination of the conspiracy, whether in success or failure, is generally inadmissible to prove the guilt of one other than the

declarant, 92 and coconspirators are entitled to an instruction that such statement may be considered only against the conspirator who made it. 93

Statements of coconspirators are generally admissible if made before the last overt act of the conspiracy has taken place, 94 including statements regarding the distribution of the proceeds of the conspiracy, 95 and statements made in connection with payments for assistance in furthering the goals of the conspiracy. 96 Statements made during an escape from law enforcement agents constitute statements made during the course of a conspiracy, since arriving undetected or escaping is a primary objective of a conspiracy. 97 However, in a conspiracy to assist escape, statements made while escapees are temporarily safe are inadmissible since once fugitives reach temporary safety a conspiracy to assist escape terminates. 98 The cessation of activity in furtherance of the conspiracy does not constitute the termination of the conspiracy so as to render subsequent statements made between conspirators inadmissible, when the cessation is considered merely a suspension of conspiratorial activity. 99 Acts of acceptance of a completed transaction within the scope of the activity conducted by the conspirators may be sufficient to allow statements made in connection with that transaction to be admitted against fellow conspirators, even though a mastermind of the conspiracy has instructed participants that the particular transaction not take place. 1

Footnotes

Footnote 91. *United States v Nerlinger* (CA2 NY) 862 F2d 967, 27 Fed Rules Evid Serv 271; *United States v Stapleton* (WD Va) 730 F Supp 1375, 29 Fed Rules Evid Serv 1421; *United States v Gomez-Lemos* (CA6 Mich) 939 F2d 326, 33 Fed Rules Evid Serv 683, reh, en banc, den (CA6) 1991 US App LEXIS 26601; *United States v Carper* (CA8 Iowa) 942 F2d 1298, 33 Fed Rules Evid Serv 949, reh den (CA8) 1991 US App LEXIS 22488 and cert den (US) 116 L Ed 2d 636, 112 S Ct 614; *United States v Perez-Garcia* (CA11 Fla) 904 F2d 1534, 31 Fed Rules Evid Serv 173; *Guntharp v State*, 54 Ala App 363, 308 So 2d 722, cert quashed 293 Ala 756, 308 So 2d 728; *Eubanks v State* (Alaska) 516 P2d 726; *People v Morales* (4th Dist) 263 Cal App 2d 368, 69 Cal Rptr 402, cert den 393 US 1104, 21 L Ed 2d 798, 89 S Ct 907; *Villafranca v People*, 194 Colo 472, 573 P2d 540; *Moore v State* (Fla App D4) 503 So 2d 923, 12 FLW 501; *Hill v State*, 232 Ga 800, 209 SE2d 153; *People v Strubberg* (5th Dist) 61 Ill App 3d 521, 18 Ill Dec 727, 378 NE2d 191; *Smith v State*, 159 Ind App 438, 307 NE2d 875; *State v Oliphant*, 210 Kan 451, 502 P2d 626; *Napier v Commonwealth* (Ky) 515 SW2d 615; *Commonwealth v Nolin*, 373 Mass 45, 364 NE2d 1224; *People v Ayoub*, 150 Mich App 150, 387 NW2d 848, app den 425 Mich 868; *State v Walker*, 306 Minn 105, 235 NW2d 810, cert den 426 US 950, 49 L Ed 2d 1187, 96 S Ct 3172; *Mitchell v State* (Miss) 495 So 2d 5, appeal after remand (Miss) 572 So 2d 865; *State v Wilson* (Mo App) 812 SW2d 213; *State v Bobo*, 198 Neb 551, 253 NW2d 857; *State v Jones* (Stark Co) 22 Ohio App 2d 67, 51 Ohio Ops 2d 135, 258 NE2d 258; *Jones v State* (Okla Crim) 738 P2d 525; *State v Williams*, 38 Or App 327, 590 P2d 259; *Commonwealth v Robinson*, 298 Pa Super 447, 444 A2d 1260; *State v Burke* (RI) 574 A2d 1217; *Deeb v State* (Tex Crim) 815 SW2d 692, reh den (Sep 25, 1991) and cert den (US) 120 L Ed 2d 907, 112 S Ct 3038; *State v Sanders*, 27 Utah 2d 354, 496 P2d 270; *State v Marcum*, 182 W Va 104, 386 SE2d 117.

In a joint trial for murder, rape, home invasion, burglary, and conspiracy to commit home invasion, confessions made by two defendants were inadmissible against the other defendants where the confessions were made after the conspiracy ended and not in the

presence of the other defendants, and the defendants who made the confessions did not testify at trial. *People v Collins* (1st Dist) 184 Ill App 3d 321, 132 Ill Dec 173, 539 NE2d 736, app den (Ill) 136 Ill Dec 593, 545 NE2d 117.

Footnote 92. *Anderson v United States*, 417 US 211, 41 L Ed 2d 20, 94 S Ct 2253; *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico) 678 F Supp 353, affd without op (CA1 Puerto Rico) 873 F2d 1433; *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166; *United States v Gullett* (CA6 Mich) 713 F2d 1203, 13 Fed Rules Evid Serv 816, cert den 464 US 1069, 79 L Ed 2d 211, 104 S Ct 973; *United States v Silverstein* (CA10 Kan) 737 F2d 864, 15 Fed Rules Evid Serv 2015.

The exception to the hearsay rule for out-of-court statements by joint criminal venturers does not apply after the criminal enterprise has ended. *Commonwealth v Angiulo*, 415 Mass 502, 615 NE2d 155, summary op at (Mass) 21 M.L.W. 2881.

An incarcerated coconspirator's statements to a cellmate were inadmissible since the conspiracy had ended upon its failure in murder of the wrong person and its frustration by insurmountable circumstances, imprisonment of both the defendant and the coconspirator. *Deeb v State* (Tex Crim) 815 SW2d 692, reh den (Sep 25, 1991) and cert den (US) 120 L Ed 2d 907, 112 S Ct 3038.

Annotation: Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court cases, 1 L Ed 2d 1780.

Footnote 93. *State v Patriarca*, 112 RI 14, 308 A2d 300, later proceeding (RI) 463 A2d 1352, habeas corpus proceeding (DC RI) 580 F Supp 1056, revd on other grounds (CA1 RI) 751 F2d 450, cert den 472 US 1010, 86 L Ed 2d 724, 105 S Ct 2709.

Footnote 94. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558 and (among conflicting authorities on other grounds noted in *United States v Esposito* (CA2 NY) 834 F2d 272).

Footnote 95. *United States v Xheka* (CA7 Ill) 704 F2d 974, 12 Fed Rules Evid Serv 1764, cert den 464 US 993, 78 L Ed 2d 682, 104 S Ct 486 and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) (statements concerning status of insurance payments for fire-damaged building in arson conspiracy); *United States v Davis* (CA10 Okla) 766 F2d 1452, 18 Fed Rules Evid Serv 1448, cert den 474 US 908, 88 L Ed 2d 240, 106 S Ct 239.

Statements of coconspirators involved in dividing up the proceeds of an armed robbery are still admissible even though made after two other coconspirators have already departed. *United States v Hickey* (CA1 Mass) 596 F2d 1082, cert den 444 US 853, 62 L Ed 2d 70, 100 S Ct 107 and appeal after remand (CA1 Mass) 625 F2d 1030 and (criticized on other grounds by *United States v Luce* (CA6 Tenn) 713 F2d 1236, 13 Fed Rules Evid Serv 1601).

A conspiracy does not end, of necessity, before the spoils are divided among the miscreants. *State v Chavez* (Utah App) 840 P2d 846, 198 Utah Adv Rep 52, cert den (Utah) 857 P2d 948.

Footnote 96. *United States v Doyle* (CA7 Ill) 771 F2d 250, 18 Fed Rules Evid Serv 487.

In a prosecution for destroying a building with explosives, the out-of-court statements of one defendant, that he and another had been paid money to blow up the building and that he wanted to be transported to a codefendant's house to collect the money, were admissible under the coconspirator exception since the conspiracy could not have been completed for the defendant until he had received his money. *United States v Schwanke* (CA10 Okla) 598 F2d 575, 4 Fed Rules Evid Serv 1459 (criticized on other grounds by *United States v Martinez* (CA7) 1994 US App LEXIS 2161).

Footnote 97. *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108 (criticized on other grounds by *United States v Manganellis* (CA7 Wis) 864 F2d 528, 27 Fed Rules Evid Serv 1063).

Efforts on the part of a joint venturer to effect an escape warrant the inference that the joint venture continued through the time the statements were made. *Commonwealth v Angiulo*, 415 Mass 502, 615 NE2d 155, summary op at (Mass) 21 M.L.W. 2881.

Footnote 98. *United States v Vowiell* (CA9 Cal) 869 F2d 1264, 27 Fed Rules Evid Serv 1420, holding that, in a prosecution for offenses stemming from the escape of three federal prisoners, the District Court erred in admitting statements made four days after the escape while escapees were temporarily safe.

As to statements made during concealment of the conspiracy, see § 841.

Footnote 99. *United States v Balistreri* (CA7 Wis) 778 F2d 1226, cert den 477 US 908, 91 L Ed 2d 573, 106 S Ct 3284 (letter instructing the cessation of operation of a vending business until certain sensitive matters could be worked out).

Footnote 1. *United States v Cruz* (CA2 NY) 797 F2d 90, 21 Fed Rules Evid Serv 239 (criticized on other grounds by *United States v Boney* (App DC) 298 US App DC 149, 977 F2d 624, 36 Fed Rules Evid Serv 1358).

§ 839 --Renunciation of or withdrawal from conspiracy

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A party may renounce a conspiracy before its termination, so that statements made thereafter by other conspirators may not be offered against that party. 2 A conspirator's participation in an ongoing conspiracy is presumed to continue unless the conspirator demonstrates withdrawal from the conspiracy through affirmative action, such as a full confession to authorities or by conduct intended to reasonably communicate to

coconspirators the abandonment of the conspiracy and its goals. 3 Upon proof of participation in the conspiracy, the burden shifts to the alleged conspirator to show withdrawal. 4 That the alleged conspirator has ceased to actively participate has been found insufficient to prove withdrawal from the conspiracy in order to preclude admission against that party of coconspirator statements that qualify as nonhearsay under the coconspirator exception to the hearsay rule. 5

§ 839 --Renunciation of or withdrawal from conspiracy [SUPPLEMENT]

Case authorities:

Narcotics defendant's taped post-arrest statements to coconspirator were properly admitted notwithstanding claim that he had withdrawn from conspiracy since defendant did not inform coconspirator of his withdrawal from conspiracy, nor did he make "clean breast" to authorities as evidenced by his continued association with known targets of DEA investigation and attempts to warn coconspirator of police involvement. *United States v Hubbard* (1994, CA7 Ill) 22 F3d 1410, reh, en banc, den (1994, CA7 Ill) 1994 US App LEXIS 15419.

Footnotes

Footnote 2. *United States v Dorn* (CA7 Wis) 561 F2d 1252, 2 Fed Rules Evid Serv 438 (criticized on other grounds by *United States v Read* (CA7 Ill) 658 F2d 1225, CCH Fed Secur L Rep ¶ 98284); *United States v Mardian*, 178 US App DC 207, 546 F2d 973.

Footnote 3. *United States v Jannotti* (CA3 Pa) 729 F2d 213, 15 Fed Rules Evid Serv 145, cert den 469 US 880, 83 L Ed 2d 182, 105 S Ct 243, 105 S Ct 244; *United States v Patel* (CA7 Ill) 879 F2d 292, 28 Fed Rules Evid Serv 503, reh den, en banc (CA7) 1989 US App LEXIS 13146 and cert den 494 US 1016, 108 L Ed 2d 494, 110 S Ct 1318, post-conviction proceeding (ND Ill) 1993 US Dist LEXIS 5985; *United States v Troutman* (CA10 NM) 814 F2d 1428, 22 Fed Rules Evid Serv 1020 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105).

Footnote 4. *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, cert den 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, post-conviction proceeding, motion den (ED Pa) LEXIS slip op, affd (CA3 Pa) 813 F2d 596, cert den 484 US 822, 98 L Ed 2d 45, 108 S Ct 83.

Footnote 5. *United States v Walker* (CA4 Va) 796 F2d 43, 21 Fed Rules Evid Serv 102 (among conflicting authorities on other grounds noted in *United States v MMR Corp.* (LA) (CA5 La) 907 F2d 489, 1990-2 CCH Trade Cases ¶ 69136).

In a prosecution for violation of the narcotics law, the District Court did not err in admitting into evidence a transcript of a recorded telephone call, notwithstanding the defendant's contention that he was no longer member of drug conspiracy at the time the coconspirator made a tape recorded statement to him, where he did not communicate his abandonment to any coconspirators, and did not make clean breast to authorities, but on contrary attempted to exculpate himself from knowledge of smuggling ring. *United*

States v Patel (CA7 Ill) 879 F2d 292, 28 Fed Rules Evid Serv 503, reh den, en banc (CA7) 1989 US App LEXIS 13146 and cert den 494 US 1016, 108 L Ed 2d 494, 110 S Ct 1318, post-conviction proceeding (ND Ill) 1993 US Dist LEXIS 5985.

§ 840 --Effect of conspirator's arrest

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although the arrest of some of the conspirators may be sufficient to terminate a conspiracy and render any postarrest statements inadmissible as coconspirator statements made during the course of the conspiracy, 6 the arrest of some, but not all, of the conspirators will not necessarily terminate the conspiracy as a matter of law and the termination of the conspiracy must be proved, since it is possible that a conspiracy may continue despite the arrests. 7 The test is whether the remaining conspirators are able to continue with the conspiracy. 8 The arrest of a conspirator who is neither the declarant nor the party against whom the statement is offered does not affect the admissibility of the declarant's statements where the conspiracy is found to have continued beyond the arrest. 9 A conspiracy can be said to continue up to the last possible moment when pursuit of the main objective is still possible, and accordingly, courts have admitted statements made upon apprehension by law enforcement officers, but just before actual arrest. 10

The arrest of the declarant is often found to terminate the declarant's participation in the conspiracy, 11 so that the declarant's postarrest statements do not qualify as admissible coconspirator statements, 12 and thus cannot be used against fellow conspirators. 13 Thus, while an accomplice's guilty plea may be admissible if it serves a legitimate purpose and is coupled with a cautionary jury instruction, 14 a co-defendant's guilty plea is not admissible to prove the defendant's guilt. 15 Consequently, a coconspirator's plea of guilty to the crime charged is inadmissible in the separate trial of a defendant to support the prosecution's contention of the defendant's complicity. 16 Nevertheless, some courts have found that an arrest of a conspirator does not necessarily terminate his or her involvement in the conspiracy as a matter of law, and postarrest statements of the declarant which were made in furtherance of the conspiracy have been admitted against fellow conspirators, who were at large at the time the statement was made. 17 Statements by a coconspirator, who is at large and still operating in furtherance of the ongoing conspiracy may be introduced against another conspirator who was under arrest at the time the statements were made, 18 at least where the arrest of the other conspirator occurred shortly before the statement was made and the declarant was unaware of the arrest. 19

Postarrest statements of coconspirators regarding activities during the course of the conspiracy may be excluded as evidence against fellow conspirators on the ground that the statements were not made in furtherance of the conspiracy. 20

§ 840 --Effect of conspirator's arrest [SUPPLEMENT]

Case authorities:

Statements made by drug coconspirators were admissible against defendant even though they were made after defendant was in jail since there was no evidence that defendant had withdrawn from conspiracy; defendant's incarceration, by itself, did not establish her withdrawal from conspiracy. *United States v Zarnes* (1994, CA7 Ill) 33 F3d 1454.

Footnotes

Footnote 6. *United States v Barnes* (CA5 Fla) 586 F2d 1052, 3 Fed Rules Evid Serv 1278 (conspiracy to import and distribute cocaine was terminated upon the arrest of three out of the four conspirators, along with the confiscation of the cocaine).

Footnote 7. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474; *United States v Thompson* (CA6 Mich) 533 F2d 1006, cert den 429 US 939, 50 L Ed 2d 308, 97 S Ct 353 and cert den 429 US 939, 50 L Ed 2d 308, 97 S Ct 353 and (criticized on other grounds by *United States v Dempsey* (CA6 Ky) 733 F2d 392) as stated in *United States v Pelfrey* (CA6 Ohio) 822 F2d 628; *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558 and (among conflicting authorities on other grounds noted in *United States v Esposito* (CA2 NY) 834 F2d 272) (statements of convicted and jailed conspirator were held admissible, since the conspirator did not disassociate himself from the conspiracy after his arrest and there was evidence the conspirator continued to give orders while in jail).

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 8. *United States v Disbrow* (CA8 ND) 768 F2d 976, 18 Fed Rules Evid Serv 1108, cert den 474 US 1023, 88 L Ed 2d 560, 106 S Ct 577.

Footnote 9. *United States v Persico* (CA2 NY) 832 F2d 705, 24 Fed Rules Evid Serv 137, 89 ALR Fed 857, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1995, 108 S Ct 1996; *United States v Papia* (CA7 Wis) 560 F2d 827, 2 Fed Rules Evid Serv 414 (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *United States v Ordonez* (CA9 Cal) 737 F2d 793, 15 Fed Rules Evid Serv 1972) and (criticized on other grounds by *United States v De Luna* (CA8 Mo) 763 F2d 897, 18 Fed Rules Evid Serv 465) and (criticized on other grounds by *United States v Bourjaily* (CA6 Ohio) 781 F2d 539, 19 Fed Rules Evid Serv 1529).

Footnote 10. *United States v Hickey* (CA1 Mass) 596 F2d 1082, cert den 444 US 853, 62 L Ed 2d 70, 100 S Ct 107 and appeal after remand (CA1 Mass) 625 F2d 1030 and (criticized on other grounds by *United States v Luce* (CA6 Tenn) 713 F2d 1236, 13 Fed Rules Evid Serv 1601); *United States v Knuckles* (CA2 NY) 581 F2d 305, 3 Fed Rules

Evid Serv 331, cert den 439 US 986, 58 L Ed 2d 659, 99 S Ct 581 and (criticized on other grounds by *United States v Shabani* (CA9 Alaska) 993 F2d 1419, 93 CDOS 3593, 93 Daily Journal DAR 6189); *United States v Warren* (CA5 Fla) 578 F2d 1058, 4 Fed Rules Evid Serv 289, reh den, in part, en banc (CA5 Fla) 586 F2d 608 and on reh, en banc (CA5 Fla) 612 F2d 887, cert den 446 US 956, 64 L Ed 2d 815, 100 S Ct 2928 and (criticized on other grounds by *United States v Ell* (CA9 Mont) 718 F2d 291, 14 Fed Rules Evid Serv 327) and (ovrld on other grounds by *United States v Bengivenga* (CA5 Tex) 845 F2d 593); *United States v Schwanke* (CA10 Okla) 598 F2d 575, 4 Fed Rules Evid Serv 1459 (criticized on other grounds by *United States v Martinez* (CA7) 1994 US App LEXIS 2161).

Footnote 11. *United States v Williams* (CA2 NY) 577 F2d 188, 3 Fed Rules Evid Serv 921, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196 and (criticized on other grounds by *United States v Burkett* (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802); *United States v Blackshire* (CA4 Md) 538 F2d 569, 2 Fed Rules Evid Serv 204, cert den 429 US 840, 50 L Ed 2d 108, 97 S Ct 113; *United States v Arce* (CA5 Tex) 997 F2d 1123, reh, en banc, den (CA5 Tex) 5 F3d 1493; *United States v Muller* (CA5 Tex) 550 F2d 1375, cert den 434 US 971, 54 L Ed 2d 460, 98 S Ct 522; *Fuson v Jago* (CA6 Ohio) 773 F2d 55, 19 Fed Rules Evid Serv 707, cert den 478 US 1020, 92 L Ed 2d 739, 106 S Ct 3334 (custodial confession); *United States v Smith* (CA8 Neb) 578 F2d 1227, appeal after remand (CA8 Neb) 600 F2d 149; *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309; *United States v Di Rodio* (CA9 Cal) 565 F2d 573, 2 Fed Rules Evid Serv 843 (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988).

Footnote 12. *United States v Williams* (CA2 NY) 577 F2d 188, 3 Fed Rules Evid Serv 921, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196 and (criticized on other grounds by *United States v Burkett* (CA8 Mo) 821 F2d 1306, 23 Fed Rules Evid Serv 802); *United States v Blackshire* (CA4 Md) 538 F2d 569, 2 Fed Rules Evid Serv 204, cert den 429 US 840, 50 L Ed 2d 108, 97 S Ct 113; *United States v Muller* (CA5 Tex) 550 F2d 1375, cert den 434 US 971, 54 L Ed 2d 460, 98 S Ct 522; *Fuson v Jago* (CA6 Ohio) 773 F2d 55, 19 Fed Rules Evid Serv 707, cert den 478 US 1020, 92 L Ed 2d 739, 106 S Ct 3334 (custodial confession); *United States v Smith* (CA8 Neb) 578 F2d 1227, appeal after remand (CA8 Neb) 600 F2d 149; *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309; *United States v Di Rodio* (CA9 Cal) 565 F2d 573, 2 Fed Rules Evid Serv 843 (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988).

Statements made by an alleged coconspirator upon confession or after arrest are not admissible against a defendant unless made in his presence and assented to by him. *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470.

A statement made by a codefendant in a prosecution for kidnapping and conspiracy to commit theft by threat was not within the scope of the coconspirator's admission exception to the hearsay rule when it was made to police following arrest rather than in furtherance of the conspiracy; however, the statement was too vague to be prejudicial. *People v Bolla* (2d Dist) 114 Ill App 3d 442, 70 Ill Dec 118, 448 NE2d 996.

Where coconspirators were in custody when they made their confessions, the objects of

the conspiracy were completed, and the coconspirators were not attempting to conceal the crime or their cohorts, the statements were not made during the course of the conspiracy. *Re of K. P. S.* (Tex App Corpus Christi) 840 SW2d 706.

Annotation: Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Footnote 13. *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309.

Footnote 14. *United States v Coleman* (CA5 Tex) 997 F2d 1101, reh den (CA5 Tex) 1993 US App LEXIS 24113 and cert den (US) 126 L Ed 2d 698, 114 S Ct 735 and cert den (US) 127 L Ed 2d 86, 114 S Ct 893.

Footnote 15. *Virgin Islands v Mujahid* (CA3 VI) 990 F2d 111 (while a codefendant's guilty plea is not admissible to prove guilt, it may be admitted for other permissible purposes); *White v State* (Miss) 616 So 2d 304 (the admission of a coconspirators's plea of guilty, while incompetent as substantive evidence of the defendant's guilt, may be admissible for other purposes).

An instruction to the jury must deal precisely with the issue of how the guilty plea evidence can and cannot be used, and, at the very least, the district court should instruct the jury that a codefendant's guilty plea is no proof whatsoever of the defendant's guilt and must be disregarded completely when determining his guilt or innocence. *Virgin Islands v Mujahid* (CA3 VI) 990 F2d 111.

Footnote 16. *State v Ellis*, 161 W Va 40, 239 SE2d 670.

In a prosecution for criminal conspiracy, theft by deception, deceptive business practices, and aiding in the consummation of a crime, the trial court committed reversible error in permitting portions of an absent coconspirator's guilty plea to be read into the record in the presence of the jury for the purpose of establishing the unavailability of the alleged coconspirator where the information concerning the guilty plea was highly prejudicial and directly linked the defendant to crimes for which he was on trial, but afforded him no opportunity to cross-examine the coconspirator. *Commonwealth v Maleno*, 267 Pa Super 560, 407 A2d 51.

But see *People v Lewis* (3d Dept) 107 App Div 2d 838, 484 NYS2d 271, stating that, although the failure of the trial court to admonish the jury not to draw any inference of the defendant's guilt from an accomplice's plea of guilty was error, where the evidence of guilt was overwhelming, such factor was harmless.

Footnote 17. *United States v Harris* (CA7 Ind) 542 F2d 1283, cert den 430 US 934, 51 L Ed 2d 779, 97 S Ct 1558 and (among conflicting authorities on other grounds noted in *United States v Esposito* (CA2 NY) 834 F2d 272) (statements of convicted and jailed conspirator were held admissible, since the conspirator did not disassociate himself from the conspiracy after his arrest and there was evidence the conspirator continued to give orders while in jail); *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171,

97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474.

Footnote 18. *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166; *United States v Perez* (CA5 Tex) 823 F2d 854, 23 Fed Rules Evid Serv 368 (admission of tape-recorded telephone conversations between law enforcement officers operating undercover and the defendant's coconspirator, with the first call being made the day after the defendant's arrest).

Tape-recorded telephone conversations between the declarant and a third party were admissible against coconspirators, who were under arrest at the time the conversations occurred, since the declarant was unaware that the conspiracy to sell stolen securities had been terminated with the arrest of the coconspirators, and absent such knowledge, the declarant was seeking to carry out the next step of the scheme, collecting his commission for introducing buyer and seller. *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309.

Footnote 19. *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166 (statements by a coconspirator to undercover agent while riding in a vehicle that had left the area where a drug transaction took place were admissible against the defendant, who was arrested immediately after the vehicle left the area, unbeknown to the coconspirator); *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309 (coconspirator statements made the day after the defendant's arrest were admissible).

Footnote 20. § 844.

§ 841 Concealment of conspiracy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A coconspirator's statement made after the conspiracy has ended is not admissible on the theory that the statement was made in the course of an implied conspiracy aimed at preventing detection and punishment, 21 since every criminal endeavor necessarily contemplates nondisclosure after the deed is done. 22 Although acts of concealment can have significance where they are done in furtherance of the main criminal objectives of the conspiracy, when acts of concealment are done after central objectives have been obtained, for purpose only of covering up after crime, they may be inadmissible. 23 Thus, coconspirator statements made primarily for the purpose of concealing the conspiracy are outside the scope of the coconspirator exception to the hearsay rule when the duration of the alleged conspiracy is found not to extend to concealment; 24 but hearsay statements made by a conspirator during the concealment phase of a conspiracy may be admissible. 25 Some courts hold that efforts on the part of a joint venturer to conceal the occurrence of the enterprise's unlawful purpose warrant the inference that the joint venture continued through the time that the statements were made; 26 and some courts simply hold that statements of a conspirator made after the perpetration of a crime for the purpose of concealing the crime are admissible. 27

In addition, statements aimed at concealment may be considered within the exclusion for coconspirator statements if it can be shown that concealment is basic to the venture by its nature, 28 as in instances where the object of the conspiracy is not insular, but continuous, 29 and the concealment is intended to prolong the conspiracy. 30

Footnotes

Footnote 21. *Krulewitch v United States*, 336 US 440, 93 L Ed 790, 69 S Ct 716; *United States v Floyd* (CA2 NY) 555 F2d 45, 1 Fed Rules Evid Serv 1010, cert den 434 US 851, 54 L Ed 2d 120, 98 S Ct 163; *United States v Marks* (CA6 Ky) 585 F2d 164, 4 Fed Rules Evid Serv 316 (criticized on other grounds by *United States v Bourjaily* (CA6 Ohio) 781 F2d 539, 19 Fed Rules Evid Serv 1529).

An extrajudicial statement by a conspirator indicating his purpose to cover up and conceal the conspiracy is not admissible under theory that conspiracy included the further agreement to conceal, which is not implicit in every conspiracy. *Lutwak v United States*, 344 US 604, 97 L Ed 593, 73 S Ct 481, reh den 345 US 919, 97 L Ed 1352, 73 S Ct 726.

Footnote 22. *Grunewald v United States*, 353 US 391, 1 L Ed 2d 931, 77 S Ct 963, 57-1 USTC ¶ 9693, 51 AFTR 20, 62 ALR2d 1344 (not followed on other grounds by *United States v Guerro* (CA2 NY) 694 F2d 898) and (not followed on other grounds by *United States v Ingredient Technology Corp.* (CA2 NY) 698 F2d 88, 83-1 USTC ¶ 9140, 51 AFTR 2d 83-555) and (not followed on other grounds by *McCroskey v Bryant Air Conditioning Co.* (Tenn) 524 SW2d 487, 17 UCCRS 454) as stated in *Blakeney v Kassel* (Tenn App) 1991 Tenn App LEXIS 394 and (not followed on other grounds by *United States v Waldman* (CA11 Ga) 941 F2d 1544); *United States v Howard* (CA6 Ky) 770 F2d 57, 18 Fed Rules Evid Serv 1006, cert den 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507.

Footnote 23. *United States v Serrano* (CA1 Puerto Rico) 870 F2d 1, 27 Fed Rules Evid Serv 880 (among conflicting authorities on other grounds noted in *United States v North*, 285 US App DC 343, 910 F2d 843, 30 Fed Rules Evid Serv 961).

But see *Reed v People*, 156 Colo 450, 402 P2d 68, providing that statements made by conspirators out of the presence of defendant coconspirators about an hour after the burglary was committed were admissible where made in connection with efforts to cover up the crime.

Footnote 24. *United States v Gullett* (CA6 Mich) 713 F2d 1203, 13 Fed Rules Evid Serv 816, cert den 464 US 1069, 79 L Ed 2d 211, 104 S Ct 973; *United States v Silverstein* (CA10 Kan) 737 F2d 864, 15 Fed Rules Evid Serv 2015.

Footnote 25. *Duffy v State*, 262 Ga 249, 416 SE2d 734, 92 Fulton County D R 844.

A conspiracy did not terminate with the commission of the underlying offense where a participant engaged in subsequent efforts at concealment proximately related in time to the commission of the principal offense. *People v Meagher* (3d Dist) 70 Ill App 3d 597, 26 Ill Dec 800, 388 NE2d 801.

Disposing of the fruits of a crime may be part of the conspiracy. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 26. *Commonwealth v Angiulo*, 415 Mass 502, 615 NE2d 155, summary op at (Mass) 21 M.L.W. 2881.

Footnote 27. *State v Leisure* (Mo App) 838 SW2d 49.

Footnote 28. *United States v Del Valle* (CA5 Fla) 587 F2d 699, 3 Fed Rules Evid Serv 1114, cert den 442 US 909, 61 L Ed 2d 274, 99 S Ct 2822 (continuing objective of influencing witnesses before grand jury to conceal scheme to defraud insurance carriers by presenting false claims for medical expenses); *United States v Howard* (CA6 Ky) 770 F2d 57, 18 Fed Rules Evid Serv 1006, cert den 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507; *United States v Zabic* (CA7 Ill) 745 F2d 464, 16 Fed Rules Evid Serv 692; *United States v Tille* (CA9 Wash) 729 F2d 615, 15 Fed Rules Evid Serv 597, cert den 469 US 845, 83 L Ed 2d 93, 105 S Ct 156 and cert den 469 US 848, 83 L Ed 2d 100, 105 S Ct 164, post-conviction proceeding (CA9 Wash) 872 F2d 915 and (among conflicting authorities on other grounds noted in *United States v Killip* (CA10 Okla) 819 F2d 1542); *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304.

Footnote 29. *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304 (declarations made by wife to neighbors to divert suspicion from herself and her husband to conceal continuing abuse of their child); *United States v Griggs* (CA11 Fla) 735 F2d 1318, 15 Fed Rules Evid Serv 1951 (conspiracy to pass counterfeit money).

Footnote 30. *United States v LeFevour* (CA7 Ill) 798 F2d 977, 21 Fed Rules Evid Serv 391 (among conflicting authorities on other grounds noted in *United States v Pendas-Martinez* (CA11 Fla) 845 F2d 938, 25 Fed Rules Evid Serv 1142) and habeas corpus proceeding (ND Ill) 748 F Supp 579.

(4). Requirement That Statement be Made in Furtherance of Conspiracy [842-845]

§ 842 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To qualify as "not hearsay" under the Federal Rules of Evidence 31 and the Uniform Rules of Evidence, 32 as well as state law, 33 it is required that the coconspirator's statement be made "in furtherance of" the conspiracy. Similarly, some courts provide that in order for statements or acts to be admissible they must be in pursuance of the objectives of the conspiracy. 34 The "in furtherance of a conspiracy" requirement is

to be construed to protect the accused against the idle chatter of criminal partners and inadvertently misreported or deliberately fabricated evidence. 35 However, there is some authority that a statement may be susceptible to alternative interpretations and still be in furtherance of the conspiracy; the statement need not have been exclusively, or even primarily, made to further the conspiracy in order to be admissible under the coconspirator exception. 36

Statements are considered in furtherance of a conspiracy when the statements tend to advance or promote the object of the conspiracy, 37 as opposed to thwarting its purpose, 38 including statements that prompt the listener to respond in a way which facilitates carrying out the objectives of the conspiracy. 39 Statements which simply implicate one coconspirator in an attempt to shift the blame from another cannot be characterized as having been made to advance any objective of the conspiracy. 40 The court looks to the declarant's intent in making the statement, not the actual effect of the statement. 41 That the statement actually further the conspiratorial objectives is not required. 42

Whether a statement is in furtherance of the conspiracy is determined in the context in which the particular statement is made. 43 The courts look for a reasonable basis upon which to conclude that the statement furthered the conspiracy. 44 The court may consider the nature of the statement, as well as take into account the time and circumstances under which the statement was made in determining whether it was intended to further the scheme's ultimate objective. 45 Poststatement events may be used to prove that statement was made during course of conspiracy. 46 In addition, although the purpose of a conspirator's declarations may not be readily discernible because the party to whom the conspirator speaks is unknown as is the listener's relationship to the alleged conspiracy, the declarations may still be admitted under the coconspirator exception to the hearsay rule where it appears the coconspirator's declarations were intended to induce the listener to join the conspiracy. 47 There is some authority that the determination of whether a statement was made in furtherance of a conspiracy can, in the appropriate circumstances, be made by reference to the statement alone. 48

The "in furtherance" requirement has been construed broadly 49 and has been found satisfied in the context of statements—

—reciting past occurrences in an effort to map out future strategy, 50 or to facilitate a conspirator's ability to carry out assigned duties. 51

—identifying members of a conspiracy to coconspirators, 52 or to persons seeking to buy or sell contraband. 53

—enlisting another person to join the conspiracy, 54 even though the listening party is more eager to join the venture than the declarant is to allow the listening party to join, 55 or even though the invitation is declined. 56

—inviting a coconspirator to participate in a further stage of the conspiracy. 57

—urging a witness to lie to the authorities 58 or making threats to prevent a witness from telling the truth. 59

—urging a third person not to reveal the conspiracy. 60

- insuring continued participation by a coconspirator, 61 including statements intended to allay fears or suspicions. 62
- encouraging a coconspirator to carry out the conspiracy. 63
- keeping coconspirators abreast of the enterprise's progress. 64
- instilling fear as a means of pressuring a victim, 65 or fellow conspirator. 66
- accounting for transactions of the criminal enterprise. 67
- involving efforts to wind up the conspiracy after the attainment of its objective, 68 including references to actions taken by conspirators to destroy incriminating evidence. 69 Records kept by coconspirators may also be statements in furtherance of a conspiracy. 70

A mere narrative statement serving no immediate or future conspiratorial purpose does not satisfy the requirement, 71 whether communicated to outsiders 72 or to another conspirator. 73 Statements directed toward nonconspirators that merely inform the listener or reader of the coconspirator's activities are inadmissible under the coconspirator exception to the hearsay rule, where there is no intent to induce participation in the conspiracy. 74 Idle conversation is also inadmissible as not being in furtherance of the conspiracy. 75

Other declarations that do not satisfy the requirement that the statements be made in furtherance of the conspiracy include statements discouraging furtherance of the conspiracy, 76 or indicating that one conspirator had gone off on a "frolic" of his or her own. 77 Revelations of past conduct, which if anything have the effect of frustrating the conspiracy, do not qualify as in furtherance of the conspiracy. 78 Moreover, a statement by a coconspirator which relates to future dealings that are not connected to the current conspiracy and do not involve the party against whom the declarations are offered is not in furtherance of the conspiracy and is inadmissible against the party. 79 Declarations of a conspirator regarding the status of a coconspirator's future plans that are made out of the coconspirator's presence are inadmissible against the coconspirator where the statements do not promote an object of the alleged conspiracy. 80

§ 842 ----Generally [SUPPLEMENT]

Case authorities:

Witness' statement, that coconspirator asked him to talk to defendant about selling cocaine to him directly, was properly admitted as coconspirator's statement in furtherance of conspiracy; even if it was made as part of separate conspiracy by others to create own cocaine distribution scheme and eliminate middle man, common objective of either was to sell cocaine acquired from defendant. *United States v Goins* (1993, CA4 NC) 11 F3d 441, 38 Fed Rules Evid Serv 656, petition for certiorari filed (Feb 22, 1994).

In prosecution of correctional residential counselors for bribery conspiracy scheme, one coconspirator's statements to newly released resident about another conspirator were properly admitted under coconspirator exception since they were designed to enlist

participation of newly released resident's friend who was soon to arrive at facility and wanted to participate in bribery scheme. *United States v Ford* (1994, CA7 Ill) 21 F3d 759.

Witness's testimony that two codefendants in cocaine distribution conspiracy stated that they obtained their drugs from defendant was admissible under coconspirator exception since statements could be interpreted as attempts to recruit witness into conspiracy and therefore as having been made in furtherance of conspiracy. *United States v Guyton* (1994, CA7 Ill) 36 F3d 655.

Coconspirator's statements to his wife were in furtherance of conspiracy and therefore admissible under coconspirator exception where, in view of wife's mother's role in transporting marijuana on numerous occasions, his reference to transportation arrangements were made to relate need for wife's mother to remain involved in conspiracy, and coconspirator's statements to wife about substance of telephone calls he had made from Mexico to defendant were likely made to advise her of extent to which law enforcement authorities had detected conspiracy and of likelihood of their being unable to return to U.S. *United States v Curtis* (1994, CA7 Ill) 37 F3d 301.

Statement that defendant had come to witness day after government seized money from coconspirator in sting operation and stated that part of it had belonged to him was admissible coconspirator statement since it was in furtherance of conspiracy; statement was made in context of attempt to get more information about seizure. *United States v Powers* (1996, CA7 Ill) 75 F3d 335.

Coconspirator's statement that he and another were in drug business identified another coconspirator and was admissible as statement made in furtherance of conspiracy, and another coconspirator's statement that his relationship to defendant "was drugs" was likewise in furtherance of conspiracy because it revealed existence of conspiracy and identified conspirator. *United States v Escobar* (1995, CA8 Mo) 50 F3d 1414, reh, en banc, den (1995, CA8) 1995 US App LEXIS 10451 and reh, en banc, den (1995, CA8) 1995 US App LEXIS 10536.

Translator's statements were admissible against cocaine distribution defendants as coconspirator statements where translator was acting as middleman in order to facilitate cocaine transaction between coconspirators and undercover agent, translator had financial interest in accurately translating coconspirators' statements, and reliability of translations was confirmed by agent through his understanding of Spanish. *United States v Garcia* (1994, CA9 Ariz) 16 F3d 341, 94 CDOS 956, 94 Daily Journal DAR 1621, 38 Fed Rules Evid Serv 1545, later proceeding (CA9 Ariz) 1994 US App LEXIS 3249.

Statement of cocaine distribution conspirator that defendant had Mexican connection that supplied declarant with drugs to keep his business going was in furtherance of conspiracy so as to be admissible under coconspirator exception to hearsay rule; witness knew that declarant, his brother, was having problems with suppliers and evidence would support conclusion that statement was made to witness to indicate that deliveries of cocaine would continue, and regardless of defendant's claim that declarant did not trust his brother, declarant hired him to transport shipments with other people and kept him informed of certain material aspects of conspiracy. *United States v Gutierrez* (1995, CA10 Colo) 48 F3d 1134, cert den (1995, US) 63 USLW 3891.

Statements of co-conspirators are admissible in retrial of defendant on charge of

conspiracy to distribute cocaine following remand, where co-conspirators were acquitted of conspiracy during first trial, because government demonstrated by preponderance of evidence that conspiracy existed, that declarant and defendant were both members of conspiracy, and that statements were made in furtherance of conspiracy; fact that co-conspirators were acquitted was based on beyond-reasonable-doubt standard, not preponderance-of-evidence standard by which admissibility question is to be analyzed. *United States v Lacey* (1994, DC Kan) 856 F Supp 599.

The evidence was sufficient to support defendant's convictions of conspiracy to commit armed robbery and attempted armed robbery where it tended to show that defendant told his accomplice of his plan to rob an undercover police officer and his companion of marijuana that the officer and his companion proposed to sell to defendant; defendant armed himself with a pistol and chambered the weapon as he and the accomplice drove to a meeting with the officer and his companion; at the scene, defendant's accomplice knocked the officer down as he had been instructed to do by defendant as part of the robbery plan; and defendant shot the officer when the officer attempted to get out his weapon. The conduct of defendant and his accomplice supports an implied understanding between them to use a gun in the commission of the crime, and the failure of the conspirators to actually take the marijuana did not negate the attempted armed robbery. *State v Bell* (1994) 338 NC 363, 450 SE2d 710.

Footnotes

Footnote 31. FRE, Rule 801(d)(2)(E).

Footnote 32. Uniform Rules of Evidence, Rule 801(d)(2)(v).

Footnote 33. *Haney v State* (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297 (act or statement in furtherance of a plan or design); *State v Lycett* (App) 133 Ariz 185, 650 P2d 487; *Dixon v State*, 310 Ark 460, 839 SW2d 173; *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166; *Wiggins v State* (Fla App D1) 460 So 2d 483, 9 FLW 2562; *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470; *State v Ruiz* (Iowa App) 496 NW2d 789; *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103; *Commonwealth v Anselmo*, 33 Mass App 602, 603 NE2d 227; *State v Madewell* (Mo App) 846 SW2d 208 (declaration must be in furtherance of the object of the unlawful combination); *State v Leisure* (Mo App) 838 SW2d 49; *People v Tran*, 80 NY2d 170, 589 NYS2d 845, 603 NE2d 950, reconsideration den 81 NY2d 784, 594 NYS2d 721, 610 NE2d 394; *People v Glenn* (4th Dept) 185 App Div 2d 84, 592 NYS2d 175; *State v Mahaley*, 332 NC 583, 423 SE2d 58; *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207; *Zajac on behalf of H & R Enterprises, Inc. v Great American Ins. Cos.* (ND) 410 NW2d 155; *State v Cornell*, 314 Or 673, 842 P2d 394; *Commonwealth v Zdrade*, 530 Pa 313, 608 A2d 1037; *Commonwealth v Stocker*, 424 Pa Super 189, 622 A2d 333; *State v Little* (Tenn Crim) 854 SW2d 643; *Canaday v State* (Tex App Beaumont) 853 SW2d 810; *Cox v State* (Tex App El Paso) 843 SW2d 750, petition for discretionary review ref (May 5, 1993); *Re of K. P. S.* (Tex App Corpus Christi) 840 SW2d 706; *State v Lynn*, 67 Wash App 339, 835 P2d 251; *Haskins v State*, 97 Wis 2d 408, 294 NW2d 25.

The court erred in allowing a police witness to read to the jury portions of the confession of a coconspirator which implicated the appellant where the statements were not made in furtherance of a common purpose. *Commonwealth v McDowell*, 460 Pa 474, 333 A2d 872.

With respect to the admission of coconspirator statements, the central issue is whether the continuing course of conduct served the ultimate objective fostered by the conspiracy. *Cox v State* (Tex App El Paso) 843 SW2d 750, petition for discretionary review ref (May 5, 1993).

Footnote 34. *State v Marlow*, 334 NC 273, 432 SE2d 275.

To be in furtherance of the conspiracy and admissible under the coconspirator hearsay exception, the statement must further the common objectives of the conspiracy. *United States v Arias-Villanueva* (CA9 Or) 998 F2d 1491, 93 CDOS 5481, 93 Daily Journal DAR 9291, cert den (US) 126 L Ed 2d 322, 114 S Ct 359 and cert den (US) 126 L Ed 2d 472, 114 S Ct 573 and cert den (US) 126 L Ed 2d 473, 114 S Ct 573.

The requirement that statements be made "in furtherance of the conspiracy" focuses on whether the statement was intended in some way to advance the objectives of the conspiracy. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 35. *United States v Fahey* (CA1 Mass) 769 F2d 829, 18 Fed Rules Evid Serv 1141; *United States v Dorn* (CA7 Wis) 561 F2d 1252, 2 Fed Rules Evid Serv 438 (criticized on other grounds by *United States v Read* (CA7 Ill) 658 F2d 1225, CCH Fed Secur L Rep ¶ 98284).

Footnote 36. *United States v Sims* (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308.

Footnote 37. *United States v Fahey* (CA1 Mass) 769 F2d 829, 18 Fed Rules Evid Serv 1141; *United States v Garcia* (CA8 Mo) 893 F2d 188, 29 Fed Rules Evid Serv 378; *United States v De Luna* (CA8 Mo) 763 F2d 897, 18 Fed Rules Evid Serv 465, cert den 474 US 980, 88 L Ed 2d 336, 106 S Ct 382 and (criticized on other grounds by *Government of Virgin Islands v Joseph* (CA3 VI) 964 F2d 1380, 27 VI 389, 35 Fed Rules Evid Serv 877); *United States v Smith* (CA10 Colo) 833 F2d 213, 24 Fed Rules Evid Serv 283.

A statement is in furtherance of the conspiracy if it advances the ultimate objectives of the conspiracy. *United States v McConnell* (CA5 La) 988 F2d 530.

Footnote 38. *United States v Fahey* (CA1 Mass) 769 F2d 829, 18 Fed Rules Evid Serv 1141.

Footnote 39. *United States v Persico* (CA2 NY) 832 F2d 705, 24 Fed Rules Evid Serv 137, 89 ALR Fed 857, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1995, 108 S Ct 1996.

Statements are admissible under the coconspirator exception to the hearsay rule if the overall effect of the conversation is to facilitate the conspiracy. *United States v Edwards*

(CA8 Mo) 994 F2d 417, 38 Fed Rules Evid Serv 472, reh, en banc, den (CA8) 1993 US App LEXIS 11448 and reh, en banc, den (CA8) 1993 US App LEXIS 11590 and reh, en banc, den (CA8) 1993 US App LEXIS 11701 and reh, en banc, den (CA8) 1993 US App LEXIS 12539 and (among conflicting authorities noted on other grounds in *United States v Smiley* (CA8 Mo) 997 F2d 475) and cert den (US) 126 L Ed 2d 667, 114 S Ct 701, reh den (US) 62 USLW 3574.

Footnote 40. *United States v Blakey* (CA11 Ga) 960 F2d 996, 35 Fed Rules Evid Serv 924, 6 FLW Fed C 599, appeal after remand, remanded on other grounds (CA11 Ga) 14 F3d 1557, 7 FLW Fed C 1260.

Footnote 41. *United States v Williams* (CA9 Mont) 989 F2d 1061, 93 CDOS 1994, 93 Daily Journal DAR 3590, 37 Fed Rules Evid Serv 545.

Footnote 42. *United States v Reyes* (CA10 NM) 798 F2d 380, 20 Fed Rules Evid Serv 1405 (statements that explained important events to coconspirator); *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174.

Footnote 43. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 44. *United States v Sims* (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308.

Footnote 45. *United States v Handy* (CA8 Mo) 668 F2d 407, 9 Fed Rules Evid Serv 1210.

Footnote 46. *United States v Casamento* (CA2 NY) 887 F2d 1141, 29 Fed Rules Evid Serv 551, cert den 493 US 1081, 107 L Ed 2d 1043, 110 S Ct 1138, postconviction proceeding (SD NY) 1990 US Dist LEXIS 8755, affd (CA2 NY) 926 F2d 1311 and cert den 495 US 933, 109 L Ed 2d 504, 110 S Ct 2175 and cert den 495 US 958, 109 L Ed 2d 746, 110 S Ct 2564.

Footnote 47. *United States v Watchmaker* (CA11 Fla) 761 F2d 1459, 18 Fed Rules Evid Serv 330, reh den, en banc (CA11 Fla) 766 F2d 1493, cert den 474 US 1100, 88 L Ed 2d 917, 106 S Ct 879, 106 S Ct 880, 106 S Ct 881 and (among conflicting authorities on other grounds noted in *Petro-Tech, Inc. v Western Co. of N. Am.* (CA3 Pa) 824 F2d 1349) and (among conflicting authorities on other grounds noted in *Beauford v Helmsley* (CA2 NY) 843 F2d 103) and (among conflicting authorities on other grounds noted in *United States v Walgren* (CA9 Wash) 885 F2d 1417) (tape-recorded conversation between unindicted conspirator and an unknown third party during which conspirator discussed his past criminal exploits).

Footnote 48. *United States v McConnell* (CA5 La) 988 F2d 530.

Footnote 49. *United States v Patton* (CA5 Tex) 594 F2d 444; *United States v Smith* (CA5 Ala) 550 F2d 277, 1 Fed Rules Evid Serv 1359, 38 ALR Fed 132, cert den 434 US 841, 54 L Ed 2d 105, 98 S Ct 138; *United States v Edwards* (CA8 Mo) 994 F2d 417, 38 Fed Rules Evid Serv 472, reh, en banc, den (CA8) 1993 US App LEXIS 11448 and reh, en banc, den (CA8) 1993 US App LEXIS 11590 and reh, en banc, den (CA8) 1993 US App

LEXIS 11701 and reh, en banc, den (CA8) 1993 US App LEXIS 12539 and (among conflicting authorities noted on other grounds in *United States v Smiley* (CA8 Mo) 997 F2d 475) and cert den (US) 126 L Ed 2d 667, 114 S Ct 701, reh den (US) 62 USLW 3574; *United States v Garcia* (CA8 Mo) 893 F2d 188, 29 Fed Rules Evid Serv 378; *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212; *United States v Smith* (CA8 Neb) 578 F2d 1227, appeal after remand (CA8 Neb) 600 F2d 149; *United States v Smith* (CA8 Iowa) 520 F2d 1245, 1 Fed Rules Evid Serv 74, appeal after remand (CA8 Iowa) 533 F2d 1077, 2 Fed Rules Evid Serv 207.

Footnote 50. *United States v Haldeman*, 181 US App DC 254, 559 F2d 31, 1 Fed Rules Evid Serv 1203, cert den 431 US 933, 53 L Ed 2d 250, 97 S Ct 2641, reh den 433 US 916, 53 L Ed 2d 1103, 97 S Ct 2992 (presidential tapes of conversations with advisors).

Footnote 51. *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174.

Footnote 52. *United States v Pelletier* (CA1 Me) 845 F2d 1126, 25 Fed Rules Evid Serv 945; *United States v Persico* (CA2 NY) 832 F2d 705, 24 Fed Rules Evid Serv 137, 89 ALR Fed 857, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1995, 108 S Ct 1996; *United States v Perez* (CA2 NY) 702 F2d 33, 12 Fed Rules Evid Serv 892, cert den 462 US 1108, 77 L Ed 2d 1336, 103 S Ct 2457; *United States v Womochil* (CA8 Neb) 778 F2d 1311; *United States v Smith* (CA10 Colo) 833 F2d 213, 24 Fed Rules Evid Serv 283; *United States v Reyes* (CA10 NM) 798 F2d 380, 20 Fed Rules Evid Serv 1405 (statements to coconspirators describing defendant's role as that of a financial backer).

A coconspirator's statement to another coconspirator that the defendant obtained 1800 pounds of marijuana was admissible as a statement in furtherance of conspiracy because it informed the coconspirator as to who was purchasing marijuana and in what quantity and identified the defendant's participation and role in conspiracy. *United States v Hitow* (CA6 Mich) 889 F2d 1573, 29 Fed Rules Evid Serv 500.

Footnote 53. *United States v Patton* (CA5 Tex) 594 F2d 444; *United States v Christian* (CA6 Tenn) 786 F2d 203 (criticized on other grounds by *United States v Shabani* (CA9 Alaska) 993 F2d 1419, 93 CDOS 3593, 93 Daily Journal DAR 6189); *United States v Nelson* (CA8 Ark) 603 F2d 42; *United States v Paris* (CA9 Cal) 827 F2d 395, 23 Fed Rules Evid Serv 1039.

A coconspirator's statement during a drug transaction identifying the defendant as the boss was in furtherance of a narcotics conspiracy since it furthered the conspiracy's purpose by informing the participant of the identity and the role of the defendant and reassuring him to proceed with transaction in the presence of someone with whom he was not familiar. *United States v Roldan-Zapata* (CA2 NY) 916 F2d 795, 31 Fed Rules Evid Serv 443, cert den 499 US 940, 113 L Ed 2d 453, 111 S Ct 1397.

Footnote 54. *United States v Mangan* (CA2 NY) 575 F2d 32, 78-1 USTC ¶ 9349, 3 Fed Rules Evid Serv 315, 41 AFTR 2d 78-1174, cert den 439 US 931, 58 L Ed 2d 324, 99 S Ct 320; *SEC v Tome* (SD NY) 638 F Supp 629 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231); *United States v Badalamenti* (SD NY) 626 F Supp 658 (drug conspiracy); *United States v Holloway* (CA6 Mich) 740 F2d 1373, 16 Fed Rules Evid Serv 178, cert den 469 US 1021, 83 L Ed 2d 366, 105 S Ct 440; *United States v Dorn* (CA7 Wis) 561 F2d 1252, 2 Fed Rules Evid Serv 438 (criticized on other grounds by *United States v Read* (CA7 Ill) 658 F2d 1225, CCH Fed Secur L Rep ¶ 98284); *United States v Bentley* (CA8 Mo) 706 F2d 1498, 13 Fed Rules Evid Serv 152, cert den 464 US 830, 78 L Ed 2d 110, 104 S Ct 107 and cert den 467 US 1209, 81 L Ed 2d 354, 104 S Ct 2397; *United States v Smith* (CA9 Hawaii) 790 F2d 789, 20 Fed Rules Evid Serv 1018; *United States v Layton* (CA9 Cal) 720 F2d 548, 13 FR Serv 2d 1313, cert den 465 US 1069, 79 L Ed 2d 748, 104 S Ct 1423, appeal after remand (CA9 Cal) 767 F2d 549, 18 Fed Rules Evid Serv 1322, later proceeding (ND Cal) 632 F Supp 176, later proceeding (ND Cal) 666 F Supp 1369, affd (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988, cert den 489 US 1046, 103 L Ed 2d 244, 109 S Ct 1178 and (criticized on other grounds by *Territory of Guam v Ignacio* (CA9 Cal) 10 F3d 608, 93 CDOS 8509, 93 Daily Journal DAR 14575).

A bribery and extortion coconspirator's statement to an attorney was made in furtherance of conspiracy where the attorney testified that the coconspirators exerted subtle pressure on him to assist in a complicated scheme and the record supported the inference that the coconspirator's statements were intended to facilitate the flow of ill-gotten funds to members of the conspiracy. *United States v Snyder* (CA5 Miss) 930 F2d 1090, 32 Fed Rules Evid Serv 1006, reh, en banc, den (CA5) 1991 US App LEXIS 15039, later proceeding, remanded (CA5 Miss) 946 F2d 1125, 68 AFTR 2d 91-5995 and cert den (US) 116 L Ed 2d 331, 112 S Ct 380.

Footnote 55. *United States v Badalamenti* (SD NY) 626 F Supp 658.

Footnote 56. *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174.

Footnote 57. *United States v Heinemann* (CA2 NY) 801 F2d 86, 86-2 USTC ¶ 9686, 21 Fed Rules Evid Serv 976, 58 AFTR 2d 86-5814, cert den 479 US 1094, 94 L Ed 2d 163, 107 S Ct 1308; *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174.

Footnote 58. *United States v Mackey* (CA7 Ind) 571 F2d 376, 78-1 USTC ¶ 9321, 2 Fed Rules Evid Serv 1284, 41 AFTR 2d 78-728 (tax investigation); *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212 (instructions to coconspirator to keep silent when testifying before grand jury).

Footnote 59. *United States v Triplett* (CA5 Tex) 922 F2d 1174, 32 Fed Rules Evid Serv 152, cert den (US) 114 L Ed 2d 486, 111 S Ct 2245, holding that an arson coconspirator's statement to a witness that he was going to get her if she testified truthfully was properly admitted in the defendant's trial as a statement in furtherance of conspiracy.

Footnote 60. *United States v Garcia* (CA8 Mo) 893 F2d 188, 29 Fed Rules Evid Serv 378.

Footnote 61. *United States v Pelletier* (CA1 Me) 845 F2d 1126, 25 Fed Rules Evid Serv 945; *United States v McLernon* (CA6 Ohio) 746 F2d 1098, 16 Fed Rules Evid Serv 638 (criticized on other grounds by *United States v Bourjaily* (CA6 Ohio) 781 F2d 539, 19 Fed Rules Evid Serv 1529) and (among conflicting authorities on other grounds noted in *United States v Manzella* (CA7 Ill) 791 F2d 1263, 87 ALR Fed 295) and (disapproved on other grounds by *United States v Young*, 470 US 1, 84 L Ed 2d 1, 105 S Ct 1038) as stated in *United States v Hoac* (CA9 Cal) 990 F2d 1099, 93 CDOS 2196, 93 Daily Journal DAR 3855, 37 Fed Rules Evid Serv 558; *United States v Krevsky* (CA8 Iowa) 741 F2d 1090, 16 Fed Rules Evid Serv 1189, postconviction proceeding (CA8 Iowa) 924 F2d 770; *United States v Whitten* (CA9 Cal) 706 F2d 1000, 13 Fed Rules Evid Serv 384, cert den 465 US 1100, 80 L Ed 2d 125, 104 S Ct 1593 and (criticized on other grounds by *United States v Morgan* (CA6 Tenn) 743 F2d 1158); *United States v Gomez* (CA10 Okla) 810 F2d 947, 22 Fed Rules Evid Serv 659, cert den 482 US 908, 96 L Ed 2d 379, 107 S Ct 2488.

When a statement is made in the presence of a coconspirator, a statement that would not otherwise be in furtherance of the conspiracy may be in furtherance of the conspiracy if the statement demonstrates a desire to develop camaraderie in order to ensure the success of the continuing conspiracy. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 62. *United States v Rahme* (CA2 NY) 813 F2d 31, 22 Fed Rules Evid Serv 942; *United States v Castro* (CA3 Pa) 776 F2d 1118, 19 Fed Rules Evid Serv 605, cert den 475 US 1029, 89 L Ed 2d 342, 106 S Ct 1233; *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, cert den 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, postconviction proceeding, motion den (ED Pa) LEXIS slip op, affd (CA3 Pa) 813 F2d 596, cert den 484 US 822, 98 L Ed 2d 45, 108 S Ct 83; *United States v Crespo De Llano* (CA9 Ariz) 830 F2d 1532, 23 Fed Rules Evid Serv 1263, amd, reh den (CA9 Ariz) 838 F2d 1006; *United States v Whitten* (CA9 Cal) 706 F2d 1000, 13 Fed Rules Evid Serv 384, cert den 465 US 1100, 80 L Ed 2d 125, 104 S Ct 1593 and (criticized on other grounds by *United States v Morgan* (CA6 Tenn) 743 F2d 1158) (statement intended as reassurance that a coconspirator is trustworthy).

In a prosecution for conspiracy to import cocaine, the District Court did not err in admitting statements of a coconspirator under the coconspirator exception to hearsay since statements giving assurance that it was safe to continue in conspiracy, and assurances of an outlet for goods, were statements "in furtherance" of the conspiracy. *United States v Rios* (CA6 Mich) 842 F2d 868, 25 Fed Rules Evid Serv 301, cert den 488 US 1031, 102 L Ed 2d 972, 109 S Ct 840, postconviction proceeding (CA6) 1992 US App LEXIS 3335, postconviction proceeding (CA6) 1993 US App LEXIS 2083.

In a narcotics conspiracy prosecution, a statement that one coconspirator told another that the defendant could be trusted was admissible as a coconspirator's statement in furtherance of a conspiracy since it was meant to provide assurance that the defendant

could be trusted as potential source of cocaine for the partnership. *United States v Sophie* (CA7 Ill) 900 F2d 1064, 30 Fed Rules Evid Serv 946, cert den 498 US 843, 112 L Ed 2d 92, 111 S Ct 124 and (among conflicting authorities on other grounds noted in *United States v Holifield* (CA7 Wis) 956 F2d 665).

Footnote 63. *State v Cornell*, 314 Or 673, 842 P2d 394.

Footnote 64. *United States v Persico* (CA2 NY) 832 F2d 705, 24 Fed Rules Evid Serv 137, 89 ALR Fed 857, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1995, 108 S Ct 1996; *United States v Paone* (CA2 NY) 782 F2d 386, 20 Fed Rules Evid Serv 577, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269 and cert den 483 US 1019, 97 L Ed 2d 761, 107 S Ct 3261, habeas corpus proceeding (ED NY) 735 F Supp 60 and (among conflicting authorities on other grounds noted in *United States v Salerno* (CA2 NY) 868 F2d 524, 27 Fed Rules Evid Serv 868) and (criticized on other grounds by *United States v Johnson* (CA7 Ill) 927 F2d 999, 32 Fed Rules Evid Serv 735) (recitation of the details of a murder committed in connection with conspiracy to extort money from gambling organizations); *SEC v Tome* (SD NY) 638 F Supp 629 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231); *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, cert den 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, postconviction proceeding, motion den (ED Pa) LEXIS slip op, affd (CA3 Pa) 813 F2d 596, cert den 484 US 822, 98 L Ed 2d 45, 108 S Ct 83; *United States v Christian* (CA6 Tenn) 786 F2d 203 (criticized on other grounds by *United States v Shabani* (CA9 Alaska) 993 F2d 1419, 93 CDOS 3593, 93 Daily Journal DAR 6189) (instructions on the location where a drug buy would be consummated); *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212; *United States v Williams* (CA9 Mont) 989 F2d 1061, 93 CDOS 1994, 93 Daily Journal DAR 3590, 37 Fed Rules Evid Serv 545; *United States v Crespo De Llano* (CA9 Ariz) 830 F2d 1532, 23 Fed Rules Evid Serv 1263, amd, reh den (CA9 Ariz) 838 F2d 1006; *United States v Andersson* (CA9 Cal) 813 F2d 1450, 22 Fed Rules Evid Serv 1391 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Dozier* (CA9 Cal) 826 F2d 866, op withdrawn, substituted op (CA9 Cal) 844 F2d 701; *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174 (recitations of details of recently completed drug transactions).

A revolutionary group's communique to press taking credit for a robbery one year earlier was properly admitted as statement of a coconspirator in furtherance of a conspiracy since its tone reflected an ongoing operation contemplating use of robbery proceeds and provided the coconspirators with reassurance as to organization's status and solvency, new information as to membership of the conspiracy, and encouragement for future organizational activities. *United States v Maldonado-Rivera* (CA2 Conn) 922 F2d 934, 31 Fed Rules Evid Serv 1215, stay den 499 US 915, 113 L Ed 2d 236, 111 S Ct 1304 and cert den (US) 115 L Ed 2d 984, 111 S Ct 2811 and cert den (US) 115 L Ed 2d 1025, 111 S Ct 2858 and cert den (US) 115 L Ed 2d 1026, 111 S Ct 2858.

Footnote 65. *United States v O'Malley* (CA7 Ill) 796 F2d 891, 21 Fed Rules Evid Serv 92, postconviction proceeding (ND Ill) 1992 US Dist LEXIS 1458, *affd* (CA7) 1993 US App LEXIS 10175.

A coconspirator's statement to a victim just before shooting him was admissible to show the conspirator's motive in shooting the victim, namely to protect conspiracy by threatening and injuring a suspected informer. *United States v Green* (CA1 Mass) 887 F2d 25, 28 Fed Rules Evid Serv 1542.

Footnote 66. *United States v Gironda* (CA7 Ill) 758 F2d 1201, 17 Fed Rules Evid Serv 1321, *cert den* 474 US 1004, 88 L Ed 2d 456, 106 S Ct 523, later proceeding (ND Ill) 1987 US Dist LEXIS 7772 and (criticized on other grounds by *United States v Durrie* (CA7 Wis) 902 F2d 1221).

A witness' statements about conversations with coconspirators concerning their participation in murder of a former coconspirator were admissible as statements made by the coconspirators in furtherance of a conspiracy since discussions of the murder, and reasons for it, may have served to promote the criminal activities of the enterprise by enforcing discipline among its members. *United States v Simmons* (CA2 NY) 923 F2d 934, 32 Fed Rules Evid Serv 1296, *cert den* (US) 114 L Ed 2d 104, 111 S Ct 2018 and *cert den* (US) 116 L Ed 2d 334, 112 S Ct 383, later proceeding (SD NY) 1992 US Dist LEXIS 5088.

Footnote 67. *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, *cert den* 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, *cert den* 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212 (accounting records found essential to furtherance of conspiracy, since without accurate bookkeeping it would be difficult to maintain conspiracy or information necessary to continue unlawful activities).

Footnote 68. *United States v Hickey* (CA1 Mass) 596 F2d 1082, *cert den* 444 US 853, 62 L Ed 2d 70, 100 S Ct 107 and appeal after remand (CA1 Mass) 625 F2d 1030 and (criticized on other grounds by *United States v Luce* (CA6 Tenn) 713 F2d 1236, 13 Fed Rules Evid Serv 1601) (dividing up the proceeds of an armed robbery; *United States v Doyle* (CA7 Ill) 771 F2d 250, 18 Fed Rules Evid Serv 487 (telephone conversation concerning payment of defendant for bombing restaurant).

Footnote 69. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Smith* (CA9 Hawaii) 790 F2d 789, 20 Fed Rules Evid Serv 1018 (statements overheard by law enforcement agent pertaining to destruction of printing plates and the passing of counterfeit bills).

Footnote 70. *United States v Smith* (CA9 Wash) 893 F2d 1573, 30 Fed Rules Evid Serv 142, holding that a calendar or drug ledger was admissible as a coconspirator's statement where the government established that the coconspirator kept the ledger as a record of money and drug transactions so that it sufficiently demonstrated that the ledger was made in furtherance of a conspiracy to distribute cocaine.

Footnote 71. *United States v Heinemann* (CA2 NY) 801 F2d 86, 86-2 USTC ¶ 9686, 21 Fed Rules Evid Serv 976, 58 AFTR 2d 86-5814, cert den 479 US 1094, 94 L Ed 2d 163, 107 S Ct 1308.

Mere conversations or narrative declarations are not admissible under the coconspirator rule. *United States v Arias-Villanueva* (CA9 Or) 998 F2d 1491, 93 CDOS 5481, 93 Daily Journal DAR 9291, cert den (US) 126 L Ed 2d 322, 114 S Ct 359 and cert den (US) 126 L Ed 2d 472, 114 S Ct 573 and cert den (US) 126 L Ed 2d 473, 114 S Ct 573.

Footnote 72. *United States v Means* (CA5 Miss) 695 F2d 811, 12 Fed Rules Evid Serv 249, later proceeding (SD Miss) 695 F Supp 288; *United States v Wilson* (ED Mich) 490 F Supp 713, affd (CA6 Mich) 639 F2d 314; *United States v Eubanks* (CA9 Ariz) 591 F2d 513; *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304.

Footnote 73. *United States v Badalamenti* (SD NY) 626 F Supp 658 (coconspirator told that lost drug shipment had been sent in a fruit truck); *United States v Green* (CA8 Neb) 600 F2d 154; *United States v Bibbero* (CA9 Cal) 749 F2d 581, 17 Fed Rules Evid Serv 447, cert den 471 US 1103, 85 L Ed 2d 847, 105 S Ct 2330 and (criticized on other grounds by *United States v Wallace* (CA9 Wash) 848 F2d 1464, 25 Fed Rules Evid Serv 1192); *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174 (narrative of past successes and failures).

Footnote 74. *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, cert den 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, postconviction proceeding, motion den (ED Pa) LEXIS slip op, affd (CA3 Pa) 813 F2d 596, cert den 484 US 822, 98 L Ed 2d 45, 108 S Ct 83; *United States v Wood* (CA8 Mo) 834 F2d 1382, 24 Fed Rules Evid Serv 130 (conspirator's statement to wife that he was working for defendant by putting radios in boats used for smuggling); *United States v De Luna* (CA8 Mo) 763 F2d 897, 18 Fed Rules Evid Serv 465, cert den 474 US 980, 88 L Ed 2d 336, 106 S Ct 382 and (criticized on other grounds by *Government of Virgin Islands v Joseph* (CA3 VI) 964 F2d 1380, 27 VI 389, 35 Fed Rules Evid Serv 877); *United States v Snider* (CA8 Mo) 720 F2d 985, 14 Fed Rules Evid Serv 796, cert den 465 US 1107, 80 L Ed 2d 142, 104 S Ct 1613.

A coconspirator's statements to a third person should not have been admitted in the prosecution of a defendant for mail fraud and conspiracy since it was not in furtherance of conspiracy where the statement was not part of any normal information flow between coconspirators, the third party was not conspirator, and the coconspirator was only commenting on the third party's hypothetical business plan and did not intend by his remark to further any objectives of his own scheme. *United States v Johnson* (CA7 Ill) 927 F2d 999, 32 Fed Rules Evid Serv 735.

A coconspirator's statement to her live-in lover that pharmaceutical products were being transferred from a nonprofit organization to third parties and then eventually to another corporation for resale in the United States was held not to be in furtherance of the conspiracy, where the lover was not associated with the conspiracy. *United States v Weinstein* (CA11 Fla) 762 F2d 1522, 18 Fed Rules Evid Serv 757, mod, reh den, in part (CA11 Fla) 778 F2d 673, cert den 475 US 1110, 89 L Ed 2d 917, 106 S Ct 1519 and (among conflicting authorities on other grounds noted in *United Energy Owners*

Committee, Inc. v United States Energy Management Systems, Inc. (CA9 Cal) 837 F2d 356, 10 FR Serv 3d 253) and (among conflicting authorities on other grounds noted in United States v Feldman (CA9 Cal) 853 F2d 648) and (among conflicting authorities on other grounds noted in Fleischhauer v Feltner (CA6 Ohio) 879 F2d 1290) and (criticized on other grounds by McNeil v Salan (CA6) 1992 US App LEXIS 11476).

Footnote 75. United States v Smith (CA9 Hawaii) 790 F2d 789, 20 Fed Rules Evid Serv 1018 (coconspirator's personal dreams for spending counterfeit money); United States v O'Connor (CA9 Ariz) 737 F2d 814, 15 Fed Rules Evid Serv 2021, cert den 469 US 1218, 84 L Ed 2d 343, 105 S Ct 1198 (coconspirator's declaration that he had known another conspirator for 8 years found to be idle chatter when made in response to a comment that the other conspirator looked like a cop).

But see United States v Salerno (CA2 NY) 868 F2d 524, 27 Fed Rules Evid Serv 868, cert den 491 US 907, 105 L Ed 2d 700, 109 S Ct 3192 and cert den 493 US 811, 107 L Ed 2d 24, 110 S Ct 56, postconviction proceeding (CA2 NY) 964 F2d 172, postconviction proceeding (SD NY) 1992 US Dist LEXIS 11089, affd without op (CA2 NY) 990 F2d 623 and (criticized on other grounds by McIntyre v Trickey (CA8 Mo) 975 F2d 437), holding that, in a RICO prosecution, the District Court did not err in admitting certain recorded conversations pursuant to the coconspirator rule where the statements included discussions concerning the progress of law enforcement investigations, the monitoring of indictment and arrest of coconspirators, assessments of revelations by the media, discussions about interfamily disputes, discussions of identities and qualifications of various candidates for "made" status within La Cosa Nostra and conversations about the rules and structure of the Commission of La Cosa Nostra, all of which met the requirements of furthering conspiracy, and did not consist of mere "idle chatter."

A casual aside referring to the defendant as a drug supplier was found to be idle conversation that only touched upon the conspiracy, since it was made during a discussion between coconspirators of the defendant's ability as a weightlifter. United States v Urbanik (CA4 Md) 801 F2d 692, 21 Fed Rules Evid Serv 931.

Footnote 76. United States v Lang (CA2 NY) 589 F2d 92 (supplier's warning that another customer for counterfeit bills had been arrested).

Footnote 77. United States v Kessler (CA5 La) 530 F2d 1246, reh den (CA5 La) 535 F2d 660 and (disapproved on other grounds by Oregon v Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083) as stated in United States v Singleterry (CA5 Tex) 683 F2d 122 (statement by person to secure release of friend from prison held unconnected with conspiracy to export military explosives).

Footnote 78. Re Sunset Bay Assoc. (CA9 Cal) 944 F2d 1503, 91 CDOS 7627, 91 Daily Journal DAR 11691, 26 CBC2d 572.

Footnote 79. United States v O'Connor (CA9 Ariz) 737 F2d 814, 15 Fed Rules Evid Serv 2021, cert den 469 US 1218, 84 L Ed 2d 343, 105 S Ct 1198; United States v Fielding (CA9 Wash) 645 F2d 719, 8 Fed Rules Evid Serv 609.

Footnote 80. United States v Foster (CA9 Cal) 711 F2d 871, 13 Fed Rules Evid Serv 1883, cert den 465 US 1103, 80 L Ed 2d 132, 104 S Ct 1602 (statement that defendant had quit selling drugs, but planned to sell drugs in the future if defendant recovered money stolen from him).

§ 843 Statements to law enforcement agents and informants

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that the coconspirator was speaking to a law enforcement agent working undercover is not material to the admission of the statement against a fellow conspirator under the coconspirator exception to the hearsay rule. 81 On the other hand, conspirator statements to a known police agent are admissible under the coconspirator hearsay exception only if intended to allow the conspiracy to continue. 82 For instance, coconspirator statements are admissible even when the agent's identity is known to the declarant, if the declarant's object is to put the agent off the scent of an ongoing criminal venture. 83

Statements to conspirators turned informants may also satisfy the requirement that the statement be made in furtherance of the conspiracy. 84 Although statements by conspirators, who are acting as government informants, are inadmissible against fellow conspirators because the informant's statements cannot be said to further any conspiracy, 85 those statements may be admitted on other grounds, as when the implication of a conversation would be unintelligible if the informant's portion of the conversation was excised and if the jury is cautioned as to use of the informant's statements. 86 The fact that during the conversation with a conspirator the informant was eliciting information to gather evidence has been found not to preclude admission of the coconspirator's statements on the ground that the statements were not in furtherance of the conspiracy. 87

There is some authority that a conspiracy for purposes of the coconspirator exception to the hearsay rule may not be formed between a single criminally motivated person and a government agent or informer. 88

Footnotes

Footnote 81. *United States v Kahan* (CA2 NY) 572 F2d 923, 3 Fed Rules Evid Serv 605, cert den 439 US 833, 58 L Ed 2d 128, 99 S Ct 112; *United States v Castro* (CA3 Pa) 776 F2d 1118, 19 Fed Rules Evid Serv 605, cert den 475 US 1029, 89 L Ed 2d 342, 106 S Ct 1233; *United States v James* (CA5 Tex) 510 F2d 546, reh den (CA5 Tex) 513 F2d 629 and cert den 423 US 855, 46 L Ed 2d 81, 96 S Ct 105; *United States v Alonzo* (CA8 ND) 991 F2d 1422, 36 Fed Rules Evid Serv 1280; *United States v Lambros* (CA8 Minn) 564 F2d 26, 2 Fed Rules Evid Serv 505, cert den 434 US 1074, 55 L Ed 2d 779, 98 S Ct 1262; *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309 (tape-recorded negotiations between undercover agent and coconspirator for sale of stolen corporate bonds).

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 82. *United States v Alonzo* (CA8 ND) 991 F2d 1422, 36 Fed Rules Evid Serv 1280.

Footnote 83. *United States v Fahey* (CA1 Mass) 769 F2d 829, 18 Fed Rules Evid Serv 1141; *United States v Warren* (CA5 Fla) 578 F2d 1058, 4 Fed Rules Evid Serv 289, reh den, in part, en banc (CA5 Fla) 586 F2d 608 and on reh, en banc (CA5 Fla) 612 F2d 887, cert den 446 US 956, 64 L Ed 2d 815, 100 S Ct 2928 and (criticized on other grounds by *United States v Ell* (CA9 Mont) 718 F2d 291, 14 Fed Rules Evid Serv 327) and (ovrld on other grounds by *United States v Bengivenga* (CA5 Tex) 845 F2d 593); *United States v Diez* (CA5 Fla) 515 F2d 892, 75-2 USTC ¶ 9656, 36 AFTR 2d 75-5449, reh den (CA5 Fla) 521 F2d 815 and cert den 423 US 1052, 46 L Ed 2d 641, 96 S Ct 780 and (criticized on other grounds by *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26).

The declaration by a coconspirator to drug enforcement agents that the money he was carrying belonged to someone else and that he was just a courier fell within scope of the exclusion for coconspirator statements as being made in furtherance of the conspiracy to possess and distribute drugs, since the fact that the declarant spoke to known government agents did not negate the declarant's purpose of furthering the conspiracy by avoiding detection, where the declarant gave the information in a noncustodial setting so that he would be allowed to go on his way, which he in fact was allowed to do and the alleged conspiracy continued for another year. *United States v Levesque* (DC NH) 625 F Supp 428, affd without op (CA1 NH) 879 F2d 853.

Footnote 84. *United States v Heinemann* (CA2 NY) 801 F2d 86, 86-2 USTC ¶ 9686, 21 Fed Rules Evid Serv 976, 58 AFTR 2d 86-5814, cert den 479 US 1094, 94 L Ed 2d 163, 107 S Ct 1308; *United States v Mealy* (CA7 Ill) 851 F2d 890, 26 Fed Rules Evid Serv 305 (criticized on other grounds by *United States v Sassi* (CA7 Ill) 966 F2d 283); *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212; *United States v Smith* (CA8 Neb) 600 F2d 149.

A coconspirator's statements to a confidential informant, recorded on videotape, were in furtherance of conspiracy and therefore admissible to implicate another coconspirator, where they were made for a subsequent cocaine smuggling trip even though it did not materialize, since the statements were made during the period of conspiracy covered by the indictment. *United States v Byrom* (CA11 Fla) 910 F2d 725, 30 Fed Rules Evid Serv 1107.

Footnote 85. *United States v Dellacroce* (ED NY) 625 F Supp 1387, later proceeding (ED NY) 634 F Supp 877, affd (CA2 NY) 794 F2d 773; *United States v Manzella* (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified on other grounds (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457; *United States v Xheka* (CA7 Ill) 704 F2d 974, 12 Fed Rules Evid Serv 1764, cert den 464 US 993, 78 L Ed 2d 682, 104 S Ct 486 and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v*

Zambrana (CA7 Ind) 841 F2d 1320, 25 Fed Rules Evid Serv 55, later proceeding (CA7 Ind) 864 F2d 494 and postconviction proceeding (CA7) 1991 US App LEXIS 26515, reh, en banc, den (CA7 Ind) 1991 US App LEXIS 27058, habeas corpus den (ND Ind) 790 F Supp 838 and (criticized on other grounds by United States v Durrive (CA7 Wis) 902 F2d 1221).

A taped telephone conversation between a coconspirator and an undercover agent disclosing that the accused intended to pass counterfeit money for profit is not in furtherance of the conspiracy as required by the Federal Rule of Evidence coconspirator exception to hearsay. United States v Lang (CA2 NY) 589 F2d 92.

Footnote 86. United States v Ammar (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by United States v Chindawongse (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in United States v Levy (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474.

Footnote 87. United States v Osticco (MD Pa) 580 F Supp 484, 15 Fed Rules Evid Serv 511, affd without op (CA3 Pa) 738 F2d 424 and affd without op (CA3 Pa) 738 F2d 426, cert den 469 US 1158, 83 L Ed 2d 919, 105 S Ct 904.

Footnote 88. United States v Mahkimetas (CA7 Wis) 991 F2d 379.

§ 844 Postarrest statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is some authority that, under the coconspirator exception to the hearsay rule, statements made by an arrested coconspirator cannot be used against fellow coconspirators, but statements made by an unarrested coconspirator who was still operating in furtherance of the ongoing conspiracy may be introduced against arrested conspirator. 89 Thus, where coconspirators were in custody when they made their confessions, the objects of the conspiracy were complete, and the coconspirators were not attempting to conceal the crime or their cohorts, the statements were not made in furtherance of the conspiracy. 90 Nevertheless, other authority holds that statements by a conspirator who has been arrested may be admissible against coconspirators who at the time the statement was made remained at large, where the arrest did not terminate the conspiracy and the statements were in furtherance of the conspiracy. 91 However, even if the arrest of a conspirator does not terminate a conspiracy, postarrest declarations to gain favor for a plea bargain, 92 including confessions detailing the activities of the conspiracy, are not in furtherance of the conspiracy. 93 Telephone conversations between law enforcement officers and a coconspirator may be admitted against a conspirator, who was under arrest at the time of the conversations, where the coconspirator was unaware of the arrest and was still pursuing the objectives of the conspiracy. 94

Footnotes

Footnote 89. *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166.

Footnote 90. *Re of K. P. S.* (Tex App Corpus Christi) 840 SW2d 706.

Footnote 91. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3 NJ) 894 F2d 1402.

As to the impact of a conspirator's arrest on the course of a conspiracy, see § 840.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 92. *United States v Orr* (CA11 Ga) 825 F2d 1537, 23 Fed Rules Evid Serv 1056, ALR Fed 3836 (criticized on other grounds by *United States v Clavis* (CA11 Ga) 977 F2d 538, 6 FLW Fed C 1337).

Footnote 93. *United States v Palow* (CA1 Mass) 777 F2d 52, 18 Fed Rules Evid Serv 1372, cert den 475 US 1052, 89 L Ed 2d 585, 106 S Ct 1277; *Fuson v Jago* (CA6 Ohio) 773 F2d 55, 19 Fed Rules Evid Serv 707, cert den 478 US 1020, 92 L Ed 2d 739, 106 S Ct 3334.

Footnote 94. *United States v Taylor* (CA9 Nev) 802 F2d 1108, 21 Fed Rules Evid Serv 1233, cert den 479 US 1094, 94 L Ed 2d 164, 107 S Ct 1309.

§ 845 Statements to avoid detection

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Whether statements concerning the concealment of a conspiracy are made in furtherance of the ongoing conspiracy depends upon the facts of each case. 95 In situations where concealment is essential to the success of the object of the conspiracy, statements aimed at concealment or avoiding detection may be found to be made in furtherance of the conspiracy and admissible against fellow conspirators under the coconspirator exception to the hearsay rule. 96 If the evidence warrants a finding of an accused's participation in a conspiracy to suppress or fabricate evidence of the crime after its commission, an act or statement of a coconspirator in the accomplishment of this continuing conspiracy is admissible against the accused. 97 However, some courts hold

that statements aimed at concealing activities of a conspiracy from a grand jury, when made after the conspiracy has terminated due to the arrest of some of the conspirators, are not admissible against fellow conspirators. 98

§ 845 ----Statements to avoid detection [SUPPLEMENT]

Case authorities:

Statements by unindicted coconspirator revealed that he and defendant were acting in furtherance of conspiracy to steal in course of their work as baggage handlers because they were seeking to avoid detection of conspiracy to steal camera, and statements were thus properly admitted against defendant. *United States v Brookins* (1995, CA7 Ill) 52 F3d 615.

Statements of crack cocaine distribution conspirator were in furtherance of conspiracy where they identified members of conspiracy, were designed to allay fears and suspicions of party to whom they were addressed, and attempted to induce that person's future involvement with coconspirator. *United States v Williamson* (1995, CA10 Kan) 53 F3d 1500, 41 Fed Rules Evid Serv 1298.

Statements by cocaine distribution conspirator's mother, also conspirator, were in furtherance of conspiracy and therefore properly admitted where she was describing efforts to avoid detection and warning person to whom she was talking of danger of getting close to another conspirator's wife, who had role in triggering police investigation. *United States v Edmond* (1995, App DC) 52 F3d 1080.

Footnotes

Footnote 95. *United States v Howard* (CA6 Ky) 770 F2d 57, 18 Fed Rules Evid Serv 1006, cert den 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507.

Footnote 96. *United States v Levesque* (DC NH) 625 F Supp 428, affd without op (CA1 NH) 879 F2d 853; *United States v Pecora* (CA3 NJ) 798 F2d 614, 122 BNA LRRM 3196, 104 CCH LC ¶ 11978, 21 Fed Rules Evid Serv 176, cert den 479 US 1064, 93 L Ed 2d 998, 107 S Ct 949, 124 BNA LRRM 2424, 105 CCH LC ¶ 12142 (tape-recorded conversations between unindicted coconspirators concerning getting their stories straight should there be a government investigation of illegal payoffs between trucking company and union officials); *United States v De Peri* (CA3 Pa) 778 F2d 963, 19 Fed Rules Evid Serv 256 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and cert den 475 US 1110, 89 L Ed 2d 916, 106 S Ct 1518 and cert den 476 US 1159, 90 L Ed 2d 720, 106 S Ct 2277 (tape-recorded conversations between members of a conspiracy that apprise one another of their efforts to avoid indictment and conviction for participating in conspiracy to extort protection payments); *United States v Zabic* (CA7 Ill) 745 F2d 464, 16 Fed Rules Evid Serv 692; *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (among conflicting authorities on other grounds noted in *United States v Walgren* (CA9 Wash) 885 F2d 1417) (statements by drug traffickers regarding the avoidance of detection by the Internal Revenue Service).

Statements made during a discussion between coconspirators as to whether it could be determined that the fire which damaged the building was caused by arson were held to be made in furtherance of the conspiracy to defraud the insurance company, since the insurance company had not paid the insurance claim on the fire-damaged building when the conversations occurred, and detection of the arson would thwart collection of the proceeds. *United States v Howard* (CA6 Ky) 770 F2d 57, 18 Fed Rules Evid Serv 1006, cert den 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213, reh den 475 US 1104, 89 L Ed 2d 907, 106 S Ct 1507.

While efforts to conceal a criminal conspiracy are normally distinct from the conspiracy itself, and not automatically to be treated as a part or extension of that conspiracy, the District Court did not err in admitting statements made by coconspirators allegedly covering up earlier voter fraud where the defendants were both charged with two distinct conspiracies, one to defraud voters of the right to have votes counted in a federal election, and the other to obstruct justice by fraudulently impeding the investigation of alleged vote fraud, and statements made relative to the cover up were made during course of a conspiracy to obstruct justice. *United States v Townsley* (CA8 Mo) 843 F2d 1070, 25 Fed Rules Evid Serv 476, on reh, en banc (CA8 Mo) 856 F2d 1189, cert dismd 499 US 944, 113 L Ed 2d 461, 111 S Ct 1406 and (disapproved on other grounds by *Powers v Ohio*, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364, 91 CDOS 2259, 91 Daily Journal DAR 3732) as stated in *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, cert den (US) 122 L Ed 2d 360, 113 S Ct 1053.

As to whether attempts to conceal a conspiracy occur during the course of the conspiracy, see § 841.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 97. *Haney v State* (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297.

Footnote 98. *United States v Gullett* (CA6 Mich) 713 F2d 1203, 13 Fed Rules Evid Serv 816, cert den 464 US 1069, 79 L Ed 2d 211, 104 S Ct 973.

(5). Proof of Conspiracy and Participants [846-856]

§ 846 Generally

<p style="text-align: center;">View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The standard for determining the admissibility of statements made by coconspirators is

less than that required to convict a defendant of conspiracy to commit an offense. 99 The court is not bound by the rules of evidence when determining preliminary questions 1 such as the prerequisites for admission of a coconspirator statement under the Federal Rules of Evidence coconspirator exception 2 to the hearsay rule. 3 However, there is authority that hearsay evidence of a conspiracy should only be admitted when accompanied by tangible, material evidence of the conspiracy, despite rules that a trial court in determining preliminary questions of admissibility is not bound by the rules of evidence in conducting a hearing on admissibility. 4 This requirement addresses the inherent unreliability of conspirator testimony, which is not only hearsay but hearsay from a particularly incredible witness. 5 Nevertheless, in determining compliance with the Federal Rules of Evidence coconspirator hearsay exception, 6 the court is not required to inquire independently into the reliability of the coconspirator statement at issue. 7

The prerequisites for admission of coconspirator statements may be shown by way of party-admissions 8 that qualify as non-hearsay, 9 by adoptive admissions of a party 10 that qualify as non-hearsay, 11 as well as by statements of the declarant that may be received as against the declarant's penal interest. 12

The prerequisites for the admission of a coconspirator's statement against a fellow conspirator have been satisfied by evidence independent of the challenged declaration, in instances where the offering party has shown—

—narcotics transactions with government informants or undercover agents. 13

—illegal firearms transactions with government undercover agents. 14

—by way of expert testimony, that it was highly probable that it was the defendant's handwriting on the altered or forged money orders. 15

§ 846 ----Generally [SUPPLEMENT]

Case authorities:

Admission of uncharged acts of extortion, combined with jury's instructions, did not constructively amend indictment by permitting jury to convict defendants of extortion on basis different from that advanced by grand jury, since it was not necessary for jury to find that any acts of extortion occurred, whether charged or uncharged, to find defendants guilty of Hobbs Act conspiracy. *United States v Clemente* (1994, CA2 NY) 22 F3d 477, cert den sub nom *Demolfetto v United States* (1994, US) 1994 US LEXIS 6736.

Court properly found that conspiracy existed between driver and passenger of van in which marijuana was discovered, so that driver's hearsay statements were admissible against passenger; passenger's repeatedly attempting to walk away from van during questioning by police suggested that he was trying to keep police from discovering marijuana and conflicting stories told by them suggested they were attempting to deceive police as to their activities. *United States v Carter* (1994, CA6 Tenn) 14 F3d 1150, 1994 FED App. 25P, reh, en banc, den (CA6 Tenn) 1994 US App LEXIS 5952.

Admission of cocaine distribution conspirator's prior arrest at airport at which gun and digital scale with cocaine residue were found, along with coconspirator's presence at

airport to meet conspirator, was proper as evidence in support of conspiracy rather than mere instance of past bad act. *United States v McMurray* (1994, CA8 Neb) 34 F3d 1405, reh, en banc, den (1994, CA8 Neb) 1994 US App LEXIS 29125 and reh, en banc, den (1994, CA8 Neb) 1994 US App LEXIS 29274 and reh, en banc, den (1994, CA8 Neb) 1994 US App LEXIS 29668.

In prosecution for conspiracy to defraud U.S. by impeding IRS in assessment and collection of taxes, evidence of defendant's failure to file income tax returns and of tax lien against business of which he was trustee was relevant to show his participation in conspiracy by showing tax motive, negative attitude toward payment of taxes, and intent to violate his duty to pay income taxes. *United States v Scott* (1994, CA10 Kan) 37 F3d 1564, 94 TNT 197-40, cert den (1995, US) 1995 US LEXIS 428.

Evidence of cocaine distribution conspirator's subsequent involvement in methamphetamine transaction was not admissible other crimes evidence as to his involvement in conspiracy in earlier of two time periods since two- year gap exceeded bounds of relevance, but it was probative of his intent during later time period because it was contemporaneous with it. *United States v Mitchell* (1995, App DC) 49 F3d 769.

In prosecution for crimes that occurred while defendant was with group of young men, trial court did not err in admitting evidence of defendant's gang membership where defendant told one victim that he was member of Crips, where evidence was introduced for most part by complaining witnesses who told of Crips rhymes and sayings being repeated by defendant and others in his group either before or during commission of crimes, and where there was considerable evidence that they acted in concert and aiding and abetting instruction was given. Most noteworthy feature of case was that group of young men and boys acted in concert in bullying and brutalizing their neighbors. Their numbers were intimidating to their victims, and it was doubtful that they could have perpetrated their crimes without strength of group. Evidence was relevant and part of res gestae. *State v Walker* (1992) 252 Kan 117, 843 P2d 203.

Footnotes

Footnote 99. *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103, stating that such statements only constitute evidence which the jury may consider in determining whether a defendant did or did not unlawfully participate in a conspiracy to commit an offense beyond a reasonable doubt.

As to standard of proof, see § 850.

As to burden of proof in proving the crime of conspiracy in a criminal case, see 16 Am Jur 2d, Conspiracy § 41.

Footnote 1. FRE, Rule 104(a), discussed in § 16.

Footnote 2. FRE, Rule 801(d)(2)(E).

Footnote 3. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231) and (not followed on

other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174).

Footnote 4. *Utica Nat. Ins. Co. v McDonald* (Tex App Fort Worth) 814 SW2d 234, writ den (Feb 26, 1992) and reh of writ of error overr (Apr 8, 1992).

As to establishment of conspiracy, see § 848.

Footnote 5. *Utica Nat. Ins. Co. v McDonald* (Tex App Fort Worth) 814 SW2d 234, writ den (Feb 26, 1992) and reh of writ of error overr (Apr 8, 1992).

Footnote 6. FRE, Rule 801(d)(2)(E).

Footnote 7. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231) and (not followed on other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174); *United States v Cerone* (CA8 Mo) 830 F2d 938, 23 Fed Rules Evid Serv 1291, cert den 486 US 1006, 100 L Ed 2d 194, 108 S Ct 1730, appeal after remand (CA8 Mo) 859 F2d 1328, cert den 488 US 1031, 102 L Ed 2d 972, 109 S Ct 840.

Footnote 8. As to admissions of party-opponents, generally, see §§ 760 et seq.

Footnote 9. *United States v Moore* (CA2 NY) 571 F2d 76, 2 Fed Rules Evid Serv 1230, 49 ALR Fed 915; *United States v Continental Group, Inc.* (CA3 Pa) 603 F2d 444, 1979-2 CCH Trade Cases ¶ 62782, 4 Fed Rules Evid Serv 734, cert den 444 US 1032, 62 L Ed 2d 668, 100 S Ct 703 and (criticized on other grounds by *United States v Nicosia* (CA7 Ind) 638 F2d 970); *United States v Manzella* (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified on other grounds (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457; *United States v Franklin* (CA5 Fla) 586 F2d 560, 3 Fed Rules Evid Serv 1680, cert den 440 US 972, 59 L Ed 2d 789, 99 S Ct 1536; *United States v Jarrett* (CA7 Ill) 705 F2d 198, 12 Fed Rules Evid Serv 1894, cert den 465 US 1004, 79 L Ed 2d 228, 104 S Ct 995; *United States v Raymond* (CA8 Mo) 793 F2d 928; *United States v Friedman* (CA9 Wash) 593 F2d 109, 4 Fed Rules Evid Serv 646 (not followed on other grounds by *United States v Hines* (AFCMR) 18 MJ 729); *United States v Gomez* (CA10 Okla) 810 F2d 947, 22 Fed Rules Evid Serv 659, cert den 482 US 908, 96 L Ed 2d 379, 107 S Ct 2488; *United States v Perez* (CA11 Fla) 824 F2d 1567, 23 Fed Rules Evid Serv 1241; *United States v Fernandez* (CA11 Fla) 797 F2d 943, 21 Fed Rules Evid Serv 557, cert den 483 US 1006, 97 L Ed 2d 736, 107 S Ct 3230, post-conviction proceeding (CA11 Fla) 941 F2d 1488.

Footnote 10. As to adoptive admissions, generally, see § 796.

Footnote 11. *United States v Carter* (CA11 Fla) 760 F2d 1568, 18 Fed Rules Evid Serv 108.

Footnote 12. *United States v Badalamenti* (SD NY) 626 F Supp 658.

As to statements against a declarant's penal interest, see § 789.

Footnote 13. *United States v Kelly* (CA4 NC) 718 F2d 661, 14 Fed Rules Evid Serv 725; *United States v Lujan* (CA5 Tex) 796 F2d 96; *United States v Fredericks* (CA5 Fla) 586 F2d 470, 4 Fed Rules Evid Serv 271, cert den 440 US 962, 59 L Ed 2d 776, 99 S Ct 1507; *United States v Mitchell* (CA6 Tenn) 556 F2d 371, cert den 434 US 925, 54 L Ed 2d 284, 98 S Ct 406; *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (among conflicting authorities on other grounds noted in *United States v Walgren* (CA9 Wash) 885 F2d 1417); *United States v Haynes* (CA8 Minn) 560 F2d 913, 2 Fed Rules Evid Serv 160, cert den 434 US 974, 54 L Ed 2d 466, 98 S Ct 531; *United States v Wixom* (CA8 Minn) 529 F2d 217; *United States v Avila-Macias* (CA9 Cal) 577 F2d 1384; *United States v Andrews* (CA10 Colo) 585 F2d 961, 3 Fed Rules Evid Serv 1299 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 S Ct 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029, post-conviction proceeding (CA10 Colo) 975 F2d 706 and (criticized on other grounds by *United States v Baines* (CA1 Me) 812 F2d 41) as stated in *United States v Brown* (CA10 Colo) 943 F2d 1246, 33 Fed Rules Evid Serv 1286, related proceeding (Colo) 841 P2d 1066.

Footnote 14. *United States v Bell* (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44 ALR Fed 617 (criticized on other grounds by *United States v Rosales-Lopez* (CA9 Cal) 617 F2d 1349) and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Campbell* (CA8 Ark) 845 F2d 782, 25 Fed Rules Evid Serv 508, cert den 488 US 965, 102 L Ed 2d 527, 109 S Ct 490; *United States v Burgard* (CA8 Mo) 551 F2d 190, 1 Fed Rules Evid Serv 802.

Footnote 15. *United States v Hollins* (CA7 Ind) 811 F2d 384.

§ 847 Independent evidence and use of coconspirator statement as proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While some cases state that the Supreme Court declined to decide whether there must be any evidence independent of coconspirator statements to determine that a conspiracy has been established by a preponderance of the evidence, 16 many cases hold that there must be independent evidence establishing the existence of a conspiracy 17 and connecting the defendant and the declarant to it. 18 When a proponent of a coconspirator's statement offers no additional proof of the defendant's knowledge of and participation in the conspiracy, the statement must be excluded from evidence; but, where some additional proof is offered, the court must determine whether such proof, viewed in light of the coconspirator's statement itself, demonstrates by a preponderance of the

evidence that the defendant knew of and participated in the conspiracy. 19 While there is some authority that the existence of the conspiracy must be proved by evidence which does not include the statements of the coconspirator, 20 other courts consider the statements in determining whether a conspiracy existed and whether the defendant and declarant were members of it, 21 and whether the statement was made during the course of and in furtherance of the conspiracy, 22 at least where the substance of those declarations is corroborated by other evidence independent of the out-of-court statements. 23 The government may be required to submit a pretrial written proffer setting forth independent non-hearsay evidence proving the conspiracy and the participation of the defendant and the declarant before statements of the defendant's alleged coconspirators will be admitted under the coconspirator hearsay exception. 24

**§ 847 ----Independent evidence and use of coconspirator statement as proof
[SUPPLEMENT]**

Case authorities:

In drug distribution conspiracy trial, police officer's testimony regarding drug distribution activities of defendant and his suppliers who were not named in indictment was not "other crimes" evidence but was related to charged conspiracy; it constituted predicate evidence necessary to provide context to drug distribution scheme that took place within charged time frame and, by providing jury with background information on defendant's activities during preparatory stages of conspiracy, served to complete story of crime on trial. *United States v Kennedy* (1994, CA4 Md) 32 F3d 876.

Evidence of marijuana conspiracy defendant's arrest in New Mexico fell within indictment's description of conspirators' plan to from time to time travel in interstate commerce with intent to distribute proceeds of their unlawful activity and promote unlawful activity; therefore, arrest was sufficiently factually linked with charged conduct, and prejudicial effect did not outweigh probative value of evidence. *United States v Oleson* (1995, CA6 Mich) 44 F3d 381, 1994 FED App 428P, reh, en banc, den (1995, CA6) 1995 US App LEXIS 4653.

Co-conspirator statements were properly admitted against extortion defendant where independent evidence established existence of conspiracy and defendant's involvement in it. *United States v Clay* (1994, CA8 Mo) 16 F3d 892.

Money laundering coconspirator's statements could not serve as independent evidence of connection between him and coconspirators to permit its admission against latter. *United States v Castaneda* (1994, CA9 Cal) 16 F3d 1504, 94 CDOS 1170, 94 Daily Journal DAR 2046.

Footnotes

Footnote 16. *United States v Fragoso* (CA Tex) 978 F2d 896, 37 Fed Rules Evid Serv 416, cert den 123 L Ed 2d 282, 113 S Ct 1664.

Footnote 17. *United States v Arias-Villanueva* (CA9 Or) 998 F2d 1491, 93 CDOS 5481, 93 Daily Journal DAR 9291, cert den (US) 126 L Ed 2d 322, 114 S Ct 359 and cert den

(US) 126 L Ed 2d 472, 114 S Ct 573 and cert den (US) 126 L Ed 2d 473, 114 S Ct 573 and (among conflicting authorities on other grounds noted in *United States v Castaneda* (CA9 Cal) 94 CDOS 1170, 94 Daily Journal DAR 2046); *United States v Beckham* (App DC) 296 US App DC 311, 968 F2d 47, 36 Fed Rules Evid Serv 70; *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166; *Wiggins v State* (Fla App D1) 460 So 2d 483, 9 FLW 2562; *State v Property Seized from Rios* (Iowa App) 478 NW2d 870; *People v Loy-Rafuls*, 198 Mich App 594, 500 NW2d 480, revd on other grounds 442 Mich 912, 503 NW2d 453; *State v Madewell* (Mo App) 846 SW2d 208; *State v Leisure* (Mo App) 838 SW2d 49; *Commonwealth v Zdrade*, 530 Pa 313, 608 A2d 1037 (there must be other evidence of the existence of the conspiracy); *State v Chavez* (Utah App) 840 P2d 846, 198 Utah Adv Rep 52, cert den (Utah) 857 P2d 948.

The coconspirator's exception to the hearsay rule applies where there is other evidence of the existence of a conspiracy. *Commonwealth v Fox*, 422 Pa Super 224, 619 A2d 327, app den (Pa) 634 A2d 222.

The trial court did not err in admitting a police officer's hearsay account of statements made by a coconspirator where evidence independent of the hearsay declaration established the existence of the conspiracy. *Rabeiro v Commonwealth*, 10 Va App 61, 389 SE2d 731.

As to the establishment of a conspiracy, generally, see § 848.

Footnote 18. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659, 113 S Ct 1262; *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166 (independent evidence must support each members' participation in the conspiracy); *State v Madewell* (Mo App) 846 SW2d 208 (there must be independent and preponderant evidence of a conspiracy between the declarant and the defendant); *State v Chavez* (Utah App) 840 P2d 846, 198 Utah Adv Rep 52, cert den (Utah) 857 P2d 948.

Admission of a non-testifying coconspirator's confession in a robbery trial was prejudicial error where the jury necessarily had to believe the coconspirator's statements for conviction since the only evidence directly linking the defendant to the crime was the testimony of three civilian witnesses who claimed that defendant made statements to them admitting the crime. *People v Scalerico* (2d Dept) 140 App Div 2d 386, 527 NYS2d 567.

The trial court committed reversible error by admitting hearsay accusations of a defendant's alleged coconspirators where the prosecution proved no possession of drugs by the defendant, no statements made during negotiations by the defendant, and no other acts suggesting complicity in the sale of cocaine, and thus failed to establish an independent prima facie case as to defendant's membership in the conspiracy. *People v Hernandez* (1st Dept) 155 App Div 2d 342, 547 NYS2d 635, app den 75 NY2d 813, 552 NYS2d 563, 551 NE2d 1241.

Footnote 19. *United States v Silverman* (CA9 Nev) 861 F2d 571, 27 Fed Rules Evid Serv 1.

The proponent of a statement must establish independent evidence establishing the

existence of a conspiracy and connecting the declarant and the defendant to it by a preponderance of the evidence. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659, 113 S Ct 1262.

The court may consider proffered coconspirator's statements in determining whether the party seeking admission of the proffered evidence has established the existence of a conspiracy and the nonoffering party's participation in the conspiracy by a preponderance of evidence. *E.W. French & Sons, Inc. v General Portland, Inc.* (CA9 Cal) 885 F2d 1392, 1989-2 CCH Trade Cases ¶ 68741, 28 Fed Rules Evid Serv 1089, 14 FR Serv 3d 509.

Statements made by coconspirators which are the object of defense counsel's hearsay objection may be considered by the trial court in making its determination as to whether a prima facie case of conspiracy has been established. *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103.

As to the defendant's participation in conspiracy, see § 849.

Footnote 20. *Deutch v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615 (the existence of the conspiracy must be proved by evidence which does not include the statements of the coconspirator); *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227 (in accordance with Florida statute and case law, a court must rely on independent evidence to prove a conspiracy, and each member's participation in it, before admitting coconspirator hearsay statements); *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

Proof of conspiracy must be established by independent, non-hearsay evidence prior to the admission of hearsay statements. *People v Kabakovich* (2d Dist) 245 Ill App 3d 943, 186 Ill Dec 51, 615 NE2d 855.

The determination whether a prima facie case of conspiracy has been established must be made without recourse to the declarations sought to be introduced. *People v Tran*, 80 NY2d 170, 589 NYS2d 845, 603 NE2d 950, reconsideration den 81 NY2d 784, 594 NYS2d 721, 610 NE2d 394.

For a coconspirator's testimony to be admissible pursuant to state rule, the burden is on the prosecution to establish a prima facie case of conspiracy through evidence independent of the statements before the close of the state's evidence. *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207.

The state must establish a prima facie case of conspiracy, not considering the statements themselves. *State v Lynn*, 67 Wash App 339, 835 P2d 251.

Footnote 21. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (among conflicting authorities on other grounds noted in *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231) and (not followed on other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d

1174); *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; *United States v Horton* (CA6 Mich) 847 F2d 313, 25 Fed Rules Evid Serv 1285, reh den (CA6) 1988 US App LEXIS 14062; *United States v Bond* (CA7 Ill) 847 F2d 1233, 25 Fed Rules Evid Serv 1321, post-conviction proceeding, remanded (CA7 Ill) 1 F3d 631, petition for certiorari filed (Jan 6, 1994) (taped conversations of declarant used to prove declarant was a coconspirator); *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304; *United States v Smith* (CA10 Colo) 833 F2d 213, 24 Fed Rules Evid Serv 283 (tape-recorded conversations of defendant's wife found appropriately considered in determination as to whether there was a continuing conspiracy to possess and sell stolen computers); *United States v Martinez* (CA10 Colo) 825 F2d 1451, 23 Fed Rules Evid Serv 971; *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470.

To determine whether the defendant joined the conspiracy, the court may consider both independent evidence and the substance of the statements themselves. *United States v Neely* (CA7 Ill) 980 F2d 1074, 37 Fed Rules Evid Serv 449.

Out-of-court statements of coconspirators may be used to establish a conspiracy, and, in conjunction with other evidence, establish defendant's participation in the conspiracy. *United States v Jackson* (CA7 Wis) 974 F2d 57, reh den (CA7) 1993 US App LEXIS 911 and cert den (US) 125 L Ed 2d 673, 113 S Ct 2976.

Footnote 22. *United States v Garcia* (CA10 Okla) 994 F2d 1499; *United States v Nicholson* (CA10 Kan) 983 F2d 983, 37 Fed Rules Evid Serv 721, later proceeding (CA10 Kan) 1 F3d 1014; *United States v Dago* (DC Colo) 813 F Supp 736.

As to requirement that coconspirator statement be made during the course of the conspiracy, see §§ 837 et seq.

As to requirement that coconspirator statement be made in furtherance of the conspiracy, see §§ 842 et seq.

Footnote 23. *United States v Zambrana* (CA7 Ind) 841 F2d 1320, 25 Fed Rules Evid Serv 55, later proceeding (CA7 Ind) 864 F2d 494 and post-conviction proceeding (CA7) 1991 US App LEXIS 26515, reh, en banc, den (CA7 Ind) 1991 US App LEXIS 27058, habeas corpus den (ND Ind) 790 F Supp 838 (tape-recorded conversations between conspirators found admissible where preliminary facts regarding existence of conspiracy and conspirators' participation therein were established by telephone conversations concerning the delivery of cocaine which were corroborated by the subsequent seizure of cocaine from a fellow conspirator's automobile); *United States v Kragness* (CA8 Minn) 830 F2d 842, 23 Fed Rules Evid Serv 1151 (among conflicting authorities on other grounds noted in *United States v Walgren* (CA9 Wash) 885 F2d 1417).

Footnote 24. *United States v Santillanes* (ND Ill) 728 F Supp 1358.

As to establishment of conspiracy, see § 848.

As to proof of defendant's participation in conspiracy, see § 849.

§ 848 Establishment of conspiracy

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In order for a coconspirator's hearsay statement to be admissible under the coconspirator exception to the hearsay rule, there must be a showing that a conspiracy existed. 25 Generally, the government must demonstrate by a preponderance of the evidence that a conspiracy existed. 26 Some courts provide that in order for statements to be admitted under the coconspirator exception to the hearsay rule, a prima facie case of conspiracy 27 or joint venture 28 must be established. According to some authority, the prima facie case must show that two or more persons were engaged in a common plan to accomplish a criminal goal or to reach a common end by criminal means. 29 A prima facie case of conspiracy is presented when the state introduces evidence which, if unrebutted, would be sufficient to establish the facts of the conspiracy. 30 Other courts state that the record must reveal sufficiently reliable evidence of a conspiracy for a coconspirator's declarations to be admissible. 31

Circumstantial evidence is sufficient to support a determination of the existence of a conspiracy. 32 Timing, circumstances, or one or more of a series of meetings may establish a conspiracy. 33 In some cases, the defendant's actions alone may be sufficient to establish a conspiracy. 34 Proof of the existence of a conspiracy is not limited to evidence which existed before the challenged declarations occurred and evidence of acts or conduct which by themselves are inadequate to support the admission of the statement, may, when considered together, support a finding of concert of action. 35

Some state courts hold that a defendant's mere knowledge of or acquiescence to an illegal act does not constitute a conspiracy for purposes of the coconspirator exception to the hearsay rule; rather, there must be affirmative acts of agreement. 36 Some courts hold that, in criminal cases, the proponent of the evidence need only show a likelihood of an illicit association between the declarant and the defendant. 37

§ 848 ----Establishment of conspiracy [SUPPLEMENT]

Case authorities:

Coconspirator's statements regarding both heroin and cocaine conspiracy were properly admitted against coconspirator charged only with cocaine conspiracy upon implicit finding that all were components of larger conspiracy. *United States v Fisher* (1993, CA1 Mass) 3 F3d 456, summary op at (CA1 Mass) 21 M.L.W. 3312.

In prosecution for conspiracy to commit murder for purpose of increasing defendants' position within criminal enterprise, evidence of murders that occurred during organized crime wars but did not involve defendants were properly admitted since they were direct proof of disputed fact regarding charged conspiracy, i.e., existence of violent internal war in organized crime family; evidence was not unduly prejudicial since existence of war

was crucial to government's proof and there was no suggestion that defendants committed any of murders. *United States v Brady* (1994, CA2 NY) 26 F3d 282, cert den (1994, US) 115 S Ct 246.

Coconspirator's testimony relating to prior criminal act by defendant legitimately tended to prove nature of relationship between defendant and other coconspirators and was probative of conspiracy since, without it, defendant's "mere presence" defense would be much stronger; prejudicial effect was minimized by court's instruction that evidence be considered only on issue of trust and confidence between defendant and witness. *United States v Araujo* (1996, CA2 Conn) 79 F3d 7.

Evidence concerning fraudulent insurance claims that fell within time frame of alleged mail fraud conspiracy was admissible to prove involvement in charged conspiracy and not simply to prove similar acts, hence Rule 404(b) was not applicable. *United States v Dozie* (1994, CA4 NC) 27 F3d 95.

Coconspirator's statement was properly admitted where evidence established that both defendant and coconspirator were members of same drug conspiracy and statement was made during course of their drug dealing. *United States v Perez* (1994, CA7 Wis) 28 F3d 673.

Evidence of extortion defendant's participation in agreement with codefendant was sufficient to admit codefendant's out-of-court statement, to effect that defendant had hired him to damage some stores in Chicago and that one of the people involved was killed, as statement of coconspirator. *United States v Sturman* (1995, CA7 Ill) 49 F3d 1275.

Coconspirator's testimony that defendant delivered kilogram of cocaine base to her at beginning of March did not implicate Rule 404(b) because it tended to prove whether conspiracy to distribute cocaine existed until March 17, as charged, and therefore was inextricably intertwined with conspiracy charged so that its admission did not violate Rule's notice requirements. *United States v Severe* (1994, CA8 Minn) 29 F3d 444, reh den (1994, CA8 Minn) 1994 US App LEXIS 22019.

Footnotes

Footnote 25. *State v Marlow*, 334 NC 273, 432 SE2d 275.

Footnote 26. § 850.

Footnote 27. *Haney v State* (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297; *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470; *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467; *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103; *People v Tran*, 80 NY2d 170, 589 NYS2d 845, 603 NE2d 950, reconsideration den 81 NY2d 784, 594 NYS2d 721, 610 NE2d 394; *State v Martin* (Lake Co) 9 Ohio App 3d 150, 9 Ohio BR 215, 458 NE2d 898; *State v Lynn*, 67 Wash App 339, 835 P2d 251.

It is well settled that before a coconspirator's testimony may be admitted, there must be prima facie grounds for believing in the existence of the conspiracy. *Deutch v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615.

Before a court may allow into evidence the hearsay statements of a coconspirator against a defendant, the state must present prima facie proof that the defendant and the hearsay declarant were in fact engaging in a conspiracy. *People v Kabakovich* (2d Dist) 245 Ill App 3d 943, 186 Ill Dec 51, 615 NE2d 855.

Statements of coconspirators are admissible against members of the conspiracy so long as a prima facie case of conspiracy is established independently of the statements sought to be admitted. *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207.

Footnote 28. *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

Footnote 29. *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470.

Footnote 30. *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103.

The state's evidence must establish a prima facie case of conspiracy independently of the statements sought to be admitted. *State v Mahaley*, 332 NC 583, 423 SE2d 58.

In order for statements to be admissible under the coconspirator rule, it is sufficient if the conspiracy is established by evidence making a prima facie case which fairly raises a presumption or an inference of conspiracy. *State v Martin* (Lake Co) 9 Ohio App 3d 150, 9 Ohio BR 215, 458 NE2d 898.

Footnote 31. *State v Lycett* (App) 133 Ariz 185, 650 P2d 487.

Footnote 32. *United States v Pelletier* (CA1 Me) 845 F2d 1126, 25 Fed Rules Evid Serv 945; *United States v De Jesus* (CA2 NY) 806 F2d 31, 22 Fed Rules Evid Serv 95, cert den 479 US 1090, 94 L Ed 2d 155, 107 S Ct 1299; *United States v Jankowski* (CA8 Neb) 713 F2d 394, 13 Fed Rules Evid Serv 1955, cert den 464 US 1051, 79 L Ed 2d 192, 104 S Ct 732; *United States v Martinez* (CA10 Colo) 825 F2d 1451, 23 Fed Rules Evid Serv 971; *Deutch v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615; *Haney v State* (Ala App) 603 So 2d 368, appeal after remand (Ala App) 1991 Ala Crim App LEXIS 1174, supp op, reh overr (Ala App) 1991 Ala Crim App LEXIS 2692 and affd (Ala) 603 So 2d 412, cert den (US) 122 L Ed 2d 687, 113 S Ct 1297; *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

The existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence. *Lee v State*, 204 Ga App 283, 418 SE2d 809, 92 Fulton County D R 714.

With respect to the coconspirator exception to the hearsay rule, the elements of conspiracy may be proved by circumstantial evidence, and the agreement may be inferred from the surrounding circumstances. *State v Ruiz* (Iowa App) 496 NW2d 789.

Because there usually is no formal agreement to begin a conspiracy, the very existence of a conspiracy usually must be inferred from the facts surrounding the statements. *State v Cornell*, 314 Or 673, 842 P2d 394.

A conspiracy for purposes of the coconspirator exception to the hearsay rule may be inferentially established by showing the relation, conduct or circumstances of the parties. *Commonwealth v Stocker*, 424 Pa Super 189, 622 A2d 333.

Annotation: Comment Note.—Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 ALR3d 1148.

Footnote 33. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659, 113 S Ct 1262.

Footnote 34. *State v Lycett* (App) 133 Ariz 185, 650 P2d 487.

Footnote 35. *United States v Silvano* (CA1 Mass) 812 F2d 754, 22 Fed Rules Evid Serv 1345; *United States v Resnick* (CA8 Minn) 745 F2d 1179, 16 Fed Rules Evid Serv 1361.

Footnote 36. *People v Kabakovich* (2d Dist) 245 Ill App 3d 943, 186 Ill Dec 51, 615 NE2d 855.

Footnote 37. *United States v De Jesus* (CA2 NY) 806 F2d 31, 22 Fed Rules Evid Serv 95, cert den 479 US 1090, 94 L Ed 2d 155, 107 S Ct 1299.

§ 849 Proof of participation by defendant and declarant in conspiracy

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, the government must demonstrate by a preponderance of the evidence that the defendant and the declarant were part of the conspiracy. 38 Although it is unnecessary to prove a formal or express agreement between conspirators, 39 or an overt act, 40 a party's mere presence or association with conspirators is insufficient to establish that party as a coconspirator. 41 However, the defendant need not be part of the conspiracy at the time the statements were made, 42 and the government need not prove that the defendant knew each and every detail of the conspiracy or played more than a minor role in the conspiracy. 43 It is enough to show an agreement between the defendant and the declarant and a statement in furtherance of their scheme. 44

Once a conspiracy has been established, some courts consider evidence of a slight

connection to the conspiracy sufficient to link the party-opponent to the conspiracy for the purpose of admitting a coconspirator statement, 45 providing that the evidence be of a quality that will reasonably support a conclusion that the defendant willfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy. 46 Proof that the party-opponent was aware of the essential elements of the conspiracy, and with that knowledge joined the conspiracy, has also been required. 47

Circumstantial evidence is sufficient to support a determination of the defendant's participation in a conspiracy. 48 Proof of the party-opponent's connection to a conspiracy has been satisfied by evidence of electronic surveillance of conversations between alleged coconspirators which contain references by the alleged conspirators to their own cocaine dealings, 49 as well as by evidence of the party's willingness to provide a location for the consummation of an illegal transaction, participating also as an interpreter for those who could not speak the same language. 50 The timing and circumstances of a meeting or series of meetings, 51 may be sufficiently suspicious to permit a reasonable inference of a complicity in a criminal enterprise to support a finding of the existence and participation in a conspiracy for purposes of the Federal Rules of Evidence. In some cases, the defendant's actions alone may be sufficient to establish defendant's participation in a conspiracy. 52

◆ Observation: With respect to racketeering enterprises 53 it has been held that statements made during the course and in furtherance of the racketeering enterprise to which the party-opponent and declarant are members is sufficient to allow statements of the declarant to be admitted against the party-opponent, notwithstanding that the declarant and party-opponent were not shown to be members in the same smaller conspiracies that comprised the larger racketeering enterprise. 54

§ 849 ----Proof of participation by defendant and declarant in conspiracy [SUPPLEMENT]

Case authorities:

Evidence of cocaine distribution conspirator's prior involvement in marijuana distribution conspiracy was properly admitted as highly probative of his intent to enter another drug conspiracy with same coconspirator and rebut his defense of innocent association. *United States v Zackson* (1993, CA2 NY) 12 F3d 1178.

Coconspirators' statements regarding loansharking were properly admitted; evidence that loansharking was principal activity of organized-crime family and that defendant was captain in family hierarchy established defendant's membership in conspiracy, and evidence established that declarant's were participants in family loansharking conspiracy. *United States v Amato* (1994, CA2 NY) 15 F3d 230.

Evidence of cocaine distribution defendant's contemporaneous distribution of marijuana was properly admitted as bearing on whether defendant intended to distribute other drugs in his possession. *United States v Kills Enemy* (1993, CA8 SD) 3 F3d 1201, reh, en banc, den (CA8) 1993 US App LEXIS 27048.

Footnotes

Footnote 38. *United States v Morgan* (CA8 Mo) 997 F2d 433, reh den (CA8 Mo) 1993 US App LEXIS 19733; *United States v Sims* (ND Ill) 808 F Supp 620, later proceeding (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308.

Among the foundational requirements, the party seeking to introduce a statement by a coconspirator must establish that there was a conspiracy in which both the accused and the declarant were members. *State v Cornell*, 314 Or 673, 842 P2d 394.

Under the coconspirator exception to the hearsay rule, statements of a non-testifying coconspirator made in the course of the conspiracy are admissible provided a conspiracy exists between the non-testifying coconspirator and the defendant against whom the testimony is offered. *Commonwealth v Johnson*, 419 Pa Super 625, 615 A2d 1322, app den 533 Pa 657, 625 A2d 1191.

Footnote 39. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; *United States v Resnick* (CA8 Minn) 745 F2d 1179, 16 Fed Rules Evid Serv 1361.

A defendant, even if not an agreeing member of the conspiracy, may also be found guilty of conspiracy if he knew of the conspiracy's existence at the time of his acts, and his acts knowingly aided and abetted the business of the conspiracy. *United States v Sims* (ND Ill) 808 F Supp 620, later proceeding (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308.

Footnote 40. *State v Leisure* (Mo App) 838 SW2d 49.

Footnote 41. *United States v Stanley* (CA5 Tex) 765 F2d 1224, 18 Fed Rules Evid Serv 738, reh den, en banc (CA5 Tex) 772 F2d 904 and (criticized on other grounds by *United States v Edelman* (CA5 Tex) 873 F2d 791, 27 Fed Rules Evid Serv 985); *United States v Carrascal-Olivera* (CA11 Fla) 755 F2d 1446 (among conflicting authorities on other grounds noted in *United States v Collado* (CA3 Pa) 975 F2d 985).

Mere presence of the accused at the scene, without more, is insufficient to establish his or her participation in a conspiracy. *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

Footnote 42. *State v Hoffman*, 123 Idaho 638, 851 P2d 934, petition for certiorari filed (Aug 24, 1993); *State v Chavez* (Utah App) 840 P2d 846, 198 Utah Adv Rep 52, cert den (Utah) 857 P2d 948.

Footnote 43. *United States v Sims* (ND Ill) 808 F Supp 620, later proceeding (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308.

Footnote 44. *State v Leisure* (Mo App) 838 SW2d 49.

Footnote 45. *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79, cert den 474 US 1085, 88 L Ed 2d 898, 106 S Ct 859 and cert den 474 US 1086, 88 L Ed 2d 901, 106 S Ct 863 and habeas corpus proceeding (ND Ill) 1987 US

Dist LEXIS 6377; *United States v Sims* (ND Ill) 808 F Supp 620, later proceeding (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den (ND Ill) 822 F Supp 1308; *United States v Paris* (CA9 Cal) 827 F2d 395, 23 Fed Rules Evid Serv 1039.

As to establishment of conspiracy, see § 848.

Footnote 46. *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79, cert den 474 US 1085, 88 L Ed 2d 898, 106 S Ct 859 and cert den 474 US 1086, 88 L Ed 2d 901, 106 S Ct 863 and habeas corpus proceeding (ND Ill) 1987 US Dist LEXIS 6377.

Footnote 47. *United States v Anderson* (CA11 Ga) 782 F2d 908, reh den, en banc (CA11 Ga) 788 F2d 1570 and reh den, en banc (CA11 Ga) 788 F2d 1570 and (among conflicting authorities on other grounds noted in *United States v Hurst* (CMA) 29 MJ 477, 29 Fed Rules Evid Serv 1252).

Footnote 48. *United States v Raymond* (CA8 Mo) 793 F2d 928; *United States v Jankowski* (CA8 Neb) 713 F2d 394, 13 Fed Rules Evid Serv 1955, cert den 464 US 1051, 79 L Ed 2d 192, 104 S Ct 732; *United States v Andersson* (CA9 Cal) 813 F2d 1450, 22 Fed Rules Evid Serv 1391 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Dozier* (CA9 Cal) 826 F2d 866, op withdrawn, substituted op (CA9 Cal) 844 F2d 701, cert den 488 US 927, 102 L Ed 2d 331, 109 S Ct 312; *State v Edwards* (Fla App D1) 536 So 2d 288, 13 FLW 2680.

Footnote 49. *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26, cert den 467 US 1214, 81 L Ed 2d 363, 104 S Ct 2656 and cert den 467 US 1219, 81 L Ed 2d 373, 104 S Ct 2668.

Footnote 50. *United States v Alvarez* (CA11 Fla) 755 F2d 830, 17 Fed Rules Evid Serv 1181, 77 ALR Fed 613, cert den 474 US 905, 88 L Ed 2d 235, 106 S Ct 274 and cert den 482 US 908, 96 L Ed 2d 380, 107 S Ct 2489 and (criticized on other grounds by *United States v Jim* (CA9 Nev) 865 F2d 211).

Footnote 51. *Government of Virgin Islands v Brathwaite* (CA3 VI) 782 F2d 399, 19 Fed Rules Evid Serv 1535; *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929, cert den 469 US 1106, 83 L Ed 2d 774, 105 S Ct 779, post-conviction proceeding, motion den (ED Pa) LEXIS slip op, affd (CA3 Pa) 813 F2d 596, cert den 484 US 822, 98 L Ed 2d 45, 108 S Ct 83; *United States v Resnick* (CA8 Minn) 745 F2d 1179, 16 Fed Rules Evid Serv 1361; *United States v Paris* (CA9 Cal) 827 F2d 395, 23 Fed Rules Evid Serv 1039; *United States v Anderson* (CA11 Ga) 782 F2d 908, reh den, en banc (CA11 Ga) 788 F2d 1570 and reh den, en banc (CA11 Ga) 788 F2d 1570 and (among conflicting authorities on other grounds noted in *United States v Hurst* (CMA) 29 MJ 477, 29 Fed Rules Evid Serv 1252).

Timing, circumstances, or one or more of a series of meetings may establish a conspiracy and connect the declarant and the defendant to it. *Big Apple BMW, Inc. v BMW of North America, Inc.* (CA3 Pa) 974 F2d 1358, 1992-2 CCH Trade Cases ¶ 69918, 36 Fed Rules Evid Serv 319, reh, en banc, den (CA3) 1992 US App LEXIS 22262 and cert den (US) 122 L Ed 2d 659.

Footnote 52. State v Lycett (App) 133 Ariz 185, 650 P2d 487.

Footnote 53. Within the scope of 18 USCS § 1962.

Footnote 54. United States v Fernandez (CA11 Fla) 797 F2d 943, 21 Fed Rules Evid Serv 557, cert den 483 US 1006, 97 L Ed 2d 736, 107 S Ct 3230, postconviction proceeding (CA11 Fla) 941 F2d 1488; United States v Hewes (CA11 Ga) 729 F2d 1302, 15 Fed Rules Evid Serv 1075, reh den (CA11 Ga) 734 F2d 1481 and cert den 469 US 1110, 83 L Ed 2d 783, 105 S Ct 790.

§ 850 Standard of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, when preliminary facts to admissibility of coconspirator testimony under the coconspirator hearsay exception are disputed, the proponent of the evidence must establish the preliminary facts required by a preponderance of the evidence before the coconspirator statements may be admitted. 55 This preponderance standard simply requires the prosecution to present sufficient proof so that the trial judge may find that the existence of the contested fact is more probable than its nonexistence. 56 However, some state courts have different standards for admitting such statements. For instance, some courts hold that a trial court can properly admit evidence of statements made in pursuance of a conspiracy if there is "some evidence" of a conspiracy or a sufficient offer of proof of its existence. 57 Other courts require sufficient, substantial and independent non-hearsay evidence of a conspiracy. 58 Although there is some authority to the contrary, 59 courts, following the preponderance of the evidence standard, state that the preponderance of the evidence standard governs the court's preliminary rulings in both civil and criminal cases. 60

Nevertheless, there is authority that, in determining the sufficiency of the evidence to establish a conspiracy, the evidence is considered in the light most favorable to the state. 61 In addition, despite some authority to the contrary, 62 some courts have stated that only slight evidence of a connection to a conspiracy is sufficient to support a finding that the declarant and party-opponent were conspirators. 63 However, in reference to such cases, it has been stated that the offering party must still meet the standard of a preponderance of the evidence, and that the reference to "slight evidence" refers to the nature and extent of the involvement in the conspiracy. 64

§ 850 ----Standard of proof [SUPPLEMENT]

Case authorities:

Acquittal motions of defendants convicted of conspiracy were properly denied since jury's inferences from evidence that defendants were participants rather than innocent bystanders were eminently reasonable. United States v Mena- Robles (1993, CA1 Puerto

Rico) 4 F3d 1026, summary op at (CA1 Puerto Rico) 22 M.L.W. 127, 14 R.I.L.W. 514 and petition for certiorari filed (Jan 18, 1994).

Government provided independent evidence to corroborate existence of conspiracy between defendant and coconspirator so as to admit coconspirator's statements to witness under coconspirator exception to hearsay rule; fact that witness's drug deal with coconspirator fell through immediately after latter spoke with defendant supported government's theory that coconspirator worked for defendant, defendant made statement to witness indicating that coconspirator worked for him, and police found sheet of paper with coconspirator's name and telephone number on it while searching defendant's house. *United States v Neal* (1996, CA4 SC) 78 F3d 901.

Court did not err in admitting into evidence taperecorded statements made by extortion defendant's alleged coconspirator since there was sufficient evidence of defendant's participation in conspiracy. *United States v Blandford* (1994, CA6 Ky) 33 F3d 685, 1994 FED App 312P, reh, en banc, den (1994, CA6 Ky) 1994 US App LEXIS 34101.

Footnotes

Footnote 55. *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105 (not followed on other grounds by *Romani v State* (Fla) 542 So 2d 984, 14 FLW 227) and (not followed on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371) and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174); *United States v Blevins* (CA4 Va) 960 F2d 1252, 35 Fed Rules Evid Serv 185; *United States v Fragoso* (CA5 Tex) 978 F2d 896, 37 Fed Rules Evid Serv 416, cert den (US) 123 L Ed 2d 282, 113 S Ct 1664; *United States v Ascarrunz* (CA5 Tex) 838 F2d 759, 24 Fed Rules Evid Serv 1166; *United States v Garner* (CA7 Ill) 837 F2d 1404, 24 Fed Rules Evid Serv 476, cert den 486 US 1035, 100 L Ed 2d 608, 108 S Ct 2022 and cert den 487 US 1240, 101 L Ed 2d 945, 108 S Ct 2914 and cert den 488 US 898, 102 L Ed 2d 232, 109 S Ct 244 and (disapproved on other grounds by *Reves v Ernst & Young* (US) 122 L Ed 2d 525, 113 S Ct 1163, 93 CDOS 1494, 93 Daily Journal DAR 2750, CCH Fed Secur L Rep ¶ 97357, RICO Bus Disp Guide (CCH) ¶ 8227, 7 FLW Fed S 41) as stated in *United States v Quintanilla* (CA7 Ill) 2 F3d 1469; *United States v Garcia* (CA10 Okla) 994 F2d 1499; *State v Edwards* (Fla App D1) 536 So 2d 288, 13 FLW 2680; *People v Roppo* (1st Dist) 234 Ill App 3d 116, 174 Ill Dec 890, 599 NE2d 974, app den 146 Ill 2d 646, 176 Ill Dec 816, 602 NE2d 470; *State v Cornell*, 314 Or 673, 842 P2d 394.

A coconspirator's out-of-court statement is not hearsay and is admissible against a defendant if the government demonstrates by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and the declarant were part of the conspiracy; and (3) the declaration was made during the course and in furtherance of the conspiracy. *United States v Morgan* (CA8 Mo) 997 F2d 433, reh den (CA8 Mo) 1993 US App LEXIS 19733.

For hearsay statements of a coconspirator to be admissible, a conspiracy must be shown by a preponderance of the evidence. *People v Loy-Rafuls*, 198 Mich App 594, 500 NW2d 480, revd on other grounds 442 Mich 912, 503 NW2d 453.

In order for a coconspirator statement to be admissible, there must be "independent and

preponderant" evidence of a conspiracy between the declarant and the defendant. *State v Madewell* (Mo App) 846 SW2d 208.

The foundation required for the coconspirator exception to the hearsay rule includes proof by a fair preponderance of the evidence that a conspiracy existed. *Commonwealth v Stocker*, 424 Pa Super 189, 622 A2d 333.

Annotation: Comment Note.—Comment Note.—Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 ALR3d 1148.

Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Practice References 20 Am Jur Trials 351, Handling the Defense in a Conspiracy Prosecution.

Footnote 56. *United States v McGlory* (CA3 Pa) 968 F2d 309, 35 Fed Rules Evid Serv 1124, cert den (US) 121 L Ed 2d 339, 113 S Ct 415 and cert den (US) 121 L Ed 2d 559, 113 S Ct 627 and cert den (US) 122 L Ed 2d 763, 113 S Ct 1388.

A coconspirator statement will be admitted if the court finds that it is more likely than not the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy. *United States v McCarthy* (CA1 Mass) 961 F2d 972, 35 Fed Rules Evid Serv 478.

Footnote 57. *State v Hoffman*, 123 Idaho 638, 851 P2d 934, petition for certiorari filed (Aug 24, 1993).

Footnote 58. *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

Footnote 59. *SEC v Tome* (SD NY) 638 F Supp 629 (noting that the coconspirator exemption would be rendered a nullity in civil cases if courts required a preponderance of the evidence before a coconspirator's statement is admissible, since where a party to a civil action required to prove the existence of the conspiracy by a preponderance of the non-hearsay evidence before the statement is admissible, the statement would be merely corroborative evidence tending to reinforce the case already proved; however the court held that in the particular case it would be unnecessary to determine what the predicate for the admissibility of the evidence would be, since the plaintiff proved the existence of a conspiracy by independent evidence).

Footnote 60. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231.

Footnote 61. *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207.

Footnote 62. *United States v Durrive* (CA7 Wis) 902 F2d 1221, later proceeding (CA7 Wis) 4 F3d 548, stating that when the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, "substantial evidence" should be the test rather than "slight evidence" or "slight connection."

Footnote 63. *United States v Girona* (CA7 Ill) 758 F2d 1201, 17 Fed Rules Evid Serv 1321, cert den 474 US 1004, 88 L Ed 2d 456, 106 S Ct 523, later proceeding (ND Ill) 1987 US Dist LEXIS 7772; *United States v Zambrana* (CA7 Ind) 841 F2d 1320, 25 Fed Rules Evid Serv 55, later proceeding (CA7 Ind) 864 F2d 494 and post-conviction proceeding (CA7) 1991 US App LEXIS 26515, reh, en banc, den (CA7 Ind) 1991 US App LEXIS 27058, habeas corpus den (ND Ind) 790 F Supp 838; *United States v Crespo De Llano* (CA9 Ariz) 830 F2d 1532, 23 Fed Rules Evid Serv 1263, amd, reh den (CA9 Ariz) 838 F2d 1006.

A single act or conversation can suffice to connect the defendant to the conspiracy if that act leads to the reasonable inference of intent to participate in an unlawful enterprise. *United States v Sims* (ND Ill) 808 F Supp 620, later proceeding (ND Ill) 808 F Supp 627, later proceeding (ND Ill) 808 F Supp 630, motion den (ND Ill) 818 F Supp 1199, motion den.

Footnote 64. *United States v Scartz* (CA6 Ohio) 838 F2d 876, 24 Fed Rules Evid Serv 995, reh den, en banc (CA6) 1988 US App LEXIS 5889 and cert den 488 US 923, 102 L Ed 2d 322, 109 S Ct 303.

§ 851 Admissibility decided by judge

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Whether a coconspirator's statements have met the preliminary requirements for admission is a factual matter to be determined by the court ⁶⁵ in accord with the applicable rules of evidence. ⁶⁶ According to some courts, the trial judge must determine initially whether there is prima facie evidence that a conspiracy exists. ⁶⁷ The trial judge is permitted to weigh and evaluate the credibility of the witnesses and other evidence in rendering a determination on compliance with the prerequisites for admission, ⁶⁸ and the judge's decision is conclusive so that the jury may not reexamine the question of whether there is enough evidence of the defendant's participation to allow hearsay to be used. ⁶⁹ It has been found appropriate to rule on the issue of compliance with the prerequisites for admission at the close of all the evidence. ⁷⁰ In civil cases, a preliminary determination of admissibility may be made before the close of all the evidence, providing the proponent of the coconspirator statement has been given a fair and reasonable opportunity to present evidence of a conspiracy and the declarant's participation in it. ⁷¹ The judge need not hold a hearing outside the presence of the jury to develop evidence of the alleged conspiracy before admitting any coconspirator's statements. ⁷²

◆ **Caution:** Although it may be argued that any written statement by a coconspirator in the furtherance of a conspiracy may be subject to pretrial discovery under the Federal Rule of Criminal Procedure pertaining to disclosure of evidence by the government, ⁷³ criminal defendants are not entitled to pretrial discovery of coconspirator's statements under the subsection pertaining to disclosure of statements made by a defendant, ⁷⁴

notwithstanding that defendants could be held vicariously liable for such statements as if they were their own admissions. 75 Similarly, the Jencks Act, 76 which prohibits compelled disclosure of oral statements of a government witness before that witness testifies, governs the pretrial release of any inculpatory oral statements of coconspirators who are prospective government witnesses, 77 and statements of a coconspirator need not be disclosed if the coconspirator has not yet testified. 78

§ 851 ----Admissibility decided by judge [SUPPLEMENT]

Rules:

(FRCrP, Rule 16), amended in 1994, clarifies the rule's applicability to organizational as well as individual defendants.

Case authorities:

District court did not abuse its discretion in failing to make more specific findings on admissibility of coconspirators' statements where defendants did not object when district court, prompted by government to need for finding which it had delayed after admitting evidence, said there was clearly no problem with the government's having met its burden of proof of admissibility, government's burden was clearly met, and defendant's did not cite specific coconspirator statements to which they objected on appeal. *United States v Moss* (1993, CA6 Mich) 9 F3d 543, reh, en banc, den (CA6) 1994 US App LEXIS 1612.

Court did not err in questioning alleged unindicted coconspirator in jury's presence to satisfy itself that requirements for admission of coconspirator's statements; court's questioning was prompted by defense objections to government's attempts to elicit hearsay statements from witness. *United States v Pedigo* (1994, CA7 Ill) 12 F3d 618.

District court's use of written proffer rather than full blown pretrial hearing on issue of admissibility of coconspirator statements was not abuse of discretion. *United States v Vargas* (1994, CA7 Ind) 16 F3d 155.

Trial court's failure to make all required findings for admissibility of coconspirators' statements constituted reversible error since coconspirator hearsay testimony was most damaging and probative evidence offered by government against defendant. *United States v Rascon* (1993, CA10 NM) 8 F3d 1537, 38 Fed Rules Evid Serv 364.

Footnotes

Footnote 65. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Martorano* (CA1 Mass) 557 F2d 1, reh den (CA1 Mass) 561 F2d 406, 2 Fed Rules Evid Serv 275, cert den 435 US 922, 55 L Ed 2d 515, 98 S Ct 1484 and (criticized on other grounds by *United States v Macklin* (CA8 Mo) 573 F2d 1046, 3 Fed Rules Evid Serv 334); *United States v Stanchich* (CA2 NY) 550 F2d 1294, 1 Fed Rules Evid Serv 575; *United States v Trowery* (CA3 Pa) 542 F2d 623, 1 Fed Rules Evid Serv 332, cert den 429 US 1104, 51 L Ed 2d 555, 97 S Ct 1132; *United States v Stroupe* (CA4 NC) 538 F2d 1063, 2 Fed Rules Evid Serv 9; *United States v James* (CA5 Ga) 590 F2d 575, 3 Fed Rules Evid Serv 785, cert den 442 US 917, 61 L Ed 2d 283, 99

S Ct 2836 and cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401) and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929) and (criticized on other grounds by *Llach v United States* (CA8 ND) 739 F2d 1322, 16 Fed Rules Evid Serv 428) as stated in *United States v Perez* (CA5 Tex) 823 F2d 854, 23 Fed Rules Evid Serv 368 and (criticized on other grounds by *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26) as stated in *United States v McCoy* (CA4) 1991 US App LEXIS 21743; *United States v Enright* (CA6 Mich) 579 F2d 980, 3 Fed Rules Evid Serv 284 (criticized on other grounds by *United States v Cassity* (CA6 Mich) 631 F2d 461); *United States v Santiago* (CA7 Ill) 582 F2d 1128, 3 Fed Rules Evid Serv 1288 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105); *United States v Bell* (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44 ALR Fed 617 (criticized on other grounds by *United States v Rosales-Lopez* (CA9 Cal) 617 F2d 1349) and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Campbell* (CA8 Ark) 845 F2d 782, 25 Fed Rules Evid Serv 508; *United States v Eubanks* (CA9 Ariz) 591 F2d 513; *United States v Watson* (CA10 Okla) 594 F2d 1330, 4 Fed Rules Evid Serv 1440, cert den 444 US 840, 62 L Ed 2d 51, 100 S Ct 78; *United States v Barker* (DC Colo) 623 F Supp 823; *United States v Caldwell* (CA11 Ga) 771 F2d 1485, 19 Fed Rules Evid Serv 728; *United States v Perez* (CA11 Fla) 824 F2d 1567, 23 Fed Rules Evid Serv 1241; *United States v Dago* (DC Colo) 813 F Supp 736; *State v Cornell*, 314 Or 673, 842 P2d 394.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Footnote 66. §§ 9 et seq.

Footnote 67. *Deutch v State* (Ala App) 610 So 2d 1212, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 1143 and cert den, without op (Ala) 1992 Ala LEXIS 1615.

As to the requirement by some courts of prima facie evidence of a conspiracy, see § 833.

Footnote 68. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; *United States v Dray* (DC Mass) 659 F Supp 1426; *United States v Alvarez* (CA11 Fla) 755 F2d 830, 17 Fed Rules Evid Serv 1181, 77 ALR Fed 613, cert den 474 US 905, 88 L Ed 2d 235, 106 S Ct 274 and cert den 482 US 908, 96 L Ed 2d 380, 107 S Ct 2489 and (criticized on other grounds by *United States v Jim* (CA9 Nev) 865 F2d 211).

Footnote 69. *United States v Martinez de Ortiz* (CA7 Wis) 907 F2d 629, 31 Fed Rules Evid Serv 203, cert den 498 US 1029, 112 L Ed 2d 676, 111 S Ct 684 and (among conflicting authorities on other grounds noted in *United States v Ruiz* (CA7 Ill) 932 F2d 1174).

As to proof of defendant's participation in the conspiracy for purposes of the

coconspirator exception to the hearsay rule, see § 849.

Footnote 70. *United States v Ortiz* (CA1 Puerto Rico) 966 F2d 707, 35 Fed Rules Evid Serv 1235, cert den (US) 122 L Ed 2d 154, 113 S Ct 1005; *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681).

Footnote 71. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231.

Footnote 72. *United States v Jackson* (CA4 NC) 757 F2d 1486, 17 Fed Rules Evid Serv 1406, cert den 474 US 994, 88 L Ed 2d 358, 106 S Ct 407; *United States v Nicoll* (CA5 Ga) 664 F2d 1308, 9 Fed Rules Evid Serv 1117, cert den 457 US 1118, 73 L Ed 2d 1330, 102 S Ct 2929 and (ovrld on other grounds by *United States v Henry* (CA5 Tex) 749 F2d 203); *United States v Barker* (DC Colo) 623 F Supp 823.

Footnote 73. FR Crim P, Rule 16(a), discussed in 23 Am Jur 2d, Depositions and Discovery §§ 400 et seq.

Footnote 74. FR Crim P, Rule 16(a)(1)(A).

Footnote 75. *United States v Roberts* (CA4 NC) 811 F2d 257, 22 Fed Rules Evid Serv 862; *United States v Orr* (CA11 Ga) 825 F2d 1537, 23 Fed Rules Evid Serv 1056, ALR Fed 3836 (criticized on other grounds by *United States v Clavis* (CA11 Ga) 977 F2d 538, 6 FLW Fed C 1337).

Footnote 76. 18 USCS § 3500.

Footnote 77. *United States v Thomas* (ED NC) 609 F Supp 1048.

Footnote 78. *United States v Tarantino*, 269 US App DC 398, 846 F2d 1384, 26 Fed Rules Evid Serv 164, cert den 488 US 840, 102 L Ed 2d 83, 109 S Ct 108, later proceeding 284 US App DC 353, 905 F2d 458 and cert den 488 US 867, 102 L Ed 2d 143, 109 S Ct 174.

§ 852 --Articulation of findings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is authority that, at the close of all the evidence, the court must make an explicit, on-the-record finding on the admissibility of the coconspirator statements before the case is submitted to the jury, 79 at least when requested by appropriate motion. 80 Where no motion is made, it has sometimes been held that explicit findings regarding the prerequisites for admission are not required. 81 It is appropriate for the court to make the ruling on the record, but out of the jury's presence. 82

◆ Observation: Some courts make a distinction between findings in jury trials as opposed to bench trials. Such courts hold that, in a jury trial, failure to make findings

that the standards of the coconspirator exception to the hearsay rule have been met constitutes reversible error, regardless of whether the defendant requested such findings. 83 However, in bench trials, while the rule on admissibility remains unchanged, the court requires explicit findings only when the defendant makes a specific request for them. 84

◆ Caution: A motion for acquittal and a renewal of all previous evidentiary objections is not by itself a sufficiently specific request to alert the court to the need for additional specific findings as to whether the prerequisites for admission have been satisfied by a preponderance of the evidence. 85 And a party cannot later complain that the court improperly determined compliance with the coconspirator exception to the hearsay rule by ruling at the close of the offering party's evidence and not at the conclusion of all the evidence if there is no motion for a specific ruling. 86

In the absence of explicit findings by the trial court regarding the prerequisites for the admission of coconspirator statements, the necessary threshold determination for admissibility has been held implicit in the court's decision to send the case to the jury. 87 Where the record indicates careful consideration of the court's responsibility under the coconspirator exception, it may be implied that the necessary threshold determination for admissibility has been made at the close of all the evidence, when the court explicitly determines that the evidence presented was sufficient to let the case against all the defendants go to the jury. 88 The court's failure to make a specific finding of admissibility of coconspirator statements has been held harmless error, where the record demonstrates there was sufficient evidence that qualified the statements as "not hearsay" under coconspirator exception to the hearsay rule. 89 Moreover, it does not constitute reversible error when the trial judge announces an intention to subsequently rule on the admissibility of the coconspirator statements and then fails to articulate specific findings or conclusions on the issue, where the record indicates careful consideration was given to the matter, since the failure to articulate findings does not necessarily mean the issue was never decided. 90

The court is not required to articulate specific facts and reasons in support of a ruling on the admission of coconspirator statements, 91 at least where the court indicates there was sufficient and substantial evidence of the preliminary facts. 92 Although specific findings as to each party with respect to participation in the alleged conspiracy are preferred, the failure to make such a finding does not necessarily preclude admissibility, 93 as the requisite finding of participation in the alleged conspiracy may be implied from the admission of the coconspirator statement and a denial of the party's motion for acquittal on the conspiracy charge. 94 Moreover, a general ruling that the party-opponents were members of the alleged conspiracy combined with the receipt into evidence of the coconspirator statements may be a sufficient determination that the prerequisites for admission have been satisfied, where there is substantial evidence linking the parties to the conspiracy. 95

Footnotes

Footnote 79. *United States v Hansen* (CA5 Fla) 569 F2d 406, 2 Fed Rules Evid Serv 1057; *United States v Herrera* (ND Ill) 407 F Supp 766, 1 Fed Rules Evid Serv 162; *United States v Bell* (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44 ALR Fed 617 (criticized on other grounds by *United States v Rosales-Lopez* (CA9 Cal) 617

F2d 1349) and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Campbell* (CA8 Ark) 845 F2d 782, 25 Fed Rules Evid Serv 508; *United States v Vargas-Rios* (CA9 Cal) 607 F2d 831, 5 Fed Rules Evid Serv 714.

There is authority that where the record clearly indicates that the district judge concluded that the statements were admissible the court's lack of full compliance with guidelines for making findings on the record does not require reversal. *United States v Bentley* (1983, CA8 Mo) 706 F2d 1498, 13 Fed Rules Evid Serv 152, cert den *Platt v United States* (1983) 464 US 830, 78 L Ed 2d 110, 104 S Ct 107 and cert den *Bentley v United States* (1984) 467 US 1209, 81 L Ed 2d 354, 104 S Ct 2397.

Footnote 80. *United States v Miller* (CA5 Tex) 799 F2d 985, 21 Fed Rules Evid Serv 970; *United States v Gomez* (CA10 Okla) 810 F2d 947, 22 Fed Rules Evid Serv 659, cert den 482 US 908, 96 L Ed 2d 379, 107 S Ct 2488.

Footnote 81. *United States v Alfonso* (CA10 Okla) 738 F2d 369, 16 Fed Rules Evid Serv 480; *United States v Barker* (DC Colo) 623 F Supp 823; *United States v Hewes* (CA11 Ga) 729 F2d 1302, 15 Fed Rules Evid Serv 1075, reh den (CA11 Ga) 734 F2d 1481 and cert den 469 US 1110, 83 L Ed 2d 783, 105 S Ct 790.

Footnote 82. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314.

Footnote 83. *United States v Powell* (CA10 Colo) 973 F2d 885, cert den (US) 123 L Ed 2d 161, 113 S Ct 1598.

Footnote 84. *United States v Powell* (CA10 Colo) 973 F2d 885, cert den (US) 123 L Ed 2d 161, 113 S Ct 1598.

Footnote 85. *United States v Gomez* (CA10 Okla) 810 F2d 947, 22 Fed Rules Evid Serv 659, cert den 482 US 908, 96 L Ed 2d 379, 107 S Ct 2488.

As to preponderance of the evidence standard in determining admissibility of coconspirator statements, see § 850.

Footnote 86. *United States v Rivera* (CA10 NM) 778 F2d 591, 19 Fed Rules Evid Serv 1358, cert den 475 US 1068, 89 L Ed 2d 609, 106 S Ct 1384.

Footnote 87. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3 NJ) 894 F2d 1402, motion gr, cert gr, in part 496 US 935, 110 L Ed 2d 660, 110 S Ct 3212, motion gr 498 US 805, 112 L Ed 2d 13, 111 S Ct 36 and motion gr 498 US 936, 112 L Ed 2d 303, 111 S Ct 338; *United States v Scott* (CA4 W Va) 730 F2d 143, 15 Fed Rules Evid Serv 418, cert den 469 US 1075, 83 L Ed 2d 512, 105 S Ct 572 (court sent case to the jury with instructions concerning the consideration of the coconspirator

statements).

Footnote 88. *United States v Manzella* (CA5 La) 782 F2d 533, 20 Fed Rules Evid Serv 196, cert den 476 US 1123, 90 L Ed 2d 672, 106 S Ct 1991 and reh den, clarified on other grounds (CA5 La) 790 F2d 1260 and cert den 479 US 961, 93 L Ed 2d 403, 107 S Ct 457.

Footnote 89. *United States v Fernandez* (CA11 Fla) 797 F2d 943, 21 Fed Rules Evid Serv 557, cert den 483 US 1006, 97 L Ed 2d 736, 107 S Ct 3230, post-conviction proceeding (CA11 Fla) 941 F2d 1488.

Footnote 90. *United States v Winship* (CA5 La) 724 F2d 1116, 14 Fed Rules Evid Serv 1501, and (criticized on other grounds by *United States v Kerley* (CA7 Wis) 838 F2d 932).

Footnote 91. *United States v Haimowitz* (CA11 Fla) 725 F2d 1561, 15 Fed Rules Evid Serv 441, cert den 469 US 1072, 83 L Ed 2d 504, 105 S Ct 563.

Footnote 92. *United States v Cattle King Packing Co.* (CA10 Colo) 793 F2d 232, 21 Fed Rules Evid Serv 59, cert den 479 US 985, 93 L Ed 2d 577, 107 S Ct 573.

Footnote 93. *United States v Paone* (CA2 NY) 782 F2d 386, 20 Fed Rules Evid Serv 577, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269 and cert den 483 US 1019, 97 L Ed 2d 761, 107 S Ct 3261, habeas corpus proceeding (ED NY) 735 F Supp 60 and (among conflicting authorities on other grounds noted in *United States v Salerno* (CA2 NY) 868 F2d 524, 27 Fed Rules Evid Serv 868) and (criticized on other grounds by *United States v Johnson* (CA7 Ill) 927 F2d 999, 32 Fed Rules Evid Serv 735); *United States v De Peri* (CA3 Pa) 778 F2d 963, 19 Fed Rules Evid Serv 256 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and cert den 475 US 1110, 89 L Ed 2d 916, 106 S Ct 1518 and cert den 476 US 1159, 90 L Ed 2d 720, 106 S Ct 2277.

Footnote 94. *United States v Perez* (CA2 NY) 702 F2d 33, 12 Fed Rules Evid Serv 892, cert den 462 US 1108, 77 L Ed 2d 1336, 103 S Ct 2457; *United States v De Peri* (CA3 Pa) 778 F2d 963, 19 Fed Rules Evid Serv 256 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and cert den 475 US 1110, 89 L Ed 2d 916, 106 S Ct 1518 and cert den 476 US 1159, 90 L Ed 2d 720, 106 S Ct 2277.

Footnote 95. *United States v Paone* (CA2 NY) 782 F2d 386, 20 Fed Rules Evid Serv 577, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269 and cert den 483 US 1019, 97 L Ed 2d 761, 107 S Ct 3261, habeas corpus proceeding (ED NY) 735 F Supp 60 and (among conflicting authorities on other grounds noted in *United States v Salerno* (CA2 NY) 868 F2d 524, 27 Fed Rules Evid Serv 868) and (criticized on other grounds by *United States v Johnson* (CA7 Ill) 927 F2d 999, 32 Fed Rules Evid Serv 735).

§ 853 --Jury instructions

[View Entire Section](#)

Since it is the court's role to determine the admissibility of coconspirator statements, 96 the jury is not to be instructed about the admissibility of statements of coconspirators. 97

Although it has been held that an interim instruction on the coconspirator exception is appropriate to prepare the jury for the possibility that upcoming testimony disclosing coconspirator statements may be subsequently stricken from the record, 98 such an instruction is said to run the risk of alerting the jury that the judge will determine that a conspiracy involving the defendant has been proven by a preponderance of the evidence. 99

◆ Practice guide: It has been suggested that when the declaration of a coconspirator is to be offered, requiring the need for a judicial determination of admissibility under the Federal Rules of Evidence coconspirator hearsay exception 1 the court may be so advised in the presence of the jury by using technical terms which only the judge and counsel will understand to avoid alerting the jury. 2

Footnotes

Footnote 96. § 851.

Footnote 97. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3 NJ) 894 F2d 1402, motion gr, cert gr, in part 496 US 935, 110 L Ed 2d 660, 110 S Ct 3212, motion gr 498 US 805, 112 L Ed 2d 13, 111 S Ct 36 and motion gr 498 US 936, 112 L Ed 2d 303, 111 S Ct 338; *United States v James* (CA5 Ga) 576 F2d 1121, 3 Fed Rules Evid Serv 815, mod, in part, en banc (CA5 Ga) 590 F2d 575, 3 Fed Rules Evid Serv 785, cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401) and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929) and (criticized on other grounds by *Llach v United States* (CA8 ND) 739 F2d 1322, 16 Fed Rules Evid Serv 428) and (criticized on other grounds by *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26) as stated in *United States v McCoy* (CA4) 1991 US App LEXIS 21743 and (criticized on other grounds by *United States v Perez* (CA9 Cal) 658 F2d 654, 9 Fed Rules Evid Serv 240); *United States v Vinson* (CA6 Ky) 606 F2d 149, 5 Fed Rules Evid Serv 1, cert den 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, reh den 445 US 972, 64 L Ed 2d 251, 100 S Ct 1668 and cert den 445 US 904, 63 L Ed 2d 319, 100 S Ct 1080; *United States v Bell* (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44 ALR Fed 617 (criticized on other grounds by *United States v Rosales-Lopez* (CA9 Cal) 617 F2d 1349) and (criticized on other

grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Campbell* (CA8 Ark) 845 F2d 782, 25 Fed Rules Evid Serv 508.

Footnote 98. *United States v Eubanks* (CA9 Ariz) 591 F2d 513.

Footnote 99. *United States v Vinson* (CA6 Ky) 606 F2d 149, 5 Fed Rules Evid Serv 1, cert den 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, reh den 445 US 972, 64 L Ed 2d 251, 100 S Ct 1668 and cert den 445 US 904, 63 L Ed 2d 319, 100 S Ct 1080.

An interim instruction to jury regarding determination of coconspirator exception violated FRE, Rule 104(a), but the error was not prejudicial as long as the judge did not declare his belief that the government had proven its case of conspiracy, and because the jury's consideration of the preliminary issue constituted a windfall for the defendant. *United States v Nickerson* (CA6 Tenn) 606 F2d 156, 5 Fed Rules Evid Serv 19, cert den 444 US 994, 62 L Ed 2d 424, 100 S Ct 528.

Footnote 1. FRE, Rule 801(d)(2)(E).

Footnote 2. *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico) 678 F Supp 353, affd without op (CA1 Puerto Rico) 873 F2d 1433, post-conviction proceeding (CA1 Puerto Rico) 879 F2d 975, cert den 493 US 1082, 107 L Ed 2d 1045, 110 S Ct 1140, post-conviction proceeding (CA1) 1991 US App LEXIS 7103, post-conviction proceeding (DC Puerto Rico) 788 F Supp 667 and (among conflicting authorities on other grounds noted in *United States v Roberts* (CA1 Mass) 1992 US App LEXIS 20528) and (criticized on other grounds by *Liteky v United States* (US) 62 USLW 4161, 7 FLW Fed S 793).

§ 854 Order of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The control of the order of proof is a matter committed to the sound discretion of the trial court, and some courts state that the trial court has considerable discretion with respect to the order of proof. ³ A problem arises because the preliminary questions regarding the admission of coconspirator statements often coincide with the ultimate issue in many conspiracy prosecutions. ⁴ The court must avoid invading the jury's province to determine the ultimate issue of conspiracy and avoid prejudicing the defendant by the admission of coconspirator statements that are subsequently withdrawn when the existence of a conspiracy is not proven to the court's satisfaction. ⁵

Taking the view that the remedy of a curative instruction or a mistrial is either inadequate or too costly, some courts have set out a preferred order of proof, under which the government is to make a sufficient showing of a conspiracy and the defendant's participation in it before seeking the admission of statements of a coconspirator. ⁶ To satisfy this interim stage, some courts require the proponent of the coconspirator

statements to produce substantial evidence of the existence of a conspiracy and the participation in it of the declarant and party-opponent. 7 Some courts, recognizing that requiring the offering party to demonstrate the existence of a conspiracy and the participation in it by the declarant and the party against whom the statement is offered is not always reasonably practical, permit coconspirator statements to be provisionally admitted, subject to eventual proof of the conspiracy and the defendant's participation in it, 8 as well as proof that the statements were made in the course of and in furtherance of the conspiracy. 9 Thus, some courts say that a coconspirator's statement may be admitted before the establishment of a prima facie case of conspiracy conditioned upon a subsequent showing of conspiracy before the close of the state's evidence. 10 Conditional admission of coconspirator statements has been found appropriate where—

—the segmentation of the hearsay testimony from the surrounding circumstances and the removal of statements from context would cause confusion and needless repetition of testimony. 11

—the trials of the alleged conspirators were severed, leaving each trial with two absent conspirators and an order of proof problem. 12

—the out-of-court declarations constituted the prosecution's case in chief and without such evidence it was unlikely the defendants could be convicted. 13

◆ Caution: When coconspirator statements are admitted provisionally subject to a later motion to strike, the failure to timely move that the testimony be stricken may be considered a waiver of objections to the testimony. 14

If the prosecution fails to subsequently offer sufficient evidence after a provisional admission of coconspirator statements, the statements may be stricken from the record, 15 with appropriate limiting instructions to the jury, 16 and in some cases a mistrial may be warranted. 17

The court's discretion in controlling the order of proof may be broader where the party seeks to introduce coconspirators' statements in a civil action. 18

Footnotes

Footnote 3. 75 Am Jur 2d, Trial § 354.

Footnote 4. *United States v Enright* (CA6 Mich) 579 F2d 980, 3 Fed Rules Evid Serv 284 (criticized on other grounds by *United States v Cassity* (CA6 Mich) 631 F2d 461); *United States v King* (CA9 Cal) 552 F2d 833, 41 ALR Fed 735, cert den 430 US 966, 52 L Ed 2d 357, 97 S Ct 1646.

Footnote 5. *United States v Vinson* (CA6 Ky) 606 F2d 149, 5 Fed Rules Evid Serv 1, cert den 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, reh den 445 US 972, 64 L Ed 2d 251, 100 S Ct 1668 and cert den 445 US 904, 63 L Ed 2d 319, 100 S Ct 1080.

Footnote 6. *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico) 678 F Supp 353, affd without op (CA1 Puerto Rico)

873 F2d 1433, post-conviction proceeding (CA1 Puerto Rico) 879 F2d 975, cert den 493 US 1082, 107 L Ed 2d 1045, 110 S Ct 1140, post-conviction proceeding (CA1) 1991 US App LEXIS 7103, post-conviction proceeding (DC Puerto Rico) 788 F Supp 667 and (among conflicting authorities on other grounds noted in *United States v Roberts* (CA1 Mass) 1992 US App LEXIS 20528) and (criticized on other grounds by *Liteky v United States* (US) 62 USLW 4161, 7 FLW Fed S 793); *United States v James* (CA5 Ga) 590 F2d 575, 3 Fed Rules Evid Serv 785, cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401) and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929) and (criticized on other grounds by *Llach v United States* (CA8 ND) 739 F2d 1322, 16 Fed Rules Evid Serv 428) and (criticized on other grounds by *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26) as stated in *United States v McCoy* (CA4) 1991 US App LEXIS 21743; *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906); *United States v Reda* (CA8 Iowa) 765 F2d 715, 18 Fed Rules Evid Serv 692; *United States v Macklin* (CA8 Mo) 573 F2d 1046, 3 Fed Rules Evid Serv 334, cert den 439 US 852, 58 L Ed 2d 157, 99 S Ct 160; *United States v White* (ND Cal) 13 Fed Rules Evid Serv 1173; *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 S Ct 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029, post-conviction proceeding (CA10 Colo) 975 F2d 706; *United States v Troutman* (CA10 NM) 814 F2d 1428, 22 Fed Rules Evid Serv 1020 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67.

Footnote 7. *United States v Miliet* (CA5 La) 804 F2d 853, 22 Fed Rules Evid Serv 35; *United States v Barker* (DC Colo) 623 F Supp 823.

Footnote 8. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681); *United States v Cambindo Valencia* (CA2 NY) 609 F2d 603, 4 Fed Rules Evid Serv 1197, 5 Fed Rules Evid Serv 570, cert den 446 US 940, 64 L Ed 2d 795, 100 S Ct 2163 and (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988); *United States v Borish* (ED Pa) 452 F Supp 518; *United States v Jackson* (CA4 NC) 757 F2d 1486, 17 Fed Rules Evid Serv 1406, cert den 474 US 994, 88 L Ed 2d 358, 106 S Ct 407; *United States v McCormick* (CA4 Va) 565 F2d 286, 2 Fed Rules Evid Serv 785, cert den 434 US 1021, 54 L Ed 2d 769, 98 S Ct 747; *United States v Ruiz* (CA5 Miss) 987 F2d 243, 38 Fed Rules Evid Serv 551, cert den (US) 126 L Ed 2d 123, 114 S Ct 163 (the court may admit the statement subject to being connected up); *United States v Christian* (CA6 Tenn) 786 F2d 203; *United States v Ramsey* (CA7 Ill) 785 F2d 184, 20 Fed Rules Evid Serv 58, cert den 476 US 1186, 91 L Ed 2d 552, 106 S Ct 2924 and post-conviction proceeding (ND Ill) 1988 US Dist LEXIS 11903, reconsideration den (ND Ill) 1989 US Dist LEXIS 5847 and affd (CA7) 1990 US App LEXIS 13800; *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906); *United States v Santiago* (CA7 Ill) 582 F2d 1128, 3 Fed Rules Evid Serv 1288 and

(disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Shoffner* (CA7 Ind) 826 F2d 619, 23 Fed Rules Evid Serv 977, cert den 484 US 958, 98 L Ed 2d 381, 108 S Ct 356, habeas corpus proceeding (CA7) 1991 US App LEXIS 3216; *United States v Reda* (CA8 Iowa) 765 F2d 715, 18 Fed Rules Evid Serv 692; *United States v Bell* (CA8 Ark) 651 F2d 1255; *United States v Reed* (CA9 Cal) 726 F2d 570, 15 Fed Rules Evid Serv 51 (criticized on other grounds by *United States v Beldin* (CA5 Tex) 737 F2d 450, 16 Fed Rules Evid Serv 557) and cert den 469 US 871, 83 L Ed 2d 151, 105 S Ct 221; *United States v Arbelaez* (CA9 Cal) 719 F2d 1453, 14 Fed Rules Evid Serv 973, cert den 467 US 1255, 82 L Ed 2d 847, 104 S Ct 3543, later proceeding (CA9 Cal) 812 F2d 530 and (criticized on other grounds by *United States v Balistrieri* (CA7 Wis) 779 F2d 1191); *United States v Di Rodio* (CA9 Cal) 565 F2d 573, 2 Fed Rules Evid Serv 843 (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988); *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 S Ct 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029, post-conviction proceeding (CA10 Colo) 975 F2d 706; *United States v Fernandez* (CA11 Fla) 797 F2d 943, 21 Fed Rules Evid Serv 557, cert den 483 US 1006, 97 L Ed 2d 736, 107 S Ct 3230, post-conviction proceeding (CA11 Fla) 941 F2d 1488.

The trial court may vary the order of proof and admit the declarations of coconspirators subject to the subsequent production of the independent proof of the conspiracy. *State v Lycett* (App) 133 Ariz 185, 650 P2d 487.

The trial judge may admit testimony by coconspirators before the conspiracy has been proved, provided that such existence is afterwards shown during trial. *Lee v State*, 204 Ga App 283, 418 SE2d 809, 92 Fulton County D R 714.

Where independent evidence (aside from the coconspirator statement) provides sufficient circumstantial evidence of conspiracy and that the defendant was an integral part of it, the non-hearsay evidence need not be introduced prior to admission of the coconspirator statement. *People v Melgoza* (1st Dist) 231 Ill App 3d 510, 172 Ill Dec 591, 595 NE2d 1261, app den 146 Ill 2d 643, 176 Ill Dec 813, 602 NE2d 467.

Annotation: Admissibility of statement by coconspirator under Rule 801(d)(2)(E) of Federal Rules of Evidence, 44 ALR Fed 627.

Practice References 20 Am Jur Trials 351, Handling the Defense in a Conspiracy Prosecution.

Footnote 9. *United States v Dago* (DC Colo) 813 F Supp 736.

Footnote 10. *State v Withers*, 111 NC App 340, 432 SE2d 692, review den 335 NC 180, 438 SE2d 207.

As to requirement by some states of establishment of a prima facie case of conspiracy, see § 848.

Footnote 11. *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 S Ct 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029, post-conviction proceeding (CA10 Colo) 975 F2d 706.

Footnote 12. *United States v Harenberg* (CA10 NM) 732 F2d 1507, 15 Fed Rules Evid Serv 1502 (criticized on other grounds by *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054).

Footnote 13. *United States v Steinmetz* (MD Pa) 643 F Supp 537, holding that the conditional admission of conversations between defendants and undercover agents, in an action arising from a scheme to obstruct collection of income tax by concealing the income of others, was appropriate, since the risk of any prejudice to the defendant was outweighed by the burden imposed on the government by not allowing the declarations to be admitted until proof of the conspiracy and participation therein was established.

Footnote 14. *Burgess v Premier Corp.* (CA9 Wash) 727 F2d 826, CCH Fed Secur L Rep ¶ 99699, 15 Fed Rules Evid Serv 241 (criticized on other grounds by William Z. Salcer, Panfeld, *Edelman v Envicon Equities Corp.* (CA2 NY) 744 F2d 935, CCH Fed Secur L Rep ¶ 91673).

Defense counsel must be vigilant and insist that the state carry its burden to provide the necessary independent evidence by objecting at the proper time; otherwise, the state's failure in this regard will be deemed waived by the defendant. *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166.

Footnote 15. *United States v Christian* (CA6 Tenn) 786 F2d 203 (criticized on other grounds by *United States v Shabani* (CA9 Alaska) 993 F2d 1419, 93 CDOS 3593, 93 Daily Journal DAR 6189); *United States v Coe* (CA7 Ill) 718 F2d 830, 14 Fed Rules Evid Serv 200; *United States v Weiner* (CA9 Cal) 578 F2d 757, CCH Fed Secur L Rep ¶ 96541, cert den 439 US 981, 58 L Ed 2d 651, 99 S Ct 568, reh den 439 US 1135, 59 L Ed 2d 98, 99 S Ct 1060 and (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Massa* (CA8 Mo) 740 F2d 629, 16 Fed Rules Evid Serv 339, cert den 471 US 1115, 86 L Ed 2d 258, 105 S Ct 2357.

Footnote 16. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Stanchich* (CA2 NY) 550 F2d 1294, 1 Fed Rules Evid Serv 575; *United States v Jackson* (CA4 NC) 757 F2d 1486, 17 Fed Rules Evid Serv 1406, cert den 474 US 994, 88 L Ed 2d 358, 106 S Ct 407; *United States v James* (CA5 Ga) 590 F2d 575, 3 Fed Rules Evid Serv 785, cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401) and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929) and (criticized on other grounds by *Llach v United States* (CA8 ND) 739 F2d 1322, 16 Fed Rules Evid Serv 428) and (criticized on other grounds by *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26) as stated in *United States v McCoy* (CA4) 1991 US App LEXIS 21743; *United States v Christian* (CA6 Tenn) 786 F2d 203 (criticized on other grounds by *United States v Shabani* (CA9 Alaska) 993 F2d 1419, 93 CDOS 3593, 93 Daily Journal DAR 6189); *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906); *United States v Bell* (CA8 Minn) 573 F2d 1040, 3 Fed Rules Evid Serv 302, 44

ALR Fed 617 (criticized on other grounds by *United States v Rosales-Lopez* (CA9 Cal) 617 F2d 1349) and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Campbell* (CA8 Ark) 845 F2d 782, 25 Fed Rules Evid Serv 508; *United States v Di Rodio* (CA9 Cal) 565 F2d 573, 2 Fed Rules Evid Serv 843 (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988).

Footnote 17. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681) and (criticized on other grounds by *United States v Lau* (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881); *United States v Stanchich* (CA2 NY) 550 F2d 1294, 1 Fed Rules Evid Serv 575; *United States v Jackson* (CA4 NC) 757 F2d 1486, 17 Fed Rules Evid Serv 1406, cert den 474 US 994, 88 L Ed 2d 358, 106 S Ct 407; *United States v James* (CA5 Ga) 590 F2d 575, 3 Fed Rules Evid Serv 785, cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and cert den 442 US 917, 61 L Ed 2d 283, 99 S Ct 2836 and (criticized on other grounds by *United States v Piccolo* (CA6 Mich) 696 F2d 1162, 12 Fed Rules Evid Serv 450) and (criticized on other grounds by *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849) and (criticized on other grounds by *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401) and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929) and (criticized on other grounds by *Llach v United States* (CA8 ND) 739 F2d 1322, 16 Fed Rules Evid Serv 428) and (criticized on other grounds by *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26) as stated in *United States v McCoy* (CA4) 1991 US App LEXIS 21743; *United States v Vinson* (CA6 Ky) 606 F2d 149, 5 Fed Rules Evid Serv 1, cert den 444 US 1074, 62 L Ed 2d 756, 100 S Ct 1020, reh den 445 US 972, 64 L Ed 2d 251, 100 S Ct 1668 and cert den 445 US 904, 63 L Ed 2d 319, 100 S Ct 1080; *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906).

Conviction of a corporation and several of the corporation's employees was reversed and a new trial ordered in a conspiracy action arising from the alleged conversion of grain owned or pledged to a government agency, since cautionary jury instructions were inadequate to cure the prejudice caused by the admission of certain declarations which the prosecution failed to prove by subsequent evidence were made by coconspirators, where the defense claimed that the grain transfer was an isolated and unintentional occurrence, and the hearsay testimony consisted of a declaration during an executive meeting by corporate counsel who stated the grain shipments violated federal law and the declaration of another corporate employee expressing an opinion that the grain shipments were illegal and that the use of grain belonging to others was a routine practice in the industry. *United States v American Grain & Related Industries* (CA8 Iowa) 763 F2d 312, 18 Fed Rules Evid Serv 730.

The prosecutor who claims that he or she will tie up the loose ends of the various pieces of independent evidence at a later point in the trial risks a mistrial if the court determines that independent evidence is lacking and a curative instruction is ineffectual. *Nelson v State* (Fla App D2) 602 So 2d 550, 17 FLW D 321, review den (Fla) 606 So 2d 1166.

Footnote 18. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; Paul

F. Newton & Co. v Texas Commerce Bank (CA5 Tex) 630 F2d 1111, CCH Fed Secur L Rep ¶ 97702, 7 Fed Rules Evid Serv 1080, reh den (CA5 Tex) 634 F2d 1355 and (criticized on other grounds by Buhler v Audio Leasing Corp. (CA9 Or) 807 F2d 833, CCH Fed Secur L Rep ¶ 93056).

§ 855 --Pretrial hearings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although there is some authority to the contrary, 19 pretrial hearings may be held to determine whether anticipated testimony and evidence will comply with the preliminary requirements for admission as coconspirator statements. 20 There is authority that there is no requirement that the trial court hold a pretrial hearing to determine the admissibility of coconspirator statements, although such hearings are acceptable. 21 Despite a pretrial hearing, the party-opponent may still move for reconsideration of the determination at the close of all the trial evidence. 22 Pretrial hearings have been held in instances, when—

—the evidence to establish the conspiracy is voluminous. 23

—the evidence being offered against the party consists primarily of out-of-court declarations by coconspirators, 24 although pretrial hearings have also been denied because the burden imposed on the prosecution in trying to prove a conspiracy without the use of the out-of-court declarations was greater than any potential prejudice due to inadmissible hearsay. 25

—the statements being offered are by individuals who were former conspirators before becoming informants, making it necessary to separate the statements made when the declarants were conspirators, and those made when the declarants became informants and thus inadmissible under the Federal Rule of Evidence coconspirator exception to the hearsay rule. 26

—out-of-court declarations by a party's defense counsel are sought to be admitted. 27

Although a recognized option, pretrial hearings are not constitutionally mandated, and the trial court may properly determine that such a hearing is unnecessary. 28 The determination of the admissibility of coconspirator statements is one that some courts consider can be generally handled competently in the context of a trial. 29 In deciding to forgo a pretrial hearing on the admissibility of coconspirator statements, the court is not required to make a finding that such a hearing would be impractical. 30 Requests for a pretrial hearing regarding the admission of coconspirator statements have been denied when such a hearing would be lengthy 31 or would result in a mini-trial. 32

It has been held that the Federal Rule of Criminal Procedure pertaining to the defendant's presence at certain proceedings 33 does not convey upon a criminal defendant the right to be present throughout the taking of testimony at a pretrial hearing for the

determination of the admissibility of coconspirator statements under the Federal Rules of Evidence, 34 and that the absence of the defendant from the hearing does not violate the defendant's rights under the Confrontation Clause of the Sixth Amendment of the Constitution. 35

Footnotes

Footnote 19. *United States v Wood* (CA8 Mo) 851 F2d 185, 26 Fed Rules Evid Serv 45, holding that procedural steps to be used when the admissibility of a coconspirator's statement is at issue have been set forth in the Eighth Circuit and since pretrial determination of the issue of conspiracy is not part of the procedure set forth, the magistrate properly denied a motion for a pretrial hearing.

Footnote 20. *United States v Levesque* (DC NH) 625 F Supp 428, affd without op (CA1 NH) 879 F2d 853; *United States v Valentine* (SD NY) 637 F Supp 196, 22 Fed Rules Evid Serv 201; *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3 NJ) 894 F2d 1402, motion gr, cert gr, in part 496 US 935, 110 L Ed 2d 660, 110 S Ct 3212, motion gr 498 US 805, 112 L Ed 2d 13, 111 S Ct 36 and motion gr 498 US 936, 112 L Ed 2d 303, 111 S Ct 338; *United States v Lujan* (CA5 Tex) 796 F2d 96; *United States v Conn* (CA7 Ill) 769 F2d 420, 20 Fed Rules Evid Serv 1190; *United States v Brown* (CA7 Ill) 739 F2d 1136, 15 Fed Rules Evid Serv 1005, cert den 469 US 933, 83 L Ed 2d 268, 105 S Ct 331, post-conviction proceeding (CA7 Ill) 840 F2d 375; *United States v Wolf* (CA10 Wyo) 839 F2d 1387, 24 Fed Rules Evid Serv 981, cert den 488 US 923, 102 L Ed 2d 323, 109 S Ct 304; *United States v Caldwell* (CA11 Ga) 771 F2d 1485, 19 Fed Rules Evid Serv 728.

Footnote 21. *United States v Dago* (DC Colo) 813 F Supp 736.

Footnote 22. *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906).

Footnote 23. *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906).

Footnote 24. *United States v Gomez* (CA10 Okla) 810 F2d 947, 22 Fed Rules Evid Serv 659, cert den 482 US 908, 96 L Ed 2d 379, 107 S Ct 2488.

Footnote 25. *United States v Steinmetz* (MD Pa) 643 F Supp 537.

Footnote 26. *United States v Dellacroce* (ED NY) 625 F Supp 1387, later proceeding (ED NY) 634 F Supp 877, affd (CA2 NY) 794 F2d 773.

Footnote 27. *United States v Valencia* (CA2 NY) 826 F2d 169, 23 Fed Rules Evid Serv 1005.

Footnote 28. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3 NJ) 894 F2d 1402, motion gr, cert gr, in part 496 US 935, 110 L Ed 2d 660, 110 S Ct 3212, motion gr 498 US 805, 112 L Ed 2d 13, 111 S Ct 36 and motion gr 498 US 936, 112 L Ed 2d 303, 111 S Ct 338; *United States v Ricks* (CA5 Ga) 639 F2d 1305, 7 Fed Rules Evid Serv 1760; *United States v Arbelaez* (CA9 Cal) 719 F2d 1453, 14 Fed Rules Evid Serv 973, cert den 467 US 1255, 82 L Ed 2d 847, 104 S Ct 3543, later proceeding (CA9 Cal) 812 F2d 530 and (criticized on other grounds by *United States v Balistrieri* (CA7 Wis) 779 F2d 1191).

The trial court did not abuse its discretion in failing to conduct a pretrial hearing to determine the existence of a conspiracy for the purpose of further determining the admissibility of certain incriminating statements pursuant to the coconspirator exception to the hearsay rule. *Cox v State* (Tex App El Paso) 843 SW2d 750, petition for discretionary review ref (May 5, 1993).

Footnote 29. *United States v Medina* (CA1 Puerto Rico) 761 F2d 12, 18 Fed Rules Evid Serv 314; *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico) 678 F Supp 353, affd without op (CA1 Puerto Rico) 873 F2d 1433, post-conviction proceeding (CA1 Puerto Rico) 879 F2d 975, cert den 493 US 1082, 107 L Ed 2d 1045, 110 S Ct 1140, post-conviction proceeding (CA1) 1991 US App LEXIS 7103, post-conviction proceeding (DC Puerto Rico) 788 F Supp 667 and (among conflicting authorities on other grounds noted in *United States v Roberts* (CA1 Mass) 1992 US App LEXIS 20528) and (criticized on other grounds by *Liteky v United States* (US) 62 USLW 4161, 7 FLW Fed S 793).

Footnote 30. *United States v Pepe* (CA11 Fla) 747 F2d 632, 17 Fed Rules Evid Serv 412.

Footnote 31. *United States v Panzardi-Alvarez* (DC Puerto Rico) 646 F Supp 1158, habeas corpus proceeding (DC Puerto Rico) 678 F Supp 353, affd without op (CA1 Puerto Rico) 873 F2d 1433, post-conviction proceeding (CA1 Puerto Rico) 879 F2d 975, cert den 493 US 1082, 107 L Ed 2d 1045, 110 S Ct 1140, post-conviction proceeding (CA1) 1991 US App LEXIS 7103, post-conviction proceeding (DC Puerto Rico) 788 F Supp 667 and (among conflicting authorities on other grounds noted in *United States v Roberts* (CA1 Mass) 1992 US App LEXIS 20528) and (criticized on other grounds by *Liteky v United States* (US) 62 USLW 4161, 7 FLW Fed S 793); *United States v Hernandez* (CA10 Colo) 829 F2d 988, 24 Fed Rules Evid Serv 67, cert den 485 US 1013, 99 L Ed 2d 714, 108 S Ct 1486, reh den 486 US 1039, 100 L Ed 2d 615, 108 S Ct 2029, post-conviction proceeding (CA10 Colo) 975 F2d 706 (pretrial hearing expected to last one week and would result in complicated and repetitive procedure given the number of witnesses required).

Footnote 32. *United States v Ammar* (CA3 Pa) 714 F2d 238, 13 Fed Rules Evid Serv 849, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344 and (criticized on other grounds by *United States v Chindawongse* (CA4 Md) 771 F2d 840, 19 Fed Rules Evid Serv 79) and (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Levy* (CA3 NJ) 865 F2d 551, 27 Fed Rules Evid Serv 474, appeal after remand (CA3

NJ) 894 F2d 1402, motion gr, cert gr, in part 496 US 935, 110 L Ed 2d 660, 110 S Ct 3212, motion gr 498 US 805, 112 L Ed 2d 13, 111 S Ct 36 and motion gr 498 US 936, 112 L Ed 2d 303, 111 S Ct 338.

Footnote 33. FR Crim P, Rule 43.

Footnote 34. FRE, Rule 801(d)(2)(E).

Footnote 35. *United States v Pepe* (CA11 Fla) 747 F2d 632, 17 Fed Rules Evid Serv 412, holding that, in a racketeering action brought for loan sharking, the defendant's absence due to a heart attack from a pretrial evidentiary hearing on the admissibility of coconspirator statements did not violate FR Crim P, Rule 43 or the Sixth Amendment, where only one witness was not viewed by the defendant, the defendant's counsel was present and conducted a cross-examination, and when the defendant was able to take part in the proceedings, the court granted the defendant another opportunity to cross-examine the witness.

As to confrontation of witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

Annotation: Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions, 23 ALR4th 955.

Defendant's right, under Rule 43 of Federal Rules of Criminal Procedure, to be present at federal criminal proceedings—Supreme Court cases, 84 L Ed 2d 976.

§ 856 Standard of review of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

On appeal, the court must view the evidence in the light most favorable to upholding the trial court's decision. 36 The court's determination regarding compliance with the prerequisites for admission under the coconspirator exception to the hearsay rule will not be disturbed on appeal unless the court's exercise of discretion is clearly erroneous. 37 Some courts state that the trial court's decision will not be disturbed so long as there is sufficient evidence to permit the trial court to reasonably infer that there existed a conspiracy. 38 In addition, even if the prerequisites are not satisfied and the coconspirator statements are improperly admitted against the nonoffering parties, the court may still consider the admission a harmless error upon review of the other evidence, 39 particularly where there is overwhelming evidence of the defendant's guilt. 40 However, it is possible that an appellate court will remand an action for an explicit finding as to compliance with the preliminary facts needed for the admission of coconspirator statements under the Federal Rule of Evidence coconspirator exception to the hearsay rule 41 where the trial court has failed to make the requisite finding in admitting such evidence, instead of reversing the judgment due to the judge's failure to

make a determination of admissibility in a situation where it would be considered a reversible error if there was insufficient evidence of the preliminary facts. 42

◆ Caution: Although the introduction of inadmissible hearsay may constitute harmless error because the evidence is cumulative to other evidence properly admitted, it does not automatically mean that the error is harmless regarding the constitutional right to confrontation of witnesses nor does it mean that the inadmissible hearsay automatically assumes constitutional proportions. 43

§ 856 ----Standard of review of evidence [SUPPLEMENT]

Case authorities:

Substantial evidence showed that defendants were members of cocaine distribution conspiracy; therefore, coconspirator's statements about their role in conspiracy were properly admitted under coconspirator exception to hearsay rule; one witness testified that one defendant was declarant's right-hand man, member of special group which developed around declarant when another gang that distributed cocaine began losing strength, and that two defendants delivered drugs and picked up money for declarant, and other witnesses testified that third defendant participated in drug transactions connected to declarant. *United States v Stephenson* (1995, CA7 Ill) 53 F3d 836.

There was no prejudicial error in a prosecution for murder and multiple assaults where the trial court admitted testimony from one witness that two of the victims had come to her door with one of them saying "Tari has assassinated Tyrone" and testimony from another witness that the same victim had awakened him in the early morning hours and told him that "[H]e was running away from the scene of the shooting, as he was running away, he could see out of the corner of his eye. [Defendants] was shooting, both of them." Assuming that these out-of-court statements were inadmissible hearsay because they went so far beyond the witness' in-court testimony as not to be corroborative, there was no prejudice because the other evidence established clearly and overwhelmingly that either defendant Cureton or defendant Abraham, acting in concert with the other, shot and killed one victim as he attempted to flee. There is no possibility that a different result would have occurred at trial had the complained-of evidence not been admitted. *State v Abraham* (1994) 338 NC 315, 451 SE2d 131.

Footnotes

Footnote 36. *Toney v State* (Alaska App) 833 P2d 15.

Footnote 37. *Earle v Benoit* (CA1 Mass) 850 F2d 836, 26 Fed Rules Evid Serv 231; *United States v Blevins* (CA4 Va) 960 F2d 1252, 35 Fed Rules Evid Serv 185; *United States v Miliet* (CA5 La) 804 F2d 853, 22 Fed Rules Evid Serv 35; *United States v Garner* (CA7 Ill) 837 F2d 1404, 24 Fed Rules Evid Serv 476, cert den 486 US 1035, 100 L Ed 2d 608, 108 S Ct 2022 and cert den 487 US 1240, 101 L Ed 2d 945, 108 S Ct 2914 and cert den 488 US 898, 102 L Ed 2d 232, 109 S Ct 244 and (disapproved on other grounds by *Reves v Ernst & Young* (US) 122 L Ed 2d 525, 113 S Ct 1163, 93 CDOS 1494, 93 Daily Journal DAR 2750, CCH Fed Secur L Rep ¶ 97357, RICO Bus Disp Guide (CCH) ¶ 8227, 7 FLW Fed S 41) as stated in *United States v Quintanilla*

(CA7 Ill) 2 F3d 1469; *United States v Andrus* (CA7 Ill) 775 F2d 825, 19 Fed Rules Evid Serv 296 (criticized on other grounds by *United States v Sagaribay* (CA5 Tex) 982 F2d 906); *United States v Womochil* (CA8 Neb) 778 F2d 1311; *United States v Andersson* (CA9 Cal) 813 F2d 1450, 22 Fed Rules Evid Serv 1391 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Dozier* (CA9 Cal) 826 F2d 866, op withdrawn, substituted op (CA9 Cal) 844 F2d 701, cert den 488 US 927, 102 L Ed 2d 331, 109 S Ct 312; *United States v Smith* (CA9 Hawaii) 790 F2d 789, 20 Fed Rules Evid Serv 1018; *United States v Perez* (CA11 Fla) 824 F2d 1567, 23 Fed Rules Evid Serv 1241.

To obtain a reversal of the finding of fact that there was sufficient independent evidence to establish that the declarant and the defendant conspired to engage in criminal activities, the trial court judge's conclusion must be clearly erroneous. *Toney v State* (Alaska App) 833 P2d 15.

A trial court's determination as to the admissibility of evidence, as to whether the state has made a prima facie showing of a conspiracy and whether a defendant has sufficiently proven withdrawal so as to make his coconspirators' statements admissible or inadmissible will not be overturned absent clear error. *State v Lobato* (La) 603 So 2d 739, appeal after remand (La App 2d Cir) 621 So 2d 103.

But see *United States v Machor* (CA1 Puerto Rico) 879 F2d 945, 28 Fed Rules Evid Serv 705, cert den 493 US 1081, 107 L Ed 2d 1043, 110 S Ct 1138 and cert den 493 US 1094, 107 L Ed 2d 1070, 110 S Ct 1167, holding that where the appeals court cannot determine whether the preponderance standard has been met or feels that the trial court did not properly consider the issue, the case may be remanded.

Footnote 38. *State v Hoffman*, 123 Idaho 638, 851 P2d 934, petition for certiorari filed (Aug 24, 1993).

Footnote 39. *Hanrahan v Thieret* (CA7 Ill) 933 F2d 1328, reh, en banc, den (CA7) 1991 US App LEXIS 14358 and reh, en banc, den (CA7) 1991 US App LEXIS 18381 and cert den (US) 116 L Ed 2d 464, 112 S Ct 446 (statements did not contribute to convictions); *United States v Machado* (CA11 Fla) 804 F2d 1537, 22 Fed Rules Evid Serv 145; *Hope v State*, 164 Ga App 665, 297 SE2d 88 (statement made during booking); *People v Moman* (1st Dist) 201 Ill App 3d 293, 146 Ill Dec 897, 558 NE2d 1231; *State v Capitan*, 8 Or App 582, 494 P2d 443 (statements made after conspiracy had ended); *Commonwealth v Evans*, 489 Pa 85, 413 A2d 1025 (statements made after termination of conspiracy); *State v Chavez* (Utah App) 840 P2d 846, 198 Utah Adv Rep 52, cert den (Utah) 857 P2d 948 (debatable whether the statement furthered the conspiracy, but before court would upset the verdict the defendant had to demonstrate that the evidence was so prejudicial that there was a reasonable likelihood of a more favorable result for the defendant in its absence).

Where there was evidence that corroborated defendant's admissions and confessions, and the defendant made no statement during the murder trial and offered no defense except testimony purporting to show that he was insane at the time of the commission of the crimes, even if the confessions of coconspirators were not properly admitted, their admission was harmless error. *Morgan v State*, 231 Ga 280, 201 SE2d 468.

The fact that evidence of a coconspirator's statement was admitted against the defendant

under an erroneous instruction did not require a new trial where the statement did not differ materially from the defendant's testimony on trial. *State v Jaeger* (Mo) 394 SW2d 347.

In the case of coconspirator statements, error in the admission of evidence was rendered harmless since other evidence at trial was admitted without objection which proved the same fact that the inadmissible evidence sought to prove. *Re of K. P. S.* (Tex App Corpus Christi) 840 SW2d 706.

Footnote 40. *People v Glenn* (4th Dept) 185 App Div 2d 84, 592 NYS2d 175.

Footnote 41. FRE, Rule 801(d)(2)(E).

Footnote 42. *United States v Mahar* (CA6 Mich) 801 F2d 1477, 21 Fed Rules Evid Serv 832.

Footnote 43. *United States v Weinstein* (CA11 Fla) 762 F2d 1522, 18 Fed Rules Evid Serv 757, mod, reh den, in part (CA11 Fla) 778 F2d 673, cert den 475 US 1110, 89 L Ed 2d 917, 106 S Ct 1519 and (among conflicting authorities on other grounds noted in *United Energy Owners Committee, Inc. v United States Energy Management Systems, Inc.* (CA9 Cal) 837 F2d 356, 10 FR Serv 3d 253) and (among conflicting authorities on other grounds noted in *United States v Feldman* (CA9 Cal) 853 F2d 648) and (among conflicting authorities on other grounds noted in *Fleischhauer v Feltner* (CA6 Ohio) 879 F2d 1290) and (criticized by on other grounds *McNeil v Salan* (CA6) 1992 US App LEXIS 11476).

As to confrontation of witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 720-731, 956-966.

6. Competency or Capacity of Person Making Statement [857-859]

§ 857 Mental or physical condition

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where there is evidence to show that a person making an admission was at the time in such a mental or physical condition as not to be able to recollect and to voluntarily state the facts, the probative value and weight of the admission is for the trier of fact. 44 Admissions of an insane person may be shown for what they are worth, although they are not binding on the declarant. 45 However, it has also been held that a statement made by a person of unsound mind should be rejected when offered in evidence against such person for any purpose other than to show that he or she is insane. 46

Statements which are pre-incapacitation admissions of a plaintiff may be properly admitted. 47

Footnotes

Footnote 44. *Aide v Taylor*, 214 Minn 212, 7 NW2d 757, 145 ALR 530; *Johnson v Southern R. Co.*, 351 Mo 1110, 175 SW2d 802.

Annotation: Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 ALR4th 802.

Footnote 45. *Deposit Guaranty Bank & Trust Co. v Nelson*, 212 Miss 335, 54 So 2d 476.

Footnote 46. *Hoffman v Overbey*, 137 US 465, 34 L Ed 754, 11 S Ct 157.

Footnote 47. *Gusky v Candler General Hosp., Inc.*, 202 Ga App 837, 415 SE2d 541, 103-43 Fulton County D R 19.

§ 858 --Injury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A number of jurisdictions have enacted statutes which limit the admissibility or effect of statements given or made by an injured party near the time of the injury, when offered in evidence against such party in an action based upon the party's injuries. 48 "Injured party," for purposes of some statutes, may not include the defendant in an action, even though the defendant was injured in an action which was the basis of the suit. 49 Such statutes may only apply to actions to recover damages for personal injuries and not in actions to recover property damage. 50 However, such statutes have been held to extend to statements given by an injured person of his or her own accord, and not merely to one given at the request of the other party. 51 Nevertheless, statements made to an investigating officer at the scene of an accident may not be excluded since the statute is not applicable to police officers who lack an interest in the outcome of the case. 52

Under such statutes, an ex parte statement, voluntarily made by an injured party, cannot be used even if the injured party's adversary might be dependent upon it to establish nonliability. 53 The purpose of such statutes is to protect claimants against the extortion of damaging admissions, by defendants or their representatives, the statutes do not affect statements which are shown to have been made voluntarily to persons other than the defendants or their agents. 54

Footnotes

Footnote 48. *Fendrick v Faeges* (Fla App D3) 117 So 2d 858, cert den (Fla) 123 So 2d 350.

Statements taken by the party adverse to the plaintiff, an injured employee, while he was under a doctor's care and within fifteen days of the accident, which were made available

to counsel for defendant employer for use as evidence in an injury trial, were inadmissible in a FELA action against the employer for a work-connected injury, where the state statute prohibited such use. *Marlow v Atchison, T. & S. F. R. Co.* (Colo App) 671 P2d 438.

Some statutes provide that statements taken within a certain number of days of the accident are presumably fraudulent. *Hillesheim v Stippel*, 283 Minn 59, 166 NW2d 325.

Annotation: Constitutionality, construction, and effect of legislation forbidding or limiting the use, as evidence, of statement secured from an injured person, 22 ALR2d 1269.

Footnote 49. *Edeler v O'Brien*, 38 Wis 2d 691, 158 NW2d 301.

Footnote 50. *Lombardo v Simko*, 3 Conn Cir 363, 214 A2d 911, certif dismd 153 Conn 724, 213 A2d 526.

Footnote 51. *Spellman v Metropolitan Transit Authority*, 328 Mass 446, 104 NE2d 493.

Footnote 52. *Hack v State Farm Mut. Auto. Ins. Co.*, 37 Wis 2d 1, 154 NW2d 320.

Footnote 53. *Public Finance Corp. v Londeree*, 200 Va 607, 106 SE2d 760.

Footnote 54. *Sprader v Mueller*, 269 Minn 25, 130 NW2d 147; *Musha v United States Fidelity & Guaranty Co.*, 10 Wis 2d 176, 102 NW2d 243 (holding that a statement made to a policeman investigating the accident was not barred by a statute excluding statements made within 72 hours of an accident).

§ 859 Infancy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, although a child who does not understand the obligation of an oath may be excluded from testifying in court, when a child becomes a party to a suit, the same kinds of evidence, including admissions and declarations, are received against the child as are received against an adult, 55 subject to the limitation that his or her admissions cannot be given the effect of imposing a contractual liability upon him or her which the law permits an infant to avoid. 56 In addition, in a number of cases, it has been held that a child's out-of-court admissions against interest are admissible. 57 However, some cases hold that only a minor who has reached the age of discretion can make an admission against interest. 58

Nevertheless, the admissions and declarations of a child are to be received with caution, and the weight and effect of such admissions and declarations are to be determined by the trier of fact, after due consideration of the child's age and understanding and all the facts and circumstances in the case. 59

Although some authorities seem to favor applying the same criteria to the admissibility of a declaration of a child as those which apply to his or her testimonial qualifications as a witness, this does not necessarily mean that disqualification to testify is fatal to the admissibility of the declaration. 60 It is one thing for the child-declarant to have had the capacity to make a trustworthy statement about something he or she had just experienced or seen occur, and another to be able to testify reliably in court as a witness as to what occurred a number of years previously, to withstand cross-examination thereon, and to appreciate the obligation of an oath. 61 In each case admissibility is for the sound discretionary judgment of the trial court. 62

Footnotes

Footnote 55. *Hardman v Helene Curtis Industries, Inc.* (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033; *Smith v Illinois C. R. Co.*, 214 Miss 293, 58 So 2d 812.

In an action for personal injuries arising out of an automobile accident, although the infant plaintiff was incompetent to testify at examination before trial, the father of the infant could testify in regard to an admission made by the infant to the father. *Berggren v Reilly*, 95 Misc 2d 486, 407 NYS2d 960.

As to admissions by a party-opponent, generally, see § 760.

Competency of children to testify is discussed in 81 Am Jur 2d, Witnesses §§ 210 et seq.

Annotation: Admissibility as evidence in civil cases of admissions by infants, 12 ALR3d 1051.

Footnote 56. *Smith v Illinois C. R. Co.*, 214 Miss 293, 58 So 2d 812.

As to a child's right to avoid contracts, see 42 Am Jur 2d, Infants §§ 58 et seq.

Footnote 57. *Shell v Parrish* (CA6 Tenn) 448 F2d 528 (applying Tennessee law); *Hardman v Helene Curtis Industries, Inc.* (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033; *Rolfe v Olson*, 87 NJ Super 242, 208 A2d 817; *Musha v United States Fidelity & Guaranty Co.*, 10 Wis 2d 176, 102 NW2d 243.

But see *Ellis v Allstate Ins. Co.* (4th Dept) 97 App Div 2d 970, 468 NYS2d 776, stating that, in an action against a minor and others, the minor's hearsay statement was improperly admitted by the trial court where such statement was not admissible as an admission against interest in that it was not established that the declarant was unavailable or that, when the declarant made the statement, he knew it was against his interest, and where, although the statement would have been admissible as an admission by a party if offered against the minor, the statement was offered as evidence against a coparty. *Ellis v Allstate Ins. Co.* (4th Dept) 97 App Div 2d 970, 468 NYS2d 776.

As to statements against interest, generally, see §§ 785 et seq.

Footnote 58. *Orr v State Farm Mut. Auto. Ins. Co.* (Mo) 494 SW2d 295.

Footnote 59. *F. H. Sammons Coal Co. v Stamper* (Ky) 356 SW2d 35; *Smith v Illinois C.*

R. Co., 214 Miss 293, 58 So 2d 812; Berggren v Reilly, 95 Misc 2d 486, 407 NYS2d 960.

Footnote 60. Rolfe v Olson, 87 NJ Super 242, 208 A2d 817.

As to competency of children as witnesses, see 81 Am Jur 2d, Witnesses §§ 210 et seq.

Footnote 61. Rolfe v Olson, 87 NJ Super 242, 208 A2d 817.

Footnote 62. Rolfe v Olson, 87 NJ Super 242, 208 A2d 817.

D. Spontaneous Statements and Other Actions Illustrative of Principal Fact; Res Gestae [860-889]

Research References

28 USCS Appendix, FR Evid, Rule 803(1)-(4)

ALR Digests: Evidence §§ 1031 et seq., 1031-1109, 1118, 1123

ALR Index: Evidence; Evidence Rules; Hearsay; Res Gestae

7 Am Jur POF2d 605, Election to Take Under Will § 4; 22 Am Jur POF2d 225, Defective or Improperly Operated Taillights § 6; 22 Am Jur POF2d 173, Defective or Improperly Operated Headlights § 8; 27 Am Jur POF2d 1, Point of Origin of Fire: Improperly Installed or Maintained Heating Appliance § 10; 28 Am Jur POF2d 167, Slip and Fall Due to Foreign Substance on Floor § 15; 33 Am Jur POF2d 211, Privileged Use of Force in Self-Defense § 9; 42 Am Jur POF2d 1, Negligence of Pedestrian Struck by Motor Vehicle § 1, 11, 32; 1 Am Jur POF3d 613, Assault and Battery § 6; 1 Am Jur POF3d 197, Recovery for Severe Burn Injuries § 35

5 Am Jur Trials 921, Showing Pain and Suffering § 59; 6 Am Jur Trials 112, Basis of Medical Testimony § 47; 10 Am Jur Trials 493, Divider Line Automobile Accident Cases, §§ 33, 35, 37; 14 Am Jur Trials 101, Glass Door Accidents § 62; 19 Am Jur Trials 123, Defense on Charge of Driving While Intoxicated § 55; 20 Am Jur Trials 441, Motion in Limine Practice § 44

1. Overview [860-869]

§ 860 Res gestae, generally; definition

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Broadly speaking, the term "res gestae"—from the Latin meaning "things done"—includes circumstances, facts, and declarations incidental to the main fact or transaction, and necessary to illustrate its character, and acts, words, and declarations which are so closely connected to the main fact or transaction as to constitute a part of it. 63 As defined by a state statute, res gestae declarations have been characterized as those declarations accompanying an act, or so nearly connected in time to such act as to be free from all

suspicion of device or afterthought. The term "res gestae" refers to declarations which (1) obviously spring out of the transaction; (2) tend to elucidate it; (3) are not suspected or extracted and thus are spontaneous and voluntary; and (4) are made at a time and under circumstances precluding any suggestion of deliberate design. 64

There are two separate and distinguishable contexts in which the term res gestae is used to refer to admissible evidence. 65 Frequently, the term res gestae refers to excited utterances or other spontaneous statements excepted from the rule against hearsay. 66 Apart from spontaneous statements, the term also is applied to statements and acts contemporaneous with an incident in question. 67 Contemporaneous res gestae statements of this type are not hearsay because they are not offered to prove the truth of the assertions contained therein, but rather for the purpose of completing the story of the incident and its immediate context. 68

While the concepts that traditionally were labeled as res gestae are still present in the law of evidence, the phrase itself is no longer recognized in many jurisdictions; 69 statements and acts formerly admitted under the res gestae doctrine are now described and rendered admissible by separate specific evidence rules. 70

§ 860 ----Res gestae, generally; definition [SUPPLEMENT]

Practice Aids: Compromising the hearsay rule: The fallacy of res gestae reliability, 29 Loyola LR (LA) 1:203 (1995).

The death of res gestae and other developments in Missouri hearsay law, 60 Mo LR 4:991 (1995).

Case authorities:

Spontaneous descriptions of events made substantially contemporaneously with observations (present sense impressions) are admissible as exception to hearsay rule if descriptions are sufficiently corroborated by other evidence; further, such statements may be admitted even though declarant is not participant in events and is unidentified bystander. *People v Brown* (1993) 80 NY2d 729, 594 NYS2d 696, 610 NE2d 369.

Footnotes

Footnote 63. *State v Carpenter* (Tenn Crim) 773 SW2d 1 (disapproved on other grounds by *State v Jacumin* (Tenn) 778 SW2d 430).

Res gestae are events speaking for themselves through the instinctive words and acts of the participants, rather than the words and acts of participants when narrating the events. What is done or said by the participants under the immediate spur of a transaction becomes part of the transaction, because it is the transaction that thus speaks. *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844.

Footnote 64. *Lee v Peacock*, 199 Ga App 192, 404 SE2d 473, 102-71 Fulton County D R 17B.

For a discussion of modern hearsay exceptions stemming from the res gestae exception to the hearsay rule, see §§ 864-867.

Footnote 65. *Riley v State* (Ind) 506 NE2d 476.

Footnote 66. § 861.

Footnote 67. § 862.

Footnote 68. § 862.

Footnote 69. *Kellman v Twin Orchard Country Club* (1st Dist) 202 Ill App 3d 968, 148 Ill Dec 291, 560 NE2d 888, app den 136 Ill 2d 544, 153 Ill Dec 374, 567 NE2d 332 and (criticized on other grounds by *Darrough v Glendale Heights Community Hosp.* (2d Dist) 234 Ill App 3d 1055, 175 Ill Dec 790, 600 NE2d 1248); *Horton v State* (Wyo) 764 P2d 674.

Law Reviews: *The Res Gestae Doctrine: Manifestations in the Common Law of Alabama and its Role under the Federal Rules of Evidence.* 42 Ala L Rev 1363 (Spring, 1991).

Footnote 70. *Buckbee v United Gas Pipe Line Co.* (La) 561 So 2d 76, on remand (La App 3d Cir) 587 So 2d 79, revd on other grounds, remanded (La) 614 So 2d 1233, on remand, motion den (La App 3d Cir) 626 So 2d 1190 and on remand (La App 3d Cir) 1993 La App LEXIS 2089, on reh, reh den, in part (La App 3d Cir) 626 So 2d 1191, cert den (La) 631 So 2d 1162 and ops combined at (La App 3d Cir) 626 So 2d 1191.

To speak accurately, there is no "res gestae exception" to the hearsay rule. The "res gestae exception" is in fact a catch-all exception that embraces several distinct, although sometimes overlapping exceptions. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

The "res gestae exception" to the hearsay rule has become a collective reference to a number of separately identifiable exceptions, the common denominator of which is that the declarant uttered the statement spontaneously and without deliberation. *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844.

Law Reviews: *Bates, Distilling the Res Gestae*, 30 Crim L Q 276 (June 1988).

§ 861 --As exception to hearsay rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The doctrine of res gestae, although abandoned by the legislatures and courts of many states, 71 retains vitality in a few states as a theory for the introduction of otherwise inadmissible hearsay. 72 Where still applicable, res gestae, as an exception to the

hearsay rule, refers to spontaneous or excited utterances. 73 Under modern law, there are at least four distinct exceptions to the hearsay rule encompassed by the term "res gestae": (1) declarations of present bodily condition, including statements made to physicians; (2) declarations of present mental state and emotion; 74 (3) excited utterances; 75 and (4) declarations of present sense impressions. 76 Nevertheless, some courts continue to refer to the "res gestae exception," sometimes without explaining which of the distinct exceptions in question is meant, and other times using the term interchangeably with the excited utterance exception. 77 Some courts have declared that the term "res gestae" should be eliminated from the language of the law of evidence because it is no longer useful and tends only to confuse the reasoning with respect to why a given hearsay statement should be admissible. 78

The Federal Rules of Evidence, upon which many states have patterned their rules of evidence, make no mention of res gestae, 79 but do contain hearsay exceptions for statements of present sense impression, 80 excited utterances, 81 statements of present mental or physical condition, 82 and statements for purposes of medical diagnosis or treatment. 83

§ 861 --As exception to hearsay rule [SUPPLEMENT]

Case authorities:

In prosecution of owner and manager of night club on charges of promoting prostitution and promoting obscenity, testimony by Alcohol Beverage Control agent regarding prior uncharged sexual acts by topless female dancers was properly admitted as prior crimes evidence under res gestae exception, and to contradict owner's contention that he did not know about illegal acts, by showing that he was present and had knowledge of wrongdoing, and where uncharged acts tended to show defendant's motive, opportunity, identity, and intent to gain monetarily by dancers' conduct. *State v McGraw* (1994) 19 Kan App 2d 1001, 879 P2d 1147.

Footnotes

Footnote 71. § 860.

Footnote 72. See, for example, *Krivijanski v Union R. Co.*, 357 Pa Super 196, 515 A2d 933, holding that a statement made by an accident victim to a police officer was properly admitted as part of the res gestae exception to the hearsay rule, where (1) the police officer spoke with the victim at the hospital approximately 2 hours after the accident; (2) the officer asked the victim what had happened to him and the victim replied that he had "hit the cable"; and (3) the serious nature of the victim's injuries and his physical condition at the time precluded the possibility of the statement being a self-serving remark based on reflective thought.

As to hearsay, generally, see §§ 658 et seq.

Footnote 73. *Riley v State* (Ind) 506 NE2d 476.

For general discussion of excited utterances as excepted from the hearsay rule, under

modern law, see § 865.

Footnote 74. As to statements of present mental, emotional, or physical condition as a modern hearsay exception derived from the res gestae exception, generally, see § 866.

Footnote 75. § 865.

Footnote 76. *Wabisky v D. C. Transit System, Inc.*, 114 US App DC 22, 309 F2d 317; *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426; *State v Carpenter* (Tenn Crim) 773 SW2d 1 (disapproved on other grounds by *State v Jacumin* (Tenn) 778 SW2d 430); *Horton v State* (Wyo) 764 P2d 674.

The term "res gestae" has been used in determining the admissibility of declarations of mental state, declarations of bodily condition, admissions by parties, various classes of spontaneous exclamations, and other kinds of evidence. *Dallas v Donovan* (Tex App Dallas) 768 SW2d 905.

For a discussion of statements of present sense impressions as a modern hearsay exception derived from the res gestae exception to the hearsay rule, see § 864.

Footnote 77. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

◆ Observation: In some jurisdictions, the res gestae exception to the hearsay rule is also known as the "spontaneous exclamation exception." *Madison v Ray* (Ala) 538 So 2d 10.

Footnote 78. *Horton v State* (Wyo) 764 P2d 674.

"Res gestae" has been condemned as a Latin phrase to serve as a substitute for reasoning; as an expression that gives lawyers and judges relief at a pinch; and as a password for the admission of otherwise inadmissible evidence. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

Footnote 79. FR Evid, Rule 803.

Footnote 80. § 864.

Footnote 81. § 865.

Footnote 82. § 866.

Footnote 83. § 867.

§ 862 --As theory permitting introduction of incidental or contemporaneous acts, circumstances, and statements

[View Entire Section](#)

Although the term "res gestae" has fallen out of favor as a password for the admittance of hearsay testimony, 84 it retains validity in many states as a term describing acts and circumstances admitted into evidence because of their ability to shed light on a principal fact at issue, usually the commission of a crime. 85 In this regard, separate and apart from excited utterances, 86 the term "res gestae" has also been applied to statements and conduct contemporaneous with an incident in question. 87 For example, the motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act, and such statements—also known as "verbal acts"—are admissible in evidence with the remainder of the transaction which they illustrate. 88

Contemporaneous res gestae statements of this type are not hearsay because they are not offered to prove the truth of the assertions contained therein, but rather for the purpose of completing the story of the incident and its immediate context. 89 Thus, under the doctrine of res gestae, the prosecution is allowed sufficient latitude to elicit relevant testimony of the facts and circumstances surrounding a charged offense. 90 Acts performed before, 91 during, 92 or after the principal event may be admitted as part of the res gestae. 93

The typical objection to the introduction of evidence of incidental acts and circumstances is that it violates the prohibition on introducing evidence of other crimes, wrongs, or acts to prove the character of a person, in order to show that such person later acted in conformity therewith. 94 In many jurisdictions, however, evidence of other crimes, wrongs or "bad acts" of an accused is admissible when such evidence is introduced as part of the res gestae of the crime, despite the fact that it may incidentally suggest that the accused acted in conformity with his prior crimes or wrongs. 95 This exception, known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception, 96 exists to help the factfinder understand the context in which the alleged crime occurred. 97 Thus, for example, evidence of the use of force, threats, and assaults occurring contemporaneously with the charged crime of kidnapping is part of the res gestae of the offense of kidnapping and is admissible as evidence against an accused. 98 Similarly, evidence that a fight was about to occur at the time of the defendant's arrest for possession of metallic knuckles is properly admitted as part of the res gestae of the charged offense. 99 And where evidence of an accused's marijuana possession serves the purpose of establishing the chain of circumstances leading up to his arrest for possession of LSD, such evidence is admissible because it is probative of more than just the accused's propensity to possess illegal drugs. 1

Footnotes

Footnote 84. § 860.

Footnote 85. *Atkinson v State* (Ind) 581 NE2d 1247, stating that evidence of happenings near in time and place which complete the story of a crime is admissible under the theory of res gestae.

The res gestae is not confined to the act charged, but includes acts, statements, occurrences, and circumstances which are substantially contemporaneous with the main fact. *Moore v State* (Ind) 515 NE2d 1099.

Evidence tending to establish the context or chain of circumstances of a crime is to be distinguished from the hearsay *res gestae* category of evidence. *State v Agee*, 326 NC 542, 391 SE2d 171.

Footnote 86. As to excited utterances, generally, see § 865.

Footnote 87. *Riley v State* (Ind) 506 NE2d 476.

Footnote 88. § 863.

Footnote 89. *Riley v State* (Ind) 506 NE2d 476.

Footnote 90. *Rushing v State* (Tex App Houston (14th Dist)) 813 SW2d 646, petition for discretionary review ref (Oct 2, 1991), holding that it was not improper for a prosecutor, during the penalty phase of murder prosecution, to comment on the defendant's drug use.

Footnote 91. *Fitzgerald v State*, 201 Ga App 361, 411 SE2d 102, 102-200 Fulton County D R 15B, holding that the trial court did not err in concluding that the entire contents of a videotape were admissible as part of the *res gestae* of the defendant's attempt to film underneath a woman's dress.

Footnote 92. *Pope v State* (Ala App) 586 So 2d 1003, holding that the presence of a young child in the defendant's lap at the time he allegedly committed an assault was admissible as part of the *res gestae* of the offense.

Footnote 93. *Byrd v State* (Fla App D5) 503 So 2d 451, 12 FLW 698 (holding that evidence of violence occurring after a completed robbery, when the victim attempted to retake his property or to apprehend the defendant, while not relevant of the proof of the elements of the robbery charge itself, may nevertheless be admissible as part of the *res gestae*); *State v Dunn*, 249 Kan 488, 820 P2d 412.

Practice References 1 Am Jur POF3d 613, Assault and Battery § 6.

Acts related in time to crime charged but not to elements thereof, 20 Am Jur Trials 441, Motion in Limine Practice § 44.

Footnote 94. See, for example, *Latham v State*, 195 Ga App 355, 393 SE2d 498, holding that evidence of drug use by the accused in a murder trial was admissible as part of the *res gestae* even though it incidentally put the accused's character in issue.

For discussion of the rules concerning admission of other crimes, wrongs, or acts in a criminal prosecution, see §§ 405 et seq.

Footnote 95. *King v State* (Ala App) 595 So 2d 539; *People v Lindsey* (Colo App) 805 P2d 1134, cert den (Colo) 1991 Colo LEXIS 137 and (disapproved on other grounds by *People v Milton* (Colo) 864 P2d 1097); *Erickson v State* (Fla App D4) 565 So 2d 328, 15 FLW D 1579, review den (Fla) 576 So 2d 286 (holding that testimony concerning the defendant's touching of a child's private parts was admissible under "inseparable crime evidence" exception to rule banning evidence of other offenses because the act was inseparably linked in time and circumstances to the evidence of the defendant's acts upon

the victim in the instant case); *Byrd v State* (Fla App D5) 503 So 2d 451, 12 FLW 698; *Miller v State*, 202 Ga App 745, 415 SE2d 701, 103-38 Fulton County D R 25; *People v Brown* (1st Dist) 199 Ill App 3d 860, 145 Ill Dec 841, 557 NE2d 611, app den 133 Ill 2d 561, 149 Ill Dec 326, 561 NE2d 696 (holding that evidence of a defendant's abuse of one child could be admitted as *res gestae* of the offense of child abuse against another, despite general prohibition on wrongful acts evidence, where the wrongful acts committed against the one child were but part of the general course of conduct in which he engaged against two others at the same place and over the same period); *Atkinson v State* (Ind) 581 NE2d 1247; *State v Prater* (La App 3d Cir) 583 So 2d 520; *People v Arnold*, 181 Mich App 140, 449 NW2d 423, later proceeding (Mich) 1990 Mich LEXIS 204 and vacated on other grounds 437 Mich 901, 465 NW2d 560; *Wade v State* (Miss) 583 So 2d 965; *State v Henderson* (Mo App) 826 SW2d 371; *State v Ortiz*, 253 NJ Super 239, 601 A2d 735, cert den 130 NJ 6, 611 A2d 646 (holding that statute barring introduction of similar crimes evidence does not apply if the evidence with respect to the defendant's conduct is part of the total criminal event on the same occasion and therefore part of the *res gestae* of the crimes); *People v Charles*, 137 Misc 2d 111, 519 NYS2d 921, mod (2d Dept) 162 App Div 2d 460, 556 NYS2d 396, app gr 76 NY2d 938, 563 NYS2d 68, 564 NE2d 678 and revd on other grounds 78 NY2d 1044, 576 NYS2d 81, 581 NE2d 1336; *Duvall v State* (Okla Crim) 780 P2d 1178; *State v Thompson*, 47 Wash App 1, 733 P2d 584, review den 108 Wash 2d 1014.

Evidence of other crimes may be admissible under Rule 404(b) of the Federal Rules of Evidence, which rule prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, where such evidence explains the circumstances of the crime charged. *United States v Petary* (CA8 Iowa) 857 F2d 458, 26 Fed Rules Evid Serv 1090.

The prohibition on the admission of evidence of other crimes is not intended to prohibit the state from introducing evidence of similar transactions or occurrences which are immediately related in time and place to the charge being tried, as part of a single, continuous transaction. Thus, testimony was admissible where it implicated appellants, who were charged with the crime of hindering the apprehension of a fugitive, in a robbery committed by the fugitive after he had escaped from jail, inasmuch as the entire course of the appellants' dealings with the fugitive after his escape from jail was a necessary part of the *res gestae* showing that they had frequent contact with the fugitive, and that their time was spent protecting the fugitive and shielding him from the public and the authorities. *Owen v State*, 202 Ga App 833, 415 SE2d 537, 103-42 Fulton County D R 24.

Evidence of prior crimes having a logical connection to the case in explaining why events happened or in establishing a relationship between parties is *res gestae* and is not subject to the rule prohibiting evidence of prior crimes. *State v Dunn*, 249 Kan 488, 820 P2d 412.

Evidence of other crimes or wrongs is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts. *State v Agee*, 326 NC 542, 391 SE2d 171; *Commonwealth v Marshall*, 523 Pa 556, 568 A2d 590.

Footnote 96. *State v Agee*, 326 NC 542, 391 SE2d 171.

Footnote 97. *People v Lindsey* (Colo App) 805 P2d 1134, cert den (Colo) 1991 Colo LEXIS 137 and (disapproved on other grounds by *People v Milton* (Colo) 864 P2d 1097).

Res gestae events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the prosecution could not accurately present its case without reference to them. *State v Prater* (La App 3d Cir) 583 So 2d 520.

Footnote 98. *King v State* (Ala App) 595 So 2d 539.

Footnote 99. *People v Arnold*, 181 Mich App 140, 449 NW2d 423, later proceeding (Mich) 1990 Mich LEXIS 204 and vacated on other grounds 437 Mich 901, 465 NW2d 560.

Footnote 1. *State v Agee*, 326 NC 542, 391 SE2d 171.

§ 863 "Verbal acts"

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The motive, character, and object of an act are frequently indicated by what was said by the person engaged in the act, and such statements—also known as "verbal acts"—are admissible in evidence with the remainder of the transaction which they illustrate. ² For utterances to be admissible as verbal acts, (1) the conduct to be characterized by the words must be independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; and (4) the words must accompany the conduct. ³

The purpose of admitting a verbal act or fact is to prove the nature of an act, rather than to prove the truth of any alleged statement. ⁴ Thus, contemporaneous words that characterize ambiguous nonverbal conduct generally are considered not hearsay, rather than as hearsay for which an exception is made. ⁵

Under the verbal act doctrine, utterances are never regarded as verbal acts unless they accompany the conduct to which some legal effect is sought to be attached. ⁶

Footnotes

Footnote 2. *United States v Valentine* (SD NY) 644 F Supp 818, 22 Fed Rules Evid Serv 204, later proceeding (SD NY) 655 F Supp 731, later proceeding (CA2 NY) 820 F2d 565; *Buckbee v United Gas Pipe Line Co.* (La) 561 So 2d 76, on remand (La App 3d Cir) 587 So 2d 79, revd on other grounds, remanded (La) 614 So 2d 1233, on remand, motion den (La App 3d Cir) 626 So 2d 1190 and on remand (La App 3d Cir) 1993 La App LEXIS 2089, on reh, reh den, in part (La App 3d Cir) 626 So 2d 1191, cert den (La) 631 So 2d 1162 and ops combined at (La App 3d Cir) 626 So 2d 1191; *Phillip R. Morrow, Inc. v FBS Ins. Montana-Hoiness Labar, Inc.*, 236 Mont 394, 770 P2d 859; *Alliance Nat. Bank & Trust Co. v State Surety Co.*, 223 Neb 403, 390 NW2d 487; *In re Braig*, 520 Pa 409, 554 A2d 493.

In an action for damages for the killing of a pedestrian walking upon public highway at night, testimony of a companion at the time of the accident to the effect that the deceased kept warning the companion to keep off the paved portion of the highway is admissible as a verbal act. *Hatzakorzian v Rucker-Fuller Desk Co.*, 197 Cal 82, 239 P 709, 41 ALR 1027.

Evidence of conduct and exclamations of the prosecuting witness while fleeing from the defendant immediately after being wounded by the latter, being verbal acts closely associated with the assault, are admissible in a prosecution for assault with intent to murder. *Martin v State*, 203 Miss 187, 33 So 2d 825, 2 ALR2d 640.

Annotation: Admissibility, as *res gestae*, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 § 9.

Footnote 3. *Alliance Nat. Bank & Trust Co. v State Surety Co.*, 223 Neb 403, 390 NW2d 487.

Footnote 4. *Chacon v State (Fla)* 102 So 2d 578; *Caudill v Citizens Bank (Ky)* 383 SW2d 350.

In an action for false imprisonment, it is not error to admit evidence that the officers, when making the arrest, said that the defendant had accused the plaintiff of stealing a ring, especially where there is evidence tending to prove that the arrest was made at the command and procurement of the defendant. *Rich v McNery*, 103 Ala 345, 15 So 663.

In a suit for ejecting the plaintiff from a railway car under the claim that he had not paid his fare, the admissible evidence includes all the conversation between the plaintiff and the conductor about the fare at the time of, and immediately after, the ejectment, and also what the conductor said immediately after allowing the plaintiff to return and resume his seat in the car. *Robinson v Superior Rapid Transit R. Co.*, 94 Wis 345, 68 NW 961.

Footnote 5. *United States v Valentine (SD NY)* 644 F Supp 818, 22 Fed Rules Evid Serv 204, later proceeding (SD NY) 655 F Supp 731, later proceeding (CA2 NY) 820 F2d 565.

If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. The effect is to exclude from hearsay the entire category of verbal acts and verbal parts of an act, in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights. *Alliance Nat. Bank & Trust Co. v State Surety Co.*, 223 Neb 403, 390 NW2d 487.

Footnote 6. *State v Fouts*, 169 Kan 686, 221 P2d 841.

§ 864 Statements of present sense impression

[View Entire Section](#)

In many jurisdictions, a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not excluded by the rule against hearsay evidence, 7 and is thus admissible to prove the truth of the statement. 8 In this regard, while the Federal Rules of Evidence, upon which many states have patterned their rules of evidence, make no mention of *res gestae*, 9 they do contain a hearsay exception for statements of present sense impression. 10

The theory underlying this exception to the hearsay rule is that since a statement of present sense impression is made at the same time as the event being described, there is neither a memory problem nor time for a calculated misstatement. 11 Present sense impression statements are considered reliable because: (1) they refer to observations being made at the time of the statement and are free from any defect of the memory; (2) they are made contemporaneous with the observation and there is little or no time for calculated misstatement; (3) they are made to a third person who will probably have an opportunity to observe the situation and provide a check on the accuracy of the declarant's statement; and (4) since the declarant will often be available for cross-examination his credibility will be subject to substantial verification before the trier of fact. 12

For a statement of a present sense impression to be admissible against a hearsay objection, the declarant must have perceived the event described by the statement, the statement must describe or explain the event, and the statement must be substantially contemporaneous with the event. 13 Some jurisdictions, as a further guaranty of reliability, and despite any such specific requirement in the applicable Federal Rule of Evidence, 14 require that the statement describing or explaining the event be "spontaneous," 15 or that the declarant make the observation about the perceived event to another person also present at the scene, for purposes of corroboration. 16 However, some courts have rejected the contention that corroboration by an equally percipient witness is invariably required as a condition to the admissibility of a statement of present sense impression. 17 Nevertheless, extrinsic evidence sometimes may be required to demonstrate the contemporaneity of the statement and the event, or to show that the statement is the product of personal perception of the declarant. 18 Even when not required for admissibility, corroboration, or the lack thereof, may be important in determining the weight to be given the statement. 19

If an utterance is concurrent with the force or action that immediately results in one's injury or damage, and is so made that it derives testimonial credit from the attention of the speaker to what is happening, it is admissible as a present sense impression. 20

Footnotes

Footnote 7. As to the general rules regarding hearsay evidence, generally, see §§ 658 et seq.

Footnote 8. *United States v Campbell* (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661 (applying FRE, Rule 803(1)); *Stumpf v State* (Alaska App) 749 P2d 880, cert den 490 US 1070, 104 L Ed 2d 639, 109 S Ct 2075; *People v De Witt*, 173 Mich App 261,

433 NW2d 325; *Turner v State* (Miss) 573 So 2d 1335, later proceeding (Miss) 573 So 2d 1340; *Helena v Hoy*, 248 Mont 128, 809 P2d 1255; *State v Cummings*, 326 NC 298, 389 SE2d 66; *Cardenas v State* (Tex App Houston (1st Dist)) 787 SW2d 160, petition for discretionary review ref (Sep 12, 1990); *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813 (stating that Virginia is among the majority of states that recognize the present sense impression exception to the hearsay rule).

◆ **Observation:** In some states, the present sense impression exception to the hearsay rule is considered a sub-rule of a broader "res gestae" exception to the hearsay rule. *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

For a discussion of the res gestae exception to the hearsay rule, generally, see § 861.

For discussion of principal facts which may be proven by statements under this and related exceptions, see § 887.

Annotation: When is hearsay statement a "present sense impression" admissible under Rule 803(1) of the Federal Rules of Evidence, 60 ALR Fed 524.

Footnote 9. § 861.

Footnote 10. FRE Rule 803(1).

Footnote 11. *Turner v State* (Miss) 573 So 2d 1335, later proceeding (Miss) 573 So 2d 1340; *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

The substantial contemporaneity of the event and the statement negate the likelihood of deliberate or conscious misrepresentation. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 803.

Footnote 12. *People v Brown*, 148 Misc 2d 70, 559 NYS2d 772, affd (1st Dept) 179 App Div 2d 485, 579 NYS2d 15, app gr 79 NY2d 944, 583 NYS2d 198, 592 NE2d 806 and app gr 79 NY2d 944, 583 NYS2d 198, 592 NE2d 806 and app gr 79 NY2d 949, 583 NYS2d 203, 592 NE2d 811 and affd 80 NY2d 729, 594 NYS2d 696, 610 NE2d 369.

Footnote 13. *United States v Campbell* (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661.

For discussion of the requirement that a declarant witness the event described, generally, see § 872.

For general discussion of the requirement that the statement be contemporaneous with the event described, see § 883.

Footnote 14. FRE, Rule 803(1).

Footnote 15. *People v Franklin* (Colo App) 782 P2d 1202, noting that Colorado's departure from Rule 803(1) of the Federal Rules of Evidence, which contains no express

"spontaneous" requirement, was prompted by the concern that neither immediacy nor spontaneity would be guaranteed by the Federal Rule, and because Colorado case law requires a present sense impression to be instinctive and spontaneous in order to be admissible.

Footnote 16. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd, remanded on other grounds 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675); *United States v Blakey* (CA7 Ill) 607 F2d 779, 60 ALR Fed 509 (disapproved on other grounds by *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24) as stated in *United States v Harty* (CA7 Ill) 930 F2d 1257, 32 Fed Rules Evid Serv 1010, cert den (US) 116 L Ed 2d 215, 112 S Ct 262 (finding it necessary that witnesses be able to corroborate the declarant's statement); *Hewitt v Grand Trunk W. R. Co.*, 123 Mich App 309, 333 NW2d 264 (finding a requirement that the statement be made to one who had equal opportunity to observe and check misstatements); *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

In order for the court to assess the value of testimony in a situation where a statement made under questionable circumstances is offered, the declarant must be capable of being thoroughly cross-examined. Therefore, the court may consider whether an absent declarant's statement of present sense impression could be verified by the witness who heard the statement. *State v Case*, 100 NM 714, 676 P2d 241, later proceeding 103 NM 501, 709 P2d 670 and habeas corpus proceeding (CA10 NM) 887 F2d 1388, cert den 494 US 1035, 108 L Ed 2d 626, 110 S Ct 1490.

Law Reviews: *Res gestae*, the present sense impression exception and extrinsic corroboration under Federal Rule of Evidence 803(1) and its state counterparts, 17 *Fordham Urb LJ* 89 (1988, 1989).

Annotation: 60 ALR Fed 524 § 2[b].

Practice References 12 *Federal Procedure*, L Ed, Evidence § 33:403.

Footnote 17. *State v Flesher* (Iowa) 286 NW2d 215; *State v Jones*, 311 Md 23, 532 A2d 169; *People v Luke*, 136 Misc 2d 733, 519 NYS2d 316; *Commonwealth v Coleman*, 458 Pa 112, 326 A2d 387, 74 ALR3d 954; *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

Footnote 18. *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

The question of corroboration, considered in the context of the present sense impression, ordinarily relates to proof of first-hand knowledge or spontaneity. *State v Jones*, 311 Md 23, 532 A2d 169.

Footnote 19. *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

For a discussion of the weight to be given particular types of evidence, generally, see §§ 1430 et seq.

Footnote 20. *Johnson v White*, 430 Mich 47, 420 NW2d 87; *People v Caviness*, 38 NY2d 227, 379 NYS2d 695, 342 NE2d 496.

§ 865 Excited utterances

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Hearsay statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition—that is, "excited utterances"—are ordinarily admissible in evidence. 21 In this regard, the Federal Rules of Evidence contain a hearsay exception for excited utterances. 22 To come within the excited utterance exception to the hearsay rule, a statement must be a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived. 23

The basis for the excited utterance exception to the hearsay rule is that the perceived event produces nervous excitement, making fabrication of statements about that event unlikely. 24 Since an excited utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest cannot be fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him. 25

Whether a statement fits within the excited utterance exception to the hearsay rule is to be determined on the facts of the particular case. 26 The exception applies only if (1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; 27 and (3) the statement relates to the startling event or condition. 28 Generally, the sufficiency of the event or occurrence to qualify as the startling event is not questioned. 29 The primary consideration for the trial court is whether the utterance is, because of the circumstances, reliable. 30 However, courts have not attempted to confine the application of the excited utterance exception solely to indisputably reliable statements. 31 Courts look primarily to the effect of a particular event upon the declarant, and, if satisfied that the event was such as to cause adequate excitement, the inquiry is ended. 32

◆ Observation: A spontaneous statement of opinion or conclusion is inadmissible even where the statement as a whole meets the requirements of the excited utterance exception to the hearsay rule. 33

§ 865 ----Excited utterances [SUPPLEMENT]

Practice Aids: Criminal law—Witnesses—Spontaneous utterances, 80 Mass LR 1:42 (1995).

Case authorities:

Inmate's statement to guard identifying defendant as assailant of other inmate was admissible as excited utterance since inmate, while seeking assistance for injured inmate who was bleeding badly from deep 7-inch wound and following defendant who fled scene, blurted out obscenity identifying defendant upon seeing guard. *United States v Moses* (1994, CA8 Minn) 15 F3d 774, cert den (US) 62 USLW 3826.

Rape victim's statements to her mother were properly admitted under excited utterance exception to hearsay rule even though they were made at least 30 minutes after alleged rape, where victim was only 15 while defendant was 45, during assault victim had been subjected to physical abuse and death threats made against her and her family, she made statement immediately after she returned to her mother, mother testified that victim was crying and in semi-hysterical state at time she made statements, and statements concerned ordeal victim had just experienced. *United States v Rivera* (1995, CA9 Mont) 43 F3d 1291, 95 CDOS 56, 95 Daily Journal DAR 154.

Trial court did not err in admitting, as excited utterance, mother's testimony that, on morning after evening during which defendant visited house, 5- year-old daughter told mother that defendant sexually assaulted girl, where communication occurred on first occasion that girl saw adult after alleged assault. *Greenlee v State* (1994) 318 Ark 191, 884 SW2d 947.

In prosecution for third degree weapon possession, court erred in allowing police officers to testify that, prior to approaching defendant, they had been informed by certain individual that man dressed in brown clothing had "just pulled a gun"; such statement did not fall within "excited utterance" exception to hearsay rule. *People v Furtado* (1992, 2d Dept) 182 AD2d 637, 581 NYS2d 871.

Victim's statements to girlfriend and police officer, identifying defendant as his assailant, were properly admitted as excited utterances where (1) his statement to girlfriend was made minutes after being shot in stomach, and while he was bleeding, breathing heavily, perspiring, weak, dizzy, and expressing desire to go to hospital, and (2) he was still under continuing stress and excitement of shooting at time he made statement to officer 30 minutes later. *People v Evans* (1992, 2d Dept) 183 AD2d 780, 583 NYS2d 510, app den 80 NY2d 895, 587 NYS2d 925, 600 NE2d 652.

Testimony by an assault victim that defendants' companion yelled "shoot the mother f—er" just before defendants drew their guns and began shooting was not inadmissible hearsay since the testimony was admitted to establish why defendants began shooting and to show the context in which the shooting began. Even if the statement was hearsay, it was admissible under the "excited utterance" exception to the hearsay rule where it was made when someone with whom the companion had been arguing came toward him holding a bar chair in the air. *State v Reid* (1994) 335 NC 647, 440 SE2d 776.

The trial court did not err in a first- degree murder sentencing hearing by allowing the victim's mother-in- law to testify that on the morning of the murder she went to the

victim's home, where the victim's two-and-a-half-year-old daughter came to the door and said, "Mama is asleep. Mama is dead." The statement by the daughter was made a few hours after the murder, she had been through a startling experience which suspended reflective thought, and her statement was a spontaneous reaction not resulting from fabrication. It was an excited utterance and was admissible as an exception to the hearsay rule. G.S. § 8C-1, Rule 803(2). *State v Reeves* (1994) 337 NC 700, 448 SE2d 802.

An exculpatory statement about the shooting of the victim made by defendant to the aunt with whom he lived was not admissible as an excited utterance and was properly excluded as hearsay in this first-degree murder trial where defendant first talked with his aunt on the telephone after the shooting from his grandmother's house but did not mention the shooting, and defendant waited until he went to his aunt's home an hour after the shooting to tell her what had happened, since defendant had time to manufacture the statement and the statement lacked spontaneity. G.S. § 8C-1, Rule 803(2). *State v Sidberry* (1994) 337 NC 779, 448 SE2d 798.

Defendant's statement to his girlfriend, when she told him she had heard he had shot someone, that he had shot a gun but had not shot anyone was not admissible under the excited utterance exception to the hearsay rule set forth in G.S. § 8C-1, Rule 803(2) since the girlfriend's comment to defendant was not a sufficiently startling event, and defendant's response cannot be considered spontaneous because the statement was made five hours after the shooting, and defendant had ample time for reflection and preparation for any confrontation regarding his prior activities. *State v Jackson* (1995) 340 NC 301, 457 SE2d 862.

Statements made by a homicide victim and a rescue squad member were admissible under the excited utterances exception to the hearsay rule. G.S. § 8C-1, Rule 803(2) *State v Littlejohn* (1995) 340 NC 750, 459 SE2d 629.

Footnotes

Footnote 21. *United States v Campbell* (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661 (applying Federal Rule of Evidence 803(2)); *W.C.L. v People* (Colo) 685 P2d 176; *State v Sneed*, 327 NC 266, 393 SE2d 531.

The excited utterance exception to the hearsay rule is similar to the common law *res gestae* exception, which applied to statements relating to a startling act or event made spontaneously and without reflection while the declarant was under the stress of excitement. *W.C.L. v People* (Colo) 685 P2d 176.

For discussion of principal facts which may be proven by statements under this and related exceptions, see § 887.

Annotation: Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 3.

Footnote 22. FRE, Rule 803(2).

Annotation: When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence, 48 ALR Fed 451.

Footnote 23. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

Footnote 24. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881; *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966; *W.C.L. v People* (Colo) 685 P2d 176; *People v Franklin* (Colo App) 782 P2d 1202.

The basis for the excited utterance exception is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. *Idaho v Wright*, 497 US 805, 111 L Ed 2d 638, 110 S Ct 3139, 30 Fed Rules Evid Serv 24.

Footnote 25. *People v Fuelner* (1st Dist) 104 Ill App 3d 340, 60 Ill Dec 87, 432 NE2d 986.

The justification for the excited utterance exception is that a spontaneous declaration of an individual who has recently suffered an overpowering and shocking experience is likely to be truthful. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

Footnote 26. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

Footnote 27. To answer the question whether the declarant reacted while under the stress of the condition, several factors must be considered, including: (1) the lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881.

Footnote 28. *United States v Campbell* (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661; *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966; *People v Fuelner* (1st Dist) 104 Ill App 3d 340, 60 Ill Dec 87, 432 NE2d 986; *People v De Witt*, 173 Mich App 261, 433 NW2d 325; *State v Carpenter* (Tenn Crim) 773 SW2d 1 (disapproved on other grounds by *State v Jacumin* (Tenn) 778 SW2d 430).

For the purpose of the "spontaneous utterance" exception to the hearsay rule, an utterance is spontaneous if it is made under the influence of an exciting event and before the declarant has had time to contrive or fabricate the remark. The general rule is that the spontaneous utterance must also tend to qualify, characterize, and explain the underlying event. *Commonwealth v Zagranski*, 408 Mass 278, 558 NE2d 933.

Footnote 29. *W.C.L. v People* (Colo) 685 P2d 176.

Footnote 30. *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966; *State v Carpenter* (Tenn Crim) 773 SW2d 1 (disapproved on other grounds by *State v Jacumin* (Tenn) 778 SW2d 430).

Footnote 31. *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966 (stating that admission as a hearsay exception is not foreclosed by the fact that a statement's reliability has been impugned).

Footnote 32. *W.C.L. v People* (Colo) 685 P2d 176.

Footnote 33. *People v Miron* (5th Dist) 210 Cal App 3d 580, 258 Cal Rptr 494, review den.

For a discussion of the general rule barring the admission of opinions and conclusions under the spontaneous-statement exceptions to the hearsay rule, see § 872.

§ 866 Statements of present mental, emotional, or physical condition

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Statements that shed light upon the declarant's then-existing mental, emotional, or physical condition typically are admissible as an exception to the hearsay rule, and may

be offered to prove the declarant's condition, his subsequent conduct, or his intent, plan, or motive at the time the statement was made. 34 Thus, for example, the Federal Rules of Evidence, upon which many states have patterned their rules of evidence, contain a hearsay exception for statements of present mental or physical condition. 35 Statements of memory or belief to prove the fact remembered or believed are not covered by the hearsay exception for statements of present mental or physical condition, 36 although in some jurisdictions, statements of memory or belief that relate to the execution, revocation, identification, or terms of the declarant's will are admissible under the state-of-mind exception. 37

Evidence tending to show a presently existing state of mind is admissible only if the state of mind sought to be proved is relevant 38 and the prejudicial effect of the evidence does not outweigh its probative value. 39 Thus, for example, a victim's hearsay statements of fear of an accused are admissible under the hearsay exception for statements of present mental condition only when the victim's conduct in conformity with that fear is in dispute. 40

When a declarant's intent is directly in issue, the declarant's statements relative to his then-existing intention are admitted without question. 41 Some courts have extended the state-of-mind exception to admit hearsay statements of a declarant's future intent to perform an act with another person as circumstantial proof that the act did occur 42 and, by necessary implication, that the other person participated in the act. 43

◆ Observation: Statements of present mental condition are not admissible to show the state of mind of someone other than the declarant. 44

◆ Comment: Although it is true that some details accompanying a statement of one's state of mind may be inadmissible, "details" per se are not excluded under the hearsay exception for statements of present mental condition. 45

§ 866 ----Statements of present mental, emotional, or physical condition [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder resentencing hearing by admitting hearsay statements of the victim relating to her state of mind. *State v Spruill* (1994) 338 NC 612, 452 SE2d 279.

The diary of a murder victim was not admissible under the state- of-mind hearsay exception in the noncapital first-degree murder prosecution of her husband where the diary described an incident in which defendant had hit and slapped the victim, thrown water, dishes, ashtrays, and paper at her, and screamed that he was going to kill her. The statements in the diary are not statements of the victim's state of mind, but are merely a recitation of facts. Mere statements of fact are provable by other means and are not inherently trustworthy. Moreover, the diary is at best speculative as to the victim's state of mind and contains indications that she was not intimidated by defendant. *State v Hardy* (1994) 339 NC 207, 451 SE2d 600.

The trial court did not err in a noncapital first-degree murder prosecution by admitting

testimony that the victim, a practical nurse, had told a person at whose house she worked that defendant was the father of her child and that she feared for her life if she went to court to obtain child support from defendant. The scope of the conversation related directly to the victim's state of mind and emotional condition, the victim's state of mind was relevant as it related directly to circumstances giving rise to a potential confrontation with defendant on the day she was murdered, and the probative value of this evidence was not outweighed by unfair prejudice. N.C.G.S. § 8C-1, Rule 803(3). *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

In an action to have a deed declared void on the ground that it was obtained by undue influence, statements made by plaintiff, who was deceased at the time of trial, were not inadmissible hearsay, since evidence of declarations of the testator which disclosed his state of mind at the time of the execution of the paper writing on the circumstances under which it was executed, tending to show that he did or did not act freely and voluntarily, is competent as substantive proof of undue influence, and all the challenged testimony here concerned plaintiff's state of mind regarding defendant and tended to show that plaintiff did not freely and voluntarily deed the remainder interest in the property to defendant. *Caudill v Smith* (1994) 117 NC App 64, 450 SE2d 8, review den (NC) 1995 NC LEXIS 75.

The trial court in a murder prosecution did not err in admitting testimony of the victim's brother concerning a question asked of defendant by the victim at the beginning of their altercation as to why defendant had recently pulled a gun on him, since this hearsay statement was properly admitted pursuant to N.C.G.S. § 8C-1, Rule 803(3), which deals with a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition. *State v Nixon* (1994) 117 NC App 141, 450 SE2d 562.

Footnotes

Footnote 34. *United States v Faust* (CA9 Cal) 850 F2d 575, 26 Fed Rules Evid Serv 571, postconviction proceeding (CA9) 1992 US App LEXIS 29989 (applying Federal Rule of Evidence 803(3)); *State v Prince*, 160 Ariz 268, 772 P2d 1121, 32 Ariz Adv Rep 12; *People v Ruiz*, 44 Cal 3d 589, 244 Cal Rptr 200, 749 P2d 854, cert den 488 US 871, 102 L Ed 2d 155, 109 S Ct 186, reh den 493 US 948, 107 L Ed 2d 343, 110 S Ct 355 and stay gr (Cal) 1988 Cal LEXIS 1162; *State v Mason* (Me) 528 A2d 1259; *People v De Witt*, 173 Mich App 261, 433 NW2d 325; *Gayten v State* (Miss) 595 So 2d 409; *People v Chambers* (1st Dept) 125 App Div 2d 88, 512 NYS2d 89, app gr 513 NYS2d 1005 and app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, motion to vacate den 70 NY2d 727, 519 NYS2d 644, 513 NE2d 1305; *State v Cummings*, 326 NC 298, 389 SE2d 66; *State v Brewer*, 48 Ohio St 3d 50, 549 NE2d 491, reh den 49 Ohio St 3d 705, 551 NE2d 618 and cert den 498 US 881, 112 L Ed 2d 177, 111 S Ct 218, reh den 498 US 973, 112 L Ed 2d 427, 111 S Ct 445; *Commonwealth v Tillia*, 359 Pa Super 302, 518 A2d 1246; *Norton v State* (Tex App Texarkana) 771 SW2d 160, petition for discretionary review ref (Oct 4, 1989); *Mathes v State* (Tex App Beaumont) 765 SW2d 853, petition for discretionary review ref, affd (Tex Crim) 830 SW2d 596, motion for rehearing on PDR denied (Jun 3, 1992); *State v Dibello* (Utah) 780 P2d 1221, 115 Utah Adv Rep 20; *State v Bernson*, 40 Wash App 729, 700 P2d 758, review den 104 Wash 2d 1016.

For discussion of principal facts which may be proven by statements under this and related exceptions, see §§ 887 et seq.

For discussion of principal facts which may be proven by statements under this and related exceptions, including the cause of an injury, see §§ 887 et seq.

As to the separate hearsay exception for statements made for the purpose of medical diagnosis or treatment, see § 867.

Practice References 19 Am Jur Trials 123, Defense on Charge of Driving While Intoxicated § 55.

5 Am Jur Trials 921, Showing Pain and Suffering § 59.

1 Am Jur POF3d 197, Recovery for Severe Burn Injuries § 35.

Footnote 35. FRE, Rule 803(3).

Rule 803(3) of the Federal Rules of Evidence—excepting from the hearsay rule statements of then-existing mental, emotional, or physical condition—is essentially a specialized application of Rule 803(1)—excepting statements of present sense impression—presented separately to enhance its usefulness and accessibility. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 803.

Law Reviews: Weissenberger, Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3). 64 Temp L Rev 145 (Spring 1991).

Annotation: Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition, 75 ALR Fed 170.

Footnote 36. *United States v Yu* (ED NY) 697 F Supp 635 (holding that a defendant's hearsay statement that he believed boxes to be part of his girlfriend's business and not his own was not admissible, as the declaration was not offered to prove present thoughts or feelings, or even thoughts or feelings in the past, but rather offered as proof of an act committed by someone else); *People v Ruiz*, 44 Cal 3d 589, 244 Cal Rptr 200, 749 P2d 854, cert den 488 US 871, 102 L Ed 2d 155, 109 S Ct 186, reh den 493 US 948, 107 L Ed 2d 343, 110 S Ct 355 and stay gr (Cal) 1988 Cal LEXIS 1162; *Norton v State* (Tex App Texarkana) 771 SW2d 160, petition for discretionary review ref (Oct 4, 1989).

State-of-mind statements must be of a present existing state of mind. *State v Bernson*, 40 Wash App 729, 700 P2d 758, review den 104 Wash 2d 1016.

Practice References Federal Procedure, L Ed, Evidence § 33:411.

Footnote 37. *State v Mason* (Me) 528 A2d 1259; *State v Dibello* (Utah) 780 P2d 1221, 115 Utah Adv Rep 20.

As to admissibility of declarations of a beneficiary, cobeneficiary, or executor of a will as proof of state of mind, generally, see 79 Am Jur 2d, Wills §§ 466, 476.

Practice References 7 Am Jur POF2d 605, Election to Take Under Will § 4.

Footnote 38. As to relevance, generally, as affecting admissibility of such statements, see § 871.

Footnote 39. *State v Cummings*, 326 NC 298, 389 SE2d 66; *State v Greene*, 324 NC 1, 376 SE2d 430, vacated on other grounds 494 US 1022, 108 L Ed 2d 603, 110 S Ct 1465, later proceeding 327 NC 474, 397 SE2d 226 and on remand, remanded 329 NC 771, 408 SE2d 185; *State v Weeks*, 322 NC 152, 367 SE2d 895.

State-of-mind statements must appear to have been made in a natural manner and not under circumstances of suspicion. *State v Bernson*, 40 Wash App 729, 700 P2d 758, review den 104 Wash 2d 1016.

Footnote 40. *People v Ruiz*, 44 Cal 3d 589, 244 Cal Rptr 200, 749 P2d 854, cert den 488 US 871, 102 L Ed 2d 155, 109 S Ct 186, reh den 493 US 948, 107 L Ed 2d 343, 110 S Ct 355 and stay gr (Cal) 1988 Cal LEXIS 1162.

Admission of a murder victim's hearsay statement that she had been drugged would not have been proper under the state-of-mind exception, as the victim's state of mind at the time she made the statement would have been of questionable relevance to any issues at trial. *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966.

In some jurisdictions, state-of-mind statements by the victim of a crime are not admissible in evidence unless the trier of fact is warranted in finding that the defendant had been aware of the victim's state of mind. *Commonwealth v Zagranski*, 408 Mass 278, 558 NE2d 933; *Commonwealth v Olszewski*, 401 Mass 749, 519 NE2d 587, appeal after remand 416 Mass 707, 625 NE2d 529, summary op at (Mass) 22 M.L.W. 894.

Practice References 33 Am Jur POF2d 211, Privileged Use of Force in Self-defense § 9.

Footnote 41. *People v Chambers* (1st Dept) 125 App Div 2d 88, 512 NYS2d 89, app gr 513 NYS2d 1005 and app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, motion to vacate den 70 NY2d 727, 519 NYS2d 644, 513 NE2d 1305; *State v Greene*, 324 NC 1, 376 SE2d 430, vacated on other grounds 494 US 1022, 108 L Ed 2d 603, 110 S Ct 1465, later proceeding 327 NC 474, 397 SE2d 226 and on remand, remanded 329 NC 771, 408 SE2d 185.

Footnote 42. *State v Mason* (Me) 528 A2d 1259; *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426.

Footnote 43. *People v Chambers* (1st Dept) 125 App Div 2d 88, 512 NYS2d 89, app gr 513 NYS2d 1005 and app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, motion to vacate den 70 NY2d 727, 519 NYS2d 644, 513 NE2d 1305.

◆ Observation: There is a rigid test for admission of a statement by a deceased of intent to meet another. Such a statement is admissible only where the statement is made under circumstances that make it probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place. *People v Chambers* (1st Dept) 125 App Div 2d 88, 512 NYS2d 89, app gr 513 NYS2d 1005 and app dismd 70 NY2d 694, 518 NYS2d 1031, 512 NE2d 557, motion to vacate den 70 NY2d 727, 519 NYS2d 644, 513 NE2d 1305.

Footnote 44. *People v Franklin* (Colo App) 782 P2d 1202.

Footnote 45. *United States v Peak* (CA7 Ind) 856 F2d 825, 26 Fed Rules Evid Serv 1203, reh den, en banc (CA7) 1988 US App LEXIS 15970 and cert den 488 US 969, 102 L Ed 2d 535, 109 S Ct 499.

§ 867 Statements for purposes of medical diagnosis or treatment

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An exception to the hearsay rule is commonly made for statements made for purposes of medical diagnosis or treatment, including, where pertinent to diagnosis or treatment, statements describing (1) medical history; (2) past or present symptoms, pain, or sensations; and (3) the cause of such symptoms. 46 The Federal Rules of Evidence, upon which many states have patterned their rules of evidence, contain a hearsay exception for statements for purposes of medical diagnosis or treatment. 47 Hearsay statements not essential or pertinent to diagnosis or treatment, and which only serve to corroborate details of prior testimony, are highly prejudicial, and thus not admissible under the medical diagnosis or treatment exception. 48

In some jurisdictions, statements made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial do not share the medical diagnosis or treatment hearsay exception. 49 In other jurisdictions, it is held that the fact that the declarant consulted a physician knowing that legal action might be taken does not necessarily change the nature of the consultation, and statements made in the course of the consultation may be admissible under the medical diagnosis or treatment exception. 50

The rationale for the exception is that a patient has a strong motivation to be truthful about information that will form the basis of his diagnosis and treatment, making statements in this regard inherently trustworthy. 51 Based on this rationale, courts consider two factors in determining the admissibility of statements made for medical diagnosis or treatment: (1) whether the declarant's motive in speaking was consistent with receiving medical care; and (2) whether it was reasonable for the physician to rely on the statements in diagnosis or treatment. 52 Thus, statements by an injured person concerning the actual event that caused the injury are pertinent to diagnosis and treatment and are admissible, while statements concerning who was responsible for the

injury are seldom, if ever, sufficiently related to diagnosis and treatment, and, generally, are not admissible. 53 However, this rule is relaxed when the case involves sexual abuse of children in the home. 54 A statement by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household is considered reasonably pertinent to treatment, and is excluded only with great caution. 55

Statements for purposes of medical diagnosis or treatment do not have to be made to a physician, but can be made to any person, such as a hospital attendant, ambulance driver, or even a family member, provided they are made for the purpose of diagnosis or treatment. 56 Moreover, the statements need not refer to the declarant's own physical condition. 57 Statements relating to someone else's symptoms, pains, or sensations may be admissible, again provided that they are made for purposes of diagnosis or treatment. 58 In this regard, the relationship between the declarant and the patient usually determines admissibility. 59

- ◆ Observation: Where statements are relevant in diagnosing the cause of the declarant's condition, the fact that no treatment was contemplated or given does not render the statements inadmissible. 60

§ 867 ----Statements for purposes of medical diagnosis or treatment [SUPPLEMENT]

Practice Aids: Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Uniform Rules of Evidence. 38 ALR5th 433.

Case authorities:

Defendant's statements to a psychiatrist were made in preparation for his murder trial and were thus not admissible under the medical diagnosis or treatment exception to the hearsay rule set forth in G.S. § 8C-1, Rule 803(4) where the psychiatrist saw defendant less than two months before trial and nine months after the killing; defense counsel arranged defendant's interview by the psychiatrist; there was no evidence that the psychiatrist planned or proposed any course of treatment; and the psychiatrist's contact with defendant prior to trial was limited to one occasion while defendant was in jail. *State v Harris* (1994) 338 NC 211, 449 SE2d 462.

Statements made by defendant to a medical expert who stated an opinion that at the time of a killing defendant was so intoxicated that he was incapable of premeditation and deliberation were not admissible as substantive evidence under the medical diagnosis and treatment exception to the hearsay rule set forth in G.S. § 8C-1, Rule 803(4) where the statements were made by defendant ten months after the killing for the purpose of preparing and presenting a defense to the crimes for which he stood accused rather than for the purpose of seeking treatment of a medical condition or a diagnosis of his condition to obtain treatment. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Statements made by defendant's mother and wife to defendant's medical expert were not admissible as substantive evidence under the medical diagnosis and treatment exception

to the hearsay rule set forth in Rule 803(4) because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. *State v Jones* (1994) 339 NC 114, 451 SE2d 826, reconsideration den (NC) 453 SE2d 188.

Footnotes

Footnote 46. *United States v Iron Thunder* (CA8 SD) 714 F2d 765, 13 Fed Rules Evid Serv 1902 (applying FRE, Rule 803(4)); *State v Jeffers*, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966; *W.C.L. v People* (Colo) 685 P2d 176; *State v Hebert* (Me) 480 A2d 742; *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426; *McKenna v St. Joseph Hospital* (RI) 557 A2d 854; *State v Pina* (RI) 455 A2d 313.

◆ Observation: In some states, statements made for purposes of medical diagnosis or treatment are deemed as not being hearsay, rather than as being an exception to the hearsay rule. *State v McDaniel*, 37 Wash App 768, 683 P2d 231, review gr 103 Wash 2d 1004, dismd without op 103 Wash 2d 1040.

Annotation: Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Federal Rules of Evidence, 55 ALR Fed 689.

Practice References 6 Am Jur Trials 112, Basis of Medical Testimony § 47.

Footnote 47. FRE, Rule 803(4).

Footnote 48. *State v Barber* (RI) 468 A2d 277, appeal after remand (RI) 539 A2d 76.

Footnote 49. *McKenna v St. Joseph Hospital* (RI) 557 A2d 854.

Footnote 50. *State v Hebert* (Me) 480 A2d 742, finding that a statement made for purposes of medical diagnosis did not lose its inherently trustworthy nature merely because the declarant might have been aware criminal proceedings might be instituted.

Rule 803(4) of the Federal Rules of Evidence abolished the common-law distinction between statements made to a doctor consulted for the purpose of treatment, which statements could be admitted, and statements made during an examination for the purpose of diagnosis only, which statements could not be admitted. At common law, an examination for the purpose of diagnosis only usually is considered a consultation in preparation for trial, and thus is found not sufficiently reliable. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881.

Footnote 51. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881;

Gong v Hirsch (CA7 Ill) 913 F2d 1269, 31 Fed Rules Evid Serv 762; Stull v Fuqua Industries, Inc. (CA8 Mo) 906 F2d 1271, 30 Fed Rules Evid Serv 1092, corrected, reh den, en banc (CA8) 1990 US App LEXIS 14538; McKenna v St. Joseph Hospital (RI) 557 A2d 854 (citing the advisory committee notes to Federal Rule of Evidence 803); State v Pina (RI) 455 A2d 313.

Statements to physicians are presumptively reliable because of a patient's belief that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician. W.C.L. v People (Colo) 685 P2d 176.

Footnote 52. Morgan v Foretich (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881; Gong v Hirsch (CA7 Ill) 913 F2d 1269, 31 Fed Rules Evid Serv 762; State v Jeffers, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966.

The test for admissibility of statements made for purposes of medical diagnosis or treatment under Rule 803(4) of the Federal Rules of Evidence should be the same as under FRE, Rule 703, concerning expert testimony—whether an expert in the field would be justified in relying upon the statement in rendering his opinion. Under this standard, a statement is not admissible if it does not reveal symptoms, objective data, surrounding circumstances, or any similar factual data that a reasonable physician would consider relevant in the treatment or even diagnosis of a medical condition. Expressions of a patient's conclusion as to the appropriate medical diagnosis are not a basis upon which an expert in the field can rely in rendering an opinion. Gong v Hirsch (CA7 Ill) 913 F2d 1269, 31 Fed Rules Evid Serv 762.

Admission or rejection will hinge on whether what has been related by the patient will assist or is helpful in the diagnosis or treatment of his ailments. State v Pina (RI) 455 A2d 313.

Footnote 53. State v Jeffers, 135 Ariz 404, 661 P2d 1105, cert den 464 US 865, 78 L Ed 2d 174, 104 S Ct 199, habeas corpus den (DC Ariz) 627 F Supp 1334, affd in part and revd in part on other grounds (CA9 Ariz) 832 F2d 476, 24 Fed Rules Evid Serv 321, cert gr 493 US 889, 107 L Ed 2d 183, 110 S Ct 232, motion gr 493 US 952, 107 L Ed 2d 348, 110 S Ct 361 and revd, remanded on other grounds 497 US 764, 111 L Ed 2d 606, 110 S Ct 3092, reh den 497 US 1050, 111 L Ed 2d 829, 111 S Ct 14 and revd, remanded on other grounds (CA9 Ariz) 974 F2d 1075, 92 CDOS 7509, 92 Daily Journal DAR 12484, amd (CA9 Cal) 5 F3d 1199, 93 CDOS 6964, 93 Daily Journal DAR 11926, reh, en banc, gr (CA9 Cal) 94 CDOS 2607, 94 Daily Journal DAR 4966; State v Pina (RI) 455 A2d 313 (stating that in circumstances where fault is an issue, statements of causation do not hold the same reliability of truthfulness).

Statements as to fault do not ordinarily qualify under the medical diagnosis exception. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 803.

Footnote 54. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881; *United States v Provost* (CA8 SD) 875 F2d 172, 28 Fed Rules Evid Serv 187, cert den 493 US 859, 107 L Ed 2d 127, 110 S Ct 170, postconviction proceeding (CA8 SD) 921 F2d 163, cert den 499 US 968, 113 L Ed 2d 666, 111 S Ct 1603, later proceeding (DC SD) 777 F Supp 774, affd (CA8 SD) 1992 US App LEXIS 15023, op withdrawn, substituted op (CA8 SD) 969 F2d 617, cert den (US) 122 L Ed 2d 139, 113 S Ct 986.

For a discussion of statutory responses to the question of the admissibility of allegedly spontaneous hearsay statements by child abuse victims, see § 868.

Footnote 55. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881.

Footnote 56. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426 (holding statements made to a nurse admissible); *McKenna v St. Joseph Hospital* (RI) 557 A2d 854 (stating that the fact that a statement was made to a nonphysician/health-care provider does not detract from its admissibility).

Footnote 57. *Mendez v United States* (SD NY) 732 F Supp 414; *McKenna v St. Joseph Hospital* (RI) 557 A2d 854.

Footnote 58. *Mendez v United States* (SD NY) 732 F Supp 414; *McKenna v St. Joseph Hospital* (RI) 557 A2d 854.

Footnote 59. *Stull v Fuqua Industries, Inc.* (CA8 Mo) 906 F2d 1271, 30 Fed Rules Evid Serv 1092, corrected, reh den, en banc (CA8) 1990 US App LEXIS 14538 (stating that to fall within the exception, the statement must be obtained from the person seeking treatment, or in some instances from someone with a special relationship to the person seeking treatment, such as a parent); *Mendez v United States* (SD NY) 732 F Supp 414 (finding that where the patient is a child, a parent or guardian's statements on behalf of the child are assumed reliable).

Footnote 60. *United States v Iron Thunder* (CA8 SD) 714 F2d 765, 13 Fed Rules Evid Serv 1902.

§ 868 Statements by child abuse victims

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A child's statements concerning sexual or other physical abuse often are admitted over a hearsay objection where the statements conform to the rules governing one of the traditional spontaneous-statement exceptions to the hearsay rule, such as excited utterances or statements made for purposes of medical diagnosis or treatment. 61 In addition, some state legislatures have specifically enacted statutes which provide for a hearsay exception to children who have been victims of sexual abuse. 62 Typically, these statutes provide that a child's hearsay statement complaining of or describing any act of abuse or any conduct involving an unlawful sexual act performed in the presence

of or on the declarant child is admissible if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either testifies at the proceeding or is unavailable as a witness, provided that if the child is unavailable, there is corroborative evidence of the act which is the subject of the statement. 63 In effect, states enacting such statutes have created a new, relaxed excited-utterance exception to the hearsay rule specifically designed for the young child-witness. 64 Under such an exception, a trial judge may find a child's hearsay statements unreliable on the ground that there has been a lapse of time and intervening counseling between the abuse and the statements at issue only when the evidence demonstrates that the lapse or counseling somehow affected the child's statements. 65

Other statutes allow for the admission of a child's hearsay statements about sexual or other physical abuse, where the statements are made (1) spontaneously within a reasonable time after an act of abuse is alleged to have occurred and (2) to someone the child would normally turn to for sympathy, protection, or advice. 66 Such statutes do not require that the person to whom the child speaks be previously known to him or her, thus allowing for the admission of statements to doctors. 67 Nor do such statutes require that a child be found competent before his or her statement may be admitted into evidence. 68

◆ Caution: Statutory child-hearsay statutes often apply in certain types of proceedings only. 69

§ 868 ----Statements by child abuse victims [SUPPLEMENT]

Case authorities:

Statements by child victim to grandmother within few hours of sexual assault were admissible as excited utterances, where statements were made at child's first opportunity, when grandmother arrived home from work, and child was "crying and incoherent" while she related events. *People v Bolton* (1993, Colo App) 859 P2d 311.

Statement made by sexual molestation victim "a few hours" after alleged molestation was admissible as excited utterance. *State v Stover* (1994, Idaho App) 881 P2d 553.

Statements made by six-year-old child victim of alleged sexual assault were not admissible under excited utterance exception to hearsay rule, where statements were made more than one year after alleged incidents and after substantial prodding and suggestive questioning. *Felix v State* (1993) 109 Nev 151, 849 P2d 220.

The trial court in a first-degree sex offense case did not err in admitting testimony of a social worker and two psychologists concerning statements made by the victims since those statements were made for the purposes of medical diagnosis or treatment and hence were admissible under G.S. § 8C-1, Rule 803(4). *State v Figured* (1994) 116 NC App 1, 446 SE2d 838.

A pediatrician's testimony that she asked an alleged rape, sexual offense and indecent liberties victim if anyone had touched her in a way that she did not like and that the victim replied that her father had was admissible under the medical diagnosis and

treatment exception to the hearsay rule where the pediatrician examined the victim for possible sexual abuse. *State v Hughes* (1994) 114 NC App 742, 443 SE2d 76.

Statements made by sexual molestation victim to police officer interviewing victim 5 days after alleged molestation were not admissible as *res gestae*. *State v Free* (1994, La App 2d Cir) 643 So 2d 767.

Footnotes

Footnote 61. See, for example, *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881 (admitting 4-year-old child's statements to her mother as excited utterances and statements to psychologist as statements for the purposes of medical diagnosis or treatment).

Spontaneous utterance of 3-year-old boy that he had been molested by defendant was admissible as excited utterance although it occurred 5 hours after alleged molestation. *People v Nevitt*, 135 Ill 2d 423, 142 Ill Dec 854, 553 NE2d 368, on remand (1st Dist) 228 Ill App 3d 888, 170 Ill Dec 908, 593 NE2d 797.

For a discussion of the effect of a child's age on the admissibility of his or her spontaneous statements, generally, see § 881.

Law Reviews: Mosteller, Child Sex Abuse and Statements for the Purpose of Medical Diagnosis or Treatment. 67 NC L Rev 257 (January 1989).

Annotation: Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 ALR4th 1043 § 3[a].

Footnote 62. *Cassidy v State*, 74 Md App 1, 536 A2d 666, cert den 312 Md 602, 541 A2d 965 (noting the increase throughout the 1980's in the number of states enacting hearsay exceptions for out-of-court assertions by children who have been victims of sexual abuse); *In re Marriage of P.K.A.* (Mo App) 725 SW2d 78 (noting number of state statutes regarding the admissibility, in certain criminal matters, of hearsay statements by children); *State v Swan*, 114 Wash 2d 613, 790 P2d 610, modif den, reconsideration den, clarified (Wash) 1990 Wash LEXIS 73 and cert den 498 US 1046, 112 L Ed 2d 772, 111 S Ct 752, habeas corpus den (CA9 Wash) 6 F3d 1373, 93 CDOS 7465, 93 Daily Journal DAR 12722, 38 Fed Rules Evid Serv 404, petition for certiorari filed (Apr 18, 1994).

Footnote 63. *State v Bingham*, 116 Idaho 415, 776 P2d 424 (ovrld by *State v Guzman* (Idaho) 1990 Ida LEXIS 188) (child under 10); *In re Marriage of L.R.* (1st Dist) 202 Ill App 3d 69, 147 Ill Dec 439, 559 NE2d 779, app den 136 Ill 2d 545, 153 Ill Dec 375, 567 NE2d 333 (child under 13); *State v Carlson*, 61 Wash App 865, 812 P2d 536, motion to vacate den, reh den 66 Wash App 909, 833 P2d 463, review den 120 Wash 2d 1022, 844 P2d 1017 (child under 10).

Footnote 64. *In re NE-KIA S.* (RI) 566 A2d 392 (noting that Rhode Island's child-hearsay statute relaxed the standards of spontaneity and timeliness generally applicable to hearsay proffered under the excited utterance exception to the hearsay rule).

Unlike an excited utterance, a child's statements admissible under Washington's child-hearsay statute need not be contemporaneous with the event in question. *State v Carlson*, 61 Wash App 865, 812 P2d 536, motion to vacate den, reh den 66 Wash App 909, 833 P2d 463, review den 120 Wash 2d 1022, 844 P2d 1017.

Footnote 65. *State v Carlson*, 61 Wash App 865, 812 P2d 536, motion to vacate den, reh den 66 Wash App 909, 833 P2d 463, review den 120 Wash 2d 1022, 844 P2d 1017.

Prosecution failed to sustain its burden in showing that statement was spontaneous response to existing event, where it failed to show that, at time child spoke to her mother on phone, evening of day following alleged molestation by her father, sway of previous evening's event still dominated and controlled her reflective power. *State v Jalette*, 119 RI 614, 382 A2d 526.

In prosecution for child abuse, foster mother's hearsay testimony which recalled statement of allegedly abused child was not admissible as spontaneous declaration, where there was 3-day interval between alleged crime and child's statement, and statement was made in response to question foster mother asked child while child was calm. *State v Doe*, 105 Wash 2d 889, 719 P2d 554.

Annotation: 15 ALR4th 1043 § 3[b].

Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance, 89 ALR3d 102 §§ 33[c], 37.

Footnote 66. In re NE-KIA S. (RI) 566 A2d 392, finding that since the goal of the statute is to prevent child abuse and to attempt to alleviate the consequent emotional trauma that a child may experience by being forced to testify about abuse, particularly when the abuser is the victim's parent, the statute applies equally to situations in which sexual abuse is alleged, and situations in which physical abuse alone is alleged.

Footnote 67. In re NE-KIA S. (RI) 566 A2d 392 (stating that a physician occupies a position of trust even though he/she may be previously unknown to his/her patient).

Footnote 68. In re NE-KIA S. (RI) 566 A2d 392.

For general discussion of the effect of the declarant's competency on the admissibility of spontaneous statements, see § 876.

Footnote 69. *State v Bingham*, 116 Idaho 415, 776 P2d 424 (overruled by *State v Guzman* (Idaho) 1990 Ida LEXIS 188) (noting that Idaho statute applies in proceedings under child protective act or in any criminal proceedings); In re Marriage of L.R. (1st Dist) 202 Ill App 3d 69, 147 Ill Dec 439, 559 NE2d 779, app den 136 Ill 2d 545, 153 Ill Dec 375, 567 NE2d 333 (noting that Illinois statute applies in all civil proceedings); In re NE-KIA S. (RI) 566 A2d 392 (noting that Rhode Island statute permits the use of child-hearsay evidence in any custody and/or termination trial).

§ 869 Admissibility as question of law or fact; burden of proof

Generally speaking, the admission of evidence is initially left to the discretion of the trial court, 70 and the question whether particular evidence is admissible under the res gestae doctrine or one of the spontaneous-statement exceptions to the hearsay rule is one of law for the court. 71

The proponent of a spontaneous statement has the burden of establishing its admissibility. 72

§ 869 ----Admissibility as question of law or fact; burden of proof [SUPPLEMENT]

Case authorities:

The trial court in a first-degree sex offense case did not err in admitting testimony of a social worker and two psychologists concerning statements made by the victims since those statements were made for the purposes of medical diagnosis or treatment and hence were admissible under G.S. § 8C-1, Rule 803(4). *State v Figured* (1994) 116 NC App 1, 446 SE2d 838.

Footnotes

Footnote 70. 75 Am Jur 2d, Trial § 321.

Footnote 71. *Bodak v Masotti*, 14 Conn App 347, 540 A2d 719; *Lee v Peacock*, 199 Ga App 192, 404 SE2d 473, 102-71 Fulton County D R 17B; *State v Burton* (App) 115 Idaho 1154, 772 P2d 1248; *Riley v State* (Ind) 506 NE2d 476; *Collins v State* (Miss) 513 So 2d 877; *People v Brown*, 70 NY2d 513, 522 NYS2d 837, 517 NE2d 515; *State v Carpenter* (Tenn Crim) 773 SW2d 1 (disapproved on other grounds by *State v Jacumin* (Tenn) 778 SW2d 430).

Annotation: Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation, or excited utterance, 89 ALR3d 102 § 7.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 § 2.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 4.

Comment Note.—Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 ALR2d 372.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 5.

Footnote 72. *People v Miron* (5th Dist) 210 Cal App 3d 580, 258 Cal Rptr 494, review den; *Flath v Madison Metal Services, Inc.* (5th Dist) 212 Ill App 3d 367, 156 Ill Dec 496, 570 NE2d 1218 (excited utterance).

Annotation: Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 4.

2. Factors Affecting Admissibility of Spontaneous Statements [870-886]

a. In General [870-874]

§ 870 Establishment of principal fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The principal fact sought to be proved must be established before a spontaneous statement describing or explaining such fact may be admitted. 73 Thus, statements sought to be admitted as spontaneous statements accompanying an act are inadmissible where the act itself is inadmissible. 74

§ 870 ----Establishment of principal fact [SUPPLEMENT]

Case authorities:

The trial court's instruction in a prosecution for first-degree sex offenses against three children that there was some evidence "which tends to show that the defendant may have admitted a fact relating to the crime charged in this case" was supported by evidence that defendant said "Who, Brooks?" when informed that he was being arrested for statutory rape. Furthermore, the instruction did not constitute an expression of opinion on the evidence. *State v Figured* (1994) 116 NC App 1, 446 SE2d 838.

Footnotes

Footnote 73. *Allen v Burrow* (La App 2d Cir) 505 So 2d 880, cert den (La) 507 So 2d 229 (stating that the spontaneous-statement exceptions to the hearsay rule are premised upon the establishment of the factual context of an event for the benefit of the trier of fact); *People v Burton*, 433 Mich 268, 445 NW2d 133 (finding that extrajudicial statements sought to be admitted as excited utterances may not be admitted when there is no independent evidence, direct or circumstantial, of an underlying startling event to which they relate).

Annotation: Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under res gestae or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act, 38 ALR4th 1237.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 5[a].

Footnote 74. *ciGilbert v Gilbert*, 22 Ala 529; *Pinney v Jones*, 64 Conn 545, 30 A 762.

§ 871 Relevance of statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The admission of spontaneous statements in no event dispenses with the conventional requirements of relevancy and materiality in general; unless such a statement is relevant and material in the first instance, it is inadmissible. 75 Thus, regardless of the degree of spontaneity or contemporaneity of a declaration, to be admissible as a statement accompanying an act, the declaration must be relevant in that it must relate to the main event and must explain, elucidate, or in some way characterize that event. 76

For example, a hearsay statement—"it's not my business; it's my girlfriend's business,"—made by a defendant who had been questioned about his alleged importation of large parcels into the United States from Hong Kong is not admissible as a spontaneous statement concerning the defendant's then-existing mental state, because the statement does not negate any requisite criminal knowledge on the part of the defendant, and therefore is not relevant. 77 Similarly, statements made after a presentation of fraudulent documents to collect on a letter of credit are not relevant as to a defendant's own state of mind and intent as related to the criminal act. 78 On the other hand, testimony of a hearsay statement made by a defendant on trial for the murder of his wife, that if his wife ever left him, he would kill her, is admissible as a statement of the defendant's mental state and intent, and is not irrelevant merely because the defendant in fact left his wife, and not vice versa. 79

◆ **Comment:** A homicide victim's state of mind prior to any fatal incident is generally neither at issue nor probative of any material issue in a murder prosecution, and thus hearsay statements of the victim's state of mind are not admissible, but an exception exists when the victim's state of mind is relevant and necessary to rebut the defendant's claim of self-defense. 80

Footnotes

Footnote 75. *Rock v Huffco Gas & Oil Co.* (CA5 La) 922 F2d 272, 32 Fed Rules Evid Serv 1041, stating that before a hearsay statement can be admitted under Rule 803(3) of the Federal Rules of Evidence to show the declarant's then-existing state of mind, the declarant's state of mind must be a relevant issue in the case.

As to relevancy and materiality as a basis for admissibility of evidence generally, see §§ 304 et seq.

Footnote 76. *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844.

Before a spontaneous declaration, uttered at the scene of the accused's arrest, is admissible in evidence at the trial of an accused, the state must establish and demonstrate that the spontaneous declaration is related to or connected in some material way with the offense for which the accused is on trial for committing. Thus, in a prosecution for aggravated robbery, the trial court reversibly erred by admitting into evidence a spontaneous declaration containing an accusation that defendant had robbed and attempted to rape the declarant, which declaration, other than being the reason for defendant's arrest, had nothing to do with the aggravated robbery for which defendant was tried and convicted. *Smith v State* (Tex Crim) 646 SW2d 452.

Footnote 77. *United States v Yu* (ED NY) 697 F Supp 635.

Footnote 78. *United States v Schardar* (CA11 Fla) 850 F2d 1457, 26 Fed Rules Evid Serv 824, cert den 488 US 932, 102 L Ed 2d 343, 109 S Ct 326.

Footnote 79. *State v Dibello* (Utah) 780 P2d 1221, 115 Utah Adv Rep 20.

Footnote 80. *Norton v State* (Tex App Texarkana) 771 SW2d 160, petition for discretionary review ref (Oct 4, 1989).

For discussion of admissibility of acts and declarations as *res gestae* or spontaneous statements in prosecutions for homicide, generally, see 40 Am Jur 2d, Homicide §§ 331 et seq.; as to dying declarations as an exception to the hearsay rule in homicide prosecutions, see 40 Am Jur 2d, Homicide §§ 347 et seq.

§ 872 Declarant's personal knowledge of facts disclosed by statements; opinions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a spontaneous statement has relevancy only for its disclosure of facts, it must appear, *prima facie*, that the speaker had personal knowledge of those facts in order for the statement to be admissible in evidence. ⁸¹ Although direct proof of perception is not necessary, the circumstantial evidence must be such that the purpose of the spontaneous-statement exceptions to the hearsay rule will not be defeated. ⁸² When there is no evidence of personal perception apart from the declaration itself, courts have hesitated to allow an excited utterance to stand alone as evidence of the declarant's opportunity to observe. ⁸³ Thus, in some instances, extrinsic evidence may be required to satisfy the personal perception requirement. ⁸⁴

Identification of the declarant, while often helpful in establishing that he or she was a percipient witness, is generally not a condition of admissibility. ⁸⁵ Thus, when the

statement itself or other circumstantial evidence demonstrates the percipience of a declarant, whether identified or unidentified, the personal knowledge requirement is met. 86

Spontaneous statements that express only a supposition, conclusion, or opinion about the fact sought to be proved are not admissible. 87 Thus, the declaration of a person, particularly a bystander or other nonactor, after an accident as to whose fault it was is inadmissible because it is a mere expression of opinion. 88 However, a hearsay statement that simply describes in a few words a number of facts about the proximity, apposition, and movement of two motor vehicles, although couched in terms of an opinion, is admissible as a shorthand fact description, where the statement is not the sort of conscious deduction prohibited by the rules admitting spontaneous statements. 89

◆ Comment: The burden of establishing perception is on the proponent of the evidence. 90

Footnotes

Footnote 81. *Cummiskey v Chandris, S.A.* (SD NY) 719 F Supp 1183, 1989 AMC 2561, 28 Fed Rules Evid Serv 648, affd (CA2 NY) 895 F2d 107, 1990 AMC 1452 (stating that the declarant of an excited utterance must personally observe the startling event); *People v Garcia* (Colo App) 809 P2d 1038, cert gr (Colo) 1991 Colo LEXIS 260 and revd (Colo) 826 P2d 1259; *State v Jones*, 311 Md 23, 532 A2d 169 (stating that the party offering the statement must show that the declarant spoke from personal knowledge; *People v Kent*, 157 Mich App 780, 404 NW2d 668; *People v Alexander* (1st Dept) 173 App Div 2d 296, 569 NYS2d 689; *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466; *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844 (stating that it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made).

Annotation: Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 15[a].

Footnote 82. *Cummiskey v Chandris, S.A.* (SD NY) 719 F Supp 1183, 1989 AMC 2561, 28 Fed Rules Evid Serv 648, affd (CA2 NY) 895 F2d 107, 1990 AMC 1452.

A telephone conversation can supply indicia of reliability sufficient to support an inference that what was recorded by the declarant reflected the sense of what confronted him. First, the declarant called the 911 operator not once, but twice, to give a continuing account of the events and to inquire as to the arrival of the police. Second, her identity was known to the prosecution. Third, when the police officers arrived at the scene within minutes, they observed and perceived (1) a broken window; (2) the declarant pointing at the defendants from her window; (3) other bystanders pointing at them as well; and (4) the fact that the perpetrators, having just completed the burglary, were seen by the officers carrying with them the proceeds of the crime. *People v Luke*, 136 Misc 2d 733, 519 NYS2d 316.

For discussion of the purpose of the spontaneous-statement exceptions to the hearsay rule, see §§ 864-868.

Footnote 83. *Cummiskey v Chandris, S.A.* (SD NY) 719 F Supp 1183, 1989 AMC 2561, 28 Fed Rules Evid Serv 648, *affd* (CA2 NY) 895 F2d 107, 1990 AMC 1452, finding that the specific words of an unidentified declarant did not offer any indication that the declarant knew anything more than that the plaintiff had fallen and that she was wet, and that therefore there was no evidence that the declarant actually observed either the wetness that caused the plaintiff's fall or the accident.

Footnote 84. *State v Jones*, 311 Md 23, 532 A2d 169.

Footnote 85. § 875.

Footnote 86. *State v Jones*, 311 Md 23, 532 A2d 169.

Footnote 87. *Allen v Burrow* (La App 2d Cir) 505 So 2d 880, *cert den* (La) 507 So 2d 229; *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844.

It is necessary that a statement, in order to be admitted under the *res gestae* exception to the hearsay rule, state a provable fact; a mere opinion is incompetent, even though it satisfies the other requirements for admission of this kind of evidence. *Field v North Coast Transp. Co.*, 164 Wash 123, 2 P2d 672, 76 ALR 1114.

Annotation: Admissibility, as *res gestae*, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 § 10.

Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 18.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 16.

Footnote 88. *Gray v Boston E. R. Co.*, 215 Mass 143, 102 NE 71; *Field v North Coast Transp. Co.*, 164 Wash 123, 2 P2d 672, 76 ALR 1114.

Annotation: Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 17[a], [b].

Footnote 89. *State v Jones*, 311 Md 23, 532 A2d 169.

Footnote 90. *Cummiskey v Chandris, S.A.* (SD NY) 719 F Supp 1183, 1989 AMC 2561, 28 Fed Rules Evid Serv 648, *affd* (CA2 NY) 895 F2d 107, 1990 AMC 1452; *People v Kent*, 157 Mich App 780, 404 NW2d 668.

§ 873 Self-serving nature of statements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Spontaneous statements which are otherwise admissible are not rendered inadmissible because they are self-serving in character, 91 although the self-serving character of a statement, such as with regard to the cause or responsibility for an accident, may be a factor which affords some indication of a lack of the spontaneity requisite to the applicability of spontaneous-statement exceptions to the hearsay rule. 92 On the other hand, the fact that a spontaneous statement is inculpatory or against the interest of the declarant will not affect its admissibility, and may be considered as an extra guaranty of the spontaneity of the statement. 93

§ 873 ----Self-serving nature of statements [SUPPLEMENT]

Case authorities:

Statements of victim of shooting to neighbor and emergency medical technician naming defendant as person who shot him and his girlfriend when neighbor asked who shot him were admissible, even though victim did not say he saw defendant shoot him, where it was clear statement was what he perceived, statements were made shortly after he had been shot, near scene of crime, when victim feared he was going to die, and nothing indicated victim had incentive to falsify or distort. *State v Stafford* (1994) 255 Kan 807, 878 P2d 820.

There was no error in a first- degree murder prosecution where the court did not allow defendant to present an exculpatory statement made by defendant to an officer where defendant contended that the State opened the door when it introduced defendant's earlier remarks into evidence. Although it has been held that if the State submits parts of a defendant's confession the defendant must be allowed to present other parts of the statement even though they are self-serving, defendant's remarks here constituted two verbal transactions. The first remarks took place while defendant was being processed and fingerprinted, were unsolicited, and the conversation was terminated by the officer. The second remarks were made after a period of time had elapsed, after defendant had left one room and entered another, and after defendant had been given Miranda warnings and interrogation had begun. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

There was no error in a first- degree murder prosecution where the court did not allow defendant to present an exculpatory self- serving statement made by defendant because the State opened the door by asking the officer about earlier remarks. The State does not open the door for the introduction of another statement made later in the day by simply introducing an earlier statement by a defendant; a party is only entitled to introduce evidence that would have been inadmissible if offered initially where the other party introduces evidence as to a particular fact that is covered by the subsequent statement. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

Footnotes

Footnote 91. *Moore v Bellamy* (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214.

The fact that a statement was in the nature of an excuse is no reason for excluding it. *Alsever v Minneapolis & S. L. R. Co.*, 115 Iowa 338, 88 NW 841.

But see *Palmer v Nationwide Mut. Fire Ins. Co.* (Tenn App) 723 SW2d 124, an arson case in which the court refused to allow an excited utterance—made by a homeowner whose house had burned—that the homeowner did not have any fire insurance, because the evidence was so convincing that the declarant was the one who committed the arson.

Footnote 92. *State v Burton* (App) 115 Idaho 1154, 772 P2d 1248 (stating that although the self-serving nature of a statement did not conclusively signify that the statement was nonspontaneous, the exculpatory content of the statement was a factor to be weighed in determining whether it was a product of reflective thought); *People v House*, 141 Ill 2d 323, 152 Ill Dec 572, 566 NE2d 259 (stating that the presence or absence of self-interest is a factor to be considered in determining whether the declarant's statement was in fact spontaneous, excited, and unreflecting); *Jones v Commonwealth*, 11 Va App 75, 396 SE2d 844.

Dangers associated with deliberation and reflection are not as real where both the person making the statement and the person seeking to repeat it in court are disinterested witnesses, as contrasted to litigants or interested witnesses. *May v Wright*, 62 Wash 2d 69, 381 P2d 601.

For a discussion of the requirement of spontaneity for the application of the spontaneous-statement exceptions to the hearsay rule, see § 882.

Annotation: Admissibility, as *res gestae*, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 § 6.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 11[a].

Footnote 93. *Pickwick Stages Corp. v Williams*, 36 Ariz 520, 287 P 440; *Lane v Pacific Greyhound Lines*, 26 Cal 2d 575, 160 P2d 21; *Riley v Weigand*, 18 NJ Super 66, 86 A2d 698; *Zemp v W. & M. R. Co.*, 43 SCL 84; *Jackson v Utah Rapid Transit Co.*, 77 Utah 21, 290 P 970 (stating that declarations which are disserving are more likely to be instinctive and spontaneous and not the result of premeditation or design than declarations which are self-serving).

Annotation: 53 ALR2d 1245 § 12.

§ 874 Declarant's availability to testify

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admissibility of spontaneous statements generally does not depend upon the availability of the declarant as a witness at trial. 94 Under the Federal Rules of Evidence, there is no requirement that the declarant be unavailable before statements of present sense impression, excited utterances, statements of present mental or physical

condition, or statements for the purpose of medical diagnosis or treatment may be admitted. 95 However, some jurisdictions retain an unavailability requirement for the admission of certain spontaneous statements. 96

◆ Comment: The Confrontation Clause of the Sixth Amendment to the United States Constitution, which guarantees the accused in a criminal prosecution the right to be confronted with the witnesses against him, does not require that a declarant either testify at trial or be found unavailable to testify as a condition for the admission of spontaneous declarations or statements for the purpose of medical diagnosis or treatment. 97

§ 874 ----Declarant's availability to testify [SUPPLEMENT]

Case authorities:

Trial court properly exercised its discretion to admit hearsay testimony, under *res gestae* exception, of police officer as to statements made by driver of car in which murder suspect and firearm were found, in which statement driver claimed that suspect owned gun and had placed it under seat, where driver was homicide victim prior to trial and was thus unavailable to testify. *State v Toney* (1993) 253 Kan 651, 862 P2d 350.

Present sense impression exception to hearsay rule does not require showing of declarant's unavailability as *sine qua non* to admissibility, though such factor may be weighed by trial judges in assessing traditional probativeness versus undue prejudice calculus for allowing evidence before petit jury; further, proponent of such evidence does not have obligation to show some special "necessity" before such evidence is deemed admissible. *People v Buie* (1995) 86 NY2d 501, 634 NYS2d 415, 658 NE2d 192.

Victim's availability and testimony did not otherwise preclude admissibility of 911 tape of victim's telephone call to police, which contained victim's description of unfolding events to operator, under present sense impression hearsay exception, where it was undisputed that 911 call was contemporaneous with victim's observations and independently corroborated by much other evidence. *People v Buie* (1995) 86 NY2d 501, 634 NYS2d 415, 658 NE2d 192.

Footnotes

Footnote 94. *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466.

Footnote 95. Advisory Committee Note to Federal Rules of Evidence, FRE, Rule 803, stating that the hearsay exceptions contained in Rule 803 proceed upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guaranties of trustworthiness sufficient to justify nonproduction of the declarant in person at trial even though he may be available.

Footnote 96. *People v Lawler* (5th Dist) 194 Ill App 3d 547, 141 Ill Dec 612, 551 NE2d 799, app gr 132 Ill 2d 551, 144 Ill Dec 263, 555 NE2d 382 and affd 142 Ill 2d 548, 154 Ill Dec 674, 568 NE2d 895, holding that statements indicating a declarant's state of mind are admissible as exceptions to the hearsay rule only if the declarant was unavailable and

there existed a reasonable probability that the testimony was truthful.

Footnote 97. *White v Illinois*, 502 US ----, 116 L Ed 2d 848, 112 S Ct 736..

For a discussion of the requirements of the Confrontation Clause generally, see 21A Am Jur 2d, Criminal Law §§ 720-723.

b. General Nature and Condition of Declarant; Identification [875-881]

§ 875 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The person making a spontaneous statement need not be a participant in the principal act in order for the statement to be admissible; 98 for example, he may be have been a bystander. 99

Identification of the declarant, while often helpful in establishing that he or she was a percipient witness, is generally not a condition of admissibility, 1 provided there is proof that the declarant actually witnessed the act his statements purport to explain or describe. 2 In fact, the specific identity of the declarant need not even be established. 3 Thus, for example, testimony that, after a collision, an unidentified person at the scene had shouted a statement indicating that the plaintiff's decedent had been attempting to pass the defendant's car at the time of the collision is admissible under the rule admitting spontaneous utterances. 4

Footnotes

Footnote 98. *Moore v Bellamy* (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214; *People v Alexander* (1st Dept) 173 App Div 2d 296, 569 NYS2d 689.

Participation by the declarant is not required. A nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Advisory Committee Notes to FRE, Rule 803.

Footnote 99. § 33.

Footnote 1. *State v Jones*, 311 Md 23, 532 A2d 169.

But see *People v Alexander* (1st Dept) 173 App Div 2d 296, 569 NYS2d 689, (stating that where there is no proof of the identity of the declarants or of whether they had an adequate opportunity to observe the event, it is error to permit spontaneous-statement hearsay testimony).

As to the admissibility, as against a surety, of declarations of the principal on the theory

that they are a part of the res gestae in the transaction of business for which the surety is bound, see 74 Am Jur 2d, Suretyship § 150.

As to the admissibility of the declarations of a conspirator against his coconspirator, see 16 Am Jur 2d, Conspiracy § 46.

Footnote 2. § 872.

Footnote 3. Moore v Bellamy (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214; Allen v Burrow (La App 2d Cir) 505 So 2d 880, cert den (La) 507 So 2d 229.

But see People v Alexander (1st Dept) 173 App Div 2d 296, 569 NYS2d 689, finding that where there is no proof of the identity of the declarants or of whether they had an adequate opportunity to observe the event, it is error to permit hearsay testimony of a spontaneous statement.

Annotation: Admissibility, as part of res gestae, of spontaneous utterances of unidentified bystander testified to by an interested party, 50 ALR3d 716.

Footnote 4. Moore v Bellamy (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214.

§ 876 Effect of incompetency

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that the declarant is incompetent to testify as a witness does not affect the admissibility of his statements under the spontaneous-statement exceptions to the hearsay rule; 5 so long as a statement qualifies as a spontaneous declaration, it is reliable and admissible regardless of the competency of the declarant, since the reliability of the statement comes from the circumstances under which the statement are made. 6 Thus, testimony concerning spontaneous statements made by persons incompetent to testify because of insanity, mental defect, or other mental deficiency is nonetheless admissible in evidence. 7 Likewise, spontaneous statements of a husband and wife are generally admissible for or against each other, even if the spouse would be incompetent to testify as a witness in the case. 8 Similarly, the fact that the declarant is a convict or an unpardoned felon, incompetent to testify, will not affect the admissibility of testimony of his or her spontaneous statements. 9 There have been differing conclusions made, based on the circumstances, as to the admissibility of a child's spontaneous statement. 10

Footnotes

Footnote 5. State v Bingham, 116 Idaho 415, 776 P2d 424 (ovrld on other grounds by State v Guzman (Idaho) 1990 Ida LEXIS 188 on reh 122 Idaho 981, 842 P2d 660; Matthews v State (Ind) 515 NE2d 1105.

The competency of the declarant is not a criterion for admissibility of a statement as a spontaneous declaration. *People v Cherry* (5th Dist) 88 Ill App 3d 1048, 44 Ill Dec 155, 411 NE2d 61, 15 ALR4th 1032 (criticized on other grounds by *People v Flores* (2d Dist) 168 Ill App 3d 636, 119 Ill Dec 214, 522 NE2d 876).

Annotation: Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 ALR4th 1043.

Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 23.

Footnote 6. *People v Cherry* (5th Dist) 88 Ill App 3d 1048, 44 Ill Dec 155, 411 NE2d 61, 15 ALR4th 1032 (criticized on other grounds by *People v Flores* (2d Dist) 168 Ill App 3d 636, 119 Ill Dec 214, 522 NE2d 876).

Footnote 7. *State v Bingham*, 116 Idaho 415, 776 P2d 424 (ovrld on other grounds by *State v Guzman* (Idaho) 1990 Ida LEXIS 188 on reh 122 Idaho 981, 842 P2d 660; *Henry Vogt Machine Co. v Chamberlain* (Ky) 279 SW2d 224; *Moore v State*, 26 Md App 556, 338 A2d 344; *State v Simmons*, 52 NJ 538, 247 A2d 313, cert den 395 US 924, 23 L Ed 2d 241, 89 S Ct 1779.

Annotation: 15 ALR4th 1043 § 5[a].

Footnote 8. *People v Cherry* (5th Dist) 88 Ill App 3d 1048, 44 Ill Dec 155, 411 NE2d 61, 15 ALR4th 1032 (criticized by *People v Flores* (2d Dist) 168 Ill App 3d 636, 119 Ill Dec 214, 522 NE2d 876); *State v Childers*, 222 Kan 32, 563 P2d 999; *Moore v State*, 26 Md App 556, 338 A2d 344; *Eubanks v State*, 242 Miss 372, 135 So 2d 183; *State v Simmons*, 52 NJ 538, 247 A2d 313, cert den 395 US 924, 23 L Ed 2d 241, 89 S Ct 1779; *Southwestern Bell Tel. Co. v Nelson* (Okla) 384 P2d 914; *State v Burtts*, 81 SD 150, 132 NW2d 209; *Davidson v State* (Tex Crim) 386 SW2d 144.

Annotation: 15 ALR4th 1043 § 4[a].

Footnote 9. *Moster v Bower*, 153 Ind App 158, 286 NE2d 418; *Moore v State*, 26 Md App 556, 338 A2d 344; *State v Simmons*, 52 NJ 538, 247 A2d 313, cert den 395 US 924, 23 L Ed 2d 241, 89 S Ct 1779.

Annotation: 15 ALR4th 1043 § 6.

Footnote 10. § 881.

§ 877 Declarant asleep or unconscious

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In some jurisdictions, the expressions of a person made while asleep are not admissible

as spontaneous statements, since they proceed from an unconscious and irresponsible condition. 11 It has been said that such expressions have little or no meaning, are as likely to refer to unreal facts or conditions as to things real, and are wholly unreliable, and a jury ought not to be allowed to guess that such expressions are produced by a present mental or physical condition. 12 The same reasoning has been applied to an utterance offered as a spontaneous statement made by a person while unconscious by reason of an injury. 13 But the view has also been followed, in some instances, that there should be no question as to the competency of a spontaneous statement because of an alleged unconscious state of the declarant, unless the language is incoherent and the speaker delirious. 14

§ 877 ----Declarant asleep or unconscious [SUPPLEMENT]

Practice Aids: Voices from darkness: The evidentiary admissibility of sleep talk, 30 U SF LR 2:509 (1996).

Footnotes

Footnote 11. *Godfrey v State*, 258 Ga 28, 365 SE2d 93, on remand 187 Ga App 319, 370 SE2d 183 (holding that the lack of information offered regarding the fundamental nature of sleep talk rendered statements insufficiently reliable to come within statutory hearsay exception for statements made by abused children); *Gough v General Box Co. (Mo)* 302 SW2d 884.

Annotation: Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 ALR4th 802 § 3[b].

Footnote 12. *Gough v General Box Co. (Mo)* 302 SW2d 884.

A mother's testimony as to statements made by her daughter while asleep should not have been admitted under a statutory exception admitting statements by children under 14 concerning sexual abuse, where the statute requires the court to find that the circumstances of the statement provide sufficient indicia of reliability, and there was no expert testimony to prove the reliability of sleep talk. *Godfrey v State*, 258 Ga 28, 365 SE2d 93, on remand 187 Ga App 319, 370 SE2d 183.

Footnote 13. *Siegel v Missouri K. T. R. Co.*, 342 Mo 1130, 119 SW2d 376, cert den 305 US 654, 83 L Ed 423, 59 S Ct 249.

Annotation: 14 ALR4th 802 § 4[b].

Footnote 14. *Johnson v Southern R. Co.*, 351 Mo 1110, 175 SW2d 802; *Allen v McLain (SD)* 75 SD 520, 69 NW2d 390.

Annotation: 14 ALR4th 802 §§ 3[a], 4[a].

§ 878 Declarant who died shortly after making statement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that the declarant died only a short time after making his statement is not, by itself, decisive of the question of the statement's admissibility under one of the spontaneous-statement exceptions to the hearsay rule; however, it is a factor which may be considered in conjunction with all the other pertinent circumstances bearing on admissibility. 15 The fact that the declarant died only a short time after making his statement tends to rebut the idea that his statement was made with premeditation and design. 16

Footnotes

Footnote 15. *Augusta Factory v Barnes*, 72 Ga 217; *Keefer v Pacific Mut. Life Ins. Co.*, 201 Pa 448, 51 A 366.

As to the admissibility of dying declarations generally, see § 829.

Annotation: Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 17[d].

Footnote 16. *Hartford Acci. & Indem. Co. v Olivier* (CA5 Tex) 123 F2d 709.

§ 879 Bystander

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The spontaneous-statement exceptions to the hearsay rule apply to statements made by bystanders as well as participants. 17 Thus, for example, a statement by a man who witnessed an accident—"Lord, the lady is going to get run over"—qualifies as an excited utterance even though the man was not involved in the accident except as a witness. 18 Similarly, statements made by bystanders yelling when police officers arrived at the scene of a crime are admissible as part of one continuing transaction. 19

Footnotes

Footnote 17. *Moore v Bellamy* (5th Dist) 183 Ill App 3d 110, 131 Ill Dec 658, 538 NE2d 1214; *People v Alexander* (1st Dept) 173 App Div 2d 296, 569 NYS2d 689.

As to res gestae statements of bystanders in: motor vehicle accident cases, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1060; actions against carriers for injuries to passengers, see 14 Am Jur 2d, Carriers § 1183.

Annotation: Admissibility, as part of res gestae, of spontaneous utterances of unidentified bystander testified to by an interested party, 50 ALR3d 716.

Admissibility in criminal case, as part of the res gestae, of statements or utterances of bystanders made at time of arrest, 78 ALR2d 300 § 2.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 14.

Practice References 42 Am Jur POF2d 1, Negligence of Pedestrian Struck by Motor Vehicle § 11.

Footnote 18. Blalock v Claiborne (Tenn App) 775 SW2d 363.

Footnote 19. Ewald v State, 156 Ga App 68, 274 SE2d 31.

§ 880 Agent or employee

[View Entire Section](#)
[Go to Parallel Reference Table](#)

What an agent or employee says, relative to an act done within the scope of his agency or employment or contemporaneously therewith, may be admissible under one of the spontaneous-statement exceptions to the hearsay rule, either for or against the principal or employer. 20

Footnotes

Footnote 20. Brooks v Kroger Co., 194 Ga App 215, 390 SE2d 280 (noting Georgia statute which provides that the declarations of an agent as to the business transacted by him are admissible against his principal where the declarations were part of the res gestae); Simmons v Ricks (4th Dept) 149 App Div 2d 914, 540 NYS2d 49 (stating that admissibility is not dependant upon the fact of agency).

§ 881 Child

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, the fact that a child may be incompetent to testify as a witness ²¹ does not make a spontaneous statement by him or her inadmissible, ²² because the nature of a spontaneous statement is such that it obviates the usual source of untrustworthiness in children's testimony. ²³ Some jurisdictions have relaxed the common-law requirements of contemporaneity and spontaneity for the admission of statements made by a young child, ²⁴ particularly in cases of child abuse. ²⁵ However, some courts have found the allegedly spontaneous statements of a child too unreliable to admit into evidence, where the child's competency to testify truthfully was clearly questionable, ²⁶ or where the contemporaneity of the event and statement could not be established with any precision. ²⁷

§ 881 ----Child [SUPPLEMENT]

Case authorities:

Three-year-old's statement identifying defendant as assailant was properly admitted under excited utterance exception even though it came 20 minutes after event where child witnessed beating, cried for 20 minutes, then asked witness, her grandmother, whether they could pray for victim and for defendant who had beaten victim. *United States v Sowa* (1994, CA7 Ill) 34 F3d 447.

In child sexual abuse trial, testimony of victim's brother as to what victim had told him in early morning hours only few minutes after last of three acts of molestation was admissible, since victim was young girl who was, at time of recounting, distraught and in tears. *State v Parkinson* (1996, App) 128 Idaho 29, 909 P2d 647.

In prosecution for defendant's molestation of his 5-year-old grandson, trial court properly admitted victim's testimony regarding defendant's uncharged offense of molestation of victim's 3-year-old brother, although evidence was not admissible in order to prove that defendant had depraved sexual instinct, where testimony fell within *res gestae* branch of common scheme or plan exception, since molestation of brother was identical to molestation of victim, acts occurred contemporaneously, in same manner and at exact same location. *Palmer v State* (1994, Ind App) 640 NE2d 415.

Footnotes

Footnote 21. As to incompetency of a declarant, generally, as affecting admissibility of spontaneous statements made by such person, see § 876.

Footnote 22. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881 (applying excited-utterance exception and exception for statements made for purposes of medical diagnosis or treatment); *State v Bauer* (App) 146 Ariz 134, 704 P2d 264; *People v Orduno* (4th Dist) 80 Cal App 3d 738, 145 Cal Rptr 806, cert den 439 US 1074, 59 L Ed 2d 41, 99 S Ct 849; *People v Roark* (Colo) 643 P2d 756; *People v Ortega* (Colo App) 672 P2d 215; *People v Fisher* (3d Dist) 169 Ill App 3d 785, 119 Ill Dec 760, 523 NE2d 368, app den 122 Ill 2d 583, 125 Ill Dec 226, 530 NE2d 254; *People v Cherry* (5th Dist)

88 Ill App 3d 1048, 44 Ill Dec 155, 411 NE2d 61, 15 ALR4th 1032 (criticized on other grounds by *People v Flores* (2d Dist) 168 Ill App 3d 636, 119 Ill Dec 214, 522 NE2d 876); *Souder v Commonwealth* (Ky) 719 SW2d 730; *Moore v State*, 26 Md App 556, 338 A2d 344; *State v Van Orman* (Mo) 642 SW2d 636; *State in interest of C.A.*, 201 NJ Super 28, 492 A2d 683; *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466; *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466; *State v Hutchison*, 222 Or 533, 353 P2d 1047, 83 ALR2d 1361; *State v McCafferty* (SD) 356 NW2d 159, appeal after remand (SD) 384 NW2d 323, cert den 476 US 1172, 90 L Ed 2d 983, 106 S Ct 2897, habeas corpus proceeding (SD) 449 NW2d 590, habeas corpus proceeding (CA8 SD) 944 F2d 445, 34 Fed Rules Evid Serv 794, reh, en banc, den (CA8) 1991 US App LEXIS 26039 and cert den (US) 117 L Ed 2d 503, 112 S Ct 1277; *Ortega v State* (Tex Crim) 500 SW2d 816; *State v Robinson*, 44 Wash App 611, 722 P2d 1379, review den 107 Wash 2d 1009.

Res gestae statement of child was admissible notwithstanding child's testimonial incapacity due to age, where testimony held admissible was of mother of girl not quite 3 years old regarding statements made to her by child concerning a sexual offense allegedly committed upon her by defendant. The requirement of spontaneity and excitement subsumed by the res gestae exception to the rule of inadmissibility of hearsay statements furnishes a sufficient guaranty of trustworthiness of a child's statements for them to be admissible. *Lancaster v People*, 200 Colo 448, 615 P2d 720 (superseded by statute on other grounds as stated in *People v District Court of Summit County* (Colo) 791 P2d 682).

Annotation: Admissibility of testimony regarding spontaneous declarations made by one incompetent to testify at trial, 15 ALR4th 1043 § 3[a].

Footnote 23. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881.

Footnote 24. *In re Marriage of Ashby* (5th Dist) 193 Ill App 3d 366, 140 Ill Dec 272, 549 NE2d 923; *In re Interest of R.A.*, 225 Neb 157, 403 NW2d 357 (ovrld on other grounds by *State v Jacob*, 242 Neb 176, 494 NW2d 109).

For a discussion of the requirements of spontaneity and contemporaneity, generally, see 882.

Footnote 25. § 868.

Footnote 26. *In re Marriage of Taylor* (3d Dist) 202 Ill App 3d 740, 147 Ill Dec 810, 559 NE2d 1150 (criticized on other grounds by *In re Marriage of Berk* (2d Dist) 215 Ill App 3d 459, 158 Ill Dec 971, 574 NE2d 1364) (3-1/2-year-old child).

Annotation: 15 ALR4th 1043 § 3[b].

Footnote 27. *M.E.D. v J.P.M.*, 3 Va App 391, 350 SE2d 215.

c. Time and Circumstances in Which Statement was Made [882-886]

§ 882 Generally; requirement of contemporaneity with principal fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Spontaneous statements derive their reliability in part from the fact that they are made so near in time to the event they purport to explain or describe that there is little chance that they are based on a fabrication or a faulty memory. 28 Thus, as a general rule, a declaration or utterance sought to be proved under one of the spontaneous-statement exceptions to the hearsay rule must be contemporaneous with the event established as the principal act; it must spring from this act at the time of its occurrence, without any intervening interval or opportunity for deliberation in forming the statement. 29 The declaration or utterance need not in all strictness be contemporaneous, in the sense of simultaneous, with the principal act. 30 Rather, spontaneous statements only need be "substantially contemporaneous" with the event they purport to describe or explain. 31 The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought. 32 In other words, it is logical that the theory admitting spontaneous statements should have its limits determined, not by the strict meaning of the term "contemporaneous," but rather by the causal, natural, or psychological relation of such exclamations to the primary facts in controversy. 33 Thus, the mathematical elapsed time between the event and the making of a statement relative thereto is not alone decisive of the question whether the statement is admissible, but it is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. 34 It is clear, on the other hand, that if the declarations are not in their nature a part of the act and do not characterize, explain, or flow therefrom, they are inadmissible in evidence, regardless of how closely related to the main event in point of time. 35

The present sense impression exception to the hearsay rule 36 requires a closer time proximity than the excited utterance exception. 37 Since precise contemporaneity between a statement of present sense impression and the event prompting it often is impossible, a slight time lapse is allowable, 38 although the time interval must be very short. 39 Under the excited utterance exception, the standard of measurement for the time interval between the event and the statement is the duration of the state of excitement. 40 Courts have varied greatly in determining how much of a time lapse between an event and an excited utterance is too much. 41 For example, it has been stated that 4 1/2 to 5 hours represents the extreme outer limit to which the excited utterance exception can be pushed, 42 although statements made possibly 1 or 2 days after an occurrence of child abuse have been admitted as excited utterances. 43 (LOGO)Comment: Verbal acts must be simultaneous with the fact to be proved in order to be admissible. 44

§ 882 ----Generally; requirement of contemporaneity with principal fact [SUPPLEMENT]

Case authorities:

In husband's prosecution for murdering wife, trial court did not err in admitting, as res gestae, statements made by wife concerning her relationship with husband, even though

prosecution did not identify time at which statements were made. *State v Gadelkarim* (1994) 256 Kan 671, 887 P2d 88.

Court did not abuse its discretion in determining that written exculpatory statement made by defendant in different precinct one hour after his spontaneous oral inculpatory statement was inadmissible hearsay and was independent of oral statement. *People v Hentley* (1989, 1st Dept) 155 AD2d 392, 547 NYS2d 876, app den 75 NY2d 919, 555 NYS2d 38, 554 NE2d 75.

An exculpatory statement about the shooting of the victim made by defendant to the aunt with whom he lived was not admissible as an excited utterance and was properly excluded as hearsay in this first-degree murder trial where defendant first talked with his aunt on the telephone after the shooting from his grandmother's house but did not mention the shooting, and defendant waited until he went to his aunt's home an hour after the shooting to tell her what had happened, since defendant had time to manufacture the statement and the statement lacked spontaneity. G.S. § 8C- 1, Rule 803(2). *State v Sidberry* (1994) 337 NC 779, 448 SE2d 798.

Footnotes

Footnote 28. *Foley v Commonwealth*, 8 Va App 149, 379 SE2d 915, on reh, en banc 9 Va App 175, 384 SE2d 813.

Footnote 29. *First State Bank v Maryland Casualty Co.* (CA5 Tex) 918 F2d 38, 31 Fed Rules Evid Serv 998 (stating that timeliness is the key to determining whether a statement meets the present sense impression exception to the hearsay rule); *State v Jones*, 311 Md 23, 532 A2d 169; *In re Interest of R.A.*, 225 Neb 157, 403 NW2d 357 (ovrld on other grounds by *State v Jacob*, 242 Neb 176, 494 NW2d 109); *In re NE-KIA S. (RI)* 566 A2d 392.

The trustworthiness of a spontaneous statement is based on the startling or exciting nature of the act observed and on the spontaneity of the statement made under the stress of excitement produced by declarant's observation of that act or event. "Spontaneous" does not mean that the statement is made at the time of the incident, but rather in circumstances such that the statement is made without reflection. *People v Hughey* (2nd Dist) 194 Cal App 3d 1383, 240 Cal Rptr 269.

Annotation: Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 6.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 6.

Practice References 27 Am Jur POF2d 1, Point of Origin of Fire: Improperly Installed or Maintained Heating Appliance § 10.

Footnote 30. *Maynard v Hall*, 61 Ariz 32, 143 P2d 884, 150 ALR 618; *Williams v Martin*, 226 Ark 431, 290 SW2d 442; *Littlejohn v State* (Sup) 59 Del 291, 219 A2d 155; *St. Germain v Carpenter* (Fla) 84 So 2d 556; *Mason v Mootz*, 73 Idaho 461, 253 P2d 240; *Drake v Moore*, 184 Kan 309, 336 P2d 807; *Conley v Berberich* (Mo App) 300

SW2d 844; Potter v Baker, 162 Ohio St 488, 55 Ohio Ops 389, 124 NE2d 140, 53 ALR2d 1234; State v Poole, 161 Or 481, 90 P2d 472; Renshaw v Countess (Tex Civ App Fort Worth) 289 SW2d 621.

Annotation: Time element as affecting admissibility of statement or complaint made by victim of sex crime as res gestae, spontaneous exclamation, or excited utterance, 89 ALR3d 102 § 6.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 §§ 3, 4.

4 ALR3d 149 § 4.

53 ALR2d 1245 §§ 7[a], 9.

Footnote 31. United States v Campbell (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661.

Footnote 32. State v Jones, 311 Md 23, 532 A2d 169.

Although a number of factors may be relevant under the circumstances to rebut a presumption of deliberation, elapsed time, although not controlling, is highly relevant to the determination whether a declaration was spontaneous and instinctive or premeditated and deliberate. Jones v Commonwealth, 11 Va App 75, 396 SE2d 844; United States v Campbell (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661.

Annotation: 4 ALR3d 149 §§ 7-12.

53 ALR2d 1245 §§ 6-9.

Footnote 33. Harrison v Baker, 260 Ala 488, 71 So 2d 284 (recognizing that although perfect coincidence of time between the declaration and the main fact is not required, the declaration must be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact and be so closely connected with it as to virtually constitute but one entire transaction); Littlejohn v State (Sup) 59 Del 291, 219 A2d 155; State v Lasecki, 90 Ohio St 10, 106 NE 660.

Footnote 34. Hamilton v Huebner, 146 Neb 320, 19 NW2d 552, 163 ALR 1.

In determining spontaneity, we eschew any approach that calls for a blind obedience to a clock and hour-by-hour count of the time that has transpired between the event and the declaration. In re NE-KIA S. (RI) 566 A2d 392.

Footnote 35. St. Louis, I. M. & S. R. Co. v Weakly, 50 Ark 397, 8 SW 134; Marriott v Williams, 152 Cal 705, 93 P 875; Batton v Watson, 13 Ga 63; Commonwealth v Chance, 174 Mass 245, 54 NE 551; Leahey v Cass Ave. & F. G. R. Co., 97 Mo 165, 10 SW 58; Butler v Manhattan R. Co., 143 NY 417, 38 NE 454 (ovrld on other grounds by People v Caviness, 38 NY2d 227, 379 NYS2d 695, 342 NE2d 496).

Statements by the complaining witness made at a distance of 100 to 125 yards from the place of the shooting and approximately 3 minutes after the occurrence were inadmissible

as being too remote. *Daws v Commonwealth*, 314 Ky 265, 234 SW2d 953.

Annotation: 4 ALR3d 149 § 6.

53 ALR2d 1245 §§ 7-9.

Footnote 36. As to this exception, generally, see § 864.

Footnote 37. *Urquhart v Antrum* (Tex App Houston (14th Dist)) 776 SW2d 595.

For discussion of the "excited utterance" exception, generally, see § 865.

Footnote 38. Advisory Committee Notes to Federal Rule of Evidence, FRE, Rule 803.

Footnote 39. *State v Jones*, 311 Md 23, 532 A2d 169.

A time period potentially as large as 23 minutes may be within the scope of the "substantially contemporaneous" standard for present sense impressions. *United States v Campbell* (ND Ill) 782 F Supp 1258, 34 Fed Rules Evid Serv 661.

Footnote 40. *In re Interest of R.A.*, 225 Neb 157, 403 NW2d 357 (ovrld on other grounds by *State v Jacob*, 242 Neb 176, 494 NW2d 109); *In re NE-KIA S. (RI)* 566 A2d 392.

Footnote 41. *Morgan v Foretich* (CA4 Va) 846 F2d 941, 25 Fed Rules Evid Serv 881.

See 884 for a general discussion of the admissibility of statements made after the occurrence of the principal fact.

Footnote 42. *Cassidy v State*, 74 Md App 1, 536 A2d 666, cert den 312 Md 602, 541 A2d 965 (finding it difficult to conceive of circumstances under which excited spontaneity could continue to operate over a 3-day period).

Footnote 43. *In re NE-KIA S. (RI)* 566 A2d 392.

Many courts have relaxed the requirement of spontaneity when the declarant made the statement at the earliest opportunity to do so, during continued intimidation, or while fearful of another attack. *In re Interest of R.A.*, 225 Neb 157, 403 NW2d 357 (ovrld on other grounds by *State v Jacob*, 242 Neb 176, 494 NW2d 109).

As to the admissibility of a child's statements regarding physical or sexual abuse generally, see 868.

Footnote 44. *Sconce v Jones*, 343 Mo 362, 121 SW2d 777.

Generally, as to verbal acts, see § 863.

§ 883 Statements made prior to principal fact

[View Entire Section](#)

Declarations made before a specific act takes place are admissible if the declarations tend to illustrate and give character to the act. 45 For example, when the question is whether a person did a certain act, his declarations, oral or written, made prior to and approximately at the time he is alleged to have done the act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion of misrepresentation. 46 To a like effect, utterances preceding an accident or injury, even if somewhat remote from it, are admissible if they are so linked with it in continuity of action and proof as to constitute a part of the *res gestae*. 47 But statements made before the principal act occurred, or was within the contemplation of the parties, are not admissible, although separated by but a short span of time, unless the declarations tend to explain the principal act, since otherwise they cannot be said to throw any light upon the act or the motive for it. 48

Footnotes

Footnote 45. *Sun Papers, Inc. v Jerrell* (Ala App) 411 So 2d 790; *Piedmont Life Ins. Co. v Lea*, 140 Ga App 400, 231 SE2d 147; *Ewing-Von Allmen Dairy Co. v Fowler's Ex'r*, 312 Ky 547, 228 SW2d 449.

A passenger should have been permitted to testify about the driver's exclamation—just prior to accident—relating to steering problem. *Harmon v Statfeld* (2d Dept) 51 App Div 2d 761, 379 NYS2d 511.

Annotation: Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance, 89 ALR3d 102 § 3.

Admissibility, as *res gestae*, of accusatory utterances made by homicide victim before the act, 74 ALR3d 963.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 17[c].

Footnote 46. § 863.

Footnote 47. § 888.

Footnote 48. *Boyer Chemical Laboratory Co. v Industrial Com.*, 366 Ill 635, 10 NE2d 389, 113 ALR 264.

§ 884 Statements made after principal fact; narrative accounts

A statement which is merely narrative of a past occurrence generally is not admissible in evidence as a spontaneous statement, notwithstanding the fact that it is made soon after the occurrence. 49 However, the fact that a statement made subsequent to an act or occurrence was narrative in form sometimes does not preclude its admissibility, provided it meets all the requirements of admissibility as a spontaneous statement. 50 In any case, when opportunity for formulation of the content of the statement has existed to sufficient extent to prevent the declaration from becoming part of the main event, the courts generally reject the statement as hearsay, regardless of the character of the declaration or the event it seeks to explain or characterize. 51 Similarly, statements which are written long after the event they record or which form no integral part thereof are not admissible as spontaneous statements. 52

**§ 884 ----Statements made after principal fact; narrative accounts
[SUPPLEMENT]**

Case authorities:

Emotional statement made to aunt by victim of sexual assault was inadmissible as excited utterance, where conversation took place six weeks after assault. *Battle v United States* (1993, App DC) 630 A2d 211.

Footnotes

Footnote 49. *W.C.L. v People* (Colo) 685 P2d 176 (rejecting statements in part because they were part of a calm narrative); *Rosenberg v Equitable Life Assur. Soc.* (1st Dept) 148 App Div 2d 337, 538 NYS2d 551, appeal after remand (1st Dept) 169 App Div 2d 533, 564 NYS2d 386, app gr 77 NY2d 810, 571 NYS2d 913, 575 NE2d 399 and app den 78 NY2d 995, 575 NYS2d 273, 580 NE2d 759 and revd, complaint dismd 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840, reh dismd 82 NY2d 825, 605 NYS2d 3, 625 NE2d 589 (finding a narrative regarding the administration of a stress test inadmissible); *First Southwest Lloyds Ins. Co. v MacDowell* (Tex App Texarkana) 769 SW2d 954, writ den (Nov 1, 1989).

Annotation: Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance, 89 ALR3d 102.

Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 §§ 13, 14.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 §§ 8, 10.

Footnote 50. *Commonwealth v Blackwell*, 343 Pa Super 201, 494 A2d 426, holding that statements made to a police officer and a nurse within 1/2-hour to 45 minutes after a robbery were admissible as excited utterances, despite the fact that the statements were in

narrative form, and were preceded by at least one other account of the incident, where (1) the statements were made under the continuing stress arising from the robbery; (2) they repeated, without alteration, statements already made to a police dispatcher; and (3) the victim had no opportunity to discuss the robbery with anyone else, or to reflect on it.

Footnote 51. *People v Sostre*, 51 NY2d 958, 435 NYS2d 702, 416 NE2d 1038; *Commonwealth v Little*, 469 Pa 83, 364 A2d 915.

Practice References 28 Am Jur POF2d 167, Slip and Fall Due to Foreign Substance on Floor § 15.

Footnote 52. *Goff v Stoughton State Bank*, 78 Wis 106, 47 NW 190.

§ 885 Statements made in response to questioning

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that a statement was made in response to a question does not itself deprive that statement of the spontaneity necessary for admissibility under one of the spontaneous-statement exceptions to the hearsay rule. 53 Rather, the fact that an utterance was in response to an inquiry is merely one factor bearing on the spontaneity of the utterance. 54 In other words, the nature, extent and purpose of the questions and the identity, position and manner of the questioner are but additional factors to be considered in determining whether the statements were made under the continuing influence of the stress and excitement generated by the initial event. 55

In some jurisdictions, the key inquiry in deciding whether a statement in response to questioning is admissible as a spontaneous statement is whether the statement would have been made if the questions had not been asked. 56 Other courts hold that an otherwise admissible declaration is not rendered inadmissible by questioning which (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties. 57

Footnotes

Footnote 53. *People v Lawler* (5th Dist) 194 Ill App 3d 547, 141 Ill Dec 612, 551 NE2d 799, app gr 132 Ill 2d 551, 144 Ill Dec 263, 555 NE2d 382 and affd 142 Ill 2d 548, 154 Ill Dec 674, 568 NE2d 895; *People v Brown*, 70 NY2d 513, 522 NYS2d 837, 517 NE2d 515.

Annotation: Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 21[a].

Footnote 54. *People v Brown*, 70 NY2d 513, 522 NYS2d 837, 517 NE2d 515; *State v Burns* (RI) 524 A2d 564.

Annotation: Fact that rape victim's complaint or statement was made in response to questions as affecting res gestae character, 80 ALR3d 369.

Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 § 5.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 21[b].

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 10.

Footnote 55. *People v Brown*, 70 NY2d 513, 522 NYS2d 837, 517 NE2d 515, stating that unless the questioning causes some interruption of or moderation in declarant's continued stress and excitement from a shocking event, it does not, standing alone—any more than do other specific circumstances—defeat the admissibility of the responses as excited utterances.

Footnote 56. *People v Lawler* (5th Dist) 194 Ill App 3d 547, 141 Ill Dec 612, 551 NE2d 799, app gr 132 Ill 2d 551, 144 Ill Dec 263, 555 NE2d 382 and affd 142 Ill 2d 548, 154 Ill Dec 674, 568 NE2d 895.

Footnote 57. *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466.

§ 886 Statements made after regaining consciousness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Declarations made immediately upon regaining consciousness by a party injured in an accident by which he was rendered unconscious are viewed by most courts as being as much a part of the occurrence as if they had been made immediately after the accident. 58 According to these courts, the period of unconsciousness is not to be taken into consideration in determining the question of spontaneity as affected by the lapse of time. 59 The real test is whether the circumstances exclude premeditation and design. 60 The fact that declarations are made in response to questions of an attending physician when such injured person is first restored to consciousness will not affect the admissibility of such statements, 61 although it is a factor entitled to consideration. 62

◆ **Comment:** Statements made by a declarant upon regaining consciousness are not admissible as spontaneous statements where the declarant was conscious for a period of time following the occurrence which caused his injury and was then able to speak. 63

Footnotes

Footnote 58. *Shiflett v State*, 262 Ala 337, 78 So 2d 805; *Christopherson v Chicago M. & S. P. R. Co.*, 135 Iowa 409, 109 NW 1077; *Denver v Atchison, T. & S. F. R. Co.*, 96 Kan 154, 150 P 562; *Johnson v Southern R. Co.*, 351 Mo 1110, 175 SW2d 802; *Bennette v Hader*, 337 Mo 977, 87 SW2d 413, 101 ALR 1190; *Demeter v Rosenberg*, 114 NJL 55, 175 A 621 (statement 1 1/2 hours after accident); *Dupuy v Youngstown M. R. Co. (App, Mahoning Co)* 24 Ohio L Abs 670; *Smith v State Workmen's Ins. Fund*, 140 Pa Super 602, 14 A2d 554; *Cobb v Southern Public Utilities Co.*, 181 SC 310, 187 SE 363; *Davis Transport, Inc. v Bolstad (Tex Civ App Galveston)* 295 SW2d 941 (disapproved on other grounds by *Flanigan v Carswell*, 159 Tex 598, 324 SW2d 835); *Britton v Washington Water Power Co.*, 59 Wash 440, 110 P 20.

Annotation: Admissibility, as part of *res gestae*, of accusatory utterances made by homicide victim after act, 4 ALR3d 149 § 15.

Admissibility as *res gestae* of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 § 7[b].

Footnote 59. *Gough v General Box Co. (Mo)* 302 SW2d 884; *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466 (stating that a period of unconsciousness, even an extended period, does not necessarily destroy the effect of a startling event upon the mind of the declarant for the purpose of satisfying the excited utterance exception to the hearsay rule).

Footnote 60. *Christopherson v Chicago M. & S. P. R. Co.*, 135 Iowa 409, 109 NW 1077.

An assault victim's unelicited statement upon awakening—"You know he hurt me"—was admissible as an excited utterance, where the record contained no evidence that during her intermittent periods of consciousness or semi-consciousness, the victim had a meaningful opportunity to reflect on the assault. *State v Wallace*, 37 Ohio St 3d 87, 524 NE2d 466.

Footnote 61. *Christopherson v Chicago M. & S. P. R. Co.*, 135 Iowa 409, 109 NW 1077.

As to the effect of questioning on admissibility, generally, see § 885.

Footnote 62. *Gough v General Box Co. (Mo)* 302 SW2d 884.

Footnote 63. *Smith v State Workmen's Ins. Fund*, 140 Pa Super 602, 14 A2d 554.

3. Principal Facts Provable by Spontaneous Statements [887-889]

§ 887 Generally

<p>View Entire Section Go to Parallel Reference Table</p>

Statements of present sense impression may be introduced to prove any event or

condition perceived by the declarant. 64 Excited utterances may be introduced to prove a wider range of facts, inasmuch as such utterances need only "relate" to a startling event or condition. 65 In this regard, the hearsay exception in Rule 803(2) of the Federal Rules of Evidence for excited utterances affords a broader scope of subject matter coverage than the exception for statements of present sense impression in Rule 803(1). 66 Statements admissible under the excited utterance exception are not confined to descriptions or explanations of the startling event itself, but may include statements that tend to prove facts such as notice or agency. 67

Statements of present mental, emotional, or physical condition may be introduced to prove any condition experienced internally by the declarant at the time of his statements, such as his intent, plan, motive, design, mental feeling, pain, or bodily health. 68 Past or present symptoms, pain, or sensations, including the declarant's medical history and the cause of the pain, may be proved by statements made for purposes of medical diagnosis or treatment. 69

◆ Observation: A conversation, telephone or otherwise, is an "event" within the meaning of the federal rule excepting present sense impressions from the hearsay rule. 70

Footnotes

Footnote 64. § 864.

Footnote 65. § 865.

Footnote 66. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 803.

Footnote 67. *Murphy Auto Parts Co. v Ball*, 101 US App DC 416, 249 F2d 508, cert den 355 US 932, 2 L Ed 2d 415, 78 S Ct 413 (agency); *Dallas v Donovan* (Tex App Dallas) 768 SW2d 905 (notice).

Footnote 68. § 866.

Footnote 69. § 867.

Footnote 70. *Trevizo v Astec Industries, Inc.* (App) 156 Ariz 320, 751 P2d 980, holding that testimony as to what a declarant said he had just been told over the phone was admissible to prove the fact of the statement.

Translation is admissible under the present sense impression exception to the hearsay rule. *United States v Kramer* (SD Fla) 741 F Supp 893, 30 Fed Rules Evid Serv 757.

§ 888 Circumstances or cause of accident or injury

[View Entire Section](#)

If an utterance is concurrent with the force or action that immediately results in one's injury or damage, and is so made that it derives testimonial credit from the attention of the speaker to what is happening, it is admissible as a present sense impression and has probative effect to explain the occurrence. 71 Similarly, an accident or injury may be explained by excited utterances made while the declarant was still under the stress of the event. 72

Footnotes

Footnote 71. *Johnson v White*, 430 Mich 47, 420 NW2d 87; *People v Caviness*, 38 NY2d 227, 379 NYS2d 695, 342 NE2d 496.

As to the admissibility of res gestae utterances in motor vehicle accident cases, see 8 Am Jur 2d, *Automobiles and Highway Traffic* §§ 970-973.

Annotation: Admissibility, as res gestae, of statements relating to origin or cause of, or responsibility for, fire, 13 ALR3d 1114 §§ 13-15.

Admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident, 53 ALR2d 1245 §§ 18-59.

Practice References 22 Am Jur POF2d 173, *Defective or Improperly Operated Headlights* § 8.

22 Am Jur POF2d 225, *Defective or Improperly Operated Taillights* § 6.

Footnote 72. *Flynn v Manhattan & Bronx Surface Transit Operating Authority* (1st Dept) 94 App Div 2d 617, 462 NYS2d 17, affd 61 NY2d 769, 473 NYS2d 154, 461 NE2d 291 (admitting accident victim's statement that a bus had hit him); *Krivijanski v Union R. Co.*, 357 Pa Super 196, 515 A2d 933 (admitting motorcycle accident victim's statement that he had hit an unmarked wire cable maintained by the defendant).

Annotation: 53 ALR2d 1245.

Practice References 10 Am Jur Trials 493, *Divider Line Automobile Accident Cases*, §§ 33, 35, 37.

14 Am Jur Trials 101, *Glass Door Accidents*, § 62.

42 Am Jur POF2d 1, *Negligence of Pedestrian Struck by Motor Vehicle* §§ 11, 32.

28 Am Jur POF2d 167, *Slip and Fall Due to Foreign Substance on Floor* § 15.

27 Am Jur POF2d 1, *Point of Origin of Fire: Improperly Installed or Maintained Heating Appliance* § 10.

§ 889 --Notice or knowledge of danger

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Spontaneous statements made after an accident may be introduced to prove a defendant's notice of a dangerous condition. 73 In addition, warnings of impending danger given to a person shortly before an accident or an event causing him injury are admissible as spontaneous statements in order to prove the victim's knowledge of the danger. 74

Footnotes

Footnote 73. *David v Pueblo Supermarket of St. Thomas* (CA3 VI) 740 F2d 230, 15 Fed Rules Evid Serv 2055 (admitting an excited utterance probative of notice of a premises defect); *Dallas v Donovan* (Tex App Dallas) 768 SW2d 905 (holding that a woman's statement about her report to the city concerning the fact that a stop sign was down was admissible as an excited utterance since the statement was probative of actual notice to the city that the stop sign was down and tended to explain the accident at issue).

As to use of spontaneous statements to prove the circumstances or cause of an accident or injury, generally, see § 888.

Footnote 74. *Conner v State* (Fla App D4) 356 So 2d 336, cert den (Fla) 364 So 2d 883 (holding, in a trial for aggravated battery arising out of a barroom brawl and subsequent shooting, that a statement made by the defendant's son—"you better watch out, my Dad's a killer"—was properly admitted under a res gestae or excited utterance theory); *Atlanta C. S. R. Co. v Bagwell*, 107 Ga 157, 33 SE 191; *Sullivan v Heyer*, 300 Ill App 599, 21 NE2d 776; *Saturno v Yanow* (4th Dept) 58 App Div 2d 968, 397 NYS2d 250 (holding that the testimony of a defendant motorist—that the plaintiff's passenger stated that he, the passenger, kept yelling "stop" right before the accident—was properly received under the spontaneous declaration exception to the hearsay rule); *Puett v Caldwell & N. R. Co.*, 141 NC 332, 53 SE 852; *Hornschuch v Southern Pac. Co.*, 101 Or 280, 203 P 886.

E. Evidence from Prior Proceeding [890-933]

Research References

FRE, Rule 804(a)(b)(1)

FR Civ P Rule 80(c)

ALR Digests: Criminal Law § 121.5; Evidence §§ 1128-1133; Witnesses § 1

ALR Index: Prior Testimony or Statement; Unavailable Witnesses

Uniform Rules of Evidence Rule 804(a)(b)(1)

23 Am Jur Pl & Pr Forms (Rev), Stipulations, Forms 25, 28, 31; 23A Am Jur Pl & Pr Forms (Rev), Trial, Form 112

28 Am Jur POF2d 1, Foundation for Offering Deposition or other Former Testimony in Evidence

1. In General [890-895]

§ 890 Rule of inadmissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Testimony given at a former trial or proceeding between parties to an action or proceeding is hearsay, 75 and unless a proper foundation is laid which brings the prior testimony within an exception to the hearsay rule, 76 this testimony is not admissible in evidence. 77 If the witness is available, the witness must be produced the same as if he or she were testifying de novo. 78

§ 890 ----Rule of inadmissibility [SUPPLEMENT]

Case authorities:

Affidavits from jurors who served in prior trial, offered by defendant to establish that his alienage was necessarily decided in prior proceeding, were not inadmissible under rule since defendant was not seeking to impeach that verdict; rule does not limit admissibility of juror affidavits to determine what issues were decided in prior proceeding. *United States v Barragan-Cepeda* (1994, CA9 Cal) 29 F3d 1378, 94 CDOS 5325, 94 Daily Journal DAR 9764.

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. *State v Bacon* (1994) 337 NC 66, 446 SE2d 542.

Footnotes

Footnote 75. As to hearsay evidence, generally, see §§ 658 et seq.

Footnote 76. As to the exception to the general rule of inadmissibility of prior testimony, see § 891.

Footnote 77. *George v Davie*, 201 Ark 470, 145 SW2d 729; *Dolen v State*, 151 Neb 76, 36 NW2d 566; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660.

Practice References 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence.

Footnote 78. *State v Grier*, 314 NC 59, 331 SE2d 669; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660.

As to the attendance of witnesses generally, see 81 Am Jur 2d, Witnesses §§ 1-49.

§ 891 Exception to rule, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Testimony given at a former trial or proceeding between parties to an action or proceeding is hearsay, and unless a proper foundation is laid which brings the prior testimony within an exception to the hearsay rule, this testimony is not admissible in evidence. 79 However, the law recognizes that it is sometimes impossible to produce a witness who has testified at a former trial, and in such cases where the second action involves substantially the same issues, 80 is between the same parties or someone having a similar interest, 81 and where the party against whom the evidence is offered had the opportunity to cross-examine the witness who gave the testimony, 82 the testimony given at the former hearing or trial is admissible in the later one. 83 The Federal and Uniform Rules of Evidence codify this common-law hearsay exception by providing for the admission of the former testimony of an unavailable witness whose testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. 84 The legislative history to the federal rule indicates that this exception is to be narrowly construed. 85 When found to be admissible, former testimony has been admitted on the principle that it is the best of which the case admits. 86 The issue becomes one of fairness to the respective parties, together with orderly and expeditious administration of justice under the facts and circumstances shown to the trial court. 87 Testimony from a former trial should not be admitted if to do so would result in a miscarriage of justice. 88 Any part of the former testimony that is irrelevant may be excluded at the subsequent trial. 89

The exception to the hearsay rule permitting the introduction of evidence given at a former trial or proceeding is applicable to criminal proceedings 90 as well as civil cases, and where testimony given in a criminal case is sought to be used in a subsequent civil case. 91 The exception also generally applies, regardless of whether the former proceeding was judicial, legislative, or administrative, so long as the requisites for the admissibility of former testimony have been met. 92 The admissibility of testimony of a witness given during a prior proceeding involves the discretion of the trial judge, and the discretion of the trial judge will not be disturbed absent an abuse of discretion. 93

§ 891 ----Exception to rule, generally [SUPPLEMENT]

Case authorities:

Codefendant's testimony at prior state murder trial may be admitted against other

codefendant at joint trial for federal firearms offenses after both were acquitted of murder in separate state trials, where redaction of testimony to eliminate any reference to other codefendant can cure potential Sixth amendment harm if codefendant invokes his Fifth Amendment privilege, because testimony falls within former testimony exception to hearsay rule, FRE 804(b)(1). *United States v Lombard* (1993, DC Me) 853 F Supp 549.

Defendant was not entitled to have his exculpatory testimony from first trial introduced via government's case agent where he created his own unavailability by invoking privilege against self-incrimination. *United States v Kimball* (1994, CA5 La) 15 F3d 54, 38 Fed Rules Evid Serv 1363, petition for certiorari filed (May 10, 1994).

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. *State v Bacon* (1994) 337 NC 66, 446 SE2d 542.

There was no error in a first- degree murder retrial where a witness who had testified at the first trial had subsequently been indicted and refused to answer questions based upon the Fifth Amendment and the witness's testimony at the first trial was admitted. Although defendant contends that the witness was an alibi witness at the first trial and that defendant did not have a similar motive for questioning the witness during the second trial, there was no reasonable showing that the motive would have been different. That motive was to seek the facts favorable to defendant regarding defendant's whereabouts at the time of the crime and defense counsel had ample opportunity to develop this testimony. G.S. § 8C-1, Rule 804(b)(1). *State v Hunt* (1995) 339 NC 622, reconsideration den 339 NC 741.

Footnotes

Footnote 79. § 890.

Footnote 80. § 901.

Footnote 81. § 897.

Footnote 82. § 903.

Footnote 83. *Nolen v State* (Ala App) 469 So 2d 1326; *Gaines v Thomas*, 241 SC 412, 128 SE2d 692; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660.

Forms: Stipulations as to admission of former testimony. 23 Am Jur Pl & Pr Forms (Rev), Stipulations, Forms 25, 28.

Instructions to jury—Effect of stipulation admitting testimony of witness at former trial. 23 Am Jur Pl & Pr Forms (Rev), Stipulations, Forms 31.

Notice of intention to offer in evidence testimony given at former proceeding. 23A Am Jur Pl & Pr Forms (Rev), Trial, Form 112.

Footnote 84. FRE, Rule 804(b)(1); Uniform Rules of Evidence Rule 804(b)(1).

For discussion of what constitutes hearsay, and hearsay exceptions, generally, see §§ 658 et seq.

For a list of jurisdictions adopting versions of the Uniform Rules of Evidence, see Am Jur 2d, Desk Book, Item No. 282, Record of Passage of Uniform Acts.

Footnote 85. In re Master Key Antitrust Litigation (DC Conn) 72 FRD 108, 1 Fed Rules Evid Serv 279.

Unsworn congressional testimony by a former government agent was inadmissible at trial where there was no evidence as to how the witness arrived at his conclusions. In re Beef Industry Antitrust Litigation (ND Tex) 713 F Supp 971, 1988-2 CCH Trade Cases ¶ 68382, affd (CA5 Tex) 907 F2d 510, 1990-2 CCH Trade Cases ¶ 69122.

Footnote 86. Mattox v United States, 156 US 237, 39 L Ed 409, 15 S Ct 337; George v Davie, 201 Ark 470, 145 SW2d 729.

For discussion of the weight and sufficiency of evidence given at a former trial or proceedings, see § 1444.

Footnote 87. Briones v Solomon (Tex App San Antonio) 769 SW2d 312, writ den (Sep 27, 1989) and reh of writ of error overr (Nov 29, 1989).

Footnote 88. Travelers Fire Ins. Co. v Wright (Okla) 322 P2d 417, 70 ALR2d 1170.

Footnote 89. Woods v State, 39 Ala App 513, 104 So 2d 760.

Footnote 90. §§ 892, 893.

Footnote 91. § 894.

Footnote 92. Fleury v Edwards, 14 NY2d 334, 251 NYS2d 647, 200 NE2d 550 (holding, with respect to a statute which refers to testimony taken in an "action" or "special proceeding," that the legislature did not intend to exclude proofs taken judicially by bodies other than courts, such as administrative bodies); Valdez v Lyman-Roberts Hospital, Inc. (Tex App Corpus Christi) 638 SW2d 111.

Notes of a minor's testimony before the Liquor Control Board were admissible in hearing de novo in court where the minor refused to testify against the holder of a restaurant liquor license). In re Revocation of Restaurant Liquor License R-7792, 70 Pa Cmwlt 437, 453 A2d 687.

Requisites for admissibility of former testimony are discussed in §§ 896 et seq.

Evidence in proceedings before administrative bodies is discussed in 2 Am Jur 2d, Administrative Law §§ 338 et seq.

Footnote 93. French v State, 43 Ga App 97, 157 SE 902; State v Emory, 116 Kan 381, 226 P 754; State v Bailey, 62 NM 111, 305 P2d 725; State v Jackson, 30 NM 309, 233 P 49; Cunnigan v State (Okla Crim) 747 P2d 328; Morgo v West Mifflin, 116 Pa Cmwlt

§ 892 Criminal proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The exception to the hearsay rule which allows testimony given at a former trial or proceeding to be used in evidence, when certain circumstances are present which preclude attendance of the witness in person, 94 is applicable to criminal prosecutions if a proper foundation has been laid, including a showing that the witness is no longer "available," 95 subject to such local statutes or practice as may define the rights of the prosecution or the defendant in such matters. 96

The use of a former witness' testimony is not violative of the accused's constitutional right to be confronted with the witnesses against him if, at the preliminary hearing or former trial, the accused had been accorded an adequate opportunity to cross-examine the witness. 97 Additionally, the admission of prior testimony does not violate a defendant's right of confrontation if the party offering the prior testimony demonstrates the actual unavailability of the witness despite good-faith and due diligent efforts to secure the presence of the witness at trial, 98 and if the transcript of the witness' testimony bears sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior testimony. 99 The test for reliability involves two components: the testimony must be shown to be reliable when given, and it must be shown that the testimony was accurately preserved. 1

§ 892 ----Criminal proceedings [SUPPLEMENT]

Case authorities:

Hearsay rule does not apply to grand jury proceedings. *Alexiou v United States* (In re Subpoena to Testify Before the Grand Jury) (1994, CA9 Wash) 39 F3d 973, 94 CDOS 8521, 94 Daily Journal DAR 15600.

Trial court erred in permitting state to use transcript of preliminary hearing testimony of absent witness at defendant's trial on charge of unlawful possession of firearm, where state failed to prove that it had exercised reasonable diligence in attempting to ascertain whereabouts of witness; mere proof that warrant had been issued for witness, and that police officers "had not seen" witness did not show reasonable diligence in attempting to ascertain whereabouts of absent witness. *State v Mitchell* (1993) 18 Kan App 2d 530, 855 P2d 989.

Court properly precluded defendant's attempts to impeach testimony of undercover officer with statements relating to collateral matters which he made at trial of another individual. *People v Jenkins* (1992, 2d Dept) 186 AD2d 583, 588 NYS2d 802, app den 81 NY2d 841, 595 NYS2d 740, 611 NE2d 779.

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. *State v. Bacon* (1994) 337 NC 66, 446 SE2d 542.

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b). *State v. Carter* (1994) 338 NC 569, 451 SE2d 157.

The trial court did err in a first- degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under GS § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. GS § 15A- 2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding. *State v. McLaughlin* (1995) 341 NC 426, 462 SE2d 1.

In prosecution of defendant for murder, robbery, and other crimes, trial court did not err in admitting in evidence record taken at preliminary hearing of testimony of eyewitness who died before time of trial where defendant had had full and fair opportunity to cross-examine witness at that hearing. *Commonwealth v. Thompson* (1994, Pa) 648 A2d 315.

In murder prosecution, fact that wife's grand jury testimony was read at defendant's trial did not warrant reversal, where reasons for disallowing grand jury testimony were not compelling since testimony in record made it clear that reason wife was called before grand jury was for purpose of providing evidence against her sister-in-law and not her own husband, there was nothing adverse to defendant in testimony that was read at his trial, and when witness-spouse's testimony was not adverse to defendant- spouse, such testimony did not necessarily fall within protection of marital privilege. *State v. Jarrell* (1994, W Va) 442 SE2d 223.

Footnotes

Footnote 94. § 891.

Footnote 95. As to unavailability of witnesses, generally, see §§ 906 et seq.

Footnote 96. *People v. McDonald*, 66 Cal App 2d 504, 152 P2d 448; *State v. Stallings* (Minn) 478 NW2d 491, reh den (Minn) 1992 Minn LEXIS 23.

Footnote 97. *Ohio v. Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1; *United States v. Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *United States v. Curry* (CA5 Fla) 471 F2d 419, cert den 411

US 967, 36 L Ed 2d 688, 93 S Ct 2150; *United States v Davis* (CA8 Ark) 551 F2d 233, 1 Fed Rules Evid Serv 833, cert den 431 US 923, 53 L Ed 2d 237, 97 S Ct 2197; *State v Browder* (Ala App) 507 So 2d 1040; *Rodgers v State*, 209 Ark 37, 189 SW2d 608; *People v Brock*, 38 Cal 3d 180, 211 Cal Rptr 122, 695 P2d 209; *Gardner v State* (Ct Gen Sess) 43 Del 358, 47 A2d 310; *Alston v United States* (Dist Col App) 383 A2d 307, appeal after remand (Dist Col App) 412 A2d 351; *State v Johnston*, 62 Idaho 601, 113 P2d 809; *Stearnsman v State*, 237 Ind 149, 143 NE2d 81; *State v Brown*, 181 Kan 375, 312 P2d 832; *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726; *People v Sinclair*, 327 Mich 686, 42 NW2d 786; *State v Logan*, 344 Mo 351, 126 SW2d 256, 122 ALR 417; *Aesoph v State*, 102 Nev 316, 721 P2d 379; *State v Riddel*, 38 NM 550, 37 P2d 802; *People v Hayes* (4th Dept) 110 App Div 2d 1035, 489 NYS2d 19; *State v Prince*, 270 NC 769, 154 SE2d 897; *Gibson v State*, 85 Okla Crim 228, 186 P2d 667; *Norton v State*, 148 Tex Crim 294, 186 SW2d 347; *State v Burke*, 102 Utah 249, 129 P2d 560; *Fisher v Commonwealth*, 217 Va 808, 232 SE2d 798; *Pettit v Rhay*, 62 Wash 2d 515, 383 P2d 889.

Opportunity for cross-examination is discussed in § 903.

For discussion of the accused's right to confront witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 728, 965.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Footnote 98. § 906.

Footnote 99. *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726; *Cunnigan v State* (Okla Crim) 747 P2d 328; *State v Barela* (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44; *State v Whiting* (App) 136 Wis 2d 400, 402 NW2d 723; *Rodriguez v State* (Wyo) 711 P2d 410.

Footnote 1. *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726.

Proof of former testimony is discussed in §§ 924 et seq.

§ 893 --Right of accused to reproduce former testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rules adopted with respect to permitting or rejecting testimony in favor of the prosecution have been applied where the accused seeks to reproduce the testimony of an absent witness at a former trial or preliminary hearing. 2 The same rules with respect to authentication of testimony, 3 and the circumstances permitting reproduction of testimony, 4 apply as in cases where the prosecution attempts to introduce the testimony. 5 There is authority to the effect that in order to use former testimony of a witness who

has since become unavailable, the party against whom the testimony is offered must have been present when the testimony was given. 6 In circumstances where the prosecution does not have a similar interest and opportunity to develop the testimony at the prior proceeding, such evidence is not admissible. 7 If, on its own behalf, the state introduces only a part of the testimony given at the former trial, the defendant may prove the rest of the testimony given by the witness. 8

The federal courts have divided over whether the hearsay exception permitting the use of prior testimony 9 authorizes admission of the prior testimony where a defendant in a criminal trial seeks to introduce a deposition from a former civil trial in which the government was not a party. According to some courts, deposition testimony will be excluded despite the fact that issues were similar at the earlier trial and the declarant was cross-examined therein, since the government did not itself have an opportunity to cross-examine. 10 However, elsewhere the view has been taken that if a party in a civil case and the government, in a later criminal case, have sufficiently similar incentives to develop the testimony in question, the hearsay exception 11 is not necessarily unavailable to a criminal defendant. 12

Footnotes

Footnote 2. *Smith v State*, 66 Tex Crim 593, 148 SW 722.

Trial court properly refused to admit preliminary hearing testimony of witness who failed to respond to trial subpoena in prosecution for aggravated assault against defendant with whom witness had a romantic relationship where the prior testimony of the witness which recanted damaging information about the defendant lacked sufficient indicia of reliability to render the trial court's refusal to admit the former testimony an abuse of discretion under a state statute which restrictively defined former testimony. *State v Stallings* (Minn) 478 NW2d 491, reh den (Minn) 1992 Minn LEXIS 23.

As to the right of the prosecution to introduce prior testimony, see § 892.

Footnote 3. § 933.

Footnote 4. *Lovejoy v State*, 247 Ala 48, 22 So 2d 537.

Footnote 5. Proof of former testimony is discussed in §§ 924 et seq.

Footnote 6. *People v Moore*, 306 Mich 29, 10 NW2d 296, cert den 321 US 787, 88 L Ed 1078, 64 S Ct 783, reh den 321 US 804, 88 L Ed 1090, 64 S Ct 846; *State v Ortego*, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 7. §§ 903-905.

Footnote 8. *Bloodworth v State*, 161 Ga 332, 131 SE 80.

Footnote 9. FRE, Rule 804(b)(1).

Footnote 10. *United States v Kapnison* (CA10 NM) 743 F2d 1450, 16 Fed Rules Evid Serv 990, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017; *United States v*

Harenberg (CA10 NM) 732 F2d 1507, 15 Fed Rules Evid Serv 1502.

For discussion of identity of parties as a requisite for admissibility of prior testimony, see §§ 897-900.

Opportunity for cross-examination is discussed in § 903.

Footnote 11. FRE, Rule 804(b)(1).

Footnote 12. United States v McDonald (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054.

§ 894 Use, in civil case, of former testimony in criminal case

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Testimony in a criminal proceeding of a witness who is no longer "available" is generally admissible in a subsequent civil action if the parties and issues are substantially the same, and if the person against whom the testimony is offered had an adequate opportunity to cross-examine at the time the testimony was given. 13 The question often arises when testimony given against a defendant in a criminal trial was subsequently proffered against the same person, or one whose interests were the same, in a subsequent civil action involving the same transaction. 14 But, in some instances, testimony given on behalf of a defendant in a criminal trial has been held admissible on behalf of the same person in a subsequent civil action where the witness who testified at the criminal trial was no longer accessible and the person against whom the testimony was proffered was the prosecuting witness in the criminal action. 15 Whether there is substantial identity of parties and issues is a preliminary factual issue question for determination by the court, 16 and where it is determined that the party against whom the evidence is offered and the party against whom the testimony was given in the criminal case are not substantially the same, the former testimony will be excluded in the subsequent civil case. 17

According to other authorities, testimony given on the trial of a criminal case cannot be used against the defendant in the criminal action on the trial of a civil action involving the same transaction, although the witness is dead or is otherwise not procurable, for the reason that the parties and issues in the criminal and civil cases are not identical. 18 On this basis, some courts hold that testimony given in a prior traffic court proceeding against a driver is not admissible before a jury trying a civil negligence action against that driver. 19

On the other hand, testimony given in a prior criminal prosecution against an attorney is admissible in a disbarment proceeding against him if the witness who gave such testimony is no longer accessible. 20

§ 894 ----Use, in civil case, of former testimony in criminal case [SUPPLEMENT]

Case authorities:

In proceeding pursuant to CLS RPAPL Art 15, defendant was entitled to protective order barring plaintiff's use of transcript of testimony of defendant's surveyor at first examination before trial where (1) parties agreed to examinations of each other's surveyor, but plaintiff's surveyor was ill on date for examination, (2) parties agreed to permit plaintiff to examine defendant's surveyor, but also agreed that examination would not be transcribed until plaintiff's surveyor was examined, (3) parties later agreed to new examination of both surveyors, with proviso that first examination of defendant's surveyor would not be transcribed, and (4) after new examination of both surveyors, plaintiff had first examination of defendant's surveyor transcribed by telling reporting service that defendant had consented to transcription. *Anderson v Mazza* (1993, Co Ct) 158 Misc2d 928, 601 NYS2d 996.

Footnotes

Footnote 13. *Odato v Vargo* (WD Pa) 677 F Supp 384, 24 Fed Rules Evid Serv 753; *Werner v State Bar*, 24 Cal 2d 611, 150 P2d 892; *Goodwin v Allen*, 83 Ga App 615, 64 SE2d 212, appeal after remand 89 Ga App 187, 78 SE2d 804; *Yellow Cab Co. v Henderson*, 183 Md 546, 39 A2d 546, 175 ALR 267; *School Dist. v Sachse*, 274 Mich 345, 264 NW 396; *Hayes v Dalton* (Mo App) 257 SW2d 198; *In re Falzone*, 240 Mo App 877, 220 SW2d 765; *In re Lacy*, 234 Mo App 71, 112 SW2d 594; *Healy v Rennert*, 9 NY2d 202, 213 NYS2d 44, 173 NE2d 777; *Zimmerman v Board of Regents* (3d Dept) 31 App Div 2d 560, 294 NYS2d 435; *Parrish v Bryant*, 237 NC 256, 74 SE2d 726; *Hinnant v Holland*, 92 NC App 142, 374 SE2d 152, review den 324 NC 335, 378 SE2d 792; *Huempfer v Bailly*, 36 SD 533, 156 NW 78; *Bryant v Trinity Universal Ins. Co.* (Tex Civ App Dallas) 411 SW2d 945, writ ref n r e (May 17, 1967) and reh'g of writ of error overr (Jun 14, 1967).

In a wrongful death action, the court properly admitted testimony of codefendant given in previous criminal action, even though prior admissions were obtained through grant of immunity, since such admission was not obtained by constraint within the meaning of the governing statute. *Kesler v Veal*, 165 Ga App 475, 300 SE2d 217.

Testimony given by witnesses during defendant motorist's criminal assault trial was admissible in subsequent personal injury action brought against motorist and his employer where the defendant had the opportunity to cross-examine the witness at his criminal trial, and the defendant employer's interest and motive were similar to those of defendant's, so that the employer's interest were protected by the defendant's ability to cross-examine. *Orrill v Ram Rod Trucking* (La App 4th Cir) 557 So 2d 384.

Testimony of a witness at a former trial of a business partner for arson in connection with a fire destroying partnership property was admissible at the trial of an action brought by the partner and his copartner to recover on fire insurance policies, where the witness, at the trial of the latter action, rightfully claimed his privilege against self-incrimination. It was immaterial that the copartner did not participate in the alleged burning of the insured property, was not a party defendant in the criminal case, and had no opportunity to cross-examine in that case, the accused partner having the same motive and interest in cross-examining the witnesses in the criminal case as would the copartner in the civil

case. It was also immaterial that in the criminal case, the state, rather than the insurer, was the adversary of the accused partner. *Travelers Fire Ins. Co. v Wright* (Okla) 322 P2d 417, 70 ALR2d 1170.

Identity of parties is discussed in §§ 897-900.

Identity of issues is discussed in §§ 901, 902.

Annotation: Use in civil case of testimony given in criminal case by witness no longer accessible, 70 ALR2d 1179.

Footnote 14. See, for example, *Orrill v Ram Rod Trucking* (La App 4th Cir) 557 So 2d 384 (testimony given by witnesses during motorist's criminal assault trial was admissible in subsequent personal injury action against motorist and his employer); *Zimmerman v Board of Regents* (3d Dept) 31 App Div 2d 560, 294 NYS2d 435 (testimony of residents of foreign states who had testified at petitioner's former criminal abortion trial was admissible in proceeding to review suspension of petitioner's license to practice medicine).

Footnote 15. *Goodwin v Allen*, 83 Ga App 615, 64 SE2d 212, appeal after remand 89 Ga App 187, 78 SE2d 804.

Footnote 16. As to identity of parties, generally, see §§ 897 et seq.; with regard to identity of issues, see §§ 897-902.

Footnote 17. § 897.

Footnote 18. *McInturff v Insurance Co. of North America*, 248 Ill 92, 93 NE 369; *Brown v Bailey*, 215 SC 175, 54 SE2d 769.

Footnote 19. *Schreier v Parker* (Fla App D3) 415 So 2d 794; *Yellow Cab Co. v Henderson*, 183 Md 546, 39 A2d 546, 175 ALR 267.

Footnote 20. *Werner v State Bar*, 24 Cal 2d 611, 150 P2d 892; *In re Lacy*, 234 Mo App 71, 112 SW2d 594.

§ 895 Former testimony as subject to ordinary objections and exceptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, testimony given by a witness at the first trial, if used at a subsequent trial, is open to all proper objections and exceptions which would exclude the testimony of the witness to the same matters, 21 particularly with regard to questions of competency 22 and relevancy. 23 However, former testimony is ordinarily not open to the objections ordinarily urged against hearsay evidence because it has been delivered under the sanction of an oath and has been subject to the right of the adverse party to cross-examine the witness giving it. 24

In some cases, objections to the testimony of a witness which were available but not urged at the first trial are deemed to be waived and cannot be urged at the subsequent trial. 25

Footnotes

Footnote 21. *Aetna Ins. Co. v Koonce*, 233 Ala 265, 171 So 269; *Wellden v Roberts*, 37 Ala App 1, 67 So 2d 69, affd 259 Ala 517, 67 So 2d 75; *Morrison v Lowe*, 274 Ark 358, 625 SW2d 452; *Habig v Bastian*, 117 Fla 864, 158 So 508; *Arnold v Genzberger*, 96 Mont 358, 31 P2d 296; *Calley v Boston & M. R. R.*, 93 NH 359, 42 A2d 329, 159 ALR 115; *Clark v Ross* (App) 284 SC 543, 328 SE2d 91.

Footnote 22. *Garrett v Weinberg*, 54 SC 127, 31 SE 341, reh dismd 54 SC 147, 34 SE 70.

Footnote 23. *Habig v Bastian*, 117 Fla 864, 158 So 508.

Annotation: Former testimony used at subsequent trial as subject to ordinary objections and exceptions, 40 ALR4th 514.

Footnote 24. *Burton v Oldfield*, 195 Va 544, 79 SE2d 660.

Footnote 25. *State v Fredette* (Me) 462 A2d 17, 40 ALR4th 498; *Leach v Nelson*, 50 ND 538, 196 NW 755; *Sherman Gas & Electric Co. v Belden*, 103 Tex 59, 123 SW 119.

For the related question of the waiver of the right to object to testimony by a witness in person because of the failure to object to his testifying at former trial, see 75 Am Jur 2d, Trial § 416.

2. Requisites for Admissibility [896-923]

a. In General [896-905]

§ 896 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, there are three essential requirements which must be met in order to use testimony from a prior proceeding: (1) the prior proceeding must have involved substantially the same issues; 26 (2) the party against whom the testimony is sought to be used or someone having a similar interest, 27 must have had a fair opportunity and adequate motive to cross-examine the witness under oath in the earlier proceeding; 28 and (3) the witness must be unavailable to testify in the present case. 29 It has been

noted that the requirement that there be an identity of parties and issues is but a convenient phrase to indicate a situation where the underlying requirement of adequacy of the present opponent's opportunity of cross-examination would usually be satisfied, 30 and that identity of parties is not required where the party against whom the former testimony is offered had a full opportunity to cross-examine the witness. 31

In order that former evidence may be admissible upon a subsequent proceeding, it must have been introduced in the regular course of a trial or proceeding 32 before a tribunal capable of enforcing the attendance of witnesses, administering oaths, and employing cross-examination as a part of its procedure. 33 According to some courts, former testimony may not be utilized if the witness had not been sworn at the hearing or former trial. 34

In many jurisdictions, statutes have been enacted which provide for and regulate the reproduction of testimony given upon a former trial. These requirements vary, of course, in the different jurisdictions, and it is essential, therefore, that one desiring to use such testimony examine carefully the provisions of his local statutes, for where admissibility of evidence given upon a former trial is regulated by statute, the testimony cannot be reproduced unless the requirements of the statute are substantially complied with. 35

§ 896 ----Generally [SUPPLEMENT]

Case authorities:

In prosecution of police officer who used threats of arrest to coerce five prostitutes to engage in various sexual acts with him against their will, district court did not abuse its discretion in excluding another police officer's testimony that prostitute warned him he was "next," since it was uncorroborated, speculative testimony of mysterious conspiracy to frame defendant. *United States v Sanchez* (1996, CA5 Tex) 74 F3d 562.

In prosecution of defendant for multiple counts of mail fraud in connection with his operation of mail-correspondence university, evidence of state court injunction against defendant after he attempted to open university in that state and prior indictment and conviction for mail fraud in another state for mail-correspondence universities were properly admitted as relevant to his state of mind, notice of illegality of his conduct, absence of mistake, and to rebut his good faith defense. *United States v Reddeck* (1994, CA10 Utah) 22 F3d 1504.

Exclusion from patent infringement suit of evidence of prior litigation involving patent was proper since prior decision that patent has previously survived attack on its validity serves only to inform district court that caution must be taken in reaching contrary legal conclusion, judge did permit introduction of part of proffered evidence as marginally relevant to issue of obviousness, but judge's opinion in prior litigation was not needed for any legitimate purpose and could have had improper influence on jury. *Mendenhall v Cedarapids, Inc.* (1993, CA FC) 5 F3d 1557, 28 USPQ2d 1081, reh, en ban, den *Mendenhall v Cedarapids, Inc.* (1993, CA FC) 1993 US App LEXIS 30108.

In murder prosecution, trial court did not err in admitting witness' preliminary hearing testimony where, at time of trial, witness had been diagnosed as having incurable liver cancer, was being medicated 24 hours per day, and was experiencing memory lapses and auditory hallucinations, and where defendant had been fully able to cross-examine

witness at preliminary hearing. *State v Stafford* (1994) 255 Kan 807, 878 P2d 820.

Footnotes

Footnote 26. § 901.

Footnote 27. § 897.

Footnote 28. § 903.

Footnote 29. §§ 906 et seq.

Footnote 30. *Gaines v Thomas*, 241 SC 412, 128 SE2d 692.

Footnote 31. § 897.

Footnote 32. *Foley v Ham*, 102 Kan 66, 169 P 183; *People v Qualey*, 210 NY 202, 104 NE 138.

Footnote 33. *State v Heffernan*, 24 SD 1, 123 NW 87 (criticized on other grounds by *State v Carr*, 67 SD 481, 294 NW 174).

Practice References 28 Am Jur POF2d 1, Foundation for Offering Deposition or other Former Testimony in Evidence.

Footnote 34. *Hawkins v United*, 3 Okla Crim 651, 108 P 561; *Pettit v Rhay*, 62 Wash 2d 515, 383 P2d 889.

Footnote 35. *Batt v Globe Engineering Co.*, 13 Kan App 2d 500, 774 P2d 371, review den 245 Kan 782 (trial court did not err in excluding the transcript of an unemployment compensation hearing in a suit for defamation and breach of employment contract under state statute unambiguously providing that unemployment benefit hearing transcripts are inadmissible in any proceeding, except those specifically enumerated); *People v Slaughter* (2d Dept) 163 App Div 2d 342, 557 NYS2d 926 (suppression hearing testimony is not included, either expressly or by implication, among the types of testimony a New York statute enumerates as admissible at subsequent proceedings if a witness becomes unavailable); *Ashford v Ashford*, 395 Pa Super 125, 576 A2d 1076 (a custody conference held not to constitute a tribunal within the meaning of a state statute providing for a basis for the admission of testimony given at a former trial); *Smith v State*, 142 Tex Crim 349, 152 SW2d 751.

§ 897 Identity of parties

<p>View Entire Section Go to Parallel Reference Table</p>

Under the Federal and Uniform Rules of Evidence, the former testimony of an

unavailable witness is admissible in a civil action or proceeding if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. 36 Under the common law, it was stated that in order to render admissible on a subsequent trial the former testimony of a witness who has since become unavailable, there must be a substantial identity between the parties to the first and the parties to the subsequent action or proceeding. 37 However, complete mutuality 38 or absolute identity of parties is not necessary to admit prior testimony into evidence. 39 It is enough that there is a practical or representative identity of the party against whom the prior testimony is offered. 40 Further, there is authority for the view that it is not necessary that the party offering the evidence be involved in the previous suit if the parties against whom the evidence is offered are substantially the same. 41 Whether there is substantial identity of parties is a preliminary factual question for determination by the court. 42 Where it is determined that the party against whom the evidence is offered and the party against whom the testimony was given in the criminal case are not substantially the same, the former testimony will be excluded in the subsequent civil case. 43

The fundamental reason for the requirement of identity of parties in order to render former testimony admissible is the necessity that there have been full opportunity to cross-examine. 44 In view of the close relationship between the requirement of necessity of opportunity for cross-examination 45 and the rule requiring identity of parties, there is a tendency to subordinate the latter rule to the former and make the test of admissibility the presence of an adequate opportunity for cross-examination on the identical issues. 46 Thus, even though there is lack of identity of parties in the subsequent trial, the former testimony is admissible when the party against whom it is offered, as a party to the former action, had full opportunity to cross-examine the witness, 47 and when the subsequent trial is based upon the same transaction or the same property or status involved. 48 However, the view that actual identity of parties or privity between parties is not essential as long as it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have was accorded an adequate opportunity for cross-examination has been rejected where statutory provisions require identity of parties as a prerequisite to the admissibility of former testimony. 49

Footnotes

Footnote 36. § 891.

Footnote 37. *Cooke v Wilbanks*, 223 Ala 312, 135 So 435, 83 ALR 1441; *De La Gonzalez v Krystal Co.*, 173 Ga App 574, 327 SE2d 546; *Yellow Cab Co. v Henderson*, 183 Md 546, 39 A2d 546, 175 ALR 267.

Footnote 38. *Travelers Ins. Co. v Harkins* (La App 3d Cir) 458 So 2d 632.

Footnote 39. *Best Steel Bldgs., Inc. v Hardin* (Tex Civ App Tyler) 553 SW2d 122, writ *ref n r e* (Oct 19, 1977) and *rehg of writ of error overr* (Jan 18, 1978).

Footnote 40. *Best Steel Bldgs., Inc. v Hardin* (Tex Civ App Tyler) 553 SW2d 122, writ *ref n r e* (Oct 19, 1977) and *rehg of writ of error overr* (Jan 18, 1978).

Footnote 41. *Condas v Condas* (Utah) 618 P2d 491.

Predecessors in interest under the Federal and Uniform Rules of Evidence are discussed in § 899.

Footnote 42. *Parrish v Bryant*, 237 NC 256, 74 SE2d 726; *Travelers Fire Ins. Co. v Wright* (Okla) 322 P2d 417, 70 ALR2d 1170.

Footnote 43. *Hinnant v Holland*, 92 NC App 142, 374 SE2d 152, review den 324 NC 335, 378 SE2d 792.

Footnote 44. *Tom Reed Gold Mines Co. v Moore*, 40 Ariz 174, 11 P2d 347; *Walterhouse v Walterhouse*, 130 Mich 89, 89 NW 585; *Citizens Bank & Trust Co. v Reid Motor Co.*, 216 NC 432, 5 SE2d 318; *Security Realty & Dev. Co. v Bunch* (Tex Civ App) 143 SW2d 687, writ diss.

In case to determine whether transfer of real properties and stocks pursuant to divorce decree was discharge of marital obligation or non-taxable event for transferee spouse, the government was not entitled to introduce testimony of divorce court judge from prior proceeding against transferor spouse since transferee spouse was not party to that action, was not able to cross-examine divorce court judge, and had no right to intervene in her ex-husband's tax case. *Cook v United States* (CA1 Mass) 904 F2d 107, 90-1 USTC ¶ 50288, 65 AFTR 2d 90-1156.

Footnote 45. § 903.

Footnote 46. *George v Davie*, 201 Ark 470, 145 SW2d 729; *In re Durant*, 80 Conn 140, 67 A 497; *Travelers Ins. Co. v Harkins* (La App 3d Cir) 458 So 2d 632; *School Dist. v Sachse*, 274 Mich 345, 264 NW 396.

Identity of issues is discussed in § 901.

Footnote 47. *Gaines v Thomas*, 241 SC 412, 128 SE2d 692.

Footnote 48. § 901.

Footnote 49. *Estate of Keefauver*, 359 Pa Super 336, 518 A2d 1263, app den 516 Pa 634, 533 A2d 92 and app den 516 Pa 634, 533 A2d 92.

§ 898 --Privity, in civil actions and proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The requirement as to the identity of parties is satisfied by the existence of the relation of privity. 50 While the term privity generally involves a party so identical in interest with another that he represents the same legal right, a determination of just who are privities requires a careful examination into the circumstances of each case. 51 A finding of

privity has been predicated on relationships arising from connection with a decedent's estate, 52 or out of interests in property, 53 the relationship of employer and employee, 54 principal and surety, 55 or of successive plaintiffs in actions for wrongful death. 56

Footnotes

Footnote 50. Gray v Graham, 231 Va 1, 341 SE2d 153.

Footnote 51. Gray v Graham, 231 Va 1, 341 SE2d 153.

Footnote 52. Hill v McWhorter, 237 Ala 419, 187 So 494; Lake E. & W. R. Co. v Huffman, 177 Ind 126, 97 NE 434.

Evidence of executrix's prior suit to set aside will was not admissible in executrix's subsequent action to set aside deed where the grantees were neither parties nor privities to the former proceeding. Parker v Tate (Ala) 426 So 2d 817.

Footnote 53. Stephens v Hoffman, 263 Ill 197, 104 NE 1090, appeal after remand 269 Ill 376, 109 NE 994 (grantor and grantee); Shook v Fox, 126 App Div 565, 110 NYS 951 (remainderman and life tenant).

Footnote 54. Gray v Graham, 231 Va 1, 341 SE2d 153.

Footnote 55. Woodworth v Gorsline, 30 Colo 186, 69 P 705.

Footnote 56. Harrell v Quincy, O. & K. C. R. Co. (Mo) 186 SW 677.

§ 899 --Predecessor in interest, in civil actions and proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Federal and Uniform Rules of Evidence, the former testimony of an unavailable witness is admissible in a civil action or proceeding if the party against whom the testimony is now offered, 57 or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, 58 or redirect examination. 59 The rationale behind this rule is that it is considered unfair to impose upon the party against whom the evidence is being offered responsibility for the manner in which the witness was previously handled by another party, unless that other party was a predecessor in interest. 60

The predecessor in interest requirement is broader than the common-law privity requirement, 61 which required a common property interest between the parties. 62 The fact of being a predecessor in interest is not limited to a legal relationship, but is also to be determined by whether the defendant had an opportunity and similar motive to develop the testimony by cross-examination. 63

A party to one cause of action is not a predecessor in interest to another party pursuing a different cause of action on a similar theory, 64 even against a common defendant. 65 Predecessors in interest may include: the United States, with respect to testimony given at a federal antitrust action followed by private antitrust actions; 66 the Coast Guard, with respect to a license suspension hearing followed by a private action for personal injuries incurred in the incident which was the subject of the hearing; 67 the owner of a company, with respect to testimony given in a previous criminal trial in which he was prosecuted for bribing a union, followed by a civil action against the company for conspiring with the union to deprive employees of contractual rights; 68 the owner of a labor-leasing company, as to testimony given in a criminal prosecution and admissible in a subsequent civil suit against the company; 69 and a creditor who sought to establish the debtor's ownership of a home, where a trustee in bankruptcy subsequently sought to do the same. 70

Footnotes

Footnote 57. As to identity of parties, generally, see § 897.

Footnote 58. Opportunity for cross-examination is discussed in § 903.

Footnote 59. § 891.

Footnote 60. In re Van Houten (BC WD Mich) 56 BR 891; Hinnant v Holland, 92 NC App 142, 374 SE2d 152, review den 324 NC 335, 378 SE2d 792.

Law Reviews: Lawrence, The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest. 42 U Miami LR 975, (March-May 1988).

Footnote 61. Clay v Johns-Manville Sales Corp. (CA6 Tenn) 722 F2d 1289, CCH Bankr L Rptr ¶ 69507, CCH Prod Liab Rep ¶ 9855, 14 Fed Rules Evid Serv 1205, cert den 467 US 1253, 82 L Ed 2d 842, 104 S Ct 3537).

Footnote 62. White Pine Ranches v Osguthorpe (Utah) 731 P2d 1076, 49 Utah Adv Rep 18.

As to common-law privity requirement, see § 898.

Footnote 63. Lloyd v American Export Lines, Inc. (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461; Dykes v Raymark Industries, Inc. (CA6 Tenn) 801 F2d 810, 21 Fed Rules Evid Serv 953, cert den 481 US 1038, 95 L Ed 2d 815, 107 S Ct 1975.

The testimony of an unavailable witness from a criminal trial of a defendant on charges of solicitation to murder was not admissible in an action brought by an insurer in which the insurer had claimed that the insured had been killed as a result of a conspiracy between the defendant and the widow of the insured, because the defendant had no motivation to clear the widow's name during the course of his criminal trial. New England Mut. Life Ins. Co. v Anderson (CA10 Kan) 888 F2d 646, 28 Fed Rules Evid Serv 1516.

The fact that the prosecutor had a similar motive to develop the testimony of a witness did not make the prosecutor a predecessor in interest to the decedent's estate, which was bringing a wrongful death action against the defendant. *Hinnant v Holland*, 92 NC App 142, 374 SE2d 152, review den 324 NC 335, 378 SE2d 792.

Footnote 64. *In re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, later proceeding (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, later proceeding (CA3 Pa) 840 F2d 181, 1989 AMC 1025.

Footnote 65. *In re IBM Peripheral EDP Devices Antitrust Litigation* (ND Cal) 444 F Supp 110, 2 Fed Rules Evid Serv 909.

Footnote 66. *In re Master Key Antitrust Litigation* (DC Conn) 72 FRD 108, 1 Fed Rules Evid Serv 279.

Footnote 67. *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461.

Footnote 68. *Creamer v General Teamsters Local Union 326* (DC Del) 579 F Supp 1284, 117 BNA LRRM 2654.

Footnote 69. *Creamer v General Teamsters Local Union 326* (DC Del) 579 F Supp 1284, 117 BNA LRRM 2654.

Footnote 70. *In re Van Houten* (BC WD Mich) 56 BR 891.

Annotation: Who is "predecessor in interest" for purposes of Rule 804(b)(1) of Federal Rules of Evidence, 47 ALR Fed 895.

§ 900 --In criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a criminal prosecution, testimony given at a former trial or at a preliminary hearing is not admissible unless it appears that the defendant against whom it was offered was a party to such former proceedings. 71 The testimony of an absent witness given at another's previous trial for the same offense with which the defendant is charged is not admissible in a subsequent proceeding. 72 However, testimony given at a former prosecution by a witness not available at a subsequent trial is admissible, notwithstanding the circumstance that at the first trial the defendant against whom it was given was tried alone and on the subsequent trial he was tried jointly with another. 73

◆ Observation: The issue of whether one is a predecessor in interest in criminal cases does not arise because one has to be a party in the prior proceeding before testimony can be used at another trial. 74

§ 900 --In criminal cases [SUPPLEMENT]**Case authorities:**

Trial court properly admitted, at second trial, former testimony of fact witness in first trial for kidnapping and rape after finding that witness was unavailable, where prosecutor's investigator double-checked witness' former residence, which had been subsequently torn down; subpoenaed utility records; asked about witness in her old neighborhood; inquired of local nursing homes; and checked criminal records. *Vick v State* (1993) 314 Ark 618, 863 SW2d 820.

The trial court did err in a first-degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under GS § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. GS § 15A- 2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding. *State v McLaughlin* (1995) 341 NC 426, 462 SE2d 1.

In malicious wounding prosecution, trial court erred in admitting absent witness' preliminary hearing testimony where prosecutor knew that witness was out of state and stayed at home of relative several nights each month, and had left several unanswered messages for witness there, but had not sought out relative to gather information on witness' whereabouts, and had not requested that summons be issued for appearance of witness on final trial date. *State v Shepherd* (1994, W Va) 442 SE2d 440.

In prosecution for first degree murder, trial court did not err in allowing previous testimony of state's witness, an inmate representative who was present when defendant confessed, to be introduced and read into record. Witness' refusal to testify at trial, despite court order and contempt citation, clearly fell under express provisions of statute requiring unavailability, as well as fulfilling mandate of Confrontation Clause of Sixth amendment. Moreover, despite defendant's claim that his counsel was limited by court in his cross-examination of witness at hearing on defendant's motion to suppress confession, defense counsel clearly was afforded and exercised his right to cross-examine witness at preliminary hearing. As such, witness' previous testimony bore requisite "indicia of reliability" required by Sixth amendment and was properly admitted and read into evidence. *State v Adams* (1992, La App 4th Cir) 609 So 2d 894.

Footnotes

Footnote 71. *Simmons v State*, 129 Ala 41, 29 So 929.

Footnote 72. *Simmons v State*, 129 Ala 41, 29 So 929.

Footnote 73. *Commonwealth v Gallo*, 275 Mass 320, 175 NE 718, 79 ALR 1380.

Footnote 74. *Bolden v Carter*, 269 Ark 391, 602 SW2d 640.

§ 901 Identity of issues

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, in order to render admissible in a civil case testimony or depositions in a former proceeding of a witness not now available, the subject matter or issues must be the same, or substantially the same; 75 where such is the case and the other requisites as to the admissibility of former testimony are met, the evidence is admissible. 76 On the other hand, the testimony or deposition in a former trial or proceeding of a witness not now available is not admissible in the present trial or proceeding where the issues or subject matter are not the same or substantially the same. 77 Whether there is substantial identity of issues is a preliminary factual question for determination by the court. 78

The requirement that there be a substantial identity of issues, sometimes referred to as "the substantially the same test," does not require that all the issues in the two proceedings be the same, but, at most, that the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second. 79 The issues in the two proceedings must be sufficiently similar to insure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered. 80

◆ Observation: The requirement of identity of issues should not be stated as a mechanical requirement, but rather as a requirement that the issues in the first proceeding, and hence the purpose for which the testimony was there offered, must be such that the present opponent or some person in interest had an adequate motive for testing on cross-examination the credibility of the testimony now offered. 81

Even though there may be some issues which are not the same in both actions, the testimony in a former action of a subsequently unavailable witness is admissible in a later action, where the testimony is offered on an issue which is the same in both actions. 82 Where the requirement of the identity of subject matter or issues is satisfied, the fact that the causes of action may be different, 83 or that the form of action has been changed, 84 or that there has been a nominal change in parties or counts, 85 is immaterial.

The rule of admissibility where the issues or subject matter are the same has been applied in the situation where there were two trials of the same case, 86 even though the theory of law at the second trial was or might have been different. 87 In a few cases, it has been held that a subsequently deceased party's testimony given at the first trial of a case is admissible at a second trial, 88 even though there is an amendment to the pleadings or a new pleading is substituted, 89 where the issues or subject matter are the same or substantially the same. It has also been held that the deposition or testimony of a witness, now unavailable, taken at the hearing on a motion or petition for a new trial is admissible at a retrial of the case upon the same issue. 90

Footnotes

Footnote 75. *Miwon, U.S.A., Inc. v Crawford* (SD NY) 629 F Supp 153; *De La Gonzalez v Krystal Co.*, 173 Ga App 574, 327 SE2d 546; *In re Estate of Eliassen*, 105 Idaho 234, 668 P2d 110; *Travelers Ins. Co. v Harkins* (La App 3d Cir) 458 So 2d 632; *Stutts v Humphries* (La App 2d Cir) 408 So 2d 940; *Bartlett v Kansas City Public Service Co.*, 349 Mo 13, 160 SW2d 740, 142 ALR 666; *Thompson v Merrell Dow Pharmaceuticals, Inc.*, 229 NJ Super 230, 551 A2d 177; *Carr v American Locomotive Co.*, 29 RI 276, 70 A 196.

Annotation: Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 ALR2d 494 § 3.

Footnote 76. *Copeland v Petroleum Transit Co.* (DC SC) 32 FRD 445, 7 FR Serv 2d 594; *Batelli v Kagan & Gaines Co.* (CA9 Cal) 236 F2d 167; *Myrick v Sievers*, 104 Ga App 95, 121 SE2d 185; *Edgerley v Appleyard*, 110 Me 337, 86 A 244; *Yellow Cab Co. v Henderson*, 183 Md 546, 39 A2d 546, 175 ALR 267; *In re White's Will*, 2 NY2d 309, 160 NYS2d 841, 141 NE2d 416, 70 ALR2d 484, reh den 2 NY2d 996; *In re Water Rights in Silvies River*, 115 Or 27, 237 P 322.

Footnote 77. *George R. Whitten, Jr., Inc. v State University Constr. Fund* (DC Mass) 359 F Supp 1037, 17 FR Serv 2d 353, affd (CA1 Mass) 493 F2d 177; *In re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, later proceeding (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, later proceeding (CA3 Pa) 840 F2d 181, 1989 AMC 1025; *United States v Bully* (ED Va) 282 F Supp 327; *Jefferson Amusement Co. v Lincoln Nat. Life Ins. Co.* (CA5 Tex) 409 F2d 644; *Minyen v American Home Assur. Co.* (CA10 Okla) 443 F2d 788; *De La Gonzalez v Krystal Co.*, 173 Ga App 574, 327 SE2d 546; *George v Moorhead*, 399 Ill 497, 78 NE2d 216; *In re Soderland's Estate*, 239 Iowa 569, 30 NW2d 128; *Callihan v Luster* (Ky) 305 SW2d 530; *White v Natural Gas Pipeline Co.* (Tex) 444 SW2d 298, 36 OGR 168, reh'g of cause overr (Jul 30, 1969).

A testator's application for admission to a mental health facility and the certificate of two physicians, upon which the commitment was made, are inadmissible in evidence on the issue of his testamentary capacity not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. *Keely v Moore*, 196 US 38, 49 L Ed 376, 25 S Ct 169.

An absent witness' evidence given in prior suit for damages from automobile collision was inadmissible in later suit for declaratory judgment on insurance policy coverage involving the same collision and same policy as in prior suit, but different policy provisions. *Employers Ins. Co. v Cross*, 284 Ala 505, 226 So 2d 161.

Annotation: 70 ALR2d 494 § 4.

Footnote 78. *Parrish v Bryant*, 237 NC 256, 74 SE2d 726; *Travelers Fire Ins. Co. v Wright* (Okla) 322 P2d 417, 70 ALR2d 1170.

Footnote 79. *Gray v Graham*, 231 Va 1, 341 SE2d 153.

Footnote 80. *Lohrmann v Pittsburgh Corning Corp.* (CA4 Md) 782 F2d 1156, CCH Prod Liab Rep ¶ 10928; *United States v King* (CA11 Fla) 713 F2d 627, 13 Fed Rules Evid Serv 1661, cert den 466 US 942, 80 L Ed 2d 470, 104 S Ct 1924; *Valdez v Lyman-Roberts Hospital, Inc.* (Tex App Corpus Christi) 638 SW2d 111.

Opportunity for cross-examination is discussed in § 903.

Footnote 81. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797.

Footnote 82. *Gibson v Gagnon*, 82 Colo 108, 257 P 348; *Palon v Great N. R. Co.*, 135 Minn 154, 160 NW 670.

The issues are the same where the first proceeding is an action by a husband against a bus company for the loss of the services of his wife as a result of injuries sustained by her in alighting from a bus, and the second proceeding is an action by the wife herself for the same injury, the disputed testimony having to do not with the question of damages, but with the issue, identical in both proceedings, of the primary negligence of the bus company. *Bartlett v Kansas City Public Service Co.*, 349 Mo 13, 160 SW2d 740, 142 ALR 666.

In a trial on defendant's counterclaim for specific performance of a contract, the trial court did not err in permitting defendant to introduce into evidence the entire record from an earlier trial of plaintiffs' claim for reformation of the contract where the complaint and counterclaim were filed in the same lawsuit and constituted two parts of the same action, and the claims for reformation and specific performance were severed for trial. *Munchak Corp. (Delaware) v Caldwell*, 46 NC App 414, 265 SE2d 654, affd, mod, in part 301 NC 689, 273 SE2d 281.

Annotation: 70 ALR2d 494 § 6.

Footnote 83. *Damm v Damm*, 82 Mont 239, 266 P 410; *Hartis v Charlotte E. R. Co.*, 162 NC 236, 78 SE 164.

Annotation: 70 ALR2d 494 § 7[a].

Footnote 84. *Evans v Reed*, 78 Pa 415.

Footnote 85. *Hill v McWhorter*, 237 Ala 419, 187 So 494.

Footnote 86. *Briggs v Chicago G. W. R. Co.*, 248 Minn 418, 80 NW2d 625; *Vessels v Kansas City Light & Power Co.* (Mo) 219 SW 80; *Bare v Victoria Coal & Coke Co.*, 73 W Va 632, 80 SE 941.

Annotation: 70 ALR2d 494 § 11[a].

Footnote 87. *Szeliwicki v Connor Lumber & Land Co.*, 163 Wis 20, 156 NW 622.

Annotation: 70 ALR2d 494 § 11[c].

Footnote 88. *Chicago & E. I. R. Co. v O'Connor*, 119 Ill 586, 9 NE 263.

Annotation: 70 ALR2d 494 § 15.

Footnote 89. *Jonescu v Orlich*, 220 Mich 89, 189 NW 919; *Jones v Pendleton*, 160 Mich 338, 125 NW 349.

Where, pending a second appeal in an action for injuries sustained in an automobile accident involving simple negligence, the plaintiff died, and his daughter was appointed administratrix of his estate and was substituted as plaintiff, and an amended declaration was filed alleging gross negligence, the reviewing court, in rejecting the contention that the testimony of the original plaintiff was not admissible because the issues in the case at bar were dissimilar to the issues in the former trial, held that the trial court properly permitted the testimony of the original plaintiff to be read to the jury. *McDougald v Imler*, 153 Fla 619, 15 So 2d 418.

Annotation: 70 ALR2d 494 § 16[a].

Footnote 90. *Jonescu v Orlich*, 220 Mich 89, 189 NW 919.

Annotation: 70 ALR2d 494 § 14.

§ 902 --In criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The rule applicable to civil proceedings generally, respecting the necessity for identity of issues between the former proceeding from which the testimony was taken and the instant action where its admissibility is drawn in issue, 91 applies to criminal proceedings. Thus, the crime charged and the issues involved at the subsequent trial must be the same or substantially the same as those involved at the preliminary hearing or former trial. 92

Different crimes, or different degrees of the same crime, based on the same act may be sufficiently similar to make testimony at a preliminary examination of the accused when charged with one offense admissible at the trial of the other, provided the other requisites for admission are established. 93 The following crimes, based upon the same conduct, have been regarded as sufficiently similar: assault with intent to kill, and murder; 94 assault and battery, and murder; 95 rape and murder; 96 murder and manslaughter; 97 murder and robbery; 98 larceny and embezzlement; 99 liquor law violation and bribery; 1 and violation of a city gambling ordinance and a state gambling statute. 2 However, the offense of accessory before the fact to murder has been found distinct from the offense of aiding and abetting the same murder. 3

The fact that a preliminary examination before commitment included charges for offenses in addition to that for which the defendant is on trial does not prevent use of testimony given at that examination, if the part reproduced is limited to such portion as bears out the accusation before the court. 4

§ 902 --In criminal cases [SUPPLEMENT]**Case authorities:**

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b). *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

The trial court did err in a first- degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under GS § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. GS § 15A- 2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding. *State v McLaughlin* (1995) 341 NC 426, 462 SE2d 1.

Footnotes

Footnote 91. § 901.

Footnote 92. *United States v Barrett* (CA1 Me) 766 F2d 609, 18 Fed Rules Evid Serv 1170, cert den 474 US 923, 88 L Ed 2d 264, 106 S Ct 258, post-conviction proceeding (DC Me) 763 F Supp 658, affd (CA1 Me) 965 F2d 1184; *Miles v State* (Ala App) 476 So 2d 1228; *Spights v State*, 155 Ark 102, 244 SW 14; *Skyers v United States* (Dist Col App) 619 A2d 931; *State v Johnston*, 62 Idaho 601, 113 P2d 809; *Wininger v State* (Ind App) 526 NE2d 1216; *State v Boyd*, 140 Kan 623, 38 P2d 665; *Commonwealth v Gallo*, 275 Mass 320, 175 NE 718, 79 ALR 1380; *State v Brown*, 331 Mo 556, 56 SW2d 405; *People v Stanley* (2d Dept) 163 App Div 2d 435, 558 NYS2d 146, app den 76 NY2d 1024, 565 NYS2d 775, 566 NE2d 1180; *Williams v State*, 42 Okla Crim 399, 276 P 515; *State v Swiden*, 62 SD 208, 252 NW 628; *State v Kenstler*, 49 SD 551, 207 NW 535; *Stone v State*, 111 Tex Crim 547, 15 SW2d 18; *Zepeda v State* (Tex App Corpus Christi) 797 SW2d 258, petition for discretionary review ref (Dec 12, 1990).

Footnote 93. *Hart v State*, 15 Tex App 202.

Footnote 94. *State v Wilson*, 24 Kan 189; *Hart v State*, 15 Tex App 202; *Hart v State*, 15 Tex App 202; *Dunlap v State*, 9 Tex App 179; *Jones v State*, 9 Tex App 178.

Footnote 95. *State v O'Brien*, 81 Iowa 88, 46 NW 752.

Footnote 96. *Commonwealth v Ryhal*, 274 Pa 401, 118 A 358.

Footnote 97. *Lee v State*, 124 Miss 398, 86 So 856.

Footnote 98. *Fox v State*, 102 Ark 393, 144 SW 516.

Footnote 99. *People v Hart*, 28 Cal App 335, 152 P 947.

Footnote 1. *State v McManis*, 129 Kan 376, 282 P 588, reh den 129 Kan 827, 284 P 616.

Footnote 2. *Lowe v State*, 86 Ala 47, 5 So 435.

Footnote 3. *State v Graham*, 303 NC 521, 279 SE2d 588.

Footnote 4. *State v Gaetano*, 96 Conn 306, 114 A 82, 15 ALR 458.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

§ 903 Motive and opportunity for cross-examination

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Federal Rules of Evidence, and the Uniform Rules of Evidence, the former testimony of an unavailable witness is admissible if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. 5 This cross-examination requirement operates to screen out those statements which, although made under oath, were not subject to the scrutiny of a party interested in thoroughly testing their validity. 6 The requirement that trial counsel have a sufficient opportunity to test the testimony of an unavailable witness by cross-examination is ordinarily satisfied by showing a similarity of parties and issues. 7

◆ Observation: Representation by the same attorney at both proceedings is not required. 8 In order to admit the former testimony of an unavailable witness against a criminal defendant at trial, the defendant must have been given the opportunity in the prior proceeding to cross-examine the witness with an interest and motive similar to that which he has at trial. 9 Where the prosecution does not have a similar interest and opportunity to develop the testimony at the prior proceeding, such evidence is not admissible. 10

The requirement of a meaningful opportunity to cross-examine is not satisfied where the party against whom the testimony is offered had neither the opportunity 11 nor a similar motive 12 to cross-examine the witness at a previous deposition. The former testimony will be admitted if the motivation to cross-examine was similar, 13 and former testimony will be excluded if the motivation was not similar. 14 Opportunity and motivation to cross-examine the deponent in the first instance are the important factors, rather than the actual extent of cross-examination. 15 Since parties, at times, for tactical or other reasons, may, as with a live witness at trial, choose not to cross-examine, 16 actual cross-examination at the prior hearing or trial is not required; it is necessary merely that the party against whom the testimony is sought to be offered had an adequate opportunity and motive to exercise the right of cross-examination. 17 However, mere

opportunity to cross-examine the witness is not enough; there must also be a perceived real need or incentive to thoroughly cross-examine at the time of the deposition. 18

Footnotes

Footnote 5. FRE, Rule 804(b)(1); Uniform Rules of Evidence Rule 804(b)(1).

Footnote 6. *United States v Pizarro* (CA7 Ill) 717 F2d 336, 14 Fed Rules Evid Serv 1, appeal after remand (CA7 Ill) 756 F2d 579, 17 Fed Rules Evid Serv 1010, cert den 471 US 1139, 86 L Ed 2d 703, 105 S Ct 2686.

Footnote 7. *Skyers v United States* (Dist Col App) 619 A2d 931.

Footnote 8. *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515.

Footnote 9. *People v Robinson* (6th Dist) 226 Cal App 3d 1581, 277 Cal Rptr 504, 91 CDOS 793, 91 Daily Journal DAR 1151, review den (Cal) 1991 Cal LEXIS 1685.

Footnote 10. *United States v Atkins* (CA5 Tex) 618 F2d 366, 6 Fed Rules Evid Serv 166, reh den (CA5 Tex) 629 F2d 1350 and (among conflicting authorities noted on other grounds in *United States v Deeb* (CA11 Fla) 13 F3d 1532, 38 Fed Rules Evid Serv 1087, 7 FLW Fed C 1211); *Commonwealth v Martinez*, 384 Mass 377, 425 NE2d 300.

In an attempted manslaughter prosecution, preliminary hearing testimony by defendant's wife prior to her death, that she did not think defendant really tried to kill victim, did not fit former testimony exception to hearsay rule and was inadmissible where defendant wanted to use statement at trial on issue of his intent to kill, but the statement had been made in response to question by court about setting amount of defendant's bond, after direct and cross-examination were concluded and in circumstances in which prosecution did not have motive to question the witness further about the defendant's intent to kill the victim. *People v Vera*, 153 Mich App 411, 395 NW2d 339.

Footnote 11. *Hewitt v Hutter* (WD Va) 432 F Supp 795, 1 Fed Rules Evid Serv 916, 23 FR Serv 2d 1518 (no notice given of deposition offered in place of unavailable witness); *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474 US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238 (in prior civil proceeding, witness gave deposition in return for promise that he would not be prosecuted, and defendants had little personal or financial stake in civil litigation).

Annotation: Admissibility in evidence of deposition as against one not a party at time of its taking, 4 ALR3d 1075.

Footnote 12. *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474

US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238.

Footnote 13. *Gogol v Johns-Manville Sales Corp.* (DC NJ) 595 F Supp 971, CCH Prod Liab Rep ¶ 10389; *Dartez v Fibreboard Corp.* (CA5 Tex) 765 F2d 456, CCH Prod Liab Rep ¶ 10873, 19 Fed Rules Evid Serv 137, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301; *Dykes v Raymark Industries, Inc.* (CA6 Tenn) 801 F2d 810, 21 Fed Rules Evid Serv 953, cert den 481 US 1038, 95 L Ed 2d 815, 107 S Ct 1975; *Clay v Johns-Manville Sales Corp.* (CA6 Tenn) 722 F2d 1289, CCH Bankr L Rptr ¶ 69507, CCH Prod Liab Rep ¶ 9855, 14 Fed Rules Evid Serv 1205, cert den 467 US 1253, 82 L Ed 2d 842, 104 S Ct 3537; *In re Johns-Manville/Asbestosis Cases* (ND Ill) 93 FRD 853, 10 Fed Rules Evid Serv 961; *Murray v Toyota Motor Distribs.* (CA9 Mont) 664 F2d 1377, 1982-1 CCH Trade Cases ¶ 64467, 9 Fed Rules Evid Serv 1128, cert den 457 US 1106, 73 L Ed 2d 1314, 102 S Ct 2905; *Carpenter v United States*, 4 Cl Ct 705, 84-1 USTC ¶ 13565, 53 AFTR 2d 84-1624, later proceeding 7 Cl Ct 732, 85-1 USTC ¶ 13612, 55 AFTR 2d 85-1585, affd without op (CA FC) 790 F2d 91.

Footnote 14. *In re Sterling Navigation Co.* (SD NY) 444 F Supp 1043; *In re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, later proceeding (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, later proceeding (CA3 Pa) 840 F2d 181, 1989 AMC 1025; *Hewitt v Hutter* (WD Va) 432 F Supp 795, 1 Fed Rules Evid Serv 916, 23 FR Serv 2d 1518; *United States v Atkins* (CA5 Tex) 618 F2d 366, 6 Fed Rules Evid Serv 166, reh den (CA5 Tex) 629 F2d 1350 and (among conflicting authorities noted on other grounds in *United States v Deeb* (CA11 Fla) 13 F3d 1532, 38 Fed Rules Evid Serv 1087, 7 FLW Fed C 1211); *Murphy v Owens-Illinois, Inc.* (CA6 Tenn) 779 F2d 340, CCH Prod Liab Rep ¶ 10906, 19 Fed Rules Evid Serv 821; *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474 US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238; *Baylor v Jefferson County Bd. of Education* (CA11 Ala) 733 F2d 1527, 35 BNA FEP Cas 377, 34 CCH EPD ¶ 34426, 15 Fed Rules Evid Serv 1324.

Deposition by executive of franchisor in suit against franchisor and manufacturer was inadmissible in subsequent case based on agency relationship between manufacturer and franchisor, due to lack of motive on part of manufacturer to extensively cross-examine deponent on issue of agency relationship in prior case. *Oberlin v Marlin American Corp.* (CA7 Ind) 596 F2d 1322, 4 Fed Rules Evid Serv 1422.

Footnote 15. *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515; *In re Related Asbestos Cases* (ND Cal) 543 F Supp 1142, 11 Fed Rules Evid Serv 889; *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169 (among conflicting authorities noted on other grounds in *United States v Graves* (CA5 La) 5 F3d 1546).

A party's decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude the opposing party's use of the deposition at a subsequent proceeding. *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169 (among conflicting authorities noted on other grounds in *United States v Graves* (CA5 La) 5 F3d 1546).

Footnote 16. *People v Nucci* (2d Dept) 162 App Div 2d 725, 557 NYS2d 422, app den 76 NY2d 862, 560 NYS2d 1002, 561 NE2d 902.

Footnote 17. *De Luryea v Winthrop Laboratories, Div. of Sterling Drug, Inc.* (CA8 Ark) 697 F2d 222, CCH Prod Liab Rep ¶ 9476, 12 Fed Rules Evid Serv 515; *In re Related Asbestos Cases* (ND Cal) 543 F Supp 1142, 11 Fed Rules Evid Serv 889; *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169 (among conflicting authorities noted on other grounds in *United States v Graves* (CA5 La) 5 F3d 1546); *Commonwealth v Canon*, 373 Mass 494, 368 NE2d 1181, cert den 435 US 933, 55 L Ed 2d 531, 98 S Ct 1510; *People v Nucci* (2d Dept) 162 App Div 2d 725, 557 NYS2d 422, app den 76 NY2d 862, 560 NYS2d 1002, 561 NE2d 902.

Footnote 18. *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474 US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238.

§ 904 --Determination of similarity of motive to cross-examine

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In determining whether the party against whom the evidence is offered had a similar motive to develop the testimony, a court must evaluate not only the similarity of the issues but also the purpose for which the testimony is given. 19 Accordingly, in assessing the similarity of motive, the court must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove or disprove the same side of a substantially similar issue. 20 Circumstances or factors which influence motive to develop testimony include: (1) the type of proceeding in which the testimony is given; 21 (2) trial strategy; (3) the potential parties or financial stakes; and (4) the number of issues and parties. These factors may differ greatly in civil and criminal cases involving the same defendant, and may, in a criminal trial, prohibit the admission, against the defendant, of a deposition previously taken in a civil trial involving the same defendant. 22

State courts have approached the issue of whether a criminal defendant's motive to cross-examine a witness at the preliminary hearing was similar to the motive he would

have had to cross-examine, in different ways, the witness at trial. 23 According to one view, defense attorneys never have similar motives to cross-examine at both preliminary hearings and trials. 24 Another view holds that defense attorneys always have similar motives to cross-examine at preliminary hearings and trials. 25 Others hold that the motives of the defense attorney, at preliminary hearings and trials, must be compared on a case-by-case basis. 26

Footnotes

Footnote 19. *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474 US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238.

Footnote 20. *United States v DiNapoli* (1993, CA2 NY) 8 F3d 909, 38 Fed Rules Evid Serv 277.

Footnote 21. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant but not conclusive on the ultimate issue of similarity of motive. *United States v DiNapoli* (1993, CA2 NY) 8 F3d 909, 38 Fed Rules Evid Serv 277.

Footnote 22. *United States v Feldman* (CA7 Ill) 761 F2d 380, 18 Fed Rules Evid Serv 1, 84 ALR Fed 649 (disapproved on other grounds by *United States v Rojas-Contreras*, 474 US 231, 88 L Ed 2d 537, 106 S Ct 555) as stated in *United States v Watkins* (CA11 Fla) 811 F2d 1408, cert den 482 US 909, 96 L Ed 2d 381, 107 S Ct 2490 and appeal after remand (CA7 Ill) 825 F2d 124, 23 Fed Rules Evid Serv 1182, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 8003, later proceeding (ND Ill) 780 F Supp 492, post-conviction proceeding (CA7) 1991 US App LEXIS 30238.

As to the use, in civil case, of former testimony in criminal case, see § 894.

As to the right of accused to reproduce former testimony, see § 893.

Footnote 23. *Rodriguez v State* (Wyo) 711 P2d 410.

Footnote 24. *People v Smith*, 198 Colo 120, 597 P2d 204.

Footnote 25. *State v Martinez* (App) 102 NM 94, 691 P2d 887, cert den 102 NM 88, 691 P2d 881, habeas corpus proceeding (CA10 NM) 881 F2d 921, 28 Fed Rules Evid Serv 921, cert den 493 US 1029, 107 L Ed 2d 758, 110 S Ct 740; *State v Brooks* (Utah) 638 P2d 537.

Footnote 26. *Scott v State*, 272 Ark 88, 612 SW2d 110; *Rodriguez v State* (Wyo) 711 P2d 410.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

§ 905 --In criminal proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The use of a former witness' testimony is not violative of the accused's constitutional right to be confronted with witnesses against him or her if, at the preliminary hearing or former trial, the accused had been accorded an adequate opportunity to cross-examine such witness. 27 A court will not impute to a defendant who flees before trial knowledge that he waived his right to cross-examine witnesses against him. 28

The requirement that the party against whom the evidence is to be admitted must have been able to conduct cross-examination at the former proceeding is generally satisfied if the former testimony comes from another hearing of the same criminal proceeding, such as before a grand jury if the hearsay testimony is offered against the government, 29 or from a prior trial of the same criminal defendant. 30 A preliminary hearing affords a constitutionally adequate opportunity to cross-examine opposing witnesses, especially where extensive cross-examination is conducted by the same counsel who represented the defendant at trial, and the hearing is conducted before a judicial tribunal equipped to provide a judicial record of the hearing. 31 However, a transcript of a plea bargain is not admissible. 32 And transcripts of prior state prosecutions have been excluded from federal prosecutions on the ground that the federal government had no opportunity to cross-examine in the state proceedings. 33

A defendant is not entitled, under the Confrontation Clause, to a cross-examination that is effective in whatever way and to whatever extent defense might wish. 34 If a party against whom the testimony is now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring the party to accept his own prior conduct of cross-examination or decision not to cross-examine. Consequently, the court's inquiry under focuses not on the extent of cross-examination at the former proceeding but on whether the party's handling of the testimony was meaningful in light of the circumstances which prevailed when the former testimony was offered. 35

§ 905 --In criminal proceedings [SUPPLEMENT]

Case authorities:

The trial court did err in a first- degree murder resentencing hearing by allowing a codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under GS § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. GS § 15A- 2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is

competent and admissible as a matter of law during a capital sentencing proceeding. *State v McLaughlin* (1995) 341 NC 426, 462 SE2d 1.

Footnotes

Footnote 27. *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1; *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *United States v Curry* (CA5 Fla) 471 F2d 419, cert den 411 US 967, 36 L Ed 2d 688, 93 S Ct 2150; *United States v Davis* (CA8 Ark) 551 F2d 233, 1 Fed Rules Evid Serv 833, cert den 431 US 923, 53 L Ed 2d 237, 97 S Ct 2197; *State v Browder* (Ala App) 507 So 2d 1040; *Lewis v State*, 288 Ark 595, 709 SW2d 56, post-conviction proceeding 299 Ark 310, 771 SW2d 773; *Rodgers v State*, 209 Ark 37, 189 SW2d 608; *People v Brock*, 38 Cal 3d 180, 211 Cal Rptr 122, 695 P2d 209; *People v Hamilton* (2nd Dist) 254 Cal App 2d 462, 62 Cal Rptr 261; *Gardner v State* (Ct Gen Sess) 43 Del 358, 47 A2d 310; *Alston v United States* (Dist Col App) 383 A2d 307, appeal after remand (Dist Col App) 412 A2d 351; *State v Johnston*, 62 Idaho 601, 113 P2d 809; *Stearnsman v State*, 237 Ind 149, 143 NE2d 81; *State v Brown*, 181 Kan 375, 312 P2d 832; *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726; *People v Sinclair*, 327 Mich 686, 42 NW2d 786; *People v Moore*, 306 Mich 29, 10 NW2d 296, cert den 321 US 787, 88 L Ed 1078, 64 S Ct 783, reh den 321 US 804, 88 L Ed 1090, 64 S Ct 846; *State v Logan*, 344 Mo 351, 126 SW2d 256, 122 ALR 417; *Meyers v State*, 112 Neb 149, 198 NW 871; *Aesoph v State*, 102 Nev 316, 721 P2d 379; *State v Loveless*, 62 Nev 312, 150 P2d 1015; *State v Riddel*, 38 NM 550, 37 P2d 802; *People v Hayes* (4th Dept) 110 App Div 2d 1035, 489 NYS2d 19; *State v Prince*, 270 NC 769, 154 SE2d 897; *Gibson v State*, 85 Okla Crim 228, 186 P2d 667; *State v Swiden*, 62 SD 208, 252 NW 628; *Norton v State*, 148 Tex Crim 294, 186 SW2d 347; *State v Burke*, 102 Utah 249, 129 P2d 560; *Fisher v Commonwealth*, 217 Va 808, 232 SE2d 798; *Pettit v Rhay*, 62 Wash 2d 515, 383 P2d 889.

Uncross-examined grand jury testimony of alleged coconspirators was improperly admitted as violation of confrontation clause where testimony did not fall within exception for coconspirators' statement. *United States v Gomez-Lemos* (CA6 Mich) 939 F2d 326, 33 Fed Rules Evid Serv 683, reh, en banc, den (CA6) 1991 US App LEXIS 26601.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Footnote 28. *United States v Deeb* (CA11 Fla) 13 F3d 1532, 38 Fed Rules Evid Serv 1087, 7 FLW Fed C 1211.

Footnote 29. *United States v Henry* (DC NJ) 448 F Supp 819, 3 Fed Rules Evid Serv 340.

Footnote 30. *United States v Pizarro* (CA7 Ill) 717 F2d 336, 14 Fed Rules Evid Serv 1, appeal after remand (CA7 Ill) 756 F2d 579, 17 Fed Rules Evid Serv 1010, cert den 471 US 1139, 86 L Ed 2d 703, 105 S Ct 2686; *United States v Davis* (CA8 Ark) 551 F2d 233, 1 Fed Rules Evid Serv 833, cert den 431 US 923, 53 L Ed 2d 237, 97 S Ct 2197.

Footnote 31. *California v Green*, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930, on remand 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, cert dismd 404 US 801, 30 L Ed 2d 34, 92 S Ct 20.

Footnote 32. *United States v Callahan* (DC Minn) 442 F Supp 1213, 2 Fed Rules Evid Serv 890, later proceeding (DC Minn) 455 F Supp 524, revd on other grounds (CA8 Minn) 596 F2d 759.

Footnote 33. *United States v Barrett* (CA1 Me) 766 F2d 609, 18 Fed Rules Evid Serv 1170, cert den 474 US 923, 88 L Ed 2d 264, 106 S Ct 258, post-conviction proceeding (DC Me) 763 F Supp 658, affd (CA1 Me) 965 F2d 1184; *United States v Lanci* (CA6 Ohio) 669 F2d 391, 9 Fed Rules Evid Serv 1256, cert den 457 US 1134, 73 L Ed 2d 1350, 102 S Ct 2960, later proceeding (CA6 Ohio) 725 F2d 1040, 14 Fed Rules Evid Serv 1782, cert den 467 US 1252, 82 L Ed 2d 840, 104 S Ct 3535, habeas corpus proceeding (CA6 Ky) 854 F2d 830 (court found that state did not have similar motive, in its prosecution for murder, to develop facts concerning bribery, which was issue in subsequent federal prosecution).

Footnote 34. *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726.

Footnote 35. *United States v Pizarro* (CA7 Ill) 717 F2d 336, 14 Fed Rules Evid Serv 1, appeal after remand (CA7 Ill) 756 F2d 579, 17 Fed Rules Evid Serv 1010, cert den 471 US 1139, 86 L Ed 2d 703, 105 S Ct 2686.

For discussion of the accused's right to confront witnesses, generally, see 21A Am Jur 2d, Criminal Law §§ 728, 965.

b. Unavailability of Witness [906-923]

(1). In General [906, 907]

§ 906 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In order to establish a right to introduce the testimony of a witness given at a former trial, it is incumbent upon the proponent of such evidence to lay a proper foundation for its introduction by showing the unavailability of the witness who gave the testimony sought to be produced. 36 Generally, former testimony is not admissible unless the declarant is unavailable because the opportunity to observe the demeanor of the witness gives depth and meaning to the testimony. 37

The determination as to whether a proper foundation has been laid demonstrating the

unavailability of a witness is at the discretion of the trial judge. 38 In determining unavailability, the focus is not on the unavailability of the witness per se, but on the unavailability of his or her testimony, 39 at the time the former testimony is to be admitted in evidence. 40 A witness may be physically present in the courtroom and still be unavailable. 41

For a witness to be unavailable, it must be practically impossible to produce the witness in court. 42 It is not enough to show that the witness would be uncomfortable on the stand or that testifying would be stressful. 43 Further, the unavailability of a witness cannot be premised solely on the fact that the proponent of the testimony does not feel that the declarant's presence is necessary. 44 The "witness unavailable" exception to the hearsay rule is not applicable when the unavailability of the witness is due solely to a limit imposed by the court. 45

§ 906 ----Generally [SUPPLEMENT]

Case authorities:

If artist's estate asserts New York Dead Man's Statute, art dealer will become "unavailable" within meaning of FRE 804(a) to testify about her dealings with deceased artist, and her testimony from first trial—in which estate waived Statute—will be admissible at this retrial, where dealer sues on alleged failure of artist to deliver 3 paintings promised, because Federal Rules of Evidence govern hearsay problems in federal court even when state law supplies rule of decision, under FRE 101 and 1101. *Rosenfeld v Basquiat* (1994, SD NY) 866 F Supp 790.

In prosecution for assault, trial court did not abuse its discretion in refusing to admit statement of unavailable witness made to defense counsel where statement was made approximately 16 months after incident, statement was handwritten by defense counsel, and it elicited only favorable information. *State v Smith* (1994) 35 Conn App 51, 644 A2d 923.

Footnotes

Footnote 36. *Sims v State*, 139 Ala 74, 36 So 138; *State v Schad*, 129 Ariz 557, 633 P2d 366, cert den 455 US 983, 71 L Ed 2d 693, 102 S Ct 1492, post-conviction proceeding 142 Ariz 619, 691 P2d 710, appeal after remand 163 Ariz 411, 788 P2d 1162, 49 Ariz Adv Rep 23, motion gr, cert gr 498 US 894, 112 L Ed 2d 202, 111 S Ct 243 and affd 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491, 91 CDOS 4739, 91 Daily Journal DAR 7372, reh den (US) 115 L Ed 2d 1109, 112 S Ct 28 and (criticized on other grounds but reluctantly followed by *United States v Correa-Ventura* (CA5 Tex) 6 F3d 1070); *People v Hovey*, 44 Cal 3d 543, 244 Cal Rptr 121, 749 P2d 776, cert den 488 US 871, 102 L Ed 2d 157, 109 S Ct 188, later proceeding 410 Mass 364, 573 NE2d 1 and stay gr (Cal) 1989 Cal LEXIS 77, habeas corpus den (Cal) 1989 Cal LEXIS 840; *Clay v State*, 238 Ga 285, 232 SE2d 559; *Levi v State*, 182 Ind 188, 104 NE 765, reh den 182 Ind 188, 105 NE 898; *State v McClellan*, 79 Kan 11, 98 P 209; *Franklin Coal Co. v McMillan*, 49 Md 549; *Commonwealth v Ortiz*, 393 Mass 523, 471 NE2d 1321; *Goff v St. Luke's Hospital (Mo)* 753 SW2d 557 (among conflicting authorities noted on other grounds in *Gaynor v Circle B Trucking, Inc.* (Mo App) 801 SW2d 369); *State v Sullivan*, 24 NJ 18, 130 A2d 610, 66

ALR2d 761, cert den 355 US 840, 2 L Ed 2d 51, 78 S Ct 52; New York C. R. Co. v Stevens, 126 Ohio St 395, 185 NE 542, 87 ALR 884; Perkins v State (Okla Crim) 695 P2d 1364; Commonwealth v Walloe, 472 Pa 473, 372 A2d 788; Burton v Oldfield, 195 Va 544, 79 SE2d 660; State v Ortego, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 37. Liles v Employers Mut. Ins. (App) 126 Wis 2d 492, 377 NW2d 214.

Footnote 38. People v Liner (4th Dist) 168 Cal App 2d 411, 335 P2d 964; State v Ward, 51 Idaho 68, 1 P2d 620; Stearsman v State, 237 Ind 149, 143 NE2d 81; State v Emory, 116 Kan 381, 226 P 754; State v Budge, 127 Me 234, 142 A 857; Meyers v State, 112 Neb 149, 198 NW 871; State v Maynard, 184 NC 653, 113 SE 682; State v Allen, 120 Or 652, 253 P 371.

Footnote 39. Walden v Sears, Roebuck & Co. (CA5 Tex) 654 F2d 443, CCH Prod Liab Rep ¶ 9050, 8 Fed Rules Evid Serv 1657; Thomas v Cardwell (CA9 Ariz) 626 F2d 1375, 7 Fed Rules Evid Serv 1209, cert den 449 US 1089, 66 L Ed 2d 816, 101 S Ct 881; State v Thomas, 110 Ariz 120, 515 P2d 865; Johnson v People, 152 Colo 586, 384 P2d 454, cert den 376 US 922, 11 L Ed 2d 617, 84 S Ct 682; State v Stewart, 85 Kan 404, 116 P 489; People v Pickett, 339 Mich 294, 63 NW2d 681, 45 ALR2d 1341, cert den 349 US 937, 99 L Ed 1266, 75 S Ct 781; Commonwealth v Rodgers, 472 Pa 435, 372 A2d 771; State v Barela (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44.

Footnote 40. Commonwealth v Siegfriedt, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726.

Footnote 41. State v R.C. (La App 2d Cir) 494 So 2d 1350, later proceeding (La App 2d Cir) 514 So 2d 759, cert den, stay vac (La) 516 So 2d 128.

A victim who took the stand and answered questions but refused to talk about the alleged attempted aggravated rape offense was unavailable at trial within the meaning of a state statute governing the admissibility of videotaped testimony of child sexual abuse victims. State v R.C. (La App 2d Cir) 494 So 2d 1350, later proceeding (La App 2d Cir) 514 So 2d 759, cert den, stay vac (La) 516 So 2d 128.

Footnote 42. State v Barela (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44.

Footnote 43. State v Barela (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44.

Footnote 44. United States v Parcel of Real Property Known as 6109 Grubb Rd. (CA3 Pa) 886 F2d 618, 28 Fed Rules Evid Serv 1463, 110 ALR Fed 553, reh, en banc, den (CA3) 890 F2d 659 and (not followed on other grounds by United States v Certain Real Property & Premises Known as 418 57th Street (ED NY) 737 F Supp 749) and (among conflicting authorities noted on other grounds in United States v One 1989 Jeep Wagoneer (CA8 Minn) 976 F2d 1172).

Footnote 45. Secretary of Labor v DeSisto (CA1 Mass) 929 F2d 789, 30 BNA WH Cas 345, 118 CCH LC ¶ 35467, 32 Fed Rules Evid Serv 723.

The burden of satisfying the court of the validity of the excuse for nonproduction of a witness lies upon the party seeking to introduce the prior testimony. 46 It must be shown that some circumstance exists by reason of which the witness who gave the testimony at the former trial cannot be produced as a witness, or cannot be made to testify, at the second trial. 47

The sufficiency of the proof to establish the unavailability of a witness is largely within the discretion of the trial court, 48 and, in the absence of a showing that such discretion has been abused, its decision will not be interfered with on appeal. 49 The trial court abuses its discretion only if its decision is outside the zone of reasonable disagreement. 50 Generally, it is within the discretion of the trial court to accept or reject counsel's representation on unavailability of a witness. 51

A higher standard of proof of unavailability is required in criminal cases than is in civil cases. 52 But it has been held that the prosecution must prove the witness' unavailability by a preponderance of the evidence, and not to a complete certainty. 53 For the purposes of the Sixth Amendment confrontation clause, the prosecution bears the burden of establishing that a witness is unavailable to testify at trial, despite good-faith efforts, undertaken prior to trial, to locate and present that witness. 54

Footnotes

Footnote 46. *United States v Chanya* (CA5 Tex) 723 F2d 374, 14 Fed Rules Evid Serv 1210, cert den 466 US 943, 80 L Ed 2d 471, 104 S Ct 1925, reh den 467 US 1231, 81 L Ed 2d 886, 104 S Ct 2693; *United States v Fernandez-Roque* (CA5 La) 703 F2d 808, 12 Fed Rules Evid Serv 1781; *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *Bussard v State*, 300 Ark 174, 778 SW2d 213, post-conviction proceeding (Ark) 1991 Ark LEXIS 581, petition den (Ark) 1992 Ark LEXIS 93; *Spears v State Farm Fire & Casualty Ins.*, 291 Ark 465, 725 SW2d 835; *New York C. R. Co. v Stevens*, 126 Ohio St 395, 185 NE 542, 87 ALR 884; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660; *State v Ortego*, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 47. *Fresh v Gilson*, 41 US 327, 16 Pet 327, 10 L Ed 982; *Marler v State*, 67 Ala 55; *Maloney v State*, 91 Ark 485, 121 SW 728; *Henwood v People*, 57 Colo 544, 143 P 373; *Levi v State*, 182 Ind 188, 104 NE 765, reh den 182 Ind 188, 105 NE 898; *State v Nelson*, 68 Kan 566, 75 P 505; *Stein v Swensen*, 46 Minn 360, 49 NW 55; *People v Elliott*, 172 NY 146, 64 NE 837; *New York C. R. Co. v Stevens*, 126 Ohio St 395, 185 NE 542, 87 ALR 884; *Martin v State*, 46 Okla Crim 411, 287 P 424, 85 ALR 512; *Drayton v Wells*, 10 SCL 409; *Kerry v State*, 17 Tex App 178; *State v King*, 24 Utah 482, 68 P 418; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660; *State v Ortego*, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 48. *Corl v Kacmar*, 391 Pa Super 376, 571 A2d 417.

Footnote 49. *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584,

reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *Dres v Campoy* (CA9 Cal) 784 F2d 996, 20 Fed Rules Evid Serv 354; *Nolen v State* (Ala App) 469 So 2d 1326; *Nolen v State* (Ala App) 469 So 2d 1326; *Firestone Tire & Rubber Co. v Adams* (Del Sup) 541 A2d 567, CCH Prod Liab Rep ¶ 11797; *Clay v State*, 238 Ga 285, 232 SE2d 559; *Territory v Curran*, 23 Hawaii 421; *Levi v State*, 182 Ind 188, 104 NE 765, reh den 182 Ind 188, 105 NE 898; *State v Emory*, 116 Kan 381, 226 P 754; *State v R.C.* (La App 2d Cir) 494 So 2d 1350, later proceeding (La App 2d Cir) 514 So 2d 759, cert den, stay vac (La) 516 So 2d 128; *Jackson v State*, 133 Neb 786, 277 NW 92; *Commonwealth v Walloe*, 472 Pa 473, 372 A2d 788; *Reyes v State* (Tex App El Paso) 845 SW2d 328; *Burton v Oldfield*, 195 Va 544, 79 SE2d 660; *State v Ortego*, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 50. *Reyes v State* (Tex App El Paso) 845 SW2d 328.

Footnote 51. *Bailey v Southern Pacific Transp. Co.* (CA5 Tex) 613 F2d 1385, 5 Fed Rules Evid Serv 956, reh den (CA5 Tex) 618 F2d 781 and cert den 449 US 836, 66 L Ed 2d 42, 101 S Ct 109; *Spears v State Farm Fire & Casualty Ins.*, 291 Ark 465, 725 SW2d 835; *Barrett v Asarco, Inc.*, 245 Mont 196, 799 P2d 1078, 117 CCH LC ¶ 56486.

Trial court did not abuse its discretion when it ruled that witness was not "unavailable" and that his prior testimony therefore could not be introduced into evidence where counsel attempted to make contact with witness by phone, was unable to do so, and did not attempt to inform the court that he was having difficulty in locating the witness. *Commonwealth v Walloe*, 472 Pa 473, 372 A2d 788.

Footnote 52. *Bussard v State*, 300 Ark 174, 778 SW2d 213, post-conviction proceeding (Ark) 1991 Ark LEXIS 581, petition den (Ark) 1992 Ark LEXIS 93; *Spears v State Farm Fire & Casualty Ins.*, 291 Ark 465, 725 SW2d 835.

Footnote 53. *People v Turner* (2nd Dist) 219 Cal App 3d 1207, 268 Cal Rptr 686, review den (Cal) 1990 Cal LEXIS 3364.

Footnote 54. *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1 (criticized on other grounds by *United States v Inadi*, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121, 19 Fed Rules Evid Serv 1009) as stated in *United States v Paris* (CA9 Cal) 812 F2d 471, 22 Fed Rules Evid Serv 970, and on other grounds, reh den (CA9 Cal) 827 F2d 395, 23 Fed Rules Evid Serv 1039 and (not followed on other grounds by *United States v Kaden* (CA7 Ill) 819 F2d 813, 23 Fed Rules Evid Serv 167).

For discussion of the accused's right to confront witnesses, see 21A Am Jur 2d, Criminal Law §§ 728, 965.

(2). Reasons for Unavailability [908-923]

§ 908 Generally

[View Entire Section](#)

Where statutes enumerate the grounds upon proof of which the testimony of a witness at a former trial or proceeding may be introduced in evidence, it is necessary to establish one of the enumerated grounds. 55 A declarant is unavailable 56 as a witness under the Uniform and Federal Rules of Evidence if the declarant: (1) is exempted, by a court ruling, on the ground of privilege, from testifying concerning the subject matter of the declarant's statement; 57 (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; 58 (3) testifies to a lack of memory of the subject matter of the declarant's statement; 59 (4) is unable to be present or to testify at the hearing because of death 60 then existing physical or mental illness or infirmity; 61 or (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. 62

§ 908 ----Generally [SUPPLEMENT]

Case authorities:

Trial court did not err in determining that witness for state was unavailable for trial and thus that witness' previously transcribed testimony from preliminary hearing was admissible. Outside presence of jury, court conducted rather extensive hearing to determine whether state's witness was actually unavailable, and whether state had exercised due diligence in its efforts to locate witness. Hearing included testimony of witness' mother, his girlfriend, investigator for state, and jailer for city. Witness had murder charge, unconnected with case at bar, pending against him and had recently escaped from jail. Each person who testified to witness' unavailability indicated that each had made efforts to locate him, but that he could not be found. *Johnson v State* (1993, Ala App) 623 So 2d 444.

Footnotes

Footnote 55. *People v Lawrence* (1st Dist) 168 Cal App 2d 510, 336 P2d 189; *State v Mayeux* (La App 3d Cir) 526 So 2d 1243, cert den (La) 531 So 2d 262, habeas corpus proceeding (WD La) 1990 US Dist LEXIS 15760, adopted (WD La) 737 F Supp 957; *Fleury v Edwards*, 14 NY2d 334, 251 NYS2d 647, 200 NE2d 550.

For discussion of hearsay exceptions restricted to situations where the declarant is unavailable as a witness, generally, see §§ 690 et seq.

Footnote 56. For the definition of "unavailability" under Rule 804(a) of the Federal Rules of Evidence and under Rule 804(a) of the Uniform Rules of Evidence, see § 692.

Footnote 57. § 921.

Footnote 58. § 920.

Footnote 59. § 911.

Footnote 60. § 909.

Footnote 61. § 912.

Footnote 62. § 914.

§ 909 Death

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is generally agreed that the testimony of a witness since deceased, given at a former trial or proceeding in which the witness was under oath, cross-examined, or where there was opportunity for cross-examination, is admissible in evidence in a subsequent trial of the same action or proceeding. 63 This approach has been adopted by the Federal and Uniform Rules of Evidence, 64 and has been applied to criminal proceedings. 65

§ 909 ----Death [SUPPLEMENT]

Case authorities:

Affidavit by since-deceased deputy police chief, that police chief had mentioned that his philosophy was to weed out older employees, should not have been admitted in police officer's age discrimination suit; affidavit did not indicate context, times, or locations of police chief's alleged statements, city did not have opportunity to cross-examine affiant, and affidavit contained no information to substantiate affiant's belief that chief wanted to promote younger employees. *Stokes v City of Omaha* (1994, CA8 Neb) 23 F3d 1362, 64 BNA FEP Cas 1107.

In murder prosecution involving juvenile being tried as adult, trial court did not err in admitting, during punishment phase, testimony of psychologist given in juvenile certification hearing. Psychologist had died during interim, and defendant had been afforded opportunity and had had similar motive to cross-examine psychologist at certification hearing; identity of motive was not required. *Coffin v State* (1994, Tex Crim) 885 SW2d 140.

Footnotes

Footnote 63. *Washington Gas Light Co. v District of Columbia*, 161 US 316, 40 L Ed 712, 16 S Ct 564; *McInturff v Insurance Co. of North America*, 248 Ill 92, 93 NE 369; *Western Assur. Co. v McAlpin*, 23 Ind App 220, 55 NE 119; *New v Smith*, 94 Kan 6, 145 P 880; *Davis v Kline*, 96 Mo 401, 9 SW 724; *In re White's Will*, 2 NY2d 309, 160 NYS2d 841, 141 NE2d 416, 70 ALR2d 484, reh den 2 NY2d 996; *Settee v Charlotte E.*

R. Co., 171 NC 440, 88 SE 734; *Harger v Thomas*, 44 Pa 128; *Lyon v Rhode Island Co.*, 38 RI 252, 94 A 893; *Drayton v Wells*, 10 SCL 409; *Briones v Solomon* (Tex App San Antonio) 769 SW2d 312, writ den (Sep 27, 1989) and reh'g of writ of error overr (Nov 29, 1989); *Carrico v West Virginia C. & P. R. Co.*, 39 W Va 86, 19 SE 571.

Footnote 64. FRE, Rule 804(a)(4); Uniform Rules of Evidence Rule 804(a)(4).

Footnote 65. *Mattox v United States*, 156 US 237, 39 L Ed 409, 15 S Ct 337; *United States v Clark*, 96 US 37, 6 Otto 37, 24 L Ed 696; *United States v Driscoll* (DC NJ) 445 F Supp 864, 3 Fed Rules Evid Serv 251; *United States v Goins* (CA8 Mo) 593 F2d 88, 3 Fed Rules Evid Serv 1164, cert den 444 US 827, 62 L Ed 2d 35, 100 S Ct 52; *United States v Layton* (CA9 Cal) 720 F2d 548, 13 FR Serv 2d 1313, cert den 465 US 1069, 79 L Ed 2d 748, 104 S Ct 1423, appeal after remand (CA9 Cal) 767 F2d 549, 18 Fed Rules Evid Serv 1322, later proceeding (ND Cal) 632 F Supp 176, later proceeding (ND Cal) 666 F Supp 1369, affd (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988, cert den 489 US 1046, 103 L Ed 2d 244, 109 S Ct 1178 and (criticized on other grounds by *Territory of Guam v Ignacio* (CA9 Cal) 10 F3d 608, 93 CDOS 8509, 93 Daily Journal DAR 14575); *United States v Poland* (CA9 Ariz) 659 F2d 884, 9 Fed Rules Evid Serv 320, cert den 454 US 1059, 70 L Ed 2d 598, 102 S Ct 611; *United States v Brooks* (App DC) 296 US App DC 219, 966 F2d 1500; *Benton v State*, 31 Ala App 338, 18 So 2d 423, cert den 245 Ala 625, 18 So 2d 428; *State v Virden*, 32 Del 32, 118 A 597; *James v State* (Fla App D1) 254 So 2d 838, cert den (Fla) 261 So 2d 840 and cert den 409 US 985, 34 L Ed 2d 249, 93 S Ct 334; *State v Boyd*, 140 Kan 623, 38 P2d 665; *Denny v Commonwealth*, 274 Ky 419, 118 SW2d 778; *State v Ford* (La) 336 So 2d 817; *Commonwealth v Richards*, 35 Mass 434; *State v Brown*, 331 Mo 556, 56 SW2d 405; *State v McO'Brien*, 24 Mo 402; *State v Jackson*, 30 NM 309, 233 P 49; *People v Stanley* (2d Dept) 163 App Div 2d 435, 558 NYS2d 146, app den 76 NY2d 1024, 565 NYS2d 775, 566 NE2d 1180; *Commonwealth v Ryhal*, 274 Pa 401, 118 A 358; *State v Hill*, 20 SCL 607; *State v Heffernan*, 24 SD 1, 123 NW 87 (criticized on other grounds by *State v Carr*, 67 SD 481, 294 NW 174); *State v Bowers* (Tenn Crim) 744 SW2d 588; *McCue v State*, 75 Tex Crim 137, 170 SW 280; *State v King*, 24 Utah 482, 68 P 418; *Spencer v State*, 132 Wis 509, 112 NW 462; *Rodriguez v State* (Wyo) 711 P2d 410.

Where two of the witnesses for the government at the former trial of an indictment for murder have since died, a transcribed copy of the reporter's stenographic notes of their testimony at such trial, supported by his testimony that it was correct, is admissible in evidence against the accused on the second trial of the indictment. *Mattox v United States*, 156 US 237, 39 L Ed 409, 15 S Ct 337.

In a prosecution for possession of a controlled substance, preliminary hearing testimony previously given by the arresting officer was properly admitted at trial where the officer, who was the only witness to testify at the preliminary hearing, was killed in an automobile accident two days after the hearing and the state would have been unable to prove its case at trial if it had been barred from using the officer's preliminary hearing testimony. *State v Ricks* (App) 122 Idaho 856, 840 P2d 400.

The rather unusual contention was made in a Texas case that the state could not put into evidence the testimony of a deceased witness for the reason that it was the state itself which made it impossible for the witness to testify at the trial by ordering his electrocution as punishment for a crime committed by him. In this case, an accomplice of the accused testified at the first trial of the accused but was electrocuted by the state prior to the second trial of the accused. It was held that his testimony was admissible on

behalf of the state as the testimony of a person since deceased. *Abston v State*, 139 Tex Crim 416, 141 SW2d 337.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

§ 910 --Proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The death of a witness must be proved as a fact before evidence of a witness taken at a prior trial may be admitted. 66 A death certificate provides the proper foundation to admit the preliminary hearing testimony of a witness who had died before trial. 67 In addition, the death of the witness may be stipulated by the parties. 68

A claim that the plaintiff knew "from general repute" that the witness was dead is not sufficient to establish that fact so as to permit the introduction of the testimony given by the witness at a former trial. 69 Moreover, the mere return of a subpoena showing that the witness could not be found or is dead is insufficient to justify the admission of evidence given at a former trial. 70

Footnotes

Footnote 66. *Driggers v United States*, 21 Okla 60, 95 P 612.

Footnote 67. *Moore v State* (Ind) 440 NE2d 1092, appeal after remand (Ind) 467 NE2d 720.

Footnote 68. *Briones v Solomon* (Tex App San Antonio) 769 SW2d 312, writ den (Sep 27, 1989) and reh of writ of error overr (Nov 29, 1989).

For discussion of stipulations pertaining to evidence introduced at trial, generally, see 73 Am Jur 2d, Stipulations § 17.

Footnote 69. *Welch v New York, N. H. & H. R. Co.*, 182 Mass 84, 64 NE 695.

Testimony by two witnesses that they have heard of the death of the witness whose testimony is sought to be introduced, and that such is the general report, is insufficient proof of his death to permit the admission, in a criminal prosecution, of his testimony given on the preliminary examination of the defendant. *State v Wright*, 70 Iowa 152, 30 NW 388.

Footnote 70. *State v McClellan*, 79 Kan 11, 98 P 209; *Driggers v United States*, 21 Okla

§ 911 Loss of memory

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While it has been held that the mere fact that a witness who is not mentally incapacitated has forgotten the facts to which he formerly testified, or that he fails to recollect particular facts, does not furnish a ground for the admission of proof of his testimony given at a former trial, 71 under the modern view adopted by the Federal and Uniform Rules of Evidence, if the declarant testifies to a lack of memory of the subject matter of his or her statement during testimony in a prior proceeding, the declarant is considered unavailable. 72 A witness' claim of lack of memory will generally be deemed sufficient if supported by corroborating circumstances. 73

◆ Observation: The consistency or inconsistency of earlier testimony with a witness' subsequent loss of memory becomes irrelevant where the witness testifies to a lack of memory as to a material portion of the subject matter of the prior testimony. 74

Footnotes

Footnote 71. *Turner v Missouri K. T. R. Co.*, 346 Mo 28, 142 SW2d 455, 129 ALR 829.

Unavailability of a witness due to mental illness is discussed in § 912.

Footnote 72. FRE, Rule 804(a)(3); Uniform Rules of Evidence 804(a)(3).

Footnote 73. *United States v Amaya* (CA5 Tex) 533 F2d 188, 2 Fed Rules Evid Serv 584, reh den (CA5 Tex) 540 F2d 1086 and cert den 429 US 1101, 51 L Ed 2d 551, 97 S Ct 1125; *United States v Davis* (CA8 Ark) 551 F2d 233, 1 Fed Rules Evid Serv 833, cert den 431 US 923, 53 L Ed 2d 237, 97 S Ct 2197; *State v Severns*, 184 Kan 213, 336 P2d 447.

A deposition taken 19 months after an accident involving a minor was admissible at trial 9 years after the accident where the minor testified that he could remember events immediately before and after the accident, but not events of the accident itself, and where it was shown that physical complications involving brain function caused him to have difficulty with his memory. *Walden v Sears, Roebuck & Co.* (CA5 Tex) 654 F2d 443, CCH Prod Liab Rep ¶ 9050, 8 Fed Rules Evid Serv 1657.

Footnote 74. *McDonnell v United States* (CA8 SD) 472 F2d 1153, cert den 412 US 942, 37 L Ed 2d 402, 93 S Ct 2785.

§ 912 Physical or mental illness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If the declarant is unable to be present or testify at the hearing because of an existing physical ⁷⁵ or mental ⁷⁶ illness or infirmity, ⁷⁷ the declarant is considered unavailable. ⁷⁸ This view is followed by the Federal and Uniform Rules of Evidence. ⁷⁹

Where the unavailability of a witness is caused by an incapacitating physical or mental condition existing at trial, the illness or infirmity must be of comparative severity, and it must exist to such a degree as to render the witness' attendance or his testifying relatively impossible, and not merely inconvenient. ⁸⁰ Mere passing discomfort or inconvenience does not satisfy statutory requirements governing the admissibility of hearsay evidence or the confrontation clause. ⁸¹

Footnotes

Footnote 75. *United States v Keithan* (CA1 Mass) 751 F2d 9; *United States v Ricketson* (CA7 Ill) 498 F2d 367, cert den 419 US 965, 42 L Ed 2d 180, 95 S Ct 227 and (criticized on other grounds by *United States ex rel. Esola v Groomes* (CA3 NJ) 520 F2d 830); *Williams v State*, 156 Ark 205, 246 SW 503; *People v Hernandez* (5th Dist) 263 Cal App 2d 242, 69 Cal Rptr 448; *Tanner v State*, 213 Ga 820, 102 SE2d 176; *State v Fondren*, 11 Kan App 2d 309, 721 P2d 284; *State v Rich* (Me) 395 A2d 1123, cert den 444 US 854, 62 L Ed 2d 71, 100 S Ct 110; *People v Hawthorne*, 293 Mich 15, 291 NW 205; *People v Williams* (2d Dept) 115 App Div 2d 676, 496 NYS2d 510; *Davis v State* (Okla Crim) 753 P2d 388; *A. F. Conner & Sons, Inc. v Tri-County Water Supply Corp.* (Tex) 561 SW2d 466, reh'g of cause overr (Mar 1, 1978).

A witness was unavailable within the meaning of that requirement for the admission of previously recorded testimony where the witness was 70 years old, had just had surgery for a breast tumor and an injured foot, and his doctor certified that travel would be detrimental to his health. *State v Smith*, 291 NC 505, 231 SE2d 663.

Footnote 76. *Thomas v Cardwell* (CA9 Ariz) 626 F2d 1375, 7 Fed Rules Evid Serv 1209, cert den 449 US 1089, 66 L Ed 2d 816, 101 S Ct 881 (witness, when called to testify, was recalcitrant, nonresponsive, extremely disoriented, and testified that he was a heavy drug user and was currently residing in a state hospital); *People v Turner* (2nd Dist) 219 Cal App 3d 1207, 268 Cal Rptr 686, review den (Cal) 1990 Cal LEXIS 3364; *State v Pierson*, 337 Mo 475, 85 SW2d 48; *Commonwealth v Loomis*, 270 Pa 254, 113 A 428.

Prosecution was entitled to introduce victim's preliminary hearing testimony at rape trial, where her unavailability was caused by incapacitating depression that had worsened after each contact with criminal justice system, and she had repeatedly and emphatically refused to come to court to testify, and mental health expert had diagnosed her as suffering from rape-induced post-traumatic stress disorder requiring long-term treatment. *People v Turner* (2nd Dist) 219 Cal App 3d 1207, 268 Cal Rptr 686, review den (Cal)

1990 Cal LEXIS 3364.

Footnote 77. *People v Rojas*, 15 Cal 3d 540, 125 Cal Rptr 357, 542 P2d 229, 92 ALR3d 1127 (a chief prosecution witness' fear that if he testified, his safety and that of his family would be endangered, induced the "mental infirmity" required by a state statute providing that one is unavailable to testify because of a then existing mental illness or infirmity).

Footnote 78. For discussion of illness as grounds for the taking of a deposition of a witness, see 23 Am Jur 2d, *Depositions and Discovery* §§ 181-185.

Annotation: Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

Footnote 79. FRE, Rule 804(a)(4); Uniform Rules of Evidence Rule 804 (a)(4).

Annotation: Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

Footnote 80. *People v Turner* (2nd Dist) 219 Cal App 3d 1207, 268 Cal Rptr 686, review den (Cal) 1990 Cal LEXIS 3364.

The introduction, at the second trial, of a key prosecution witness' testimony at the first trial, at which the prosecution's witness had testified extensively and was subject to cross-examination, did not violate the right of confrontation where at the second trial the witness was recalcitrant, nonresponsive, and extremely disoriented, as an apparent result of heavy drug use, and where the same counsel represented the petitioner at both trials. *Thomas v Cardwell* (CA9 Ariz) 626 F2d 1375, 7 Fed Rules Evid Serv 1209, cert den 449 US 1089, 66 L Ed 2d 816, 101 S Ct 881.

Footnote 81. *State v Barela* (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44.

In a prosecution for incest, the victim's cerebral palsy was not a physical illness which would qualify her as unavailable, where mere passing discomfort or inconvenience at trial would not justify the admission of testimony the victim had given at preliminary hearing. *State v Barela* (Utah App) 779 P2d 1140, 116 Utah Adv Rep 44.

For discussion of the accused's right to confront witness, see 21A Am Jur 2d, *Criminal Law* §§ 728, 965.

§ 913 --Proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The existence of the infirmity should be established by the testimony of a medical witness⁸² or by affidavit.⁸³ Allegations that the witness is hospitalized are not enough where the party seeking to introduce the prior testimony is unable to demonstrate that the witness is too sick to testify at trial.⁸⁴ Likewise, uncorroborated statements

made by defense counsel, that the defendant's witness is unavailable to testify due to her child's illness, are, of themselves, insufficient to demonstrate unavailability of the witness. 85

Footnotes

Footnote 82. *Parrott v Wilson* (CA11 Ga) 707 F2d 1262, 13 Fed Rules Evid Serv 1149, 36 FR Serv 2d 1070, cert den 464 US 936, 78 L Ed 2d 311, 104 S Ct 344.

In a prosecution for sexual assault and kidnapping, testimony of physician, given three months before trial, furnished a sufficient basis for trial judge, in exercise of his discretion, to declare victim unavailable for trial due to mental illness and to permit introduction at trial of her testimony given at preliminary hearing. *State v Burns*, 112 Wis 2d 131, 332 NW2d 757, habeas corpus proceeding (ED Wis) 599 F Supp 1438, affd (CA7 Wis) 798 F2d 931, 21 Fed Rules Evid Serv 481.

Footnote 83. *In re Complaint of Bankers Trust Co.* (CA3 Pa) 752 F2d 874, 1986 AMC 74, 17 Fed Rules Evid Serv 128, 40 FR Serv 2d 1181, later proceeding (CA3 Pa) 775 F2d 545, 3 FR Serv 3d 159, later proceeding (CA3 Pa) 840 F2d 181, 1989 AMC 1025.

The state failed to show unavailability of the witness where letter from the complainant's doctor was not notarized as required by statute and the testimony of the district attorney as to what the complainant and her physician had told him when contacted constituted hearsay. *Porier v State* (Tex Crim) 662 SW2d 602.

Footnote 84. *State v Monta* (La App 3d Cir) 470 So 2d 383, cert den (La) 476 So 2d 348.

Footnote 85. *United States v Acosta* (CA11 Fla) 769 F2d 721, 20 Fed Rules Evid Serv 91.

§ 914 Inability to locate or procure witness; absence from jurisdiction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A witness is unavailable, under the rule allowing admission of testimony of a witness from a prior proceeding, 86 if a party cannot locate the witness within the jurisdiction. 87 Statutes often regulate the use of former testimony of a witness who is absent from the jurisdiction. 88 Under the Federal and Uniform Rules of Evidence, a declarant is unavailable as a witness when he or she is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. 89 There is no requirement that an attempt be made to depose a witness as a precondition to the witness being deemed unavailable, for the purposes of introducing prior testimony under the Federal Rules of Evidence. 90 However, an attempt to depose a witness as a precondition to the witness being deemed unavailable may sometimes be required under state law. 91

Footnotes

Footnote 86. As to the rule, generally, see § 906.

Footnote 87. *Barber v Page*, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318; *United States v Mann* (CA1 Puerto Rico) 590 F2d 361, 4 Fed Rules Evid Serv 339; *United States v Sindona* (CA2 NY) 636 F2d 792, CCH Fed Secur L Rep ¶ 97732, 7 Fed Rules Evid Serv 1109, cert den 451 US 912, 68 L Ed 2d 302, 101 S Ct 1984, later proceeding (CA2 NY) 728 F2d 77 and later proceeding (ED NY) 584 F Supp 1437; *United States v Bowman*, 197 US App DC 246, 609 F2d 12, 4 Fed Rules Evid Serv 1530; *Benton v State*, 31 Ala App 338, 18 So 2d 423, cert den 245 Ala 625, 18 So 2d 428; *Gee Long v State*, 33 Ariz 420, 265 P 622; *Rodgers v State*, 209 Ark 37, 189 SW2d 608; *People v Denson* (2nd Dist) 178 Cal App 3d 788, 224 Cal Rptr 63; *Duran v People*, 156 Colo 385, 399 P2d 412; *Gardner v State* (Ct Gen Sess) 43 Del 358, 47 A2d 310; *Putnal v State*, 56 Fla 86, 47 So 864; *Cady v State*, 198 Ga 99, 31 SE2d 38, cert den and app dismd 323 US 676, 89 L Ed 549, 65 S Ct 190; *State v Brassfield*, 40 Idaho 203, 232 P 1; *Sekularac v State*, 205 Ind 98, 185 NE 898; *State v Drosos*, 253 Iowa 1152, 114 NW2d 526; *State v Lesco*, 194 Kan 555, 400 P2d 695, cert den 382 US 1015, 15 L Ed 2d 529, 86 S Ct 627; *State v Scarbrough*, 167 La 484, 119 So 523; *State v Budge*, 127 Me 234, 142 A 857; *Britton v State*, 2 Md App 285, 234 A2d 274; *People v Sinclair*, 327 Mich 686, 42 NW2d 786; *State v Logan*, 344 Mo 351, 126 SW2d 256, 122 ALR 417; *Jackson v State*, 133 Neb 786, 277 NW 92; *State v Loveless*, 62 Nev 312, 150 P2d 1015; *State v Jackson*, 30 NM 309, 233 P 49; *People v Moshell*, 287 NY 9, 38 NE2d 108; *State v Husemoen*, 55 ND 842, 215 NW 536; *Columbus v Edmister* (Franklin Co) 106 Ohio App 443, 7 Ohio Ops 2d 186, 79 Ohio L Abs 204, 155 NE2d 72, motion overr; *Harris v State* (Okla Crim) 400 P2d 64; *State v Allen*, 120 Or 652, 253 P 371; *Corl v Kacmar*, 391 Pa Super 376, 571 A2d 417; *State v Carr*, 67 SD 481, 294 NW 174; *Norton v State*, 148 Tex Crim 294, 186 SW2d 347; *State v Gunn*, 102 Utah 422, 132 P2d 109; *State v Anderson*, 219 Wis 623, 263 NW 587.

Annotation: Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

Footnote 88. *People v Robinson* (6th Dist) 226 Cal App 3d 1581, 277 Cal Rptr 504, 91 CDOS 793, 91 Daily Journal DAR 1151, review den (Cal) 1991 Cal LEXIS 1685; *Louisville Taxicab & Transfer Co. v Johnson*, 311 Ky 597, 224 SW2d 639, 27 ALR2d 158; *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726; *People v Conner*, 182 Mich App 674, 452 NW2d 877, app den 436 Mich 888; *People v Carracedo*, 147 Misc 2d 1093, 559 NYS2d 784; *State v Smith*, 49 Ohio St 3d 137, 551 NE2d 190; *Reyes v State* (Tex App El Paso) 845 SW2d 328.

Footnote 89. FRE, Rule 804(a)(5); Uniform Rules of Evidence Rule 804(a)(5).

Footnote 90. House Judiciary Committee Report No. 93-650 (1973) p 15.

Footnote 91. *Thompson v Merrell Dow Pharmaceuticals, Inc.*, 229 NJ Super 230, 551 A2d 177 (expert witness not unavailable where proponent made no attempt to videotape expert's deposition prior to trial); *Burton v Oldfield*, 195 Va 544, 79 SE2d 660.

For discussion of deposition procedures, generally, see 23 Am Jur 2d, Depositions and Discovery.

Examination of witnesses is discussed in 81 Am Jur 2d, Witnesses §§ 713 et seq.

§ 915 --Criminal proceedings; requirement of good-faith effort to secure attendance of witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In criminal cases, a witness is not unavailable, for purposes of the exception to the confrontation requirement for the use of prior reliable testimony, unless the prosecutorial authorities have made a good-faith effort to obtain the witness' presence at trial. 92 Accordingly, a witness is not considered unavailable unless the prosecution has made reasonable efforts in good faith to secure the witness' presence. 93 The test has been described as pretrial, good-faith efforts to locate and present that witness. 94

The prosecution must engage in a diligent search. 95 In a case where the location of a witness is known and is amenable to process, due diligence and good faith requires that the prosecutor use the power of process available under law to bring the witness before court. 96 A foreign citizen outside of the country can be considered unavailable per se without violating the Confrontation Clause where the witness is a foreign citizen not subject to the court's compulsory process. 97 In the case where the location of the witness is not known, good faith requires the prosecutor to take all reasonable initiatives to produce the witness. 98 Unavailability is established by the prosecution where it shows that good-faith, reasonable efforts have been made to produce the witness for trial, but without success. 99

The prosecution's obligation to make a diligent good-faith effort is nondelegable. 1 But if the prosecution relies on out-of-state police to follow particular leads, and the out-of-state police make a diligent good-faith effort to find and produce the witnesses, then their efforts may discharge the prosecution's obligation. 2

§ 915 --Criminal proceedings; requirement of good-faith effort to secure attendance of witness [SUPPLEMENT]

Case authorities:

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. *State v. Bacon* (1994) 337 NC 66, 446 SE2d 542.

Footnotes

Footnote 92. *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1; *Barber v Page*, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318.

For discussion of the accused's right to confront witness, see 21A Am Jur 2d, Criminal Law §§ 728, 965.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Footnote 93. *People v Robinson* (6th Dist) 226 Cal App 3d 1581, 277 Cal Rptr 504, 91 CDOS 793, 91 Daily Journal DAR 1151, review den (Cal) 1991 Cal LEXIS 1685; *People v Wright* (5th Dist) 222 Cal App 3d 1002, 272 Cal Rptr 219, review den (Cal) 1990 Cal LEXIS 5223; *People v Noone*, 132 Cal App 89, 22 P2d 284; *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726; *People v Conner*, 182 Mich App 674, 452 NW2d 877, app den 436 Mich 888; *People v Hayes* (4th Dept) 110 App Div 2d 1035, 489 NYS2d 19; *State v Smith*, 49 Ohio St 3d 137, 551 NE2d 190; *Reyes v State* (Tex App El Paso) 845 SW2d 328.

Footnote 94. *Lewis v State*, 288 Ark 595, 709 SW2d 56, post-conviction proceeding 299 Ark 310, 771 SW2d 773; *People v Dye*, 431 Mich 58, 427 NW2d 501, cert den 488 US 985, 102 L Ed 2d 571, 109 S Ct 541; *Reyes v State* (Tex App El Paso) 845 SW2d 328.

Where the witness had moved to California and declined to return for the second trial, and the prosecution had instituted proceedings to compel her attendance but a California court had quashed the request upon a finding that further testimony in the matter would be detrimental to the witness' health, the state had met its dual obligation to show that the witness was unavailable and that a good-faith effort had been made to obtain the witness' presence. *Commonwealth v Griffin*, 243 Pa Super 115, 364 A2d 477.

Footnote 95. *Commonwealth v Siegfriedt*, 402 Mass 424, 522 NE2d 970, habeas corpus den (CA1 Mass) 982 F2d 14, 37 Fed Rules Evid Serv 726.

Footnote 96. *Barber v Page*, 390 US 719, 20 L Ed 2d 255, 88 S Ct 1318; *State v Lindsay* (Mo App) 709 SW2d 499, post-conviction proceeding (Mo App) 790 SW2d 521.

Footnote 97. *People v Denson* (2nd Dist) 178 Cal App 3d 788, 224 Cal Rptr 63.

Footnote 98. *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1; *California v Green*, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930, on remand 3 Cal 3d 981, 92 Cal Rptr 494, 479 P2d 998, cert dismd 404 US 801, 30 L Ed 2d 34, 92 S Ct 20 and (not followed on other grounds by *State v Whelan*, 200 Conn 743, 513 A2d 86); *State v Lindsay* (Mo App) 709 SW2d 499, post-conviction proceeding (Mo App) 790 SW2d 521.

Footnote 99. *Nolen v State* (Ala App) 469 So 2d 1326; *People v Arguello* (Colo App) 737 P2d 436; *State v Monta* (La App 3d Cir) 470 So 2d 383, cert den (La) 476 So 2d 348.

Footnote 1. *People v Dye*, 431 Mich 58, 427 NW2d 501, cert den 488 US 985, 102 L Ed 2d 571, 109 S Ct 541.

Footnote 2. *People v Dye*, 431 Mich 58, 427 NW2d 501, cert den 488 US 985, 102 L Ed 2d 571, 109 S Ct 541.

§ 916 --Extent of inaccessibility; efforts to secure attendance, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The question whether a witness is inaccessible to an extent sufficient to justify reception of his testimony rendered at a former trial is a preliminary question for determination by the trial court. 3 Where an expert witness is under the control of the offering litigant, due diligence must be used to secure the attendance of the witness at trial. 4

If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 5 The reasonableness of the effort necessarily depends on the circumstances shown in the particular case. 6 The determination of whether prosecutorial efforts to secure the presence of a witness were sufficient is within the sound discretion of the trial judge. 7 The determination of due diligence by the trial court will not be overturned on appeal, absent an abuse of discretion. 8

A witness is not considered unavailable simply because he or she cannot be reached by subpoena. 9 The party offering the out-of-court statement of a witness beyond the reach of a subpoena should represent to the court that it made an effort to secure the voluntary attendance of the witness at trial. 10 The mere fact, however, that a witness was not placed under subpoena before he left the jurisdiction has been held not to raise a presumption of bad faith or amount to such lack of diligence as, of itself, to forbid the use of his former testimony. 11 Prior testimony may be admitted where the witness is out of the jurisdiction, effectively precluding service of a subpoena upon the witness. 12 Thus, a patently futile attempt to serve a subpoena on a potential witness in a case where the witness' physical location and address are completely unknown is not required. 13

§ 916 --Extent of inaccessibility; efforts to secure attendance, generally
[SUPPLEMENT]**Case authorities:**

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. *State v. Bacon* (1994) 337 NC 66, 446 SE2d 542.

Footnotes

Footnote 3. Long v California-Western States Life Ins. Co., 43 Cal 2d 871, 279 P2d 43; Atlanta & C. A. L. R. Co. v Gravitt, 93 Ga 369, 20 SE 550.

Footnote 4. Thompson v Merrell Dow Pharmaceuticals, Inc., 229 NJ Super 230, 551 A2d 177.

Footnote 5. Reyes v State (Tex App El Paso) 845 SW2d 328.

Footnote 6. People v McElroy (4th Dist) 208 Cal App 3d 1415, 256 Cal Rptr 853; People v Dye, 431 Mich 58, 427 NW2d 501, cert den 488 US 985, 102 L Ed 2d 571, 109 S Ct 541. State v Lindsay (Mo App) 709 SW2d 499, post-conviction proceeding (Mo App) 790 SW2d 521; People v Conner, 182 Mich App 674, 452 NW2d 877, app den 436 Mich 888.

Footnote 7. Smith v State, 247 Ga 453, 276 SE2d 633; Reyes v State (Tex App El Paso) 845 SW2d 328.

Footnote 8. People v Robinson (6th Dist) 226 Cal App 3d 1581, 277 Cal Rptr 504, 91 CDOS 793, 91 Daily Journal DAR 1151, review den (Cal) 1991 Cal LEXIS 1685; People v Conner, 182 Mich App 674, 452 NW2d 877, app den 436 Mich 888.

According to another view, the appellate court exercises independent judgment when reviewing determinations as to the unavailability of a witness. People v Watson (2nd Dist) 213 Cal App 3d 446, 261 Cal Rptr 635, review den (Cal) 1989 Cal LEXIS 4831.

Footnote 9. Young v Key Pharmaceuticals, Inc., 63 Wash App 427, 819 P2d 814, review den 118 Wash 2d 1023, 827 P2d 1392.

Footnote 10. Rice v Janovich, 109 Wash 2d 48, 742 P2d 1230.

Footnote 11. Jackson v State, 133 Neb 786, 277 NW 92.

Footnote 12. Odatto v Vargo (WD Pa) 677 F Supp 384, 24 Fed Rules Evid Serv 753; Commonwealth, Pennsylvania Liquor Control Bd. v Abraham, 116 Pa Cmwlt 270, 541 A2d 1161.

Footnote 13. People v Forgason (1st Dist) 99 Cal App 3d 356, 160 Cal Rptr 263; Brown v Harry Heathman, Inc. (Utah App) 744 P2d 1016, 69 Utah Adv Rep 36.

§ 917 --Sufficiency of efforts to secure witness under Uniform Act to Secure Attendance

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Uniform Act To Secure Attendance of Witnesses From Without the State in Criminal

Proceedings provides a mechanism for the production of witnesses, but it is not a substitute for a diligent effort to find witnesses because the certificates sent under the Uniform Act do not obligate local police to undertake a diligent search. 14 However, it has been held that the failure to implement the Uniform Act To Secure Attendance of Witnesses From Without the State in Criminal Proceedings constitutes a failure to exercise reasonable diligence. 15 But failure to implement the Uniform Act has been excused in certain circumstances, 16 and preliminary hearing testimony has been held properly admitted in such cases. 17

Footnotes

Footnote 14. *People v Dye*, 431 Mich 58, 427 NW2d 501, cert den 488 US 985, 102 L Ed 2d 571, 109 S Ct 541.

Footnote 15. *People v Blackwood* (1st Dist) 138 Cal App 3d 939, 188 Cal Rptr 359; *State v Chapman* (Utah) 655 P2d 1119.

Footnote 16. Failure to implement the Uniform Act may be excused where insufficient time before trial prevents the use of the Uniform Act. *People v Arguello* (Colo App) 737 P2d 436.

Footnote 17. *Underwood v State* (Okla Crim) 659 P2d 948, later proceeding (Okla Crim) 786 P2d 707; *State v Chapman* (Utah) 655 P2d 1119.

The Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Proceedings was intended to operate as a matter of comity between states, to enable them to obtain material witnesses for criminal prosecutions, and was not intended to limit the use of prior testimony of an absent witness. *State v Lesco*, 194 Kan 555, 400 P2d 695, cert den 382 US 1015, 15 L Ed 2d 529, 86 S Ct 627.

For general discussion of the Uniform Act To Secure the Attendance of Witnesses From Without the State in Criminal Proceedings, see 81 Am Jur 2d, Witnesses §§ 34-49.

§ 918 --Proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If the evidence rendered at a former trial is offered on the theory that the witness is absent from the state or out of the jurisdiction of the court, the proponent must offer competent evidence sufficiently showing the absence of the witness and due diligence in an effort to secure his or her attendance. 18 The burden to prove good faith falls on the prosecution, and the lengths to which the prosecution must go to produce a witness is a question of reasonableness. 19 Proof of mere temporary absence from the state is not sufficient in the absence of a showing of the exercise of a reasonable effort and diligence to produce the witness. 20 Where a witness' location is known, a court will not find unavailability absent a showing that the proponent of the testimony attempted in good

faith to obtain the witness' attendance at trial. 21 The best sources of information reasonably accessible should be used to learn whether the witness can be found and made to testify. 22 Conclusory allegations that a witness is outside the jurisdiction of the court are inadequate. 23

Footnotes

Footnote 18. *People v Latham*, 43 Cal App 2d 35, 110 P2d 101; *State v Kain* (Mo) 330 SW2d 842; *Jackson v State*, 133 Neb 786, 277 NW 92; *Sweet v State*, 70 Okla Crim 443, 107 P2d 817.

The due diligence requirement was met by police in attempting to locate the victim of multiple stab wounds so as to warrant use of the victim's preliminary hearing testimony at the trial where the fruits of the police search led to the inescapable conclusion that the victim was hiding to avoid testifying. *People v Arroyo*, 54 NY2d 567, 446 NYS2d 910, 431 NE2d 271, cert den 456 US 979, 72 L Ed 2d 855, 102 S Ct 2248.

Footnote 19. *State v Lindsay* (Mo App) 709 SW2d 499, post-conviction proceeding (Mo App) 790 SW2d 521.

Footnote 20. *People v Steeps* (2d Dept) 52 App Div 2d 887, 383 NYS2d 74; *Saied v State*, 65 Okla Crim 124, 83 P2d 605; *State v Anderson*, 219 Wis 623, 263 NW 587.

Footnote 21. *Muilenberg v Upjohn Co.*, 169 Mich App 636, 426 NW2d 767, app den 432 Mich 890.

Footnote 22. *Warwick v Elsey*, 47 Mich 12, 10 NW 57.

Footnote 23. *Rice v Janovich*, 109 Wash 2d 48, 742 P2d 1230.

§ 919 Imprisonment

<p>View Entire Section Go to Parallel Reference Table</p>

The mere fact that the witness is confined to prison does not justify the reproduction of his testimony under the hearsay exception permitting the introduction of evidence given at a former trial or proceeding, if there is ample provision or opportunity for obtaining his testimony. 24 Thus, one serving a term of years in the state penitentiary is not civilly dead, and such confinement is not a sufficient basis for the introduction of his testimony given at a former trial. 25 Moreover, in the case of a declarant who is incarcerated in a federal penitentiary, once the court agrees to issue a writ of habeas corpus to secure the prisoner's presence, the unavailability requirement is no longer met. 26 On the other hand, evidence from a prior proceeding is admissible upon a good-faith showing that the witness has escaped from jail. 27

Footnotes

Footnote 24. *Hayden v Commonwealth*, 140 Ky 634, 131 SW 521.

The government's assertion that coconspirator's unavailability as a witness was established by the fact that he was imprisoned in a foreign country was insufficient to establish the coconspirator's unavailability where the government did not represent that it had made any request of the foreign government to make the witness available through extradition or any other means. *United States v Curbello* (CA11) 940 F2d 1503, 33 Fed Rules Evid Serv 1400.

Footnote 25. *State v Conway*, 56 Kan 682, 44 P 627.

Footnote 26. *United States v Sebetich* (CA3 Pa) 776 F2d 412, 19 Fed Rules Evid Serv 384, reh den, en banc (CA3) 828 F2d 1020 and cert den 484 US 1017, 98 L Ed 2d 673, 108 S Ct 725 and (criticized on other grounds by *United States v Hurtado* (CA5 Tex) 899 F2d 371).

Footnote 27. *State v Owens* (La) 338 So 2d 645.

Annotation: Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

§ 920 Refusal to testify

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal and Uniform Rules of Evidence, a declarant is unavailable as a witness where the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so. 28 A state court interpreting a similar state statute has held that this rule does not require a court to ascertain the specific reasons behind a refusal to testify before a witness may be declared unavailable, nor does it provide that a witness be declared unavailable only upon a showing of good and valuable reasons for failure to testify. 29 Moreover, the rule does not place an affirmative duty on the state to elicit the reasons behind a witness' refusal to testify. 30

Under a state statutory provision providing that the testimony of a witness at trial is admissible in a subsequent, related proceeding if the witness is unable to attend because of "incapacity," a witness' refusal to testify constituted incapacity where the County Court made sufficient good-faith efforts, including a threat to cite the witness for contempt, to induce the witness to testify in person at trial. 31 On the other hand, a state statutory provision authorizing the use of former testimony where a witness is deceased, insane, out of the jurisdiction, or cannot be found with due diligence, has been held not to authorize the admission of former testimony of a witness who is present at a later trial but refuses to testify for fear of self-incrimination. 32

§ 920 ----Refusal to testify [SUPPLEMENT]**Case authorities:**

In drug prosecution, witness' testimony from preliminary hearing would not be admitted, even though witness steadfastly refused to testify at defendant's trial, notwithstanding commonwealth's offer of use immunity or court's order compelling testimony, finding witness in contempt of order and sentencing him to 1 year in prison, and determination that commonwealth exercised all reasonable efforts to compel witness' live testimony at trial; defendant did not have full and fair opportunity to cross-examine witness at preliminary hearing, where prosecution had not disclosed witness' prior criminal history or pending criminal charges, defendant did not have opportunity to impeach witness, who was only eyewitness to alleged drug transaction, and defendant did not have opportunity to explore witness' reasons for ultimately testifying at preliminary hearing. Commonwealth v Smith (1994, Pa Super) 647 A2d 907.

In prosecution for aggravated sexual assault and possession of child pornography, admission at trial of transcript of testimony of seven-year-old from bond revocation hearing was not abuse of discretion after child refused to answer questions at trial, even though defendant alleged that motive to develop child's testimony at hearing was not similar to what it would be at trial, where evidence and argument at bond hearing demonstrated that central disputed factual issue, whether defendant in fact sexually assaulted two complainants, was identical in both proceedings; in addition, even if prior testimony had been inadmissible, objection was waived by failure to object to admission. Ward v State (1995, Tex App Tyler) 910 SW2d 1, petition for discretionary review ref (Oct 11, 1995).

Footnotes

Footnote 28. FRE, Rule 804(a)(2); Uniform Rules of Evidence Rule 804(a)(2).

Footnote 29. Williamson v State (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325, post-conviction proceeding (Okla Crim) 852 P2d 167, petition for certiorari filed (Sep 1, 1993).

Footnote 30. Williamson v State (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325, post-conviction proceeding (Okla Crim) 852 P2d 167, petition for certiorari filed (Sep 1, 1993).

Footnote 31. People v Muccia (3d Dept) 139 App Div 2d 838, 527 NYS2d 620, app den 72 NY2d 960, 534 NYS2d 673, 531 NE2d 305.

Footnote 32. People v Lawrence (1st Dist) 168 Cal App 2d 510, 336 P2d 189.

Annotation: Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

§ 921 --Claim of privilege

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The use of testimony given by a witness at a former trial or preliminary examination of an accused on trial is generally held permissible, even though the witness is present in court at the later trial, if the witness refuses to testify on the ground of a recognized privilege. 33

Under the Federal and Uniform Rules of Evidence, a declarant is unavailable as a witness where the declarant is exempted by ruling of the court, on the ground of privilege from testifying concerning the subject matter of the declarant's statement. 34 The use of testimony given by a witness at a former trial or preliminary examination of an accused on trial is generally held permissible, even though the witness is present in court at the later trial if, having been granted immunity, the witness refuses to testify and is cited for contempt. 35

Evidence by the spouse of the defendant, 36 or by a codefendant or accomplice, 37 given at a preliminary hearing or former trial, may be presented from a secondary source where such witness, at the later trial of the defendant, claims the privilege of refusing to testify. A grant of immunity to a witness has been held to bar the use of his former testimony for other than impeachment purposes, however, since he can then be compelled to testify, 38 but there is also authority to the contrary in this respect. 39

A witness is unavailable if he claims his privilege against self incrimination. 40

If a witness retains his Fifth Amendment privilege after testifying before a grand jury, the defendant is entitled to introduce the witness' grand jury testimony before the trial jury. 41

◆ Practice guide: A requirement that the witness assert his privilege against self-incrimination in the court's presence does not necessarily mean that the witness must claim the privilege in the presence of the jury, since claims of privilege are to be determined outside the presence of the jury, and if the court determines that the prior statement is admissible, then the jury should simply be told that the witness is not available before the prior testimony is read into the record. 42

§ 921 --Claim of privilege [SUPPLEMENT]

Case authorities:

Prior statements of witness who, asserting Fifth Amendment privilege, was sworn in but refused to testify at defendant's trial were not admissible, as witness was not unavailable, and statements were not against witness' penal interest, in that they did not directly subject him to criminal responsibility. *State v Johnson-Howell* (1994) 255 Kan 928, 881 P2d 1288.

The trial court did err in a first- degree murder resentencing hearing by allowing a

codefendant's testimony from a prior trial to be read into evidence where the codefendant had asserted his privilege against self-incrimination. Whether this evidence was admissible under GS § 8C-1, Rule 804 is not controlling; defendant was not awarded a new trial but a new capital sentencing hearing. GS § 15A- 2000(a)(3) expressly provides that evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding. *State v McLaughlin* (1995) 341 NC 426, 462 SE2d 1.

Footnotes

Footnote 33. *United States v Zurosky* (CA1 Mass) 614 F2d 779, 5 Fed Rules Evid Serv 725, cert den 446 US 967, 64 L Ed 2d 826, 100 S Ct 2945; *United States v Lang* (CA2 NY) 589 F2d 92; *United States v Brainard* (CA4 NC) 690 F2d 1117, 11 Fed Rules Evid Serv 1434, appeal after remand (CA4 NC) 745 F2d 320, 16 Fed Rules Evid Serv 779, cert den 471 US 1099, 85 L Ed 2d 839, 105 S Ct 2320; *Park v Huff* (CA5 Ga) 506 F2d 849, cert den 423 US 824, 46 L Ed 2d 40, 96 S Ct 38; *United States v Mobley* (CA5 Ga) 421 F2d 345; *Phillips v Wyrick* (CA8 Mo) 558 F2d 489, cert den 434 US 1088, 55 L Ed 2d 793, 98 S Ct 1283; *Brooks v Wyrick* (ED Mo) 486 F Supp 939, affd without op (CA8 Mo) 620 F2d 308, cert den 446 US 969, 64 L Ed 2d 829, 100 S Ct 2949; *United States v Milano* (CA10 Colo) 443 F2d 1022, cert den 404 US 943, 30 L Ed 2d 258, 92 S Ct 294; *United States v Allen* (CA10 Colo) 409 F2d 611; *Bridges v State* (Ala App) 516 So 2d 895; *Williams v State* (Ala App) 375 So 2d 1257, cert den (Ala) 375 So 2d 1271; *People v Leach*, 15 Cal 3d 419, 124 Cal Rptr 752, 541 P2d 296, cert den 424 US 926, 47 L Ed 2d 335, 96 S Ct 1137; *Alston v United States* (Dist Col App) 383 A2d 307, appeal after remand (Dist Col App) 412 A2d 351; *Bradshaw v State*, 162 Ga App 750, 293 SE2d 360; *State v Haislip*, 237 Kan 461, 701 P2d 909, cert den 474 US 1022, 88 L Ed 2d 558, 106 S Ct 575, later proceeding (Kan App) 769 P2d 682, habeas corpus den (DC Kan) 788 F Supp 482, affd (CA10 Kan) 992 F2d 1085, cert den (US) 126 L Ed 2d 214, 114 S Ct 263; *State v Lashley*, 233 Kan 620, 664 P2d 1358, habeas corpus proceeding (DC Kan) 1987 US Dist LEXIS 12845; *Richmond v Commonwealth* (Ky) 637 SW2d 642; *State v Oliver* (La) 430 So 2d 650, cert den 464 US 997, 78 L Ed 2d 688, 104 S Ct 495; *Commonwealth v Canon*, 373 Mass 494, 368 NE2d 1181, cert den 435 US 933, 55 L Ed 2d 531, 98 S Ct 1510; *People v Oaks*, 94 Mich App 745, 290 NW2d 70; *State v Olsen* (Minn) 258 NW2d 898; *State v Holt* (Mo) 592 SW2d 759, later proceeding (Mo App) 688 SW2d 34, appeal after remand (Mo App) 735 SW2d 191 and (disapproved on other grounds by *State v Broadux* (Mo) 618 SW2d 649) as stated in *State v Starks* (Mo App) 820 SW2d 527; *State v Franks* (Mo App) 685 SW2d 845; *State v Hicks* (Mo App) 591 SW2d 184, habeas corpus proceeding (WD Mo) 555 F Supp 763, later proceeding (Mo App) 719 SW2d 86; *State v Hall*, 234 Mont 57, 761 P2d 1283; *People v Muccia* (3d Dept) 139 App Div 2d 838, 527 NYS2d 620, app den 72 NY2d 960, 534 NYS2d 673, 531 NE2d 305; *People v Riccardi*, 73 Misc 2d 19, 340 NYS2d 996, affd (2d Dept) 40 App Div 2d 1083, 338 NYS2d 598, cert den 414 US 827, 38 L Ed 2d 61, 94 S Ct 47; *Asheville Mall, Inc. v F.W. Woolworth Co.*, 83 NC App 532, 350 SE2d 875, review den 319 NC 402, 354 SE2d 709; *Exleton v State*, 30 Okla Crim 224, 235 P 627; *State v Douglas*, 310 Or 438, 800 P2d 288; *State v Brooks*, 64 Or App 404, 668 P2d 466, petition den 296 Or 56, 672 P2d 1192; *Commonwealth v Bellacchio*, 296 Pa Super 468, 442 A2d 1147; *State v Dikstaal* (SD) 320 NW2d 164; *State v Solomon*, 5 Wash App 412, 487 P2d 643, review den 80 Wash 2d 1001; *State v Whiting* (App) 136 Wis 2d 400, 402 NW2d 723; *Simms v State* (Wyo) 492 P2d 516, cert den 409 US 886, 34 L Ed 2d 142, 93 S Ct 104.

Privileged relations and communications are generally discussed in 81 Am Jur 2d, Witnesses §§ 285-556.

Annotation: Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

Footnote 34. FRE, Rule 804(a)(1); Uniform Rules of Evidence Rule 804(a)(1).

Footnote 35. *United States v Brasco* (SD NY) 385 F Supp 964; *Lowery v Maryland* (DC Md) 401 F Supp 604, 1 Fed Rules Evid Serv 128, affd without op (CA4 Md) 532 F2d 750, cert den 429 US 919, 50 L Ed 2d 285, 97 S Ct 312; *United States v Licavoli* (CA6 Ohio) 725 F2d 1040, 14 Fed Rules Evid Serv 1782, cert den 467 US 1252, 82 L Ed 2d 840, 104 S Ct 3535, habeas corpus proceeding (CA6 Ky) 854 F2d 830; *People v Rojas*, 15 Cal 3d 540, 125 Cal Rptr 357, 542 P2d 229, 92 ALR3d 1127; *State v Pearson* (La) 336 So 2d 833; *State v Ghoram* (La) 328 So 2d 91 (criticized but reluctantly followed by *State v Pearson* (La) 336 So 2d 833); *State v Olson* (Minn) 291 NW2d 203.

Footnote 36. *McCoy v State*, 221 Ala 466, 129 So 21; *State v Woods*, 130 Kan 492, 287 P 248; *State v Stewart*, 85 Kan 404, 116 P 489; *Commonwealth v Di Pietro*, 373 Mass 369, 367 NE2d 811.

For discussion of the marital privilege, see 81 Am Jur 2d, Witnesses §§ 296-336.

Annotation: 45 ALR2d 1354 § 3[a].

Footnote 37. *Johnson v People*, 152 Colo 586, 384 P2d 454, cert den 376 US 922, 11 L Ed 2d 617, 84 S Ct 682; *State v Hill*, 143 Kan 791, 57 P2d 49; *Exleton v State*, 30 Okla Crim 224, 235 P 627.

Annotation: 45 ALR2d 1354 § 3[b].

Footnote 38. *Pleau v State*, 255 Wis 362, 38 NW2d 496.

Footnote 39. *People v Pickett*, 339 Mich 294, 63 NW2d 681, 45 ALR2d 1341, cert den 349 US 937, 99 L Ed 1266, 75 S Ct 781.

Privileged relations and communications are discussed in 81 Am Jur 2d, Witnesses §§ 285-556.

Footnote 40. *United States v Rodriguez* (CA2 Conn) 706 F2d 31, 13 Fed Rules Evid Serv 594; *United States v MacCloskey* (CA4 NC) 682 F2d 468, 10 Fed Rules Evid Serv 1206; *In re Crabtree* (BC ED Tenn) 90 BR 871, 26 Fed Rules Evid Serv 1489; *United States v Harrell* (CA11 Fla) 788 F2d 1524, 20 Fed Rules Evid Serv 1276, reh den, en banc (CA11 Fla) 794 F2d 687; *Bridges v State* (Ala App) 516 So 2d 895; *State v Haislip*, 237 Kan 461, 701 P2d 909, cert den 474 US 1022, 88 L Ed 2d 558, 106 S Ct 575, later proceeding (Kan App) 769 P2d 682, habeas corpus den (DC Kan) 788 F Supp 482, affd (CA10 Kan) 992 F2d 1085, cert den (US) 126 L Ed 2d 214, 114 S Ct 263; *State v Holt*

(Mo) 592 SW2d 759, later proceeding (Mo App) 688 SW2d 34, appeal after remand (Mo App) 735 SW2d 191 and (disapproved on other grounds by State v Broadux (Mo) 618 SW2d 649) as stated in State v Starks (Mo App) 820 SW2d 527; State v Phillips (Mo) 511 SW2d 841; State v Franks (Mo App) 685 SW2d 845; Reyes v State (Tex App El Paso) 845 SW2d 328.

Footnote 41. United States v Miller, 284 US App DC 245, 904 F2d 65, 30 Fed Rules Evid Serv 284.

Footnote 42. State v Lashley, 233 Kan 620, 664 P2d 1358, habeas corpus proceeding (DC Kan) 1987 US Dist LEXIS 12845.

§ 922 Subsequent disqualification as witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is a difference of opinion as to whether the testimony of a witness given at a former trial may be introduced in evidence when the witness subsequently becomes incompetent as a witness by reason of the death of a person interested in the transaction concerning which he testified. 43 According to the rule in some jurisdictions, if, by reason of the death of a party, the witness becomes incompetent to testify at the subsequent proceeding to which a privy of such deceased party is a party, the testimony given at the first trial may be proved at the second trial by the evidence of other witnesses. 44 It has been said that when such evidence is offered, it is not testimony that could have been fabricated after the death of the adverse party whose interests might be injuriously affected thereby, since, when taken, the parties stood on an equal footing and each had the right to perpetuate his own testimony. 45 Some courts, however, hold that the former testimony cannot be introduced in such a case. 46

Except in certain cases where the adverse party in interest is an executor or administrator, the common-law disqualification of a witness by reason of his interest in the outcome of the action has been removed by statute in this country. 47

Footnotes

Footnote 43. As to the disqualification of a witness to testify as to transactions with a deceased person, see 81 Am Jur 2d, Witnesses §§ 563 et seq.

Footnote 44. Habig v Bastian, 117 Fla 864, 158 So 508; Georgia Chemical Works v Malcolm, 186 Ga 275, 197 SE 763; New v Smith, 94 Kan 6, 145 P 880; Lee's Adm'r v Hill, 87 Va 497, 12 SE 1052.

Footnote 45. Habig v Bastian, 117 Fla 864, 158 So 508.

Footnote 46. Trunkey v Hedstrom, 131 Ill 204, 23 NE 587; Greenlee v Mosnat, 136 Iowa 639, 111 NW 996.

§ 923 Unavailability by reason of fault or procurement of party

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The hearsay exception permitting the introduction of evidence given at a former trial or proceeding 48 is not applicable if the declarant has been made unavailable as a witness due to the procurement or wrongdoing of the proponent of a statement made for the purpose of preventing the witness from attending or testifying. 49 Thus, in a criminal prosecution, if a witness is absent due to procurement or connivance of the accused, the testimony which the witness gave at a former trial or at the preliminary hearing of the accused is admissible. 50 A nexus between the proponent's intentional act and the witness' refusal to testify must be established. 51 Despite the general rules, however, where the absence of a witness in a criminal case is by procurement of the prosecution, the trial court will protect the defendant and refuse to permit the use of the former testimony. 52 The trial court will also refuse to permit the use of former testimony where the negligence of the prosecution leads to the absence of a witness. 53

Footnotes

Footnote 48. FRE, Rule 804(b)(1); Uniform Rules of Evidence Rule 804(b)(1).

Footnote 49. FRE, Rule 804(a); Uniform Rules of Evidence Rule 804(a).

For discussion of hearsay exceptions restricted to situations where the declarant is unavailable as a witness, generally, see §§ 690 et seq.

Annotation: Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases, 3 ALR4th 87.

Footnote 50. *Diaz v United States*, 223 US 442, 56 L Ed 500, 32 S Ct 250 (not followed on other grounds by *Larson v Tansy* (CA10 NM) 911 F2d 392) and (not followed on other grounds by *Brown v State* (1994, Okla Crim) 871 P2d 56; *Parker v People*, 13 Colo 155, 21 P 1120; *Bergen v People*, 17 Ill 426; *Levi v State*, 182 Ind 188, 104 NE 765, reh den 182 Ind 188, 105 NE 898; *State v Grier*, 314 NC 59, 331 SE2d 669; *State v King*, 24 Utah 482, 68 P 418; *Spencer v State*, 132 Wis 509, 112 NW 462.

In a prosecution for murder of witness to robbery, the defendant could not assert constitutional right to cross-examine adverse witness as bar to introduction of prior unsworn statements of witness where failure of witness to obey court order to testify was induced by threats and intimidation of defendant's coconspirator and such acts in furtherance of conspiracy were imputed to defendant. *State v Olson* (Minn) 291 NW2d 203.

In a homicide prosecution, the Grand Jury testimony of a key prosecution witness who was murdered the day before his scheduled trial testimony would be admitted where the prosecution established by clear and convincing proof at an evidentiary hearing that defendant was involved in the murder of the witness and that the murder was committed by individuals acting on the defendant's behalf. *People v Sweeper*, 122 Misc 2d 386, 471 NYS2d 486, later proceeding (1st Dept) 127 App Div 2d 507, 511 NYS2d 860.

Footnote 51. *Williamson v State* (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325, post-conviction proceeding (Okla Crim) 852 P2d 167, petition for certiorari filed (Sep 1, 1993) (insufficient nexus between state's refusal to take steps to remove obstacles from the witness' testimony and the witness' refusal to testify out of fear of reprisal from inmates).

Footnote 52. *Motes v United States*, 178 US 458, 44 L Ed 1150, 20 S Ct 993; *Miles v State* (Ala App) 476 So 2d 1228; *State v Nelson*, 68 Kan 566, 75 P 505.

Footnote 53. *Motes v United States*, 178 US 458, 44 L Ed 1150, 20 S Ct 993.

3. Mode of Proof of Former Testimony [924-933]

a. In General [924-928]

§ 924 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

So far as the mode or method of proof is concerned, there is little essential distinction between the proof in criminal and in civil cases. Most courts regard former testimony of a witness provable by oral testimony of other witnesses who were present at the former hearing or trial, heard him testify, and remember the testimony, 54 even though minutes or notes of such testimony were taken at the former trial or hearing. 55 Some courts regard proof by notes or transcript as a permissible cumulative or alternative method of proof. 56 As in the case of any testimony, the weight to be accorded reproduced testimony is for the jury to determine. 57

§ 924 ----Generally [SUPPLEMENT]

Case authorities:

Where defendant had opportunity to cross-examine trial witness at preliminary hearing, witness' preliminary hearing statement is admissible at trial if witness is unavailable, despite good faith efforts of prosecution to produce witness. *Reed v City & County of Honolulu* (1994) 76 Hawaii 219, 873 P2d 98.

Footnotes

Footnote 54. § 925.

Footnote 55. § 927.

Grounds for admissibility of deposition of unavailable witness are discussed in 23 Am Jur 2d, Depositions and Discovery §§ 181-185.

Footnote 56. §§ 927 et seq.

Footnote 57. *Hawkins v State* (Ala App) 443 So 2d 1312.

For discussion of the weight and sufficiency of evidence given at former trial or proceedings, see 29 Am Jur 2d, Evidence §§ 1082, 1090.

§ 925 Proof by oral testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The general rule, in both criminal 58 and civil cases, 59 is that the testimony at a former trial or hearing of a witness who cannot be produced at the subsequent trial may be proved by the oral testimony of any person who was present at the former trial and heard the witness testify, such as a spectator, a judge before whom the trial was had, a committing magistrate, a juror, a stenographer, or an attorney. Before a witness may be allowed to testify concerning the testimony of a witness at a former trial, a proper foundation must first be laid by showing that the witness at the present trial not only had the opportunity to hear such former testimony, but that he professes to remember the substance of the entire testimony as to the particular matter for which the former testimony is sought to be introduced. 60 A witness by whom former testimony is thus sought to be proved must testify from memory without reliance, except by way of refreshing his recollection, upon records or writings which in themselves would have been incompetent evidence to prove such former testimony. 61

Footnotes

Footnote 58. *Meyers v United States*, 84 US App DC 101, 171 F2d 800, 11 ALR2d 1, cert den 336 US 912, 93 L Ed 1076, 69 S Ct 602; *Williams v State* (Ala App) 375 So 2d 1257, cert den (Ala) 375 So 2d 1271; *Lanahan v State*, 176 Ark 104, 2 SW2d 55; *People v Downs*, 114 Cal App 2d 758, 251 P2d 369; *Richardson v State* (Fla) 247 So 2d 296, post-conviction proceeding (Fla) 546 So 2d 1037, 14 FLW 318; *Littles v State*, 236 Ga 651, 224 SE2d 918; *Davidson v State*, 205 Ind 564, 187 NE 376; *Benge v Commonwealth*, 298 Ky 562, 183 SW2d 631; *Commonwealth v Glassman*, 253 Mass 65, 147 NE 833; *Commonwealth v Taylor*, 32 Mass App 570, 591 NE2d 1108, review den

413 Mass 1105, 600 NE2d 171; Jolly v State (Miss) 269 So 2d 650; State v Phillips (Mo) 511 SW2d 841; State v Christiansen, 187 Neb 73, 187 NW2d 303; People v Colon, 281 App Div 354, 119 NYS2d 503; State v Highsmith, 74 NC App 96, 327 SE2d 628, review den 314 NC 119, 332 SE2d 486; Armstrong v State, 68 Okla Crim 105, 95 P2d 919; State v Dickerson, 112 Or App 51, 827 P2d 1354, review den 313 Or 627, 835 P2d 916; Commonwealth v Neff, 149 Pa Super 513, 27 A2d 737; State v Hicks, 261 SC 247, 199 SE2d 304; Hammett v State, 84 Tex Crim 635, 209 SW 661, 4 ALR 347; State v Roebuck, 75 Wash 2d 67, 448 P2d 934; State v Bixby, 27 Wash 2d 144, 177 P2d 689; Spencer v State, 132 Wis 509, 112 NW 462.

For discussion of the right of the accused to confront the witnesses against him or her, see 21A Am Jur 2d, Criminal Law §§ 728, 965.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 2.

Footnote 59. Ruch v Rock Island, 97 US 693, 7 Otto 693, 24 L Ed 1101; Johnson v Umsted (CA8 Ark) 64 F2d 316; Northwestern Rug Mfg. Co. v Leftwich Hardware & Furniture Co., 176 Ark 212, 2 SW2d 1109; Littles v Balkcom, 245 Ga 285, 264 SE2d 219; Studabaker v Faylor, 170 Ind 498, 83 NE 747; Gloeser v Moore, 284 Mich 106, 278 NW 781; Davis v Kline, 96 Mo 401, 9 SW 724; Olmsted v Olmsted, 190 NY 458, 83 NE 569, affd 216 US 386, 54 L Ed 530, 30 S Ct 292; Harmon v Matthews (Sup) 27 NYS2d 656; Caldwell v Kuykendall, 94 Okla 84, 221 P 84; Wolfe v Scott, 275 Pa 343, 119 A 468; Eggett v Allen, 119 Wis 625, 96 NW 803.

Annotation: 11 ALR2d 30 § 29.

Practice References 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence.

Footnote 60. State v Christiansen, 187 Neb 73, 187 NW2d 303.

Footnote 61. Estate of Mesner, 37 Cal 2d 563, 233 P2d 551; Merrill v Leisenring, 166 Mich 219, 131 NW 538; Tibbetts v Flanders, 18 NH 284.

In the absence of a court record of the testimony of the defendant in a prosecution for false swearing at a former trial, it is competent to prove the matters to which he testified at the former trial, by the official court reporter, or any other witness who heard him testify on the former trial; the reporter is privileged to refresh her recollection by reference to any memorandum she may have made. Benge v Commonwealth, 298 Ky 562, 183 SW2d 631.

§ 926 --Sufficiency of reproducing substance of testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In both civil 62 and criminal cases, the witness testifying as to former testimony need

not reproduce the exact or precise words of the former witness; it is sufficient for the witness to state the substance of the former testimony. 63

◆ Practice guide: An opposing party may cross-examine the offered witness, in the absence of the jury, if so desired, in order to test his ability to remember accurately and relate truthfully the testimony sought to be produced by him. 64

While it is sufficient for a witness to state the substance of former testimony which he or she heard, the witness must state the whole substance of the whole of the former witness' testimony, or at the least the substance of the whole testimony on the particular point or issue involved in the previous trial, including both testimony given on the direct examination and testimony given on the cross-examination. 65 Thus, the person who seeks to relate the testimony of the witness must be capable of stating the subject matter of the prior witness' testimony with clarity and detail. 66 If one called to testify as to what a witness testified at a former trial does not recollect what the latter had said on cross-examination, such testimony is not competent and should be excluded. 67

Footnotes

Footnote 62. *Ruch v Rock Island*, 97 US 693, 7 Otto 693, 24 L Ed 1101; *Woods v Postal Telegraph-Cable Co.*, 205 Ala 236, 87 So 681, 27 ALR 834; *Kansas & Texas Coal Co. v Galloway*, 71 Ark 351, 74 SW 521; *Brown v Matheson*, 142 Ga 396, 83 SE 98; *Studabaker v Faylor*, 170 Ind 498, 83 NE 747; *Walker v Commonwealth*, 196 Ky 843, 245 SW 868; *Burson v Huntington*, 21 Mich 415; *Stein v Swensen*, 46 Minn 360, 49 NW 55; *Davis v Kline*, 96 Mo 401, 9 SW 724.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 30.

Footnote 63. *Williams v State* (Ala App) 375 So 2d 1257, cert den (Ala) 375 So 2d 1271; *State v Herlihy*, 102 Me 310, 66 A 643; *People v Sanders*, 70 NY2d 837, 523 NYS2d 444, 517 NE2d 1330; *Harris v State*, 71 Tex Crim 463, 160 SW 447; *Shifflett v Commonwealth*, 218 Va 25, 235 SE2d 316; *Foley v State*, 11 Wyo 464, 72 P 627.

While it must be shown that the witness is able to recall and relate the substance of the entire testimony upon the subject or topic involved, the admission of incompetent evidence is not prejudicial where the same fact is established by testimony of the complaining party. *State v Christiansen*, 187 Neb 73, 187 NW2d 303.

Annotation: 11 ALR2d 30 § 5.

Footnote 64. *State v Ortego*, 22 Wash 2d 552, 157 P2d 320, 159 ALR 1232.

Footnote 65. *Walker v Commonwealth*, 196 Ky 843, 245 SW 868; *State v Levy*, 187 NC 581, 122 SE 386; *Scribner v Palmer*, 90 Wash 595, 156 P 531.

Footnote 66. *Shifflett v Commonwealth*, 218 Va 25, 235 SE2d 316.

Footnote 67. *State v O'Brien*, 81 Iowa 88, 46 NW 752.

§ 927 --Effect of existence of written record

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The view followed by most courts, both in civil 68 and criminal 69 cases, is that parol proof is admissible to prove former testimony even though stenographic notes or other written records of such testimony exist. There is also, however, authority for the view that the written record is the best evidence to prove the former testimony, and that parol proof of it is inadmissible. 70 However, the rule that in the case of recorded testimony stenographer's notes or transcript constitute the best evidence of prior statements has no applicability where the object is not to prove the truth of the statements contained in it, but merely to show such inconsistencies as bearing upon the general credibility of a witness, or for the purpose of laying a proper foundation for impeachment by introduction of contradictory matter in due course of events. 71

Statutes requiring the testimony of witnesses to be reduced to writing do not necessarily preclude, under the best evidence rule, the introduction of parol testimony in a subsequent trial to prove such former testimony. Rather, such statutes have sometimes been construed as merely providing for a cumulative mode of proof. 72

Footnotes

Footnote 68. Estate of Mesner, 37 Cal 2d 563, 233 P2d 551; Meyer v Foster, 147 Cal 166, 81 P 402; Studabaker v Faylor, 170 Ind 498, 83 NE 747; Packham v Ludwig, 103 Md 416, 63 A 1048; Oklahoma R. Co. v Boles, 30 Okla 764, 120 P 1104.

Footnote 69. Ary v State, 104 Ark 212, 148 SW 1032; Miller v People, 216 Ill 309, 74 NE 743; Davidson v State, 205 Ind 564, 187 NE 376; Alexander v State, 51 Okla Crim 1, 299 P 237; State v Woolridge, 45 Or 389, 78 P 333; State v Bixby, 27 Wash 2d 144, 177 P2d 689.

In a prosecution for subornation of perjury before a senate subcommittee, the transcript made from shorthand notes of the witness' testimony, while admissible, is not the only admissible evidence concerning it, and testimony of the chief counsel of the senatorial committee, who examined the witness and heard all the testimony, is admissible to show what the witness swore to before the subcommittee. Meyers v United States, 84 US App DC 101, 171 F2d 800, 11 ALR2d 1, cert den 336 US 912, 93 L Ed 1076, 69 S Ct 602.

Footnote 70. Galloway v Hogg, 167 Ga 502, 146 SE 156; People v Olbrot (1st Dist) 117 Ill App 2d 366, 254 NE2d 569, cert den 400 US 959, 27 L Ed 2d 268, 91 S Ct 359; People v Hinchman, 75 Mich 587, 42 NW 1006; Carrico v West Virginia C. & P. R. Co., 39 W Va 86, 19 SE 571 (under West Virginia statute).

Absent a showing that the court reporter's transcript or notes of the prior hearing were unobtainable, the trial court properly excluded testimony by a lawyer present at the prior hearing as to impeaching statements made at the hearing by a prosecution witness.

People v Olbrot (1st Dist) 117 Ill App 2d 366, 254 NE2d 569, cert den 400 US 959, 27 L Ed 2d 268, 91 S Ct 359.

For discussion of the best evidence rule as applied to judicial records, generally, see § 1072.

For discussion of proof by transcript, notes, or other writings or recordings, see §§ 929 et seq.

Footnote 71. Urga v State (Fla App D2) 104 So 2d 43.

Footnote 72. Blanks v State, 30 Ala App 519, 8 So 2d 450.

For discussion of best and secondary evidence, generally, see §§ 1049 et seq.

§ 928 Bill of exceptions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The view has been followed, in both criminal 73 and civil 74 cases, that a bill of exceptions, prepared at a former trial for the purpose of an appeal from the judgment rendered in that trial, may be used as evidence to prove the testimony of a witness at that trial. However, there is also authority for the view that a bill of exceptions is not admissible in evidence for this purpose in criminal 75 or civil 76 cases.

Footnotes

Footnote 73. Mayhall v State, 22 Ala App 223, 114 So 361; State v Hudspeth, 159 Mo 178, 60 SW 136.

A witness' testimony in a former trial can be read from the record made up during the course of the first trial, where the record was certified correct by the trial judge and was also approved by the defense counsel at the time of the first trial and on the present appeal. McBee v State, 213 Tenn 15, 372 SW2d 173, cert den 377 US 955, 12 L Ed 2d 499, 84 S Ct 1633.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 14.

Footnote 74. Young v People, 54 Colo 293, 130 P 1011; Gaty v United R. Co. (Mo) 251 SW 61 (under statute); Howard v Beldenville Lumber Co., 134 Wis 644, 114 NW 1114.

The testimony of nonresident witnesses, in a previous trial, as preserved in the bill of exceptions, can properly be used and read in evidence without previous notice being given of an intention to do so. Scully v Rolwing (Mo App) 115 SW2d 96.

Annotation: 11 ALR2d 30 § 40.

Footnote 75. In re Petition of Rex, 166 Ill App 607; Kean v Commonwealth, 73 Ky 190.

Annotation: 11 ALR2d 30 § 14.

Footnote 76. Riley v Fletcher, 185 Ala 570, 64 So 85; Simmons v Spratt, 26 Fla 449, 8 So 123.

Annotation: 11 ALR2d 30 § 40.

b. Proof by Transcript, Notes, or Other Writing or Recording [929-933]

§ 929 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although there is some authority to the contrary, ⁷⁷ several courts follow the view that in civil cases, official or court reporters' or stenographers' notes or transcripts are competent evidence to prove the former testimony of a witness, ⁷⁸ and may, after due authentication and proper proof of their accuracy by the reporter or stenographer, ⁷⁹ be read to the jury as evidence. ⁸⁰ Under the Federal and Uniform Rules of Evidence, testimony by a witness with knowledge that a matter is what it is claimed to be fulfills the requirement of authentication or identification. ⁸¹ Further, it is provided in the Federal Rules of Civil Procedure that whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript of it duly certified by the person who reported the testimony. ⁸²

It has been held that statutes making official stenographic reports of the evidence prima facie proof of their correctness have the effect of rendering admissible in evidence such reports, in order to prove the testimony of a witness at a former trial, ⁸³ but there is also authority to the contrary. ⁸⁴

Generally, in criminal cases, the former testimony of a witness may be proved by the stenographer or official reporter, or a properly verified copy or transcript of the evidence, by having the same read to the jury by such stenographer or reporter, after the stenographer testifies as to the correctness or accuracy of the notes or the transcript. ⁸⁵ It is not an essential prerequisite that a transcript of the evidence taken at a preliminary examination be filed with the court clerk in order to render it admissible in evidence, even if that is required by statute in the case of a deposition. ⁸⁶ Although there is some authority to the contrary, ⁸⁷ in most cases, the admission in evidence of stenographic notes, or transcripts thereof, or other writings to prove the testimony of a former witness, is not violative of the constitutional provision entitling the accused to the right of confrontation of witnesses against him, where the accused has already had the opportunity at the preliminary trial to be confronted with the former witness and to

cross-examine him. 88 In a few criminal cases, however, usually because of particular circumstances, the official stenographer's or reporter's notes or transcript thereof have not been permitted to be read in evidence to prove the testimony of a witness given at a former trial. 89

§ 929 ----Generally [SUPPLEMENT]

Case authorities:

District court properly refused to admit 12 statements ATF agent had taken during his investigation that failed to mention defendant in connection with drug ring; raw interview transcripts were not factual findings and had no indicia of reliability or trustworthiness, and there was no reason to believe that absence of defendant's mention was factual finding or sufficiently trustworthy to allow it to be admitted. *United States v D'Anjou* (1994, CA4 NC) 16 F3d 604, cert den (US) 1994 US LEXIS 4999.

In manslaughter prosecution, trial court did not err in admitting tape recording of defendant's incriminating statement to police where prosecutor laid proper foundation under "pictorial communication" theory, by which qualified and competent witness testified that sound recording accurately and reliably represented what witness sensed at time in question. *Ex parte Fuller* (1993, Ala) 620 So 2d 675.

In workers' compensation proceeding relating to teacher's claim for work-related mental injuries arising out allegations of sexual misconduct, ultimately resulting in teacher's termination by board of education, workers' compensation commissioner did not abuse his discretion in disallowing transcript of testimony of former student given at teacher's termination hearing. Director of pupil services for school system, who testified to unavailability of former student, stated that his "search" for former student had consisted of two telephone calls to two unidentified secretaries at schools outside state. He testified that witness had moved to New Hampshire, but he did not do anything further to determine her availability. Witness residing in another state is not unavailable for that reason alone, and there was no showing whether jurisdiction in which witness allegedly resided had statute or common law process relating to attendance of witnesses in other states. *Crochiere v Board of Educ.* (1993) 227 Conn 333, 630 A2d 1027, related proceeding (Conn Super) 1993 Conn Super LEXIS 3188.

Trial court in drug prosecution properly admitted transcribed suppression-hearing testimony of witness who testified at hearing for defendant, where issues and parties of both suppression hearing and subsequent trial were identical. *Williams v State* (1994) 214 Ga App 280, 447 SE2d 676, 94 Fulton County D R 2700, reconsideration den (Jul 29, 1994).

The prior testimony of a prosecution witness at a preliminary hearing was properly admitted into evidence to rebut the defendant's inference of recent fabrication and to rehabilitate the witness where (1) on direct examination, the witness acknowledged that he had signed an affidavit in which he recanted his statement to police and his preliminary hearing testimony and stated that he signed the affidavit out of fear and that the contents of the affidavit were false, and (2) on cross examination, defense counsel used the affidavit to attack the witness's credibility. *Commonwealth v Murphy* (1995, Pa) 657 A2d 927.

Footnotes

Footnote 77. *Woods v Postal Telegraph-Cable Co.*, 205 Ala 236, 87 So 681, 27 ALR 834; *Smith v Hine*, 179 Pa 203, 36 A 222; *State v Freidrich*, 4 Wash 204, 29 P 1055, on reh 4 Wash 226, 30 P 328.

Footnote 78. *Indianapolis v Parker* (Ind App) 427 NE2d 456; *Jones v De Vries*, 326 Mich 126, 40 NW2d 317; *Godding v Swanson*, 173 Pa Super 575, 98 A2d 210.

Footnote 79. As to authentication, see § 933.

Footnote 80. *Blache v Blache*, 37 Cal 2d 531, 233 P2d 547; *Seymour Trust Co. v Hershowitz*, 103 Conn 532, 131 A 399; *New v Smith*, 94 Kan 6, 145 P 880; *Snyder v Cearfoss*, 190 Md 151, 57 A2d 786; *Jones v De Vries*, 326 Mich 126, 40 NW2d 317; *Omaha v Jensen*, 35 Neb 68, 52 NW 833; *Show v Mt. Vernon Farm Dairy Products, Inc.*, 128 W Va 598, 37 SE2d 459.

A transcript of a trial on plaintiffs' complaint in which the jury determined that the parties intended a contract to be enforceable as written, if offered to prove the truth of the matters contained therein, was hearsay and not admissible in a trial on defendant's counterclaim for specific performance on the contract, absent the laying of a proper foundation for its admission. *Munchak Corp. v Caldwell*, 301 NC 689, 273 SE2d 281.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 37.

Footnote 81. FRE, Rule 901(b)(1); Uniform Rules of Evidence Rule 901(b)(1).

For discussion of Rule 901 of the Federal and Uniform Rules of Evidence, generally, with regard to authentication of writings and recordings, generally, see §§ 1032 et seq.; real or demonstrative evidence, generally, see §§ 934 et seq.

Footnote 82. FR Civ P Rule 80(c).

Footnote 83. *Alabama W. R. Co. v Downey*, 177 Ala 612, 58 So 918; *Batye v State* (Mo App) 599 SW2d 231.

Annotation: 11 ALR2d 30 §§ 11, 37.

Footnote 84. *In re Estate of Benton*, 131 Cal 472, 63 P 775; *People v Stevenson* (2nd Dist) 79 Cal App 3d 976, 145 Cal Rptr 301.

Statute dealing with competency of transcripts of evidence given on former trial dealing expressly with civil cases did not authorize transcript of evidence given at preliminary hearing in criminal case, since preliminary hearing was not trial. *Davis v State* (Fla) 65 So 2d 307.

Annotation: 11 ALR2d 30 § 37.

Footnote 85. *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184,

cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196; Meyers v United States, 84 US App DC 101, 171 F2d 800, 11 ALR2d 1, cert den 336 US 912, 93 L Ed 1076, 69 S Ct 602; Walker v State (Ala App) 416 So 2d 1083; Brown v State (Ala App) 386 So 2d 501; People v Moran (1st Dist) 39 Cal App 3d 398, 114 Cal Rptr 413; State v Gaetano, 96 Conn 306, 114 A 82, 15 ALR 458; Cady v State, 198 Ga 99, 31 SE2d 38, cert den and app dismd 323 US 676, 89 L Ed 549, 65 S Ct 190; State v Elisondo (App) 112 Idaho 815, 736 P2d 867, revd on other grounds 114 Idaho 412, 757 P2d 675; Zimmerman v State, 190 Ind 537, 130 NE 235; Wininger v State (Ind App) 526 NE2d 1216; State v Nagel, 185 Iowa 1038, 170 NW 289, error dismd 254 US 620, 65 L Ed 442, 41 S Ct 319; State v Terry, 202 Kan 599, 451 P2d 211; State v Bell (La) 346 So 2d 1090; Commonwealth v Di Pietro, 373 Mass 369, 367 NE2d 811; Batye v State (Mo App) 599 SW2d 231; Davis v State, 171 Neb 333, 106 NW2d 490, cert den 366 US 973, 6 L Ed 2d 1262, 81 S Ct 1939; State v Mitchell (App) 86 NM 343, 524 P2d 206; People v Gregg (2d Dept) 90 App Div 2d 812, 455 NYS2d 816; State v Sparks, 297 NC 314, 255 SE2d 373; Lamb v State (Okla Crim) 560 P2d 583; Commonwealth v Miller, 203 Pa Super 511, 201 A2d 256; State v Crowley, 226 SC 472, 85 SE2d 714; Russell v State (Tex Crim) 604 SW2d 914; State v Kazda, 15 Utah 2d 313, 392 P2d 486; State v Waite, 141 Wash 429, 251 P 855.

Where two of the witnesses for the government on the former trial of an indictment for murder have since died, a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, is admissible in evidence against the accused on the second trial of the indictment. *Mattox v United States*, 156 US 237, 39 L Ed 409, 15 S Ct 337.

Procedure of allowing district attorney to read from transcript of prior trial testimony of witnesses who were unable to be present did not amount to abuse of discretion or substantial violation of defendants' constitutional rights where jury was cautioned that district attorney was not testifying and was not a neutral party, but that he was merely reading testimony of state witnesses who could not be called to testify in person; more desirable procedure would have been to have neutral party read prior testimony of deceased witnesses. *State v Bell (La)* 346 So 2d 1090.

In a criminal prosecution, where trial judge concluded that there were two different official transcripts of probable cause hearing, the judge properly permitted both defense and prosecution to use their respective, although different, transcripts on cross-examination and redirect. *Commonwealth v Campbell*, 394 Mass 77, 474 NE2d 1062.

Annotation: 11 ALR2d 30 § 11.

Practice References 28 Am Jur POF2d 1, Foundation for Offering Deposition or Other Former Testimony in Evidence.

Footnote 86. *Farrar v State (Okla Crim)* 505 P2d 1355; *Sweet v State*, 70 Okla Crim 443, 107 P2d 817.

Where a transcript of testimony taken at the preliminary examination, although not filed with the clerk, was properly identified before the trial court and certified by the stenographer who transcribed it, such transcript is admissible. *Harris v State (Okla Crim)* 400 P2d 64.

Footnote 87. 21A Am Jur 2d, Criminal Law § 958.

Footnote 88. 21A Am Jur 2d, Criminal Law § 728.

Footnote 89. *People v Qurise*, 59 Cal 343; *People v Stevenson* (2nd Dist) 79 Cal App 3d 976, 145 Cal Rptr 301; *Ward v State* (Del Sup) 395 A2d 367; *State v Rose*, 3 NJ Misc 1002, 130 A 461.

§ 930 Unofficial notes of stenographer or other person present at former proceeding

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is authority for the view, both in the context of criminal 90 and civil 91 cases, that the notes of an unofficial stenographer, or the notes of a witness, judge, attorney, or other person present at the former trial, are competent evidence and may be read to prove the former testimony of a witness, provided they are properly authenticated. 92 However, there is also support for the view, in both criminal and civil cases, that such notes may not be read as evidence of the former testimony or that they may be used by the witness only to refresh his memory. 93

Footnotes

Footnote 90. *Sekularac v State*, 205 Ind 98, 185 NE 898; *State v Coy*, 140 Kan 284, 36 P2d 971; *Commonwealth v Di Pietro*, 373 Mass 369, 367 NE2d 811; *People v Scharaga* (Co Ct) 45 NYS2d 343; *Edwards v State*, 51 Okla Crim 221, 1 P2d 175.

Transcript of guilty plea hearing was admitted where official court reporter was not present, court taped the hearing, secretary of prosecuting attorney took stenographic notes, and transcript was prepared by secretary of prosecuting attorney by typing from tape recording and stenographic notes, and secretary, defense attorney, and convict himself all testified that transcript was accurate record of guilty-plea proceeding. *Batye v State* (Mo App) 599 SW2d 231.

Footnote 91. *Ruch v Rock Island*, 97 US 693, 7 Otto 693, 24 L Ed 1101; *In re Robinson* (DC Mass) 42 F Supp 342; *Mineral P. R. Co. v Keep*, 22 Ill 9; *Wegiel v Hogan*, 28 NJ Super 144, 100 A2d 349; *King v State Industrial Acci. Com.*, 211 Or 40, 309 P2d 159, adhered to 211 Or 71, 315 P2d 148.

Footnote 92. § 933.

Footnote 93. *Ex parte French* (Ala) 547 So 2d 547, on remand on other grounds (Ala App) 547 So 2d 549 (civil); *Simmons v Spratt*, 26 Fla 449, 8 So 123 (civil); *State v Hilbish*, 126 Kan 282, 267 P 1109 (criminal).

A transcript of the justice containing the statement that the criminal defendant admitted being with the affiant was held not admissible to show the admission of the defendant, but it was said that either the magistrate himself must be called to testify as to such admission, or what occurred at the preliminary hearing might be established by the testimony of others who were present. *Commonwealth v Neff*, 149 Pa Super 513, 27 A2d 737.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 §§ 12, 38.

§ 931 Writing or deposition of former witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal and Uniform Rules of Evidence, if the declarant is unavailable as a witness, the hearsay rule does not exclude testimony given in a deposition taken in compliance with law in the course of the same or another proceeding. 94

◆ Observation: There is authority for the view that a deposition taken in compliance with the law of a foreign country is admissible. 95

The former testimony of a witness not available at a subsequent trial may be proved by a writing or a deposition which he signed in giving his testimony. 96 Moreover, it has been held that such a writing or deposition is admissible in evidence even though not signed by the witness, 97 but there is also authority to the contrary. 98

§ 931 ----Writing or deposition of former witness [SUPPLEMENT]

Case authorities:

Deposition testimony of party in another case who was injured in battery explosion accident involving battery manufactured by defendant was properly admitted since manufacturer had every incentive to cross-examine party who, like plaintiff here, was suing for injuries from explosion of battery built by defendant. *McKnight by & Through Ludwig v Johnson Controls* (1994, CA8 Mo) 36 F3d 1396.

Footnotes

Footnote 94. FRE, Rule 804(b)(1); Uniform Rules of Evidence Rule 804(b)(1).

Annotation: Admissibility of depositions under Federal Evidence Rule 804(b)(1), 84 ALR Fed 668.

Footnote 95. *United States v Salim* (CA2 NY) 855 F2d 944, 26 Fed Rules Evid Serv 897, 105 ALR Fed 513 (deposition of key prosecution witness imprisoned in France admissible where deposition was taken in careful compliance with French law).

Annotation: Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rules of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed 537.

Footnote 96. *Baldwin v United States* (CA6 Tenn) 5 F2d 133, cert den 269 US 552, 70 L Ed 407, 46 S Ct 17; *State v Barnes*, 274 Mo 625, 204 SW 267.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 15.

Footnote 97. *Roberts v State*, 68 Ala 515; *Scott v State*, 160 Ark 125, 254 SW 341; *Sheets v Hodes* (App, Crawford Co) 39 Ohio L Abs 492, 68 NE2d 342, affd 142 Ohio St 559, 27 Ohio Ops 498, 53 NE2d 804.

Unsigned depositions were admissible where no request was made for signature on one deposition, and deponent submitted signed list of corrections as to other deposition on his own letterhead. *In re Johns-Manville/Asbestosis Cases* (ND Ill) 93 FRD 853, 10 Fed Rules Evid Serv 961.

Annotation: 11 ALR2d 30 §§ 16, 41.

Footnote 98. *State v Jamerson* (Mo) 252 SW 682 (under statute).

Annotation: 11 ALR2d 30 § 16.

§ 932 Sound recording or videotape of former witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Sound recorded or videotaped testimony is admissible to prove the testimony of a witness who is now unavailable. In criminal cases, the court acts in good faith and properly admits into evidence videotaped testimony of a prosecution witness who appears to be unable to testify at trial where the accuracy and integrity of the videotape is not questioned, the taping is under the control and supervision of the trial judge and in the presence of the defendant and his attorney, and the defense attorney is given an unimpeded opportunity to cross-examine the witness. ² On the other hand, the transcript of a preliminary hearing is inadmissible where the transcript is made from an electronic recording of a hearing at which no reporter is present, since, when a transcriber prepares a transcript from such a recording, he is not relying upon his notes or his recollection, but only upon a recording that he is in no better position than anyone else to interpret. ³

Where a witness in a prior proceeding has died, the party seeking admission of a tape recording must prove that the tape or witness testifying on the basis of the tape can substantially reproduce the prior testimony of the deceased witness in all material particulars. 4

Footnotes

Footnote 99. *State v Ford* (La) 336 So 2d 817 (criminal case); *State v Mayeux* (La App 3d Cir) 526 So 2d 1243, cert den (La) 531 So 2d 262, habeas corpus proceeding (WD La) 1990 US Dist LEXIS 15760, adopted (WD La) 737 F Supp 957 (criminal case); *State ex rel. Moreno v Floyd*, 85 NM 699, 516 P2d 670 (criminal case).

Transcript of cassette recording of preliminary hearing was properly admitted into evidence in trial for aggravated criminal battery, over objection that gaps in transcript due to inaudible, untranscribed testimony made remaining testimony unreliable, where inaudible portions concerned peripheral matters having nothing to do with central issues in the case. *State v Elisondo* (App) 112 Idaho 815, 736 P2d 867, revd on other grounds 114 Idaho 412, 757 P2d 675.

Admissibility of sound recordings is discussed, generally, in §§ 1221 et seq.

Footnote 1. *United States v Steele* (CA3 NJ) 685 F2d 793, 10 Fed Rules Evid Serv 1116, cert den 459 US 908, 74 L Ed 2d 170, 103 S Ct 213 (criminal case); *Hendrix v Raybestos-Manhattan, Inc.* (CA11 Ga) 776 F2d 1492, CCH Prod Liab Rep ¶ 10890, 19 Fed Rules Evid Serv 903, 3 FR Serv 3d 1169 (among conflicting authorities noted on other grounds in *United States v Graves* (CA5 La) 5 F3d 1546) (civil case); *Mainland Industries, Inc. v Standal's Patents, Ltd.* (CA FC) 799 F2d 746, 230 USPQ 772 (criticized on other grounds by *A.C. Aukerman Co. v R.L. Chaides Constr. Co.* (CA FC) 960 F2d 1020, 92 Daily Journal DAR 5649, 22 USPQ2d 1321, 35 Fed Rules Evid Serv 505) (civil case); *People v Ware* (1st Dist) 78 Cal App 3d 822, 144 Cal Rptr 354 (disapproved on other grounds by *People v Wright*, 43 Cal 3d 399, 233 Cal Rptr 89, 729 P2d 280) (criminal case).

Television or videotape testimony of witnesses is generally discussed in 81 Am Jur 2d, Witnesses §§ 720, 721.

Authentication of writing or recording is discussed in § 933.

As to the admissibility of videotapes, generally, see § 958.

Annotation: Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Admissibility of depositions under Federal Evidence Rule 804(b)(1), 84 ALR Fed 668.

Footnote 2. *People v Wilson* (4th Dept) 112 App Div 2d 746, 492 NYS2d 242.

Footnote 3. *Harrod v State*, 39 Md App 230, 384 A2d 753.

Footnote 4. *Commonwealth v Vaden*, 373 Mass 397, 367 NE2d 621.

§ 933 Authentication of writing or recording

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To permit the admission in evidence, in criminal 5 or civil 6 cases, of stenographic notes or transcripts of stenographic notes or other records or recordings, to prove the testimony of a witness at a former trial or hearing, it is necessary that a proper foundation be laid for their admission by proof as to their correctness and accuracy in reproducing the evidence and by identification of the contents of such notes as the evidence given at the former trial.

◆ Practice guide: There is no error in admitting into evidence a transcript of former testimony without proof of its correctness where an objection to its lack of authentication is not made when the transcript is sought to be admitted. 7 This is particularly true under statutory provisions providing for the admission of such evidence. 8 Under the Federal Rules of Civil Procedure, whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript of it duly certified by the person who reported the testimony. 9

◆ Observation: Under the Federal and Uniform Rules of Evidence, the requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. 10

§ 933 ----Authentication of writing or recording [SUPPLEMENT]

Case authorities:

In drug prosecution, defendant waived objection to authentication of transcript of tape recording where he acquiesced in admission and request for limiting instruction prior to making objection that transcripts were unnecessary. *Ascherman v State* (1991, Ind App) 575 NE2d 277, reh den (Ind App) 580 NE2d 294 and transfer den (Mar 4, 1992) and (criticized by *Roller v State* (Ind App) 602 NE2d 165, transfer den (Dec 28, 1992)).

Footnotes

Footnote 5. *Williams v Meachum* (DC Mass) 382 F Supp 521; *United States v Bully* (ED Va) 282 F Supp 327; *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196; *Brown v State* (Ala App) 386 So 2d 501; *Eyer v State*, 112 Ark 37, 164 SW 756; *People v Moran* (1st Dist) 39 Cal App 3d 398, 114 Cal Rptr 413; *State v Elisondo* (App) 112 Idaho 815, 736 P2d 867, revd on other grounds 114 Idaho 412, 757 P2d 675; *State v Terry*, 202 Kan 599, 451 P2d 211;

Brown v Commonwealth, 200 Ky 313, 254 SW 891; State v Bell (La) 346 So 2d 1090; Commonwealth v Vaden, 373 Mass 397, 367 NE2d 621; State v Purl (Mo) 183 SW2d 903; Batye v State (Mo App) 599 SW2d 231; State v Mitchell (App) 86 NM 343, 524 P2d 206; Lamb v State (Okla Crim) 560 P2d 583; Liddell v State, 18 Okla Crim 87, 193 P 52, 16 ALR 405; Russell v State (Tex Crim) 604 SW2d 914; State v Kazda, 15 Utah 2d 313, 392 P2d 486; Fletcher v State, 20 Wyo 284, 123 P 80.

Transcripts of police officer's testimony were admissible where, although better method of authentication would have been to have court reporter who transcribed them testify as to their authenticity, foregoing was impossible in this case because reporter was bedridden, where act of turning over copy of minutes to defendant constituted sufficient act of validation to render transcript admissible, and where transcripts were also submitted to the court by the People on their prior appeal and the People thereby attested to the accuracy of the transcripts. People v Gregg (2d Dept) 90 App Div 2d 812, 455 NYS2d 816.

Where it is not shown that the testimony at the former trial was correctly taken by the stenographer, or the minutes correctly transcribed, his testimony as to what the witness had testified to on the former trial was held inadmissible. People v Hoke, 151 App Div 744, 136 NYS 235.

Footnote 6. Redwing v Moncravie, 138 Cal App 432, 32 P2d 408; Indianapolis v Parker (Ind App) 427 NE2d 456; Job v Grand T. W. R. Co., 245 Mich 353, 222 NW 723; Ledbetter v Allen's Estate (Mo App) 183 SW2d 846; Settee v Charlotte E. R. Co., 171 NC 440, 88 SE 734.

The judge presiding at the trial cannot testify at a subsequent proceeding that a stenographer's transcript of the testimony of a witness was correct so as to make the transcript admissible in evidence, since it is merely hearsay. Woods v Postal Telegraph-Cable Co., 205 Ala 236, 87 So 681, 27 ALR 834.

Annotation: Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30 § 39.

Footnote 7. Cacioppo v Kansas City Public Service Co. (Mo App) 234 SW2d 799.

Footnote 8. Russell v State (Tex Crim) 604 SW2d 914.

In a prosecution for murder, trial court properly refused to admit into evidence tape recording of prior testimony of witness at family court proceeding where defendant informed court that judge from family court was only person who turned tape recorder on and off, and argued that any number of people could authenticate tapes, but made no effort, prior to time he attempted to proffer tapes, to procure attendance of judge or any other witness for purpose of authenticating them. Walker v State (Ala App) 416 So 2d 1083.

Footnote 9. § 929.

Annotation: 11 ALR2d 30 § 13.

Footnote 10. FRE, Rule 901(a)(1); Uniform Rules of Evidence Rule 901(a)(1).

For discussion of Rule 901 of the Federal and Uniform Rules of Evidence, generally, with regard to authentication of writings and recordings, generally, see §§ 1032 et seq.; real or demonstrative evidence, generally, see §§ 934 et seq.

F. Real or Demonstrative Evidence [934-1022]

Research References

FRE, Rules 702, 901, 1001(2)-(4), 1003

Uniform Rules of Evidence, Rules 702, 901, 1001(2)-(4), 1003

ALR Digests: Evidence §§ 712-724

ALR Index: Blackboard; Clothing; Demonstrative and Real Evidence; Diagrams, Charts, and Tables; Evidence Rules; Exhibits; Experiments and Tests; Fingerprints; Models; Mug Shot; Pictures and Photographs; Rogue's Gallery Photograph; Theaters and Motion Pictures; Videotapes; Voice; Witnesses; X-rays

2 Am Jur Trials 669, Preparing and Using Maps; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases; 3 Am Jur Trials 377, Preparing and Using Models; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence; 3 Am Jur Trials 507, Preparing and Using Diagrams; 5 Am Jur Trials 505, Mapping the Trial—Order of Proof §§ 38-40; 5 Am Jur Trials 553, Introducing and Marking Exhibits §§ 16-18, 22; 5 Am Jur Trials 695, Courtroom Semantics §§ 107 et seq.; 5 Am Jur Trials 921, Showing Pain and Suffering §§ 57 et seq.; 39 Am Jur Trials 261, Planning and Producing a "Day-in-the-Life" Videotape in a Personal Injury Lawsuit §§ 37-41; 40 Am Jur Trials 501, Forensic Pathology in Homicide Cases; 40 Am Jur Trials 249, Using or Challenging a "Day-in-the-Life" Documentary in a Personal Injury Lawsuit §§ 9-16

4 Am Jur Proof of Facts 627, Electrocardiograms, Proofs 1, 2; 4 Am Jur Proof of Facts 641, Electroencephalograms, Proof 1; 5 Am Jur Proof of Facts 113, Firearms Identification, Proofs 1, 2; 5 Am Jur Proof of Facts 411, Glass, Proof 5; 6 Am Jur Proof of Facts 465, Intoxication, Proof 3; 7 Am Jur Proof of Facts 601, Maps, Diagrams, and Models, Proofs 2, 3; 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proofs 1-9; 15 Am Jur Proof of Facts 115, Identification of Substances by Neutron Activation Analysis; 19 Am Jur Proof of Facts 423, Spectrogram Voice Identification; 22 Am Jur Proof of Facts 385, Identification of Substances by Instrumental Analysis; 29 Am Jur Proof of Facts 65, Firearms Identification; 29 Am Jur Proof of Facts 461, Identification of Substances by Thin-Layer Chromatography and Paper Chromatography; 10 Am Jur Proof of Facts 2d 365, Nondestructive Testing of Material—X-ray, Gamma Ray, and Neutron Radiography; 14 Am Jur Proof of Facts 2d 1, Reliability of Polygraph Examination §§ 1 et seq.; 18 Am Jur POF2d 305, Admissibility of Opinion Survey; 38 Am Jur POF2d 145, Foundation for Admissibility of Hospital Records and X-rays §§ 9-10, 12, 18-24; 44 Am Jur POF2d 707, Foundation for Admission of Map, diagram, or Chart; 45 Am Jur POF2d 631, Age of Person § 3; 46 Am Jur POF2d 275, Foundation for Admission of Thermogram § 9; 16 Am Jur POF3d 493, Foundation for Contemporaneous Videotape Evidence §§ 1 et seq.; 8 Am Jur POF3d 145, Use of Cat Scans in Litigation §§ 10-19

1. General Principles [934, 935]

§ 934 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Proof which is addressed directly to the senses of the court or the jury without interposing the testimony of witnesses is generally characterized as visual, real, or demonstrative evidence. 11 Real or demonstrative evidence is admissible both in civil 12 and criminal 13 cases if it tends to solve some issue in the case and is relevant to the case. 14 While real or demonstrative evidence comprises a comparatively small proportion of the evidence ordinarily produced in the trial of a case, it is a most convincing and satisfactory class of proof, and its importance in the determination of controversies is relatively great. 15 Evidence of this character includes objects or articles brought into court and exhibited to the court and jury, 16 photographs, X-ray pictures, motion pictures and videotapes, 17 maps, diagrams, drawings, and models, 18 fingerprints, palmprints, and footprints, 19 the exhibition of one's person or body, 20 and experiments, demonstrations, or tests conducted either in or out of court. 21

§ 934 ----Generally [SUPPLEMENT]

Case authorities:

In a prosecution for the murder of a mother and daughter, both of whom were stabbed dozens of times with a knife and scissors, the Commonwealth was properly permitted to introduce into evidence a scissors and 2 knives seized from the home of the defendant's mother pursuant to a search warrant, even though those items could not be specifically linked to the murders, where the physician who conducted the autopsies of the victims testified that the scissors and one of the knives were consistent with the wounds inflicted on the victims and an officer who executed the search warrant testified that he saw the defendant in the bedroom and kitchen of his mother's house, which were the rooms from which the items were seized. Commonwealth v Lee (1995, Pa) 662 A2d 645, application gr (Pa) 1995 Pa LEXIS 1335 and petition for certiorari filed (Dec 18, 1995).

Footnotes

Footnote 11. Kabase v State, 31 Ala App 77, 12 So 2d 758, cert den 244 Ala 182, 12 So 2d 766; Virgil v New York, C. & S. L. R. Co., 347 Ill App 281, 106 NE2d 749; Reyna v State (Tex App Corpus Christi) 797 SW2d 189.

The sounding of a police siren for the jury is not an experiment, reconstruction or demonstration; rather, it is real or illustrative evidence. State v Mitchell, 56 Wash App 610, 784 P2d 568.

For discussion of the use of demonstrative aids not introduced into evidence, see 75A Am Jur 2d, Trial §§ 505 et seq.

Law Reviews: Presenting Demonstrative Evidence in Land Use Case, 1 Prac Litigator 2:43 (1990).

Lucas, Props: An Overview of Demonstrative Evidence. 13 Am J Trial Ad 1097, (Spring 1990).

The derivative relevance of demonstrative evidence: charting its proper evidentiary status, 25 U Cal Dav LR 957 (1992).

The Case for Visual Presentation: High-Tech Communications at Trial, Bowdren & Winter, 1992 Tr Dip J 125 (1992).

Practice References Demonstrative Evidence. 5 Am Jur Trials 695, Courtroom Semantics §§ 107 et seq.

Footnote 12. Liberty Nat. Life Ins. Co. v Weldon, 267 Ala 171, 100 So 2d 696, 61 ALR2d 1346; Smith v Ohio Oil Co. (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680; Virgil v New York, C. & S. L. R. Co., 347 Ill App 281, 106 NE2d 749; Hampton v Rautenstrauch (Mo) 338 SW2d 105, 83 ALR2d 1260; Palmer v Farmers Ins. Exch., 233 Mont 515, 761 P2d 401, related proceeding (Mont) 861 P2d 895; Grenz v Werre (ND) 129 NW2d 681.

Footnote 13. Goldsby v United States, 160 US 70, 40 L Ed 343, 16 S Ct 216; State v Griffin (Mo) 756 SW2d 475, cert den 490 US 1113, 104 L Ed 2d 1036, 109 S Ct 3175, post-conviction proceeding (Mo) 794 SW2d 659, stay gr (US) 1990 US LEXIS 3812 and cert den (US) 115 L Ed 2d 1075, 111 S Ct 2911; State v Black (Mo App) 748 SW2d 184; Sedlacek v State, 147 Neb 834, 25 NW2d 533, 169 ALR 868; State v Gallegos, 45 NM 404, 115 P2d 626; State v Johnson, 37 NM 280, 21 P2d 813, 89 ALR 1368; Cody v State (Okla Crim) 361 P2d 307, 84 ALR2d 997, appeal after remand (Okla Crim) 376 P2d 625; State v Hood, 225 Or 40, 356 P2d 1100; State v Weston, 155 Or 556, 64 P2d 536, 108 ALR 1402; Washburn v State, 167 Tex Crim 125, 318 SW2d 627, cert den 359 US 965, 3 L Ed 2d 834, 79 S Ct 876.

Footnote 14. § 935.

Footnote 15. Virgil v New York, C. & S. L. R. Co., 347 Ill App 281, 106 NE2d 749.

Footnote 16. §§ 936 et seq.

Footnote 17. §§ 960 et seq.

Footnote 18. §§ 988 et seq.

Footnote 19. § 957.

Footnote 20. §§ 950 et seq.

For discussion of questions relating to a physical or mental examination of a party to a suit for discovery purposes, see 23 Am Jur 2d (Rev), Depositions and Discovery §§ 282 et seq.

Footnote 21. §§ 996 et seq.

As to a view by the jury of premises or property involved in the litigation before the court, see 75 Am Jur 2d, Trial §§ 258 et seq.

Comparisons of writings is discussed in §§ 1212 et seq.

§ 935 Balancing probative value against particular dangers in admitting evidence; discretion of court

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts favor the use of accurate and relevant demonstrative evidence to help the jury better understand the issues in the case. 22 Demonstrative evidence need only be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact. 23 Accordingly, exhibits used for demonstration purposes are admissible if they supplement the witness' spoken description of the transpired event, 24 clarify some issue in the case, 25 and if the probative value of the exhibit outweighs the likelihood of improperly influencing the minds of the jury. 26 An exhibit should be excluded where the purpose of the exhibit is to inflame the minds of the jury or excite the feelings of the jury rather than to enlighten the jury as to any fact. 27 In other words, when demonstrative evidence is likely to confuse the jury, raise collateral issues, or is more prejudicial than probative, the court should refuse its admission. 28 "Prejudicial," in this regard, does not mean detrimental to a party's case but rather an undue tendency to suggest a decision on an improper basis. 29 However, the admission of other evidence does not prohibit the use of demonstrative evidence which has probative value in establishing conditions and corroboration of witnesses on the issues of the case. 30 Ultimately, the admissibility of demonstrative evidence is a matter within the discretion of the trial court, 31 and the trial court's ruling will not be disturbed absent a clear showing that the trial court has abused that discretion. 32

§ 935 ----Balancing probative value against particular dangers in admitting evidence; discretion of court [SUPPLEMENT]

Practice Aids: To tell the truth: Accuracy in demonstrative evidence, 5 Prac Litig 3:47 (1994).

Case authorities:

Admission of sawed-off shotgun in defendant's trial on drug charges was unwarranted since it was not involved in crimes charged and potentially inflammatory, but was harmless in light of overwhelming evidence of defendant's guilt. *United States v Thomas* (1995, CA6 Ohio) 49 F3d 253.

A witness's testimony which described acts of prostitution between the witness and defendant and her finding a metal pipe under defendant's pillow a month before the death of the victim, a known prostitute, was properly admitted in defendant's murder trial to show that the pipe was in defendant's bedroom in reasonable proximity to the time of the victim's death where other evidence tended to show that the victim was killed by a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. Furthermore, the trial court did not err by finding that this testimony was more probative than prejudicial under the balancing test of Rule 403. N.C.G.S. § 8C-1, Rules 403 and 404(b). *State v Weathers* (1994) 339 NC 441, 451 SE2d 266.

Footnotes

Footnote 22. *Ogg v Springfield* (4th Dist) 121 Ill App 3d 25, 76 Ill Dec 531, 458 NE2d 1331, CCH Prod Liab Rep ¶ 10008, later proceeding (4th Dist) 141 Ill App 3d 383, 95 Ill Dec 638, 490 NE2d 111; *State v Lord*, 117 Wash 2d 829, 822 P2d 177, cert den (US) 121 L Ed 2d 112, 113 S Ct 164.

Footnote 23. *Underly v Advance Mach. Co.* (Ind App) 605 NE2d 1186, CCH Prod Liab Rep ¶ 13539, reh den (May 4, 1993) and transfer den (Jul 7, 1993).

Footnote 24. *Reyna v State* (Tex App Corpus Christi) 797 SW2d 189.

Footnote 25. *Palmer v Farmers Ins. Exch.*, 233 Mont 515, 761 P2d 401, related proceeding (Mont) 861 P2d 895.

Footnote 26. *Leonard v Nichols Homeshield, Inc.*, 384 Pa Super 1, 557 A2d 743, CCH Prod Liab Rep ¶ 12118, app den 525 Pa 584, 575 A2d 115.

For discussion of general principles of admissibility, including limitations and relevance, see §§ 301 et seq.

Footnote 27. *State v Campbell*, 146 Mont 251, 405 P2d 978, 22 ALR3d 824.

Footnote 28. *Masters v Dewey* (App) 109 Idaho 576, 709 P2d 149; *Jenkins v Snohomish County Public Utility Dist. No. 1*, 105 Wash 2d 99, 713 P2d 79.

Footnote 29. *Leonard v Nichols Homeshield, Inc.*, 384 Pa Super 1, 557 A2d 743, CCH Prod Liab Rep ¶ 12118, app den 525 Pa 584, 575 A2d 115.

Footnote 30. *State v Black* (Mo App) 748 SW2d 184.

For general discussion of the exclusion of evidence on grounds of prejudice, confusion, or waste of time, see §§ 324 et seq.

Footnote 31. *Carson v Polley* (CA5 Tex) 689 F2d 562, 11 Fed Rules Evid Serv 1259, 35 FR Serv 2d 152, 64 ALR Fed 613; *Rogers v Raymark Industries, Inc.* (CA9 Cal) 922 F2d 1426, 91 CDOS 319, 91 Daily Journal DAR 380, 31 Fed Rules Evid Serv 1231; *Ames v Sears, Roebuck & Co.*, 8 Conn App 642, 514 A2d 352, CCH Prod Liab Rep ¶ 11346, certif den 201 Conn 809, 515 A2d 378, later proceeding 206 Conn 16, 536 A2d

563; 27th Ave. Gulf Service Center v Smellie (Fla App D3) 510 So 2d 996, 12 FLW 1710; Mathis v State, 184 Ga App 455, 361 SE2d 856; Monlux v General Motors Corp., 68 Hawaii 358, 714 P2d 930; Ogg v Springfield (4th Dist) 121 Ill App 3d 25, 76 Ill Dec 531, 458 NE2d 1331, CCH Prod Liab Rep ¶ 10008, later proceeding (4th Dist) 141 Ill App 3d 383, 95 Ill Dec 638, 490 NE2d 111; Doe v Johnston (Iowa) 476 NW2d 28; State v Kenny (NM App) 818 P2d 420, cert den (NM) 1991 NM LEXIS 312; Tritt v Judd's Moving & Storage, Inc. (Franklin Co) 62 Ohio App 3d 206, 574 NE2d 1178; Banks v State (Okla Crim) 728 P2d 497; De Rosa v Kolb, 90 Or App 548, 752 P2d 1282, review den 306 Or 101, 757 P2d 1362; Commonwealth v Thomas, 522 Pa 256, 561 A2d 699; Commonwealth v Hudson, 489 Pa 620, 414 A2d 1381; State v Brown, 147 Vt 324, 515 A2d 1059; State v Lord, 117 Wash 2d 829, 822 P2d 177, cert den (US) 121 L Ed 2d 112, 113 S Ct 164; State v Kerns, 187 W Va 620, 420 SE2d 891.

Footnote 32. United States v Rans (CA8 SD) 851 F2d 1111, 26 Fed Rules Evid Serv 430; Ogg v Springfield (4th Dist) 121 Ill App 3d 25, 76 Ill Dec 531, 458 NE2d 1331, CCH Prod Liab Rep ¶ 10008, later proceeding (4th Dist) 141 Ill App 3d 383, 95 Ill Dec 638, 490 NE2d 111; Doe v Johnston (Iowa) 476 NW2d 28; Nusz v Wells Mfg. Corp., 214 Neb 1, 332 NW2d 204, CCH Prod Liab Rep ¶ 9587; Victory Park Apartments, Inc. v Axelson (ND) 367 NW2d 155; State v Brown, 147 Vt 324, 515 A2d 1059.

To establish a necessary abuse of discretion for the overruling of a lower court, the appellant must demonstrate that the ruling was clearly against the logic and effect of the facts and circumstances before the court. Smith v Crouse-Hinds Co., 175 Ind App 679, 373 NE2d 923, transfer den 271 Ind 366, 392 NE2d 1168.

2. Objects or Articles, In General [936-949]

a. In General [936-944]

§ 936 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When a fact in issue may be explained by the production of an article or object to which the testimony relates, the article or object may be brought into court and exhibited to the jury if the circumstances permit. 33 Whenever it is necessary to show the condition or quality of a certain article or substance, the thing itself is the most powerful evidence that can be produced, and it may be introduced in evidence as supplementing the testimony of witnesses or as direct evidence when properly identified. 34 Things may be exhibited to the jurors in order that they may obtain clearer views and be able to reach sounder conclusions, 35 and this course is viewed as more effective than a description by the witnesses. 36 However, the admission of physical evidence is governed by the same rules of relevancy and materiality as govern admission of testimonial evidence, 37 and an object or article is not admissible for demonstrative

purposes when it does not illustrate or make clearer some issue in the case, that is, where it is irrelevant or immaterial, or where it is of such a character as to prejudice the jury. 38 The admission or exclusion of relevant demonstrative evidence is determined by the trial court through balancing the probative value of the evidence against the dangers of unfair prejudice, distraction, confusion of issues and waste of time. 39 Where there is a conflict or dispute in the evidence as to the existence of the particular object sought to be introduced into evidence, demonstrative evidence is not admissible. 40

The right to introduce and exhibit to the jury articles or objects to which testimony relates or which tend to elucidate or explain issues in a case exists to the same extent in criminal prosecutions as in civil cases. 41 Instruments, devices, or tokens used in the commission of a crime and taken from the person or premises of the accused, 42 by an officer upon the arrest, are competent evidence, provided they were not obtained as a result of an unlawful search and seizure. 43 Clothing of the accused or of the victim of a crime may also be exhibited where relevant to the inquiry. 44

The admission of objects or articles is largely a matter for the discretion of the court. 45

◆ Observation: It is common practice to send exhibits admitted into evidence into the jury room. A trial court's decision to send an exhibit into the jury is guided by consideration of whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced, and whether the exhibit could be subjected to improper use by the jury. 46 In determining the propriety of the use of a physical object before a jury, the courts weigh the explanatory value of the object against its possible emotional effect, with no flat rule that a gruesome object cannot be used. 47 If an object is not to be received in evidence, it should not be permitted to remain in the view of the jury. 48

A party may require the production of private documents in the possession of his adversary or of third persons for use as evidence in a trial. 49 Likewise, a party may, where he or she desires to exhibit an object to the jury by way of demonstrative proof, require his or her adversary to produce the object if it has probative value as evidence. 50 The right to do so does not depend upon having an interest in the object, or, where exhibits in a previous cause are in question, upon having an interest in the original cause, or upon the object's being admissible or inadmissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing; so long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it unless some exception is shown to the general rule. 51

§ 936 ----Generally [SUPPLEMENT]

Case authorities:

Government's display of over 200 pounds of cocaine seized in drug conspiracy trial was not abuse of discretion. *United States v Jones* (1995, CA10 Wyo) 44 F3d 860.

In products-liability action by tree worker against manufacturer of rope, trial court did not abuse its discretion by allowing two rope samples into evidence, where although manufacturer contended that it was prejudiced by admission of rope because jury could only conclude that frayed rope making up exhibits was defective and, by improper

inference, that manufacturer's rope was defective, purpose of offering ropes was not to establish that there was manufacturing defect in rope used at time of accident, but to show that rope was produced by manufacturer; changes made in ropes were not material to purpose for which ropes were admitted; and trial court gave limiting instruction to jury that ropes were only to be considered for identification purposes. *Columbian Rope Co. v Todd* (1994, Ind App) 631 NE2d 941, CCH Prod Liab Rep ¶ 13899, transfer dismissed (Jul 29, 1994).

The trial court did not err during a first-degree murder prosecution involving poisoning by admitting into evidence medical devices which defendant contended were used merely to inflame the passions of the jury. The medical devices were identified and introduced solely to illustrate the testimony of a registered nurse involved in the victim's primary care and treatment, the pieces of equipment were not excessively displayed and were not presented separately to the jury for a closer inspection, and the probative value of the evidence substantially outweighed the possibility of any unfair prejudice to defendant. GS § 8C-1, Rule 403. *State v Moore* (1994) 335 NC 567, 440 SE2d 797.

In a prosecution of defendant for attempted robbery with a dangerous weapon, the trial court did not err in admitting into evidence a broken bottleneck where defendant pushed a rock-like object into the face and lip of his victim and told her he would cut her bad; the victim believed she had been cut and was extremely scared; defendant's movements were limited to a very small area through which no one else walked between the time defendant grabbed the victim and the policeman arrived; the policeman watched defendant continuously; the policeman saw defendant drop something that was dark and no larger than a baseball that made a "glassy sound" when it hit the ground; the bottleneck was the only big object found in the area and no other bottle parts were found in the area; and the policeman frisked defendant for weapons, without finding anything, even though defendant did have some implement in his hand when he attacked the victim. *State v Harris* (1994) 115 NC App 560, 445 SE2d 626.

The trial court did not err in denying defendant's motion for mistrial based on the admission into evidence of a pin and photograph previously suppressed by the trial court in pretrial motions on the ground that defendant's opening argument to the jury had reflected the trial court's suppression order where the suppression order was entered without prejudice to the State to show that the two items might be admissible under another theory of law; defendant was thus aware that the State might come forward with a legally acceptable basis for admission of the evidence; the State showed that the items were lawfully seized by an officer who entered defendant's trailer to effect an arrest; and defense counsel admitted that he did not tell the jury during the opening statement that the State would not offer either the pin or the photograph. Even if the admission of these items was error, defendant failed to present evidence of prejudice worthy of a mistrial considering the overwhelming evidence presented against him. *State v Hill* (1994) 116 NC App 573, 449 SE2d 573.

Footnotes

Footnote 33. *Goldsby v United States*, 160 US 70, 40 L Ed 343, 16 S Ct 216; *Barney v Rickard*, 157 US 352, 39 L Ed 730, 15 S Ct 642; *Stokes v United States*, 157 US 187, 39 L Ed 667, 15 S Ct 617; *Liberty Nat. Life Ins. Co. v Weldon*, 267 Ala 171, 100 So 2d 696, 61 ALR2d 1346; *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526,

58 ALR2d 680; Grenz v Werre (ND) 129 NW2d 681.

As to the exhibition of objects and articles not introduced into evidence, see 75 Am Jur 2d, Trial § 510.

Footnote 34. Masters v Dewey (App) 109 Idaho 576, 709 P2d 149; Sedlacek v State, 147 Neb 834, 25 NW2d 533, 169 ALR 868; State v Johnson, 37 NM 280, 21 P2d 813, 89 ALR 1368.

Footnote 35. Githens v Great American Ins. Co., 201 Iowa 266, 207 NW 243, 44 ALR 863; Kentucky Independent Oil Co. v Schnitzler, 208 Ky 507, 271 SW 570, 39 ALR 979.

Footnote 36. State v Weston, 155 Or 556, 64 P2d 536, 108 ALR 1402.

In an action brought by the plaintiff for injuries sustained due to a dog bite, it was proper for the trial court to allow the jury to view the dog where the issue in dispute was whether or not the dog possessed dangerous propensities. Arnold v Laird, 94 Wash 2d 867, 621 P2d 138.

Footnote 37. Linger v State (Ind App) 508 NE2d 56.

As to relevancy and materiality of evidence, generally, see §§ 301 et seq.

Footnote 38. Caldwell v United States (CA8 Mo) 338 F2d 385, cert den 380 US 984, 14 L Ed 2d 277, 85 S Ct 1354; Masters v Dewey (App) 109 Idaho 576, 709 P2d 149.

Footnote 39. § 935.

Footnote 40. Young v Price, 50 Hawaii 430, 50 Hawaii 459, 442 P2d 67 (in personal injury action where there was conflict in evidence as to existence of warning devices, it was reversible error to admit in evidence replicas of yellow cone and red flag).

Footnote 41. Caldwell v United States (CA8 Mo) 338 F2d 385, cert den 380 US 984, 14 L Ed 2d 277, 85 S Ct 1354; Reizenstein v State, 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265; State v Gallegos, 45 NM 404, 115 P2d 626; Cody v State (Okla Crim) 361 P2d 307, 84 ALR2d 997, appeal after remand (Okla Crim) 376 P2d 625; State v Hood, 225 Or 40, 356 P2d 1100; State v Weston, 155 Or 556, 64 P2d 536, 108 ALR 1402.

Annotation: Propriety, at federal criminal trial, of allowing material, object, or model of object allegedly used in criminal act to be taken into jury room during deliberations, 62 ALR Fed 950.

Footnote 42. § 937.

Footnote 43. §§ 589 et seq.

Footnote 44. § 940.

Footnote 45. Millers' Nat. Ins. Co. v Wichita Flour Mills Co. (CA10 Kan) 257 F2d 93, 1

FR Serv 2d 261, 76 ALR2d 385; *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204; *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680; *Kunzman v Cherokee Silo Co.*, 253 Iowa 885, 114 NW2d 534, 95 ALR2d 673; *Hampton v Rautenstrauch* (Mo) 338 SW2d 105, 83 ALR2d 1260; *Glowacki v Holste* (Mo) 295 SW2d 135; *Reizenstein v State*, 165 Neb 865, 87 NW2d 560, mod on other grounds and reh den 166 Neb 450, 89 NW2d 265; *State v Gallegos*, 45 NM 404, 115 P2d 626; *State v Hood*, 225 Or 40, 356 P2d 1100; *Washburn v State*, 167 Tex Crim 125, 318 SW2d 627, cert den 359 US 965, 3 L Ed 2d 834, 79 S Ct 876.

Footnote 46. 75B Am Jur 2d, Trial §§ 1665, 1666.

Footnote 47. *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680.

In a prosecution for assault upon an FBI agent, the agent's gun has probative value and is properly admitted, where it was not introduced solely to create prejudice, but rather to show how the agent's injury, consisting of a serious skull fracture, could have been caused, medical testimony having been offered to establish the nature of the object required to inflict so severe a fracture, namely, an object such as a gun. *United States v Lombardozzi* (CA2 NY) 335 F2d 414, 10 ALR3d 826, cert den 379 US 914, 13 L Ed 2d 185, 85 S Ct 261.

Footnote 48. *Washburn v State*, 167 Tex Crim 125, 318 SW2d 627, cert den 359 US 965, 3 L Ed 2d 834, 79 S Ct 876.

Footnote 49. §§ 1146 et seq.

Footnote 50. *McGuire v Caledonia*, 140 Minn 151, 167 NW 425.

Footnote 51. *Ex parte Upperco*, 239 US 435, 60 L Ed 368, 36 S Ct 140.

§ 937 Instrumentalities used in crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An instrumentality, such as a weapon or ammunition, used by the accused in committing the crime charged, is admissible in evidence. 52 When real evidence is purported to be the actual object associated with a crime, proof of accuracy has two elements, the offering party must establish (1) that the evidence is identical to that involved in the crime, and (2) that the evidence has not been tampered with. 53

§ 937 ----Instrumentalities used in crime [SUPPLEMENT]

Case authorities:

Evidence of drug-manufacturing chemicals and materials seized from defendant's residence and place of employment should have been excluded; it would not be regarded as "inextricably intertwined" with charged drug and firearms offenses given weakness of proof of drug offenses (no drugs were found), weakness of link between drug offenses and particular weapon found, and barely adequate proof of defendant's possession of weapon, which rendered impact of drug evidence greater. *United States v Ridlehuber* (1993, CA5 Tex) 11 F3d 516.

District court did not abuse its discretion in admitting into evidence 92 tinfoil packets recovered from drain pipe directly below toilet where cocaine distribution conspiracy defendants were arrested since they were relevant to proving what defendants were doing when they were arrested, and since chemical analysis was impossible due to contents having been exposed to moisture, defendants were able to argue that jury should reject government's version of what took place, hence were not prejudiced. *United States v James* (1994, CA7 Wis) 40 F3d 850, cert den (1995, US) 63 USLW 3563.

In a prosecution of defendant for attempted robbery with a dangerous weapon, the trial court did not err in admitting into evidence a broken bottleneck where defendant pushed a rock-like object into the face and lip of his victim and told her he would cut her bad; the victim believed she had been cut and was extremely scared; defendant's movements were limited to a very small area through which no one else walked between the time defendant grabbed the victim and the policeman arrived; the policeman watched defendant continuously; the policeman saw defendant drop something that was dark and no larger than a baseball that made a "glassy sound" when it hit the ground; the bottleneck was the only big object found in the area and no other bottle parts were found in the area; and the policeman frisked defendant for weapons, without finding anything, even though defendant did have some implement in his hand when he attacked the victim. *State v Harris* (1994) 115 NC App 560, 445 SE2d 626.

A weapon may be admissible as evidence even though there is no proof that it was the actual murder weapon; all that is required is a sufficient foundation demonstrating circumstances justifying an inference of the likelihood that the weapon was used in the course of the crime charged. *Commonwealth v Murphy* (1995, Pa) 657 A2d 927.

Two .357 caliber revolvers were properly admitted into evidence at the defendant's murder prosecution where (1) the defendant possessed both weapons at the time of his arrest, (2) the 2 victims were killed with .357 caliber weapons, (3) the bullet recovered from one victim was consistent with one of the weapons, and (4) an expert testified that the other victim could have been killed with the other weapon. *Commonwealth v Murphy* (1995, Pa) 657 A2d 927.

Footnotes

Footnote 52. *Caldwell v United States* (CA8 Mo) 338 F2d 385, cert den 380 US 984, 14 L Ed 2d 277, 85 S Ct 1354; *Shaw v United States*, 93 US App DC 90, 209 F2d 298, cert den 347 US 905, 98 L Ed 1063, 74 S Ct 430; *Ex parte Jones* (Ala) 592 So 2d 210; *People v Duncan*, 51 Cal 2d 523, 334 P2d 858; *Williams v State* (Fla) 110 So 2d 654, cert den 361 US 847, 4 L Ed 2d 86, 80 S Ct 102; *Jones v State*, 210 Ga 94, 78 SE2d 18;

People v Myers, 35 Ill 2d 311, 220 NE2d 297, cert den 385 US 1019, 17 L Ed 2d 557, 87 S Ct 752; Benner v State (Ind) 580 NE2d 210; State v Gaines, 223 La 711, 66 So 2d 618; State v Anderson (La App 2d Cir) 554 So 2d 133; Wilson v State, 181 Md 1, 26 A2d 770; Commonwealth v Norton, 339 Mass 592, 161 NE2d 766; State v Price (Mo) 365 SW2d 534, cert den 374 US 811, 10 L Ed 2d 1034, 83 S Ct 1702; State v Stidham (Mo) 305 SW2d 7; Sedlacek v State, 147 Neb 834, 25 NW2d 533, 169 ALR 868; People v Williams, 260 App Div 1024, 23 NYS2d 761, affd 285 NY 728, 34 NE2d 896; State v Sneed, 274 NC 498, 164 SE2d 190; Smith v State, 55 Okla Crim 214, 28 P2d 587; State v Olsen, 212 Or 191, 317 P2d 938; Commonwealth v Downer, 159 Pa Super 626, 49 A2d 516; Chavira v State, 167 Tex Crim 197, 319 SW2d 115; State v Prince, 75 Utah 205, 284 P 108; Cheng v Commonwealth, 240 Va 26, 393 SE2d 599; State v Gray, 64 Wash 2d 979, 395 P2d 490.

As to the admissibility, relevancy and materiality of articles taken from the accused, see 29 Am Jur 2d, Evidence §§ 288-290.

Footnote 53. People v Julian, 41 NY2d 340, 392 NYS2d 610, 360 NE2d 1310.

Authentication and identification are discussed in §§ 945 et seq.

§ 938 Articles similar to those used in, or illustrative of, crime, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While real evidence may consist of the actual object associated with a crime, 54 it is not necessary that the object introduced into evidence actually be that which was used in the commission of the offense, provided that the object was at least suitable for the commission of the offense. 55 Thus as long as the state presents sufficient evidence from which a rational trier of fact could conclude that the crime was committed with the use of a weapon, it makes no material difference whether the weapon admitted into evidence was the one actually used or was only similar to the weapon used by the defendant. 56

An article, which relates to the crime in such a way as to be illustrative of the crime, is likewise admissible in evidence. 57 Accordingly, the following have been deemed admissible as evidence: a windshield through which a bullet had passed; 58 pieces of glass found at the scene of the accident; 59 a defective tire taken from the defendant's truck where the tire showed defects similar to the tire impression found near the scene of an assault; 60 a hammer found at the scene of a burglary; 61 buckshot dug from a wall after a shooting; 62 blood-stained checks found on the floor near the body of the deceased; 63 a blood-soaked newspaper which had been placed over blood spots on the pavement at the scene of the crime; 64 blood-stained bedding taken from the bed of the deceased; 65 blood-stained paper towels found near the deceased; 66 a portion of a blood-stained tree trunk found near the murder victim; 67 bone fragments found where the murder victim's severed corpse was discovered; 68 a ski mask found in a third party's hotel room, where bank surveillance photographs showed that the bank robber wore a

mask; 69 jugs of whisky found in an automobile, in a prosecution for driving while intoxicated; 70 and the fender of an automobile which struck and killed a boy. 71

**§ 938 ----Articles similar to those used in, or illustrative of, crime, generally
[SUPPLEMENT]**

Case authorities:

District court did not err in allowing government to show jury gun similar to one defendant allegedly possessed when he sold marijuana to witnesses since, by observing size and shape of .357 revolver, jury could better assess whether witnesses actually could have seen revolver under defendant's jacket as they testified. *United States v McIntosh* (1994, CA8 Mo) 23 F3d 1454.

Footnotes

Footnote 54. § 937.

Footnote 55. *People v Coleman* (1st Dist) 222 Ill App 3d 614, 165 Ill Dec 151, 584 NE2d 330, app den 144 Ill 2d 637, 169 Ill Dec 145, 591 NE2d 25.

Footnote 56. *Young v State*, 205 Ga App 326, 422 SE2d 227, 92 Fulton County D R 1908; *People v Fierer*, 124 Ill 2d 176, 124 Ill Dec 855, 529 NE2d 972, appeal after remand (3d Dist) 196 Ill App 3d 404, 143 Ill Dec 100, 553 NE2d 807, app den 133 Ill 2d 563, 149 Ill Dec 328, 561 NE2d 698 and cert den (US) 115 L Ed 2d 999, 111 S Ct 2830, appeal after remand (Ill App 3d Dist) 1994 Ill App LEXIS 279; *Commonwealth v Hamilton*, 411 Mass 313, 582 NE2d 929; *Jackson v State* (Tex App Beaumont) 772 SW2d 459; *State v Royball* (Utah) 710 P2d 168 (criticized on other grounds by *State v Wade* (Utah) 725 P2d 1316, 40 Utah Adv Rep 6).

The trial court did not err in permitting the district attorney to display a .22 caliber pistol before the jury where two of the State's witnesses testified that the pistol was similar to the pistol used by defendant in committing the crimes charged, and the court instructed the jury that the pistol was not substantive evidence but could be considered only for the purpose of illustrating the testimony of the two State's witnesses. *State v See*, 301 NC 388, 271 SE2d 282.

As to the introduction of objects similar to those used in the commission of a crime, see § 994.

As to the admissibility of an instrument with which homicide was committed, see 40 Am Jur 2d, Homicide § 414.

Footnote 57. *Sanders v United States* (CA10 NM) 238 F2d 145; *West v State*, 37 Ala App 125, 65 So 2d 203, cert den 259 Ala 5, 65 So 2d 207; *People v Player* (1st Dist) 161 Cal App 2d 360, 327 P2d 83; *Hendrickson v Commonwealth*, 235 Ky 462, 31 SW2d 712; *State v Bertrand*, 247 La 232, 170 So 2d 386, cert den 382 US 960, 15 L Ed 2d 364, 86 S Ct 442; *State v Griffin* (Mo) 756 SW2d 475, cert den 490 US 1113, 104 L Ed 2d 1036, 109 S Ct 3175, post-conviction proceeding (Mo) 794 SW2d 659, stay gr (US)

1990 US LEXIS 3812 and cert den (US) 115 L Ed 2d 1075, 111 S Ct 2911.

An automobile headrest compartment commonly used by drug dealers to hide narcotics was properly admitted into evidence even though no drugs were found in the compartment at time of defendant's arrest on a narcotics charge. *State v Hernandez*, 28 Conn App 126, 612 A2d 88, app den 223 Conn 920, 614 A2d 828.

Footnote 58. *People v Cash*, 326 Ill 104, 157 NE 76.

Footnote 59. *State v McGrath*, 6 NJ Misc 217, 140 A 452, affd 105 NJL 251, 142 A 918.

Footnote 60. *State v Pollitt*, 205 Conn 61, 530 A2d 155.

Footnote 61. *Dotson v State* (Okla Crim) 739 P2d 538.

Footnote 62. *State v Waller*, 169 La 1002, 126 So 507.

Footnote 63. *Dixon v State*, 164 Miss 540, 143 So 855.

Footnote 64. *State v Burdette*, 135 W Va 312, 63 SE2d 69.

Footnote 65. *Miranda v State*, 42 Ariz 358, 26 P2d 241; *White v State*, 290 Ark 130, 717 SW2d 784, post-conviction proceeding (Ark) 1988 Ark LEXIS 88; *Hendrickson v Commonwealth*, 235 Ky 462, 31 SW2d 712.

Footnote 66. *State v Montgomery* (La App 4th Cir) 598 So 2d 553.

Footnote 67. *Martinez v State* (Ind) 549 NE2d 1026.

Footnote 68. *State v Spodnick*, 292 SC 68, 354 SE2d 904.

Footnote 69. *United States v Towns* (CA7 Ill) 913 F2d 434, 31 Fed Rules Evid Serv 378, reh den, en banc (CA7) 1990 US App LEXIS 20367.

Footnote 70. *State v Raines*, 333 Mo 538, 62 SW2d 727.

Footnote 71. *People v Wallage*, 353 Ill 95, 186 NE 540.

§ 939 --Articles in actual or constructive possession of accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

An article in the actual or constructive possession of the accused or victim, which serves to illustrate the crime charged, is admissible in evidence. 72 Thus, the following articles found in the possession of the accused may be shown: money alleged to have been stolen; 73 money alleged to have been obtained through the sale or distribution of

illegal drugs; 74 blood-stained money taken from defendant upon his arrest for murder; 75 articles identified as belonging to the victim of the crime; 76 burglar's tools or hardware which could be used for the purpose of breaking and entering; 77 a pistol 78 or ammunition found in defendant's home; 79 a pillow found in murder defendant's truck where a pathologist testified that victim's death was due to asphyxia; 80 a gun, flashlight, and bottle of liquor, in a prosecution for robbery; 81 a knife allegedly used by defendant during rape; 82 an obscene film; 83 adult magazines and various sexual paraphernalia, in a prosecution for child molestation; 84 fraudulent checks; 85 items used for the alteration of postal money orders; 86 items used for counterfeiting; 87 and a letter upon which blood had fallen. 88

§ 939 --Articles in actual or constructive possession of accused [SUPPLEMENT]

Case authorities:

A weapon may be admissible as evidence even though there is no proof that it was the actual murder weapon; all that is required is a sufficient foundation demonstrating circumstances justifying an inference of the likelihood that the weapon was used in the course of the crime charged. *Commonwealth v Murphy* (1995, Pa) 657 A2d 927.

Footnotes

Footnote 72. *Bryant v United States* (CA5 Tex) 252 F2d 746; *Banning v United States* (CA6 Mich) 130 F2d 330, cert den 317 US 695, 87 L Ed 556, 63 S Ct 434; *United States v Thompson* (CA7 Ill) 807 F2d 585, 22 Fed Rules Evid Serv 140, cert den 480 US 938, 94 L Ed 2d 774, 107 S Ct 1585; *Sanders v United States* (CA10 NM) 238 F2d 145; *White v State*, 249 Ala 501, 31 So 2d 335; *People v Chapman* (3rd Dist) 261 Cal App 2d 149, 67 Cal Rptr 601; *Williams v State* (Fla) 110 So 2d 654, cert den 361 US 847, 4 L Ed 2d 86, 80 S Ct 102; *Vaughn v State*, 97 Ga App 406, 103 SE2d 101; *People v Boozer*, 12 Ill 2d 184, 145 NE2d 619; *State v Leftwich*, 216 Iowa 1226, 250 NW 489; *Jones v Commonwealth*, 249 Ky 502, 60 SW2d 991; *Reynolds v State*, 219 Md 319, 149 A2d 774; *Commonwealth v Bonomi*, 335 Mass 327, 140 NE2d 140; *Strickland v State*, 220 Miss 71, 70 So 2d 1; *State v Johnson*, 37 NM 280, 21 P2d 813, 89 ALR 1368; *Rasbury v State* (Okla Crim) 303 P2d 465; *State v Parsons*, 181 W Va 56, 380 SE2d 223.

Footnote 73. *State v Simmons* (Idaho App) 818 P2d 787; *Reaves v State* (Ind) 586 NE2d 847; *State v Lambert* (La App 3d Cir) 503 So 2d 739; *McGilvery v State* (Miss) 497 So 2d 67, appeal after remand, en banc (Miss) 540 So 2d 41; *State v Schwartz*, 239 Neb 84, 474 NW2d 461; *People v Clemons* (1st Dept) 171 App Div 2d 517, 567 NYS2d 244, app den 78 NY2d 964, 574 NYS2d 943, 580 NE2d 415; *State v Barry*, 43 Wash 2d 807, 264 P2d 233.

Footnote 74. *United States v Gonzalez* (CA2 NY) 922 F2d 1044, cert den (US) 116 L Ed 2d 751, 112 S Ct 660; *United States v Patterson* (DC Md) 691 F Supp 908; *United States v Rodriguez-Garcia* (CA10 Utah) 983 F2d 1563, 37 Fed Rules Evid Serv 1101; *People v McLemore* (5th Dist) 203 Ill App 3d 1052, 149 Ill Dec 187, 561 NE2d 465.

Money found on a defendant at time of his arrest for delivery of a controlled substance was not admissible because it was not relevant to the charged activities which allegedly

occurred 8 months earlier. *Gonzales v State*, 303 Ark 537, 798 SW2d 101.

Footnote 75. *People v McLean* (2d Dept) 184 App Div 2d 591, 584 NYS2d 645, app den 80 NY2d 907, 588 NYS2d 832, 602 NE2d 240.

Footnote 76. *Frost v State*, 225 Ala 232, 142 So 427; *Jones v State*, 210 Ga 94, 78 SE2d 18; *State v Worthy* (La App 1st Cir) 532 So 2d 541, cert den (La) 538 So 2d 610; *State v McCormack* (Mo) 263 SW2d 344; *State v Johnson*, 37 NM 280, 21 P2d 813, 89 ALR 1368.

Footnote 77. *State v Williams*, 245 Iowa 494, 62 NW2d 742; *Phillips v State*, 157 Neb 419, 59 NW2d 598, 58 ALR2d 1141.

Footnote 78. *Commonwealth v O'Toole*, 326 Mass 35, 92 NE2d 618.

Footnote 79. *Benner v State* (Ind) 580 NE2d 210.

Footnote 80. *Callahan v State* (Ala App) 557 So 2d 1292, affd (Ala) 557 So 2d 1311, reh den, without op (Ala) 1990 Ala LEXIS 21 and cert den 498 US 881, 112 L Ed 2d 176, 111 S Ct 216.

Footnote 81. *State v Leftwich*, 216 Iowa 1226, 250 NW 489.

Footnote 82. *Lee v United States* (Dist Col App) 471 A2d 683; *Commonwealth v Ascolillo*, 405 Mass 456, 541 NE2d 570.

Footnote 83. *State v Strutt*, 4 Conn Cir 501, 236 A2d 357.

Footnote 84. *Holden v State*, 202 Ga App 558, 414 SE2d 910, 103-23 Fulton County D R 15B.

But see *Collins v State* (Miss) 513 So 2d 877 where the court reversed defendant's conviction of sexual battery finding that the admission of a magazine showing photographs of nude women found in defendant's shed was highly inflammatory, irrelevant, and not part of the res gestae of the crime.

Footnote 85. *England v State*, 249 Ind 446, 233 NE2d 168.

Footnote 86. *United States v Field* (CA7 Ind) 875 F2d 130, 28 Fed Rules Evid Serv 149, reh den (CA7) 1989 US App LEXIS 11709.

Footnote 87. *United States v Rodriguez Alvarado* (CA1 Puerto Rico) 985 F2d 15.

Footnote 88. *State v Shawley*, 334 Mo 352, 67 SW2d 74.

§ 940 Clothing

[View Entire Section](#)

The clothing of a person is admissible in evidence to the extent that it is relevant to the inquiry and helpful in resolving a fact in issue. 89 Accordingly, the clothing of a defendant 90 or third person, 91 if relevant, is admissible. The clothing must be identified and shown to be in virtually the same condition as at the time of the crime. 92

◆ Observation: The introduction in evidence of clothing seized by the police of one suspected of a felony does not compel the defendant to become a witness against himself in violation of the Fifth Amendment. 93

Footnotes

Footnote 89. *Clarke v Bruckner* (DC VI) 93 FRD 666, 11 Fed Rules Evid Serv 305 (civil action for assault and battery); *Caldwell v United States* (CA8 Mo) 338 F2d 385, cert den 380 US 984, 14 L Ed 2d 277, 85 S Ct 1354; *Burton v State* (Ala App) 521 So 2d 91; *Bartley v State*, 210 Ark 1061, 199 SW2d 965; *People v Clark*, 104 Cal App 2d 634, 232 P2d 290; *Jorgenson v People*, 174 Colo 144, 482 P2d 962; *Stanley v State*, 240 Ga 341, 241 SE2d 173, cert den 439 US 882, 58 L Ed 2d 194, 99 S Ct 218, 99 S Ct 219; *State v Hokenson*, 96 Idaho 283, 527 P2d 487; *People v McCalvin*, 55 Ill 2d 161, 302 NE2d 342, cert den 416 US 909, 40 L Ed 2d 114, 94 S Ct 1618; *Mueller v State* (Ind) 517 NE2d 788; *Boyd v State* (Ind) 494 NE2d 284, cert den 479 US 1046, 93 L Ed 2d 860, 107 S Ct 910; *State v Mitchell*, 181 Kan 193, 310 P2d 1063, 68 ALR2d 895; *Poe v Commonwealth* (Ky) 314 SW2d 199; *Poe v Commonwealth* (Ky) 301 SW2d 900; *State v Copeland* (La) 530 So 2d 526, later proceeding (La) 532 So 2d 1385 and cert den 489 US 1091, 103 L Ed 2d 860, 109 S Ct 1558, reh den 490 US 1077, 104 L Ed 2d 655, 109 S Ct 2092; *Shanks v State*, 185 Md 437, 45 A2d 85, 163 ALR 931; *Commonwealth v Stroud*, 375 Mass 265, 376 NE2d 849; *State v Schluter* (Minn) 281 NW2d 174; *State v Duncan* (Mo App) 540 SW2d 130; *MacAvoy v State*, 144 Neb 827, 15 NW2d 45, cert den 323 US 804, 89 L Ed 642, 65 S Ct 559; *State v Gallegos*, 45 NM 404, 115 P2d 626; *People v Sears* (3d Dept) 58 App Div 2d 693, 395 NYS2d 756; *State v Elkerson*, 304 NC 658, 285 SE2d 784; *Bowman v State* (Okla Crim) 585 P2d 1373, cert den 440 US 920, 59 L Ed 2d 471, 99 S Ct 1243, post-conviction proceeding (Okla Crim) 789 P2d 631; *Commonwealth v Garnett*, 458 Pa 4, 326 A2d 335; *State v Pepper*, 103 RI 310, 237 A2d 330; *State v Bell*, 302 SC 18, 393 SE2d 364, cert den 498 US 881, 112 L Ed 2d 182, 111 S Ct 227; *England v State*, 196 Tenn 186, 264 SW2d 815; *Bradford v State* (Tex Crim) 608 SW2d 918; *State v Rice*, 110 Wash 2d 577, 757 P2d 889, cert den 491 US 910, 105 L Ed 2d 707, 109 S Ct 3200, post-conviction proceeding 118 Wash 2d 876, 828 P2d 1086, cert den (US) 121 L Ed 2d 344, 113 S Ct 421 and (criticized on other grounds by *In re Rupe*, 115 Wash 2d 379, 798 P2d 780).

Although it was error in murder prosecution to admit in evidence blood-stained shirt and undershirt worn by slain police officer, where State's evidence concerning distance between shotgun and victim's body did not require admission of those items, in view of compelling evidence of guilt, the error did not produce an unjust result. *State v Rose*, 112 NJ 454, 548 A2d 1058, appeal after remand 120 NJ 61, 576 A2d 235.

Footnote 90. *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 18 L Ed 2d 782,

87 S Ct 1642; *Caldwell v United States* (CA8 Mo) 338 F2d 385, cert den 380 US 984, 14 L Ed 2d 277, 85 S Ct 1354; *Pate v State*, 152 Ark 553, 239 SW 27; *State v Greene*, 209 Conn 458, 551 A2d 1231, 80 ALR4th 315; *Milligan v State*, 109 Fla 219, 147 So 260; *Hatcher v State*, 176 Ga 454, 168 SE 278; *Martin v State* (Ind) 528 NE2d 461; *State v Leftwich*, 216 Iowa 1226, 250 NW 489; *State v Mills* (La App 2d Cir) 505 So 2d 933, cert den (La) 508 So 2d 65; *State v Cruz* (Me) 594 A2d 1082; *Cody v State*, 167 Miss 150, 148 So 627; *State v Evans* (Mo) 237 SW2d 149; *State v Gaters* (Mo) 39 SW2d 548; *State v Juhl*, 234 Neb 33, 449 NW2d 202; *State v Gambetta*, 66 Nev 317, 208 P2d 1059; *State v Papitsas*, 80 NJ Super 420, 194 A2d 8; *State v Colson*, 274 NC 295, 163 SE2d 376, cert den 393 US 1087, 21 L Ed 2d 780, 89 S Ct 876; *Coleman v State*, 151 Tex Crim 582, 209 SW2d 925; *State v Parsons*, 181 W Va 56, 380 SE2d 223.

A bulletproof vest is admissible in a firearms case to establish that the defendant knew of the existence of other guns and ammunition. *United States v Johnson* (CA8 Mo) 857 F2d 500.

Footnote 91. *Gholston v State*, 221 Ala 556, 130 So 69; *Gambrel v Commonwealth*, 241 Ky 39, 43 SW2d 335.

Footnote 92. *Lee v State* (Ala App) 364 So 2d 687; *Teague v State*, 269 Ind 103, 379 NE2d 418; *State v Ubben* (Iowa) 186 NW2d 625; *State v Parker*, 261 Iowa 88, 151 NW2d 505; *State v Nelson*, 261 La 153, 259 So 2d 46; *State v Cox* (La App 1st Cir) 464 So 2d 439; *State v Sprout* (Mo) 365 SW2d 572; *State v Harrison* (App) 81 NM 623, 471 P2d 193, cert den 81 NM 668, 472 P2d 382; *State v Gray* (App) 79 NM 424, 444 P2d 609.

Footnote 93. *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642.

§ 941 --Clothing of victim

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Clothing of a victim has been deemed admissible to show: the nature of his wounds or the manner in which he died; 94 his position at the time of the crime; 95 the course of a bullet; 96 the use of force by the defendant; 97 or to disprove the defendant's claim that he acted in self-defense, 98 or that the victim died from a heart attack. 99

Clothing worn by the deceased at the time of a fatal assault upon him is not rendered inadmissible solely because it is cumulative of other evidence. 1

Footnotes

Footnote 94. *Scroggin v State* (Ala App) 529 So 2d 1025; *Berard v State* (Ala App) 402 So 2d 1044, appeal after remand, reh overr (Ala App) 486 So 2d 458, remanded on other

grounds (Ala) 486 So 2d 476, on remand (Ala App) 486 So 2d 482; *White v State*, 290 Ark 130, 717 SW2d 784, post-conviction proceeding (Ark) 1988 Ark LEXIS 88; *People v Dukett*, 56 Ill 2d 432, 308 NE2d 590, cert den 419 US 965, 42 L Ed 2d 180, 95 S Ct 226 and appeal after remand (4th Dist) 33 Ill App 3d 863, 338 NE2d 487; *Huspon v State* (Ind) 545 NE2d 1078; *State v Nowlin* (Iowa) 244 NW2d 596; *Brown v Commonwealth* (Ky) 445 SW2d 845; *State v Copeland* (La) 530 So 2d 526, later proceeding (La) 532 So 2d 1385 and cert den 489 US 1091, 103 L Ed 2d 860, 109 S Ct 1558, reh den 490 US 1077, 104 L Ed 2d 655, 109 S Ct 2092; *Commonwealth v Zagranski*, 408 Mass 278, 558 NE2d 933; *Sloan v State* (Miss) 368 So 2d 228; *State v Whitfield* (Mo App) 650 SW2d 305; *State v Blakeslee*, 131 Mont 47, 306 P2d 1103; *State v Horton*, 299 NC 690, 263 SE2d 745; *Ellis v State* (Okla Crim) 651 P2d 1057; *Commonwealth v Yount*, 455 Pa 303, 314 A2d 242; *Ruben v State* (Tex Crim) 645 SW2d 794, reh den (Mar 9, 1983); *State v Rice*, 110 Wash 2d 577, 757 P2d 889, cert den 491 US 910, 105 L Ed 2d 707, 109 S Ct 3200, post-conviction proceeding 118 Wash 2d 876, 828 P2d 1086, cert den (US) 121 L Ed 2d 344, 113 S Ct 421 and (criticized on other grounds by *In re Rupe*, 115 Wash 2d 379, 798 P2d 780).

Bloodstained clothing taken from victims home which was the scene of the crime was properly admitted into evidence as the clothing was relevant to the central issue as to whether the deceased died as a result of alcohol intoxication or as a result of criminal agency. *Kniep v State* (Miss) 525 So 2d 385.

Footnote 95. *Jones v State* (Ala App) 362 So 2d 1303; *Hannah v State*, 183 Ark 810, 38 SW2d 1090; *Perez v State*, 258 Ga 343, 369 SE2d 256; *People v Johnson* (3d Dist) 108 Ill App 2d 81, 246 NE2d 859; *State v Wallace* (Mo) 504 SW2d 67, cert den 419 US 847, 42 L Ed 2d 76, 95 S Ct 84; *State v Elkerson*, 304 NC 658, 285 SE2d 784; *Rouse v State* (Okla Crim) 594 P2d 787; *Commonwealth v Johnson*, 450 Pa 575, 301 A2d 632; *Garza v State*, 159 Tex Crim 105, 261 SW2d 575.

Footnote 96. *Roberts v State*, 258 Ala 534, 63 So 2d 584; *Butler v State*, 264 Ark 243, 570 SW2d 272; *State v Mitchell*, 181 Kan 193, 310 P2d 1063, 68 ALR2d 895; *Shanks v State*, 185 Md 437, 45 A2d 85, 163 ALR 931; *People v Becker*, 300 Mich 562, 2 NW2d 503, 139 ALR 1171; *Overstreet v State* (Miss) 369 So 2d 275; *State v Evans*, 247 Mont 218, 806 P2d 512, post-conviction proceeding 250 Mont 172, 819 P2d 156; *State v Elkerson*, 304 NC 658, 285 SE2d 784; *Buntin v State* (Okla Crim) 403 P2d 237; *State v Richards*, 182 W Va 664, 391 SE2d 354.

Footnote 97. *State v Marra*, 222 Conn 506, 610 A2d 1113; *Coldiron v Commonwealth* (Ky) 263 SW2d 125; *State v Addington* (Me) 518 A2d 449; *State v Martin* (Mo App) 530 SW2d 447; *State v Blakeslee*, 131 Mont 47, 306 P2d 1103; *State v Barker*, 53 Ohio St 2d 135, 7 Ohio Ops 3d 213, 372 NE2d 1324, cert den 439 US 913, 58 L Ed 2d 260, 99 S Ct 285; *Revard v State* (Okla Crim) 332 P2d 967, cert den 359 US 1000, 3 L Ed 2d 1030, 79 S Ct 1138; *Sledge v State*, 40 Okla Crim 421, 269 P 385; *Commonwealth v Nahodil*, 462 Pa 301, 341 A2d 91; *Commonwealth v McNeal*, 456 Pa 394, 319 A2d 669.

Bloodstained panties were properly admitted in rape case as relevant to show that sexual intercourse did occur. *Commonwealth v Meadows*, 381 Pa Super 354, 553 A2d 1006, app den 524 Pa 618, 571 A2d 381; *Rhoden v State* (Tenn Crim) 816 SW2d 56, habeas corpus proceeding (MD Tenn) 1994 US Dist LEXIS 3241.

Footnote 98. *State v Briggs*, 112 Ariz 379, 542 P2d 804; *Poe v Commonwealth* (Ky) 314 SW2d 199; *People v Becker*, 300 Mich 562, 2 NW2d 503, 139 ALR 1171; *State v*

Evans, 247 Mont 218, 806 P2d 512, post-conviction proceeding 250 Mont 172, 819 P2d 156; Suggs v State (Okla Crim) 509 P2d 1374; Jones v State, 70 Wis 2d 41, 233 NW2d 430.

Bulletproof vest was properly admitted as relevant to rebut self-defense claim made by defendant. Kutscheid v State (Ind) 592 NE2d 1235.

Footnote 99. North v State (Fla) 65 So 2d 77, affd 346 US 932, 98 L Ed 423, 74 S Ct 376, reh den 347 US 924, 98 L Ed 1078, 74 S Ct 513.

Annotation: Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 ALR2d 903.

Practice References 40 Am Jur Trials 501, Forensic Pathology in Homicide Cases §§ 40, 42.

Footnote 1. Flannagin v State, 289 Ala 177, 266 So 2d 643; Jorgenson v People, 174 Colo 144, 482 P2d 962; Richards v State, 251 Ga 447, 306 SE2d 302.

Reversible error occurred where prosecution introduced into evidence bloodstained shirt worn by deceased at time of shooting, it being cumulative evidence which tended only to arouse and inflame emotions of jury. State v Steele, 120 Ariz 462, 586 P2d 1274.

While articles of murder victim's clothing should have been excluded as largely irrelevant in light of investigators testimony that the murder victim had been found nude, the excludible items of personal clothing were not particularly inflammatory nor likely to divert the jury from its focus on aggravating and mitigating factors and therefore the admission of the clothing was harmless error. State v Bey, 129 NJ 557, 610 A2d 814.

§ 942 Surgical and prosthetic devices

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In a personal injury action, surgical and prosthetic appliances worn by the injured party are admissible in evidence, at the discretion of the trial court, provided that they are not unduly inflammatory or offensive and are not such as will unjustly arouse sympathy for or prejudice against a party. 2 In some cases, the device, although not formally offered or admitted in evidence, is exhibited to the jury, alluded to by the witnesses, and treated by the court as if admitted, with no issue being made as to the basic impropriety of displaying and alluding to objects not admitted in evidence. 3

Footnotes

Footnote 2. Bridges v Clements (Ala) 580 So 2d 1346 (leg brace); Norman v Norman, 103 Ga App 626, 120 SE2d 42 (surgical pins); Fedt v Oak Lawn Lodge, Inc. (1st Dist) 132 Ill App 3d 1061, 88 Ill Dec 154, 478 NE2d 469 (splint); Darling v Charleston

Community Memorial Hospital (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204 (artificial leg); Glowacki v Holste (Mo) 295 SW2d 135 (leg brace).

In a suit for personal injuries received in an automobile accident, the plaintiff was allowed to show his artificial leg to the jury by rolling up leg of britches, but was not allowed to demonstrate how artificial leg functioned to show means by which it was attached to body. *Brown v Billy Marlar Chevrolet, Inc.* (Ala) 381 So 2d 191.

Upon an assignment of error for the admission in evidence of a Thomas collar, a back brace or corset, and a pelvic traction brace, for the reason that "such exhibits, in themselves, had the effect of unduly prejudicing the jury against appellant, and had the effect of unduly arousing the jury's sympathy for respondent," the court said that since the exhibits in question were considered necessary in the treatment of the plaintiff's injuries and caused her additional discomfort, pain, and inconvenience, she was entitled to have them admitted in evidence to show how the injuries were treated by her physician and the effect of such treatment upon her. *Hampton v Rautenstrauch* (Mo) 338 SW2d 105, 83 ALR2d 1260.

Annotation: Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, 83 ALR2d 1271 § 3.

Footnote 3. *Burnett v Caho* (3d Dist) 7 Ill App 3d 266, 285 NE2d 619 (artificial eye); *Dinwiddie v Siefkin*, 299 Ill App 316, 20 NE2d 130 (plaster cast); *McMann v Reliable Furniture Co.*, 153 Me 383, 140 A2d 736 (exact replica of "Blount blade" attached to plaintiff's leg).

The exhibition of objects or items not in evidence is discussed in 75 Am Jur 2d, Trial § 510.

Annotation: Permissibility of in-court demonstration to show effect of injury in action for bodily injury, 82 ALR4th 980.

83 ALR2d 1271 § 4.

§ 943 Samples

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While it is generally proper, when a fact in issue may be explained by the production of an article or object to which testimony relates, to bring such article or object into court and exhibit it to the jury, 4 the admissibility of samples to prove the condition, quality, or nature of an article, substance, or mass which is not before the court is subject to certain limitations and qualifications. 5 Not only must the samples be properly identified as to source, and shown to be in the same or substantially the same condition as they were at the time the sample's condition became material to the issues involved, 6

but they must also appear fairly representative of the whole, where the samples are offered to show the condition of a large amount of material. 7

◆ **Observation:** A court may properly take judicial notice that in statistical analysis, the sample size of 30 or more is generally recognized as sufficient to guarantee normality of the distribution of sample means. 8 In some cases, a further qualification exists which requires that the circumstances and uses of the sample, at the time of its taking, must be similar to the circumstances and uses of the object or mass whose condition, nature, or quality it purports to establish. 9

§ 943 ----Samples [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Footnotes

Footnote 4. § 936.

Footnote 5. Kunzman v Cherokee Silo Co., 253 Iowa 885, 114 NW2d 534, 95 ALR2d 673.

Annotation: Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681.

Footnote 6. § 948.

Footnote 7. Rite Fabrics, Inc. v Stafford–Higgins Co. (SD NY) 366 F Supp 1, 13 UCCRS 588; Leonard v Uniroyal, Inc. (CA6 Ky) 765 F2d 560, CCH Prod Liab Rep ¶ 10530, 18 Fed Rules Evid Serv 718; E. K. Hardison Seed Co. v Jones (CA6) 149 F2d 252.

Annotation: 95 ALR2d 681 § 5[a].

Footnote 8. Texpor Traders, Inc. v Trust Co. Bank (SD NY) 720 F Supp 1100, 10 UCCRS2d 1227.

For discussion of judicial notice, generally, see §§ 24 et seq.

Footnote 9. Yedor v Centre Properties, Inc. (1st Dist) 173 Ill App 3d 132, 122 Ill Dec 916, 527 NE2d 414.

In action for breach of contract to buy rice, the trial court properly excluded rice samples from evidence, where the samples were not part of original testing samples taken by defendant but were selected from six of eight rejected containers of rice after the decision had been made to reject rice. Delta Rice Mill, Inc. v General Foods Corp. (CA8 Ark) 763 F2d 1001.

In a wrongful death action resulting from a boy's drowning in oil storage tank, the trial court's refusal to admit a sample of oil to show the extent of offensive odor emanating

from the tank was not an abuse of discretion where, although the sample was from the same general area or pool, it came from different tank battery, it was in gallon cans as opposed to large tank, and the difference in temperatures outside and inside containers might affect odors. *Talley v J & L Oil Co.*, 224 Kan 214, 579 P2d 706.

Annotation: 95 ALR2d 681 § 5[b].

§ 944 --Admissibility as effected by intended use as evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is within the trial court's discretion to determine whether or not to permit a juror to inspect a sample. 10 Inspection evidence is properly received where it is both relevant and probative, where better evidence cannot be expected, and where the dangers of its use are small in comparison to its advantages. 11 Samples whose admission in evidence might otherwise be questionable have been properly received in a number of cases where they were offered to illustrate or explain testimony, the court basing its conclusion on the value of the exhibit to the jury's determination of the issues, as compared with the possible harm resulting from the introduction of the evidence. 12 Moreover, a sample whose admission might otherwise constitute reversible error may be properly received in evidence when offered in rebuttal or upon cross-examination on an issue rendered material by evidence previously admitted. 13

There appears to be some agreement, however, that upon a question of the good merchantable quality of goods, a sample is not admissible in evidence in the absence of anything to show that the jury would know what goods would be of good merchantable quality. 14

Footnotes

Footnote 10. *Holloway v Evans*, 55 NM 601, 238 P2d 457.

Footnote 11. *Holloway v Evans*, 55 NM 601, 238 P2d 457.

In an action for damages to livestock and crops claimed to have resulted from salt water escaping from the defendants' oil-producing properties into a creek flowing through the plaintiff's land, the admission in evidence of an identified bottle of salt water from the creek was upheld in *Greis v Mitchell*, 185 Okla 136, 90 P2d 894, over the defendants' complaint that the degree of salt therein was not definitely shown, where a veterinarian who tested the polluted water by taste testified that the water, if used for drinking purposes, would kill the stock.

Annotation: Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681 § 7.

Footnote 12. *Johnston v Pears*, 117 Cal App 208, 3 P2d 617; *Rust v Guinn* (Ind App)

In personal injury action for damages arising from automobile whiplash injury, trial court properly admitted automobile seat with headrest of same model car but different year, offered to discredit testimony of injured plaintiff, where manner in which plaintiff sustained injury was material fact in issue. *Masters v Dewey* (App) 109 Idaho 576, 709 P2d 149.

Annotation: 95 ALR2d 681 § 10.

Footnote 13. *Rich v Cooper*, 234 Or 300, 380 P2d 613.

Annotation: 95 ALR2d 681 § 9.

Footnote 14. *Trego v Arave*, 20 Idaho 38, 116 P 119; *Pacific Coast Elevator Co. v Bravinder*, 14 Wash 315, 44 P 544.

Annotation: 95 ALR2d 681 § 7.

**b. Authentication and Identification of Objects, Articles, Samples, and Specimens
[945-949]**

(1). In General [945-947]

§ 945 Generally; objects readily identifiable and resistant to change

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Authentication and identification are aspects of relevancy that are a condition precedent to admissibility. 15 The requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. 16 At the threshold, the proponent must make a prima facie showing of authenticity sufficient to enable a reasonable juror to find in favor of authenticity. 17 Article or objects which relate to or tend to explain the issues or form a part of the transaction are admissible in evidence after a showing that the proposed exhibit is relevant and material, 18 that the proposed exhibit is what it purports to be, and it is in substantially the same condition as it was at the time of the crime, 19 or occurrence. 20 The trial court has discretion to exclude an exhibit if evidence as to its accuracy is conflicting or if significant changes have occurred between the time of the event and the time the exhibit was prepared. 21 Physical objects based on post-event inspection of those objects are ordinarily inadmissible unless the proponent produces evidence showing that the objects and conditions expected remained essentially unchanged in the interim. 22

As a general rule, if the proffered evidence is unique, readily identifiable and relatively resistant to change, that foundation need only consist of testimony by a witness with knowledge that the evidence is what the proponent claims. 23 The credibility of authenticating witnesses is for the trier of fact to determine. 24

The determination whether a proper foundation has been laid for the introduction of an exhibit into evidence rests within the discretion of the trial court, 25 and a higher court reviews a lower court's authentication ruling in a deferential manner, testing only for mistake of law 26 or a clear abuse of discretion. 27 Once the judge admits the evidence, any weakness in positive identification goes to the weight rather than the admissibility of the evidence, and is thus reserved for the jury. 28

§ 945 ----Generally; objects readily identifiable and resistant to change [SUPPLEMENT]

Case authorities:

Letter rogatory issued by Venezuelan court requesting judicial assistance in verifying certain documents did not fail to meet due process requirements by failing to adequately identify individual to be examined since Rule 30 permitted domestic corporation to designate company officials to testify to authenticity of documents in question. In re Letter Rogatory from the First Court of First Instance in Civil Matters (1995, CA5 Tex) 42 F3d 308.

Inspector's testimony that he became familiar with defendant's voice during two-month wiretap surveillance was sufficient to authenticate contents of transcription which identified voice as defendant's; rule did not require him to have been familiar with defendant's voice prior to commencing wiretapping activity. *United States v Puentes* (1995, CA11 Fla) 50 F3d 1567, 9 FLW Fed C 25.

Certain "linesheets" prepared by monitoring agent during electronic telephone surveillance (containing master tape numbers, dates used, sequential numbers of calls, beginning and ending times of conversations, and corresponding counter numbers on recorder) were properly admitted in criminal trial as business records under CLS CPLR § 4518 since linesheets served important administrative function in daily conduct of police surveillance operation, they were required to be made under court order, their purpose was to maintain inventory of surveillance tapes and to safeguard them against tampering, and they were included in progress reports that were filed regularly with judge supervising wiretap order. *People v Guidice* (1994) 83 NY2d 630, 612 NYS2d 350, 634 NE2d 951.

Prerequisite to admissibility of all evidence is that it meet authentication requirements of statute which states that requirements are satisfied by evidence sufficient to support finding that matter in question is what its proponent claims (Stats § 901.01). *Nischke v Farmers & Merchants Bank & Trust* (1994, App) 187 Wis 2d 96, 522 NW2d 542.

Footnotes

Footnote 15. *State v Lavers*, 168 Ariz 376, 814 P2d 333, 91 Ariz Adv Rep 38, cert den

(US) 116 L Ed 2d 282, 112 S Ct 343.

Footnote 16. FRE Rule 901(a); Uniform Rules of Evidence, Rule 901(a).

Footnote 17. *Siegal v American Honda Motor Co.* (CA1 Mass) 921 F2d 15, 31 Fed Rules Evid Serv 1513.

Footnote 18. For discussion of general principles of admissibility, including limitations and relevance, see §§ 301 et seq.

Footnote 19. *United States v Lott* (CA7 Ill) 854 F2d 244, 26 Fed Rules Evid Serv 709; *United States v Dickerson* (CA9 Cal) 873 F2d 1181; *Holder v State* (Ala App) 584 So 2d 872, reh den, without op (Ala App) 1991 Ala Crim App LEXIS 1113; *State v Kodesh* (App) 122 Idaho 756, 838 P2d 885; *Reaves v State* (Ind) 586 NE2d 847; *State v Sexton*, 240 Neb 466, 482 NW2d 567; *State v Haugen* (ND) 448 NW2d 191; *State v Madsen*, 28 Utah 2d 108, 498 P2d 670; *State v Mitchell*, 56 Wash App 610, 784 P2d 568.

Real evidence is sufficiently authenticated if evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court. *Commonwealth v Schwartz*, 419 Pa Super 251, 615 A2d 350, app den (Pa) 629 A2d 1379.

Practice References Custody of the Evidence. 40 Am Jur Trials 503, Forensic Pathology in Homicide Cases § 39.

Footnote 20. *Jones v Pizza Boy, Oxford, Inc.* (Ala) 387 So 2d 819; *Priest v McConnell*, 219 Neb 328, 363 NW2d 173; *Victory Park Apartments, Inc. v Axelson* (ND) 367 NW2d 155; *Vander Veer v Toyota Motor Distributors, Inc.*, 282 Or 135, 577 P2d 1343.

Footnote 21. *State v James*, 321 NC 676, 365 SE2d 579.

Footnote 22. *Yedor v Centre Properties, Inc.* (1st Dist) 173 Ill App 3d 132, 122 Ill Dec 916, 527 NE2d 414.

Footnote 23. *United States v Porter* (CA8 Mo) 831 F2d 760, cert den 484 US 1069, 98 L Ed 2d 1001, 108 S Ct 1037; *United States v Johnson* (CA10 Okla) 977 F2d 1360, 36 Fed Rules Evid Serv 1165, corrected (CA10 Okla) slip op and cert den (US) 122 L Ed 2d 170, 113 S Ct 1024; *United States v Cardenas* (CA10 NM) 864 F2d 1528, 27 Fed Rules Evid Serv 658, cert den 491 US 909, 105 L Ed 2d 705, 109 S Ct 3197 and (criticized on other grounds by *United States v Pineda-Ortuno* (CA5 Tex) 952 F2d 98); *Green v State*, 206 Ga App 42, 424 SE2d 646, 92 Fulton County D R 2597; *State v Simmons* (Idaho App) 818 P2d 787; *People v Hominick* (2d Dist) 177 Ill App 3d 18, 126 Ill Dec 422, 531 NE2d 1049; *Scherer v State* (Ind) 563 NE2d 584; *Daniel v State* (Ind) 524 NE2d 1275; *State v Daniels* (La App 2d Cir) 614 So 2d 97, cert den (La) 619 So 2d 573; *Commonwealth v Andrews*, 403 Mass 441, 530 NE2d 1222; *State v Bellikka* (Minn App) 490 NW2d 660; *State v Evans*, 247 Mont 218, 806 P2d 512, post-conviction proceeding 250 Mont 172, 819 P2d 156; *People v Love* (4th Dept) 187 App Div 2d 1030, 591 NYS2d 111, app den 81 NY2d 888, 597 NYS2d 950, 613 NE2d 982; *State v Smith*, 291 NC 505, 231 SE2d 663; *State v White* (Cuyahoga Co) 65 Ohio App 3d 564, 584 NE2d 1255; *Holder v State* (Tex App Austin) 837 SW2d 802, petition for discretionary review ref (Dec 23, 1992).

Knife is a nonfungible distinct physical object for which no custodial proof is required for admission. *Stubbs v State*, 201 Ga App 546, 411 SE2d 525, 102-200 Fulton County D R 14B.

Testimony by police officer authenticating fingerprint card was sufficient and fact that the card bearing inked fingerprints was delivered to and retained by officer's superiors for unstated period of time was not sufficient, in absence of any evidence of tampering, to require proof of chain of custody. *State v Olivera*, 57 Hawaii 339, 555 P2d 1199.

If the offered item possesses characteristics which are fairly unique and readily identifiable, and is the substance of which the item is composed is relatively impervious to change, trial court has broad discretion in determining whether to admit it merely upon the basis of testimony the item is the one in question and is in a substantially unchanged condition. *Canaan v State (Ind)* 541 NE2d 894, cert den 498 US 882, 112 L Ed 2d 185, 111 S Ct 230.

Where witness testified that bullet was that removed by doctor in his presence from brain of victim during autopsy, and that it was in same condition when offered in evidence as when removed, proof of chain of custody was unnecessary. *State v Malone (Mo)* 694 SW2d 723, cert den 476 US 1165, 90 L Ed 2d 733, 106 S Ct 2292, postconviction proceeding (Mo App) 747 SW2d 695, post-conviction proceeding (Mo) 798 SW2d 149, cert den 500 US 929, 114 L Ed 2d 128, 111 S Ct 2044, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2844.

Trial court erred in excluding soft drink bottle cap offered into evidence by plaintiff in products liability action since a sufficient foundation was laid for their admissibility by witness testimony that the bottle and cap were the ones in question, and also that their condition was basically the same as that it was at the time of the happening of the accident. *Hansen v Coca-Cola Bottling Co. (2d Dept)* 78 App Div 2d 848, 432 NYS2d 723.

An adequate foundation for the admission of rings was provided by a pawn brokers identification of the gold ring stolen from the pawn shop. *State v Iron Necklace (SD)* 430 NW2d 66.

Practice References If the proffered item is reasonably identifiable, the proponent first asks the witness whether the witness can recognize the item, and then asks the witness to specify the physical characteristics that the witness is relying on to identify the item. *Miller v State (Ala App)* 602 So 2d 488, cert den, without op (Ala) 1992 Ala LEXIS 1159.

Footnote 24. *Hansen v Coca-Cola Bottling Co. (2d Dept)* 78 App Div 2d 848, 432 NYS2d 723.

Footnote 25. *State v Romanosky*, 162 Ariz 217, 782 P2d 693, 46 Ariz Adv Rep 5, appeal after remand, remanded on other grounds 176 Ariz 118, 859 P2d 741, 149 Ariz Adv Rep 41; *Dixon v State*, 310 Ark 460, 839 SW2d 173; *State v Mehner (Iowa)* 480 NW2d 872; *Wells v State (Miss)* 604 So 2d 271; *Coleman v State (Miss)* 545 So 2d 3; *State v Douthit (Mo App)* 846 SW2d 761; *State v Zackuse*, 253 Mont 305, 833 P2d 143; *Vander Veer v Toyota Motor Distributors, Inc.*, 282 Or 135, 577 P2d 1343; *State v Wimberly (SD)* 467

NW2d 499; State v Wimberly (SD) 467 NW2d 499; In re Paternity of J.S.C. (App) 135 Wis 2d 280, 400 NW2d 48.

Footnote 26. United States v Ortiz (CA1 Puerto Rico) 966 F2d 707, 35 Fed Rules Evid Serv 1235, cert den (US) 122 L Ed 2d 154, 113 S Ct 1005.

Footnote 27. United States v Collado (CA1 RI) 957 F2d 38, 35 Fed Rules Evid Serv 69; United States v Williams (CA1 Mass) 809 F2d 75, 22 Fed Rules Evid Serv 418, cert den 481 US 1030, 95 L Ed 2d 531, 107 S Ct 1959 and cert den 481 US 1072, 95 L Ed 2d 877, 107 S Ct 2469 and cert den 482 US 906, 96 L Ed 2d 377, 107 S Ct 2484; State v Noble, 109 Ariz 539, 514 P2d 460; State v Pollitt, 205 Conn 61, 530 A2d 155; State v Wilson (App) 120 Idaho 643, 818 P2d 347; People v Hominick (2d Dist) 177 Ill App 3d 18, 126 Ill Dec 422, 531 NE2d 1049; Rust v Guinn (Ind App) 429 NE2d 299; Coleman v State (Miss) 545 So 2d 3; State v Evans, 247 Mont 218, 806 P2d 512, post-conviction proceeding 250 Mont 172, 819 P2d 156; State v Madsen, 28 Utah 2d 108, 498 P2d 670.

Footnote 28. United States v Pressley (CA8 Mo) 978 F2d 1026; United States v Johnson (CA10 Okla) 977 F2d 1360, 36 Fed Rules Evid Serv 1165, corrected (CA10 Okla) slip op and cert den (US) 122 L Ed 2d 170, 113 S Ct 1024; Pierce v State (Ala) 612 So 2d 516, reh den (Ala) 1993 Ala LEXIS 214 and cert den (US) 126 L Ed 2d 158, 114 S Ct 201; State v Amaya-Ruiz, 166 Ariz 152, 800 P2d 1260, 69 Ariz Adv Rep 12, cert den 500 US 929, 114 L Ed 2d 129, 111 S Ct 2044; State v Romanosky, 162 Ariz 217, 782 P2d 693, 46 Ariz Adv Rep 5, appeal after remand, remanded on other grounds 176 Ariz 118, 859 P2d 741, 149 Ariz Adv Rep 41; State v Simmons (Idaho App) 818 P2d 787; Oglesby v State (Ind) 513 NE2d 638, cert den 485 US 1037, 99 L Ed 2d 914, 108 S Ct 1600; State v Dukes (La App 2d Cir) 609 So 2d 1144, cert den (La) 618 So 2d 402; State v Malone (Mo) 694 SW2d 723, cert den 476 US 1165, 90 L Ed 2d 733, 106 S Ct 2292; People v Wynn (3d Dept) 176 App Div 2d 375, 574 NYS2d 83.

A defect or deficiency with respect to proper identification, such as a clerical error, goes to the weight of the evidence and not its admissibility. State v Evans, 247 Mont 218, 806 P2d 512, post-conviction proceeding 250 Mont 172, 819 P2d 156.

The possibility of contamination goes to the weight of the evidence, not its admissibility. State v Richey, 64 Ohio St 3d 353, 595 NE2d 915, reh den 65 Ohio St 3d 1421, 598 NE2d 1172.

§ 946 Objects not readily identifiable and susceptible to change; chain of custody requirements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the evidence is not readily identifiable or when a witness has failed to observe its uniqueness, and is susceptible to alteration by tampering or contamination, the trial court requires a foundation more stringent than in cases involving objects readily identifiable and resistant to change, 29 entailing a chain of custody of the item with sufficient

completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with. 30

The purpose of establishing a chain of custody is to guaranty the integrity of physical evidence, 31 and to prevent the introduction of evidence which is not authentic. 32 The less susceptible an exhibit is to fungibility, alteration or tampering, the less strictly is the chain of custody rule applied. 33 Moreover, according to some courts, chain of custody of physical evidence is irrelevant where the exhibit is positively identified. 34

◆ Observation: In general, proof of the chain of custody is vital to the admissibility of evidence if its relevant characteristics are distinguishable only by scientific test or analyses. 35 Proof of this identity involves showing that the thing was taken 36 from the particular body from which it was supposed to be taken, 37 and that thereafter it was properly kept 38 and, if necessary, transported 39 and delivered 40 to the one who produced it at the trial or the expert who analyzed or examined it. If the "complete chain of evidence" is established, the substance is admissible; 41 otherwise, it is not admissible. 42

◆ Observation: The fixing of bright line chain of custody or authentication rules for all cases is impossible because each case requires a judgmental determination of whether sufficient guaranties exist that the evidence proffered truly relates to those matters or things which are relevant to the case. 43

§ 946 ----Objects not readily identifiable and susceptible to change; chain of custody requirements [SUPPLEMENT]

Case authorities:

Chain of custody for vials of cocaine was established by detective's testimony that envelopes submitted at trial contained two vials informant purchased from defendant—identifying those vials using his initials and case number—and that he personally filled out lab request and placed vials in police evidence locker, by another officer's testimony that he delivered vials from police station to lab, and by forensic chemist's testimony that he received samples from sealed envelope and returned them to sealed envelope upon completing his analysis. *United States v Ricco* (1995, CA4 Va) 52 F3d 58.

Footnotes

Footnote 29. For a discussion of authentication requirements of objects readily identifiable and resistant to change, see § 945.

Footnote 30. *United States v Johnson* (CA10 Okla) 977 F2d 1360, 36 Fed Rules Evid Serv 1165, corrected (CA10 Okla) slip op and cert den (US) 122 L Ed 2d 170, 113 S Ct 1024; *United States v Cardenas* (CA10 NM) 864 F2d 1528, 27 Fed Rules Evid Serv 658, cert den 491 US 909, 105 L Ed 2d 705, 109 S Ct 3197 and (criticized on other grounds by *United States v Pineda-Ortuno* (CA5 Tex) 952 F2d 98); *People v Hernandez* (3d Dist) 229 Ill App 3d 546, 171 Ill Dec 303, 593 NE2d 1123, app den 146 Ill 2d 638, 176 Ill Dec 810, 602 NE2d 464; *State v Evans*, 247 Mont 218, 806 P2d 512, post-conviction

proceeding 250 Mont 172, 819 P2d 156; State v Taylor, 332 NC 372, 420 SE2d 414; State v Wimberly (SD) 467 NW2d 499; State v Wimberly (SD) 467 NW2d 499.

Footnote 31. Lester v State, 82 Md App 391, 571 A2d 897.

Footnote 32. Davasher v State, 308 Ark 154, 823 SW2d 863, cert den (US) 119 L Ed 2d 571, 112 S Ct 2948.

Footnote 33. Reaves v State (Ind) 586 NE2d 847.

Footnote 34. State v Clifford (Mo App) 815 SW2d 3.

Where authentication is based on unique identification, the chain of custody, at best, is relegated to a jury issue. State v Woitkowski, 136 NH 134, 612 A2d 1317.

Footnote 35. Davis v State (Tex App Austin) 831 SW2d 426, petition for discretionary review ref (Sep 30, 1992).

Footnote 36. Parker v State (Fla) 456 So 2d 436, 9 FLW 354, habeas corpus proceeding (Fla) 537 So 2d 969, 13 FLW 695, post-conviction proceeding (Fla) 611 So 2d 1224, 17 FLW S 641; State v La Mere, 103 Idaho 839, 655 P2d 46; Dabney v State (Ind) 498 NE2d 1225; Priest v McConnell, 219 Neb 328, 363 NW2d 173; State v Grier, 307 NC 628, 300 SE2d 351, appeal after remand 314 NC 59, 331 SE2d 669; Selfridge v State (Okla Crim) 723 P2d 986; Lynch v State (Tex App Amarillo) 687 SW2d 76, petition for discretionary review ref (Jan 8, 1986).

In prosecution of defendant for murder, trial court erred in admitting into evidence hair which state represented was from head of deceased, inasmuch as the only testimony concerning the origin of the exhibit was hearsay. Kuntschik v State (Tex App Corpus Christi) 636 SW2d 744.

Annotation: Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216 § 6.

Footnote 37. State v Kwaak, 21 Conn App 138, 572 A2d 1015, app den 215 Conn 811, 576 A2d 540; Andrews v Major, 180 Ga App 393, 349 SE2d 225.

Annotation: 21 ALR2d 1216 § 5.

Footnote 38. Huss v United States (WD Mich) 738 F Supp 1098; Peek v State (Fla) 395 So 2d 492, cert den 451 US 964, 68 L Ed 2d 342, 101 S Ct 2036, later proceeding (Fla) 488 So 2d 52, 11 FLW 175; Burris v State (Ind) 465 NE2d 171, cert den 469 US 1132, 83 L Ed 2d 809, 105 S Ct 816, post-conviction proceeding (Ind) 558 NE2d 1067, habeas corpus den (ND Ind) 845 F Supp 636; State v Lamp (Iowa) 322 NW2d 48, habeas corpus proceeding (CA8 Iowa) 763 F2d 994, cert den 474 US 1009, 88 L Ed 2d 465, 106 S Ct 534.

Trial court properly overruled defendant's objection to admission of blood sample, where evidence showed that officer administered test, filled out the required forms, placed test in "drop box" from which chemist took sample unopened with officer's name and

identification information on it. *State v Pickering* (Me) 491 A2d 560.

Annotation: 21 ALR2d 1216 § 7.

Footnote 39. *Interstate Life & Acci. Ins. Co. v Whitlock*, 112 Ga App 212, 144 SE2d 532; *Ver Steegh v Flaugh*, 251 Iowa 1011, 103 NW2d 718; *Schacht v State*, 154 Neb 858, 50 NW2d 78; *People v Lesinski*, 10 Misc 2d 254, 171 NYS2d 339; *Rodgers v Commonwealth*, 197 Va 527, 90 SE2d 257.

Testimony of state trooper that he received sealed container containing defendant's blood sample from laboratory technologist who took sample, put it in envelope, sealed it, initialed it, watched while envelope was addressed to forensic laboratory, and saw envelope placed, not in U.S. mail, but in regular outgoing mail for his department, was insufficient to establish a chain of custody. *Miller v State* (Ala App) 484 So 2d 1203.

Trial court properly refused to admit portion of defendant's hospital record containing result of blood alcohol test where plaintiff in personal injury action failed to establish required chain of custody of blood sample from withdrawal to testing by failure to offer any evidence as to means by which specimen was sent to and received by laboratory in which it was analyzed. *Fendley v Ford* (Ind App) 458 NE2d 1167.

Annotation: 21 ALR2d 1216 § 9.

Footnote 40. *McGowan v Los Angeles*, 100 Cal App 2d 386, 223 P2d 862, 21 ALR2d 1206; *Parker v State* (Fla) 456 So 2d 436, 9 FLW 354, habeas corpus proceeding (Fla) 537 So 2d 969, 13 FLW 695, post-conviction proceeding (Fla) 611 So 2d 1224, 17 FLW S 641; *Priest v McConnell*, 219 Neb 328, 363 NW2d 173; *State v Johnson* (Tenn Crim) 673 SW2d 877; *Clayton v Metropolitan Life Ins. Co.*, 96 Utah 331, 85 P2d 819, 120 ALR 1117.

Proper chain of custody was established by State as to .30 caliber bullet fragment in jacket which had been removed from skull of victim where firearm examiner testified that he had received fragment from physician who had removed bullet from skull of victim. *Trahan v State* (Ala App) 450 So 2d 1102, habeas corpus proceeding (Ala App) 511 So 2d 280, habeas corpus proceeding (SD Ala) 1990 US Dist LEXIS 17515.

In prosecution for murder, admission of bullet allegedly removed during surgery on victim of shooting was error where, although surgeon testified that he removed bullet and gave it to operating room personnel, and nurse who came on duty after surgery testified that she had taken the bullet marked with the victim's name from a locked cabinet and forwarded it to coroner, no evidence was offered to account for possession of the bullet from the time the physician released it until the time the nurse located it. *People v Garcia* (Colo App) 627 P2d 255.

Annotation: 21 ALR2d 1216 § 10.

Footnote 41. *Harmon v Anderson* (ED Mich) 495 F Supp 341; *United States v Duhart* (CA9 Wash) 496 F2d 941, cert den 419 US 967, 42 L Ed 2d 182, 95 S Ct 230; *McPhearson v State*, 271 Ala 533, 125 So 2d 709; *Blackmon v State* (Ala App) 487 So 2d 1022, appeal after remand (Ala App) 494 So 2d 200, post-conviction proceeding (SD Ala) 1990 US Dist LEXIS 11077, adopted (SD Ala) 1990 US Dist LEXIS 11081; *Cook v*

State, 52 Ala App 159, 290 So 2d 228; State v Romo, 66 Ariz 174, 185 P2d 757; Douglas v State, 286 Ark 296, 692 SW2d 217; Turner v State, 258 Ark 425, 527 SW2d 580; People v Pendarvis (1st Dist) 178 Cal App 2d 239, 2 Cal Rptr 824; Hancock v State, Dept. of Revenue, Motor Vehicle Div. (Colo) 758 P2d 1372; State v Riley, 24 Conn Supp 235, 1 Conn Cir 523, 189 A2d 518; Mealey v State (Del Sup) 347 A2d 651; Parker v State (Fla) 456 So 2d 436, 9 FLW 354, habeas corpus proceeding (Fla) 537 So 2d 969, 13 FLW 695, postconviction proceeding (Fla) 611 So 2d 1224, 17 FLW S 641; Peek v State (Fla) 395 So 2d 492, cert den 451 US 964, 68 L Ed 2d 342, 101 S Ct 2036, later proceeding (Fla) 488 So 2d 52, 11 FLW 175; Cunningham v State, 255 Ga 35, 334 SE2d 656; Allen v State, 248 Ga 676, 286 SE2d 3, appeal after remand 253 Ga 390, 321 SE2d 710, cert den 470 US 1059, 84 L Ed 2d 834, 105 S Ct 1774, later proceeding 471 US 1098, 85 L Ed 2d 837, 105 S Ct 2318 and reh den 475 US 1040, 89 L Ed 2d 358, 106 S Ct 1250; Smith v East Point, 189 Ga App 454, 376 SE2d 215; State v Webb, 76 Idaho 162, 279 P2d 634; People v Saltz (2d Dist) 75 Ill App 3d 477, 30 Ill Dec 945, 393 NE2d 1292; Dabney v State (Ind) 498 NE2d 1225; Arnold v State (Ind) 436 NE2d 288; State v Langlet (Iowa) 283 NW2d 330; State v Roadenbaugh, 234 Kan 474, 673 P2d 1166; State v Crawford, 223 Kan 127, 573 P2d 982, cert den 435 US 930, 55 L Ed 2d 527, 98 S Ct 1504; State v McCabe (La) 420 So 2d 955; State v Harmon (La App 3d Cir) 448 So 2d 264, cert den (La) 450 So 2d 953; State v Thompson (Me) 503 A2d 689; State v Wardwell, 158 Me 307, 183 A2d 896; Commonwealth v Giacomazza, 311 Mass 456, 42 NE2d 506; People v Cords, 75 Mich App 415, 254 NW2d 911; Berendes v Commissioner of Public Safety (Minn App) 382 NW2d 888; Lambert v State (Miss) 462 So 2d 308; State v Hebb (Mo App) 595 SW2d 47; State v Grant, 221 Mont 122, 717 P2d 562; State v Tatreau, 176 Neb 381, 126 NW2d 157; State v Fornier, 103 NH 152, 167 A2d 56; State v Sanchez (App) 98 NM 781, 652 P2d 1232; People v Scalzi (3d Dept) 102 App Div 2d 952, 477 NYS2d 808; People v Porter (3d Dept) 46 App Div 2d 307, 362 NYS2d 249; State v Sloan, 316 NC 714, 343 SE2d 527; State v Gainey, 32 NC App 682, 233 SE2d 671, cert den 292 NC 732, 235 SE2d 786; State v Williams (Lorain Co) 2 Ohio App 3d 289, 2 Ohio BR 320, 441 NE2d 832; Selfridge v State (Okla Crim) 723 P2d 986; Kennedy v State (Okla Crim) 640 P2d 971; Commonwealth v Arizini, 277 Pa Super 27, 419 A2d 643; State v Sarvis, 265 SC 144, 217 SE2d 38; State v Walz, 88 SD 262, 218 NW2d 480; State v Johnson (Tenn Crim) 673 SW2d 877; State v McKinney (Tenn Crim) 605 SW2d 842; McCreary v State, 165 Tex Crim 436, 307 SW2d 948; Kirby v State (Tex App El Paso) 713 SW2d 221; State v Comstock, 145 Vt 503, 494 A2d 135; State v La Belle, 138 Vt 437, 420 A2d 851; State v Boehme, 71 Wash 2d 621, 430 P2d 527, cert den 390 US 1013, 20 L Ed 2d 164, 88 S Ct 1259; State v Michael, 141 W Va 1, 87 SE2d 595; In re Paternity of J.S.C. (App) 135 Wis 2d 280, 400 NW2d 48; Tabor v State (Wyo) 616 P2d 1282.

Footnote 42. Miller v State (Ala App) 484 So 2d 1203; People v Garcia (Colo App) 627 P2d 255; McElwee v State, 147 Ga App 84, 248 SE2d 162; Baker v State (Ind) 449 NE2d 1085; State v Foster, 198 Kan 52, 422 P2d 964; State v Gagnon, 151 Me 501, 121 A2d 345; People v Brown (2d Dept) 115 App Div 2d 610, 496 NYS2d 272; Lugo v Gaines (1st Dept) 83 App Div 2d 542, 441 NYS2d 466; Driskell v State (Okla Crim) 659 P2d 343; Lynch v State (Tex App Amarillo) 687 SW2d 76, petition for discretionary review ref (Jan 8, 1986); Kuntschik v State (Tex App Corpus Christi) 636 SW2d 744; Robinson v Commonwealth, 212 Va 136, 183 SE2d 179.

Footnote 43. In re Paternity of J.S.C. (App) 135 Wis 2d 280, 400 NW2d 48.

§ 947 --Proof of proper chain of custody

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, in order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: (1) the receipt of the item; (2) the ultimate disposition of the item, that is, transfer, destruction, or retention; and (3) the safeguarding and handling of the item between receipt and disposition. 44 Ordinarily, the fact of a "missing link" does not prevent admission of real evidence so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect. 45 According to some courts, however, if the state, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a missing link, and the item is inadmissible. 46 Where this view is followed, if the state has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the link, as to one or more criteria or as to one or more links, the result is a weak link, and the item may be admitted. 47

When an object is subject to positive identification the proof of chain of custody need not be conclusive. 48

In setting up a chain of evidence, the prosecution is not required to elicit testimony from every custodian 49 or every person who had an opportunity to come in contact with the evidence sought to be admitted. 50 Where an item of evidence is jointly possessed by two people, it is only necessary for one of them to testify as to its chain of custody. As long as one of the joint possessors testifies and that testimony negates the possibility of tampering, it alone is adequate to prove chain of custody. 51 Further, the chain of custody rule does not require the prosecution to account for the possession of evidence before it comes into their hands. 52

While the state bears the burden of establishing the proper chain of custody, 53 the state need not exclude or negate every possibility of tampering or substitution, but must demonstrate that it is reasonably probable or reasonably certain that no tampering, alteration, or substitution has occurred. 54 Thus, a chain of custody is sufficiently traced where circumstances demonstrate a reasonable assurance the object proffered into evidence is the same object and is in the same condition as of the time it was obtained. 55 The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. 56 Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence, and let what doubt remains go to its weight, 57 since mere speculation is insufficient to establish a break in a chain of custody. 58

The integrity of evidence is presumed to be preserved unless there is a showing of bad faith, ill will, or proof that the evidence has been tampered with. 59 The burden is on the defendant to make some showing that the evidence was tampered or meddled with, to

overcome a presumption of regularity in the handling of exhibits by public officers, and a presumption that public officers properly discharge their duties. 60 However, if there is some evidence of tampering, then the proponent must show that acceptable precautions were taken to maintain the evidence in its original state. 61

If the trial court after considering the nature of the evidence, and the surrounding circumstances, including presentation, custody and probability of tampering alterations determines that the evidence, is substantially in the same condition as the time at issue, the court may admit it. 62 Once the judge admits the evidence, any issue as to whether the proponent of evidence has proven an adequate chain of custody goes to the weight rather than the admissibility of the evidence, and is thus reserved for the jury. 63

§ 947 --Proof of proper chain of custody [SUPPLEMENT]

Case authorities:

Agent who testified to chain of custody of cocaine was not subject to cross-examination regarding his testimony before grand jury which indicted defendant since latter was outside scope of direct examination regarding chain of custody. *United States v Hoyos* (1993, CA7 Ill) 3 F3d 232.

Audio tape of murder defendant's confession was properly admitted into evidence, where testimony of officer present at questioning that he could identify tape by defendant's signature and by date on tape, that he had compared tape and transcript, and that transcript was accurate as to matters contained on tape was sufficient authentication; chain of evidence rule was not applicable for admissibility under such circumstances. *State v Cameron* (1995, Tenn Crim) 909 SW2d 836.

Footnotes

Footnote 44. *Ex parte Holton* (Ala) 590 So 2d 918.

Footnote 45. *United States v Howard-Arias* (CA4 Va) 679 F2d 363, 10 Fed Rules Evid Serv 1218, cert den 459 US 874, 74 L Ed 2d 136, 103 S Ct 165.

Footnote 46. *Ex parte Holton* (Ala) 590 So 2d 918.

Footnote 47. *Ex parte Holton* (Ala) 590 So 2d 918.

Testimony by a police detective in charge of a drug vault was unnecessary to establish a chain of custody because the police detective who was in charge of the drug vault and who made inventory of the drug vault was not a link in the chain where the envelope containing the cocaine had been sealed. The sealed envelope is adequate circumstantial evidence to establish the handling and safeguarding of drug evidence. *Powell v State* (Ala App) 600 So 2d 1085.

Footnote 48. *Abdullah v State*, 301 Ark 235, 783 SW2d 58, later proceeding (Ark) 1991 Ark LEXIS 129, post-conviction proceeding (Ark) 1992 Ark LEXIS 375, habeas corpus den (CA8 Ark) 18 F3d 571, reh, en banc, den (CA8) 1994 US App LEXIS 7824.

Footnote 49. *United States v Harrington* (CA9 Or) 923 F2d 1371, 91 CDOS 549, 91 Daily Journal DAR 853, corrected (CA9 Or) 91 CDOS 884, 91 Daily Journal DAR 1403 and cert den (US) 116 L Ed 2d 128, 112 S Ct 164; *Dodd v State* (Fla App D3) 537 So 2d 626, 14 FLW 95; *Ormond v State* (Miss) 599 So 2d 951, reh den (Miss) 1992 Miss LEXIS 362.

Footnote 50. *Toney v State* (Alaska App) 833 P2d 15; *Lewis v State*, 307 Ark 260, 819 SW2d 689; *Commonwealth v Williams*, 388 Pa Super 153, 565 A2d 160.

Footnote 51. *Lester v State*, 82 Md App 391, 571 A2d 897.

Footnote 52. *State v Conrad*, 241 Mont 1, 785 P2d 185.

Footnote 53. *State v Jackson* (App) 170 Ariz 89, 821 P2d 1374, 89 Ariz Adv Rep 61; *Hunter v State* (Ind) 578 NE2d 353, reh den (Nov 22, 1991); *Commonwealth v Hubble* (Ky App) 730 SW2d 532.

Ordinarily the party offering the exhibit establishes its chain of custody in order to create a presumption that it was not materially altered. *State v Kodesh* (App) 122 Idaho 756, 838 P2d 885; *State v Crook*, 98 Idaho 383, 565 P2d 576.

Footnote 54. *United States v Ortiz* (CA1 Puerto Rico) 966 F2d 707, 35 Fed Rules Evid Serv 1235, cert den (US) 122 L Ed 2d 154, 113 S Ct 1005; *United States v Olson* (CA7 Wis) 846 F2d 1103, 25 Fed Rules Evid Serv 907; *United States v Pazzanese* (CA8 Mo) 982 F2d 251, appeal after remand (CA8) 5 F3d 533, reported in full (CA8) 1993 US App LEXIS 23103; *United States v Pressley* (CA8 Mo) 978 F2d 1026; *United States v Rans* (CA8 SD) 851 F2d 1111, 26 Fed Rules Evid Serv 430; *Hoover v Thompson* (CA8 Ark) 787 F2d 449; *Ex parte Jones* (Ala) 592 So 2d 210; *Toney v State* (Alaska App) 833 P2d 15; *State v Jackson* (App) 170 Ariz 89, 821 P2d 1374, 89 Ariz Adv Rep 61; *State v Jackson* (App) 170 Ariz 89, 821 P2d 1374, 89 Ariz Adv Rep 61; *Davasher v State*, 308 Ark 154, 823 SW2d 863, cert den (US) 119 L Ed 2d 571, 112 S Ct 2948; *Lewis v State*, 307 Ark 260, 819 SW2d 689; *Gomez v State*, 305 Ark 496, 809 SW2d 809; *State v Pollitt*, 205 Conn 61, 530 A2d 155; *Johnson v State*, 207 Ga App 121, 427 SE2d 93, 93 Fulton County D R 274; *Oglesby v State*, 194 Ga App 383, 390 SE2d 630; *State v Kodesh* (App) 122 Idaho 756, 838 P2d 885; *State v Wilson* (App) 120 Idaho 643, 818 P2d 347; *People v Gomez* (1st Dist) 236 Ill App 3d 283, 177 Ill Dec 632, 603 NE2d 702; *People v Tsombanidis* (1st Dist) 235 Ill App 3d 823, 176 Ill Dec 426, 601 NE2d 1124, app den 148 Ill 2d 652, 183 Ill Dec 30, 610 NE2d 1274; *Foulks v State* (Ind) 582 NE2d 374; *Murphy v State* (Ind) 555 NE2d 127; *Smith v Crouse-Hinds Co.*, 175 Ind App 679, 373 NE2d 923, transfer den 271 Ind 366, 392 NE2d 1168; *In re Lemons* (Cuyahoga Co) 77 Ohio App 3d 691, 603 NE2d 315; *State v Brings Plenty* (SD) 490 NW2d 261; *State v Holloman* (Tenn Crim) 835 SW2d 42; *Pope v Commonwealth*, 234 Va 114, 360 SE2d 352, cert den 485 US 1015, 99 L Ed 2d 716, 108 S Ct 1489; *State v Chamberlain*, 178 W Va 420, 359 SE2d 858.

The test for chain of custody is to ascertain whether there is any indication of tampering or substitution of evidence. *Wells v State* (Miss) 604 So 2d 271.

Proof of an unbroken chain of custody is generally the method of showing the accuracy and authenticity of a fungible item of evidence, but failure to establish a chain of custody may be excused where the circumstances provide reasonable assurances of the identity

and unchanged condition of the evidence. *People v Rivera* (1st Dept) 184 App Div 2d 153, 592 NYS2d 697.

Proof of chain of custody need not negate all possibility of tampering but must establish a complete chain of evidence as far as practicable. *State v Williams*, 297 SC 290, 376 SE2d 773.

Footnote 55. *Kennedy v State* (Ind) 578 NE2d 633, cert den (US) 117 L Ed 2d 521, 112 S Ct 1299, remanded on other grounds (Ind) 620 NE2d 17; *Hall v State* (Miss) 546 So 2d 673; *State v Reed* (Mo App) 811 SW2d 50; *Scheble v Missouri Clean Water Com.* (Mo App) 734 SW2d 541; *State v Holloman* (Tenn Crim) 835 SW2d 42.

Footnote 56. *People v Williams*, 48 Cal 3d 1112, 259 Cal Rptr 473, 774 P2d 146, writ granted (3rd Dist) 8 Cal App 4th 688, 10 Cal Rptr 2d 873, 92 CDOS 6750, 92 Daily Journal DAR 10736, reh den (Cal App 3rd Dist) 92 CDOS 7448, 92 Daily Journal DAR 12034 and review den (Cal) 1992 Cal LEXIS 5571.

Footnote 57. *People v Williams*, 48 Cal 3d 1112, 259 Cal Rptr 473, 774 P2d 146, writ granted (3rd Dist) 8 Cal App 4th 688, 10 Cal Rptr 2d 873, 92 CDOS 6750, 92 Daily Journal DAR 10736, reh den (Cal App 3rd Dist) 92 CDOS 7448, 92 Daily Journal DAR 12034 and review den (Cal) 1992 Cal LEXIS 5571; *Oglesby v State*, 194 Ga App 383, 390 SE2d 630; *State v Kodesh* (App) 122 Idaho 756, 838 P2d 885.

Minor discrepancies in the chain of custody are for the trial court to weigh. *Davasher v State*, 308 Ark 154, 823 SW2d 863, cert den (US) 119 L Ed 2d 571, 112 S Ct 2948.

Footnote 58. *State v Brings Plenty* (SD) 490 NW2d 261.

A remote possibility that the confidential informant would have tampered in any way with the drug in question is not sufficient to demonstrate an interruption in the chain of custody. *Morse v State* (Ind) 593 NE2d 194, reh den (Sep 9, 1992).

Footnote 59. *United States v Pazzanese* (CA8 Mo) 982 F2d 251, appeal after remand (CA8) 5 F3d 533, reported in full (CA8) 1993 US App LEXIS 23103; *State v Huff* (Mo App) 789 SW2d 71.

Footnote 60. *United States v Luna* (CA1 Mass) 585 F2d 1, cert den 439 US 852, 58 L Ed 2d 157, 99 S Ct 160 and (criticized on other grounds by *United States v Kabbaby* (CA11 Fla) 672 F2d 857, 10 Fed Rules Evid Serv 298) as stated in *United States v Velasquez* (CA7 Ill) 772 F2d 1348, cert den 475 US 1021, 89 L Ed 2d 323, 106 S Ct 1211; *United States v Lott* (CA7 Ill) 854 F2d 244, 26 Fed Rules Evid Serv 709; *United States v Lott* (CA7 Ill) 854 F2d 244, 26 Fed Rules Evid Serv 709; *United States v Olson* (CA7 Wis) 846 F2d 1103, 25 Fed Rules Evid Serv 907; *Government Suppliers Consolidating Servs., Inc. v Bayh* (SD Ind) 753 F Supp 739, 32 Env't Rep Cas 1554, 31 ELR 20584, later proceeding (CA7 Ind) 975 F2d 1267, 35 Env't Rep Cas 1622, 23 ELR 20042, cert den (US) 122 L Ed 2d 131, 113 S Ct 977, 36 Env't Rep Cas 1048; *United States v Harrington* (CA9 Or) 923 F2d 1371, 91 CDOS 549, 91 Daily Journal DAR 853, corrected (CA9 Or) 91 CDOS 884, 91 Daily Journal DAR 1403 and cert den (US) 116 L Ed 2d 128, 112 S Ct 164; *United States v Lepanto* (CA10 Colo) 817 F2d 1463, 22 Fed Rules Evid Serv 1650; *Toney v State* (Alaska App) 833 P2d 15; *Spencer v District of Columbia* (Dist Col App) 615 A2d 586; *State v Kodesh* (App) 122 Idaho 756, 838 P2d 885; *Kennedy v State* (Ind) 578 NE2d 633, cert den (US) 117 L Ed 2d 521, 112 S Ct

1299, remanded on other grounds (Ind) 620 NE2d 17; *State v Mehner* (Iowa) 480 NW2d 872; *Hemphill v State* (Miss) 566 So 2d 207; *State v Wynia* (Utah App) 754 P2d 667, 82 Utah Adv Rep 16, cert den (Utah) 765 P2d 1278, 98 Utah Adv Rep 3.

Footnote 61. *United States v Rans* (CA8 SD) 851 F2d 1111, 26 Fed Rules Evid Serv 430; *United States v Dickerson* (CA9 Cal) 873 F2d 1181; *Blankenship v State* (Ala App) 589 So 2d 1321.

Footnote 62. *United States v Mays* (CA8 Mo) 822 F2d 793, 23 Fed Rules Evid Serv 903; *United States v Brown* (CA8 Mo) 482 F2d 1226; *United States v Johnson* (CA10 Okla) 977 F2d 1360, 36 Fed Rules Evid Serv 1165, corrected (CA10 Okla) slip op and cert den (US) 122 L Ed 2d 170, 113 S Ct 1024; *Barrow v Arizona Bd. of Regents* (App) 158 Ariz 71, 761 P2d 145, 4 Ariz Adv Rep 47; *State v Burns*, 23 Conn App 602, 583 A2d 1296; *Tricoche v State* (Del Sup) 525 A2d 151; *State v Smith*, 238 Neb 111, 469 NW2d 146; *State v Madsen*, 28 Utah 2d 108, 498 P2d 670.

Chain of custody was not shattered irreparably although there was a four-day delay from the time the evidence was received until it was turned over for proper processing, as the evidence was kept locked in the trunk of the agents car and only the agent had access to it. *United States v Logan* (CA5 Miss) 949 F2d 1370, 34 Fed Rules Evid Serv 1033, reh den (CA5) 1992 US App LEXIS 4410 and cert den (US) 118 L Ed 2d 312, 112 S Ct 1597 and cert den (US) 118 L Ed 2d 580, 112 S Ct 1982.

The trial judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic. *State v Lavers*, 168 Ariz 376, 814 P2d 333, 91 Ariz Adv Rep 38, cert den (US) 116 L Ed 2d 282, 112 S Ct 343.

Evidence that marijuana residue could seep from evidence bag and that marijuana was handled by analyst who was no longer employed at crime laboratory was insufficient to establish that the chain of custody had been broken. *Hemphill v State* (Miss) 566 So 2d 207.

Practice References Proof of identity of gun from which bullet was fired. 5 Am Jur Proof of Facts 113, Firearms Identification, Proof 1.

Proof of identity of glass fragments. 5 Am Jur Proof of Facts 411, Glass, Proof 5.

Footnote 63. *Davidson Oil Country Supply Co. v Klockner, Inc.* (CA5 Tex) 908 F2d 1238, CCH Prod Liab Rep ¶ 12551, 30 Fed Rules Evid Serv 1230, 17 FR Serv 3d 473, 12 UCCRS2d 664, later proceeding (CA5 Tex) 908 F2d 1249 and corrected, reh den, in part (CA5 Tex) 917 F2d 185; *Baltezore v Concordia Parish Sheriff's Dept.* (CA5 La) 767 F2d 202, cert den 474 US 1065, 88 L Ed 2d 790, 106 S Ct 817; *United States v Lott* (CA7 Ill) 854 F2d 244, 26 Fed Rules Evid Serv 709; *United States v Cardenas* (CA10 NM) 864 F2d 1528, 27 Fed Rules Evid Serv 658, cert den 491 US 909, 105 L Ed 2d 705, 109 S Ct 3197 and (criticized on other grounds by *United States v Pineda-Ortuno* (CA5 Tex) 952 F2d 98); *United States v Roberson* (CA11 Ga) 897 F2d 1092, reh den, en banc (CA11 Ga) 907 F2d 1145; *People v Jackson* (1st Dist) 89 Ill App 3d 461, 44 Ill Dec 527, 411 NE2d 893; *Kennedy v State* (Ind) 578 NE2d 633, cert den (US) 117 L Ed 2d 521, 112 S Ct 1299, remanded on other grounds (Ind) 620 NE2d 17; *State v Ruebke*, 240 Kan 493, 731 P2d 842, cert den 483 US 1024, 97 L Ed 2d 770, 107 S Ct 3272; *State v*

Dukes (La App 2d Cir) 609 So 2d 1144, cert den (La) 618 So 2d 402; State v Jones (La App 3d Cir) 587 So 2d 787, cert den (La) 590 So 2d 78; State v Vanassche (Me) 566 A2d 1077; State v Taylor, 332 NC 372, 420 SE2d 414; State v Haugen (ND) 448 NW2d 191; Williamson v State (Okla Crim) 812 P2d 384, cert den (US) 118 L Ed 2d 308, 112 S Ct 1592, reh den (US) 119 L Ed 2d 244, 112 S Ct 2325, post-conviction proceeding (Okla Crim) 852 P2d 167, petition for certiorari filed (Sep 1, 1993); State v Wells (SC App) 426 SE2d 814; Mello v State (Tex App Eastland) 806 SW2d 875, petition for discretionary review ref (Jun 19, 1991); State v Wynia (Utah App) 754 P2d 667, 82 Utah Adv Rep 16, cert den (Utah) 765 P2d 1278, 98 Utah Adv Rep 3.

A minor break in the chain of custody, such as failure to produce the evidence custodian who received locked sealed bags in the mail goes to the weight not admissibility. United States v Clark (CA11 Ala) 732 F2d 1536, 15 Fed Rules Evid Serv 1405, reh den (CA11 Ala) 740 F2d 979.

Defendant was not entitled to suppress evidence where an employee at the Department of Forensic Science failed to properly complete the transmittal sheet used by state law enforcement officials to track the chain of custody of evidence. Ex parte Williams (Ala) 548 So 2d 518.

Physical evidence may be admitted despite gaps in testimony regarding its custody. Lackawanna Refuse Removal, Inc. v Commonwealth, Dept. of Environmental Resources, 65 Pa Cmwlth 372, 442 A2d 423, 12 ELR 20583.

Proof of the beginning and end of the chain will support admission of the narcotics into evidence barring any showing of tampering or alteration. Mello v State (Tex App Eastland) 806 SW2d 875, petition for discretionary review ref (Jun 19, 1991).

(2). Particular Types of Objects [948, 949]

§ 948 Samples, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Before samples may be admitted in evidence, they must be properly identified as to their source. 64 Moreover, it must be shown that they are in the same or substantially the same condition they were in at the time such condition became material to the issues involved. 65 However, the fact that the offered sample has undergone some change in condition, whether occasioned by lapse of time or otherwise, may not be considered material to the fact sought to be established, or persons of ordinary knowledge may be able to determine from the sample's present appearance, with reasonable accuracy, what its condition was at the time pertinent to the issue involved. 66

§ 948 ----Samples, generally [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Footnotes

Footnote 64. *Leonard v Uniroyal, Inc.* (CA6 Ky) 765 F2d 560, CCH Prod Liab Rep ¶ 10530, 18 Fed Rules Evid Serv 718; *Fulton v Chicago, R. I. & P. R. Co.* (CA8 Mo) 481 F2d 326, cert den 414 US 1040, 38 L Ed 2d 330, 94 S Ct 540; *Talley v J & L Oil Co.*, 224 Kan 214, 579 P2d 706; *Warren v Allgood* (Miss) 344 So 2d 151.

It was error for court, in action for damages for injuries alleged to have been caused by explosion of beverage bottle, to admit as evidence on question of bottling company's negligence, a bottle containing foreign substance which did not show that contents were bottled by defendant company. *Atlanta Coca-Cola Bottling Co. v Burke*, 109 Ga App 53, 134 SE2d 909.

In action by homeowners against manufacturing plant seeking damages for tarry soot that fell on and damaged their homes and property, vial of soot was properly admitted into evidence where testimony and chemical tests showed that sample was collected from vehicles belonging to plaintiffs and matched ash samples subsequently collected at defendant's plant. *Tant v Dan River, Inc.*, 289 SC 325, 345 SE2d 495.

Annotation: Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681 § 4.

Footnote 65. *Fulton v Chicago, R. I. & P. R. Co.* (CA8 Mo) 481 F2d 326, cert den 414 US 1040, 38 L Ed 2d 330, 94 S Ct 540.

Four and one-half-year-old wax sample was improperly admitted as exhibit in case involving slip and fall on waxed floor in absence of preliminary proof regarding whether any substantial change had taken place in wax because of lapse of time. *Anderson v Berg*, 202 Kan 659, 451 P2d 248.

Annotation: 95 ALR2d 681 § 6[b].

Footnote 66. *Kunzman v Cherokee Silo Co.*, 253 Iowa 885, 114 NW2d 534, 95 ALR2d 673.

Admission of bottle from which plaintiff in breach of warranty action had drunk was upheld despite fungi and mold in liquid which had accumulated between time of injury and time of trial, since change in condition of sample occasioned by lapse of time is not of itself sufficient ground for excluding it and testimony was sufficient to explain to jury changes that had taken place in contents of bottle. *Pulley v Pacific Coca-Cola Bottling Co.*, 68 Wash 2d 778, 415 P2d 636.

Annotation: 95 ALR2d 681 § 6[c].

§ 949 Objects, specimens, or parts taken from human body

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When objects, such as bullets, specimens, or parts taken from a human body, are produced in court and used there as an exhibit, or made the basis for the testimony or report of an expert or officer, the proponent of the evidence must prove the identity of the object taken from the human body. 67 Identity of a substance taken from the human body for the purpose of an experiment or test may be proved by a witness' direct or opinion evidence. 68 If it is not possible to prove the identity of a substance by such evidence—because, as in most cases, the substance has passed through several hands before being tested and produced in court—it is necessary to establish "a complete chain of evidence," tracing the possession of the substance to the final custodian. 69 The evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis. 70

It has been said that continuity of possession of a specimen is as effective to guarantee identity as are identifying marks or labels, and since such marks or labels may be fabricated at a later date, continuity of possession, which requires proof of delivery, possession, and safekeeping, is more readily subject to verification. 71 However, it is sometimes presumed that an employee of a state crime laboratory will perform a blood analysis competently and responsibly, in a manner that will not contaminate the same or otherwise affect the accuracy of further analysis. 72 Further, a statute may provide that a report of analysis is prima facie evidence as to the custody of the material described in it. 73

§ 949 ----Objects, specimens, or parts taken from human body [SUPPLEMENT]**Case authorities:**

The first link in the chain of custody of a blood sample, that is, who drew the blood, was sufficiently proven to permit admission of the sample and expert testimony based thereon where the autopsy physician testified that an autopsy assistant was also present during the autopsy; an investigator testified that he received two vials of the victim's blood directly from the autopsy physician and the autopsy assistant; and this evidence permits an inference that either the physician or the assistant drew the blood during the autopsy. *State v Frye* (1995) 341 NC 470, 461 SE2d 664.

Footnotes

Footnote 67. *Green v Alabama Power Co.* (Ala) 597 So 2d 1325, reh den, without op (Ala) 1992 Ala LEXIS 505; *Barker v California-Western States Life Ins. Co.* (5th Dist) 252 Cal App 2d 768, 61 Cal Rptr 595, cert den 390 US 922, 19 L Ed 2d 982, 88 S Ct 855; *Hancock v State, Dept. of Revenue, Motor Vehicle Div.* (Colo) 758 P2d 1372; *Smith v East Point*, 189 Ga App 454, 376 SE2d 215; *State v Tatreau*, 176 Neb 381, 126

NW2d 157 (holding that hair samples were sufficiently identified); *State v Sloan*, 316 NC 714, 343 SE2d 527; *In re Paternity of J.S.C.* (App) 135 Wis 2d 280, 400 NW2d 48.

In a prosecution for a narcotics offense, a package of heroin introduced in evidence was adequately identified as that which had been in the defendant's mouth, where a police officer and a state chemist testified to a detailed chain of transmission of the heroin from the defendant's mouth to the state narcotics office. *People v Pendarvis* (1st Dist) 178 Cal App 2d 239, 2 Cal Rptr 824.

In a malpractice suit, the admission in evidence of an instrument (filiform) allegedly left in the plaintiff's bladder by the defendant, was not prejudicial error, assuming that the foundation was inadequate, where the defendant had admitted leaving such an instrument in the plaintiff's bladder. *Taylor v Milton*, 353 Mich 421, 92 NW2d 57.

Testimony by a surgeon as to the removal of a piece of metal from the injured person's eye, and the injured person's testimony that the piece of metal offered in evidence was the same as that which punctured his eye and was given to him by the surgeon on its removal and was kept by him exclusively and continuously except at the time of its analysis, constituted sufficient evidence to go to the jury on the question of the exhibit's identity. *WeGo Perforators v Hilligoss* (Okla) 397 P2d 113.

Annotation: Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216 § 4.

Footnote 68. *United States v Cloudman* (CA8 SD) 534 F2d 123; *Munson v State*, 250 Ala 94, 33 So 2d 463; *Nichols v McCoy*, 38 Cal 2d 447, 240 P2d 569; *State v McFarland*, 88 Idaho 527, 401 P2d 824; *People v Fisher*, 340 Ill 216, 172 NE 743; *State v Collins* (La) 328 So 2d 674; *State v Libby*, 153 Me 1, 133 A2d 877; *State v Shawley*, 334 Mo 352, 67 SW2d 74; *McCreary v State*, 165 Tex Crim 436, 307 SW2d 948.

Where witness testified that bullet was that removed by doctor in his presence from brain of victim during autopsy, and that it was in same condition when offered in evidence as when removed, proof of chain of custody was unnecessary. *State v Malone* (Mo) 694 SW2d 723, cert den 476 US 1165, 90 L Ed 2d 733, 106 S Ct 2292, post-conviction proceeding (Mo App) 747 SW2d 695, post-conviction proceeding (Mo) 798 SW2d 149, cert den 500 US 929, 114 L Ed 2d 128, 111 S Ct 2044, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2844.

Footnote 69. *State v Weltha*, 228 Iowa 519, 292 NW 148; *Calvert v Commonwealth* (Ky App) 708 SW2d 121; *Ritter v State*, 3 Tenn Crim 372, 462 SW2d 247.

As to the chain of custody requirement, generally, see § 946.

Footnote 70. *Green v Alabama Power Co.* (Ala) 597 So 2d 1325, reh den, without op (Ala) 1992 Ala LEXIS 505.

Footnote 71. *People v Judkins*, 10 Ill 2d 445, 140 NE2d 663.

Attack on laboratory's protocol went to weight of evidence, not its admissibility; since all links in chain of custody were shown, effect of evidence of laboratory's sloppiness in

handling blood samples depended on what inferences reasonable factfinder might chose to draw from it. *United States v Ladd* (CA1 NH) 885 F2d 954, 28 Fed Rules Evid Serv 1223 (among conflicting authorities noted on other grounds in *United States v Maraj* (CA1 Puerto Rico) 947 F2d 520).

A blood sample from a murder victim was properly identified where one witness testified that he saw the blood being extracted from the body, placed in a bottle, and handed over to another witness, who testified that she typed the blood and delivered the specimen to a third witness, who testified that he received the specimen from the preceding witness and proceeded to test it. *State v Anderson* (Mo) 384 SW2d 591.

Footnote 72. *State v Lamp* (Iowa) 322 NW2d 48, habeas corpus proceeding (CA8 Iowa) 763 F2d 994, cert den 474 US 1009, 88 L Ed 2d 465, 106 S Ct 534.

Footnote 73. *Harshaw v Commonwealth* (Va App) 427 SE2d 733.

3. Exhibition of Person or Body [950-956]

§ 950 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, it is proper for the court to allow one to exhibit his or her person or body to the jury in a variety of actions, as for example, for the purpose of establishing the nature and extent of plaintiff's injuries, 74 establishing family resemblance, 75 showing racial characteristics, 76 hereditary peculiarities, 77 or violence by police authorities. 78 However, like any other evidence, the exhibition of physical characteristics, is subject to challenge on the ground that a proper foundation has not been laid 79 —that is, that there is no evidence before the jury that the physical characteristics proffered were present at the time the offending act was committed. 80

§ 950 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not err in requiring defendant to place over his head a stocking recovered from the car of his codefendant, since the demonstration was relevant to aid the jury in assessing the credibility of the victim's identification of defendant. *State v Westall* (1994) 116 NC App 534, 449 SE2d 24, review den 338 NC 671, 453 SE2d 185.

Footnotes

Footnote 74. § 952.

Footnote 75. § 954.

Footnote 76. § 955.

Footnote 77. § 954.

Footnote 78. *Tyson v State*, 237 Miss 149, 112 So 2d 563, 72 ALR2d 1319.

Annotation: Right of accused to show body to jury as evidence of violence by police in securing confession, 72 ALR2d 1322.

Footnote 79. *People v Maxwell* (2d Dept) 184 App Div 2d 661, 584 NYS2d 868, app den 80 NY2d 906, 588 NYS2d 832, 602 NE2d 240.

Footnote 80. *State v Hart* (SC) 412 SE2d 380.

Proper foundation must be laid before a defendant is permitted to display to the jury tattoos or scars which had not been mentioned by eyewitnesses in their identification of defendant. *Kulick v State* (Fla App D2) 614 So 2d 672, 18 FLW D 660.

As to the use of persons not put in evidence for physical demonstration, see 75A Am Jur 2d, Trial § 511.

§ 951 In criminal proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, a victim's exhibition of his or her injury to the jury in a criminal prosecution is proper to show the nature and extent of the injury to the victim, unless specific reasons of policy apply to prohibit it. 81 Further, a victim may be displayed where identification of the victim is relevant and the probative value of the victim's display substantially outweighs the danger of unfair prejudice to the defendant. 82

In a criminal prosecution, the accused, while not a witness on his behalf, may be required to display to the trier of fact wounds, 83 scars, 84 tattoos, 85 teeth, 86 birthmarks or other distinguishing features. 87 Because such an exhibit is not testimonial in nature, the defendant is not required to take the stand before being allowed to exhibit himself to the jury when such a showing is to the defendant's advantage. 88

As long as the demonstration is relevant to the facts to be proved or disproved in the case, 89 the state's exhibition of a defendant's physical characteristics does not implicate the defendant's privilege against self-incrimination. 90 Further, some courts approve of the placing of items upon the bodies of defendants at the request of prosecutors. 91 and accordingly, for the purpose of identification, an accused may be required to wear clothing 92 or eyeglasses alleged to have been worn by the actor. 93 The defendant

can also introduce demonstrative or real physical evidence by exhibiting himself to the jury in items of clothing relevant to the inquiry, whether he testifies or not. 94 However, demonstrations with the defendant's body can be taken too far so as to deny the defendant a fair trial. 95

§ 951 ----In criminal proceedings [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 1, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Case authorities:

The trial court did not err in forcing defendant to exhibit to the jury a tattoo on his arm, since the trial judge was simply allowing the exhibition of the tattoo for the purpose of corroborating a witness's identification of defendant. *State v Netcliff* (1994) 116 NC App 396, 448 SE2d 311.

Footnotes

Footnote 81. *United States v Lee* (CA9 Hawaii) 800 F2d 903, 21 Fed Rules Evid Serv 917; *State v Robinson* (La App 1st Cir) 563 So 2d 477, cert den (La) 567 So 2d 1122; *Fuller v State* (Mo App) 837 SW2d 304; *State v Julius*, 185 W Va 422, 408 SE2d 1 (prosecution for malicious wounding).

Trial court did not improvidently exercise its discretion in permitting the victim to show the jury the scars on his chest and stomach, which were the results of the crime for which the defendant was being tried, since the purpose of that evidence was to demonstrate the seriousness of the injuries inflicted upon the victim by the defendant. *People v Dananel* (2d Dept) 183 App Div 2d 778, 584 NYS2d 485, app den 80 NY2d 902, 588 NYS2d 828, 602 NE2d 236.

Footnote 82. *United States v Lowe* (CA10 NM) 569 F2d 1113, cert den 435 US 932, 55 L Ed 2d 529, 98 S Ct 1507 (kidnapped child).

Footnote 83. *State v Cockrell*, 131 Mont 254, 309 P2d 316.

Footnote 84. *Urquhart v State*, 273 Ark 486, 621 SW2d 218, later proceeding (ED Ark) 557 F Supp 1334, affd (CA8 Ark) 726 F2d 1316; *People v Martin* (Colo App) 791 P2d 1159, cert den (Colo) 1990 Colo LEXIS 417; *State v Cockrell*, 131 Mont 254, 309 P2d 316.

Footnote 85. *People v Speirs* (4th Dist) 231 Ill App 3d 807, 173 Ill Dec 378, 596 NE2d 1257; *State v Murinko* (App) 108 Idaho 872, 702 P2d 910; *State v Rosthenhausler* (App) 147 Ariz 486, 711 P2d 625; *People v Shannon* (2d Dept) 137 App Div 2d 850, 525 NYS2d 315, app den 72 NY2d 866, 532 NYS2d 516, 528 NE2d 906; *Love v State* (Tex App Fort Worth) 730 SW2d 385.

Trial courts ruling which did not allow defendant in rape case to show the absence of a tattoo on his arm constituted reversible error where the identify of the defendant was at

issue and the victim described her assailant and the type of tattoo that she observed on his arm. *State v Martin* (La) 519 So 2d 87, appeal after remand (La App 1st Cir) 558 So 2d 654, cert den (La) 564 So 2d 318.

Footnote 86. *State v Gilmer* (La App 2d Cir) 604 So 2d 117; *State v Summers*, 105 NC App 420, 413 SE2d 299.

Footnote 87. *De Leon v State* (Tex App Houston (14th Dist)) 758 SW2d 621.

In a robbery prosecution in which one of the victims testified that she observed no marks, tattoos, or chest hair on the robber, who was shirtless, the trial court did not commit reversible error in denying defendant's motion to silently exhibit his torso to the jury without subjecting himself to cross-examination, where the defense presented absolutely no evidence to explain or establish the relevance of the display as of the date of trial. *Thomas v State* (Fla App D5) 439 So 2d 245.

Annotation: Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Footnote 88. *United States v Bay* (CA9 Cal) 762 F2d 1314, 18 Fed Rules Evid Serv 324, 81 ALR Fed 883, appeal after remand (CA9 Cal) 820 F2d 1511 (among conflicting authorities noted on other grounds in *United States v Vontsteen* (CA5 Tex) 950 F2d 1086); *Kulick v State* (Fla App D2) 614 So 2d 672, 18 FLW D 660 (display of tattoos or scars does not subject defendant to cross-examination).

Footnote 89. *State v Summers*, 105 NC App 420, 413 SE2d 299.

Footnote 90. *Schmerber v California*, 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826; *Urquhart v State*, 273 Ark 486, 621 SW2d 218, later proceeding (ED Ark) 557 F Supp 1334, affd (CA8 Ark) 726 F2d 1316; *State v Murinko* (App) 108 Idaho 872, 702 P2d 910; *People v Shannon* (2d Dept) 137 App Div 2d 850, 525 NYS2d 315, app den 72 NY2d 866, 532 NYS2d 516, 528 NE2d 906; *State v Hart* (SC) 412 SE2d 380; *De Leon v State* (Tex App Houston (14th Dist)) 758 SW2d 621.

In a prosecution for rape and sodomy, the trial court abused its discretion in unnecessarily requiring the defendant to take the stand in order to present the jury with the best evidence of his scar in support of his defense of mistaken identity, where defendant had offered to present a competent witness and to introduce hospital records to prove that he had been scarred well before the night of the rape, and where requiring the defendant to exhibit his scar inevitably resulted in his impeachment with proof of prior convictions. *People v Shields* (2d Dept) 81 App Div 2d 870, 438 NYS2d 885.

In a prosecution for first-degree robbery, the state, in absence of pretrial order for discovery, was not entitled to directive from court compelling defendant to exhibit his knee to jury in order for jury to observe alleged marks and discoloration as testified to by victim. *People v Rumph*, 128 Misc 2d 438, 488 NYS2d 998, affd (2d Dept) 141 App Div 2d 576, 529 NYS2d 185, app den 72 NY2d 1049, 534 NYS2d 948, 531 NE2d 669.

Footnote 91. *People v Speirs* (4th Dist) 231 Ill App 3d 807, 173 Ill Dec 378, 596 NE2d 1257.

Footnote 92. *People v Warmack*, 83 Ill 2d 112, 46 Ill Dec 141, 413 NE2d 1254; *People v Speirs* (4th Dist) 231 Ill App 3d 807, 173 Ill Dec 378, 596 NE2d 1257.

As to admissibility of clothing, generally, see § 940.

Footnote 93. *People v Speirs* (4th Dist) 231 Ill App 3d 807, 173 Ill Dec 378, 596 NE2d 1257; *People v Tomaszek* (1st Dist) 54 Ill App 2d 254, 204 NE2d 30, cert den 382 US 827, 15 L Ed 2d 72, 86 S Ct 62.

Footnote 94. *State v Rodriguez* (Tenn Crim) 752 SW2d 108 (error to refuse to allow defendant to put on shirt in the presence of jury).

Footnote 95. *Riley v Commonwealth* (Ky) 620 SW2d 316 (defendant was denied a fair trial where he was required to put on a coat, scarf and mask, carry a gun and make statements to the victim, who had previously been unable to identify the defendant from photographs, and a two-person line up at the preliminary hearing).

§ 952 In personal injury actions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a general rule, a plaintiff's exhibition of his or her injury to the jury in a personal injury action is proper to show the nature and extent of the injury to the plaintiff, unless specific reasons of policy apply to prohibit it. 96 This is so because there is no other class of evidence more satisfactory or convincing than the production and inspection of the very object or person whose condition is being investigated. 97

Although in a number of cases, under the circumstances considered, it would be error to permit the plaintiff in a personal injury action to exhibit his person, or a part of his body, to the jury, 98 the contention that such an exhibition would prejudice the jury against the defendant, or arouse sympathy in favor of the plaintiff, has generally been rejected. 99 Thus, even though the display of plaintiff's injured body part may have the effect at times of inflaming the passions of the jury or inciting extreme empathy, that itself does not serve as a basis for exclusion of the evidence. 1 The extent to which one may be allowed to exhibit his person or body to the jury is a matter largely in the discretion of the trial court. 2 If it appears that the exhibition by the plaintiff would necessitate an exposure which would be indecent, the court, in the exercise of its discretion, should not permit the exhibition before the jury. 3

◆ Observation: Authorities are generally unpersuaded by unfair prejudice to the defendant, and only in extreme cases will courts rely on the indecency of the showing to deny the proffer. 4

Under the general rule of admissibility, the plaintiff may be permitted to exhibit an arm or shoulder, 5 hand or fingers, 6 leg, 7 foot or ankle, 8 eye or eye socket, 9 or his torso, 10 or even amputated limbs or other separated parts of the body, 11

provided the exhibition is for a useful purpose and is not objectionable on the ground of indecency. 12

It has been recognized in a number of cases that permission for the injured plaintiff to exhibit his person to the jury was properly granted, notwithstanding that such exhibition would involve a manual touching of the plaintiff's person, or at least a close-up inspection of the injured portion of the body, by the jury. 13 However, there are a few cases in which a manual touching of the plaintiff's person or close inspection of the injured portion of the plaintiff's body has been regarded as improper. 14

Footnotes

Footnote 96. *Rich v Ellerman & Bucknall S.S. Co.* (CA2 NY) 278 F2d 704; *Spaak v Chicago & North W. R. Co.* (CA7 Ill) 231 F2d 279; *South Highlands Infirmary v Camp*, 279 Ala 1, 180 So 2d 904, 14 ALR3d 1245; *Hillman v Funderburk* (Dist Col App) 504 A2d 596; *Florida Motor Lines, Inc. v Bradley*, 121 Fla 591, 164 So 360; *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204; *Hess v Lowery*, 122 Ind 225, 23 NE 156; *Core v Winn-Dixie of Louisiana, Inc.* (La App 1st Cir) 471 So 2d 240, cert den (La) 476 So 2d 353; *Nizer v Phelps*, 252 Md 185, 249 A2d 112; *Graves v Battle Creek*, 95 Mich 266, 54 NW 757; *Johnson v Clement F. Sculley Constr. Co.*, 255 Minn 41, 95 NW2d 409; *May v Northern P. R. Co.*, 32 Mont 522, 81 P 328; *Wilson v Thayer County Agricultural Soc.*, 115 Neb 579, 213 NW 966, 52 ALR 1393; *Beal v Southern Union Gas Co.*, 66 NM 424, 349 P2d 337, 84 ALR2d 1269; *Harvey v Mazal American Partners* (1st Dept) 179 App Div 2d 1, 581 NYS2d 748; *North v Williams* (Okla) 366 P2d 406; *Hendricks v Sanford*, 216 Or 149, 337 P2d 974; *Auclair v Legare*, 82 RI 18, 105 A2d 669, 66 ALR2d 1329; *Houston & T. C. R. Co. v Anglin*, 99 Tex 349, 89 SW 966.

In an action to recover for personal injuries to a child, it is proper to allow the infant to be exhibited to the jury so that they may see the injuries, if any, although the child is not called as a witness, being incompetent to testify because of her age. *Yellow Cab Co. v Henderson*, 183 Md 546, 39 A2d 546, 175 ALR 267.

As to discretionary power of court to order a reasonable physical examination of the plaintiff to be made before trial by competent physicians and surgeons whenever such examination is necessary to ascertain the nature, extent, or permanency of alleged injuries, see 23 Am Jur 2d, *Deposition and Discovery* §§ 282 et seq.

As to a trial court's permitting an inspection and exhibition of person during trial, generally, see 75 Am Jur 2d, *Trial* § 188.

Annotation: Propriety of permitting plaintiff in personal injury action to exhibit his person to jury, 66 ALR2d 1334 § 3[a].

Footnote 97. *Hillman v Funderburk* (Dist Col App) 504 A2d 596.

Footnote 98. *Huber & Huber Motor Express v Martin's Adm'r*, 265 Ky 228, 96 SW2d 595; *Nelson v Wabash R. Co.* (Mo App) 194 SW2d 726; *Harper v Bolton*, 239 SC 541, 124 SE2d 54 (admission of glass vial containing plaintiff's left eye, preserved in alcohol,

held error where defendant had admitted that the eye was necessarily removed because of injuries received in the accident).

In an action to recover for injuries sustained as a result of an electric shock, it was held that the trial court had erred in permitting the plaintiff, over the defendant's objection, to roll up his sleeve and exhibit to the jury certain scars on his right arm, where such arm contained scars not only from the alleged electrical burns but also from more recent burns caused by scalding, and such exhibition did not tend to throw any light on any issue in the case. *O'Hara v Central Illinois Light Co.*, 319 Ill App 336, 49 NE2d 274.

Annotation: 66 ALR2d 1334 § 3[a].

Footnote 99. *Slattery v Marra Bros., Inc.* (CA2) 186 F2d 134, cert den 341 US 915, 95 L Ed 1351, 71 S Ct 736; *Russell v Coffman*, 237 Ark 778, 376 SW2d 269; *Leonard v Hume*, 5 Cal App 2d 41, 41 P2d 965; *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204; *Beal v Southern Union Gas Co.*, 66 NM 424, 349 P2d 337, 84 ALR2d 1269; *Magnolia Petroleum Co. v Angelly* (Okla) 306 P2d 309; *Bellart v Martell*, 28 Wis 2d 686, 137 NW2d 729, reh den 28 Wis 2d 694a, 139 NW2d 473.

Annotation: 66 ALR2d 1334 § 4.

Footnote 1. *Harvey v Mazal American Partners* (1st Dept) 179 App Div 2d 1, 581 NYS2d 748.

Footnote 2. *Monk v Doctors Hospital*, 131 US App DC 174, 403 F2d 580; *Russell v Coffman*, 237 Ark 778, 376 SW2d 269; *Hillman v Funderburk* (Dist Col App) 504 A2d 596; *Wheeler v Helterbrand* (Ky) 358 SW2d 501 (holding that there was no abuse of discretion in permitting view of scar resulting from hip operation); *Nizer v Phelps*, 252 Md 185, 249 A2d 112; *Tuttle v McGeeney*, 344 Mass 200, 181 NE2d 655; *Bates v Detroit*, 66 Mich App 701, 239 NW2d 716; *Johnson v Clement F. Sculley Constr. Co.*, 255 Minn 41, 95 NW2d 409; *May v Northern P. R. Co.*, 32 Mont 522, 81 P 328; *Wilson v Thayer County Agricultural Soc.*, 115 Neb 579, 213 NW 966, 52 ALR 1393; *Beal v Southern Union Gas Co.*, 66 NM 424, 349 P2d 337, 84 ALR2d 1269; *North v Williams* (Okla) 366 P2d 406; *Hendricks v Sanford*, 216 Or 149, 337 P2d 974; *Auclair v Legare*, 82 RI 18, 105 A2d 669, 66 ALR2d 1329; *Bellart v Martell*, 28 Wis 2d 686, 137 NW2d 729, reh den 28 Wis 2d 694a, 139 NW2d 473.

The exhibition of an injury to the jury is within the trial court's discretion, and a party may demonstrate the nature and extent of his injury, or disability resulting therefrom, and it is common and correct practice to exhibit a wound or injury to the jury even where there is no dispute as to the fact and nature of such injury. Only if there is an abuse of discretion manifestly prejudicing the defendant would such an exhibition be reversible error. The possibility that the demonstration may be unpleasant or gruesome is not determinative, but should be considered and weighed against the possible usefulness to the jury of such exhibition. *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204.

Annotation: 66 ALR2d 1334 § 3[b].

Footnote 3. *Union P. R. Co. v Botsford*, 141 US 250, 35 L Ed 734, 11 S Ct 1000; *Ottawa v Gilliland*, 63 Kan 165, 65 P 252; *Sullivan v Minneapolis, S. P. & S. S. M. R. Co.*, 55 ND 353, 213 NW 841; *Brown v Swineford*, 44 Wis 282.

While it was not an abuse of the trial court's discretion to refuse to permit jury to observe breast damage alleged by patient in malpractice action against physician, it would have been neither indecent nor unduly prejudicial to permit the jury to observe breast damage alleged by plaintiff. *Hillman v Funderburk* (Dist Col App) 504 A2d 596.

Annotation: 66 ALR2d 1334 § 5.

Footnote 4. *Hillman v Funderburk* (Dist Col App) 504 A2d 596.

Footnote 5. *Zelhaver v Koepke*, 260 Mich 428, 245 NW 490; *Harvey v Mazal American Partners* (1st Dept) 179 App Div 2d 1, 581 NYS2d 748; *Carrico v West Virginia C. & P. R. Co.*, 39 W Va 86, 19 SE 571.

Annotation: 66 ALR2d 1334 § 8.

Footnote 6. *Powell v Galloway*, 229 Ky 37, 16 SW2d 489; *Stephens v Elliott*, 36 Mont 92, 92 P 45; *North v Williams* (Okla) 366 P2d 406.

The trial judge did not abuse his discretion in permitting the exhibition of the plaintiff's thumb injured in the defendant's taxicab door, or in allowing a comparison with the other thumb and a demonstration of the extent of remaining use of the injured thumb. *North v Williams* (Okla) 366 P2d 406.

Annotation: 66 ALR2d 1334 § 9.

Footnote 7. *South Highlands Infirmary v Camp*, 279 Ala 1, 180 So 2d 904, 14 ALR3d 1245; *Wheeler v Helterbrand* (Ky) 358 SW2d 501; *Fravel v Burlington N. Railroad* (Mo App) 671 SW2d 339, cert den 469 US 1159, 83 L Ed 2d 921, 105 S Ct 907; *Pooschke v Union P. R. Co.*, 246 Or 633, 426 P2d 866; *Auclair v Legare*, 82 RI 18, 105 A2d 669, 66 ALR2d 1329; *Bellart v Martell*, 28 Wis 2d 686, 137 NW2d 729, reh den 28 Wis 2d 694a, 139 NW2d 473.

There was no abuse of discretion on the part of the trial court in permitting plaintiff to exhibit to the jury the stump of his amputated leg and his artificial leg, even if the injury was fully described otherwise, since a personal view of the stump and artificial leg could aid the jury in understanding voluminous evidence and was relevant as to the nature and extent of the claimed injury and various elements of claimed damages, and the court could not say that the only purpose of the exhibition was to excite the feelings of the jury. *Darling v Charleston Community Memorial Hospital* (4th Dist) 50 Ill App 2d 253, 200 NE2d 149, affd 33 Ill 2d 326, 211 NE2d 253, 14 ALR3d 860, cert den 383 US 946, 16 L Ed 2d 209, 86 S Ct 1204.

Annotation: 66 ALR2d 1334 § 10.

Footnote 8. *Sun Oil Co. v Rhodes* (CA8 Ark) 15 F2d 790; *Vander Veen v Yellow Cab Co.* (1st Dist) 89 Ill App 2d 91, 233 NE2d 68; *Jansen v Herkert*, 249 Wis 124, 23 NW2d

Annotation: 66 ALR2d 1334 § 11.

Footnote 9. *Duffy v Midlothian Country Club* (1st Dist) 135 Ill App 3d 429, 90 Ill Dec 237, 481 NE2d 1037; *Davis v Christmas* (Tex Civ App) 248 SW 126, writ diss w o j.

Annotation: 66 ALR2d 1334 § 12.

Footnote 10. *Olson v Tyner*, 219 Iowa 251, 257 NW 538; *Wheeler v Helterbrand* (Ky) 358 SW2d 501 (exhibition of scar resulting from hip operation necessitated by injuries received in automobile accident); *Johnson v Clement F. Sculley Constr. Co.*, 255 Minn 41, 95 NW2d 409 (exhibition of burned body); *Beal v Southern Union Gas Co.*, 66 NM 424, 349 P2d 337, 84 ALR2d 1269; *Hendricks v Sanford*, 216 Or 149, 337 P2d 974 (exhibition of back showing depression claimed to have resulted from defendant's negligence).

Annotation: 66 ALR2d 1334 § 7.

Footnote 11. *Russell v Coffman*, 237 Ark 778, 376 SW2d 269 (severed kneecap); *Lund v Olson*, 182 Minn 204, 234 NW 310, 75 ALR 371.

Annotation: 66 ALR2d 1334 § 13.

Footnote 12. *Harper v Bolton*, 239 SC 541, 124 SE2d 54 (admission of a glass vial containing the plaintiff's left eye, preserved in alcohol, constituted error where the defendant had admitted that the eye was necessarily removed because of injuries received in the automobile accident).

Footnote 13. *Grubaugh v Simon J. Murphy Co.*, 209 Mich 551, 177 NW 217; *Dictz v Aronson*, 244 App Div 746, 279 NYS 66 (holding that error was committed in refusing permission for an examination of throat); *Patterson v Howe*, 102 Or 275, 202 P 225; *Kansas C., M. & O. R. Co. v Foster* (Tex Civ App) 38 SW2d 391; *McAndrews v Leonard*, 99 Vt 512, 134 A 710.

Annotation: 66 ALR2d 1334 § 6.

Footnote 14. *Curry v American Enka, Inc.* (ED Tenn) 452 F Supp 178; *Coca Cola Bottling Co. v Hankins* (Tex Civ App) 245 SW2d 740, revd on other grounds 151 Tex 303, 249 SW2d 1008.

Annotation: 66 ALR2d 1334 § 6.

§ 953 --Active demonstration to show effect of injury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A demonstration by an injured person, in the presence of the jury, by a physical act, for the purpose of showing or illustrating the extent or effect of an injury, which goes further than a mere passive exhibition of an injured member or portion of the body, has been permitted in numerous instances, where the court has satisfied itself of the propriety of such practice in the light of the facts presented. 15 But it is proper not to permit such a demonstration where it would serve no useful purpose 16 or would tend to inflame or unduly prejudice the jury. 17 The determination of the question rests largely in the discretion of the trial court, 18 and its ruling as to such permissibility, whether it is for or against allowing the demonstration, is seldom overruled by the higher court. 19

The pricking of the injured portion of the plaintiff's body with a needle to show that there is no sensation in it has been permitted in some instances, 20 based on the circumstances involved, but not in others. 21 However, demonstrations performed upon the body of the plaintiff causing the plaintiff to cry out or otherwise evince pain, have been disapproved, 22 although the fact that the plaintiff cried out or otherwise indicated a feeling of pain while such a demonstration was being made in the presence of the jury has also been held not to constitute grounds for a mistrial, setting aside the verdict, or the like. 23 Furthermore, it has been deemed permissible for a plaintiff to demonstrate blindness to the jury by having another person thrust a dagger at his eye. 24

Demonstrations by the plaintiff to show the condition of his injured arm or shoulder are permissible under some, 25 but not all circumstances 26 as are also demonstrations to show the condition of his injured hand or fingers. 27 Permitting the plaintiff to walk to show that the injury to his leg, knee, or foot necessitates his limping, or permitting other demonstrations to show the condition of his injured leg, knee, or foot, have been approved in some cases considering the question, 28 although under some circumstances such a demonstration has been disapproved. 29 In some cases dealing with the matter, however, the courts have disapproved demonstrations requiring or involving the assistance of one or more of the jurors. 30

Footnotes

Footnote 15. *Ensor v Wilson* (Ala) 519 So 2d 1244, 82 ALR4th 925, reh den (Ala) 537 So 2d 66; *Howard v Gulf, M. & O. R. Co.* (4th Dist) 13 Ill App 2d 482, 142 NE2d 825; *Hall v Manson*, 99 Iowa 698, 68 NW 922; *Graves v Battle Creek*, 95 Mich 266, 54 NW 757; *Hatfield v St. Paul & D. R. Co.*, 33 Minn 130, 22 NW 176; *Fravel v Burlington N. Railroad* (Mo App) 671 SW2d 339, cert den 469 US 1159, 83 L Ed 2d 921, 105 S Ct 907; *Hanberry v Fitzgerald*, 72 NM 383, 384 P2d 256; *Wilson & Co. v Campbell*, 195 Okla 323, 157 P2d 465; *Green v Boney*, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370.

Annotation: Permissibility of in-court demonstration to show effect of injury in action for bodily injury, 82 ALR4th 980.

Footnote 16. *Bates v Newman*, 121 Cal App 2d 800, 264 P2d 197; *Self v State*, 90 Miss 58, 43 So 945; *Peters v Hockley*, 152 Or 434, 53 P2d 1059, 103 ALR 1347.

Footnote 17. *Landro v Great N. R. Co.*, 117 Minn 306, 135 NW 991; *Deveney v Smith* (Mo App) 812 SW2d 810.

Footnote 18. *Monk v Doctors Hospital*, 131 US App DC 174, 403 F2d 580; *Del Monte*

Banana Co. v Chacon (Fla App D3) 466 So 2d 1167, 10 FLW 882; Hehir v Bowers (2d Dist) 85 Ill App 3d 625, 40 Ill Dec 918, 407 NE2d 149.

Footnote 19. Howard v Gulf, M. & O. R. Co. (4th Dist) 13 Ill App 2d 482, 142 NE2d 825; North v Williams (Okla) 366 P2d 406; Green v Boney, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370.

Footnote 20. Anthony v Public Transit Co., 3 NJ Misc 1204, 130 A 895; Wilson & Co. v Campbell, 195 Okla 323, 157 P2d 465.

Footnote 21. Deveney v Smith (Mo App) 812 SW2d 810.

Where the question of damage to sensory nerves had been fully developed by numerous doctors and there was abundant testimony before the jury, the judge did not abuse his discretion by disallowing a request to demonstrate nerve damage by the use of the pinprick test or letting plaintiff bite the arm until blood came. Young v Texas & P. R. Co. (Tex Civ App El Paso) 347 SW2d 345.

Footnote 22. Landro v Great N. R. Co., 117 Minn 306, 135 NW 991; Gulf Refining Co. v Frazier, 15 Tenn App 662.

Footnote 23. Willoughby v Zylstra, 5 Cal App 2d 297, 42 P2d 685.

Footnote 24. Del Monte Banana Co. v Chacon (Fla App D3) 466 So 2d 1167, 10 FLW 882.

Footnote 25. Olson v Tyner, 219 Iowa 251, 257 NW 538; Herter v Detroit, 245 Mich 425, 222 NW 774.

Footnote 26. Hehir v Bowers (2d Dist) 85 Ill App 3d 625, 40 Ill Dec 918, 407 NE2d 149.

Footnote 27. Mahmet v American Radiator Co. (Mo) 294 SW 1014.

In an action for injury to the plaintiff's thumb in a taxicab door, the trial judge did not abuse his discretion in allowing a demonstration of the extent of the remaining use of the injured thumb and a comparison with the uninjured thumb. North v Williams (Okla) 366 P2d 406.

Footnote 28. Villegas v Kercher (2d Dist) 11 Ill App 2d 282, 137 NE2d 92; Sullivan v Minneapolis, S. P. & S. S. M. R. Co., 55 ND 353, 213 NW 841.

There was no abuse of discretion in permitting the plaintiff to walk before the jury to show a limp, where his physician testified to an impairment of the right femur, and stated that the plaintiff had "some degree of limp" which would later improve. Green v Boney, 233 SC 49, 103 SE2d 732, 66 ALR2d 1370, where the court noted that the trial judge would not permit the demonstration until plaintiff had been sworn as a witness.

Footnote 29. Coca Cola Bottling Co. v Hankins (Tex Civ App) 245 SW2d 740, revd on other grounds 151 Tex 303, 249 SW2d 1008.

Footnote 30. Stewart v Weiner, 108 Neb 49, 187 NW 121 (wherein it appeared that the trial court permitted the plaintiff to shake hands with each of the jurors in order to show

the weakened grip in his injured hand; the appellate court disapproved of this procedure and called it demonstrative evidence of a very doubtful character which afforded an opportunity for imposition in a manner that could not be met by other proof or by cross-examination); *Coca Cola Bottling Co. v Hankins* (Tex Civ App) 245 SW2d 740, revd on other grounds 151 Tex 303, 249 SW2d 1008.

The trial court did not err in refusing the plaintiff's request to have a lady juror feel a portion of the plaintiff's neck where the plaintiff testified that his muscles had "wasted away" and there was a "sunken in place." *Gray v L-M Chevrolet Co.* (Tex Civ App El Paso) 368 SW2d 861, writ ref n r e, error ref n r e.

§ 954 To show resemblance and hereditary peculiarities

[View Entire Section](#)
[Go to Parallel Reference Table](#)

According to some courts, persons between whom an alleged relationship exists may be exhibited to the trier of fact to show a resemblance of features or other indications of relationship. 31 Whether a child should be exhibited to the jury to establish family resemblance is largely in the discretion of the court. 32 The decisions are not agreed as to the conditions under which such an exhibition is properly made. Some courts state that it is only proper to exhibit a child where attention is called to particular points of resemblance. 33 There is also authority for the view that while, in the case of adults or children with settled features, comparisons may fairly be made by the jury to see if there is any resemblance tending to show the relationship of parent and child, a comparison between an adult and a very young child whose features are immature and undergoing frequent changes should not be allowed, in the absence of other marked corporal indications. 34 The precise age at which, under this view, a child will be deemed too immature to be exhibited is dependent upon the facts and circumstances of each case. 35 Although no claim can be reasonably made that there is any resemblance between a very young child and his or her alleged father, 36 a child of 2 years, 37 or several years, 38 of age has been deemed sufficiently mature and settled in his or her facial and physical characteristics to afford a basis for comparison. Moreover, there is authority for the view that an exhibition of the child to the trier of fact for the purpose of showing resemblance to the putative father is impermissible in paternity proceedings. 39

◆ Observation: There might be an appropriate occasion for the child to appear before the trier of fact for a reason other than showing resemblance to the putative father, such as to show the personal relationship between the child and the putative father. 40

Footnotes

Footnote 31. *Walker v State* (Ala App) 558 So 2d 947; *State ex rel. Munoz v Bravo* (App) 139 Ariz 393, 678 P2d 974; *Melanson v Rogers*, 38 Conn Supp 484, 451 A2d 825; *Tatum v State*, 151 Ga App 602, 260 SE2d 747; *Dorsey v English*, 283 Md 522, 390 A2d 1133; *Department of Revenue v Spinale*, 406 Mass 1007, 550 NE2d 871; *Clark v Whiten*

(Miss) 508 So 2d 1105; State v Johnson, 361 Mo 214, 234 SW2d 219; State v Green, 55 NC App 255, 284 SE2d 688, app dismd 305 NC 304, 291 SE2d 152; Domigan v Gillette (Clark Co) 17 Ohio App 3d 228, 17 Ohio BR 494, 479 NE2d 291; Commonwealth ex rel. Broschius v Fern, 418 Pa Super 34, 613 A2d 17; L. v C. (Tex Civ App Houston (14th Dist)) 601 SW2d 475, writ ref n r e (Oct 22, 1980); State v Clay, 160 W Va 651, 236 SE2d 230.

Evidence of specific resemblance is probative of paternity and should be admitted, but only when presented by qualified expert witness who relates to the jury those characteristics which bear on paternity. People in interest of S., 183 Colo 89, 514 P2d 772.

For discussion of the admissibility of DNA evidence for the purposes of identification, see § 574.

Annotation: Bastardy proceedings: Propriety of exhibition of child to jury to show family resemblance, or lack of it, on issue of paternity, 55 ALR3d 1087.

Footnote 32. State ex rel. Munoz v Bravo (App) 139 Ariz 393, 678 P2d 974; State v Cabrera, 13 Ariz App 527, 478 P2d 142.

Trial court abused its discretion in allowing the exhibition of a child where there was no indication that the child had the necessary "settled features," and there was no evidence introduced prior to the child's exhibition or while the child was in front of the jury regarding specific resemblances between the child and the defendant. Borland v Chandler (Utah) 733 P2d 144, 51 Utah Adv Rep 14.

As to the exhibition of child in rape prosecution, see 65 Am Jur 2d, Rape § 60.

As to the resemblance of child to defendant in connection with a prosecution for incest, see 41 Am Jur 2d, Incest § 20.

Footnote 33. Borland v Chandler (Utah) 733 P2d 144, 51 Utah Adv Rep 14.

Footnote 34. Flores v State, 72 Fla 302, 73 So 234; State v Harvey, 112 Iowa 416, 84 NW 535; Shorten v Judd, 56 Kan 43, 42 P 337; Jordan v Commonwealth, 180 Ky 379, 202 SW 896, 1 ALR 617; Clark v Bradstreet, 80 Me 454, 15 A 56; Borland v Chandler (Utah) 733 P2d 144, 51 Utah Adv Rep 14; Hanawalt v State, 64 Wis 84, 24 NW 489.

A child may be exhibited to the jury as evidence of his alleged paternity if the trial court is of the opinion that the child is old enough to possess settled features or other corporal indication. Lohsen v Lawson, 106 Vt 481, 174 A 861, 95 ALR 309.

Footnote 35. Nacim v Ibarra (Tex Civ App El Paso) 310 SW2d 388, writ ref n r e (May 21, 1958) and reh of writ of error overr (Jun 18, 1958).

Footnote 36. State v Harvey, 112 Iowa 416, 84 NW 535; Jordan v Commonwealth, 180 Ky 379, 202 SW 896, 1 ALR 617; Nacim v Ibarra (Tex Civ App El Paso) 310 SW2d 388, writ ref n r e (May 21, 1958) and reh of writ of error overr (Jun 18, 1958); Hanawalt v State, 64 Wis 84, 24 NW 489.

Footnote 37. *State v Smith*, 54 Iowa 104, 6 NW 153; *Nacim v Ibarra* (Tex Civ App El Paso) 310 SW2d 388, writ ref n r e (May 21, 1958) and reh'g of writ of error overr (Jun 18, 1958).

Footnote 38. *Watson v Taylor*, 35 Okla 768, 131 P 922; *Nacim v Ibarra* (Tex Civ App El Paso) 310 SW2d 388, writ ref n r e (May 21, 1958) and reh'g of writ of error overr (Jun 18, 1958).

Footnote 39. *Kaneshiro v Belisario*, 51 Hawaii 649, 466 P2d 452; *H. v M.*, 104 Misc 2d 1052, 429 NYS2d 1006.

Footnote 40. *H. v M.*, 104 Misc 2d 1052, 429 NYS2d 1006; *Tennessee Dept. of Human Services v Barbee* (Tenn) 714 SW2d 263.

§ 955 To show racial characteristics

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts permit a child born out of wedlock to be exhibited to the trier of fact in a paternity proceeding when the question is one of race or color of skin. 41 However, this line of decisions has been criticized on the ground that they are not supported by satisfactory scientific basis or statutory construction. 42

Where the significance of the evidence depends upon race or color, the admissibility of it is not affected by the extreme youth of the child. 43 But it is clear that the courts will accord little weight to attempted proof of paternity or nonpaternity upon a basis of racial color, where the shades of color are uncertain or variable. 44

Footnotes

Footnote 41. 10 Am Jur 2d, Bastards §§ 42, 121.

Footnote 42. *Hess v Whitsitt* (2nd Dist) 257 Cal App 2d 552, 65 Cal Rptr 45, 32 ALR3d 1297.

Under a statute providing that the child of a wife cohabiting with a non-impotent husband was conclusively presumed to be legitimate, the trial court did not err in refusing to allow the putative father to offer proof that child's skin pigmentation, coloration, and "racial differences" were such that it was "racially impossible" for him to be the father of the child. *County of San Diego v Brown* (4th Dist) 80 Cal App 3d 297, 145 Cal Rptr 483.

Annotation: Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 ALR3d 1303.

Footnote 43. *Flores v State*, 72 Fla 302, 73 So 234.

Footnote 44. *State v Nathoo*, 152 Iowa 665, 133 NW 129; *Foot v State*, 65 Tex Crim 368, 144 SW 275.

§ 956 To show age

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under some circumstances, when the age of a person is material, it is permissible to permit the person whose age is in question to be brought before the trier of fact to determine the age from the appearance of the person. 45 Ordinarily, however, the exhibition of the person is not enough; there must also be additional evidence of age presented. 46

Footnotes

Footnote 45. *Dutzler v State*, 41 Ariz 436, 19 P2d 326; *People v Montalvo*, 4 Cal 3d 328, 93 Cal Rptr 581, 482 P2d 205, 49 ALR3d 518; *Watson v State*, 236 Ind 329, 140 NE2d 109; *Watson v State*, 236 Ind 329, 140 NE2d 109; *State v Dorathy*, 132 Me 291, 170 A 506; *State v Cobb*, 295 NC 1, 243 SE2d 759, habeas corpus proceeding (CA4) 1991 US App LEXIS 21689; *State v Gray*, 292 NC 270, 233 SE2d 905; *State v Campbell*, 51 NC App 418, 276 SE2d 726; *Lambert v Commonwealth*, 9 Va App 67, 383 SE2d 752; *State v Fries*, 246 Wis 521, 17 NW2d 578; *Hermann v State*, 73 Wis 248, 41 NW 171.

Footnote 46. *People v Grizzle*, 381 Ill 278, 44 NE2d 917; *Commonwealth v Pittman*, 25 Mass App 25, 514 NE2d 857.

For discussion of expert and opinion evidence on the age of persons, see 31A Am Jur 2d, Expert and Opinion Evidence § 387.

Practice References 45 Am Jur POF2d 631, Age of Person § 3.

4. Impressions Left from Body Parts [957]

§ 957 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the character and identity of footprints and tracks found where a crime is discovered and of the similarity of those footprints to the footprints of the accused, or

those made by shoes worn by, or found in, the possession of the accused, is admissible to identify the accused as the guilty person. 47 While the comparison of prints is not a matter solely restricted to expert testimony, expert evidence showing the results of an experiment to determine the correspondence of footprints found at the scene of the crime to the shoe or track of an accused is generally admissible. 48 Nonetheless, expert testimony regarding the size of the shoe making an imprint may be inadmissible where the evidence does not show that the scientific community has accepted the expert's methodology. 49 Photographic enlargements of fingerprints and palmprints may be used by experts in testifying before the jury as to identity, and a projector may be used by experts in testifying as to identity from palmprints for the purpose of displaying photographic impressions to the jury. 50 Plaster casts of shoe prints found at the scene of a crime are admissible into evidence at the discretion of the trial judge where the casts are relevant and probative. 51

Expert testimony is admissible in many situations to identify a person through a comparison of the marks left by teeth on a surface or substance, often the flesh of another person, with the dentition of the person in question. 52

Footnotes

Footnote 47. 31A Am Jur 2d, Expert and Opinion Evidence § 287.

Footnote 48. 31A Am Jur 2d, Expert and Opinion Evidence § 287.

Footnote 49. *State v Harvey*, 121 NJ 407, 581 A2d 483, cert den 499 US 931, 113 L Ed 2d 268, 111 S Ct 1336.

Expert and opinion evidence of fingerprint, palmprint, footprints and tracks is generally discussed in 31A Am Jur 2d, Expert and Opinion Evidence §§ 279-289.

Footnote 50. 31A Am Jur 2d, Expert and Opinion Evidence § 285.

Footnote 51. *Graham v State*, 239 Md 521, 212 A2d 287; *Stout v State* (Okla Crim) 693 P2d 617, cert den 472 US 1022, 87 L Ed 2d 623, 105 S Ct 3489, post-conviction proceeding (Okla Crim) 733 P2d 417, later proceeding 486 US 1050, 100 L Ed 2d 916, 108 S Ct 2814, post-conviction proceeding (Okla Crim) 817 P2d 737.

Trial court in homicide prosecution did not abuse its discretion by admitting evidence of badly deteriorated plaster cast made of footprint found next to homicide victim, which with photograph of cast was compared positively to a shoe seized from defendant's home, where the cast was relevant, where cast was used by both state and defense expert to compare with shoe seized from defendant, and where testimony concerning how cast was taken and cause of its deterioration was clear from testimony. *Doisher v State* (Alaska App) 632 P2d 242, remanded on other grounds (Alaska) 658 P2d 119.

Plaster casts of tennis shoe prints were admissible where victims testified that their attacker wore tennis shoes. *Tiller v State*, 238 Ga 67, 230 SE2d 874.

As to the competency and admissibility of track and footprint evidence, see § 572.

Annotation: Admissibility of bare footprint evidence, 45 ALR4th 1178 6.

Footprints as evidence, 35 ALR2d 856 § 10.

Footnote 52. 31A Am Jur 2d, Expert and Opinion Evidence § 291.

5. Visual Recordings [958-987]

a. In General [958, 959]

§ 958 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal and Uniform Rules of Evidence, the term "photographs" includes still photographs, X-ray films, videotapes and motion pictures. ⁵³ Photographs, ⁵⁴ X-rays, ⁵⁵ and motion pictures and videotapes, ⁵⁶ are generally admissible in evidence, provided they are properly verified or authenticated. ⁵⁷

§ 958 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility in evidence of composite picture or sketch produced by police to identify offender 23 ALR5th 672.

Footnotes

Footnote 53. FRE Rule 1001(2); Uniform Rules of Evidence, Rule 1001(2).

Footnote 54. § 960.

Footnote 55. § 977.

Footnote 56. § 979.

Footnote 57. As to authentication of: photograph, see § 965; X-rays, see § 978; motion pictures and videotapes, see § 982.

As to admissibility, generally, of sound recordings as documentary evidence, see § 1023.

As to expert and opinion evidence pertaining to photographs, see 31A Am Jur 2d, Expert and Opinion Evidence § 357.

For discussion of the use of a photograph as a demonstrative aid not put in evidence, see 75A Am Jur 2d, Trial § 507.

§ 959 Effect of markings, legends, or other extraneous matter

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Properly verified or authenticated photographs and X-ray pictures are not rendered inadmissible in evidence because of marks, memoranda, legends, or other extraneous matter on them, where the individual who made the marks or writings, or another witness familiar with the facts, explains them or testifies as to their correctness. 58

Footnotes

Footnote 58. *De Forge v New York, N. H. & H. R. R.*, 178 Mass 59, 59 NE 669 (X-ray picture); *State v Lang*, 197 Neb 47, 246 NW2d 608 (photograph); *State v Weston*, 155 Or 556, 64 P2d 536, 108 ALR 1402 (photograph); *Ryder's Adm'r v Hayward*, 98 Vt 106, 126 A 491, 36 ALR 453 (photograph).

For discussion of visible extraneous marking on mug shots, see § 973.

b. Particular Types of Visual Recordings [960-985]**(1). Photographs [960-976]****(a). In General [960-970]**

§ 960 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs of persons, things, and places, when duly verified 59 and shown by extrinsic evidence to be faithful representations of the subjects as of the time in question, 60 are admissible in evidence, both in criminal, 61 and civil cases. 62 Such photographs may be admitted as aids to the jury in arriving at an understanding of the evidence, the situation or condition of objects or premises, the circumstances of an accident, or the condition or identity of a person when any such matter is relevant to the

issues being litigated. 63 Photographic evidence must be practical, instructive, and calculated to assist both the jury and the court in understanding the case. 64

When properly authenticated, 65 photographs are, as a general rule, admissible under two distinct rules—(1) to illustrate, explain, or corroborate the testimony of a witness, 66 and (2) as probative evidence of what it depicts. 67 When used as probative evidence, photographic evidence takes on the status of a "mute," "silent," or "dumb" independent photographic witness. 68 The use of photographs, as testimony to the objects represented, rests fundamentally on the theory that they are the pictorial communications of a qualified witness, who uses this method of communication instead of, or in addition to, some other method. 69 In using photographs in the examination of witnesses, care should be observed in identifying for the record the particular photograph being used and in indicating precisely what the witness is testifying to from it. 70 However, under the "silent" witness theory, the photograph is used as substantive evidence, as opposed to merely demonstrative evidence, and there is no need for a witness to testify that the photograph accurately represents what he or she has observed. 71

If a photograph correctly shows the situation and surroundings as far as it purports to show them, it should not be excluded because it does not show all of the detailed facts and circumstances. 72 In this respect, photographs are inadmissible in evidence only where they do not illustrate or make clear some issue in the case 73 —that is, where they are irrelevant or immaterial 74 —or where they are of such a character as to prejudice the jury. 75 Moreover, photographs are not inadmissible solely because the defendant is willing to stipulate or has stipulated to matters contained in the photographs, or because these matters have been established by the testimony of a prosecution witness. 76

A photograph cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot properly be made available to establish the relative proportions of such object or objects except by the evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established. 77 Similarly, the physical condition of premises portrayed by a photograph and unsupported by oral testimony is insufficient evidence to entitle a jury to reasonably infer constructive notice of such condition. 78

The admissibility of photographs is within the discretion of the trial court, and its ruling in this respect will not be interfered with on appeal except upon a clear showing of an abuse of discretion. 79 In determining whether demonstrative photographs should be admitted, a trial judge must determine whether they are relevant 80 and whether a proper foundation has been laid. 81 The trial court may properly exclude a photograph as being prejudicial 82 or as being merely cumulative of the issue already established. 83 But the mere fact that a photograph is cumulative does not render it inadmissible. 84

Under the Federal Rules of Evidence, photographs are generally admissible, upon a proper foundation. 85 Photographs may be excluded, however, as any other competent evidence, if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 86 In demonstrating that the trial court clearly abused its discretion, the petitioner must demonstrate that the court error in allowing the photograph was of such significance that the trial was fatally infected. 87

§ 960 ----Generally [SUPPLEMENT]**Case authorities:**

Trial court did not err in admitting still photographs offered by condemnees where, although some of the photographs were inadmissible as showing temporary inconvenience during construction of condemnor's project, others were not, and condemnor had failed to point out objectionable photographs with particularity. *Department of Transp. v Metts* (1993) 208 Ga App 401, 430 SE2d 622, 93 Fulton County D R 1291.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Though photographic evidence was improperly excluded, defendant was not prejudiced, since the scene depicted in the photographs was described for the jury, and it was not a difficult scene for the jury to imagine. *State v Floyd* (1994) 115 NC App 412, 445 SE2d 54.

Footnotes

Footnote 59. § 966.

Footnote 60. § 968.

Footnote 61. *Wilson v United States*, 162 US 613, 40 L Ed 1090, 16 S Ct 895; *McKee v State*, 253 Ala 235, 44 So 2d 781; *State v Maximo* (App) 170 Ariz 94, 821 P2d 1379, 96 Ariz Adv Rep 137; *Hickson v State*, 312 Ark 171, 847 SW2d 691; *Potts v People*, 114 Colo 253, 158 P2d 739, 159 ALR 1410; *Underwood v State* (Ind) 535 NE2d 507, cert den 493 US 900, 107 L Ed 2d 206, 110 S Ct 257, reh den 493 US 985, 107 L Ed 2d 524, 110 S Ct 524; *Carson v Commonwealth* (Ky) 382 SW2d 85, cert den 380 US 938, 13 L Ed 2d 825, 85 S Ct 949; *State v Perow* (La App 2d Cir) 616 So 2d 1336, cert den (La) 623 So 2d 1303; *State v Duguay*, 158 Me 61, 178 A2d 129; *Sisk v State*, 236 Md 589, 204 A2d 684; *State v Friend* (Minn) 493 NW2d 540; *Sedlacek v State*, 147 Neb 834, 25 NW2d 533, 169 ALR 868; *People v Wood*, 79 NY2d 958, 582 NYS2d 992, 591 NE2d 1178; *Cody v State* (Okla Crim) 361 P2d 307, 84 ALR2d 997, appeal after remand (Okla Crim) 376 P2d 625; *State v Garver*, 190 Or 291, 225 P2d 771, 27 ALR2d 105; *Commonwealth v Boden*, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US

846, 5 L Ed 2d 70, 81 S Ct 89; *Brown v State*, 186 Tenn 378, 210 SW2d 670; *State v Goyet*, 120 Vt 12, 132 A2d 623.

As to proof, by means of photographic devices, of violation of speed regulations, see 7A Am Jur 2d, *Automobiles and Highway Traffic* § 373.

Practice References 3 Am Jur Trials 335, *Preparing and Using Photographs in Criminal Cases*.

Footnote 62. *Howard v Stoughton*, 199 Kan 787, 433 P2d 567.

Practice References Photographs. 5 Am Jur Trials 505, *Mapping the Trial—Order of Proof* § 38.

Photographs and Motion Pictures. 5 Am Jur Trials 921, *Showing Pain and Suffering* §§ 57, 58.

3 Am Jur Trials 1, *Preparing and Using Photographs in Civil Cases*.

Footnote 63. *Howard v Stoughton*, 199 Kan 787, 433 P2d 567.

Footnote 64. *Jordan v Abernathy* (Mo App) 845 SW2d 86.

Footnote 65. § 965.

Footnote 66. *Williston v Ard* (Ala) 611 So 2d 274; *Simmons v Roorda* (Fla App D2) 601 So 2d 609, 17 FLW D 1535; *Askew v State* (Ind) 439 NE2d 1350, later proceeding (Ind) 500 NE2d 1219; *State v Worthy* (La App 1st Cir) 532 So 2d 541, cert den (La) 538 So 2d 610; *State v Shaw* (Mo App) 839 SW2d 30; *State v Lane* (Mo App) 791 SW2d 947; *Miller v Monongahela Power Co.*, 184 W Va 663, 403 SE2d 406, cert den (US) 116 L Ed 2d 147, 112 S Ct 186.

Footnote 67. *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859; *Stark v State* (Ind) 489 NE2d 43; *Sisk v State*, 236 Md 589, 204 A2d 684.

Footnote 68. *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859; *Stark v State* (Ind) 489 NE2d 43; *Sisk v State*, 236 Md 589, 204 A2d 684.

Footnote 69. *Brown v State*, 186 Tenn 378, 210 SW2d 670.

Footnote 70. *Round v Burns*, 77 RI 135, 74 A2d 861, 20 ALR2d 1048.

Footnote 71. § 965.

Footnote 72. *Brock v Gulf, M. & O. R. Co.* (Mo) 270 SW2d 827.

Footnote 73. *Potts v People*, 114 Colo 253, 158 P2d 739, 159 ALR 1410.

Footnote 74. § 962.

Footnote 75. § 963.

Footnote 76. *State v Amaya-Ruiz*, 166 Ariz 152, 800 P2d 1260, 69 Ariz Adv Rep 12, cert den 500 US 929, 114 L Ed 2d 129, 111 S Ct 2044; *People v Dobson* (Colo App) 847 P2d 176; *Wilkerson v United States* (Dist Col App) 427 A2d 923, cert den 454 US 852, 70 L Ed 2d 143, 102 S Ct 295.

The mere fact that defendant stipulated the cause of death does not preclude the prosecutions use of the photographs of the victims body in defendant's prosecution for murder. *State v Slagle*, 65 Ohio St 3d 597, 605 NE2d 916, reh den 66 Ohio St 3d 1414, 607 NE2d 13 and cert den (US) 126 L Ed 2d 72, 114 S Ct 106.

As to the stipulation of evidence, generally, see 73 Am Jur 2d, Stipulations § 17.

Footnote 77. *Morgan v Kroger Grocery & Baking Co.*, 348 Mo 542, 154 SW2d 44; *Floeck v Hoover*, 52 NM 193, 195 P2d 86; *Gibbons v New York*, 200 Misc 699, 110 NYS2d 731.

Footnote 78. *Gibbons v New York*, 200 Misc 699, 110 NYS2d 731.

Footnote 79. *United States v Analla* (CA4 SC) 975 F2d 119, cert den (US) 123 L Ed 2d 476, 113 S Ct 1853; *Virginian R. Co. v Armentrout* (CA4 W Va) 166 F2d 400, 4 ALR2d 1064; *Pritchard v Downie* (CA8 Ark) 326 F2d 323; *Williston v Ard* (Ala) 611 So 2d 274; *State v Lopez*, 174 Ariz 131, 847 P2d 1078, 129 Ariz Adv Rep 3, cert den (US) 126 L Ed 2d 210, 114 S Ct 258; *Hickson v State*, 312 Ark 171, 847 SW2d 691; *Riggan v Langley*, 238 Ark 649, 383 SW2d 661; *People v Allen*, 42 Cal 3d 1222, 232 Cal Rptr 849, 729 P2d 115, cert den 484 US 872, 98 L Ed 2d 153, 108 S Ct 202 and stay den, cert den 487 US 1264, 101 L Ed 2d 977, 109 S Ct 201; *People v Dobson* (Colo App) 847 P2d 176; *Hall v Burns*, 213 Conn 446, 569 A2d 10; *Deputy v State* (Del Sup) 500 A2d 581, cert den 480 US 940, 94 L Ed 2d 778, 107 S Ct 1589, post-conviction proceeding (Del Super) 1989 Del Super LEXIS 513, affd without op (Del Sup) 602 A2d 1081, reported in full (Del Sup) 1991 Del LEXIS 303, post-conviction proceeding (Del Super) 1993 Del Super LEXIS 227, habeas corpus den (CA3) 1994 US App LEXIS 3697; *Wilson v State* (Fla) 436 So 2d 908, habeas corpus proceeding (Fla) 474 So 2d 1162, 10 FLW 390, later proceeding (Fla) 493 So 2d 1019, 11 FLW 471; *Hicks v State*, 256 Ga 715, 352 SE2d 762, cert den 482 US 931, 96 L Ed 2d 706, 107 S Ct 3220; *State v Windsor*, 110 Idaho 410, 716 P2d 1182, cert den 479 US 964, 93 L Ed 2d 408, 107 S Ct 463; *People v Fierer* (3d Dist) 151 Ill App 3d 649, 104 Ill Dec 879, 503 NE2d 594, affd 124 Ill 2d 176, 124 Ill Dec 855, 529 NE2d 972, appeal after remand (3d Dist) 196 Ill App 3d 404, 143 Ill Dec 100, 553 NE2d 807, app den 133 Ill 2d 563, 149 Ill Dec 328, 561 NE2d 698 and cert den (US) 115 L Ed 2d 999, 111 S Ct 2830, appeal after remand (Ill App 3d Dist) 1994 Ill App LEXIS 279; *Reaves v State* (Ind) 586 NE2d 847; *State v Armstrong* (Iowa App) 376 NW2d 635; *State v Minski*, 252 Kan 806, 850 P2d 809; *State v Perow* (La App 2d Cir) 616 So 2d 1336, cert den (La) 623 So 2d 1303; *State v Ledger* (Me) 444 A2d 404; *Reid v State*, 305 Md 9, 501 A2d 436; *Bagley v State*, 232 Md 86, 192 A2d 53, 100 ALR2d 1249; *Ferguson v Delaware International Speedway*, 164 Mich App 283, 416 NW2d 415; *Botz v Krips*, 267 Minn 362, 126 NW2d 446; *Hardy v Anderson*, 241 Minn 478, 63 NW2d 814; *Hurns v State* (Miss) 616 So 2d 313; *State v McMillin* (Mo) 783 SW2d 82, cert den 498 US 881, 112 L Ed 2d 179, 111 S Ct 225, reh den 498 US 994, 112 L Ed 2d 552, 111 S Ct 543; *State v Garza*, 241 Neb 256, 487 NW2d 551; *State v Bucanis*, 26 NJ 45, 138 A2d 739, 73 ALR2d 760, cert den 357 US

910, 2 L Ed 2d 1160, 78 S Ct 1157; *Traver v Packaging Industries Group, Inc.*, 242 NJ Super 574, 577 A2d 876; *Slaubaugh v Slaubaugh* (ND) 466 NW2d 573, appeal after remand (ND) 499 NW2d 99; *State v Slagle*, 65 Ohio St 3d 597, 605 NE2d 916, reh den 66 Ohio St 3d 1414, 607 NE2d 13 and cert den (US) 126 L Ed 2d 72, 114 S Ct 106; *McClellan v State* (Okla Crim) 762 P2d 281; *Commonwealth v Hollihan*, 388 Pa Super 525, 566 A2d 254, app den 527 Pa 663, 593 A2d 838; *State v Pulphus* (RI) 465 A2d 153; *State v Todd*, 290 SC 212, 349 SE2d 339.

The admissibility of photographs of physical evidence lies in the sound discretion of the trial court, and that discretion will not be disturbed on appeal unless the court has exceeded the bounds of reason. *People v Pitts* (2nd Dist) 223 Cal App 3d 1547, 273 Cal Rptr 389, reh den (Cal App 2nd Dist) 1990 Cal App LEXIS 1115 and review den (Cal) 1990 Cal LEXIS 5675.

Footnote 80. § 962.

Footnote 81. *State v Ruebke*, 240 Kan 493, 731 P2d 842, cert den 483 US 1024, 97 L Ed 2d 770, 107 S Ct 3272.

Authentication and verification of a photograph is discussed in § 965.

Footnote 82. § 963.

Footnote 83. *Thacker v United States* (Dist Col App) 599 A2d 52; *Kallgren v Chadwick*, 134 NH 110, 589 A2d 120.

Footnote 84. *Ex parte Siebert* (Ala) 555 So 2d 780, cert den 497 US 1032, 111 L Ed 2d 806, 110 S Ct 3297; *Traver v Packaging Industries Group, Inc.*, 242 NJ Super 574, 577 A2d 876.

Footnote 85. *Le Boeuf v K-Mart Corp.* (CA5 La) 888 F2d 330, 28 Fed Rules Evid Serv 959.

Footnote 86. *Le Boeuf v K-Mart Corp.* (CA5 La) 888 F2d 330, 28 Fed Rules Evid Serv 959.

Relevancy and materiality of a photograph is discussed in § 962.

Prejudicial character of photograph is discussed in § 963.

For general discussion of the exclusion of evidence on grounds of prejudice, confusion, or waste of time, see §§ 324 et seq.

Footnote 87. *Murray v Delo* (ED Mo) 767 F Supp 975.

§ 961 Admissibility in criminal cases, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In criminal cases, a photograph is admissible to illustrate, explain, or corroborate the testimony of a witness; 88 to establish the identity of the defendant 89 or the victim 90 to establish the corpus delicti; 91 to show, in a prosecution involving theft, the stolen property, cash or a check, clothing, jewelry, a vehicle, 92 to show the corpse in a homicide prosecution, 93 the motive or intent of the defendant, 94 the position of the parties to the crime, 95 the position of the victim's body, 96 the condition of the victim, 97 the wounds of the victim, 98 the cause of the victim's death, 99 the scene of the crime, footprints, tire tracks, bloodstains at the scene of the crime, the place where the victim was found, or the weapon used by the defendant; 1 to refute the defendant's claim of self-defense 2 or that the victim had committed suicide; 3 to determine the atrociousness of the crime; 4 or the illustrate or explain an expert's testimony on ballistics. 5

§ 961 ----Admissibility in criminal cases, generally [SUPPLEMENT]

Case authorities:

In prosecution for first degree felony murder and other related crimes, trial court did not abuse its discretion in admitting various photographs and videotape of victim's apartment, despite defendant's claims that photographs and videotape showed numerous images of body of victim that made them prejudicial and inflammatory and that such evidence was not relevant because condition and position of victim's body, as well as fact that victim's death was not accidental, were not in issue. Most of photographs and majority of videotape showed exterior and interior of victim's apartment; only one photograph gave view of victim's body and, in videotape of approximately 20 minutes, victim's body was in view for approximately 1 minute. In addition, pictures of condition and position of body, as well as disarray in bedroom and blood on bed, allowed jury to draw inference that struggle had ensued prior to victim's death and, thus, were relevant to show that defendant had requisite intent to kill. Moreover, defendant was charged with felony murder, aggravated burglary, attempted robbery and battery; accordingly, pictures of possible places of entry into apartment, overturned purse and its contents, and victim's bruised and bloodied face were relevant to these charges. Finally, trial court minimized possible prejudice by ordering state to edit videotape prior to trial and exercising control over presentation of tape at trial and refusing to permit state to admit all of available still photographs at trial. *State v Hernandez* (1993) 115 NM 6, 846 P2d 312.

The trial court did not err in a first degree murder prosecution by admitting two autopsy photographs of the victim where the photographs were used to show the nature and extent of the wounds sustained by the victim; they were relevant to show not only the cause of death, but also as a means of proving the premeditation and deliberation elements of first-degree murder; there is no indication that the jury was subjected to unnecessary or excessive descriptions of the victim's injuries; and the context in which the photographs were introduced does not suggest that the purpose was to inflame the passions of the jury. *State v Ysut Mlo* (1994) 335 NC 353, 440 SE2d 98.

The trial court did not abuse its discretion in a first-degree murder trial by admitting for illustrative purposes a color photograph of defendant and two others standing handcuffed next to a sheriff's deputy in the area where the victim's car was found and a color

photograph of defendant and others walking across a field near the location of the car where the trial court determined that the photographs would assist law officers in illustrating their testimony about the assistance given them by the defendant in locating items of evidence; the photographs were not used excessively or repetitiously; and the trial court gave a limiting instruction and also instructed the jury that the fact that a photograph may depict the defendant in handcuffs is no evidence of his guilt. *State v Barton* (1994) 335 NC 696, 441 SE2d 295.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

The trial court did not abuse its discretion in the admission of three autopsy photographs of a murder victim when a photograph of the victim at the shooting scene and a photograph of the victim's chest showing the hole where the bullet entered the body had already been admitted and when there was no dispute as to the cause of death or who inflicted the fatal wound where each photograph related to material events and facts to which each identifying witness was testifying, and the testimony of each witness whose testimony the photographs illustrated related to different aspects of the case and served different purposes. *State v Gray* (1994) 337 NC 772, 448 SE2d 794.

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Though photographic evidence was improperly excluded, defendant was not prejudiced, since the scene depicted in the photographs was described for the jury, and it was not a difficult scene for the jury to imagine. *State v Floyd* (1994) 115 NC App 412, 445 SE2d 54.

Trial court in rape prosecution harmlessly erred in admitting mug- shot photos of defendant, from which image of booking plaque had been cut from print, where photos were immediately recognizable by jurors as mug shots suggesting prior criminal acts by defendant, where defendant had admitted prior arrests and convictions. *State v Dinagen* (1994, RI) 639 A2d 1353.

Footnotes

Footnote 88. *United States v Frappier* (CA1 Mass) 807 F2d 257, 22 Fed Rules Evid Serv 257, 89 ALR Fed 1, cert den 481 US 1006, 95 L Ed 2d 203, 107 S Ct 1629; *Hendrickson v State*, 290 Ark 319, 719 SW2d 420; *Brown v State* (Ind) 503 NE2d 405; *State v Hoffer* (Iowa) 383 NW2d 543; *State v Hollis*, 240 Kan 521, 731 P2d 260; *State v Garcia*, 233 Kan 589, 664 P2d 1343, post-conviction proceeding (Kan App) 827 P2d 83 and (criticized on other grounds by *State v Coleman*, 253 Kan 335, 856 P2d 121); *State v*

Pleasant (La App 1st Cir) 489 So 2d 1005, cert den (La) 493 So 2d 1218; Commonwealth v Haas, 398 Mass 806, 501 NE2d 1154; Commonwealth v Proulx, 23 Mass App 985, 504 NE2d 365, review den 399 Mass 1105, 507 NE2d 1056; Hunter v State (Miss) 489 So 2d 1086; State v McMillin (Mo) 783 SW2d 82, cert den 498 US 881, 112 L Ed 2d 179, 111 S Ct 225, reh den 498 US 994, 112 L Ed 2d 552, 111 S Ct 543; State v Rogers, 323 NC 658, 374 SE2d 852; Ybarra v State (Okla Crim) 733 P2d 1342; Persons v State (Tex App Fort Worth) 714 SW2d 475.

Footnote 89. § 972.

Footnote 90. § 972.

Footnote 91. United States v Fleming (CA7 Ill) 594 F2d 598, cert den 442 US 931, 61 L Ed 2d 299, 99 S Ct 2863; Davenport v State, 245 GA 845, 268 SE2d 337; State v Winn, 121 Idaho 850, 828 P2d 879; Morris v State (Ind App) 433 NE2d 74; State v Martin (La App 1st Cir) 607 So 2d 775; People v Thomas, 126 Mich App 611, 337 NW2d 598, app den 419 Mich 858; Castro v State (Okla Crim) 844 P2d 159, cert den (US) 126 L Ed 2d 98, 114 S Ct 135; State v Ryan, 113 RI 343, 321 A2d 92.

Footnote 92. § 975.

Footnote 93. 40 Am Jur 2d, Homicide § 417.

Footnote 94. King v State (Fla) 436 So 2d 50, cert den 466 US 909, 80 L Ed 2d 163, 104 S Ct 1690; Goss v State, 255 GA 678, 341 SE2d 448; State v Hickman (Iowa) 337 NW2d 512; Marks v State (Miss) 532 So 2d 976; State v Rife, 215 Neb 132, 337 NW2d 724, cert den 464 US 1070, 79 L Ed 2d 215, 104 S Ct 977; State v Boeglin, 105 NM 247, 731 P2d 943; People v Scott (2d Dept) 126 App Div 2d 582, 510 NYS2d 702; Commonwealth v Smith, 313 Pa Super 138, 459 A2d 777; State v Harbison (Tenn) 704 SW2d 314, cert den 476 US 1153, 90 L Ed 2d 705, 106 S Ct 2261; Boggs v Commonwealth, 229 Va 501, 331 SE2d 407, cert den 475 US 1031, 89 L Ed 2d 347, 106 S Ct 1240, reh den 475 US 1133, 90 L Ed 2d 207, 106 S Ct 1666, habeas corpus proceeding 485 US 993, 99 L Ed 2d 512, 108 S Ct 1302, habeas corpus proceeding (ED Va) 695 F Supp 864, affd in part and revd in part on other grounds (CA4 Va) 892 F2d 1193, reh den, en banc (CA4) 1990 US App LEXIS 770 and cert den 495 US 940, 109 L Ed 2d 521, 110 S Ct 2193 and stay den 497 US 1043, 111 L Ed 2d 818, 111 S Ct 2, later proceeding 498 US 891, 112 L Ed 2d 193, 111 S Ct 233.

Footnote 95. Robinson v United States, 61 App DC 370, 63 F2d 147, cert den 289 US 749, 77 L Ed 1494, 53 S Ct 697; Henderson v State (Fla) 70 So 2d 358.

Footnote 96. United States v Analla (CA4 SC) 975 F2d 119, cert den (US) 123 L Ed 2d 476, 113 S Ct 1853; State v Grilz, 136 Ariz 450, 666 P2d 1059; Holland v State, 288 Ark 435, 706 SW2d 375, post-conviction proceeding (Ark) 1989 Ark LEXIS 492; People v Milner, 45 Cal 3d 227, 246 Cal Rptr 713, 753 P2d 669; People v Kurts (Colo App) 721 P2d 1201; Eddy v State (Ind) 496 NE2d 24; Grimes v State (Ind) 450 NE2d 512; State v Perow (La App 2d Cir) 616 So 2d 1336, cert den (La) 623 So 2d 1303; Reid v State, 305 Md 9, 501 A2d 436; Marks v State (Miss) 532 So 2d 976; Hunter v State (Miss) 489 So 2d 1086; State v Grant, 221 Mont 122, 717 P2d 562; People v Nowlin (2d Dept) 124 App Div 2d 833, 508 NYS2d 551; Banks v State (Okla Crim) 728 P2d 497; Harger v State (Okla Crim) 665 P2d 827, cert den 464 US 837, 78 L Ed 2d 123, 104 S Ct 126; Commonwealth v Costal, 351 Pa Super 200, 505 A2d 337; State v Adkison, 175 W Va

706, 338 SE2d 185.

Footnote 97. § 971.

Footnote 98. § 971.

Footnote 99. *Deviney v State*, 14 Ark App 70, 685 SW2d 179; *Welty v State* (Fla) 402 So 2d 1159; *Lowery v State*, 259 Ga 818, 388 SE2d 329; *People v Williams* (1st Dist) 137 Ill App 3d 736, 92 Ill Dec 336, 484 NE2d 1191; *Wells v State* (Ind) 441 NE2d 458; *Walker v State*, 274 Ind 197, 409 NE2d 626; *State v Green*, 232 Kan 116, 652 P2d 697; *State v Williams* (La App 1st Cir) 500 So 2d 811; *State v Addington* (Me) 518 A2d 449; *Commonwealth v Zagranski*, 408 Mass 278, 558 NE2d 933; *State v McMillin* (Mo) 783 SW2d 82, cert den 498 US 881, 112 L Ed 2d 179, 111 S Ct 225, reh den 498 US 994, 112 L Ed 2d 552, 111 S Ct 543; *State v Hicks* (Mo App) 722 SW2d 650; *State v Grant*, 221 Mont 122, 717 P2d 562; *State v Doll*, 214 Mont 390, 692 P2d 473; *State v Woods*, 203 Mont 401, 662 P2d 579; *State v Elkerson*, 304 NC 658, 285 SE2d 784; *Underwood v State* (Okla Crim) 659 P2d 948, later proceeding (Okla Crim) 786 P2d 707; *Commonwealth v Wharton*, 530 Pa 127, 607 A2d 710; *Bullard v State* (Tex App Houston (14th Dist)) 706 SW2d 329, petition for discretionary review ref (Mar 25, 1987) and motion for rehearing on PDR denied (May 6, 1987); *Medrano v State* (Tex App El Paso) 701 SW2d 337, petition for discretionary review ref (Oct 22, 1986) and appeal after remand (Tex App El Paso) 768 SW2d 502, petition for discretionary review ref (Oct 25, 1989); *State v Tharp*, 27 Wash App 198, 616 P2d 693, affd 96 Wash 2d 591, 637 P2d 961.

Footnote 1. § 975.

Footnote 2. *United States v Cline* (CA8 SD) 570 F2d 731, 2 Fed Rules Evid Serv 976; *People v Phillips*, 41 Cal 3d 29, 222 Cal Rptr 127, 711 P2d 423; *Fine v State* (Ind) 490 NE2d 305; *State v Hartman* (La) 388 So 2d 688; *People v Thomas*, 126 Mich App 611, 337 NW2d 598, app den 419 Mich 858; *State v Whitfield* (Mo App) 650 SW2d 305; *People v Mosher* (3d Dept) 81 App Div 2d 684, 438 NYS2d 392; *Espericueta v State* (Tex App Corpus Christi) 649 SW2d 336; *State v Jones*, 95 Wash 2d 616, 628 P2d 472; *Mayer v State* (Wyo) 618 P2d 127.

Footnote 3. *State v Cobb*, 110 Ariz 578, 521 P2d 1124; *People v Steger*, 16 Cal 3d 539, 128 Cal Rptr 161, 546 P2d 665, 83 ALR3d 1206; *Lackey v State*, 246 Ga 331, 271 SE2d 478; *People v Radford* (1st Dist) 65 Ill App 3d 107, 22 Ill Dec 166, 382 NE2d 486; *Fine v State* (Ind) 490 NE2d 305; *White v State*, 269 Ind 479, 381 NE2d 481; *State v Clark* (Iowa) 325 NW2d 381; *State v Phipps*, 224 Kan 158, 578 P2d 709; *State v Hampton* (La) 337 So 2d 201; *Cooley v State* (Miss) 391 So 2d 614; *State v Rainwater* (Mo App) 602 SW2d 233; *State v Ruof*, 296 NC 623, 252 SE2d 720; *Commonwealth v Petrakovich*, 459 Pa 511, 329 A2d 844; *Bryant v State* (Tenn Crim) 539 SW2d 816; *Seyle v State* (Wyo) 584 P2d 1081.

Footnote 4. *State v Castaneda*, 150 Ariz 382, 724 P2d 1; *Cotton v State*, 276 Ark 282, 634 SW2d 127; *People v Dyer*, 45 Cal 3d 26, 246 Cal Rptr 209, 753 P2d 1, cert den 488 US 934, 102 L Ed 2d 347, 109 S Ct 330; *State v Hoffer* (Iowa) 383 NW2d 543; *State v Cobbs* (La App 1st Cir) 434 So 2d 1243, cert den (La) 440 So 2d 758; *Fuller v State*, 45 Md App 414, 413 A2d 277; *Commonwealth v Glowacki*, 398 Mass 507, 499 NE2d 290; *People v Lambert* (2d Dept) 125 App Div 2d 495, 509 NYS2d 413; *Wise v Commonwealth*, 230 Va 322, 337 SE2d 715, cert den 475 US 1112, 89 L Ed 2d 921,

106 S Ct 1524, habeas corpus dismissed (CA4 Va) 982 F2d 142, cert den (US) 124 L Ed 2d 689, 113 S Ct 2940; State v Giffing, 45 Wash App 369, 725 P2d 445, review den 107 Wash 2d 1015.

Footnote 5. State v Lane, 72 Ariz 220, 233 P2d 437; Commonwealth v Giacomazza, 311 Mass 456, 42 NE2d 506.

As to the admissibility of photographs in homicide cases, see 40 Am Jur 2d, Homicide §§ 416-420.

§ 962 Relevancy and materiality

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is always essential to the right to introduce a photograph in evidence that it have a relevant and material bearing upon some matter in controversy at the trial, and the party offering such evidence should establish its relevancy. 6 Accordingly, a basic test of the admissibility of a photograph is not necessity but relevance. 7 Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence and, under this conception, the issues of whether the evidence is cumulative or whether the pictures were taken away from the scene are routine issues basic to a determination of relevancy and are not issues arising from any exceptional nature of the proffered evidence. 8 The relevancy which the court considers is the relevancy of what is pictured, rather than the propriety of evidencing a relevant fact by a photograph; if the fact sought to be evidenced by a photograph is itself not admissible, it cannot be proved by photograph or otherwise. 9 Photographs can be relevant to a material issue either independently or by corroborating other evidence. 10

Photographs are relevant if they depict scenes that a witness is permitted to describe in their testimony. 11 If relevant, the photograph is not rendered inadmissible because: the subject portrayed could be described by words; 12 the accused admitted the facts portrayed or the photograph would be cumulative; 13 or if the subject itself had already been introduced into evidence. 14 However, a photograph which is entirely irrelevant and immaterial to any issue in the cause, 15 and which is of such a character as to divert the minds of the jury to improper or irrelevant considerations 16 or to prejudice the jury, 17 should be excluded from evidence. However, a relevant photograph is not inadmissible because an explanation is necessary in order to understand it. 18

§ 962 ----Relevancy and materiality [SUPPLEMENT]

Case authorities:

In a prosecution for first degree murder by reason of deliberate premeditation and extreme cruelty or atrocity, it was not error for the court to permit the introduction into

evidence of 5 color photographs which showed the extent of the victim's injuries; the photographs were relevant to show whether the murder was committed with extreme cruelty or atrocity, and the prosecution was not required to rely solely on the testimony of a witness and of the medical examiner. *Commonwealth v Benson* (1994) 419 Mass 114, 642 NE2d 1035.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

Footnotes

Footnote 6. *Williston v Ard* (Ala) 611 So 2d 274; *State v Lopez*, 174 Ariz 131, 847 P2d 1078, 129 Ariz Adv Rep 3, cert den (US) 126 L Ed 2d 210, 114 S Ct 258; *State v Amaya-Ruiz*, 166 Ariz 152, 800 P2d 1260, 69 Ariz Adv Rep 12, cert den 500 US 929, 114 L Ed 2d 129, 111 S Ct 2044; *Jones v State*, 213 Ark 863, 213 SW2d 974; *St. Lukes Hospital Ass'n v Long*, 125 Colo 25, 240 P2d 917, 31 ALR2d 1120; *People v Donaldson*, 24 Ill 2d 315, 181 NE2d 131; *White v State*, 269 Ind 479, 381 NE2d 481; *State v Williams* (La) 341 So 2d 370; *State v Duguay*, 158 Me 61, 178 A2d 129; *Wright v Kelly*, 203 Va 135, 122 SE2d 670.

For a discussion of general rules as to relevancy and materiality, see §§ 301 et seq.

Footnote 7. *Henry v State* (Fla) 613 So 2d 429, 18 FLW S 33, cert den (US) 126 L Ed 2d 665, 114 S Ct 699; *State v Sequin*, 73 Hawaii 331, 832 P2d 269.

Footnote 8. *Straight v State* (Fla) 397 So 2d 903, cert den 454 US 1022, 70 L Ed 2d 418, 102 S Ct 556.

Footnote 9. *State ex rel. State Highway Com. v Cone* (Mo) 338 SW2d 22.

Footnote 10. *Straight v State* (Fla) 397 So 2d 903, cert den 454 US 1022, 70 L Ed 2d 418, 102 S Ct 556.

Footnote 11. *Baird v State* (Ind) 604 NE2d 1170, cert den (US) 126 L Ed 2d 208, 114 S Ct 255.

Footnote 12. *People v Myers*, 35 Ill 2d 311, 220 NE2d 297, cert den 385 US 1019, 17 L Ed 2d 557, 87 S Ct 752; *Meredith v State*, 247 Ind 233, 214 NE2d 385.

Footnote 13. *State v Bracy*, 145 Ariz 520, 703 P2d 464, cert den 474 US 1110, 88 L Ed 2d 932, 106 S Ct 898; *State v DeJesus*, 194 Conn 376, 481 A2d 1277; *Deputy v State* (Del Sup) 500 A2d 581, cert den 480 US 940, 94 L Ed 2d 778, 107 S Ct 1589, post-conviction proceeding (Del Super) 1989 Del Super LEXIS 513, affd without op (Del Sup) 602 A2d 1081, reported in full (Del Sup) 1991 Del LEXIS 303, post-conviction

proceeding (Del Super) 1993 Del Super LEXIS 227, habeas corpus den (CA3) 1994 US App LEXIS 3697; People v Minnis (4th Dist) 118 Ill App 3d 345, 74 Ill Dec 179, 455 NE2d 209; Todd v Commonwealth (Ky) 716 SW2d 242; Lewis v State (Miss) 454 So 2d 1306.

Footnote 14. Commonwealth v Tucker, 189 Mass 457, 76 NE 127.

Footnote 15. O'Meara v Haiden, 204 Cal 354, 268 P 334, 60 ALR 1381; Evansville School Corp. v Price, 138 Ind App 268, 208 NE2d 689; State ex rel. State Highway Com. v Cone (Mo) 338 SW2d 22; Davis v Dunn, 90 Vt 253, 98 A 81; Bunting v Commonwealth, 208 Va 309, 157 SE2d 204; Wright v Kelly, 203 Va 135, 122 SE2d 670; Southern R. Co. v Vaughan's Adm'r, 118 Va 692, 88 SE 305; Selleck v Janesville, 104 Wis 570, 80 NW 944.

Photographs of hounds used in tracking an alleged criminal are not admissible in evidence upon the trial of an action for unlawfully searching his house for evidence of the crime, without a warrant. McClurg v Brenton, 123 Iowa 368, 98 NW 881.

Footnote 16. Kiefer v State, 239 Ind 103, 153 NE2d 899; State ex rel. State Highway Com. v Cone (Mo) 338 SW2d 22; Selleck v Janesville, 104 Wis 570, 80 NW 944.

The admission in evidence in an action for the death of a minor child of a photograph of such child is error where there is no dispute as to the identity of the child injured. O'Meara v Haiden, 204 Cal 354, 268 P 334, 60 ALR 1381.

Footnote 17. § 963.

Footnote 18. State v Robinson, 201 SC 230, 22 SE2d 587.

§ 963 Prejudicial character of photographs

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, 19 particularly if they are not substantially necessary or instructive to show material facts or conditions. 20 If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. 21 However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident 22 or crime 23 even though they may tend to arouse the passion or prejudice of the jurors. Thus, the test for determining whether a photograph may be shown to the jury is whether the photograph's probative value outweighs its possible prejudicial effect. 24

When a photograph is offered the tendency of which may be to prejudice or inflame the jury, its admissibility lies in the sound discretion of the court. 25 A court may consider several factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include, but are not limited to, the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or colored, whether they are close up, whether the body depicted is naked or clothed, 26 whether the exhibit is a slide or a print, the matter of projection or presentation, and the testimony the exhibit illustrates. 27 In determining whether the display of a grievous wound would be unduly prejudicial, the test is whether the site is of such a nature as to enflame the jurors and therefore prejudice them beyond the ordinary prejudice that is always sustained by the introduction of relevant evidence intended to prove guilt. 28 The availability of other means of proof and circumstances unique to each individual case must also be considered. 29 Thus, the photograph may be admitted if its value as evidence outweighs its possible prejudicial effect, 30 or may be excluded if its prejudicial effect outweighs its probative value. 31

§ 963 ----Prejudicial character of photographs [SUPPLEMENT]

Case authorities:

The trial court did not err in a first- degree murder prosecution by admitting two black and white photographs of victim's fatal wound where a deputy indicated that they would be helpful to illustrate his testimony regarding the location of the wound and they were not excessive in number, repetitious or peculiarly gruesome. *State v Huggins* (1994) 338 NC 494, 450 SE2d 479.

Two sets of slides used by an expert witness to illustrate his testimony concerning the similarities of wounds suffered by the victim in this murder trial and another woman murdered by defendant were not unnecessarily repetitive, graphic and misleading where slides of each victim were shown side-by-side; no slide was kept on the screen for an excessive period or unnecessarily repeated; the presentation was made to the jury only on one occasion; and the trial court gave the jury limiting instructions at all appropriate times. *State v Fisher* (1994) 336 NC 684, 445 SE2d 866.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Though photographic evidence was improperly excluded, defendant was not prejudiced, since the scene depicted in the photographs was described for the jury, and it was not a difficult scene for the jury to imagine. *State v Floyd* (1994) 115 NC App 412, 445 SE2d

In the prosecution of the defendant for the murder of an elderly woman in which there was testimony that the victim's spine was severed by blunt trauma and that all of her ribs were broken, the court did not commit reversible error when it permitted the introduction into evidence of a photograph of the defendant in a boxing stance without his shirt on in order to show the defendant's physical ability to inflict the injuries on the victim; even though the court was not convinced that the photograph was admissible, the photograph was not so inflammatory or prejudicial as to warrant a new trial. *Commonwealth v Simmons* (1995, Pa) 662 A2d 621, application gr (Pa) 1995 Pa LEXIS 1336 and petition for certiorari filed (Dec 14, 1995).

The court in a murder prosecution properly permitted the Commonwealth to introduce into evidence several color photographs of the murdered mother and her murdered 17 year old daughter during the penalty phase of the trial in order to prove the aggravating circumstance of torture where (1) both of the victims were stabbed dozens of times with a knife and scissors, (2) the mother was found with her hands tied behind her back, in a kneeling position with her back against a bed and with a pair of panties stuffed in her mouth, and (3) the daughter, who had been raped, was found with her hands tied behind her back and with a cloth noose around her neck; the defendant argued that the Commonwealth had black and white photographs that could have been used, but the black and white photographs showed the victims lying in pools of blood at the crime scene, while the color photographs depicted the victims cleansed of blood in the wound areas and lying prone on the medical examiner's table. *Commonwealth v Lee* (1995, Pa) 662 A2d 645, application gr (Pa) 1995 Pa LEXIS 1335 and petition for certiorari filed (Dec 18, 1995).

Footnotes

Footnote 19. *Frick v Commonwealth*, 313 Ky 163, 230 SW2d 634; *Craft v Commonwealth*, 312 Ky 700, 229 SW2d 465; *State v Bischert*, 131 Mont 152, 308 P2d 969; *People v Wood*, 79 NY2d 958, 582 NYS2d 992, 591 NE2d 1178; *People v Corbett* (4th Dept) 68 App Div 2d 772, 418 NYS2d 699, affd 52 NY2d 714, 436 NYS2d 273, 417 NE2d 567; *State v Wells* (SC App) 426 SE2d 814; *Lucas v HCMF Corp.*, 238 Va 446, 384 SE2d 92; *Wright v Kelly*, 203 Va 135, 122 SE2d 670; *Guhl v Whitcomb*, 109 Wis 69, 85 NW 142; *Selleck v Janesville*, 104 Wis 570, 80 NW 944.

Footnote 20. *State v Hodges* (La App 4th Cir) 526 So 2d 406, cert den (La) 532 So 2d 175; *State v Bischert*, 131 Mont 152, 308 P2d 969; *State v Orecchio*, 16 NJ 125, 106 A2d 541.

In a prosecution for conspiracy to obstruct justice in that the defendant agreed to, and did, fabricate a story concerning how a small boy received a brutal beating, which caused the death of the boy, the introduction in evidence of gruesome photographs of the murdered boy was highly prejudicial, since the photographs had no place in the trial. *Frick v Commonwealth*, 313 Ky 163, 230 SW2d 634.

As to relevancy and materiality of evidence, generally, see §§ 301 et seq.

For general discussion of the exclusion of evidence on grounds of prejudice, confusion,

or waste of time, see §§ 324 et seq.

Footnote 21. *Craft v Commonwealth*, 312 Ky 700, 229 SW2d 465; *West v State*, 218 Miss 397, 67 So 2d 366.

Footnote 22. *Thibodeau v Connecticut Co.*, 139 Conn 9, 89 A2d 223; *Elliot v Kesler* (Mo App) 799 SW2d 97; *Gum v Wooge*, 211 Or 149, 315 P2d 119; *Washburn v Beatt Equipment Co.*, 120 Wash 2d 246, 840 P2d 860.

Footnote 23. *United States v Naranjo* (CA10 Colo) 710 F2d 1465, 13 Fed Rules Evid Serv 1260; *Ex parte Siebert* (Ala) 555 So 2d 780, cert den 497 US 1032, 111 L Ed 2d 806, 110 S Ct 3297; *State v Bracy*, 145 Ariz 520, 703 P2d 464, cert den 474 US 1110, 88 L Ed 2d 932, 106 S Ct 898; *Watson v State*, 290 Ark 484, 720 SW2d 310, post-conviction proceeding (Ark) 1989 Ark LEXIS 127; *People v Milner*, 45 Cal 3d 227, 246 Cal Rptr 713, 753 P2d 669; *Deputy v State* (Del Sup) 500 A2d 581, cert den 480 US 940, 94 L Ed 2d 778, 107 S Ct 1589, post-conviction proceeding (Del Super) 1989 Del Super LEXIS 513, affd without op (Del Sup) 602 A2d 1081, reported in full (Del Sup) 1991 Del LEXIS 303, post-conviction proceeding (Del Super) 1993 Del Super LEXIS 227, habeas corpus den (CA3) 1994 US App LEXIS 3697; *Carvajal v State* (Fla App D3) 470 So 2d 73, 10 FLW 1364, review den (Fla) 479 So 2d 117; *Perez v State*, 258 Ga 343, 369 SE2d 256; *Goss v State*, 255 Ga 678, 341 SE2d 448; *State v Scroggins*, 110 Idaho 380, 716 P2d 1152, cert den 479 US 989, 93 L Ed 2d 585, 107 S Ct 582; *People v Fierer* (3d Dist) 151 Ill App 3d 649, 104 Ill Dec 879, 503 NE2d 594, affd 124 Ill 2d 176, 124 Ill Dec 855, 529 NE2d 972; *Eddy v State* (Ind) 496 NE2d 24; *Lloyd v State* (Ind) 448 NE2d 1062; *State v Minski*, 252 Kan 806, 850 P2d 809; *Todd v Commonwealth* (Ky) 716 SW2d 242; *State v Germain* (La) 433 So 2d 110; *State v Roy* (La App 3d Cir) 502 So 2d 265, writ den (La) 506 So 2d 110; *State v Condon* (Me) 468 A2d 1348, cert den 467 US 1204, 81 L Ed 2d 344, 104 S Ct 2385; *Commonwealth v Haas*, 398 Mass 806, 501 NE2d 1154; *People v Bryant*, 129 Mich App 574, 342 NW2d 86; *State v Friend* (Minn) 493 NW2d 540; *State v Canterbury* (Mo) 708 SW2d 662, post-conviction proceeding (Mo App) 781 SW2d 107; *State v Sherrill* (Mo App) 657 SW2d 731, post-conviction proceeding (Mo App) 755 SW2d 718; *State v Boeglin*, 105 NM 247, 731 P2d 943; *People v Wood*, 79 NY2d 958, 582 NYS2d 992, 591 NE2d 1178; *People v Shaw* (2d Dept) 124 App Div 2d 686, 507 NYS2d 918; *State v Rogers*, 323 NC 658, 374 SE2d 852; *State v Lowery*, 318 NC 54, 347 SE2d 729; *Sims v State* (Okla Crim) 731 P2d 1368; *Commonwealth v Truesdale*, 502 Pa 94, 465 A2d 606; *State v Middleton*, 288 SC 21, 339 SE2d 692, appeal after remand 295 SC 318, 368 SE2d 457, cert den 488 US 872, 102 L Ed 2d 158, 109 S Ct 189, reh den 488 US 961, 102 L Ed 2d 393, 109 S Ct 406; *State v Harbison* (Tenn) 704 SW2d 314, cert den 476 US 1153, 90 L Ed 2d 705, 106 S Ct 2261; *State v Johnson* (Tenn Crim) 670 SW2d 634, post-conviction proceeding (Tenn Crim) 1992 Tenn Crim App LEXIS 595; *State v Garcia* (Utah) 663 P2d 60, later proceeding (Utah) 675 P2d 527; *State v Adkison*, 175 W Va 706, 338 SE2d 185.

Footnote 24. *Le Boeuf v K-Mart Corp.* (CA5 La) 888 F2d 330, 28 Fed Rules Evid Serv 959; *State v Amaya-Ruiz*, 166 Ariz 152, 800 P2d 1260, 69 Ariz Adv Rep 12, cert den 500 US 929, 114 L Ed 2d 129, 111 S Ct 2044; *State v Sequin*, 73 Hawaii 331, 832 P2d 269; *People v Mitchell*, 152 Ill 2d 274, 178 Ill Dec 354, 604 NE2d 877, cert den (US) 124 L Ed 2d 685, 113 S Ct 2936.

Footnote 25. *State v Amaya-Ruiz*, 166 Ariz 152, 800 P2d 1260, 69 Ariz Adv Rep 12, cert den 500 US 929, 114 L Ed 2d 129, 111 S Ct 2044; *Duncan v State*, 291 Ark 521, 726 SW2d 653, appeal after remand, remanded 309 Ark 218, 831 SW2d 115; *Thibodeau v*

Connecticut Co., 139 Conn 9, 89 A2d 223; State v Winn, 121 Idaho 850, 828 P2d 879; State v Winn, 121 Idaho 850, 828 P2d 879; People v Mitchell, 152 Ill 2d 274, 178 Ill Dec 354, 604 NE2d 877, cert den (US) 124 L Ed 2d 685, 113 S Ct 2936.

Footnote 26. McFarland v State (Tex Crim) 845 SW2d 824, cert den (US) 124 L Ed 2d 686, 113 S Ct 2937.

Footnote 27. State v Syriani, 333 NC 350, 428 SE2d 118, cert den (US) 126 L Ed 2d 341, 114 S Ct 392, reh den (US) 126 L Ed 2d 707, 114 S Ct 745.

A photograph of the victim of an automobile accident displaying a tracheotomy incision should have been excluded where the photograph had such gruesome appearance that its inflammatory and prejudicial effect on the jury would far outweigh its evidentiary or probative value. Haddad v Kuriger (Ky) 437 SW2d 524.

Footnote 28. State v Ellis (RI) 619 A2d 418.

Footnote 29. McFarland v State (Tex Crim) 845 SW2d 824, cert den (US) 124 L Ed 2d 686, 113 S Ct 2937.

Footnote 30. United States v Waloke (CA8 SD) 962 F2d 824, 35 Fed Rules Evid Serv 731; Thibodeau v Connecticut Co., 139 Conn 9, 89 A2d 223; Napier v Commonwealth (Ky) 426 SW2d 121; State v Perow (La App 2d Cir) 616 So 2d 1336, cert den (La) 623 So 2d 1303; Moeller v Hauser, 237 Minn 368, 54 NW2d 639, 57 ALR2d 364; State v Slagle, 65 Ohio St 3d 597, 605 NE2d 916, reh den 66 Ohio St 3d 1414, 607 NE2d 13 and cert den (US) 126 L Ed 2d 72, 114 S Ct 106; State v Lord, 117 Wash 2d 829, 822 P2d 177, cert den (US) 121 L Ed 2d 112, 113 S Ct 164.

In a prosecution for aggravated battery based on the infliction of several knife wounds, the admission in evidence of photographs of the wounds has been held not precluded on the ground that they were calculated to arouse the passion and prejudice of the jury, although from a probative viewpoint the photographs had merely the cumulative effect of corroborating the testimony of the victim and his doctor, where the photographs, taken after the wounds had been stitched, did not show blood or the depth of the cuts, and hence were more favorable to the defendant than photographs of the original, unattended wounds would have been. State v Lee, 80 Ariz 213, 295 P2d 380, 56 ALR2d 1166.

Allegedly gruesome and inflammatory photographs are admissible if relevant to any issue to be proved in a case, even if such pictures are not needed to resolve a conflict in evidence relating to a disputed vital issue in the case. State v Wright (Fla) 265 So 2d 361.

In homicide cases, the prejudicial affect of admitting gruesome photographs of the victims corpse is outweighed by the relevancy of the exhibits. Huspon v State (Ind) 545 NE2d 1078.

Footnote 31. United States v Hitt (CA9 Or) 981 F2d 422, 92 CDOS 9651, 92 Daily Journal DAR 16110, 36 Fed Rules Evid Serv 1269 (defendant's conviction for possessing unregistered machine gun reversed because prejudicial effect of allowing photographs of many weapons outweighed photograph's probative value where there was no limiting instruction and nothing to keep the jury from being misled); People v Holm (4th Dist) 188 Ill App 3d 908, 136 Ill Dec 462, 544 NE2d 1237, app den 129 Ill 2d 568, 140 Ill Dec

Because gruesome photographs of a homicide corpse will unfairly prejudice and inflame the jury, the proponent must show the photographs have unusual probative value. *State v Dunn* (Utah) 850 P2d 1201, 208 Utah Adv Rep 100.

On admissibility of photographs of corpse or parts of body in homicide prosecution, see 40 Am Jur 2d, Homicide § 417; on admissibility of such photographs for particular evidentiary purposes, see 40 Am Jur 2d, Homicide § 418; on gruesomeness of such photographs as affecting admissibility, see 40 Am Jur 2d, Homicide § 419.

§ 964 --Gruesome or potentially inflammatory photograph rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In some jurisdictions, the rule is that a gruesome or potentially inflammatory photograph is admissible only if the need for the evidence clearly outweighs the likelihood of inflaming the minds and passions of the jurors. 32 According to jurisdictions following this rule, the photographs must have something more than probative value, because by the preliminary finding that they are gruesome, they are presumed to have a prejudicial and inflammatory effect on a jury against a defendant. 33 In other words, under the gruesome photograph rule, if the photograph is gruesome the prosecution must show that the photographs are of essential evidentiary value to its case. 34 However, in order for photographs to come within the gruesome photograph rule, there must be initial findings that they are gruesome. 35 The term gruesome in the context of photograph evidence should in most cases be limited to depiction of body or body parts. 36 Photographs that show much gore and blood, or emphasize contorted facial or bodily features, or depict a body after autopsy procedures; and color photographs and enlargements of particular areas of a corpse magnifying its revolting aspects will more likely be condemned as gruesome. 37 The visibility of blood in a photograph does not necessarily require a finding that the photograph is inflammatory. 38 Where photographs are not gruesome, they are properly admitted into evidence if the likelihood of their affecting the verdict or inflaming the minds and passions of the jurors is minimal. 39

§ 964 --Gruesome or potentially inflammatory photograph rule [SUPPLEMENT]

Practice Aids: Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene. 37 ALR5th 515.

Case authorities:

In prosecution of murder of convenience store clerk, trial court properly admitted autopsy photographs of gunshot wounds to victim's pelvic area, despite defendant's objection that photographs were cumulative and inflammatory, where photographs illustrated prosecutor's argument to jury that initial single shot to head had killed victim and that

subsequent shots fired into her prone body demonstrated defendant's personal animosity toward her for ordering him to leave store, contrary to defendant's claim that he had executed victim on a government mission. *Barnes v State* (1994, Ind) 634 NE2d 46.

Although a trial judge has discretion to permit or preclude the introduction into evidence of photographs of victims and crime scenes, a trial judge must take care to avoid exposing the jury unnecessarily to material that might inflame the jurors' emotions and possibly deprive the defendant of an impartial jury. *Commonwealth v Simmons* (1995) 419 Mass 426, 646 NE2d 97.

It was not error for the court to permit the introduction into evidence of several photographs of a murder victim that were taken during the autopsy since none of the photographs showed the victim in an altered state and since the photographs were relevant as to whether the murder was committed with extreme atrocity or cruelty. *Commonwealth v Simmons* (1995) 419 Mass 426, 646 NE2d 97.

It was not error for the court to permit the introduction into evidence of numerous photographs of a murder victim's apartment, some of which showed blood stains and spatters, notwithstanding that some of the photographs might have been duplicative, since the photographs were relevant to understanding the testimony of the Commonwealth's expert witness and to proving the Commonwealth's contentions about the defendant's movements and actions. *Commonwealth v Simmons* (1995) 419 Mass 426, 646 NE2d 97.

The trial court did not err in a first-degree murder prosecution by admitting autopsy photographs of the victim's body and the testimony of the pathologist concerning these photographs where the trial judge excluded six color photographs as being redundant and "perhaps" inflammatory and the photographs admitted into evidence were illustrative of testimony regarding the nature and number of the victim's wounds and were not excessive in number. Their probative value was not substantially outweighed by any prejudicial effect. *State v Fisher* (1994) 336 NC 684, 445 SE2d 866.

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene. *State v Carter* (1994) 338 NC 569, 451 SE2d 157.

Two photographs showing a murder victim's body as it was discovered, four photographs from the autopsy, and ten slides from the autopsy, all of which were in color, were not unfairly prejudicial or unduly repetitive, and defendant was not prejudiced by the manner in which they were presented to the jury, where they were admitted to illustrate the position and condition of the body when found and various injuries sustained by the victim when he was dragged behind defendant's logging truck. The photographs and slides were not irrelevant because defendant admitted dragging the victim behind his truck and leaving the victim on the side of the road since they supported the jury's finding that the murder was premeditated and deliberate. *State v House* (1995) 340 NC 187, 456 SE2d 292.

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting photographs of the victims at the crime scene and at the autopsy and the blood stained clothes of one of the victims. The pictures were admitted to illustrate testimony describing the position of the victims, the various injuries sustained by the victims, and

the damage done to the neighborhood by defendant; the testimony was relevant and probative to the State's case against defendant; and the photographs and clothing submitted during the sentencing proceeding established the severity and brutality of the attack on one of the victims, India Anderson, and was admissible to support the especially heinous, atrocious, or cruel aggravating circumstance. *State v Lynch* (1995) 340 NC 435, 459 SE2d 679.

The trial court did not err in denying defendant's motion to exclude photographs of the murder victim as inflammatory and unfairly prejudicial, since the photographs were illustrative of testimony regarding the nature and number of the victim's wounds, the condition of the body upon discovery, and the crime scene. *State v Williams* (1995) 341 NC 1, 459 SE2d 208.

Even if a photograph of the murder victim lying behind a bar amidst a number of broken bottles was found to be inflammatory, it was still properly admitted into evidence in order to demonstrate the state of disarray of the bar and the severity of the struggle between the victim and his attacker. *Commonwealth v Rompilla* (1995, Pa) 653 A2d 626.

Footnotes

Footnote 32. *Commonwealth v Crawley*, 514 Pa 539, 526 A2d 334.

Footnote 33. *State v Rowe*, 163 W Va 593, 259 SE2d 26.

Footnote 34. *State v Clark*, 218 Kan 18, 542 P2d 291; *State v Partee*, 199 Neb 305, 258 NW2d 634; *State v Polk*, 164 NJ Super 457, 397 A2d 330, *affd* 78 NJ 539, 397 A2d 327; *Commonwealth v Chacko*, 480 Pa 504, 391 A2d 999; *State v Rowe*, 163 W Va 593, 259 SE2d 26.

The use of autopsy photographs in capital cases during sentencing hearings are more appropriate when the state is trying to prove that the murder involved torture, depravity of mind, or an aggravated assault to the victim. *State v Bey*, 129 NJ 557, 610 A2d 814.

Footnote 35. *Pasquale v Ohio Power Co.*, 187 W Va 292, 418 SE2d 738.

Footnote 36. *State v Spirko*, 59 Ohio St 3d 1, 570 NE2d 229, *reh den* 60 Ohio St 3d 704, 573 NE2d 121 and *cert den* (US) 116 L Ed 2d 254, 112 S Ct 312.

Footnote 37. *Commonwealth v Hubbard*, 472 Pa 259, 372 A2d 687, *appeal after remand* 485 Pa 353, 402 A2d 999; *State v Rowe*, 163 W Va 593, 259 SE2d 26.

Admission of gruesome and particularly grisly pre-autopsy photographs of a pedestrian who was struck by defendant's automobile was improper in prosecution of defendant on first degree aggravated assault and unlawful possession of cocaine charges given the tenuous relevance of the photographs to the speed of defendant's vehicle and the inherently prejudicial nature of the photographs. *State v Lockett*, 249 NJ Super 428, 592 A2d 617, *certif den* 127 NJ 553, 606 A2d 366.

Photograph of electrocuted victim in wrongful death suit was not gruesome. *Pasquale v Ohio Power Co.*, 187 W Va 292, 418 SE2d 738.

Numerous color photographs of 2 decapitated bodies that had been buried for 90 days in a forest grave deemed were properly deemed gruesome. *State v Clawson*, 165 W Va 588, 270 SE2d 659.

Footnote 38. *Commonwealth v Crawley*, 514 Pa 539, 526 A2d 334.

Footnote 39. *Commonwealth v Irwin*, 460 Pa 296, 333 A2d 735.

§ 965 Authentication or verification; use of photograph to illustrate testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A photograph used to illustrate the testimony of a witness is admissible in evidence, in both civil 40 and criminal cases 41 if it is authenticated or verified by some other evidence to establish that the photograph is a substantially true, accurate, and faithful representation or portrayal of the place, person, or subject it purports to represent or portray. Ordinarily, testimony that an exhibit is a fair and accurate portrayal of the scene at the time pertinent to the inquiry is sufficient to satisfy the requirement that the scene is accurate. 42

The requirement of authentication is satisfied by testimony of bank employees that surveillance photographs of a robbery in a bank were what they were claimed to be. 43 Testimony of expert witnesses familiar with the installation and maintenance of the camera is not necessary. 44

A photograph may also be properly admitted absent explicit testimony that the photograph is an accurate depiction where it is clear by implication from the witness' testimony that the photograph accurately depicts what the photograph purports to show. 45 Further, where photographs are introduced as evidence of the crime itself, and not as illustrative evidence, there is no need to have a witness testify that they fairly and accurately represented the scenes, objects, people and position of the people they purported to portray. 46

Generally, in order to establish a photograph's accuracy, 47 a witness must be able to identify the person, place, or thing shown in the photograph. 48 However, there is no need to establish a chain of custody for an object depicted in the photograph. 49 In a criminal prosecution, the court will assume in the absence of a showing to the contrary that the government did not deliberately alter a scene before photographing it to cause the photograph to misrepresent the facts. 50

§ 965 ----Authentication or verification; use of photograph to illustrate testimony [SUPPLEMENT]

Case authorities:

Two photographs purportedly depicting defendant as a child and as a high school senior were not properly authenticated so that their exclusion was not erroneous where the witness through whom defendant sought to introduce the photographs did not know defendant at the time the photographs were taken. *State v Lee* (1994) 335 NC 244, 439 SE2d 547.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

The trial court did not err in a first- degree murder prosecution by admitting photographs of defendant's automobile where defendant contended that the witness's testimony did not indicate that she had any knowledge regarding the identity of the automobile other than that which she gained from viewing the photograph. A photograph depicting an automobile that the witness said "looked like" the defendant's automobile was sufficient to authenticate the photograph for the purpose of illustrating the witness's testimony. The fact that the witness stated that the automobile resembled a Toyota while defendant's automobile was a Volkswagen goes to the credibility of the evidence and not to its admissibility. *State v Vick* (1995) 341 NC 569, 461 SE2d 655.

In an action to recover for injuries sustained by plaintiff pedestrian when he was struck by a car driven by defendant, the trial court did not err in excluding testimony and photographs regarding the skid marks found at the scene of the accident, since testimony of other witnesses was identical to the excluded testimony, and a witness testified as to the subject matter of the photographs. *Bowden v Bell* (1994) 116 NC App 64, 446 SE2d 816.

Before and after photographs of defendants' home were properly admitted to illustrate testimony that defendants' replacement of wood clapboard siding on their home with vinyl siding did not change the appearance of their home. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

In robbery prosecution, clerk of store at which robbery occurred properly authenticated still photographs created from videotape reproducing robbery scene, when clerk identified scenes shown in photographs; prosecution was not obligated to call as witness individual who prepared photographs from videotape. *Luckette v State* (1995, Tex App Amarillo) 906 SW2d 663, petition for discretionary review ref (Jan 17, 1996).

Footnotes

Footnote 40. *Giffin v Ensign* (CA3 Pa) 234 F2d 307; *Mauldin v Upjohn Co.* (CA5 La) 697 F2d 644, CCH Prod Liab Rep ¶ 9526, 12 Fed Rules Evid Serv 485, reh den (CA5 La) 705 F2d 450 and cert den 464 US 848, 78 L Ed 2d 143, 104 S Ct 155; *Paquet v United States* (CA9 Hawaii) 236 F2d 203, cert den 352 US 926, 1 L Ed 2d 161, 77 S Ct 222;

International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, affd 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379; Higgins v Arizona Sav. & Loan Ass'n, 90 Ariz 55, 365 P2d 476; Rich Mountain Electric Coop., Inc. v Revels, 311 Ark 1, 841 SW2d 151; Adams v San Jose (1st Dist) 164 Cal App 2d 665, 330 P2d 840; Marinelli v Cutarelli, 2 Conn Cir 15, 193 A2d 727; Howard v Missman, 81 Idaho 82, 337 P2d 592; Hardesty v Sparrow (Ky) 275 SW2d 587; State v Palmer, 227 La 691, 80 So 2d 374; Launey v Traders & General Ins. Co. (La App 3d Cir) 169 So 2d 757; McKarren v Boston & N. S. R. Co., 194 Mass 179, 80 NE 477; Illinois C. R. Co. v Coussens, 223 Miss 103, 77 So 2d 818, cert dismd 350 US 801, 100 L Ed 721, 76 S Ct 36; Sellers v CSX Transp., Inc., 102 NC App 563, 402 SE2d 872; Kubiszak v Rini's Supermarket (Cuyahoga Co) 77 Ohio App 3d 679, 603 NE2d 308; McGrath v Furr (Okla) 293 P2d 609, appeal after remand (Okla) 340 P2d 243; Owens v Hagenbeck-Wallace Shows Co., 58 RI 162, 192 A 158, 112 ALR 113, reh den 58 RI 268, 192 A 464, 112 ALR 124; Great Atlantic & Pacific Tea Co. v Lyle, 49 Tenn App 78, 351 SW2d 391; Davidson v Great Nat. Life Ins. Co. (Tex) 737 SW2d 312, reh'g of cause overr (Oct 21, 1987); Hickman v Union P. R. Co., 117 Utah 136, 213 P2d 650; Tri-State Asphalt Prods., Inc. v McDonough Co., 182 W Va 757, 391 SE2d 907; Wagner v Pfeiffer, 259 Wis 566, 49 NW2d 739.

In personal injury action arising from automobile collision, any error committed by trial court in admitting photograph of plaintiff's automobile after plaintiff stated, on cross-examination, that photograph was not fair and accurate representation and objected to its admission was cured when defendant subsequently testified that it was true and accurate representation of the automobile. Skaggs v Davis (Ind App) 424 NE2d 137.

Exclusion of photographs was proper where witness was unable to qualify the photographs by testifying that they were fair and accurate representation of the scene as it existed at the time of the accident. Wactor v John H. Moon & Sons, Inc. (Miss) 516 So 2d 1364.

Footnote 41. United States v Mojica (CA5 Tex) 746 F2d 242, 16 Fed Rules Evid Serv 912; United States v Clayton (CA5 Ga) 643 F2d 1071; Guam v Ojeda (CA9 Guam) 758 F2d 403; Scanland v State (Ala App) 473 So 2d 1182, cert den 474 US 1035, 88 L Ed 2d 581, 106 S Ct 602; State v Caldwell, 117 Ariz 464, 573 P2d 864; People v Salas, 7 Cal 3d 812, 103 Cal Rptr 431, 500 P2d 7, 58 ALR3d 832, cert den 410 US 939, 35 L Ed 2d 605, 93 S Ct 1401; Gass v People, 177 Colo 232, 493 P2d 654; People v Thierry (Colo App) 780 P2d 8; Johnson v United States (Dist Col App) 613 A2d 888; Brown v State (Fla App D1) 493 So 2d 80, 11 FLW 1861; Underwood v State (Ind) 535 NE2d 507, cert den 493 US 900, 107 L Ed 2d 206, 110 S Ct 257, reh den 493 US 985, 107 L Ed 2d 524, 110 S Ct 524; State v Estrella, 257 Iowa 462, 133 NW2d 97; State v Garcia, 233 Kan 589, 664 P2d 1343, post-conviction proceeding (Kan App) 827 P2d 83 and (criticized on other grounds by State v Coleman, 253 Kan 335, 856 P2d 121); Davis v Commonwealth (Ky) 555 SW2d 575; State v Ward (La) 483 So 2d 578, cert den 479 US 871, 93 L Ed 2d 168, 107 S Ct 244, reh den 479 US 1001, 93 L Ed 2d 609, 107 S Ct 611; State v Hall (La App 2d Cir) 549 So 2d 373, cert den (La) 556 So 2d 1259; Grandison v State, 305 Md 685, 506 A2d 580, cert den 479 US 873, 93 L Ed 2d 174, 107 S Ct 38, reh den 479 US 1001, 93 L Ed 2d 609, 107 S Ct 611 and cert den 498 US 943, 112 L Ed 2d 317, 111 S Ct 354, motion den 499 US 956, 113 L Ed 2d 641, 111 S Ct 1575; State v Friend (Minn) 493 NW2d 540; State v Tinklenberg, 292 Minn 271, 194 NW2d 590; Cooley v State (Miss) 391 So 2d 614; State v Washington (Mo) 368 SW2d

439; State v Buckley, 171 Mont 238, 557 P2d 283; State v Garza, 241 Neb 256, 487 NW2d 551; Guyette v State, 84 Nev 160, 438 P2d 244; State v Belton, 60 NJ 103, 286 A2d 78; People v Culhane, 45 NY2d 757, 408 NYS2d 489, 380 NE2d 315, cert den 439 US 1047, 58 L Ed 2d 706, 99 S Ct 723, habeas corpus proceeding 133 Misc 2d 181, 506 NYS2d 620, affd (2d Dept) 139 App Div 2d 315, 531 NYS2d 287, app den 74 NY2d 610, 546 NYS2d 554, 545 NE2d 868 and reconsideration dismd 68 NY2d 910; Castro v State (Okla Crim) 844 P2d 159, cert den (US) 126 L Ed 2d 98, 114 S Ct 135; State v Middleton, 46 Or App 381, 611 P2d 698; State v Pulphus (RI) 465 A2d 153; State v Moses (Tenn Crim) 701 SW2d 629; Thomas v State (Tex Crim) 701 SW2d 653.

In prosecution for murder resulting from bank robbery, it was unnecessary that all and each of photographs of robbery be authenticated and verified by testimony based on witnesses' observation, where eyewitness examined photographs produced by camera and was able to identify large number of them as truly and accurately depicting what she had seen, evidence showed that film in camera was unexposed before robbery and that camera was inspected and in good working order, there was clear testimony as to retrieval and chain of custody of film, and unrefuted testimony indicated method used to process and print films and fact that they had not been retouched or altered; photographs depicting police officer who had been killed in robbery were adequately authenticated and verified by testimony of officer's widow. Averhart v State (Ind) 470 NE2d 666, cert den 471 US 1030, 85 L Ed 2d 323, 105 S Ct 2051, post-conviction proceeding (Ind) 614 NE2d 924, reh den (Oct 20, 1993).

In murder prosecution, photographs of victim's mother's swollen face, taken by police, and introduced for the purpose of showing that defendant had hit her in the face with his fist, was sufficiently authenticated, where the mother testified that the photograph looked just like she had when she looked in the mirror after the incident Carroll v State, 263 Ind 696, 338 NE2d 264.

In prosecution for murder, foundation was sufficient for introduction of photograph of victim standing next to mother where mother was asked whether photo fairly and accurately depicted height and weight of her son at the time he was shot, and not whether photo was fair and accurate representation of what it purported to show, and where there was no objection to form of question at trial. Ricci v State, 91 Nev 373, 536 P2d 79.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899.

Practice References 9 Am Jur Proof of Facts 147, Photographs as Evidence.

46 Am Jur POF2d 275, Foundation for Admission of Thermogram.

Footnote 42. Blankenship v State (Ala App) 589 So 2d 1321; Thomas v Dixson, 88 NC App 337, 363 SE2d 209.

As to the time of taking a photograph and the similarity of conditions when the photograph was taken, see § 968.

Footnote 43. United States v McNair (ED Pa) 439 F Supp 103, 2 Fed Rules Evid Serv 687, affd without op (CA3 Pa) 571 F2d 573, cert den 435 US 976, 56 L Ed 2d 71, 98 S Ct 1626.

Photographic prints taken from surveillance films have been held properly admitted into evidence even though the complete chain of custody of the films was not established, where eyewitnesses to the events depicted on the films authenticated the photographs by observing them at trial and testifying that they fairly and accurately depicted the event. *United States v Richardson* (CA7 Ind) 562 F2d 476, 2 Fed Rules Evid Serv 733, cert den 434 US 1021, 54 L Ed 2d 768, 98 S Ct 746 and cert den 434 US 1072, 55 L Ed 2d 776, 98 S Ct 1257.

Footnote 44. *United States v McNair* (ED Pa) 439 F Supp 103, 2 Fed Rules Evid Serv 687, affd without op (CA3 Pa) 571 F2d 573, cert den 435 US 976, 56 L Ed 2d 71, 98 S Ct 1626.

Footnote 45. *United States v Oaxaca* (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310.

Footnote 46. *United States v Nolan* (CA1 Mass) 818 F2d 1015, 22 Fed Rules Evid Serv 1671; *State v Kistle*, 59 NC App 724, 297 SE2d 626, petition den 307 NC 471, 298 SE2d 694.

Footnote 47. *United States v Stratton* (ED Pa) 392 F Supp 552, affd without op (CA3 Pa) 523 F2d 1052, cert den 424 US 945, 47 L Ed 2d 351, 96 S Ct 1415; *United States v Goslee* (WD Pa) 389 F Supp 490; *Guam v Ojeda* (CA9 Guam) 758 F2d 403; *United States v Stearns* (CA9 Hawaii) 550 F2d 1167, 1 Fed Rules Evid Serv 685; *United States v Blackwell*, 224 US App DC 350, 694 F2d 1325, 12 Fed Rules Evid Serv 60; *Briggs v State* (Ala App) 549 So 2d 155; *Holm v State* (Ala App) 416 So 2d 782; *People v O'Brien* (1st Dist) 61 Cal App 3d 766, 132 Cal Rptr 616; *People v Mattas* (Colo) 645 P2d 254; *People v Thiery* (Colo App) 780 P2d 8; *State v Castagna*, 170 Conn 80, 364 A2d 200; *Beasley v State*, 161 Ga App 29, 288 SE2d 828; *People v Beasley* (1st Dist) 109 Ill App 3d 446, 65 Ill Dec 106, 440 NE2d 961; *Smith v State* (Ind) 491 NE2d 193; *Buck v State* (Ind) 453 NE2d 993; *State v Zaehringer* (Iowa) 280 NW2d 416, appeal after remand (Iowa) 306 NW2d 792, appeal after remand (Iowa) 325 NW2d 754; *Landrum v Taylor*, 217 Kan 113, 535 P2d 406; *State v Stevenson* (La) 450 So 2d 951; *State v Hall* (La App 2d Cir) 549 So 2d 373, cert den (La) 556 So 2d 1259; *People v Johnson*, 113 Mich App 575, 317 NW2d 689; *State v Jones* (Mo) 594 SW2d 932; *State v Ruof*, 296 NC 623, 252 SE2d 720; *Skelton v State* (Okla Crim) 672 P2d 671; *State v Pulphus* (RI) 465 A2d 153; *State v Hackney* (SD) 261 NW2d 419; *Goss v State* (Tex Crim) 549 SW2d 404.

Annotation: 9 ALR2d 899.

Footnote 48. *United States v McNair* (ED Pa) 439 F Supp 103, 2 Fed Rules Evid Serv 687, affd without op (CA3 Pa) 571 F2d 573, cert den 435 US 976, 56 L Ed 2d 71, 98 S Ct 1626; *Colley v Standard Oil Co.* (CA4 SC) 157 F2d 1007; *United States v Richardson* (CA7 Ind) 562 F2d 476, 2 Fed Rules Evid Serv 733, cert den 434 US 1021, 54 L Ed 2d 768, 98 S Ct 746 and cert den 434 US 1072, 55 L Ed 2d 776, 98 S Ct 1257; *United States v Kidding* (CA7 Ill) 560 F2d 1303, cert den 434 US 872, 54 L Ed 2d 151, 98 S Ct 217; *United States v Collins* (CA8 Minn) 690 F2d 670, 11 Fed Rules Evid Serv 1068; *United States v Neal* (CA8 Mo) 527 F2d 63, cert den 429 US 845, 50 L Ed 2d 116, 97 S Ct 125; *United States v May* (CA9 Wash) 622 F2d 1000, 6 Fed Rules Evid Serv 1052, cert den 449 US 984, 66 L Ed 2d 247, 101 S Ct 402; *United States v Boyce* (CA9 Cal) 594 F2d 1246, cert den 444 US 855, 62 L Ed 2d 73, 100 S Ct 112; *United States v*

Oaxaca (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310; Young v State (Ala App) 563 So 2d 44, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 333; Adams v San Jose (1st Dist) 164 Cal App 2d 665, 330 P2d 840; People v Mattas (Colo) 645 P2d 254; People v Thierry (Colo App) 780 P2d 8; Cook v State, 255 Ga 565, 340 SE2d 843, cert den 479 US 871, 93 L Ed 2d 166, 107 S Ct 241, reh den 479 US 1000, 93 L Ed 2d 608, 107 S Ct 610, later proceeding 259 Ga 299, 379 SE2d 780; Long v General Electric Co., 213 Ga 809, 102 SE2d 9, 41 BNA LRRM 2535, 34 CCH LC ¶ 71281; Andrews v State (Ind) 532 NE2d 1159, habeas corpus proceeding (CA7 Ind) 935 F2d 272, reported in full (CA7) 1991 US App LEXIS 12498; State v Shoemake, 228 Kan 572, 618 P2d 1201; State v Hall (La App 2d Cir) 549 So 2d 373, cert den (La) 556 So 2d 1259; State v Ledger (Me) 444 A2d 404; Commonwealth v Weichell, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298; Jackson v State (Miss) 483 So 2d 1353; State v Allbritton (Mo App) 660 SW2d 322, post-conviction proceeding (Mo App) 747 SW2d 687; State v Birge, 215 Neb 761, 340 NW2d 434, later proceeding 223 Neb 761, 393 NW2d 713; State v Henderson (App) 100 NM 260, 669 P2d 736, cert den 100 NM 259, 669 P2d 735; State v Collins, 64 NC App 656, 308 SE2d 353; State v Kistle, 59 NC App 724, 297 SE2d 626, petition den 307 NC 471, 298 SE2d 694; State v Hannah, 54 Ohio St 2d 84, 8 Ohio Ops 3d 84, 374 NE2d 1359; Little v Nashville, C. & S. L. R. Co., 39 Tenn App 130, 281 SW2d 284; Clark v State (Tex App Beaumont) 704 SW2d 561; Dupnik v State (Tex App Corpus Christi) 654 SW2d 780, petition for discretionary review ref (Oct 19, 1983) and motion for rehearing on PDR denied (Nov 23, 1983); Texas & N. O. R. Co. v Hanson (Tex Civ App) 271 SW2d 309, writ dism w o j; State v Colby, 139 Vt 475, 431 A2d 462; Lawson v Darter, 157 Va 284, 160 SE 74; Saunders v Commonwealth, 1 Va App 396, 339 SE2d 550.

In order to have a photograph admitted in evidence, the photograph must be identified by a witness as a portrayal of certain facts relevant to the issue, and verified by such witness' personal knowledge as a correct representation of the facts. Kooyumjian v Stevens (1st Dist) 10 Ill App 2d 378, 135 NE2d 146; People v Beasley (1st Dist) 109 Ill App 3d 446, 65 Ill Dec 106, 440 NE2d 961.

Detective's identification of photographs as being those he had taken on night of crime established sufficient foundation for admission, even though detective admitted that he did not have independent recollection of scenes depicted and had to rely on identifying label. State v Madison (La) 345 So 2d 485.

In prosecution for murder, testimony from doctor and police officer established authenticity of photograph of portion of human body with three stab wounds where both witnesses asserted that wounds on body in photograph were same as those on body of decedent on night of murder but neither stated that body in photograph was that of decedent. State v Jones (Mo) 594 SW2d 932.

Annotation: 9 ALR2d 899 § 3.

Footnote 49. Guam v Ojeda (CA9 Guam) 758 F2d 403.

Footnote 50. United States v Mojica (CA5 Tex) 746 F2d 242, 16 Fed Rules Evid Serv 912.

§ 966 --By whom photograph may be verified

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A photograph's accuracy may be verified by the person who took the photograph, 51 by a person who was present at the time the photograph was taken, 52 by the photographer and a third person, 53 or by a third person alone. 54 It is not ordinarily necessary to verify or authenticate a photograph through the person who took the picture, 55 but rather, any person having the required knowledge of the facts may verify or authenticate the photograph. 56 Where a witness other than the photographer verifies a photograph, he need not be in the photograph, 57 or have seen the photographer take the picture in order to qualify as a verifying witness. 58

In order to properly authenticate a photograph under the Federal Rules of Evidence, 59 it is necessary to show that chances are sufficiently remote that either the photograph is distorted and technically inaccurate as a representation of the scene photographed, or that the photograph portrays a scene materially different from the scene that is relevant to the issues at trial. 60 The quantum of authentication, by showing that a photograph is reasonably accurate and correct, in order to render it admissible in evidence must be considered in a relative sense, 61 and authentication does not require strict mathematical accuracy. 62 The fact that there is conflicting evidence as to the accuracy of a photograph does not require its exclusion; if witnesses for the party offering the photograph testify that it is substantially correct, it may be admitted, and its correctness then becomes a question for the jury. 63 If the photograph is not substantially correct, but is nevertheless admissible because sufficiently correct to be helpful, 64 its verification may consist of explaining the inaccuracies. 65 Accordingly, a lack of accuracy will generally go to the weight and not the admissibility of the evidence. 66

The question whether a photograph is sufficiently correct or accurate to justify its admission in evidence is a preliminary one to be determined by the trial court, and in this respect the trial court has a certain measure of discretion. 67

§ 966 --By whom photograph may be verified [SUPPLEMENT]**Case authorities:**

In an action to recover for injuries sustained by plaintiff pedestrian when he was struck by a car driven by defendant, the trial court did not err in excluding testimony and photographs regarding the skid marks found at the scene of the accident, since testimony of other witnesses was identical to the excluded testimony, and a witness testified as to the subject matter of the photographs. *Bowden v Bell* (1994) 116 NC App 64, 446 SE2d 816.

Footnotes

Footnote 51. *United States v Bridges*, 230 US App DC 387, 717 F2d 1444, 14 Fed Rules Evid Serv 391, cert den 465 US 1036, 79 L Ed 2d 708, 104 S Ct 1310; *People v Doggett*, 83 Cal App 2d 405, 188 P2d 792; *Adams v State*, 142 Ga App 252, 235 SE2d 667; *State v Woolridge*, 2 Kan App 2d 449, 581 P2d 403; *State v Madison (La)* 345 So 2d 485; *State v Brown (Mo)* 312 SW2d 818; *Thompson v De Long*, 267 Pa 212, 110 A 251, 9 ALR 1326; *Davis v Dunn*, 90 Vt 253, 98 A 81.

In prosecution for sale and distribution of heroin, photographs of area, identified by police photographer who took them as accurate representations of what was depicted, did not need to be further verified by testimony of developer before being admitted into evidence. *State v Bryant (La)* 296 So 2d 259.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899.

Footnote 52. *State v Hollaway*, 214 Kan 636, 522 P2d 364; *State v Vincent (La)* 338 So 2d 1376.

In prosecution for store robbery, trial court properly admitted photographs of defendant in store during robbery, where even if video camera had been used to take photographs, still photographs and not videotape were admitted, and where store employee, who was present at time of robbery and who was eyewitness to crime, adequately authenticated photographs. *Gadson v State*, 197 Ga App 315, 398 SE2d 409, appeal after remand 202 Ga App 417, 414 SE2d 332, 103-9 Fulton County D R 13B.

State offered in evidence three photographs of area behind pharmacy counter not open to public taken by surveillance camera at time of crime, where photographs were identified by owner of pharmacy as being accurate and fair representation of area covered by camera. *Litton v Commonwealth (Ky)* 597 SW2d 616.

Photographs of defendant taken during robbery by bank surveillance camera were sufficiently identified by bank employees who had witnessed robbery. *State v Leggett (La)* 363 So 2d 434.

Trial court abused its discretion by failing to admit picture on driver's license, even though photographer was not present to verify photograph, where defendant verified photograph as accurately reflecting his appearance on date it was taken and explained fully circumstances by which it was taken. *State v Dunn*, 162 W Va 63, 246 SE2d 245.

Footnote 53. *Johnston v State*, 232 Ga 268, 206 SE2d 468; *Osborn v State*, 159 Tex Crim 323, 263 SW2d 263.

Footnote 54. *United States v Gray (CA8 Mo)* 531 F2d 933, cert den 429 US 841, 50 L Ed 2d 110, 97 S Ct 117; *Turner v State*, 181 Ga App 531, 353 SE2d 13; *People v Shaw (1st Dist)* 133 Ill App 3d 391, 88 Ill Dec 534, 478 NE2d 1142; *Boyd v State (Ind)* 494 NE2d 284, cert den 479 US 1046, 93 L Ed 2d 860, 107 S Ct 910; *State v Farnum (Iowa)* 397 NW2d 744; *State v Hall (La App 2d Cir)* 549 So 2d 373, cert den (La) 556 So 2d 1259; *State v Wiley (La App 2d Cir)* 513 So 2d 849, cert den (La) 522 So 2d 1092; *State v Harvin (La App 3d Cir)* 437 So 2d 983; *State v Lowery*, 318 NC 54, 347 SE2d 729; *DeLuna v State (Tex Crim)* 711 SW2d 44, cert den 479 US 877, 93 L Ed 2d 241, 107 S Ct 263, habeas corpus proceeding (CA5 Tex) 873 F2d 757, cert den 493 US 900,

107 L Ed 2d 208, 110 S Ct 259, habeas corpus proceeding (SD Tex) 1989 US Dist LEXIS 14532, adhered to (CA5 Tex) 890 F2d 720, stay den 493 US 999, 107 L Ed 2d 552, 110 S Ct 556; *Rodriguez v State* (Tex App San Antonio) 666 SW2d 305; *State v Purcell* (Utah) 711 P2d 243.

Footnote 55. *Alabama Trunk & Luggage Co. v Hauer*, 214 Ala 473, 108 So 339; *Higgins v Arizona Sav. & Loan Ass'n*, 90 Ariz 55, 365 P2d 476; *People v Cheary*, 48 Cal 2d 301, 309 P2d 431; *Adams v San Jose* (1st Dist) 164 Cal App 2d 665, 330 P2d 840; *Stubbs v State*, 201 Ga App 546, 411 SE2d 525, 102-200 Fulton County D R 14B; *Robinette v Commonwealth, Dept. of Highways* (Ky) 380 SW2d 78; *State v Edwards*, 232 La 577, 94 So 2d 674; *Launey v Traders & General Ins. Co.* (La App 3d Cir) 169 So 2d 757; *Sisk v State*, 236 Md 589, 204 A2d 684; *McKarren v Boston & N. S. R. Co.*, 194 Mass 179, 80 NE 477; *Ferguson v Delaware International Speedway*, 164 Mich App 283, 416 NW2d 415; *Jackson v State* (Miss) 483 So 2d 1353; *State v Sanders* (Mo) 365 SW2d 480; *State v James*, 321 NC 676, 365 SE2d 579; *Benefield v State* (Okla Crim) 355 P2d 874; *Taylor v Modena*, 370 Pa 100, 87 A2d 195; *Thompson v De Long*, 267 Pa 212, 110 A 251, 9 ALR 1326; *State v Bennett*, 92 RI 316, 168 A2d 282; *Great Atlantic & Pacific Tea Co. v Lyle*, 49 Tenn App 78, 351 SW2d 391; *Brinkley v State*, 161 Tex Crim 413, 277 SW2d 704, cert den 350 US 938, 100 L Ed 819, 76 S Ct 310, reh den 350 US 977, 100 L Ed 847, 76 S Ct 441 and reh den 351 US 928, 100 L Ed 1458, 76 S Ct 785; *State v Graves*, 119 Vt 205, 122 A2d 840; *Kelley v Great N. R. Co.*, 59 Wash 2d 894, 371 P2d 528.

Footnote 56. *Kortz v Guardian Life Ins. Co.* (CA10 Colo) 144 F2d 676, cert den 323 US 728, 89 L Ed 584, 65 S Ct 63; *Alabama Trunk & Luggage Co. v Hauer*, 214 Ala 473, 108 So 339; *Diller v Northern California Power Co.*, 162 Cal 531, 123 P 359; *Morris v State*, 147 Ga App 595, 249 SE2d 668; *Brownlie v Brownlie*, 357 Ill 117, 191 NE 268, 93 ALR 1041; *Kooyumjian v Stevens* (1st Dist) 10 Ill App 2d 378, 135 NE2d 146; *Launey v Traders & General Ins. Co.* (La App 3d Cir) 169 So 2d 757; *State v Sargent* (Me) 361 A2d 248; *Jones v State*, 228 Miss 296, 87 So 2d 573, cert den 352 US 937, 1 L Ed 2d 167, 77 S Ct 236; *State ex rel. State Highway Com. v Cone* (Mo) 338 SW2d 22; *Garafola v Rosecliff Realty Co.*, 24 NJ Super 28, 93 A2d 608; *State v Gardner*, 228 NC 567, 46 SE2d 824; *Benefield v State* (Okla Crim) 355 P2d 874; *State v Gibbons*, 228 Or 238, 364 P2d 611.

Identification of photograph taken by bank surveillance camera depicting defendant leaving bank with brown paper bag in hand was established by testimony that witness withdrew film from surveillance camera and took it to be developed accompanied by F.B.I. agent; defect alleged by defendant that witness was not present in darkroom when pictures were developed and he could not say whether pictures produced by developer were from film taken from bank camera was cured by testimony of person who developed pictures. *State v Demouchet* (La) 353 So 2d 1025.

A photograph must be verified either by the testimony of the person who took it or by another person with sufficient knowledge to state that it fairly and accurately represents the object or place reproduced as it existed at the time of the accident. *Nyce v Muffley*, 384 Pa 107, 119 A2d 530.

Annotation: 9 ALR2d 899 § 5.

Footnote 57. *United States v Clayton* (CA5 Ga) 643 F2d 1071.

Footnote 58. *United States v Clayton* (CA5 Ga) 643 F2d 1071; *Alabama Trunk & Luggage Co. v Hauer*, 214 Ala 473, 108 So 339; *Higgins v Arizona Sav. & Loan Ass'n*, 90 Ariz 55, 365 P2d 476; *Hebbe v Maple Creek*, 121 Wis 668, 99 NW 442.

A witness qualifying a photograph need not be the photographer or have seen the picture taken; it is only necessary that he recognize and identify the object depicted and testify that the photograph fairly and correctly represents it. *Kleveland v United States* (CA2 NY) 345 F2d 134.

Because it is not necessary for the authentication of a photograph that the person who took it testify or be identified, photographs of the decedent's body were properly authenticated by a pathologist who testified that they accurately portrayed what he had seen. *People v Cheary*, 48 Cal 2d 301, 309 P2d 431.

Annotation: 9 ALR2d 899 § 5.

Footnote 59. FRE Rule 901.

As to the requirement of authentication or identification of evidence under Rule 901, generally, see § 945.

Footnote 60. *United States v Stearns* (CA9 Hawaii) 550 F2d 1167, 1 Fed Rules Evid Serv 685.

Footnote 61. *Sisk v State*, 236 Md 589, 204 A2d 684.

Footnote 62. *Thomas v Dixon*, 88 NC App 337, 363 SE2d 209.

Footnote 63. *Funke v St. Louis S. F. R. Co.*, 225 Mo App 347, 35 SW2d 977; *Hughes v State*, 126 Tenn 40, 148 SW 543.

Annotation: 9 ALR2d 899 § 3.

Footnote 64. Before being admitted in evidence, it must be shown merely that photographs are sufficiently correct to be helpful to the court and jury. *Brockman v State*, 163 Neb 171, 79 NW2d 9.

Footnote 65. *Launey v Traders & General Ins. Co.* (La App 3d Cir) 169 So 2d 757.

Footnote 66. *Thomas v Dixon*, 88 NC App 337, 363 SE2d 209.

Footnote 67. *Jenkins v Associated Transport, Inc.* (CA6 Tenn) 330 F2d 706; *McKee v State*, 253 Ala 235, 44 So 2d 781; *Riggan v Langley*, 238 Ark 649, 383 SW2d 661; *Diller v Northern California Power Co.*, 162 Cal 531, 123 P 359; *Cagianello v Hartford*, 135 Conn 473, 66 A2d 83; *Miami v McCorkle*, 145 Fla 109, 199 So 575; *Johnson v State*, 158 Ga 192, 123 SE 120; *Brennan v Leshyn* (1st Dist) 51 Ill App 2d 132, 201 NE2d 167 (criticized on other grounds by *Rikard v Dover Elevator Co.* (5th Dist) 126 Ill App 3d 438, 81 Ill Dec 686, 467 NE2d 386); *Launey v Traders & General Ins. Co.* (La App 3d Cir) 169 So 2d 757; *Commonwealth v Tucker*, 189 Mass 457, 76 NE 127; *Wallace v State*, 203 Miss 504, 35 So 2d 703; *State v Gardner*, 228 NC 567, 46 SE2d 824; *State v*

Gibbons, 228 Or 238, 364 P2d 611; Beardslee v Columbia Tp., 188 Pa 496, 41 A 617; Consolidated Furniture Co. v Kelly (Tex Civ App Houston (1st Dist)) 369 SW2d 53; Venable v Stockner, 200 Va 900, 108 SE2d 380; Webber v Farmer (Wyo) 410 P2d 807; Logan v Pacific Intermountain Express Co. (Wyo) 400 P2d 488.

The trial court acted well within its discretion in refusing to admit photographs of a local situation into evidence, where the pictures were taken a few days before the trial and the photographer could not testify that they portrayed the property as it had existed 6 years before. Vollert v Wisconsin Rapids, 27 Wis 2d 171, 133 NW2d 786.

Annotation: 9 ALR2d 899 § 6.

§ 967 --Use of photograph as probative of matter depicted

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Generally, photographs offered as demonstrative evidence are admissible when it can be shown that they are a true and accurate representation of the scene which the purport to represent. 68 However, in certain circumstances, photographs may be admissible under the "silent witness" theory—the theory that when used as probative evidence, photographic evidence takes on the status of a "mute," "silent," or "dumb" independent photographic witness 69 –without testimony by a witness that the photographs are a true and accurate representation of the scene which the photographs purport to represent, provided that a sufficient foundation is adduced to show the circumstances under which the photograph was taken and the reliability of the production process. 70 This approach is reflected in the Federal and Uniform Rules of Evidence under which evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result is sufficient to meet the requirement of authentication or identification as a condition precedent to admissibility. 71

§ 967 --Use of photograph as probative of matter depicted [SUPPLEMENT]

Case authorities:

Stove manufacturer laid proper foundation for admission of photographs taken after accident giving rise to product liability lawsuit since only claims it made were that photographs depicted fuel canisters in stove and were taken sometime after accident, plaintiff stipulated that photographs depicted fuel canisters, and record indicated that photographs originated from one of three sources, all of whom took photographs after accident. Banghart v Origoverken, A.B. (1995, CA8 Minn) 49 F3d 1302.

In personal injury action, trial court did not err in admitting videotapes (and photographs) of plaintiff taken by defendant's surveillance witnesses, though plaintiff's interrogatories requested information as to whether photographs existed relevant to case and defendant initially answered "no," where defendant subsequently obtained photographs and

videotapes depicting plaintiff engaging in certain activities and then amended his interrogatories to include surveillance witnesses as witnesses and to amend his prior answer to advise plaintiff that "photographs" existed of him. If term "photographs" included all forms of photographs, including videotapes, then plaintiff was advised by defendant's letter that "photographs" (in general sense) existed; answer incorporated term used by plaintiff in his interrogatory. However, if "photographs" did not include "videotapes," then defendant had no obligation to advise plaintiff's attorney of existence of that for which he did not ask. Nor was there any unfair surprise to plaintiff; defendant fairly apprised plaintiff of information requested and, as such, complied with his obligation to provide discovery. Had plaintiff's attorney requested opportunity to view photographs, opportunity would have been afforded; had he inquired, and/or viewed photographs, any request to see videotapes would have been honored or court would have so ordered. *Kiss v Jacob* (1993, App Div) 268 NJ Super 235, 633 A2d 544.

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant. *State v Barlowe* (1994) 337 NC 371, 446 SE2d 352.

The trial court in a homicide prosecution did not err in admitting a photograph of defendant holding a can of beer and wearing a shoulder holster containing a .357 caliber revolver, since the photograph was admissible to illustrate a witness's testimony concerning defendant's possession and control of the murder weapon. *State v Thibodeaux* (1995) 341 NC 53, 459 SE2d 501.

In an action to recover for injuries sustained by plaintiff pedestrian when he was struck by a car driven by defendant, the trial court did not err in excluding testimony and photographs regarding the skid marks found at the scene of the accident, since testimony of other witnesses was identical to the excluded testimony, and a witness testified as to the subject matter of the photographs. *Bowden v Bell* (1994) 116 NC App 64, 446 SE2d 816.

Before and after photographs of defendants' home were properly admitted to illustrate testimony that defendants' replacement of wood clapboard siding on their home with vinyl siding did not change the appearance of their home. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

Footnotes

Footnote 68. § 965.

Footnote 69. § 960.

Footnote 70. *United States v Taylor* (CA5 Fla) 530 F2d 639, cert den 429 US 845, 50 L Ed 2d 117, 97 S Ct 127.

In prosecution for robbery and confinement, competency and authenticity of photograph taken by automatic camera in bank's automatic teller machine was established under "silent witness theory," where bank's security officer testified that automatic camera was activated when bank customer inserted card into teller machine and that while in completed transaction there would be total of three photographs taken, there was only one photograph of defendant because teller machine would not complete his attempted withdrawal due to improper code number; security officer also pointed out that date, time of transaction, and number of transaction were imprinted on film and that transaction number on photograph of defendant corresponded exactly to transaction number on teller machine audit tape. *Stark v State (Ind)* 489 NE2d 43.

In prosecution for forgery and uttering a forged instrument, a photograph taken by regiscope camera showing defendant presenting check was admissible under silent witness rationale. *Ferguson v Commonwealth*, 212 Va 745, 187 SE2d 189, cert den 409 US 861, 34 L Ed 2d 108, 93 S Ct 150, reh den 409 US 1050, 34 L Ed 2d 504, 93 S Ct 533.

Footnote 71. FRE Rule 901(b)(9); Uniform Rules of Evidence, Rule 901(b)(9).

§ 968 Effect of time of taking photograph; change of conditions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The time at which a photograph offered in evidence was taken is important only with reference to the question of change, or probability of change, in the condition of the person or object portrayed. 72 If the situation and surrounding circumstances of the taking of a picture are subject to change, a photograph, to be admissible, must have been taken at the time of the occurrence in question or before the situation and circumstances have undergone substantial change. 73 In many instances photographs have not been admitted because they were taken at a time too remote and when conditions had materially changed. 74 The mere fact, however, that photographs were taken at a time different from that in question does not render them inadmissible if witnesses are able to verify them as substantial representations of the conditions as they existed at the time in question. 75 The fact that conditions were somewhat changed before a photograph was taken does not render the photograph inadmissible if the changes were not material, provided such change is satisfactorily explained. 76 Where there is conflicting evidence as to the similarity of conditions at the time of the accident and at the time the photographs are made, the admissibility of the exhibits is within the sound discretion of the trial judge. 77 Thus, a photograph of an accident site taken months after the incident is admissible at the discretion of the trial judge where the photograph is offered primarily to demonstrate where the accident occurred and not to depict the condition of the site on the day where the accident occurred. 78 Similarly, a photograph taken after ground conditions changed following a rain storm may be admitted to show the general layout of the work site where the plaintiff was injured so long as the jury is informed that the photographs do not purport to represent the ground conditions at the time of the accident. 79

In criminal cases, there is no particular period of time within which, after the crime, the photograph must have been taken. 80 Any doubt as to whether conditions depicted in the photograph are the same as when the crime occurred should go to its weight and not to its admissibility as long as it is a fair reproduction of what it is claimed to represent. 81

Even where a photograph of the place at issue does not reflect conditions identical in every detail with those existing at the time in question, it may nevertheless be admitted into evidence for an expressly limited purpose if, as to such purpose, it is a helpful and accurate illustration, and further if, in the discretion of the trial court, its admission will not be misleading or prejudicial as to those conditions which it does not portray accurately. 82 If a photograph tells the truth about the situation and surroundings so far as it purports to show these things, it ought not to be excluded simply because it does not show some of the surroundings, the showing of which has, by the time the photograph is taken, become impossible. 83

Where a photograph is admissible in evidence notwithstanding a change in conditions between the time material to the litigation and the time the photograph was taken, the party offering it must produce evidence fully explaining the change. 84

§ 968 ----Effect of time of taking photograph; change of conditions [SUPPLEMENT]

Case authorities:

The trial court did not abuse its discretion in the denial of defendant's pretrial motion to exclude two photographs of the bodies of two murder and rape victims depicting enlarged wounds caused by decomposition and small animals where the photographs were in black and white and showed the condition and location of the victims' bodies at the time they were found; the photographs illustrated the testimony of the forensic pathologist who conducted the autopsies about the injuries inflicted on the victims, including testimony that it was impossible to determine from the autopsy whether the victims had been strangled or sexually assaulted due to decomposition of the bodies; and there was no evidence that the photographs were used excessively and solely to inflame the passions and prejudices of the jury against defendant. *State v Gregory* (1995) 340 NC 365, 459 SE2d 638.

Footnotes

Footnote 72. *Englund v Younker Bros., Inc.*, 259 Iowa 48, 142 NW2d 530; *Turpin v Commonwealth (Ky)* 352 SW2d 66; *Louisville & N. R. Co. v Daniels*, 252 Miss 1, 172 So 2d 394; *Thrasher v Amere Gas Utilities Co.*, 138 W Va 166, 75 SE2d 376, app dismd 347 US 910, 98 L Ed 1067, 74 S Ct 478.

Footnote 73. *Mason v Morel*, 234 Ark 660, 354 SW2d 19; *Baustian v Young*, 152 Mo 317, 53 SW 921; *Hampton v Norfolk & W. R. Co.*, 120 NC 534, 27 SE 96; *Chandler v Russell*, 164 Va 318, 180 SE 313.

Footnote 74. *Baker v Merry-Go-Round Roller Rink, Inc. (Ala)* 537 So 2d 1; *People v*

Vaiza (5th Dist) 244 Cal App 2d 121, 52 Cal Rptr 733 (material change in lighting conditions at scene of crime); Loftin v Howard (Fla) 82 So 2d 125, 57 ALR2d 488; Chicago & E. I. R. Co. v Crose, 214 Ill 602, 73 NE 865; Snibbe v Robinson, 151 Md 658, 135 A 838, 50 ALR 280; Chandler v Russell, 164 Va 318, 180 SE 313; Thrasher v Amere Gas Utilities Co., 138 W Va 166, 75 SE2d 376, app dismd 347 US 910, 98 L Ed 1067, 74 S Ct 478.

Photographs taken of street signs at the scene of the defendant's arrest which were taken four and one half years earlier at the time of the incident were not probative. Berkovich v Hicks (CA2 NY) 922 F2d 1018, 32 Fed Rules Evid Serv 199.

A trial court may properly exclude a photographic exhibit because the photograph does not substantially depict the area at the time at issue. State v Sequin, 73 Hawaii 331, 832 P2d 269.

The trial court did not abuse its discretion in refusing to admit photographs of the crime scene in a felony murder prosecution where there were significant differences in condition, including weather and time of day, between the photographs of the crime scene and the actual crime scene. State v Costa, 228 Kan 308, 613 P2d 1359.

Footnote 75. Anniston v Simmons, 31 Ala App 536, 20 So 2d 52; State v Lee, 80 Ariz 213, 295 P2d 380, 56 ALR2d 1166; Riggan v Langley, 238 Ark 649, 383 SW2d 661; Brown v Barnes, 162 Ga App 383, 290 SE2d 483; State ex rel. McKinney v Richardson, 76 Idaho 9, 277 P2d 272; Englund v Younker Bros., Inc., 259 Iowa 48, 142 NW2d 530; Turpin v Commonwealth (Ky) 352 SW2d 66; Botz v Krips, 267 Minn 362, 126 NW2d 446; Louisville & N. R. Co. v Daniels, 252 Miss 1, 172 So 2d 394; Gulf, M. & O. R. Co. v Golden, 221 Miss 253, 72 So 2d 446; Williamson v St. Louis Public Service Co., 363 Mo 508, 252 SW2d 295; State v Hackney (SD) 261 NW2d 419; Thrasher v Amere Gas Utilities Co., 138 W Va 166, 75 SE2d 376, app dismd 347 US 910, 98 L Ed 1067, 74 S Ct 478; Merriman v Cash-Way, Inc., 35 Wis 2d 112, 150 NW2d 472.

A photograph identified as correctly portraying conditions as they existed at the time of the event in question is admissible even though taken at some distance in time from the occurrence of the event, since inaccuracies or unreliability can be exposed by cross-examination. Jenkins v Associated Transport, Inc. (CA6 Tenn) 330 F2d 706.

In a prosecution for kidnapping, it was proper to admit into evidence two photographs taken of defendant approximately two years after the alleged offense where each picture showed a distinctive tattoo on defendant, there was testimony from the victim and from a witness that they had observed such tattoos, and the photographs were identified by the photographer as being accurate representations of the defendant during the year after the alleged offense. Martin v State, 258 Ark 529, 527 SW2d 903.

In a prosecution for maintaining a fire hazard, photographs of the alleged hazardous condition are not rendered inadmissible in evidence by the fact that they were taken 12 days before the date of the offense as charged, since the date on which the offense is charged to have been committed is not material. Kirkham v North Little Rock, 227 Ark 789, 301 SW2d 559, 64 ALR2d 1032.

Photographs taken 5 days after victim was assaulted with a hot iron were properly admitted to show the nature and extent of victim's injuries. Johnson v United States (Dist Col App) 613 A2d 888.

In landowners suit to recover damages for destruction of trees, photographs of the damaged area taken 4 years after defendant's trespass were admissible to show the type of trees which were present in the area which was damaged. *Keitges v VanDermeulen*, 240 Neb 580, 483 NW2d 137.

Photographs taken the day after the accident were not erroneously admitted into evidence where witness stated that the photographs accurately depicted the condition of the roadway immediately after the accident and with certain minor exceptions, there is no evidence that the roads' condition was altered by reason of the accident. *Schuster v Hempstead* (2d Dept) 130 App Div 2d 481, 515 NYS2d 64, app den 70 NY2d 613, 524 NYS2d 431, 519 NE2d 342.

Footnote 76. *State v Lee*, 80 Ariz 213, 295 P2d 380, 56 ALR2d 1166; *People v Vaiza* (5th Dist) 244 Cal App 2d 121, 52 Cal Rptr 733 (photograph inadmissible where there was material change in lighting conditions at scene of the crime); *Bradshaw v State*, 172 Ga App 330, 323 SE2d 253; *Hubble v State*, 260 Ind 655, 299 NE2d 612; *Coonley v Lowden*, 234 Iowa 731, 12 NW2d 870; *State v McVeigh*, 213 Kan 432, 516 P2d 918; *Allemand v Zip's Trucking Co.* (La App 1st Cir) 552 So 2d 1023, cert den (La) 558 So 2d 569 (photograph inadmissible where no explanation was offered to explain differences between accident scene and photograph taken several years later); *State v Landry (Me)* 485 A2d 218; *Commonwealth v Bonomi*, 335 Mass 327, 140 NE2d 140; *Louisville & N. R. Co. v Daniels*, 252 Miss 1, 172 So 2d 394; *Gulf, M. & O. R. Co. v Golden*, 221 Miss 253, 72 So 2d 446; *Brock v Gulf, M. & O. R. Co. (Mo)* 270 SW2d 827; *Johnson v State (Okla Crim)* 478 P2d 969; *Smith v State (Tex Crim)* 683 SW2d 393, reh den (Jan 30, 1985) and later proceeding (CA5 Tex) 798 F2d 129; *Thrasher v Amere Gas Utilities Co.*, 138 W Va 166, 75 SE2d 376, app dismd 347 US 910, 98 L Ed 1067, 74 S Ct 478.

In wrongful death action, where photographs were identified and stated to be accurate representation of roadway at time of accident, except that road had been widened slightly and painted fog line had been added on both sides, changes in road were adequately explained when exhibits were offered into evidence and did not make photographs deceptive, and photographs could properly be admitted. *Riksem v Hollister*, 96 Idaho 15, 523 P2d 1361.

Photographs which incidently revealed that repairs were made subsequent to the alleged accident were properly admitted in slip and fall action where the photographs were the only known pictures of the scene where the plaintiff claimed he fell, and the photographs would contribute to a fuller understanding of the issues in the case. *E.V.R. II Assoc., Ltd. v Brundige* (Tex App Dallas) 813 SW2d 552.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899 § 4.

Footnote 77. *Sellers v CSX Transp., Inc.*, 102 NC App 563, 402 SE2d 872; *Thomas v Dixon*, 88 NC App 337, 363 SE2d 209.

Footnote 78. *Harris v Woolworth* (Mo App) 824 SW2d 31.

Footnote 79. *Maylie v National R. Passenger Corp.* (ED Pa) 791 F Supp 477, later proceeding (CA3 Pa) 983 F2d 1052.

Footnote 80. *Potts v People*, 114 Colo 253, 158 P2d 739, 159 ALR 1410 (one and one-half months after homicide); *Lindberg v State*, 134 Fla 786, 184 So 662 (a few hours after homicide); *Weaver v State*, 199 Ga 267, 34 SE2d 163 (ten days after homicide); *Fitzgerald v Commonwealth*, 290 Ky 825, 162 SW2d 202 (one hour after homicide); *State v Smith*, 70 RI 500, 41 A2d 153 (one day after homicide discovered); *Richardson v State*, 159 Tex Crim 595, 266 SW2d 129 (one day after homicide).

Footnote 81. *Castro v State (Okla Crim)* 844 P2d 159, cert den (US) 126 L Ed 2d 98, 114 S Ct 135.

Footnote 82. *Hardy v Anderson*, 241 Minn 478, 63 NW2d 814.

In a suit for injury caused by falling on a waxed floor, a photograph showing the scene of the fall was held admissible even though the floor was subsequently altered, where the jury was told that the sole purpose of the photograph was to show the location of the fall. *First Federal Sav. & Loan Ass'n v Wylie (Fla)* 46 So 2d 396.

Although photographs showed a building abutting a street at a different stage of completion from the time of the accident, and the presence of debris on the sidewalk, the admissibility of the photographs was not impaired if, as testified by several witnesses, they correctly showed the condition of the pavement 15 feet out into the street from the curbstone, where a hole was alleged to have thrown an automobile out of control. *Saporito v New York*, 14 NY2d 474, 253 NYS2d 985, 202 NE2d 369.

The admission in evidence, in an action on an account for labor and materials in remodeling a house, of photographs of various parts of the building some 2 years after the plaintiff's employment had ceased and additional work had been done on the premises, rested in the sound discretion of the trial court where the photographs were properly identified as correctly reflecting the conditions at the time they were made and there was evidence as to the changes that had been effected. *Shears v Von Tulganburg (App, Franklin Co)* 77 Ohio L Abs 188, 148 NE2d 926.

Footnote 83. *Flint v Chicago, B. & Q. R. Co.*, 357 Mo 215, 207 SW2d 474.

Footnote 84. *Een v Consolidated Freightways (CA8 ND)* 220 F2d 82; *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, affd 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379; *State v Lee*, 80 Ariz 213, 295 P2d 380, 56 ALR2d 1166; *Riggan v Langley*, 238 Ark 649, 383 SW2d 661; *Washington Coca Cola Bottling Works, Inc. v Kelly (Mun Ct App Dist Col)* 40 A2d 85; *Southeastern Engineering & Mfg. Co. v Lyda*, 100 Ga App 208, 110 SE2d 550; *McKee v Chase*, 73 Idaho 491, 253 P2d 787; *Coonley v Lowden*, 234 Iowa 731, 12 NW2d 870; *Commonwealth, Dept. of Highways v Merrill (Ky)* 383 SW2d 327; *Pruner v Detroit U. Ry.*, 173 Mich 146, 139 NW 48; *Elliott v Massey*, 242 Miss 159, 134 So 2d 478; *State v Brown (Mo)* 312 SW2d 818; *Shears v Von Tulganburg (App, Franklin Co)* 77 Ohio L Abs 188, 148 NE2d 926; *Heath v State (Okla Crim)* 278 P2d 553; *Nyce v Muffley*, 384 Pa 107, 119 A2d 530; *Little v Nashville, C. & S. L. R. Co.*, 39 Tenn App 130, 281 SW2d 284; *Howell v Missouri K. T. R. Co. (Tex Civ App Eastland)* 380 SW2d 842, writ ref n r e (Nov 4, 1964), error ref n r e; *Smith v Rich*, 47 Wash 2d 178, 286 P2d 1034.

The exclusion, in a negligence action arising from a collision, of a photograph taken of a truck involved in the collision on the day following the accident was proper in the absence of testimony that the condition of the truck was essentially the same as it was immediately following the accident. *Giffin v Ensign* (CA3 Pa) 234 F2d 307.

In a suit involving a truck collision, an objection to a photograph showing the highway after the accident on the ground that the witness identifying it had not compared it with a previously admitted photograph showing the position of the truck after the accident, was obviated where the witness testified that the photographs were identical except that in the second one the truck had been removed. *Reynolds v Nutt*, 217 Ark 543, 230 SW2d 949.

Annotation: 9 ALR2d 899 § 4.

§ 969 Enlarged photographs; photographs joined together

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A duplicate is defined in the Federal and Uniform Rules of Evidence to include photographic enlargements, 85 and a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate instead of the original. 86 Accordingly, a photograph or slide is not rendered inadmissible because it has been enlarged, 87 where it appears to have been properly authenticated and to be material to an issue in the case, 88 and does not tend to mislead the jury. 89 In the case of photographs of wounds, the contention that enlargements tend to exaggerate the size of the wounds and will prejudice the jury has been rejected where there is no claim, aside from the enlargement, that there is any distortion or inaccuracy. 90 As in the case of the admission of photographs generally, 91 it is recognized that the admission in evidence of enlarged photographs rests in the discretion of the trial court, which will not be reversed on appeal unless clearly in error. 92 In many instances it has been noted that the use of photographic enlargements is comparable to the use of magnifying glasses or microscopes. 93 Thus, a photomicrograph of skin sections 94 or of cuts made on a tree 95 are admissible.

An enlarged photograph may be admitted into evidence to illustrate the testimony of a witness, 96 to show the place, 97 cause, 98 or results 99 of an accident or injury; to show, in an action for wrongful death, the persons killed; 1 and to show printed maps or illustrations. 2

Failure to lay a proper foundation for the admission of enlargements in evidence may result in their exclusion. 3 An enlarged photograph may also be excluded if it alters the original by excluding a part of it. 4

Individual photographs, otherwise competent evidence which have been joined together to form a panoramic view, are admissible provided there is no deception, distortion, or inaccuracy between the actual area and the photographs of the area. 5

§ 969 ----Enlarged photographs; photographs joined together [SUPPLEMENT]**Case authorities:**

Government exhibits of large photographs of Social Security cards, photo identification cards and other forms of identification seized in defendant's apartment during his arrest were not improperly admitted absent any showing that their probative value was outweighed by any prejudice to defendant charged with knowing conversion of public funds, filing false claims, and money laundering. *United States v Chesney* (1993, CA9 Cal) 10 F3d 641, 93 CDOS 8667, 93 Daily Journal DAR 14851, cert den (US) 62 USLW 3658.

Footnotes

Footnote 85. FRE Rule 1001(4); Uniform Rules of Evidence, Rule 1001(4).

Footnote 86. FRE Rule 1003; Uniform Rules of Evidence, Rule 1003.

In prosecution for unlawful purchase and possession of food stamps, the court did not err in admitting enlarged photos of food stamps marked by investigator and redeemed by defendant, where proper foundation was laid for their admission and they were relevant to issue of defendant's possession of unlawfully acquired food stamps. *United States v Collins* (CA8 Minn) 690 F2d 670, 11 Fed Rules Evid Serv 1068.

Annotation: Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence, 72 ALR Fed 732.

Footnote 87. *United States v Currier* (CA1 RI) 454 F2d 835; *United States v Collins* (CA8 Minn) 690 F2d 670, 11 Fed Rules Evid Serv 1068; *United States v Parhms* (CA9 Wash) 424 F2d 152, cert den 400 US 846, 27 L Ed 2d 83, 91 S Ct 92; *United States v Yahweh* (SD Fla) 792 F Supp 104, 36 Fed Rules Evid Serv 747; *Goffer v State* (Ala App) 430 So 2d 896; *State v Coward*, 108 Ariz 270, 496 P2d 131; *Mitchell v State*, 295 Ark 341, 750 SW2d 936, appeal after remand 299 Ark 566, 776 SW2d 332; *Mitchell v State*, 295 Ark 341, 750 SW2d 936, appeal after remand 299 Ark 566, 776 SW2d 332; *People v Ward* (1st Dist) 266 Cal App 2d 241, 72 Cal Rptr 46; *People v Torres* (Colo App) 536 P2d 868, cert den 423 US 929, 46 L Ed 2d 258, 96 S Ct 279; *State v Dubina*, 164 Conn 95, 318 A2d 95 (ovrld on other grounds by *State v Rutan*, 194 Conn 438, 479 A2d 1209); *Wasley v State* (Fla) 244 So 2d 418; *Wilson v State*, 245 Ga 49, 262 SE2d 810; *Lockhart v State*, 172 Ga App 170, 322 SE2d 503; *Lockhart v State*, 172 Ga App 170, 322 SE2d 503 (rape); *People v Beasley* (1st Dist) 109 Ill App 3d 446, 65 Ill Dec 106, 440 NE2d 961; *Wilson v State*, 169 Ind App 297, 348 NE2d 90; *State v Aldrich*, 174 Kan 335, 255 P2d 1027 (assault); *State v Williams* (La) 353 So 2d 1299, cert den 437 US 907, 57 L Ed 2d 1138, 98 S Ct 3098 (color slides); *Commonwealth v Weichell*, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298; *Commonwealth v Weichell*, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298; *Jacobsen v State*, 236 Mont 91, 769 P2d 694; *Sundahl v State*, 154 Neb 550, 48 NW2d 689; *Lloyd v State*, 94 Nev 167, 576 P2d 740; *State v Smith*, 27 NJ 433, 142 A2d 890; *State v Upton*, 60 NM 205, 290 P2d 440; *State v Sheppard* (Cuyahoga Co) 100 Ohio

App 345, 60 Ohio Ops 298, 128 NE2d 471, affd 165 Ohio St 293, 59 Ohio Ops 398, 135 NE2d 340, reh den, cert den 352 US 910, 1 L Ed 2d 119, 77 S Ct 118, reh den 352 US 955, 1 L Ed 2d 245, 77 S Ct 323; Republic Nat. Life Ins. Co. v Chilcoat (Okla) 368 P2d 821; State v Long, 195 Or 81, 244 P2d 1033; Commonwealth v Ballem, 386 Pa 20, 123 A2d 728, cert den 352 US 932, 1 L Ed 2d 167, 77 S Ct 235, later proceeding 391 Pa 626, 139 A2d 534, later proceeding 334 Pa Super 255, 482 A2d 1322; Losada v State (Tex Crim) 721 SW2d 305; State v Edelstein, 146 Wash 221, 262 P 622 (burglary); State v Kump, 76 Wyo 273, 301 P2d 808.

In rape prosecution, enlarged photograph of victim's head and neck, showing bruises around neck area, was properly admitted as relevant evidence notwithstanding that because coloring on enlargement was somewhat darker than on original photograph, enlargement depicted bruises on victim's neck as more pronounced than they appeared in original. Lloyd v State, 94 Nev 167, 576 P2d 740.

Annotation: Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Footnote 88. Diller v Northern California Power Co., 162 Cal 531, 123 P 359; Spencer v State, 237 Ind 622, 147 NE2d 581, 72 ALR2d 304; State v Thompson, 254 Iowa 331, 117 NW2d 514; Commonwealth v Noxon, 319 Mass 495, 66 NE2d 814; Republic Nat. Life Ins. Co. v Chilcoat (Okla) 368 P2d 821; State v Kump, 76 Wyo 273, 301 P2d 808.

In an action for injuries resulting from an explosion, enlarged color photographs depicting plaintiff's injuries and treatment, even though possibly prejudicial, were admissible as evidence of basis for awards for physical and mental pain and suffering as well as disability. Bergeron v Blake Drilling & Workover Co. (La App 1st Cir) 599 So 2d 827, cert den (La) 605 So 2d 1117 and cert den (La) 605 So 2d 1119.

In murder prosecution, trial court properly admitted in evidence enlarged black-and-white reproduction of color photograph of defendant taken at time of arrest, where evidence showed photograph was fair and accurate representation of defendant at time. Commonwealth v Weichell, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298.

Annotation: 72 ALR2d 308 § 3[a].

Practice References Authentication of enlargements and projection prints. 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proof 2.

Footnote 89. Bombailey v State (Ala App) 580 So 2d 41; Sim v Weeks, 7 Cal App 2d 28, 45 P2d 350; Jones v State, 249 Ga 605, 293 SE2d 708, habeas corpus den 252 Ga 60, 312 SE2d 300, cert den 469 US 873, 83 L Ed 2d 157, 105 S Ct 228, reh den 469 US 1067, 83 L Ed 2d 439, 105 S Ct 552, habeas corpus proceeding (ND Ga) 706 F Supp 1534, later proceeding 260 Ga 794, 401 SE2d 1, 102-48 Fulton County D R 12B, cert den (US) 116 L Ed 2d 77, 112 S Ct 107, later proceeding (Ga) 440 SE2d 161, 94 Fulton County D R 657.

A color photograph of the crime scene, 2 feet by 3 feet in size, of the deceased lying on the bed where she was shot with large amounts of blood on the body, bed and floor was admissible despite the admission of the crime scene sketch. Brown v State (Fla App D3)

Trial court erred in admitting into evidence a two-foot by four-foot enlargement of photograph of three-year old child dead from starvation in prosecution for murder, voluntary manslaughter, and involuntary manslaughter. *Commonwealth v Robinson*, 273 Pa Super 337, 417 A2d 677.

In trial of capital murder case, enlarged photograph of murder victim was properly admitted where nothing in the record indicated that the enlarged photograph was introduced solely to inflame the minds of the jury. *Losada v State* (Tex Crim) 721 SW2d 305.

Annotation: 72 ALR2d 308 § 3[c].

Footnote 90. *State v Sheppard* (Cuyahoga Co) 100 Ohio App 345, 60 Ohio Ops 298, 128 NE2d 471, *affd* 165 Ohio St 293, 59 Ohio Ops 398, 135 NE2d 340, *reh den*, *cert den* 352 US 910, 1 L Ed 2d 119, 77 S Ct 118, *reh den* 352 US 955, 1 L Ed 2d 245, 77 S Ct 323.

As to the admissibility of enlarged photographs of fingerprints, palmprints, and footprints, see § 957.

Footnote 91. § 960.

Footnote 92. *People v Torres* (Colo App) 536 P2d 868, *cert den* 423 US 929, 46 L Ed 2d 258, 96 S Ct 279; *Plumb v Minneapolis & S. L. R. Co.*, 249 Iowa 1187, 91 NW2d 380; *Bergeron v Blake Drilling & Workover Co.* (La App 1st Cir) 599 So 2d 827, *cert den* (La) 605 So 2d 1117 and *cert den* (La) 605 So 2d 1119.

Trial court's admission in evidence in murder trial of color photographs enlarged to 12 square feet showing victim's blood splattered on floor, although irrelevant, did not violate due process clause where defendant had failed to object to introduction into evidence of even more lurid and disgusting photographs since evidence was not prejudicial in sense that it was likely to lead to conviction of innocent person. *Ferrier v Duckworth* (CA7 Ind) 902 F2d 545, 30 Fed Rules Evid Serv 448, *reh den*, *en banc* (CA7) 1990 US App LEXIS 11805 and *cert den* 498 US 988, 112 L Ed 2d 536, 111 S Ct 526.

As to the discretion of the trial to admit or exclude photograph, generally, see § 960.

Annotation: 72 ALR2d 308 § 3[b].

Footnote 93. *Spencer v State*, 237 Ind 622, 147 NE2d 581, 72 ALR2d 304.

Annotation: 72 ALR2d 308 § 3[d].

Footnote 94. *Commonwealth v Noxon*, 319 Mass 495, 66 NE2d 814.

Footnote 95. *State v Clark*, 156 Wash 543, 287 P 18.

Footnote 96. *United States v Thompson* (CA4 Va) 744 F2d 1065; *Gopaul v State* (Fla App D3) 536 So 2d 296, 13 FLW 2693; *Teller v Schepens*, 25 Mass App 346, 518 NE2d 868, *review den* 402 Mass 1102, 521 NE2d 398; *State v Kerns*, 187 W Va 620, 420 SE2d

891.

Footnote 97. Chicago G. W. R. Co. v Robinson (CA8 Neb) 101 F2d 994, cert den 307 US 640, 83 L Ed 1520, 59 S Ct 1037.

Annotation: 72 ALR2d 308 § 7[a].

Footnote 98. Burch v Atchison, T. & S. F. R. Co., 61 Cal App 2d 286, 142 P2d 955.

Exclusion of enlarged photographs of skid marks was not prejudicial where the enlargements showed nothing that was not shown on photographs previously admitted. Bott v Wendler, 203 Kan 212, 453 P2d 100.

Annotation: 72 ALR2d 308 § 8.

Footnote 99. Sim v Weeks, 7 Cal App 2d 28, 45 P2d 350; Teller v Schepens, 25 Mass App 346, 518 NE2d 868, review den 402 Mass 1102, 521 NE2d 398.

Annotation: 72 ALR2d 308 § 10.

Footnote 1. Western & A. Railroad v Reed, 35 Ga App 538, 134 SE 134.

Annotation: 72 ALR2d 308 § 9.

Footnote 2. Robinson v Cable, 55 Cal 2d 425, 11 Cal Rptr 377, 359 P2d 929; Stockton v Frabizio, 130 NJL 12, 31 A2d 43.

Annotation: 72 ALR2d 308 § 11.

Footnote 3. Alabama Power Co. v Marine Builders, Inc. (Ala) 475 So 2d 168, CCH Prod Liab Rep ¶ 10798; Eckstrom v Brooks, 115 Cal App 727, 2 P2d 207; People v Wallert (1st Dept) 98 App Div 2d 47, 469 NYS2d 722.

Annotation: 72 ALR2d 308 § 5[b].

Footnote 4. Marlow v Davis, 227 Md 204, 176 A2d 215.

Annotation: 72 ALR2d 308 § 5[a].

Footnote 5. St. Louis S. F. R. Co. v Davis (Okla) 399 P2d 463.

§ 970 Color photographs

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If a photograph is otherwise admissible in evidence, the fact that it is a color photograph is ordinarily no reason for excluding it from evidence. Indeed, it has been noted that even

though they may be equally admissible, colored photographs may provide superior information 6 or augment the accuracy of the jury's perception of the scene as compared with black-and-white photographs. 7 After proper authentication, color photographs have been commonly used, chiefly in criminal cases or actions for personal injuries or wrongful death, to show the condition of the victim of the crime or accident, and their use has generally been upheld as against the contention that they are gruesome or inflammatory, 8 or it has been held that their probative value outweighed any potentially inflammatory effect on the jury. 9 On the other hand, if the probable inflammatory and prejudicial effect of such pictures or slides far outweighs their potential evidentiary or probative value, 10 or if they are irrelevant or have no probative value, 11 they should be excluded. 12 Colored photographs may also be excluded where they would mislead the jury because of the fact that the colors are incorrectly portrayed. 13 In any event, the admissibility or rejection of colored photographs is a matter resting within the discretion of the trial judge, and the trial judge's determination in this respect will not be disturbed except for manifest error or an abuse of discretion. 14

Where the retouching or retinting process on a photographic portrait, apparently originally taken by a camera as a black-and-white picture, has not had the effect of impairing the accuracy of the picture, or where any possible distortions have been explained so that they could be discounted by the jury, admissibility has been upheld. 15

Footnotes

Footnote 6. *State v Duguay*, 158 Me 61, 178 A2d 129.

Footnote 7. *State v Hayward*, 114 NH 792, 330 A2d 445.

Annotation: Eminent domain: admissibility of photographs or models of property condemned, 23 ALR3d 825 §§ 5, 8 (admissibility in eminent domain proceedings of color photographs of property condemned).

Footnote 8. *United States v Farries* (MD Pa) 328 F Supp 1034, *affd* (CA3 Pa) 459 F2d 1057, *cert den* 409 US 888, 34 L Ed 2d 145, 93 S Ct 143 and *cert den* 410 US 912, 35 L Ed 2d 275, 93 S Ct 975; *Berard v State* (Ala App) 402 So 2d 1044, *appeal after remand, reh overr* (Ala App) 486 So 2d 458, *remanded on other grounds* (Ala) 486 So 2d 476, *on remand* (Ala App) 486 So 2d 482; *State v Hicks*, 133 Ariz 64, 649 P2d 267; *Watson v State*, 290 Ark 484, 720 SW2d 310, *post-conviction proceeding* (Ark) 1989 Ark LEXIS 127; *People v Glenn*, 200 Colo 416, 615 P2d 700; *State v Hanna*, 150 Conn 457, 191 A2d 124; *Whalen v State* (Del Sup) 434 A2d 1346, *cert den* 455 US 910, 71 L Ed 2d 449, 102 S Ct 1258, *appeal after remand* (Del Sup) 492 A2d 552; *Hillman v Funderburk* (Dist Col App) 504 A2d 596; *Burns v State* (Fla) 609 So 2d 600, 18 FLW s 35 (autopsy slides); *Brown v State* (Fla App D1) 493 So 2d 80, 11 FLW 1861; *Wilson v State*, 245 Ga 49, 262 SE2d 810; *Cagle Poultry & Egg Co. v Busick*, 110 Ga App 551, 139 SE2d 461; *People v Boyd* (1st Dist) 88 Ill App 3d 825, 43 Ill Dec 798, 410 NE2d 931, *cert den* 454 US 1080, 70 L Ed 2d 613, 102 S Ct 633; *Underwood v State* (Ind) 535 NE2d 507, *cert den* 493 US 900, 107 L Ed 2d 206, 110 S Ct 257, *reh den* 493 US 985, 107 L Ed 2d 524, 110 S Ct 524 (color photographs of crime scene and victims body); *State v Bell*, 239 Kan 229, 718 P2d 628; *State v Perow* (La App 2d Cir) 616 So 2d 1336, *cert den* (La) 623 So 2d 1303; *State v Taylor* (Me) 343 A2d 11; *Commonwealth v*

Campbell, 378 Mass 680, 393 NE2d 820, habeas corpus proceeding (CA1 Mass) 838 F2d 1, cert den 488 US 847, 102 L Ed 2d 100, 109 S Ct 126, post-conviction proceeding 411 Mass 95, 578 NE2d 411, cert den (US) 117 L Ed 2d 415, 112 S Ct 1169; Johnson v Clement F. Sculley Constr. Co., 255 Minn 41, 95 NW2d 409 (in an action for injuries sustained by a 6-year-old child, colored pictured demonstrating the condition of the burned areas immediately following the accident held properly admitted); Knox v Granite Falls, 245 Minn 11, 72 NW2d 67, 53 ALR2d 1091; Holliday v State (Miss) 455 So 2d 750; State v Griffin (Mo) 662 SW2d 854, cert den 469 US 873, 83 L Ed 2d 153, 105 S Ct 224; State v Schaffer (Mo) 383 SW2d 698 (rape prosecution; State v Powers, 198 Mont 289, 645 P2d 1357; Anderson v Evans, 164 Neb 599, 83 NW2d 59, appeal after remand 168 Neb 373, 96 NW2d 44; Zessman v State, 94 Nev 28, 573 P2d 1174, habeas corpus den (CA9) 1993 US App LEXIS 13465; State v Perron, 118 NH 245, 385 A2d 225; State v Belton, 60 NJ 103, 286 A2d 78; State v Blakley (App) 90 NM 744, 568 P2d 270; People v Millson (3d Dept) 93 App Div 2d 899, 461 NYS2d 586; State v Young, 287 NC 377, 214 SE2d 763, vacated, in part on other grounds 428 US 903, 49 L Ed 2d 1208, 96 S Ct 3207; State v Iverson (ND) 187 NW2d 1, cert den 404 US 956, 30 L Ed 2d 273, 92 S Ct 322; State v Lane, 49 Ohio St 2d 77, 3 Ohio Ops 3d 45, 358 NE2d 1081, vacated, in part on other grounds 438 US 911, 57 L Ed 2d 1155, 98 S Ct 3148; Sims v State (Okla Crim) 731 P2d 1368; State v Long, 195 Or 81, 244 P2d 1033; State v Danahey, 108 RI 291, 274 A2d 736; State v Harbison (Tenn) 704 SW2d 314, cert den 476 US 1153, 90 L Ed 2d 705, 106 S Ct 2261; Wallace v State (Tex App Texarkana) 707 SW2d 928, petition for discretionary review gr (Dec 2, 1987) and petition for discretionary review dismd (Mar 9, 1988) and affd (Tex Crim) 782 SW2d 854, motion for rehearing on PDR denied (Jan 17, 1990) and (superseded by statute on other grounds as stated in Childs v State (Tex App San Antonio) 837 SW2d 822); State v Garcia (Utah) 663 P2d 60, later proceeding (Utah) 675 P2d 527; State v Mecier, 138 Vt 149, 412 A2d 291; Killary v Burlington-Lake Champlain Chamber of Commerce, Inc., 123 Vt 256, 186 A2d 170; State v Sarinske, 91 Wis 2d 14, 280 NW2d 725.

In an action under the Jones Act for the drowning of the decedent during his employment by the defendant, a color picture showing the decedent in his casket was admissible in connection with testimony introduced by the plaintiff concerning the decedent's pain and suffering, and the question whether or not the picture showed evidence of swelling and physical markings on the decedent's neck and face was for the jury. Presley v Upper Mississippi Towing Corp. (La App 1st Cir) 153 So 2d 416, cert den 244 La 1002, 156 So 2d 56 and cert den 244 La 1003, 156 So 2d 56.

In an action for personal injuries sustained as a result of an automobile accident, it was not error for the trial court to admit into evidence color photographs of plaintiff lying on a Stryker frame with Crutchfield tongs attached to his scalp since the photographs were not inflammatory and assisted the jury in understanding the medical evidence. Caprara v Chrysler Corp. (3d Dept) 71 App Div 2d 515, 423 NYS2d 694, CCH Prod Liab Rep ¶ 8605, affd 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545, CCH Prod Liab Rep ¶ 8902.

In prosecution for aggravated rape and aggravated assault, trial court properly allowed three small color photographs of victim to be admitted into evidence where photographs were relevant and probative to show victim's personal injuries, and where photographs were neither gruesome nor inflammatory. State v Johnson (Tenn Crim) 670 SW2d 634, post-conviction proceeding (Tenn Crim) 1992 Tenn Crim App LEXIS 595.

For cases involving gruesomeness as affecting admissibility of photograph of corpse in homicide prosecution, see 40 Am Jur 2d, Homicide § 419.

Annotation: Admissibility in evidence of colored photographs, 53 ALR2d 1102 § 2.

Practice References Authentication of color pictures by amateur photographer. 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proof 4.

Footnote 9. Dearman v State, 93 Nev 364, 566 P2d 407; State v Rebideau, 132 Vt 445, 321 A2d 58.

Admission into evidence of color photograph of victim's shower area, in which there was bucket filled with cloudy reddish liquid, was proper as being sufficiently relevant where testimony was that defendant, after beating up victim, had helped him into shower in order to stop nose bleed with cold water. People v Reynolds, 194 Colo 543, 575 P2d 1286.

In prosecution for assault and battery, unarmed robbery, and assault with intent to commit rape, defendant's concession that victim had been severely beaten and had bleed profusely did not make color photograph of victim after assault inadmissible. Commonwealth v Torres, 367 Mass 737, 327 NE2d 871.

Two color photographs depicting injuries inflicted upon one of correction officers in assault by prison inmates were properly admitted into evidence, where photographs were probative of element of crime charged that defendant inflicted physical injury on peace officer when officer was in course of performing his duties; fact that photographs might arouse sympathy of jury was not sufficient to exclude evidence. People v Cuffee (3d Dept) 112 App Div 2d 545, 491 NYS2d 483.

Footnote 10. Faught v Washam (Mo) 329 SW2d 588; Butler v Pantekoek, 231 Or 563, 373 P2d 614.

Footnote 11. Graham v Helean, 143 Mont 552, 393 P2d 46; Oxendine v State (Okla Crim) 335 P2d 940 (finding reversible error in the admission of colored photoslides where there was no issue or controversy as to the cause of death and the defendants had admitted the crime in intricate detail).

Where the sole issue in the case was whether the killing was done in the heat of passion or intentionally, the admission of colored slides taken during the autopsy, shocking and emotionally disturbing to the mind of an average individual, was inherently prejudicial when the slides were of no probative value. State v Morris, 245 La 175, 157 So 2d 728.

In a manslaughter prosecution of a parent for failure to provide a 5-month-old child with food, the trial court should not have admitted color slides taken after a post mortem, where the doctor stated that he did not need the slide to explain the findings, although it was helpful, and the slide showed ghastly and gruesome-looking sores or scars caused by dermatitis burns which did not go to the proof of starvation, and there was no charge of failure to provide medical care. State v Bischert, 131 Mont 152, 308 P2d 969.

Footnote 12. For discussion of the prejudicial character of a photograph, generally, see § 963.

Footnote 13. Georgia, Georgia S. & F. R. Co. v Perry (CA5 Fla) 326 F2d 921 (following

Florida law); *Anello v Southern Pacific Co.* (1st Dist) 174 Cal App 2d 317, 344 P2d 843.

Footnote 14. *Jenkins v Associated Transport, Inc.* (CA6 Tenn) 330 F2d 706 (applying Tennessee law); *People v Carter*, 48 Cal 2d 737, 312 P2d 665 (holding that there was no abuse of discretion in admitting colored slides); *Commonwealth, Dept of Highways v Williams* (Ky) 317 SW2d 482 (holding that there was no abuse of discretion, in an action arising from a crossing accident, in rejecting the railroad's offer of colored photographs of the scene which were not properly authenticated as to color); *Horowitz v Bokron*, 337 Mass 739, 151 NE2d 480; *Catlett v MacQueen*, 180 W Va 6, 375 SE2d 184.

Insofar as the admission or exclusion of colored photographs is discretionary on the part of the trial court, the exercise of that discretion is subject to review. *Reed v Shelly* (Mo App) 378 SW2d 291.

Footnote 15. *Harris v Snider*, 223 Ala 94, 134 So 807.

In a homicide case the court found no valid objection to the admission of a photograph of the decedent taken in his lifetime, from which substances used for retouching it had been removed (possibly tinting or coloring) for the purpose of restoring the negative to its original condition, there being no evidence that the negative was otherwise altered. *People v Madison*, 3 Cal 2d 668, 46 P2d 159.

Annotation: 53 ALR2d 1102 § 3.

(b). Photographs of Persons [971-974]

§ 971 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

A photograph of a person or of some part of the body which is shown to be a proper representation of its subject is admissible to prove the person's appearance or condition at the time of any injuries, 16 or to prove the condition of, or the nature or extent of injuries or wounds, to, the part of the body photographed, 17 as the case may be, provided the photograph is not more prejudicial than probative. 18 Thus, photographs of injuries taken during a course of treatment which are accurately reflective of the injuries and the treatment which plaintiff had to undergo are properly admitted. 19 In a personal injury action where recovery is sought for permanent disfigurement, photographs taken before the injury, where properly authenticated, are also admissible. 20

§ 971 ----Generally [SUPPLEMENT]

Case authorities:

In robbery prosecution, photo of lineup was properly admitted, even though flash may have caused more detail to come through stockings that were worn over heads, where evidence was not so inherently suggestive that it gave rise to very substantial likelihood of irreparable misidentification. *State v Lewis* (1994, Mo App) 874 SW2d 420.

In a prosecution for the first-degree murder of an undercover officer involved in a drug investigation, a photograph of the victim wearing his police uniform and standing in front of a patrol car was not introduced merely to inflame the passions of the jury but was properly admitted to illustrate a detective's testimony concerning the size and weight of the victim where defendant's defense of self-defense necessitated a showing by the State that a much larger man attacked the victim and knocked him down and defendant then shot and killed him. *State v Bell* (1994) 338 NC 363, 450 SE2d 710.

Footnotes

Footnote 16. *People v Glenn*, 200 Colo 416, 615 P2d 700; *Leasure v United States* (Dist Col App) 458 A2d 726; *Faunteroy v United States* (Dist Col App) 413 A2d 1294; *Burns v State* (Fla) 609 So 2d 600, 18 FLW S 35; *Goodman v State*, 255 Ga 226, 336 SE2d 757; *State v Winn*, 121 Idaho 850, 828 P2d 879; *People v Minnis* (4th Dist) 118 Ill App 3d 345, 74 Ill Dec 179, 455 NE2d 209; *Kennedy v State* (Ind) 578 NE2d 633, cert den (US) 117 L Ed 2d 521, 112 S Ct 1299, remanded on other grounds (Ind) 620 NE2d 17; *Jarvis v State* (Ind) 441 NE2d 1; *State v Hickman* (Iowa) 337 NW2d 512; *State v Crispin*, 234 Kan 104, 671 P2d 502; *State v Hardeman* (La App 2d Cir) 467 So 2d 1163; *Launey v Traders & General Ins. Co.* (La App 3d Cir) 169 So 2d 757; *State v Olson* (Minn App) 436 NW2d 817, cert den 493 US 862, 107 L Ed 2d 132, 110 S Ct 176; *Marks v State* (Miss) 532 So 2d 976; *State v Canterbury* (Mo) 708 SW2d 662, post-conviction proceeding (Mo App) 781 SW2d 107; *State v Evans* (Mo) 639 SW2d 820, later proceeding (Mo App) 687 SW2d 634 and habeas corpus proceeding (WD Mo) 1989 US Dist LEXIS 4415; *State v Riley*, 199 Mont 413, 649 P2d 1273; *Vowell v State* (Okla Crim) 728 P2d 854, later proceeding (Okla Crim) 732 P2d 905; *Commonwealth v McCutchen*, 499 Pa 597, 454 A2d 547; *Justus v Commonwealth*, 220 Va 971, 266 SE2d 87, appeal after remand 222 Va 667, 283 SE2d 905, cert den 455 US 983, 71 L Ed 2d 693, 102 S Ct 1491, habeas corpus proceeding 479 US 1101, 94 L Ed 2d 182, 107 S Ct 1331, habeas corpus proceeding (CA4 Va) 897 F2d 709, reh den, en banc (CA4) 1990 US App LEXIS 4943.

Footnote 17. *United States v Authement* (CA5 La) 607 F2d 1129, 5 Fed Rules Evid Serv 387; *United States v Bailey* (CA5 Tex) 537 F2d 845, 1 Fed Rules Evid Serv 1186, cert den 429 US 1051, 50 L Ed 2d 767, 97 S Ct 764; *Romine v Duckworth* (ND Ind) 648 F Supp 60, affd without op (CA7 Ind) 805 F2d 1038; *Gilmore v State* (Ala App) 497 So 2d 577; *State v Maximo* (App) 170 Ariz 94, 821 P2d 1379, 96 Ariz Adv Rep 137; *Henderson v State*, 291 Ark 138, 722 SW2d 842, petition den (Ark) LEXIS slip op and cert den 493 US 896, 107 L Ed 2d 197, 110 S Ct 247; *People v Allen*, 42 Cal 3d 1222, 232 Cal Rptr 849, 729 P2d 115, cert den 484 US 872, 98 L Ed 2d 153, 108 S Ct 202 and stay den, cert den 487 US 1264, 101 L Ed 2d 977, 109 S Ct 201; *People v Kurts* (Colo App) 721 P2d 1201; *Duncan v State*, 256 Ga 391, 349 SE2d 699; *Lewis v State*, 180 Ga App 369, 349 SE2d 257; *Lundquist v Nickels* (1st Dist) 238 Ill App 3d 410, 179 Ill Dec 150, 605 NE2d 1373, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336; *Doerner v State* (Ind) 500 NE2d 1178; *State v Ruebke*, 240 Kan 493, 731 P2d 842, cert

den 483 US 1024, 97 L Ed 2d 770, 107 S Ct 3272; *Knox v Granite Falls*, 245 Minn 11, 72 NW2d 67, 53 ALR2d 1091; *Marks v State (Miss)* 532 So 2d 976; *State v Dixon (Mo)* 717 SW2d 847; *State v Hicks (Mo App)* 722 SW2d 650; *State v Grant*, 221 Mont 122, 717 P2d 562; *People v Bell*, 63 NY2d 796, 481 NYS2d 324, 471 NE2d 137; *State v Gibbons*, 303 NC 484, 279 SE2d 574; *Ybarra v State (Okla Crim)* 733 P2d 1342; *Commonwealth v Moretti*, 358 Pa Super 141, 516 A2d 1222, app den 515 Pa 593, 528 A2d 602; *State v Kornahrens*, 290 SC 281, 350 SE2d 180, cert den 480 US 940, 94 L Ed 2d 781, 107 S Ct 1592; *State v Goad (Tenn)* 707 SW2d 846; *Luna v State (Tex App Fort Worth)* 717 SW2d 176; *Key v State (Wyo)* 616 P2d 774.

In prosecution for felony murder and rape, trial court did not abuse its discretion in admitting into evidence photographs of bite marks on victim's breast where dental expert testified that he found photographs reliable and acceptable for his use. *State v Peoples*, 227 Kan 127, 605 P2d 135.

In an action for malpractice resulting in an injury to the plaintiff's foot, photographs of the foot taken about a year after the injury have been held properly admitted in evidence as a portrayal of a condition that an expert witness for the plaintiff was attempting to describe, where there was no indication that the photographs were distorted or inaccurate, since the probative value of the photographs on the issue of the extent of the damage to the foot outweighed any possible prejudicial effect. *Moeller v Hauser*, 237 Minn 368, 54 NW2d 639, 57 ALR2d 364.

Photographs showing bruises and burns have been held admissible in a prosecution of a husband for aiding and abetting another in the rape of his wife, in corroboration of her testimony as to beatings by him before and after the alleged rape. *Cody v State (Okla Crim)* 361 P2d 307, 84 ALR2d 997, appeal after remand (Okla Crim) 376 P2d 625.

Admission of photograph of plaintiff's open wound before and after grafting was admitted to make description of witness more intelligible. *Cervone v Reading*, 371 Pa Super 279, 538 A2d 16, app den 520 Pa 586, 551 A2d 213.

A picture of the prosecutrix in a prosecution for aggravated assault upon a female, graphically showing the extent of her injuries, was admissible where the prosecutrix herself testified that the picture truly and correctly represented her as she looked after the assault. *McFarlane v State*, 159 Tex Crim 658, 266 SW2d 133.

As to the admissibility of X-ray pictures, see §§ 977, 978.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899 § 12.

Practice References Preparing and using personal injury photographs in civil cases. 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases §§ 107 et seq.

Authentication of medical photographs. 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proof 7.

Footnote 18. § 963.

Authentication or verification of a photograph is discussed in § 965.

Footnote 19. *Kelley v American Motors Corp.* (5th Dist) 130 Ill App 3d 662, 85 Ill Dec 854, 474 NE2d 814, CCH Prod Liab Rep ¶ 10774 (forty-four unquestionably gruesome photographs of burn victim taken during 8-month period admissible probative value in helping jury understand plastic surgeons testimony in illustrating course of plaintiff's progress and treatment outweighed any prejudice); *Wilson v Norfolk & W. R. Co.* (5th Dist) 109 Ill App 3d 79, 64 Ill Dec 686, 440 NE2d 238 (admission of photographs depicting plaintiff's burn injuries during course of treatment); *Lougon v Era Aviation, Inc.* (La App 3d Cir) 609 So 2d 330 (photograph taken of helicopter crash victim taken in operating room showing facial lacerations admissible); *Day v South Line Equipment Co.* (La App 1st Cir) 551 So 2d 774, cert den (La) 553 So 2d 474 (admissibility of photographs of injuries at various stages of recuperation, including photographs showing results of surgical procedures upheld); *Washburn v Beatt Equipment Co.*, 120 Wash 2d 246, 840 P2d 860 (gruesome photographs of burn victim).

Footnote 20. *Hunt v Wooten*, 238 NC 42, 76 SE2d 326 (holding photographs taken before and after the injury admissible, where photographers and others testified to their accuracy).

§ 972 Admissibility of photograph to show identity or resemblance

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A properly authenticated photograph is admissible in criminal cases to establish the identity of the defendant, 21 or victim. 22 Where the photograph is introduced in evidence for the purpose of establishing identity, testimony that the photograph looks like the person whose identity is being established is a sufficient basic introduction of the photograph, and it is not necessary to show who took the picture, or where, when, or how it was taken. 23

Further, an unauthenticated photograph may be used to show identity where the prosecution witness makes an in-court identification of the defendant and subsequently corroborates his own testimony by identifying the photograph, at which point, the court can consider the photograph and make its own observation as to whether the photograph resembles the defendant. 24 Additionally, a photograph taken by a regiscope—a device which simultaneously photographs check being presented, person presenting it and that person's identification 25 —purporting to be that of accused may be properly admitted into evidence. 26

Photographs are also admissible in evidence for the purpose of supporting statements as to race and family resemblance, 27 particularly in cases involving matters of paternity 28 and succession, 29 provided the photograph is shown to be a good likeness. Proof of the accuracy of a photograph of a person may be made by the testimony of one who was familiar with the appearance of the person at the time the photograph was taken. 30

**§ 972 ----Admissibility of photograph to show identity or resemblance
[SUPPLEMENT]**

Case authorities:

Probative value of court's orders that defendant shave and put on glasses did not outweigh prejudicial effect, as to which defendant offered no evidence, where surveillance photographs showed robber wearing glasses and photographs taken after robbery, when defendant was arrested, depicted him with slight moustache, which court described as not comparable to one he had at trial, there was evidence that defendant had worn similar glasses before, and court informed jury glass were provided by government and not found with defendant. *United States v Emanuele* (1995, CA3 Pa) 51 F3d 1123, 41 Fed Rules Evid Serv 1072.

Footnotes

Footnote 21. *United States v McQuisten* (CA9 Or) 795 F2d 858; *State v Kasold*, 110 Ariz 558, 521 P2d 990; *Martin v State*, 258 Ark 529, 527 SW2d 903; *Shelton v State*, 111 Ga App 351, 141 SE2d 776, cert den 382 US 917, 15 L Ed 2d 232, 86 S Ct 291; *State v Reding*, 52 Idaho 260, 13 P2d 253; *State v Ladehoff*, 255 Iowa 659, 122 NW2d 829; *State v Morris*, 222 La 480, 62 So 2d 649; *State v Lane* (Mo App) 791 SW2d 947; *Jones v State*, 147 Neb 219, 22 NW2d 710; *State v Silhan*, 302 NC 223, 275 SE2d 450.

In a prosecution for murder, photographs of accused showing scratch marks on both sides of his face were admissible in evidence where there was testimony by witnesses that they had observed such scratch marks. *Leaver v State*, 250 Ind 523, 237 NE2d 368, cert den 393 US 1059, 21 L Ed 2d 701, 89 S Ct 702, post-conviction proceeding 275 Ind 82, 414 NE2d 959.

In burglary prosecution, where complainant testified as to reliability of instamatic camera, location of area photographed, and accuracy of reproduction of negatives, photos which appeared to be of defendant holding stolen property near scene of crime were admissible notwithstanding lack of direct evidence on issue. *State v Holderness* (Iowa) 293 NW2d 226.

In prosecution for unlawful sale of marijuana involving critical issue as to defendant's identity as seller, trial court did not abuse wide latitude of discretion in admitting photograph purportedly depicting defendant's brother, where defendant's former wife testified that undercover agent's description of seller more nearly described defendant's brother and testified that photograph fairly depicted defendant's brother at time of crime except for slight variations in hair style and moustache length. *State v Sargent* (Me) 361 A2d 248.

Generally, as to evidence admissible to prove identity in criminal prosecutions, see §§ 560 et seq.

As to admissibility of evidence derived from improperly suggestive lineup § 628, showup § 629, or photographic array § 630.

On admissibility of mug shots, see § 973.

As to photographs of fingerprints, etc., see § 957.

As to the proof of identity, by photograph, in extradition proceedings, see 31A Am Jur 2d, Extradition § 143.

Annotation: Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction, 11 ALR2d 870 § 12 (evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction).

Practice References Photographing prisoners. 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases §§ 14, 15.

Footnote 22. *United States v Kaiser* (CA5 Ga) 545 F2d 467; *Walle v Sigler* (CA8 Neb) 456 F2d 1153; *United States v De Parias* (CA11 Fla) 805 F2d 1447, 22 Fed Rules Evid Serv 263, cert den 482 US 916, 96 L Ed 2d 678, 107 S Ct 3189; *State v Bracy*, 145 Ariz 520, 703 P2d 464, cert den 474 US 1110, 88 L Ed 2d 932, 106 S Ct 898; *People v Viduya* (Colo) 703 P2d 1281; *People v Dillon* (Colo App) 633 P2d 504, later proceeding (Colo App) 739 P2d 919; *Faunteroy v United States* (Dist Col App) 413 A2d 1294; *Brumbley v State* (Fla) 453 So 2d 381; *Simon v State*, 253 Ga 681, 324 SE2d 455; *Brown v State* (Ind) 503 NE2d 405; *State v Martin* (La App 1st Cir) 607 So 2d 775; *State v Canterbury* (Mo) 708 SW2d 662, post-conviction proceeding (Mo App) 781 SW2d 107; *State v West*, 223 Neb 241, 388 NW2d 823; *Luna v State* (Tex App Fort Worth) 717 SW2d 176.

Footnote 23. *Anderson v State*, 206 Ga 527, 57 SE2d 563; *State v Ling*, 91 Kan 647, 138 P 582; *Sundahl v State*, 154 Neb 550, 48 NW2d 689; *State v Esposito*, 73 RI 94, 54 A2d 1.

In action by beneficiary to collect proceeds of life insurance policy from insurer, photographs of body at morgue were competently identified by investigating police officer who did not view body at morgue but saw it at murder scene and by witness who identified body at morgue for police. *Davidson v Great Nat. Life Ins. Co.* (Tex) 737 SW2d 312, reh of cause overr (Oct 21, 1987).

Generally, as to the authentication of photographs, see § 965.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899 § 12.

Footnote 24. *United States v Kidding* (CA7 Ill) 560 F2d 1303, cert den 434 US 872, 54 L Ed 2d 151, 98 S Ct 217.

Footnote 25. *Dunford v State* (Okla Crim) 614 P2d 1115.

Footnote 26. *Ferguson v Commonwealth*, 212 Va 745, 187 SE2d 189, cert den 409 US 861, 34 L Ed 2d 108, 93 S Ct 150, reh den 409 US 1050, 34 L Ed 2d 504, 93 S Ct 533.

In forgery prosecution, photograph taken by machine that displayed check cashed and person who presented it in a single print was admissible even though cashier who had

cashied check and taken photograph had no independent recollection of appearance of man who presented check. *United States v Gray* (CA8 Mo) 531 F2d 933, cert den 429 US 841, 50 L Ed 2d 110, 97 S Ct 117.

Photograph of defendant taken by Regiscope was properly admitted where store employee who made photograph testified as to store's practices and to fact that he followed such practices and employee was cross-examined extensively on possibility of mistake. *Dunford v State* (Okla Crim) 614 P2d 1115.

Authentication of a photograph under the silent witness theory is discussed in § 960.

Footnote 27. *In re Estate of Jessup*, 81 Cal 408, 22 P 742, motion to vacate den 81 Cal 459, 22 P 1028; *Shorten v Judd*, 56 Kan 43, 42 P 337; *Van Houten v Morse*, 162 Mass 414, 38 NE 705.

Footnote 28. As to the admissibility of a photograph in a paternity action to show that a person in court bears a resemblance to a photograph of the alleged father, see 10 Am Jur 2d, *Bastards* § 44.

Footnote 29. *Shorten v Judd*, 56 Kan 43, 42 P 337 (where the putative father of a child is dead and the child is in court, a photograph of the man, if proved to be a good likeness of him, is admissible in evidence for the purpose of comparison with the child to show family likeness).

But see *In re Estate of Jessup*, 81 Cal 408, 22 P 742, motion to vacate den 81 Cal 459, 22 P 1028, holding that a photograph taken many years before the death of the decedent was inadmissible.

Footnote 30. *Brownlie v Brownlie*, 357 Ill 117, 191 NE 268, 93 ALR 1041.

§ 973 --Mug shots

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A "mug shot" or "rogues' gallery" photograph of the accused taken in a police department or prison, intended to be used for the purpose of identification, has been deemed admissible in certain instances, 31 but not in others. 32 In order for mug shots to be admissible: (1) the government must have a demonstrable need to introduce the photographs; and (2) the photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and (3) the manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photograph. 33 If the government fails to meet these standards, the admission of the mug shot may be reversible error. 34 The admissibility of a photograph taken at a police station is not dependant upon whether or not the defendant had consented to the taking of the photograph. 35

Case authorities:

Admission of photospread did not constitute plain error where government introduced it to strengthen inspector's identification testimony and defense mounted effective attack against this testimony, photographs possessed no characteristics identifying them as police mugshots, and manner in which they were introduced drew no particular attention to source or implications of photographs. *United States v Carrillo-Figueroa* (1994, CA1 Puerto Rico) 34 F3d 33.

Footnotes

Footnote 31. *United States v Cannon* (CA1 Mass) 903 F2d 849, 30 Fed Rules Evid Serv 577, cert den 498 US 1014, 112 L Ed 2d 589, 111 S Ct 584; *Sheffield v Curran* (DC Mass) 645 F Supp 859; *United States v Dunbar* (CA3 Pa) 767 F2d 72, 18 Fed Rules Evid Serv 1074; *United States v Padin* (CA6 Tenn) 787 F2d 1071, 20 Fed Rules Evid Serv 868, cert den 479 US 823, 93 L Ed 2d 45, 107 S Ct 93; *Futrell v Wyrick* (CA8 Mo) 716 F2d 1207, 14 Fed Rules Evid Serv 38; *United States v Bongard* (CA8 Minn) 713 F2d 419, 13 Fed Rules Evid Serv 1925; *Reiger v Christensen* (CA9 Hawaii) 789 F2d 1425; *Williams v State* (Ala App) 546 So 2d 705; *State v Marshall*, 3 Conn App 126, 485 A2d 930, certif gr 195 Conn 802, 491 A2d 1103, app dismd 199 Conn 244, 506 A2d 1035; *Davis v State* (Fla) 604 So 2d 794, 17 FLW S 463; *Flanagan v State*, 193 Ga App 408, 388 SE2d 29; *People v Lewis*, 103 Ill 2d 111, 82 Ill Dec 442, 468 NE2d 1222, cert den 470 US 1006, 84 L Ed 2d 384, 105 S Ct 1364 and cert den 470 US 1023, 84 L Ed 2d 403, 105 S Ct 1383, habeas corpus proceeding (CA7 Ill) 822 F2d 703; *People v McGee* (1st Dist) 160 Ill App 3d 807, 112 Ill Dec 276, 513 NE2d 885, app den 117 Ill 2d 549, 115 Ill Dec 406, 517 NE2d 1092; *Dunsizer v State* (Ind) 523 NE2d 409; *Commonwealth v Francis*, 391 Mass 369, 461 NE2d 811; *Commonwealth v Weichell*, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298; *State v Ivy* (Mo App) 768 SW2d 151; *State v Hemphill* (Mo App) 699 SW2d 83; *State v Young* (Mo App) 661 SW2d 637, habeas corpus proceeding (CA8 Mo) 795 F2d 55; *State v Birge*, 215 Neb 761, 340 NW2d 434, later proceeding 223 Neb 761, 393 NW2d 713; *New v State* (Okla Crim) 760 P2d 833; *Commonwealth v Brown*, 511 Pa 155, 512 A2d 596; *State v Boyd* (Tenn) 797 SW2d 589, cert den 498 US 1074, 112 L Ed 2d 861, 111 S Ct 800; *State v Hodgkinson* (Tenn Crim) 778 SW2d 54, app den (Tenn) 1989 Tenn LEXIS 300; *Davis v State* (Tex App Beaumont) 786 SW2d 77, petition for discretionary review ref (Sep 12, 1990); *Thomas v State* (Tex App Houston (14th Dist)) 706 SW2d 769, petition for discretionary review ref (Mar 25, 1987) and motion for rehearing on PDR denied (Apr 15, 1987); *State v Albretsen* (Utah) 782 P2d 515, 120 Utah Adv Rep 16; *State v Wheeler*, 22 Wash App 792, 593 P2d 550; *Sanchez v State* (Wyo) 751 P2d 1300.

In federal habeas corpus proceeding, value of mugbook which contained defendant's picture was determined to be sufficient to outweigh any prejudicial effect where entire mugbook was introduced into evidence, witness identified book as that which he had been shown by police, and witness then identified defendant's picture in book. *United States ex rel. Bleimehl v Cannon* (CA7 Ill) 525 F2d 414.

Footnote 32. *United States v Torres-Flores* (CA5 Tex) 827 F2d 1031, 23 Fed Rules Evid

Serv 1075 (jury view of mugshot array of defendant and others was prejudicial error, where police markings were crudely and inadequately covered); Roundtree v State, 181 Ga App 594, 353 SE2d 88, appeal after remand 192 Ga App 803, 386 SE2d 548 (in prosecution for armed robbery, trial court erred in admitting mug shot of defendant that contained caption indicating date of arrest for prior crime); Brown v Commonwealth (Ky) 763 SW2d 128 (admission of obvious mugshots of robbery-murder defendant was reversible error, even though police markings had been crudely removed, where evidence of guilt was not overwhelming and arose primarily from testimony of discredited codefendant); Arca v State, 71 Md App 102, 523 A2d 1064, cert den 310 Md 276, 528 A2d 1287 (introduction into evidence of obvious mug shot of defendant, even though it was shown to the jury with chest plate containing identification numbers covered over, was reversible error); Sloane v State (Miss) 437 So 2d 16 (introduction into evidence of mug shots of defendant constituted reversible error in that they implied that he had prior criminal record, where photographs retained enough identifying marks to indicate that they had come from police files); State v Taplin, 230 NJ Super 95, 552 A2d 1015 (trial court in theft prosecution abused its discretion in admitting mugshot array that clearly conveyed to jury that defendant had criminal record); Ingram v State (Okla Crim) 755 P2d 120 (admission of mugshot photograph of robbery defendant, ostensibly to show appearance at time of arrest, was prejudicial error); State v Long (RI) 488 A2d 427; State v Tate, 288 SC 104, 341 SE2d 380; Johnson v Commonwealth, 2 Va App 447, 345 SE2d 303.

Mug shots of accused to show the condition of accused's hair on the night he was arrested, and his height, were inadmissible for that purpose where other evidence to prove those marginally relevant points had been admitted and was available. State v Jones (La) 283 So 2d 476, appeal after remand (La) 325 So 2d 235.

Admissibility of evidence derived from an improperly suggestive lineup is discussed in § 628; admissibility of evidence derived from an improperly suggestive showup is discussed in § 629; admissibility of evidence derived from an improper photographic array is discussed in § 630.

Annotation: Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial, 30 ALR3d 908.

Footnote 33. United States v Torres-Flores (CA5 Tex) 827 F2d 1031, 23 Fed Rules Evid Serv 1075; United States v Hines (CA11 Ga) 955 F2d 1449, 35 Fed Rules Evid Serv 310, 6 FLW Fed C 229, later proceeding (CA11) 1993 US App LEXIS 23856; Stephenson v State (Del Sup) 606 A2d 740; State v Long (RI) 488 A2d 427; State v Davis (SC) 422 SE2d 133, cert den (US) 124 L Ed 2d 263, 113 S Ct 2355.

Mugshot which had been trimmed to eliminate any reference to local police department and which showed change in defendant's appearance between time of photo and time of trial was properly admitted where offered to prove extrajudicial identification of defendant and court instructed jury that photograph showed only that defendant had been arrested and was not to be construed as evidence of prior criminal record. State v Cunningham, 97 Idaho 650, 551 P2d 605.

Photograph of defendant taken at time of arrest, showing background of police height calibrations, which was introduced as to identification of person who delivered controlled

substance to undercover agent, was properly admitted in prosecution for unlawful delivery of controlled substance. *State v Davison* (Iowa) 245 NW2d 321, cert den 430 US 955, 51 L Ed 2d 805, 97 S Ct 1600.

Mug shots used to identify defendant in prosecution for assault and battery with dangerous weapon and rape, including full-face and profile photograph with numbers crossed out at bottom, should have been sanitized so as not to imply criminal record; however defendant was not entitled to instruction he was acquitted on prior charge surrounding which the photographs were taken. *Commonwealth v Rodriguez*, 378 Mass 296, 391 NE2d 889.

Use of mug shot to identify rapist via photograph is not prejudicial error since witness was instructed to stop using phrase "mug shots" at trial. *State v Russell* (Minn) 330 NW2d 459.

In prosecution for robbery and other offenses, admission of photographic array which had been used in pretrial identification of defendant was proper, where photographs were not referred to as "mugshots" in presence of jury and jury never saw photographs, so that it could not have inferred that defendant had engaged in prior criminal conduct. *Commonwealth v Cambridge*, 386 Pa Super 542, 563 A2d 515, app den 525 Pa 624, 578 A2d 411.

Notwithstanding that the better practice would dictate removal of police identification marks before a photograph is introduced before the jury, a "mug shot" taken of a defendant immediately subsequent to his arrest and admitted as rebuttal evidence on the issue that the police had physically abused him is properly admitted into evidence where the photograph in no way suggested that the defendant had previous encounters with the police. *Reyes v State* (Tex Crim) 579 SW2d 927.

For discussion of character and reputation evidence, see §§ 363 et seq.

Footnote 34. *United States v Torres-Flores* (CA5 Tex) 827 F2d 1031, 23 Fed Rules Evid Serv 1075.

Admission of mugshot, with police identification number removed, of defendant who had no prior criminal record, was erroneous, but constituted only harmless error in light of other strong evidence against defendant. *United States v Rixner* (CA5 La) 548 F2d 1224, cert den 431 US 932, 53 L Ed 2d 248, 97 S Ct 2639.

In bank robbery prosecution in which there was ample evidence of defendant's guilt, admission of lineup photographs showing defendant with five other individuals wearing identical "prison garb," which photographs related to second charge of which defendant was acquitted, constituted harmless error. *United States v McCoy* (CA6 Ohio) 848 F2d 743, 25 Fed Rules Evid Serv 1258, post-conviction proceeding (CA6) 1991 US App LEXIS 5340.

Any error in admission of photo which was clearly mug shot, introduced to show substantial change in defendant's appearance since picture had been taken, and thus to explain witness' inability to recognize defendant's likeness during FBI interview, was harmless beyond a reasonable doubt in light of evidence of defendant's guilt on record as whole. *United States v Bongard* (CA8 Minn) 713 F2d 419, 13 Fed Rules Evid Serv 1925.

Introduction into evidence of police photograph of defendant taken after arrest, in which top of number plate was retained, and refusal of prosecution to clarify to jury that photo did not indicate prior arrest record of defendant was clear error, but was harmless in light of other evidence against defendant. *State v Kelly*, 111 Ariz 181, 526 P2d 720, cert den 420 US 935, 43 L Ed 2d 411, 95 S Ct 1143.

Introduction into evidence of mug shots of defendant constituted reversible error in that they implied that he had prior criminal record, where photographs retained enough identifying marks to indicate that they had come from police files, and thus would cause jurors to suspect that defendant had criminal record or had been in trouble with police. *Sloane v State (Miss)* 437 So 2d 16.

Footnote 35. *State v Williams*, 303 NC 142, 277 SE2d 434.

§ 974 --Deceased persons

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In an action for wrongful death, 36 photographs of the decedent taken during his life may be material to an issue in the case and are admissible, 37 provided the photograph is shown to be an accurate and faithful representation of the decedent. 38 Thus, in a wrongful death action, a decedent's photograph may properly be admitted to show his state of well-being prior to his death, 39 or to show his conscious pain and suffering, lost earnings, and services of value he could have performed for family. 40 The admission or rejection of such photographs is largely a matter within the trial court's discretion, 41 and there does not appear to be any particular limitation as to the time within which the photograph must have been taken, although in most of the cases where the time of taking was stated by the court, the photographs were of comparatively recent origin. 42 However, a photograph of the decedent taken during his life is not admissible in a wrongful death action when the only apparent object of offering the photograph in evidence is to prejudice the jury against the defendant. 43

A photograph of the corpse of the victim of the alleged wrongful act is admissible in evidence, in the discretion of the trial court, even though gruesome in nature, provided the photograph is relevant to the inquiry and is properly identified. 44 In other words, potentially gruesome photographs may be admitted where the photographs are not so gruesome that their prejudicial potential absolutely requires their exclusion. 45 Accordingly, in wrongful death actions, relevant post-death pictures of a decedent showing extensive injuries may properly be admitted as evidence of decedent's physical pain and suffering before death. 46 However, such photographs are not admissible in evidence where they can be of no help to the jury in determining the issues submitted, but will only serve to prejudice the jury in favor of the plaintiff. 47

On the basis that the physical condition of a testator is relevant to his mental condition, a photograph shown to be a correct representation of the testator at or about the time he

§ 974 --Deceased persons [SUPPLEMENT]

Case authorities:

There was no plain error in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense in the trial court's failure to give a limiting instruction on the use of photographs of the victim in another trial in which defendant was also convicted where the evidence had been properly admitted. The jury is properly permitted to consider all the evidence presented during the guilt- innocence phase and it was appropriate for the jury to consider the evidence in finding the course of conduct aggravating circumstance. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not abuse its discretion in a prosecution which resulted in convictions for first- degree murder, first-degree rape, and first-degree sexual offense by admitting photographs and slides into evidence during the guilt- innocence phase and the sentencing phase where there was no evidence that the photographs were used excessively and solely to arouse the passions of the jury. The photographs of this victim, and the victim from another trial where defendant was also convicted, including photographs of their genitalia, were introduced to illustrate the theory that both victims were killed by the same person and that that person was defendant. *State v Moseley* (1994) 338 NC 1, 449 SE2d 412.

The trial court did not err in a noncapital first-degree murder prosecution by allowing into evidence twenty gruesome photographs of the crime scene and the victim and in allowing the photographs to be held in front of the jury where the display of the photographs was not unnecessarily repetitious and they were used to illustrate competent testimony. *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

The trial court did not err in a noncapital first-degree murder prosecution by admitting photographs depicting the victim's body in the backseat of an automobile which was wrecked on the way to the hospital following a shooting. The challenged photographs were used for illustrative purposes by several witnesses, nothing suggested that the photographs were used to incense the jurors or incite their prejudices and passions against defendant, and the State made no attempt to draw undue attention to these photographs. *State v Alford* (1995) 339 NC 562, 453 SE2d 512.

The trial court did not err in a noncapital first-degree murder prosecution by admitting a photograph of the victim in his casket in a funeral home where no autopsy or criminal investigation was conducted at the time of the victim's death in 1973, no photographs were taken of the victim as he appeared at the time of his death other than this photograph, only the victim's bones remained when the body was exhumed, and this photograph was the only physical evidence to illustrate testimony about the condition of the victim's body shortly after the time of his death. Moreover, the photograph and accompanying testimony were relevant to establish the corpus delicti of the crime. *State v White* (1995) 340 NC 264, 457 SE2d 841.

A family photograph of the two murder victims, taken while they were alive, was properly admitted in defendant's murder trial where the photographs were used for

illustrative purposes during testimony by the victim's nephew describing the victims while alive. *State v Goode* (1995) 341 NC 513, 461 SE2d 631.

Footnotes

Footnote 36. Generally, as to such actions, see 22A Am Jur 2d, Death §§ 39 et seq.

Footnote 37. *Lux v McDonnell Douglas Corp.* (ND Ill) 608 F Supp 98, revd on other grounds, remanded sub nom on other grounds *In re Air Crash Disaster near Chicago* (CA7 Ill) 803 F2d 304, 21 Fed Rules Evid Serv 1092; *Westberg v Willde*, 14 Cal 2d 360, 94 P2d 590; *Good v A. B. Chance Co.*, 39 Colo App 70, 565 P2d 217; *Jones v Livingston*, 203 Ga App 99, 416 SE2d 142, 103-51 Fulton County D R 25; *Ferris v Turner*, 320 Mass 555, 70 NE2d 715; *Mudd v Quinn* (Mo) 462 SW2d 757; *Jones v Dague*, 252 SC 261, 166 SE2d 99 (ovrld on other grounds by *Keaton v Pearson*, 292 SC 579, 358 SE2d 141); *Kramer v Portland-Seattle Auto Freight, Inc.*, 43 Wash 2d 386, 261 P2d 692.

A lifetime photograph was held admissible in a wrongful action as a photograph which showed a smiling 6-year-old girl, apparently healthy and intelligent, and thus tended to show that she was sufficiently mature and intelligent to be allowed to cross a street unattended. *Ferris v Turner*, 320 Mass 555, 70 NE2d 715.

Annotation: Admissibility, in wrongful death action, of photograph of decedent made in his lifetime, 74 ALR2d 928 § 3.

Footnote 38. *Trammell v Matthews*, 86 Ga App 661, 72 SE2d 132; *Ashland Sanitary Milk Co. v Messersmith's Adm'r*, 236 Ky 91, 32 SW2d 727.

In *Texas & N. O. R. Co. v Hanson* (Tex Civ App) 271 SW2d 309, writ dismissed, error dismissed, the testimony of a witness well acquainted with the deceased 12-year-old boy that a photograph was a "very good likeness" was held to be a sufficient and proper authentication to permit the introduction of the picture into evidence.

Generally, as to the authentication of photographs, see § 965.

For cases and materials on photographic evidence of homicide victims, see 40 Am Jur 2d, Homicide §§ 417-419.

Annotation: 74 ALR2d 928 § 6.

Footnote 39. *Fedt v Oak Lawn Lodge, Inc.* (1st Dist) 132 Ill App 3d 1061, 88 Ill Dec 154, 478 NE2d 469.

Footnote 40. *Perry v Metro-North C. Railroad* (DC Conn) 716 F Supp 61.

Footnote 41. *New York C. R. Co. v Wyatt*, 135 Ind App 205, 184 NE2d 657, transfer denied 244 Ind 373, 193 NE2d 63; *Cardamon v Iowa Lutheran Hospital*, 256 Iowa 506, 128 NW2d 226; *Kilmer v Browning* (Mo App) 806 SW2d 75, later proceeding (Mo App) 1991 Mo App LEXIS 357; *Jones v Dague*, 252 SC 261, 166 SE2d 99 (ovrld on other grounds by *Keaton v Pearson*, 292 SC 579, 358 SE2d 141); *Wright v Kelly*, 203 Va 135,

122 SE2d 670; *Lester v Rose*, 147 W Va 575, 130 SE2d 80 (criticized on other grounds by State ex rel. *Sutton v Spillers*, 181 W Va 376, 382 SE2d 570).

A lifetime photograph was held admissible in a wrongful death action in the trial court's discretion although the photograph was cumulative of testimony concerning the decedent's good health, where its admission was objected to only on the ground of irrelevancy. *Elliott v Black River Electric Cooperative*, 233 SC 233, 104 SE2d 357, 74 ALR2d 907.

Annotation: 74 ALR2d 928 § 5.

Footnote 42. See, for example, *Missouri P. R. Co. v Maxwell*, 194 Ark 938, 109 SW2d 1254 (photograph taken 2 or 3 months before the death of an 18-month-old child); *Elliott v Black River Electric Cooperative*, 233 SC 233, 104 SE2d 357, 74 ALR2d 907 (photograph taken shortly prior to decedent's death).

Although a tinted photograph of the deceased was apparently made some years prior to his death, the court in *Trammell v Matthews*, 86 Ga App 661, 72 SE2d 132, held that it would have been admissible had the proper foundation been laid by evidence showing that the picture was a correct likeness of the deceased at the approximate time of his death.

In wrongful death action, admission of nine-year old photograph showing his state of well-being prior to his death was not prejudicial, although perhaps improper. *Fedt v Oak Lawn Lodge, Inc.* (1st Dist) 132 Ill App 3d 1061, 88 Ill Dec 154, 478 NE2d 469.

Annotation: 74 ALR2d 928 § 7.

Footnote 43. *Smith v Lehigh V. R. Co.*, 177 NY 379, 69 NE 729; *Larson v Meyer* (ND) 135 NW2d 145 (ovrld on other grounds by *Hopkins v McBane* (ND) 427 NW2d 85, 77 ALR4th 391).

Where a display of grief by the mother accompanied the introduction of a photograph of her dead child, the court in *O'Meara v Haiden*, 204 Cal 354, 268 P 334, 60 ALR 1381, noting that there was no dispute as to the identity of the deceased and stating that no purpose for introducing the picture appeared in the record and that none was apparent unless it was to unduly prejudice the jury, held that under the facts of the case the procedure was harmless error since liability was clear and the verdict not excessive, but that in a closely contested case a reversal would be necessary.

Photographs that are calculated to arouse the sympathies or prejudice of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions; thus, a photograph of a child 12 months old, taken 5 months before the fatal accident, is not relevant or material and should not be admitted. *Wright v Kelly*, 203 Va 135, 122 SE2d 670.

Annotation: 74 ALR2d 928 § 4.

Footnote 44. *Thibodeau v Connecticut Co.*, 139 Conn 9, 89 A2d 223; *Drews v Gobel Freight Lines, Inc.*, 144 Ill 2d 84, 161 Ill Dec 324, 578 NE2d 970; *Gum v Wooge*, 211 Or 149, 315 P2d 119.

In a wrongful death action, color pictures showing the decedent in his casket are admissible in connection with testimony introduced by the plaintiff concerning pain and suffering before death, and the question whether or not such color pictures showed evidence of swelling and physical markings on the neck and face was for the jury to decide. *Presley v Upper Mississippi Towing Corp.* (La App 1st Cir) 153 So 2d 416, cert den 244 La 1002, 156 So 2d 56 and cert den 244 La 1003, 156 So 2d 56.

As to the admissibility of photographs of the corpse in homicide cases, see 40 Am Jur 2d, Homicide § 417.

Annotation: Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 ALR2d 769.

Footnote 45. *In re Air Crash Disaster near New Orleans* (CA5 La) 767 F2d 1151, 18 Fed Rules Evid Serv 1094, reh den, en banc (CA5 La) 775 F2d 301 and reh den, en banc (CA5 La) 775 F2d 301.

Where plaintiff in personal injury action was entitled to recover damages for emotional distress caused by injuries to and death of her fiance occurring in same accident, photograph of decedent would be admitted at trial provided it met requirements of Federal Rule of Evidence 403 that its probative value outweigh any prejudicial impact it might have. *Pieters v B-Right Trucking, Inc.* (ND Ind) 669 F Supp 1463, 24 Fed Rules Evid Serv 17.

Trial judge did not abuse discretion in ruling in action for wrongful death arising from motor vehicle accident that photographs of decedent were not so inflammatory or gruesome as to outweigh their probative value in assisting jury's determination of extent of decedent's pain and suffering. *Bullard v Barnes*, 102 Ill 2d 505, 82 Ill Dec 448, 468 NE2d 1228.

In wrongful death action trial judge did not abuse discretion in admitting in evidence photograph of face of deceased where, although hardly pleasant to view, it was not so gruesome as to shock jury or cause defendant unfair prejudice. *Edwards Transfer Co. v Brown* (Tex App) 764 SW2d 249.

Footnote 46. *Walker v Norris* (CA6 Tenn) 917 F2d 1449, reh den (CA6) 1990 US App LEXIS 22991; *Trailways, Inc. v Clark* (Tex App Corpus Christi) 794 SW2d 479, motion overr (Nov 7, 1990) and writ den (Dec 31, 1990) and reh of writ of error overr (Jan 30, 1991).

In civil rights and negligence action against city for suicide of decedent while in police custody, trial court did not err in allowing single post-suicide photograph of decedent to go out with jury where photograph was relevant on issues of cause of death and pain and suffering, court found that it was not inflammatory, and jury was charged not to base verdict on sympathy. *Simmons v Philadelphia* (ED Pa) 728 F Supp 352, 29 Fed Rules Evid Serv 694, later proceeding (ED Pa) 1990 US Dist LEXIS 300 and affd (CA3 Pa) 947 F2d 1042, 21 FR Serv 3d 966, reh, en banc, den (CA3) 1991 US App LEXIS 27788 and cert den (US) 118 L Ed 2d 391, 112 S Ct 1671.

Footnote 47. *Ryan v United Parcel Service, Inc.* (CA2 NY) 205 F2d 362; *Muir v Grier*

(2nd Dist) 160 Cal App 2d 671, 325 P2d 664.

In an action for wrongful death, error has been held not committed in excluding the plaintiff's offered evidence as to pictures of the decedent taken at a funeral home after she had been murdered by the defendant, where such evidence could not be of help to the jury in determining the issues submitted. *Armentrout v Hughes*, 247 NC 631, 101 SE2d 793, 69 ALR2d 620.

Footnote 48. 79 Am Jur 2d, Wills § 129.

(c). Photographs of Premises and Objects [975, 976]

§ 975 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographic pictures or representations of places are admissible if verified as a correct representation of the locality, provided they are material to the controversy and will be of assistance to the jury. 49 The rule is that when it becomes material to show the location, surroundings, and condition of the premises upon which the accident, injury, or crime in controversy occurred, or to show the nature or condition of a structure or object involved in the litigation, photographs of it are generally admissible as evidence, 50 insofar as they are properly authenticated by showing that they correctly represent what they purport to depict, 51 and provided there have not been such changes between the accident or occurrence and the time when the photographs were taken as to destroy substantial identity. 52 Accordingly, in criminal cases, a properly authenticated photograph is admissible to show, in a prosecution involving theft, the stolen property 53 cash or a check, 54 clothing, 55 jewelry, 56 a vehicle, 57 the scene of the crime, 58 hand and footprints, 59 tire tracks, 60 blood stains at the scene of the crime, 61 the place where the victim was found, 62 or the weapon used by the defendant. 63 If, however, the photograph does not, for any reason, appear to represent the subject or the conditions existing at the time of the occurrence in controversy in such a way as to be instructive, 64 or was not taken so as to exemplify correctly the situation and the surroundings at that time, 65 or if the accuracy and correctness of the photograph is not properly or sufficiently shown, 66 it is inadmissible. A mere change in the appearance of a locality, arising from photographs having been taken at different seasons of the year, is open to explanation. 67

Where photographs are offered to show distances, relative sizes, or locations of objects, much more convincing proof of their accuracy is required than in ordinary cases. 68

§ 975 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not err in a noncapital first-degree murder prosecution by allowing into evidence twenty gruesome photographs of the crime scene and the victim and in allowing the photographs to be held in front of the jury where the display of the photographs was not unnecessarily repetitious and they were used to illustrate competent testimony. *State v Corbett* (1994) 339 NC 313, 451 SE2d 252.

In a prosecution arising from the murder of a police officer during his attempt to arrest the defendant in connection with an assault from which the defendant was fleeing, it was not error for the court to permit the prosecutor to introduce into evidence photographs of the defendant's hotel room which depicted graffiti stating "Fuck the Police" since the expression revealed the defendant's general malicious attitude towards police officers and was relevant to show that he had a fixed bias against police officers and that such bias could have contributed to his motive for and malice in the shooting of the officer. *Commonwealth v Lacava* (Pa) 666 A2d 221.

Footnotes

Footnote 49. *Millers' Nat. Ins. Co. v Wichita Flour Mills Co.* (CA10 Kan) 257 F2d 93, 1 FR Serv 2d 261, 76 ALR2d 385; *Morgan v Kroger Grocery & Baking Co.*, 348 Mo 542, 154 SW2d 44; *Thrasher v Amere Gas Utilities Co.*, 138 W Va 166, 75 SE2d 376, app dismd 347 US 910, 98 L Ed 1067, 74 S Ct 478.

In an action for loss of lateral support due to excavations made for the establishment of adjoining streets by the subdivision developer, no error was committed in receiving in evidence photographs of a retaining wall erected by the developer on another part of the development where the photographs were offered to refute the defendant's contention of the impracticability of a retaining wall. *Levi v Schwartz*, 201 Md 575, 95 A2d 322, 36 ALR2d 1241.

Photographs of area where condemned land was located were properly admitted because the photographs were relevant and probative on the issue whether plaintiff's business could be transferred to another location. *Detroit v Hospital Drug Co.*, 176 Mich App 634, 440 NW2d 622, app den 432 Mich 896.

Footnote 50. *American Rubber Corp. v Jolley*, 260 Ala 600, 72 So 2d 102, 67 ALR2d 489; *State v Gill* (ND) 154 NW2d 791 (ovrld on other grounds by *State v Himmerick* (ND) 499 NW2d 568) (photograph of car, to show speed, was admissible); *Washington v Seattle*, 170 Wash 371, 16 P2d 597, 86 ALR 113.

Photographs of motorcycle helmet worn by plaintiff was properly admitted into evidence where plaintiff's brother testified that the photographs accurately portrayed the condition of the helmet after motorcycle accident, and the photographs were relevant to demonstrate plaintiff's condition after the accident. *Lundquist v Nickels* (1st Dist) 238 Ill App 3d 410, 179 Ill Dec 150, 605 NE2d 1373, app den 151 Ill 2d 565, 186 Ill Dec 383, 616 NE2d 336.

Photographs taken during the construction of a railroad cut through a farm showing conditions as they existed are admissible in the subsequent condemnation proceedings as bearing upon the inconvenience and damage caused the tenant operating the farm. *Korf v*

Fleming, 239 Iowa 501, 32 NW2d 85, 3 ALR2d 270.

As to aerial photographs, see § 976.

As to the admissibility of photographs in motor vehicle accident cases, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1062.

Practice References Photographs of accident scenes. 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases § 117.

–Photographs of objects. 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases § 144.

–Photographing crime scenes. 3 Am Jur Trials 335, Preparing and Using Photographs in Criminal Cases § 4.

Footnote 51. *United States v Gel Spice Co.* (ED NY) 601 F Supp 1214; *United States v McNair* (ED Pa) 439 F Supp 103, 2 Fed Rules Evid Serv 687, affd without op (CA3 Pa) 571 F2d 573, cert den 435 US 976, 56 L Ed 2d 71, 98 S Ct 1626; *United States v Richardson* (CA7 Ind) 562 F2d 476, 2 Fed Rules Evid Serv 733, cert den 434 US 1021, 54 L Ed 2d 768, 98 S Ct 746 and cert den 434 US 1072, 55 L Ed 2d 776, 98 S Ct 1257; *United States v Wilkins* (CA8 Mo) 477 F2d 323, cert den 414 US 843, 38 L Ed 2d 81, 94 S Ct 103; *Frank's Plastering Co. v Koenig* (CA8 Neb) 341 F2d 257; *Briggs v State* (Ala App) 549 So 2d 155; *Trombly v New York, N. H. & H. R. Co.*, 137 Conn 465, 78 A2d 689; *Byrd v State*, 182 Ga App 284, 355 SE2d 666; *Williams v State*, 174 Ga App 56, 329 SE2d 226; *People v Bryant* (1st Dist) 202 Ill App 3d 1057, 148 Ill Dec 358, 560 NE2d 955; *Tokar v Crestwood Imports, Inc.* (1st Dist) 177 Ill App 3d 422, 126 Ill Dec 697, 532 NE2d 382, 1989-1 CCH Trade Cases ¶ 68412, 8 UCCRS2d 682; *Andrews v State* (Ind) 532 NE2d 1159, habeas corpus proceeding (CA7 Ind) 935 F2d 272, reported in full (CA7) 1991 US App LEXIS 12498; *Robinette v Commonwealth, Dept. of Highways* (Ky) 380 SW2d 78; *State v Hall* (La App 2d Cir) 549 So 2d 373, cert den (La) 556 So 2d 1259; *State v Wiley* (La App 2d Cir) 513 So 2d 849, cert den (La) 522 So 2d 1092; *Wallace v Kramer*, 296 Mich 680, 296 NW 838; *State v Price* (Mo) 365 SW2d 534, cert den 374 US 811, 10 L Ed 2d 1034, 83 S Ct 1702; *Williamson v St. Louis Public Service Co.*, 363 Mo 508, 252 SW2d 295; *Kellam v Akers Motor Lines, Inc.*, 133 NJL 1, 42 A2d 261; *Saporito v New York*, 14 NY2d 474, 253 NYS2d 985, 202 NE2d 369; *People v Wilson* (3d Dept) 168 App Div 2d 696, 563 NYS2d 561; *Mudge v Thomas J. Hughes Constr. Co.* (1st Dept) 16 App Div 2d 106, 225 NYS2d 833, 95 ALR2d 1055; *Kubiszak v Rini's Supermarket* (Cuyahoga Co) 77 Ohio App 3d 679, 603 NE2d 308; *Taylor v Modena*, 370 Pa 100, 87 A2d 195; *Dupnik v State* (Tex App Corpus Christi) 654 SW2d 780, petition for discretionary review ref (Oct 19, 1983) and motion for rehearing on PDR denied (Nov 23, 1983); *Dofner v Branard* (Tex Civ App) 236 SW2d 544, writ ref n r e; *Hickman v Union P. R. Co.*, 117 Utah 136, 213 P2d 650; *Saunders v Commonwealth*, 1 Va App 396, 339 SE2d 550.

Court did not abuse its discretion admitting into evidence a photograph of the bunk cell at the police station that was not the actual cell which defendant was detained where an officer testified on direct that the photograph accurately and fairly depicted the bunk on which defendant was placed except that the actual bunk was on the opposite side. *United States v Myers* (CA11 Ga) 972 F2d 1566, 36 Fed Rules Evid Serv 1058, 6 FLW Fed C 1187, reh, en banc, den (CA11 Ga) 980 F2d 1449 and cert den (US) 123 L Ed 2d 445,

Trial court did not err in admitting photographs made at scene of fire which indicated that circuit breakers were in on position where one of plaintiffs testified that picture was taken on same night as fire, that no change was made in any of positions of switches and that pictures substantially depicted condition of circuit breaker at time picture was taken. *Osborn v Brown* (Ala) 361 So 2d 82.

In a prosecution for maintaining a fire hazard, photographs of the alleged hazardous condition are not inadmissible in evidence on the ground that they do not correctly reflect what was purported to be shown, where the inability of the camera to record depth is explained to the jury by the photographer. *Kirkham v North Little Rock*, 227 Ark 789, 301 SW2d 559, 64 ALR2d 1032.

In an accident case, a photograph of the scene of the accident was held admissible where the witness identified the scene as the same as that shown in a previously admitted photograph. *Reynolds v Nutt*, 217 Ark 543, 230 SW2d 949.

Photographs of the scene of a robbery and of a garage rented by the defendant in which articles of clothing were found which were similar to those worn by the guilty party were held to have been sufficiently verified in *People v Ratterman*, 38 Cal App 2d 598, 101 P2d 750, where the complaining witness testified that each photograph correctly represented the objects or scenes shown, and the defendant did not cross-examine the witness on this subject nor did he produce evidence indicating that the photographs were incorrect in any respect.

In a prosecution for rape, photographs of the defendant's automobile, clotheslines, and barbed wire mentioned in the prosecutrix's testimony, the location where the defendant's shoes were found at the steps of the prosecutrix's home, and of the prosecutrix's bed, all of which were identified by the district attorney, who stated that they were made at his direction and under his supervision on the morning after the assault and correctly portrayed the objects shown therein, were admissible. *Richardson v State*, 159 Tex Crim 595, 266 SW2d 129.

Generally, as to authentication and verification of photograph, see § 965.

Annotation: Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899 §§ 13, 14.

Footnote 52. § 968.

Footnote 53. *United States v Alexander* (CA7 Ill) 415 F2d 1352, cert den 397 US 1014, 25 L Ed 2d 427, 90 S Ct 1246; *Rice v United States* (CA8 Mo) 411 F2d 485; *United States v Stearns* (CA9 Hawaii) 550 F2d 1167, 1 Fed Rules Evid Serv 685 (stolen boat); *Page v State* (Alaska) 725 P2d 1082; *State v Bouillon*, 112 Ariz 238, 540 P2d 1219 (stolen guns); *People v Williams* (Colo App) 654 P2d 319; *Brown v United States* (Dist Col App) 464 A2d 120; *State v Tanaka*, 66 Hawaii 97, 657 P2d 1023; *Lucas v State* (Ind) 499 NE2d 1090; *State v Estrella*, 257 Iowa 462, 133 NW2d 97; *State v Madison* (La App 2d Cir) 535 So 2d 1024; *State v Landry* (La App 3d Cir) 524 So 2d 1261, cert gr (La) 531 So 2d 254, on remand (La App 3d Cir) 546 So 2d 1231; *State v Peters*, 146 Mont 188, 405 P2d 642; *State v Murphy*, 85 NJ Super 391, 204 A2d 888, affd 45 NJ 36, 211 A2d

193; *Sanders v State*, 155 Tex Crim 90, 231 SW2d 413; *State v Purcell* (Utah) 711 P2d 243; *Saunders v Commonwealth*, 1 Va App 396, 339 SE2d 550; *State v Gillingham*, 36 Wash 2d 655, 220 P2d 333.

Annotation: Admissibility of photographs of stolen property, 94 ALR3d 357.

Footnote 54. *United States v Diggs* (CA4 Va) 423 F2d 1194; *United States v Saputski* (CA9 Idaho) 496 F2d 140; *Strickland v State* (Ala App) 348 So 2d 1105, cert den (Ala) 348 So 2d 1113 (photograph, showing paper bag of assorted coins found on dresser in room where defendant was arrested, in prosecution for robbery); *Swininger v State*, 265 Ind 136, 352 NE2d 473; *Peterson v State*, 250 Ind 269, 234 NE2d 488 (photographs of money found in defendant's automobile in prosecution for robbery); *Scalf v State* (Ind App) 424 NE2d 1084 (photograph of forged check).

Footnote 55. *Richardson v State*, 113 Ga App 163, 147 SE2d 653; *State v Dominick* (La App 5th Cir) 506 So 2d 193; *State v Savu* (Mo App) 560 SW2d 244.

Footnote 56. *Guam v Ojeda* (CA9 Guam) 758 F2d 403; *Hurst v State* (Ala App) 402 So 2d 1124 (photograph of stolen jewelry and silverware); *State v Smith* (SD) 458 NW2d 779 (photograph of defendant posing with stolen jewelry and hand-gun was admissible).

Footnote 57. *United States v Nolan* (CA10 Kan) 416 F2d 588, appeal after remand (CA10 Kan) 450 F2d 934; *People v Holter*, 185 Colo 47, 521 P2d 765; *Choate v State* (Ind) 462 NE2d 1037; *Sipes v State*, 155 Ind App 380, 293 NE2d 224; *State v Baker*, 65 NC App 430, 310 SE2d 101, cert den 312 NC 85, 321 SE2d 900; *Rose v State* (Okla Crim) 509 P2d 1368; *State v Wolford* (SD) 318 NW2d 7; *State v Porter*, 28 Utah 2d 364, 502 P2d 1147 (picture of allegedly stolen motorcycle).

In a prosecution for accessory after the fact to hit and run driving, photographs of defendant's car were properly admitted to illustrate the testimony of an officer tending to show that the hit and run was committed with defendant's car and that subsequent efforts had been made to conceal this fact at a body shop. *State v Fearing*, 304 NC 499, 284 SE2d 479.

Footnote 58. *Gipson v State*, 262 Ala 229, 78 So 2d 293; *People v Mullen*, 115 Cal App 2d 340, 252 P2d 19 (prosecution for a malicious assault with a deadly weapon wherein a witness testified that a photograph of the scene of the crime conformed exactly with what the witness had seen on the day of the crime); *Green v State*, 112 Ga App 329, 145 SE2d 80; *People v Anderson* (5th Dist) 237 Ill App 3d 621, 178 Ill Dec 290, 604 NE2d 546; *Patel v State* (Ind) 533 NE2d 580 (exterior photographs of crime scene); *State v Williams* (La) 420 So 2d 1116, later proceeding (La) 571 So 2d 623, habeas corpus den (ED La) 1992 US Dist LEXIS 2439; *State v Juhl*, 234 Neb 33, 449 NW2d 202.

Trial court properly admitted photographs of vicinity of assault offense, where witness who lived in vicinity of crime and heard screams identified photographs as being street corner and front door of building in vicinity of crime. *People v Brake*, 191 Colo 390, 553 P2d 763.

Footnote 59. § 957.

Footnote 60. *State v Jager* (ND) 85 NW2d 240.

Footnote 61. *Green v State*, 252 Ala 513, 41 So 2d 566; *Grays v State*, 219 Ark 367, 242 SW2d 701; *State v King*, 222 SC 108, 71 SE2d 793.

Footnote 62. *Turrell v State*, 221 Ind 662, 51 NE2d 359.

Footnote 63. *Ramey v State*, 250 Ga 455, 298 SE2d 503; *People v Williams* (1st Dist) 137 Ill App 3d 736, 92 Ill Dec 336, 484 NE2d 1191; *Andrews v State* (Ind) 532 NE2d 1159, habeas corpus proceeding (CA7 Ind) 935 F2d 272, reported in full (CA7) 1991 US App LEXIS 12498 (witness testified that exhibited photograph of gun look just like gun used by defendant); *State v Green*, 232 Kan 116, 652 P2d 697; *State v Gaskin* (La) 412 So 2d 1007; *State v Addington* (Me) 518 A2d 449; *Commonwealth v Bjorkman*, 364 Mass 297, 303 NE2d 715; *Moss v State* (Miss) 386 So 2d 1129; *State v Grant*, 221 Mont 122, 717 P2d 562; *Cooks v State* (Okla Crim) 699 P2d 653, cert den 474 US 935, 88 L Ed 2d 275, 106 S Ct 268; *Bennett v State* (Okla Crim) 652 P2d 1237; *Commonwealth v Buehl*, 510 Pa 363, 508 A2d 1167, cert den 488 US 871, 102 L Ed 2d 156, 109 S Ct 187; *Medrano v State* (Tex App El Paso) 701 SW2d 337, petition for discretionary review ref (Oct 22, 1986) and appeal after remand (Tex App El Paso) 768 SW2d 502, petition for discretionary review ref (Oct 25, 1989).

Although actual knife used in stabbing was lost, photograph of blade of knife used as murder weapon was properly authenticated by testimony of police officer who stated he found knife where witness to stabbing said he had thrown it. *Hambright v State* (Ala App) 432 So 2d 13.

Footnote 64. *Loftin v Howard* (Fla) 82 So 2d 125, 57 ALR2d 488; *Ligon v Allen*, 157 Ky 101, 162 SW 536, appeal after remand 168 Ky 19, 181 SW 656; *Snibbe v Robinson*, 151 Md 658, 135 A 838, 50 ALR 280.

Footnote 65. *Vandiver v State*, 37 Ala App 526, 73 So 2d 566, cert den 261 Ala 700, 73 So 2d 572; *Loftin v Howard* (Fla) 82 So 2d 125, 57 ALR2d 488.

Footnote 66. *Buchanan v Hurdle*, 209 Miss 722, 48 So 2d 354, holding, in an action for diverting water, that photographs of the surrounding terrain were not admissible where their accuracy and correctness were not shown.

Trial court did not abuse discretion in refusing to admit trial photograph in boundary dispute case where photograph was not part of public records, where witness did not have actual knowledge that photograph was true and accurate portrayal of land in question, and where similar photograph, which was properly identified, was admitted into evidence. *Smith v Claybrook* (Ala) 349 So 2d 1087.

Trial judge properly excluded photographs of crime scene that were taken at night, where no witness testified photographs accurately represented condition of lighting at time of murder, where verification of one photograph by police officer did not serve to verify others, and where testimony of photographer that photographs accurately reflected how human eye would perceive human figure at distance of 175 feet was inadmissible, inasmuch as photographer lacked qualifications to testify how human eye perceives figure from distance. *Commonwealth v Weichell*, 390 Mass 62, 453 NE2d 1038, cert den 465 US 1032, 79 L Ed 2d 698, 104 S Ct 1298.

Defense photographs of crime scene in murder prosecution were properly excluded,

where eyewitness to crime testified that photographs did not accurately depict scene, and defense investigator who had taken photographs, though testifying that they accurately represented scene on day of crime, admitted that he had not been at scene on that day. *State v Daniels* (Minn) 361 NW2d 819, post-conviction proceeding (Minn) 447 NW2d 187.

Footnote 67. *Coonley v Lowden*, 234 Iowa 731, 12 NW2d 870; *Dallas R. & T. Co. v Durkee* (Tex Civ App) 193 SW2d 222, writ ref n r e (criticized on other grounds by *First Employees Ins. Co. v Skinner* (Tex App Texarkana) 636 SW2d 258).

In an eminent domain proceeding, colored slides, made in the summer, of the land condemned in the preceding spring were properly admitted in evidence where the photographer testified that except for seasonal foliage change, the slides fairly represented the condition of the property on the date of its taking. *Commonwealth, Dept. of Highways v Merrill* (Ky) 383 SW2d 327.

Footnote 68. *Ligon v Allen*, 157 Ky 101, 162 SW 536, appeal after remand 168 Ky 19, 181 SW 656; *Gibbons v New York*, 200 Misc 699, 110 NYS2d 731 (photograph of a hole could not be relied upon in a negligence action as proof in itself of dimensions of hole).

§ 976 Aerial photographs

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The same general principles which apply to the admissibility of photographs generally 69 apply to aerial photographs, 70 and in a number of cases, aerial photographs have been admitted into evidence for the purpose of giving the jury a picture of some relevant fact in issue, where witnesses familiar with the subject matter testified that they were an accurate and true representation of the scene depicted. 71 Aerial photographs have not been admitted, however, where they were not accurate, 72 not properly authenticated, 73 or where it appeared that other evidence gave the jury a sufficiently accurate picture of the subject matter involved. 74

Footnotes

Footnote 69. §§ 960 et seq.

Footnote 70. *In re Will of Johnson*, 32 NC App 704, 233 SE2d 643.

Footnote 71. *Thompson v Underwood* (CA6 Tenn) 407 F2d 994; *Moyer v United States* (CA9 Or) 312 F2d 302 (condemnation proceeding); *McLemore v Alabama Power Co.*, 285 Ala 20, 228 So 2d 780, appeal after remand 289 Ala 643, 270 So 2d 657; *McCray v Marshall*, 241 Ark 832, 410 SW2d 595; *Hubert v Marietta*, 224 Ga 706, 164 SE2d 832; *Trachta v Iowa State Highway Com.*, 249 Iowa 374, 86 NW2d 849; *Airway Homes, Inc. v Boe* (La App 4th Cir) 140 So 2d 264; *Bower v Hog Builders, Inc.* (Mo) 461 SW2d 784; *Mousel v Ten Bensel*, 195 Neb 456, 238 NW2d 632; *Jarvis v Long Island R. R. Co.*, 50

Misc 2d 769, 271 NYS2d 799, affd (1st Dept) 25 App Div 2d 617, 268 NYS2d 963; In re Will of Johnson, 32 NC App 704, 233 SE2d 643; State by State Highway Com. v Oregon-Washington Lumber Co., 24 Or App 187, 544 P2d 1058; State ex rel. Wichita Falls v Wood (Tex Civ App Fort Worth) 467 SW2d 648, writ dismissed w o j (Oct 6, 1971) and reh'g of writ of error overruled (Nov 3, 1971); Wise v Abilene (Tex Civ App) 141 SW2d 400, writ dismissed.

Annotation: Eminent domain: admissibility of photographs or models of property condemned, 23 ALR3d 825 §§ 6, 10 (admissibility in eminent domain proceedings of aerial photographs of property condemned).

Admissibility in evidence of aerial photographs, 57 ALR2d 1351 § 2.

Practice References Aerial photography. 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases § 159.

Authentication of aerial photographs. 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proof 6.

Footnote 72. Trial court did not abuse its discretion in refusing to admit aerial photograph where photograph was blurred. Short v Jones (Okla) 613 P2d 452.

Footnote 73. Arkansas State Highway Com. v First Pyramid Life Ins. Co., 265 Ark 417, 579 SW2d 587, appeal after remand 269 Ark 278, 602 SW2d 609; Forest Preserve Dist. v Harris Trust & Sav. Bank (2d Dist) 108 Ill App 2d 65, 247 NE2d 188; Indiana & Michigan Electric Co. v Hurm (Ind App) 422 NE2d 371; Major v Hoppe, 209 Va 193, 163 SE2d 164.

In boundary dispute between coterminous landowners trial court did not err in refusing to admit into evidence aerial photograph where photograph was not part of records of county office, and witness did not have actual knowledge that photograph was true and accurate portrayal of land in question and where similar photograph, which was properly identified, was admitted into evidence. Smith v Claybrook (Ala) 349 So 2d 1087.

In an action to remove an obstruction from an alleged private way, an aerial photograph purporting to portray the general area of the alleged way was improperly admitted as evidence where nobody testified that he made the photograph, it was not established when the picture was made, the photograph was not interpreted by an expert witness, and no person testified as to why or how the photograph was made. Moore v McConnell, 105 Ga App 758, 125 SE2d 675.

Annotation: 57 ALR2d 1351 § 3.

Footnote 74. Buchanan v Hurdle, 209 Miss 722, 48 So 2d 354.

In an action for the wrongful deaths of two pedestrians crossing a highway and struck by an automobile near an intersection, the discretion of the trial court with respect to the admission in evidence of aerial photographs of the intersection was not abused in rejecting the offer thereof, where two ground-level photographers and three plats of the intersection admitted in evidence, together with the testimony of various witnesses, were ample to give the jury a proper perspective of where and how the accident took place.

Veselich v Lichtsinn (2d Dist) 11 Ill App 2d 372, 135 NE2d 823, 57 ALR2d 1339.

In proceedings involving permits for outdoor advertising signs, where photographs of the advertising signs had previously been submitted into evidence by another party, there was no error in the trial court's denial of a motion to enlarge the record to include an aerial photograph of the billboards at issue. *Korngold v Zoning Bd. of Adjustment*, 147 Pa Cmwlth 93, 606 A2d 1276, app den 533 Pa 614, 618 A2d 404 and app den 533 Pa 652, 624 A2d 111.

Annotation: 57 ALR2d 1351 § 3.

(2). X-ray Pictures [977, 978]

§ 977 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The process of X-ray photography is now well established as a method of securing a reliable representation of the bones of the human body, the location of growths and foreign substances in the body, the condition of the tissues of the body. 75 Photographs are defined for the purposes of the article of the Federal Rules of Evidence relating to the contents of writings, recordings, and photographs, as including X-ray films. 76 X-ray pictures—also referred to as skiagraphs or radiographs—when shown to have been made under such circumstances and by such persons as to assure their accuracy, 77 and where relevant to a material issue in the case, are admissible in evidence, 78

Properly authenticated X-ray pictures are properly admitted in an action for personal injuries to show the condition of the interior tissues of an injured part of the body. 79 In criminal cases, an X-ray photograph is admissible to show the course and location of a bullet, 80 or the nature and extent of an injury. 81

In ruling on the admission of X-ray pictures, as in the case of ordinary photographs, 82 the trial court has reasonable latitude for the exercise of discretion. 83

◆ Observation: While case law exists in which courts have found it improper to allow the jury to see X-rays, these cases generally involve complex medical issues. 84

Footnotes

Footnote 75. § 97.

Footnote 76. § 960.

Footnote 77. § 978.

Footnote 78. *Weeks v State* (Ala App) 342 So 2d 1335; *Fisher v State*, 7 Ark App 1, 643 SW2d 571; *Call v Burley*, 57 Idaho 58, 62 P2d 101; *Wallace v State*, 203 Miss 504, 35 So 2d 703; *Hoffman v New York*, 141 Misc 2d 893, 535 NYS2d 342 (under statute); *Williams v Altruda*, 74 RI 47, 58 A2d 562; *Texas Employers' Ins. Ass'n v Crow*, 148 Tex 113, 221 SW2d 235, 10 ALR2d 913.

As to admission of X-rays and medical files as business records, see § 1453.

As to opinion testimony to interpret an X-ray, see 31A Am Jur 2d, Expert and Opinion Evidence § 358.

Annotation: Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303.

Practice References Foundation for admissibility of hospital records and X-rays. 38 Am Jur Proof of Facts 2d 145.

Footnote 79. *Harrison v Sears, Roebuck & Co.* (CA1 Mass) 981 F2d 25, 37 Fed Rules Evid Serv 813; *Fries v Goldsby*, 163 Neb 424, 80 NW2d 171; *Geneva v Burnett*, 65 Neb 464, 91 NW 275.

Footnote 80. *Howard v State*, 264 Ind 275, 342 NE2d 604; *Wallace v State*, 203 Miss 504, 35 So 2d 703; *State v O'Connor*, 42 NJ 502, 201 A2d 705, cert den 379 US 916, 13 L Ed 2d 187, 85 S Ct 268.

Footnote 81. *Guthrie v United States*, 92 US App DC 361, 207 F2d 19; *State v Enloe*, 147 Or 123, 31 P2d 772; *Commonwealth v Wilson*, 245 Pa Super 415, 369 A2d 471 (in criminal prosecution, physician was properly allowed to testify, based in part on examination of X-rays, that defendant's wound was caused by projectile).

Footnote 82. § 960.

Footnote 83. *Williams v Altruda*, 74 RI 47, 58 A2d 562.

Footnote 84. *Broderick v Gibbs*, 1 Mass App 822, 296 NE2d 708.

§ 978 Authentication or verification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Federal and Uniform Rules of Evidence, evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result is sufficient to meet the requirement of authentication or identification as a condition precedent to admissibility. 85 This method of authentication involves situations in which the accuracy of the result is dependent upon a process or system which produces it, such as X-rays. 86

In some jurisdictions, it is necessary in all cases where X-ray pictures are to be introduced into evidence that the proponent lay a proper foundation for their introduction, that is, they must be verified and authenticated by someone who has knowledge of the accuracy and correctness of the X-rays. 87 X-rays are properly authenticated when it is shown that the X-ray is of the person, anatomical part, or object involved in the case, 88 that the X-ray was made by a competent technician, and that the X-ray accurately portrays the condition of the person's body which the X-ray purports to represent. 89 Whether there is sufficient verification of an X-ray picture is a matter within the discretion of the trial court, and its ruling in this respect will not be interfered with on appeal except upon a clear showing of an abuse of discretion. 90

Proof of the identity of an X-ray is usually provided through the testimony of some qualified individual, most typically a physician, 91 or sometimes by means of a deposition furnished by an expert witness, usually a physician, 92 or by identification markings, usually corroborated by an X-ray technician or attending physician. 93

It has also been held that in verifying an X-ray picture, there should be proof that the condition of the person X-rayed was the same at the time the X-ray was taken as at the time in controversy, 94 and that the X-ray machine or other apparatus used was dependable and was operating properly at the time the X-ray was taken. 95 It has also often been held that before an X-ray can be admitted in evidence, it should be shown that the picture was taken by a person with knowledge and experience in the use of the X-ray process, such as a physician, 96 or an X-ray technician. 97 As an additional requirement, it has been held in a number of cases that the manner of taking the X-ray picture must be shown. 98 But in view of the fact that the science of taking X-ray pictures is now so well founded and generally recognized, it is not necessary for a witness to testify to the reliability and trustworthiness of X-ray pictures as such before admitting them in evidence. 99

The admissibility of X-ray photographs as evidence is often dependent on whether the photographs have been subject to interpretation by a properly qualified witness. 1 A person qualified to testify as an expert in the use of X-ray machines may, from the result produced, give an opinion as to whether the machine was operated in a proper manner. 2

Footnotes

Footnote 85. FRE Rule 901(b)(9); Uniform Rules of Evidence, Rule 901(b)(9).

Footnote 86. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 87. *Williams v Southern R. Co.*, 99 Ga App 503, 109 SE2d 343.

Even though hospital technicians were unable to say which of various X-ray pictures were taken by each of them, authentication of these pictures is sufficient so as to render them admissible in a personal injury action where doctor testified that they were the ones he ordered, that they showed the person of the plaintiff at the various times indicated, and that they were accurate. *T. C. Young Constr. Co. v Brown* (Ky) 372 SW2d 670, 99 ALR2d 730.

X-rays of injuries were improperly admitted into evidence where radiological technician who testified as to X-rays was not in employ of the hospital where the X-rays were made at the time the X-rays were taken and did not actually know the technician who took the X-rays. *Higgins v Dallas County Child Welfare Unit* (Tex Civ App Dallas) 544 SW2d 745 (criticized on other grounds by *In Interest of S.H.A.* (Tex App Dallas) 728 SW2d 73).

As to opinion testimony to interpret an X-ray, see 31A Am Jur 2d, Expert and Opinion Evidence § 358.

Annotation: Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303 § 3.

Practice References Foundation for admissibility of hospital records and X-rays. 38 Am Jur Proof of Facts 2d 145.

Footnote 88. *T. C. Young Constr. Co. v Brown* (Ky) 372 SW2d 670, 99 ALR2d 730; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288; *Highland Underwriters Ins. Co. v Helm* (Tex Civ App Eastland) 449 SW2d 548; *Texas General Indem. Co. v Thomas* (Tex Civ App Tyler) 428 SW2d 463, writ ref n r e (Oct 2, 1968).

Annotation: 5 ALR3d 303 § 6[a].

Footnote 89. *Texas General Indem. Co. v Thomas* (Tex Civ App Tyler) 428 SW2d 463, writ ref n r e (Oct 2, 1968).

X-rays of plaintiff's injuries were properly in evidence where orthopedic surgeon, who had initially examined plaintiff upon latter's arrival at hospital, testified that X-ray was taken under direction of radiologist at hospital and that X-ray technicians there were qualified to take X-ray pictures and that X-rays taken correctly portrayed plaintiff's injuries. *Texaco, Inc. v Pursley* (Tex Civ App Eastland) 527 SW2d 236, writ ref n r e (Jan 7, 1976) and reh'g of writ of error overr (Feb 4, 1976), error ref n r e.

Footnote 90. *Oxford v Villines*, 232 Ark 103, 334 SW2d 660; *Clark v Reising*, 341 Mo 282, 107 SW2d 33.

In a personal injury action, the trial judge did not abuse his discretion in refusing to permit the jury to view X-ray pictures which were not taken of the plaintiff but were illustrative or demonstrative generally of the motion of the skeletal structure of the human body, and included alleged depictions of vertebral fixations resulting from whiplash and other injuries. *Carvell v Winn* (La App 3d Cir) 154 So 2d 788, cert den 245 La 61, 156 So 2d 603.

Annotation: 5 ALR3d 303 § 4.

Footnote 91. *De Martini v McDonnell*, 14 Cal App 2d 405, 58 P2d 170; *Chailland v Smiley* (Mo) 363 SW2d 619, 5 ALR3d 288; *Branch v Gurley*, 267 NC 44, 147 SE2d 587.

Annotation: 5 ALR3d 303 § 6[b].

Footnote 92. Demopolis Tel. Co. v Hood, 212 Ala 216, 102 So 35; Utilities Indem. Exchange v Burks (Tex Civ App) 7 SW2d 1112, writ dismissed, error dismissed.

Annotation: 5 ALR3d 303 § 6[c].

Footnote 93. Kimball v Northern Electric Co., 159 Cal 225, 113 P 156; Roach v Petrequin, 234 Mich 551, 208 NW 695.

X-rays submitted by the plaintiff in a personal injury action could not be introduced into evidence where identifying number did not appear on one X-ray as required by statute and address of radiologist did not appear on other X-ray as required by statute. Harth v Nicholas Liakis & Son, Inc., 103 Misc 2d 217, 425 NYS2d 523.

Evidence to show that X-ray films were those of plaintiff's body was sufficient where hospital administrator and plaintiff's physician testified to the effect that plaintiff appeared at hospital pursuant to physician's instruction, at appointed time, that he was assigned number which appeared on each of the X-rays in question, and that X-ray film was subsequently placed in envelope on which plaintiff's name was affixed. Texas General Indem. Co. v Thomas (Tex Civ App Tyler) 428 SW2d 463, writ refused (Oct 2, 1968).

Annotation: 5 ALR3d 303 § 6[d].

Footnote 94. Cooney v Hughes, 310 Ill App 371, 34 NE2d 566; West v Wilson, 90 Mont 522, 4 P2d 469.

Annotation: 5 ALR3d 303 § 7.

Footnote 95. Griswold v Chicago R. Co., 339 Ill 94, 170 NE 845; Eaker v International Shoe Co., 199 NC 379, 154 SE 667.

Annotation: 5 ALR3d 303 § 8.

Footnote 96. Kramer v Henely, 227 Iowa 504, 288 NW 610; Doyle v Singer Sewing Mach. Co., 220 Mass 327, 107 NE 949.

Annotation: 5 ALR3d 303 § 9[a].

Footnote 97. Wosoba v Kenyon, 215 Iowa 226, 243 NW 569; Howell v George, 201 Miss 783, 30 So 2d 603.

Annotation: 5 ALR3d 303 § 9[b].

Footnote 98. Call v Burley, 57 Idaho 58, 62 P2d 101; McKee v New Idea, Inc. (App, Mercer Co) 36 Ohio L Abs 563, 44 NE2d 697, motion overruled; Williams v Altruda, 74 RI 47, 58 A2d 562.

Annotation: 5 ALR3d 303 § 10.

Footnote 99. Call v Burley, 57 Idaho 58, 62 P2d 101.

Annotation: 5 ALR3d 303 § 5[c].

Footnote 1. 31A Am Jur 2d, Expert and Opinion Evidence § 358.

Footnote 2. 31A Am Jur 2d, Expert and Opinion Evidence § 358.

(3). Motion Pictures and Videotape [979-985]

§ 979 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs are defined for the purposes of the article of the Federal Rules of Evidence relating to the contents of writings, recordings, and photographs, as including motion pictures and videotapes. 3 The rules which apply to the admissibility of photographs also generally apply to that of motion pictures and videotapes. 4 Thus it is well established that motion pictures and videotapes, 5 when properly authenticated 6 and relevant to the issues in the case, 7 are admissible in evidence, 8 within the discretion of the trial court. 9 The issue to be determined in admitting or rejecting a videotape is whether it is practical, instructive, and calculated to assist the trier of fact in understanding the case. 10 A videotape's tone and editing, 11 as well as the availability of similar evidence through in court testimony, are all factors a trial court should consider when deciding whether to admit a videotape. 12 If a motion picture has a tendency to prejudice the jury, the question before the court is whether its value as evidence outweighs its possible prejudicial effect. 13 The prejudicial effect of a video tape is to be decided on a case-by-case basis. 14

Motion pictures and videotapes, secretly taken between the time the plaintiff received the injuries and the trial of the action in which recovery is sought, depicting the plaintiff engaged in various physical activities, have frequently been received in evidence on behalf of the defendant to demonstrate that the injuries were neither as extensive nor as permanent as claimed. 15

§ 979 ----Generally [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Case authorities:

In prosecution for sexual abuse of defendant's minor stepdaughter, trial court did not abuse its discretion in ruling that prejudicial effect of videotape of program regarding false allegations of sexual abuse in unrelated cases outweighed any probative value; defendant could make defense of false allegations without videotape, and he did not share characteristics of those on tape, that is, Jehovah's Witnesses involved in child custody or

dissolution proceedings. *United States v Foster* (1994, CA7 Ind) 30 F3d 65.

Trial court in homicide prosecution arising from child-abuse death of two-year-old harmlessly erred in admitting videotaped re-enactment of abuse incident involving decedent's sister, in which defendant acted out false story of dropping sister while running to car to take her to doctor, where, although tape was cumulative to descriptive testimony of police officer who made video, tape was not inflammatory and was relevant to defendant's history of lying to conceal his abusive conduct. *People v Evers* (1992, 4th Dist) 10 Cal App 4th 588, 12 Cal Rptr 2d 637, 92 CDOS 8650, 92 Daily Journal DAR 14307, review den (Cal) 1993 Cal LEXIS 370.

In murder trial, defendant's videotaped statements made after shooting and in which defendant discussed his gang activities was properly admitted where purpose was to establish defendant's mens rea at time of shooting, jury was instructed that tape was admitted only for that limited purpose, and jurors were told that they could not speculate whether defendant acted in conformity with his gang activities. *People v Atkins* (1992, Colo App) 844 P2d 1196, cert den (Colo) 1993 Colo LEXIS 77.

In prosecution for child molestation, statutory rape, and aggravated child molestation, trial court did not commit reversible error by failing to allow defendant to introduce videotape of family outing to show that victim was not afraid of him and that victim called him "Daddy" rather than by his first name, "Larry," where at least four witnesses had testified from personal observation that victim was not afraid of defendant and called him "Daddy," thereby making such evidence cumulative. *Stewart v State* (1993) 210 Ga App 474, 436 SE2d 679, 93 Fulton County D R 3512, cert den (Ga) 1994 Ga LEXIS 189.

In prosecution for lewd and lascivious conduct with minor, videotaped interview of victim at children-at-risk evaluation services unit, which was introduced without objection and related to events for which defendant was on trial, would not be subject to review on appeal. In addition, exclusion of tape of earlier interview of victim about previous, unrelated suspicion of sexual molestation by someone else, which was not admitted on ground that it was irrelevant, was not subject to review in absence of copy of tape. *State v Stover* (1994, Idaho App) 881 P2d 553.

In prosecution for murder and theft, trial court did not err in admitting videotape showing autopsy of victim, which tape showed, inter alia, pathologist attempting to remove fluid with syringe from what remained of victim's brain, as well as extensive maggot infestation of body; while fluid removal had no tendency to prove any material issues in case, and no witness would have been permitted to describe visual impression made by videotape regarding maggot infestation, rest of tape was unobjectionable and some parts of it were highly probative. *Meisberger v State* (1994, Ind App) 640 NE2d 716, transfer den (Dec 21, 1994).

In murder prosecution, admission of 45-second videotape showing victim playing basketball was proper, as prosecution was permitted to briefly acquaint jurors with murder victim so as to give him distinct identity in jurors' minds. *State v Hodgson* (1994, Minn) 512 NW2d 95, subsequent civil proceeding (Minn App) 1994 Minn App LEXIS 305.

Admission into evidence of three tape recordings over defendant's objections was reversible error where there was no testimony identifying voices on tape, no evidence of chain of custody, and no expert testimony regarding enhancement of tapes. *Caraway v*

State (1991, Ala App) 583 So 2d 993, cert den (Ala) 583 So 2d 997 and (criticized by Mullis v State (Ala App) 627 So 2d 1078, reh den, without op (Ala App) 1993 Ala Crim App LEXIS 139 and cert den, without op (Ala) 1993 Ala LEXIS 1354).

Where there was a question of fact concerning the presence of blood in elevator 4 in the cellblock in which a murder occurred, a videotape of the removal of the victim's body and its placement in elevator 2 was relevant to refute defendant inmates' suggestion that the blood came from the victim's body or from those who removed the body. State v Leazer (1994) 337 NC 454, 446 SE2d 54.

In DUI prosecution, trial court committed reversible error when it admitted audio portion of videotape of police interrogation in which defendant invoked his right to counsel; such evidence could be construed adversely to defendant by jury and could improperly be considered by jury as inference of guilt. Hardie v State (1991, Tex Crim) 807 SW2d 319.

Audio portion of postarrest videotape of defendant performing sobriety tests was not inadmissible since it did not show defendant exercising his constitutional right to remain silent; impression left by tape was that defendant remained silent because he did not understand due to hearing problem or because he wanted deputy to think he could not understand questions. Raffaelli v State (1994, Tex App Texarkana) 881 SW2d 714, petition for discretionary review ref (Nov 30, 1994).

Trial court in prosecution for driving under influence of alcohol properly admitted videotape of defendant's postarrest interrogation and field sobriety testing, where, because tape did not show defendant invoking right to remain silent (and therefore was not attempt to use silence against defendant), and because tape showed defendant's attempt to feign hearing impairment, tape was not admitted in violation of right to remain silent. Raffaelli v State (1994, Tex App Texarkana) 881 SW2d 714, petition for discretionary review ref (Nov 30, 1994).

Footnotes

Footnote 3. § 960.

Footnote 4. Haas v Abrahamson (ED Wis) 705 F Supp 1370, affd (CA7 Wis) 910 F2d 384; United States v Pritchett (CA11 Ala) 908 F2d 816, 90-2 USTC ¶ 50444, 66 AFTR 2d 90-5609; United States v Cole (CA11 Fla) 755 F2d 748; Thompson v State (Ala App) 462 So 2d 777; People v Montoya (Colo App) 773 P2d 623, cert den (Colo) 785 P2d 916; Pisel v Stamford Hospital, 180 Conn 314, 430 A2d 1, 36 ALR4th 94; Ames v Sears, Roebuck & Co., 8 Conn App 642, 514 A2d 352, CCH Prod Liab Rep ¶ 11346, cert den 201 Conn 809, 515 A2d 378, later proceeding 206 Conn 16, 536 A2d 563; State v Booker (Del Super) 547 A2d 618; Wright v State, 167 Ga App 445, 306 SE2d 428; Cisarik v Palos Community Hosp., 144 Ill 2d 339, 162 Ill Dec 59, 579 NE2d 873.

Generally speaking, the law governing the admissibility of photographs applies to motion pictures—that is to say, they must be relevant to the issues and be properly authenticated before they may be introduced. Lanford v People, 159 Colo 36, 409 P2d 829.

Videotapes that illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted are generally admissible,

provided their probative value outweighs any prejudicial effect. *State v Martin* (La App 1st Cir) 607 So 2d 775.

For discussion of the admissibility of photographs, see §§ 960 et seq.

Footnote 5. The precedents and reasoning in decisions dealing with the admissibility of other forms of physical and real evidence, particularly in analogous case of motion picture evidence, can with equal validity be applied to the admissibility of videotape evidence. *People v Higgins*, 89 Misc 2d 913, 392 NYS2d 800.

Footnote 6. § 982.

Footnote 7. *Lanford v People*, 159 Colo 36, 409 P2d 829; *Morris v E. I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Gordon v State* (Tex Crim) 784 SW2d 410.

In murder prosecution, trial court properly admitted videotape of murder victim taken as she performed in choral concert on night of her death for purpose of showing victim's location and appearance shortly before her death. *People v Abernathy* (1st Dist) 189 Ill App 3d 292, 136 Ill Dec 677, 545 NE2d 201, app den 129 Ill 2d 565, 140 Ill Dec 673, 550 NE2d 558.

Videotape of eight-mile stretch of highway was properly shown to jury in prosecution for negligent homicide arising from death of intoxicated woman from hypothermia after she was left on highway by defendant during extremely cold weather. *State v Schlickemayer* (ND) 334 NW2d 196, later proceeding (ND) 364 NW2d 108.

Footnote 8. *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, affd 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379; *American Nat. Watermattress Corp. v Manville (Alaska)* 642 P2d 1330; *Ratton v Busby*, 230 Ark 667, 326 SW2d 889, 76 ALR2d 751; *People v Dabb*, 32 Cal 2d 491, 197 P2d 1; *Gulf Life Ins. Co. v Stossell*, 131 Fla 127, 179 So 163; *Larnel Builders, Inc. v Martin* (Fla App D3) 105 So 2d 580, cert dismd (Fla) 110 So 2d 649; *Johnson v State Highway Com.*, 188 Kan 683, 366 P2d 282; *Barham v Nowell*, 243 Miss 441, 138 So 2d 493; *Wren v St. Louis Public Service Co. (Mo)* 333 SW2d 92; *Whitman v Consolidated Aluminum Corp. (Mo App)* 637 SW2d 405, CCH Prod Liab Rep ¶ 9430, 34 UCCRS 1149; *State v Thurman (App)* 84 NM 5, 498 P2d 697; *State v Johnson*, 18 NC App 606, 197 SE2d 592, 60 ALR3d 329; *Bernardy v O. K. Furniture & Rug Co. (Okla)* 385 P2d 909; *Alford v Bailey*, 202 Pa Super 324, 196 A2d 393; *State v Clarke (Tex Civ App Waco)* 383 SW2d 953; *State v Newman*, 4 Wash App 588, 484 P2d 473, review den 79 Wash 2d 1004.

The showing, in an action involving a collision between two airplanes, of a motion picture 4 or 5 minutes long, of the defendant's plane after the accident, by the plaintiff's expert witness, has been held not objectionable on the ground that the witness was allowed to make oral comments while it was being shown, where the picture could be stopped at any time and any questions could be asked by either counsel as to what the picture showed, and the record could be made as in the case of a still picture, and where every time the expert witness stated what the picture showed, he was cautioned: "No comments." *Ratton v Busby*, 230 Ark 667, 326 SW2d 889, 76 ALR2d 751.

Videotape of crime scene, mainly black and white and of very poor quality, was properly admitted where jury viewed crime scene and body for a few minutes at most, and that with some difficulty, and danger of prejudice to defendant was minimal. *State v Lafferty* (Utah) 749 P2d 1239, 73 Utah Adv Rep 57, on reconsideration (Utah) 776 P2d 631, 109 Utah Adv Rep 21, habeas corpus granted (CA10 Utah) 949 F2d 1546, reh, en banc, den (CA10) 1991 US App LEXIS 33104 and cert den (US) 118 L Ed 2d 548, 112 S Ct 1942.

In defendant's trial on charge of first-degree murder, videotape of location of killing was not prejudicial attempt to reenact crime but rather was properly admitted for purpose of illustration and as alternative to viewing of area by jury. *State v Brown* (Utah) 607 P2d 261.

Footnote 9. *Bannister v Noble* (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841; *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, affd 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379; *Lehmuth v Long Beach Unified School Dist.*, 53 Cal 2d 544, 2 Cal Rptr 279, 348 P2d 887; *Greeneich v Southern Pacific Co.* (3rd Dist) 189 Cal App 2d 100, 11 Cal Rptr 235; *Pisel v Stamford Hospital*, 180 Conn 314, 430 A2d 1, 36 ALR4th 94; *Malbrough v Wallace* (La App 1st Cir) 594 So 2d 428, cert den (La) 596 So 2d 196; *Carvell v Winn* (La App 3d Cir) 154 So 2d 788, cert den 245 La 61, 156 So 2d 603; *State use of Chima v United R. & E. Co.*, 162 Md 404, 159 A 916, 83 ALR 1307; *Oglesby v St. Louis Public Service Co.* (Mo App) 338 SW2d 357; *Streit v Kestel* (Hamilton Co) 108 Ohio App 241, 9 Ohio Ops 2d 245, 161 NE2d 409, motion overr; *General Acci. Fire & Life Assur. Corp. v Camp* (Tex Civ App Houston (1st Dist)) 348 SW2d 782; *State v Strandy*, 49 Wash App 537, 745 P2d 43, review den 109 Wash 2d 1027; *Roberts v Stevens Clinic Hosp., Inc.*, 176 W Va 492, 345 SE2d 791.

Trial court did not abuse its discretion in excluding videotape that displayed firepower of submachinegun, where defendant previously had presented testimony of firearms expert who described capabilities of weapon, and where tape would have been cumulative. *United States v Falcon* (CA10 Colo) 766 F2d 1469.

In appeal of condemnation award, judge did not abuse his discretion in refusing to admit into evidence a movie of condemned property and surrounding parcels where substantial changes had occurred on property during 20 months between time land was acquired and pictures were taken and evidence was merely cumulative with respect to previous testimony. *Rollie Johnson Plumbing & Heating Service, Inc. v State, Dept. of Transp.* (Div. of Highways), 70 Wis 2d 787, 235 NW2d 528.

As to admissibility, generally, of sound recordings as documentary evidence, see § 1023.

For discussion of motion pictures and videotapes used as demonstrative aids, but not introduced into evidence, see 75A Am Jur 2d, Trial § 508.

As to the admissibility of motion pictures in motor vehicle accident cases, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1063.

Footnote 10. *McPherson Redevelopment Corp. v Watkins* (Mo App) 782 SW2d 690.

Footnote 11. As to the effect of editing on the admissibility of a videotape, see § 985.

Footnote 12. *Roberts v Stevens Clinic Hosp., Inc.*, 176 W Va 492, 345 SE2d 791.

Footnote 13. *Pisel v Stamford Hospital*, 180 Conn 314, 430 A2d 1, 36 ALR4th 94; *Drews v Gobel Freight Lines, Inc.*, 144 Ill 2d 84, 161 Ill Dec 324, 578 NE2d 970; *State v Strandy*, 49 Wash App 537, 745 P2d 43, review den 109 Wash 2d 1027.

Notwithstanding defendants' objections that motion pictures only served to confuse and inflame jury, trial court properly admitted motion picture of dead fish in suit for damages under Pollution Control Coordinating Act, where picture illustrated fact of fish kill and was material to support state's suit. *State ex rel. Pollution Control Coordinating Bd. v Kerr-McGee Corp.* (Okla) 619 P2d 858, 11 ELR 20458.

Footnote 14. *Bannister v Noble* (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841.

Footnote 15. *Barham v Nowell*, 243 Miss 441, 138 So 2d 493; *Wren v St. Louis Public Service Co.* (Mo) 333 SW2d 92; *Boyarsky v G. A. Zimmerman Corp.*, 240 App Div 361, 270 NYS 134; *Hayward v Ginn* (Okla) 306 P2d 320; *Isadore v Workmen's Compensation Appeal Bd.* (Owens-Illinois), 77 Pa Cmwlt 346, 465 A2d 1096.

Videotape of claimant in workers's compensation proceeding which showed her engaging in relatively normal everyday activities, such as hanging laundry, going to the store, and washing her car, was admissible to who that claimant was able to return to her job as a radial drill press operator. *Kope v Workmen's Compensation Appeal Bd.* (Borg Warner Corp.), 98 Pa Cmwlt 341, 510 A2d 1294.

Annotation: Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812 § 12[a].

§ 980 Day-in-the-life videotapes in personal injury actions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A properly produced and presented day-in-the-life documentary may be admitted into evidence at the discretion of the trial judge to show the extent of plaintiff's injuries, and the effect that the injuries have had on the plaintiff's ability to carry on with his or her daily activities. 16

A day in the life film is only admissible if its probative value is not outweighed by the danger of unfair prejudice. 17 The probative value in the film is great and possibility of prejudice is lowest, when the conduct portrayed in limited to ordinary, day-to-day situations. 18 A film depicting the victim in unlikely circumstances or performing improbable tasks cannot be said to fairly portray a typical day in the life of the victim. 19

While some courts require that the day-in-the-life film not be duplicative of other

evidence pertaining to the nature and extent of plaintiff's injuries, 20 there is authority for the view that the mere fact that there is ample uncontradicted medical testimony concerning the nature and extent of plaintiff's injuries should not, in and of itself, prevent a plaintiff from showing to the jury a motion picture illustrating in an informative and noninflammatory manner the impact that the accident has had on his or her life. 21

§ 980 ----Day-in-the-life videotapes in personal injury actions [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Case authorities:

Trial court in personal injury action properly exercised its discretion to admit 20-minute "day-in-life" videotape of plaintiff's daily activities as paraplegic, where tape was probative of extent of injuries and impact on ordinary daily life, and tape was thus nonprejudicially relevant to issues of pain-and- suffering and quantum of damages. *Jones v City of Los Angeles* (1993, 2nd Dist) 20 Cal App 4th 436, 24 Cal Rptr 2d 528, 93 CDOS 8673, 93 Daily Journal DAR 14949.

In action by railroad brakeman, injured during collision between train and truck at grade crossing, trial court did not err in admitting videotapes showing plaintiff engaged in various activities requiring movement of his neck, arms, and back, and driving a car; tapes had been offered as rebuttal of plaintiff's testimony as to nature and extent of his injuries and, in view of what they depicted, tapes had some logical relevance to scope of injuries and damages. *Wilson v Southern Ry. Co.* (1993) 208 Ga App 598, 431 SE2d 383, 93 Fulton County D R 1703.

In damages action stemming from accident in above-ground swimming pool in which plaintiff was injured, trial court did not err in admitting videotape showing plaintiff dancing and playing pool at party about 1.5 years after accident; tape was probative as to plaintiff's mobility and extent of her injuries following accident, especially since what it depicted was inconsistent with plaintiff's trial testimony. *Egelhoff v Holt* (1994, Mo) 875 SW2d 543, CCH Prod Liab Rep ¶ 13869.

Footnotes

Footnote 16. *Bannister v Noble* (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841; *Pisel v Stamford Hospital*, 180 Conn 314, 430 A2d 1, 36 ALR4th 94; *Strach v St. John Hospital Corp.*, 160 Mich App 251, 408 NW2d 441, app den 429 Mich 886, reconsideration den 430 Mich 866; *Hahn v Tri-Line Farmers Co-op* (Minn App) 478 NW2d 515; *Wagner v York Hosp.*, 415 Pa Super 1, 608 A2d 496, app dismd without op 532 Pa 646, 614 A2d 1143.

◆ **Comment:** A day-in-the-life film prepared as evidence to illustrate the impact that the injury has had on the plaintiff's life typically shows the victim in a variety of everyday situations, including getting around the home, eating meals, and interacting with family members. *Bannister v Noble* (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841.

Law Reviews: The Case for a Visual Presentation: High-Tech Communications at Trial, Bowdren & Winter, 1992 Tr Dip J 125 (1992).

Evidence: Denial of defendant's request to attend day-in-the-life videotape filming, 38 Law Reporter 2:54 (1992).

Videotape: a litigation tool for the 1990's, 34 Defense LJ 7:2 (1992).

Defending Against Day-in-the-Life Videos, Gass, 34 Defense LJ 7:8 (1992).

Day-In-the-Life Videos: Evolving Arguments on Making and Use at Trial, 27 Tort & Ins LJ 574 (Spring 1992).

Practice References 16 Am Jur POF3d 493, Foundation for Contemporaneous Videotape Evidence.

Planning and producing a "day-in-the-life" videotape in a personal injury lawsuit. 39 Am Jur Trials 261.

Using or challenging a "day-in-the-life" documentary in a personal injury lawsuit. 40 Am Jur Trials 249.

Footnote 17. Cisarik v Palos Community Hosp., 144 Ill 2d 339, 162 Ill Dec 59, 579 NE2d 873.

Footnote 18. Bannister v Noble (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841.

A 27-minute videotaped shown in 3 segments without a sound track that showed plaintiff doing supposedly representative daily activities was properly admitted to illustrate and supplement plaintiff's testimony regarding his injuries. Arnold v Burlington N. R. Co., 89 Or App 245, 748 P2d 174, review den 305 Or 576, 753 P2d 1382.

Footnote 19. Bannister v Noble (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841.

Footnote 20. Grimes v Employers Mut. Liability Ins. Co. (DC Alaska) 73 FRD 607, 1 Fed Rules Evid Serv 600; Bannister v Noble (CA10 Okla) 812 F2d 1265, 22 Fed Rules Evid Serv 841.

Videotape showing day-in-the-life of plaintiff who was injured in an automobile accident was properly excluded where the plaintiff was present in court for the jury's observation. Helm v Wismar (Mo) 820 SW2d 495.

Footnote 21. Caprara v Chrysler Corp. (3d Dept) 71 App Div 2d 515, 423 NYS2d 694, CCH Prod Liab Rep ¶ 8605, affd 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545, CCH Prod Liab Rep ¶ 8902.

§ 981 Motion pictures and videotapes of crime or crime scene

[View Entire Section](#)

Videotapes of a crime scene are admissible in evidence if relevant to show motive, intent, method, malice, premeditation and the atrociousness of the crimes, even though photographs of the scene have also been admitted. 22 Accordingly, properly authenticated motion picture films and videotapes of the actual crime as it took place are generally admissible in prosecutions for robbery, larceny, and similar crimes, 23 possession and sale of stolen goods, 24 possession of firearms, 25 drug-related offenses, 26 and other crimes. 27

§ 981 ----Motion pictures and videotapes of crime or crime scene [SUPPLEMENT]

Practice Aids: Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene. 37 ALR5th 515.

Video Technology. 58 Am Jur Trials 481.

The use of amateur videotapes as evidence in criminal prosecutions: Citizen empowerment or little brother's new silver platter? 15 Hast Comm & Ent LJ 797 (1993).

Case authorities:

In prosecution for first degree murder and other crimes, trial court did not abuse its discretion in admitting into evidence videotape of motel crime scene recorded by police officer, which depicted motel room, including bathroom, victim's body in bathtub (with face submerged under water), and deputy coroner lifting body from bathtub, examining pillowcase over head, and cutting pillowcase to reveal face, gag in mouth and sock covering mouth. Videotape was relevant in depicting position of victim's body in tub—gagged, pillow case secured over head, and arms and legs bound behind back—supporting prosecution theory that defendant, contrary to defense presented at trial, had acted with malice and intent to kill, and that killing was deliberate and premeditated. Videotape also corroborated police officer's testimony describing crime scene. *People v Sims* (1993) 5 Cal 4th 405, 20 Cal Rptr 2d 537, 853 P2d 992, 93 CDOS 4925, 93 Daily Journal DAR 8252, reh den (Cal) 1993 Cal LEXIS 4798.

In prosecution for selling cocaine, trial court did not abuse its discretion in admitting videotape of drug sale taken with hidden camera, notwithstanding videotape showed reverse mirror images of drug transaction, where defendant did not claim videotape did not accurately depict actual events and did not point to any portion of videotape in which reverse mirror image caused material variation from actual events tending to mislead jury. *Woods v State* (1993) 210 Ga App 172, 435 SE2d 464, 93 Fulton County D R 3136.

In prosecution for voluntary manslaughter, trial court did not err in admitting into evidence videotape of victim's body; even if somewhat repetitive, evidence was relevant to issues at trial. *Marks v State* (1993) 210 Ga App 281, 435 SE2d 703, reconsideration den (Ga App) 93 Fulton County D R 3516 and cert den (Ga) slip op.

In a prosecution for armed assault with intent to rob a bank, the court properly permitted the Commonwealth to introduce a videotape of another bank robbery, notwithstanding

the contention that the videotape constituted prejudicial evidence of other bad acts, since the videotape was introduced for the limited purpose of assisting the jury in assessing the reliability of the identification of the defendant by 2 witnesses as the person depicted in the videotape. *Commonwealth v Austin*, 421 Mass 357, 657 NE2d 458.

The trial court did not abuse its discretion in allowing the jury to view a videotape of the murder victim's apartment since (1) the videotape indicated that the apartment was not quite as blood drenched as still photographs might have led one to believe, and (2) the videotape was relevant to support the Commonwealth's contention that the crime, and the defendant's subsequent actions, were the product of deliberation rather than an emotional outburst which might have caused a bloodier scene. *Commonwealth v Simmons* (1995) 419 Mass 426, 646 NE2d 97.

In prosecution for first degree murder, trial court did not commit prejudicial error in admitting videotape of defendant reenacting crimes, which consisted of defendant explaining and demonstrating his actions at crime scene as they occurred with two police officers standing in as victims. Fact that officers were used to represent victims did not render videotape inadmissible where officers did not attempt any dramatization or recreation of victim's actions, but merely assumed position in garage that defendant stated victims were in before and after he shot them. Moreover, videotape was not rendered inadmissible by reason of fact that defendant appeared calm and collected in videotape and deliberation was highly contested fact issue; even if defendant's demeanor as shown on videotape was probative on issue of deliberation and was thus prejudicial to him, this alone was not basis for holding videotape inadmissible. *State v Anderson* (1993, Mo App) 862 SW2d 425.

Where there was a question of fact concerning the presence of blood in elevator 4 in the cellblock in which a murder occurred, a videotape of the removal of the victim's body and its placement in elevator 2 was relevant to refute defendant inmates' suggestion that the blood came from the victim's body or from those who removed the body. *State v Leazer* (1994) 337 NC 454, 446 SE2d 54.

The trial court did not commit plain error in the exclusion without objection of a portion of a police videotape depicting a box behind the door of a convenience store storage room where defendant and the victim's body were found, although defendant contended that this evidence rebutted the State's evidence that defendant was found hiding behind the door and thus acknowledged wrongdoing, where defendant failed to show that the exclusion of this evidence likely affected the outcome of his trial. *State v Rouse* (1994) 339 NC 59, 451 SE2d 543, stay den (NC) 453 SE2d 189 and reconsideration den (NC) 453 SE2d 188.

The trial court did not err by admitting a videotape illustrating testimony describing the route along which a homicide victim had been dragged behind defendant's logging truck and the location of blood along the route two days after the murder. *State v House* (1995) 340 NC 187, 456 SE2d 292.

In prosecution for possession of cocaine, videotape allegedly depicting drug transaction was improperly admitted where it was not properly authenticated. *Kephart v State* (1994, Tex Crim) 875 SW2d 319.

Trial court in capital murder prosecution did not err in admitting in evidence video apparently depicting crime scene, including victims' bodies, where defendant had made

only general objection to entire video at trial; if exhibit contained both admissible and inadmissible evidence, objection had to specifically refer to challenged material to apprise trial court of exact objection being made. *Sonnier v State* (1995, Tex Crim) 913 SW2d 511, reh den (Jan 10, 1996).

In murder prosecution, trial court properly admitted videotape of murder scene, showing victim's body and murder weapon. *Price v State* (1994, Tex App Fort Worth) 870 SW2d 205, petition for discretionary review gr (May 18, 1994).

Footnotes

Footnote 22. *Stewart v Commonwealth*, 245 Va 222, 427 SE2d 394, cert den (US) 126 L Ed 2d 105, 114 S Ct 143.

Footnote 23. *United States v Rembert*, 274 US App DC 334, 863 F2d 1023, 27 Fed Rules Evid Serv 459; *Gordon v State* (Ala App) 552 So 2d 901; *Haskins v State* (Fla App D1) 428 So 2d 389, petition den (Fla) 438 So 2d 832; *Averhart v State* (Ind) 470 NE2d 666, cert den 471 US 1030, 85 L Ed 2d 323, 105 S Ct 2051, post-conviction proceeding (Ind) 614 NE2d 924, reh den (Oct 20, 1993); *Wells v State* (Miss) 604 So 2d 271; *People v Fondal* (2d Dept) 154 App Div 2d 476, 546 NYS2d 26, app den 75 NY2d 770, 551 NYS2d 912, 551 NE2d 113; *State v Cannon*, 92 NC App 246, 374 SE2d 604, app dismd, review gr, in part 324 NC 249, 377 SE2d 761 and review den, motion den 324 NC 249, 377 SE2d 757 and revd, in part on other grounds 326 NC 37, 387 SE2d 450; *Farrell v State* (Tex App Dallas) 837 SW2d 395, petition for discretionary review gr (Nov 4, 1992) and petition for discretionary review ref (Nov 4, 1992) and affd (Tex Crim) 864 SW2d 501, motion for rehearing on PDR denied (Nov 3, 1993).

In prosecution for bank robbery, videotape of robbery was admissible in evidence both as probative evidence in itself and illustrative evidence to support witness's testimony. *United States v Bynum* (CA1 Mass) 567 F2d 1167.

Annotation: Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812 § 3[a].

Footnote 24. *United States v Allen* (WD Okla) 513 F Supp 547; *Adams v State* (Fla App D5) 436 So 2d 1132; *Williams v State*, 178 Ind App 567, 383 NE2d 444; *People v Barker*, 101 Mich App 599, 300 NW2d 648; *People v Day* (4th Dept) 132 App Div 2d 987, 518 NYS2d 284.

Videotapes of "sting" transactions involving defendant's sale of stolen property to undercover police officer were properly admitted into evidence during burglary prosecution, even though tapes did not include audio playback where shown as adjunct to testimony by participating officers. *State v Brooks*, 30 Wash App 280, 633 P2d 1345, review den 96 Wash 2d 1021.

Annotation: 41 ALR4th 812 § 4.

Footnote 25. *State v Garrison* (La) 400 So 2d 874; *State v Bunting*, 187 NJ Super 506, 455 A2d 531, 41 ALR4th 808; *State v Jeffers*, 48 NC App 663, 269 SE2d 731, cert den and app dismd 301 NC 724, 276 SE2d 285.

Annotation: 41 ALR4th 812 § 5.

Footnote 26. *United States v Lance* (CA5 Miss) 853 F2d 1177, 26 Fed Rules Evid Serv 633; *United States v Rosenthal* (CA11 Ga) 793 F2d 1214, 21 Fed Rules Evid Serv 264, mod on other grounds, reh den, en banc (CA11 Ga) 801 F2d 378, cert den 480 US 919, 94 L Ed 2d 692, 107 S Ct 1377; *United States v Cole* (CA11 Fla) 755 F2d 748; *Werts v State*, 196 Ga App 452, 395 SE2d 922; *State v Jennings*, 101 Idaho 265, 611 P2d 1050; *People v Schaefer* (5th Dist) 217 Ill App 3d 666, 160 Ill Dec 530, 577 NE2d 855, app den 142 Ill 2d 662, 164 Ill Dec 925, 584 NE2d 137; *Hunt v State* (Ind) 459 NE2d 730; *Crenshaw v State* (Miss) 513 So 2d 898; *People v Moore* (2d Dept) 153 App Div 2d 702, 544 NYS2d 873, app den 75 NY2d 815, 552 NYS2d 565, 551 NE2d 1243; *Broadus v State* (Okla Crim) 553 P2d 515; *Hall v State* (Tex App Waco) 829 SW2d 407 (under state rule providing for admission of videotaped evidence).

In prosecution for distribution of controlled substance, introduction of videotape of sale of marijuana to undercover agent did not violate defendant's Fifth Amendment right against self-incrimination, in view of fact that photographs, moving pictures, recordings, and admissions are admissible. *Crenshaw v State* (Miss) 513 So 2d 898.

Annotation: 41 ALR4th 812 § 7.

Footnote 27. *United States v Moran* (CA2 NY) 194 F2d 623, cert den 343 US 965, 96 L Ed 1362, 72 S Ct 1058 (perjury); *Allison v Birmingham* (Ala App) 580 So 2d 1377, cert den (Ala) 580 So 2d 1390 (trespass); *Kindred v State* (Ind) 524 NE2d 279 (forgery); *Newland v State* (Ind) 459 NE2d 384 (escape).

Annotation: 41 ALR4th 812 § 10.

§ 982 Authentication and verification

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Motion picture films 28 and videotapes 29 may be authenticated by testimony that the film or tape accurately depicts the events shown in it. The party who offers a videotape in evidence must show that it is accurate, faithful representation of the place, person, or subject it purports to portray. 30 This foundation may be established by any witness who is familiar with the subject matter of the videotape and is competent to testify from personal observation. 31 Thus, the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission in evidence. 32 There is no requirement that the videotape be authenticated by a photographer, so long as the person authenticating the videotape is familiar with the scene depicted. 33 Whether a videotape is a fair and accurate representation of the scene sought to be depicted addresses itself to the discretion of the trial judge which will not be controlled unless abused. 34

To lay a proper foundation for the use of videotapes to preserve testimonial evidence, the proponent must show that the video and audio portions of tape were functioning properly, that the operator was trained and experienced in use of video-taping equipment, audio and visual portions of recording were authentic and accurate, no changes, additions, or deletions had been made, tape had been properly preserved, video portion was clearly visible and audio portion sufficiently understandable, and speakers were identified. 35

§ 982 ----Authentication and verification [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Case authorities:

In proceedings to review retirement board's decision to discontinue firefighter's disability pension, trial court did not commit reversible error in admitting into evidence videotape taken by investigator that showed firefighter bending, stooping, squatting, and exerting force as he attempted to change flat tire on his truck; videotape was relevant to firefighter's physical condition and it was properly authenticated by testimony of investigator, who testified regarding his surveillance of firefighter, and by firefighter's testimony that videotape reflected his performance on that occasion. *Large v Board of Managers of Birmingham Retirement & Relief Sys.* (1993, Ala App) 623 So 2d 1174.

In armed robbery prosecution, videotape of robbery was properly admitted where witness testified that video was fair and accurate representation of robbery, even though it was not shown that recorder was functioning properly, or that it was being operated by competent personnel. *Harper v State* (1994) 213 Ga App 444, 445 SE2d 303, 94 Fulton County D R 2095.

In narcotics prosecution, tape recordings of telephone conversations to which defendant was party were adequately authenticated where police officer testified that he had (1) monitored and recorded conversations, (2) heard defendant speak before and after arrest, (3) spoken with defendant after arrest, and (4) identified voice on tape as being that of defendant. *Whack v State* (1992) 94 Md App 107, 615 A2d 1226, cert den 330 Md 155, 622 A2d 1196.

In prosecution for criminal mischief and disorderly conduct arising out of protest by animal rights activists at pigeon shoot, in which both parties offered videotapes of event, trial court did not err in precluding defendant from showing his videotape in slow motion or "freeze frame" format where defendant was permitted to play his tape to jury at regular speed and was allowed to utilize enlarged still photographs made from videotape. Moreover, videotape offered by prosecution was properly authenticated and admitted into evidence where witness for Commonwealth, who was driver of car attacked by protesters, viewed tape and testified it was accurate and fair depiction of events as they occurred on day of shoot. *Commonwealth v Hindi* (1993, Pa Super) 631 A2d 1341.

Footnotes

Footnote 28. *United States v Levine* (CA5 Fla) 546 F2d 658, 2 Media L R 1971, 2 Fed Rules Evid Serv 655, reh den (CA5 Fla) 551 F2d 687 and (disapproved on other grounds

by United States v Lane, 474 US 438, 88 L Ed 2d 814, 106 S Ct 725) as stated in United States v Bruun (CA7 Ill) 809 F2d 397; Saturn Mfg., Inc. v Williams Patent Crusher & Pulverizer Co. (CA8 Mo) 713 F2d 1347, 219 USPQ 533, 13 Fed Rules Evid Serv 1892, later proceeding (ED Mo) 598 F Supp 760, affd (CA FC) 767 F2d 882, 226 USPQ 515.

Footnote 29. Louis Vuitton S.A. v Spencer Handbags Corp. (CA2 NY) 765 F2d 966, 227 USPQ 377, 18 Fed Rules Evid Serv 837.

Footnote 30. McPherson Redevelopment Corp. v Watkins (Mo App) 782 SW2d 690.

The predicate for the admission a videotape is laid by having a witness testify that the picture exhibited on the screen accurately reproduces the objects or actions observed. Marlar v Humana Medical Corp. (Ala App) 611 So 2d 1089.

Footnote 31. McPherson Redevelopment Corp. v Watkins (Mo App) 782 SW2d 690.

In prosecution for shoplifting, videotape of defendant and accomplice shoplifting two suits was properly admitted where one of two store employees who watched defendant and accomplice take suits via closed-circuit television testified that videotape accurately depicted events which he had observed. People v Fondal (2d Dept) 154 App Div 2d 476, 546 NYS2d 26, app den 75 NY2d 770, 551 NYS2d 912, 551 NE2d 113.

Footnote 32. People v Bowley, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859.

Footnote 33. Wells v State (Miss) 604 So 2d 271.

Footnote 34. Paul Davis Systems, Inc. v Peth, 201 Ga App 734, 412 SE2d 279, 102-224 Fulton County D R 12B.

Footnote 35. State v Hewett, 86 Wash 2d 487, 545 P2d 1201.

Although best procedure would have been for court to preview videotape away from jury, tape of "sting" stolen property operation transaction, portions of which were inaudible and/or unintelligible, was properly admitted where tape was of sufficient quality to permit identification of persons filmed. Crews v State (Fla App D5) 442 So 2d 432.

§ 983 --Surveillance films

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs made from bank camera films are also sufficiently authenticated by foundation evidence sufficient to show the circumstances under which the film was activated and made, the chain of custody of the film, and the reliability of the process by which the photographs were made from the film. 36 While authentication by

eyewitnesses is preferable, it is not required where the standard of evidence sufficient to support a finding that the matter in question is what its proponent claims is satisfied by proper foundation evidence. 37 Not every frame from a roll of film need be authenticated by accurate depiction testimony where several frames have been so authenticated by eyewitnesses and the chain of custody of the film has been established. 38

§ 983 --Surveillance films [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Case authorities:

In prosecution for murder, burglary, and related offenses, videotape that was composite showing defendant clearly during attempt to use stolen credit card at department store and subsequent arrest was connected to surveillance videos taken at hotel at time of murder there and was properly admitted to show identity of defendant; it provided only reliable means for accurate comparison of defendant to suspect since jury was able to see defendant appeared to be wearing same eyeglasses, suit, and tie in store and hotel videos. Probative value outweighed prejudicial effect, even though store tapes showed evidence of other crime. *State v Loftin* (1996, App Div) 287 NJ Super 76, 670 A2d 557.

In sexual-assault prosecution, trial court did not abuse its discretion in admitting tape recording of assault (made in connection with elaborate security system being used on nearby premises) where recording showed defendant's use of force and coercion, which state had burden of proving. Fact that defendant did not dispute these elements was irrelevant. *State v Mora* (1993, RI) 618 A2d 1275.

Footnotes

Footnote 36. *United States v Clayton* (CA5 Ga) 643 F2d 1071.

Footnote 37. *United States v Clayton* (CA5 Ga) 643 F2d 1071 (witness testified that five prints used in one exhibit were made from the same surveillance film as photographs admitted as three other exhibits, which were identified by all bank employees at robbery scene as accurate depictions of the scene).

In a prosecution for forgery, the state established sufficient foundation for admission of videotapes documenting check transactions through testimony of assistant managers of bank branches where transactions occurred who described general procedure for monitoring bank transactions with video cameras. *Kindred v State* (Ind) 524 NE2d 279.

In prosecution for shoplifting, videotape of defendant and accomplice shoplifting two suits was properly admitted where one of two store employees who watched defendant and accomplice take suits via closed-circuit television testified that videotape accurately depicted events which he had observed. *People v Fondal* (2d Dept) 154 App Div 2d 476, 546 NYS2d 26, app den 75 NY2d 770, 551 NYS2d 912, 551 NE2d 113.

Footnote 38. *United States v Clayton* (CA5 Ga) 643 F2d 1071.

§ 984 Effect of time of making videotape; change of conditions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A videotape will be allowed as long as it shows a true representation of the scene at the time in question or any difference is explained. 39 In other words, the fact that a videotape is taken before or after an event does not make it inadmissible if the extent of the changes are explained so that the videotape as explained will give an understanding of the conditions that existed at the time in question. If the changes do not rob the video of probative value, the tape is admissible in evidence and any inaccuracies or unreliability can be brought out on cross-examination thus enabling the jury to give proper weight to the evidence. If, on the other hand, the changes are so substantial that the videotape lacks probative value, the video is properly excluded from evidence. 40

◆ Practice guide: The prudent course for an attorney introducing a videotape, which was not made at the time pertinent to the litigation, would be to use the authenticating witness to explain any distortions or misleading elements in the video before moving for its admission. 41

§ 984 ----Effect of time of making videotape; change of conditions [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Footnotes

Footnote 39. *Palmer v Farmers Ins. Exch.*, 233 Mont 515, 761 P2d 401, related proceeding (Mont) 861 P2d 895.

Footnote 40. *McPherson Redevelopment Corp. v Watkins* (Mo App) 782 SW2d 690.

Footnote 41. *McPherson Redevelopment Corp. v Watkins* (Mo App) 782 SW2d 690.

§ 985 Effect of editing

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A videotape's editing is a factor a trial court should consider when deciding whether to

admit a videotape. 42 Almost always, an edited tape necessarily raises issues as to every sequence portrayed as to whether the event shown is fairly representative of fact, after the editing process, and whether it is unduly inflammatory because of the manner of presentation. 43 However, the fact that motion-picture film has been edited does not necessarily render it inadmissible, provided its accuracy is established; the editing of the film affects the weight rather than the admissibility of the evidence. 44 Whether the party offering the film in evidence should be permitted to edit it to remove irrelevant matter is within the discretion of the trial court. 45 However, since motion pictures are susceptible to fabrication, the courts, as a general rule, exercise caution in determining whether they should be allowed as evidence. 46

§ 985 ----Effect of editing [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Footnotes

Footnote 42. *Roberts v Stevens Clinic Hosp., Inc.*, 176 W Va 492, 345 SE2d 791.

Footnote 43. *Bolstridge v Central Maine Power Co.* (DC Me) 621 F Supp 1202, 19 Fed Rules Evid Serv 891.

Footnote 44. *Pritchard v Downie* (CA8 Ark) 326 F2d 323; *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, *affd* 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, *reh den* 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379.

Footnote 45. *Harris v St. Louis Public Service Co.* (Mo) 270 SW2d 850.

Motion picture reel, which had been spliced and edited from several boxes of film taken over 10-year period, was admissible, where there was no evidence that films did not represent accurate reproduction or that they conveyed false impressions, and where opposing counsel was given opportunity to view any edited portions of film in defendants' possession and to supply any films that he felt were relevant. *Mercantile Bank v Phillips*, 260 Ark 129, 538 SW2d 277.

Footnote 46. *Morris v E. I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Owens v Hagenbeck-Wallace Shows Co.*, 58 RI 162, 192 A 158, 112 ALR 113, *reh den* 58 RI 268, 192 A 464, 112 ALR 124.

A portion of a motion-picture film showing a party who was injured in motor vehicle accident walking faster than she was actually moving at the time should not have been shown to the jury. *Utley v Heckinger*, 235 Ark 780, 362 SW2d 13.

c. Effect of Posing; Reconstruction of Scene or Events [986, 987]

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Whether or not photographs of an attempted reproduction of the scene of a crime or accident as recalled by witnesses, showing posed persons, dummies, and movable objects, are admissible to illustrate the contention of the party offering them as to the relative positions of such persons and movable objects so represented at the time and place of the crime or accident involved in the litigation under consideration, is a matter as to which the courts are not agreed. According to many courts, a staged photograph is admissible if the court makes a preliminary determination that the photograph depicts a correct likeness of the scene it purports to represent. 47 The proper test for the admission of reconstructed photographic scenes is whether the conditions are the same or substantially similar to the events depicted. 48 Subsequent photographic evidence of reconstructed events is admissible as long as a proper foundation is laid and any discrepancies between the reconstruction and the original event are explained. 49 Once the court determines that the photograph depicts a correct likeness of the scene, it purports to represent differences between the actual scene and the photograph which go to the weight of the evidence rather than its admissibility. 50 Thus any question as to whether photographs of a crime scene have been staged goes to the weight and not the admissibility of the photograph. 51 The question of what constitutes permissible variation depends on whether it tends to confuse or mislead the jury. 52

Some courts, however, have looked with disfavor upon the admission of posed photographs based upon recollection of position of persons or objects, 53 particularly where the evidence as to their accuracy was not satisfactory. 54 And it has been held that unless rigid necessity for a posed photograph has been shown, the courts should not permit posed pictures which simply portray a scene arranged to support the testimonial contention which the profferer seeks to advance. 55

A photograph 56 portraying a reproduction of the scene of a crime, by using posed persons, dummies, or other objects, is generally admissible in evidence, where the prosecution can support their entry by proof of their relevancy, voluntariness, and accuracy, through proper verification by a witness familiar with the scene. 57 Accordingly, posed photographs have been held admissible to show: the position of persons at the scene of a homicide; 58 a police officer in the same bed in which the victim was found; 59 the places where the victims fell indicated by white spots on the photograph; 60 the scene of a homicide showing the road, truck, and certain persons; 61 the scene of a homicide showing the victim's truck and his body at the time they were found by the coroner. 62 and the scene of a larceny showing a "bird's-eye view" of the store taken from security catwalk. 63

In a few cases, the courts have prohibited, or sustained the denial of, the defendant's introduction into evidence of pictures taken at the scene of the crime which were posed for the purpose of conveying the impression to the jury that the events in question occurred in the manner portrayed, in the absence of proof as to the existence of substantially identical conditions, or authentication by an impartial witness. 64 If the

purpose of the introduction of the pictures is to corroborate the testimony of an accomplice of the accused, the pictures must be authenticated by an independent source before they may be admitted into evidence. 65

The courts in some cases have sustained the introduction by the prosecution of photographs which portrayed the defendant committing the crime charged, although taken on the defendant's behalf, where the photographs served to rebut an affirmative contention of the defendant and the scene pictured did not create an unduly prejudicial effect, or where the very act of taking the photographs comprised one of the crimes charged. 66

The admissibility of posed X-rays is to be determined on a case-by-case basis. 67

§ 986 ----Photographs; X-rays [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Footnotes

Footnote 47. Lubanski v Coleco Industries, Inc. (CA1 Mass) 929 F2d 42, CCH Prod Liab Rep ¶ 12784, 32 Fed Rules Evid Serv 1093; Georgia S. & F. R. Co. v Perry (CA5 Fla) 326 F2d 921; People v Robbins (2nd Dist) 225 Cal App 2d 177, 37 Cal Rptr 244, cert den 382 US 1017, 15 L Ed 2d 531, 86 S Ct 631; Stiefel v Wandro, 246 Iowa 807, 68 NW2d 53; State v Ebelsheiser, 242 Iowa 49, 43 NW2d 706, 19 ALR2d 865; Hunt v Wooten, 238 NC 42, 76 SE2d 326; Bailey v Greeley General Warehouse Co. (App, Cuyahoga Co) 52 Ohio L Abs 469, 83 NE2d 244; Chesapeake & O. R. Co. v Kinzer, 206 Va 175, 142 SE2d 514.

In wrongful death action arising out of motor vehicle collision, trial court did not commit error in excluding photographs showing reconstruction of collision scene where there was testimony indicating that photographs might not have correctly portrayed scene as it existed on day of collision. Wright v Redman Mobile Homes, Inc. (CA5 Ga) 541 F2d 1096.

Annotation: Admissibility of posed photograph based on recollection of position of persons or movable objects, 19 ALR2d 877 § 3.

Practice References Authentication of posed photographs and changed conditions. 9 Am Jur Proof of Facts 147, Photographs as Evidence, Proof 8.

Footnote 48. State v Kendig, 233 Kan 890, 666 P2d 684, post-conviction proceeding (Kan App) 782 P2d 1259.

Photographs of attempted recreation of scene of burglary made six weeks after fact were properly excluded where expert photographer admitted that he had no knowledge of conditions which existed on premises regarding amount of overcast, dimness, or lightness and that results of photographs would be different if he had used different speed film and different shutter speed. State v Henggeler, 199 Neb 651, 260 NW2d 495.

Footnote 49. Beck v State, DOT & Public Facilities (Alaska) 837 P2d 105.

Footnote 50. Lubanski v Coleco Industries, Inc. (CA1 Mass) 929 F2d 42, CCH Prod Liab Rep ¶ 12784, 32 Fed Rules Evid Serv 1093; State v Kendig, 233 Kan 890, 666 P2d 684, post-conviction proceeding (Kan App) 782 P2d 1259.

Footnote 51. Williams v State (Okla Crim) 673 P2d 164.

Footnote 52. State v Kendig, 233 Kan 890, 666 P2d 684, post-conviction proceeding (Kan App) 782 P2d 1259.

Footnote 53. State v Wright (Mo App) 632 SW2d 296 (a posed photograph purporting to recreate an image seen by a witness should be subject to even greater scrutiny than a photograph of crime scene pictures).

A photographer cannot set up a scene, as pointed out by others, and photograph such an arrangement so as to indicate evidence drawn from deductions and conclusions of others. May v State (Miss) 199 So 2d 635.

Annotation: 19 ALR2d 877 § 2.

Footnote 54. Kaminski v Board of Wayne County Road Comrs., 370 Mich 389, 121 NW2d 830; Martin v State, 217 Miss 506, 64 So 2d 629; Garafola v Rosecliff Realty Co., 24 NJ Super 28, 93 A2d 608.

Where a photographer, not acquainted with the position of a vehicle at the time of the accident, posed the vehicle at the accident location 10 months after the accident, the photograph was properly excluded. Barnes v Scott, 35 Tenn App 135, 243 SW2d 133.

Annotation: 19 ALR2d 877 § 3.

Footnote 55. State v Oldham, 92 Idaho 124, 438 P2d 275; People v Crowe, 390 Ill 294, 61 NE2d 348; State v Ray, 43 NJ 19, 202 A2d 425; Massey v Ivester, 168 Okla 464, 33 P2d 765.

In a prosecution for the possession of marijuana cigarettes, there was no reversible error in rejecting a posed photograph, taken shortly before the trial, showing the defendant standing between two cars (that happened to be parked on the street) at about the point where it was claimed he threw down the cigarettes, for the purpose of showing that his hand could not have been seen by the officer. Miller v State (Sup) 50 Del 579, 137 A2d 388.

Annotation: 19 ALR2d 877 § 2.

Footnote 56. Avery v Procunier (CA5 Tex) 750 F2d 444; Tucker v United States (CA5 Fla) 279 F2d 62; United States v Oaxaca (CA9 Cal) 569 F2d 518, 2 Fed Rules Evid Serv 1268, 44 ALR Fed 903, cert den 439 US 926, 58 L Ed 2d 319, 99 S Ct 310; Wilson v State, 256 Ala 12, 53 So 2d 559; People v O'Brien (1st Dist) 61 Cal App 3d 766, 132 Cal Rptr 616; People v Sexton, 192 Colo 81, 555 P2d 1151; State v Fournier, 2 Conn Cir 588, 203 A2d 245; Grant v State (Fla) 171 So 2d 361, cert den 384 US 1014, 16 L Ed 2d 1035, 86 S Ct 1933; State v McPhie, 104 Idaho 652, 662 P2d 233; People v Lazenby,

403 Ill 95, 85 NE2d 660, cert den 344 US 842, 97 L Ed 655, 73 S Ct 56; Kelley v State, 231 Ind 671, 110 NE2d 860; State v Dillon (Iowa) 161 NW2d 738; State v Kendig, 233 Kan 890, 666 P2d 684, post-conviction proceeding (Kan App) 782 P2d 1259; State v Palmer, 227 La 691, 80 So 2d 374; Bagley v State, 232 Md 86, 192 A2d 53, 100 ALR2d 1249; Wall v State (Miss) 413 So 2d 1014, cert den 459 US 870, 74 L Ed 2d 129, 103 S Ct 155; State v Hill (Mo App) 539 SW2d 521 (photographs taken by police officers at scene of crime after bodies of two victims had been removed and replaced by paper silhouettes illustrating positions of bodies); State v Thompson, 59 NJ 396, 283 A2d 513; People v Sugden, 35 NY2d 453, 363 NYS2d 923, 323 NE2d 169; Williams v State (Okla Crim) 673 P2d 164; Langley v State, 90 Okla Crim 310, 213 P2d 886; Charles v State (Tex Crim) 424 SW2d 909, cert den 392 US 940, 20 L Ed 2d 1401, 88 S Ct 2319; Moore v Commonwealth, 186 Va 453, 42 SE2d 871.

Defendant in a rape prosecution was not prejudiced where the trial court allowed into evidence a photographic reconstruction of the alleged crime, since the pictures were admitted for the limited purpose of illustrating a witness's testimony. State v Patton, 45 NC App 676, 263 SE2d 796.

Footnote 57. Wooley v People, 148 Colo 392, 367 P2d 903 (ovrld on other grounds by Callis v People (Colo) 692 P2d 1045); Grant v State (Fla) 171 So 2d 361, cert den 384 US 1014, 16 L Ed 2d 1035, 86 S Ct 1933 (holding that moving and still pictures of the accused's entirely voluntary re-enactment of the murder charged were admissible, even though he was in prison attire at the time); State v Ebelsheiser, 242 Iowa 49, 43 NW2d 706, 19 ALR2d 865; State v Palmer, 227 La 691, 80 So 2d 374; Bagley v State, 232 Md 86, 192 A2d 53, 100 ALR2d 1249.

Annotation: Admissibility of evidence of accused's re-enactment of crime, 100 ALR2d 1257 § 5.

Footnote 58. Washington v State, 181 Ark 1011, 28 SW2d 1055; People v Sambrano, 33 Cal App 2d 200, 91 P2d 221; State v Ebelsheiser, 242 Iowa 49, 43 NW2d 706, 19 ALR2d 865.

In prosecution of husband for first-degree murder of wife, in which husband alleged that wife's gunshot wounds were self-inflicted, trial court did not abuse discretion in admitting photographs in which life model with physical characteristics similar to wife was used where purpose of photographs was to demonstrate how wife would have to have held gun in order to inflict her injuries, where expert who prepared photographs used crime scene photographs in order to duplicate scene, where photographs were relevant to question of whether wife's death was homicide or suicide, and where expertise of witness who prepared photographs was sufficiently established. State v Kendig, 233 Kan 890, 666 P2d 684, post-conviction proceeding (Kan App) 782 P2d 1259.

Footnote 59. People v Jackson, 74 Cal App 2d 22, 167 P2d 776.

Footnote 60. Hall v State, 78 Fla 420, 83 So 513, 8 ALR 1034.

Footnote 61. Rose v State, 184 Ga 451, 191 SE 426.

Footnote 62. State v Scott, 198 La 162, 3 So 2d 545.

Footnote 63. State v McPhie, 104 Idaho 652, 662 P2d 233.

Annotation: Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

Admissibility of evidence of accused's re-enactment of crime, 100 ALR2d 1257 § 5.

Footnote 64. Miller v State (Sup) 50 Del 579, 137 A2d 388; People v Crowe, 390 Ill 294, 61 NE2d 348.

Annotation: 100 ALR2d 1257 § 7.

Footnote 65. People v Bowley, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859.

Footnote 66. People v Batsford, 91 Cal App 2d 607, 205 P2d 731; State v Withers (Mo) 347 SW2d 146.

Annotation: 100 ALR2d 1257 § 8.

Footnote 67. Steinmeyer v Baptist Memorial Hospital (Mo App) 701 SW2d 471 (posed X-ray properly admitted to illustrate the difficulty of identifying damaged vertebrae).

§ 987 Motion pictures and videotapes

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Motion pictures and videotapes of reconstructed scenes or of posed demonstrations are admissible in evidence, provided the relevancy and accuracy of the films are adequately established 68 and any change of conditions is properly and adequately explained. 69 A videotaped reconstruction of a view of a scene prior to an accident must be performed under conditions substantially similar to the occurrence in issue. 70

When a film represents a staged reproduction of one party's version of the facts it should be examined with care because of the danger that the filmmaker's art may blur reality in the minds of the jury. 71 Where the motion pictures of reproduced or posed scenes are produced under circumstances materially different from those existing at the time in question so that relevancy is lacking, or if they are unnecessary or of no probative value, their exclusion is proper. 72 Further, a videotaped reenactment of a criminal offense may be rejected on the premise that the jurors impressions of television images of actors pose too great a danger of prejudice to be allowed. 73

§ 987 ----Motion pictures and videotapes [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Case authorities:

In wrongful death action arising out of intersection collision between car and train, district court did not err in introducing evidence of video animation prepared by plaintiffs' expert to demonstrate his theory of how accident occurred, i.e., that vehicle entered intersection when warning gates were up, and what would have happened if vehicle had attempted to drive around gates if they were down as defendant claimed, given cautionary instructions and opportunity for vigorous cross-examination by defendants; fact that verdict attributed some fault to driver indicated that jury did not fully accept animation scenes as recreation of accident. *Robinson v Missouri Pac. R.R.* (1994, CA10 Okla) 16 F3d 1083, 38 Fed Rules Evid Serv 1253.

District court in products liability action did not err in allowing jury to view videotape depicting collision between automobile and train, for limited purposes of demonstrating physical forces at play in such collision, where court specifically instructed jury not to consider videotape as reenactment of plaintiff's decedent's accident. *Estate of Montag by & Through Montag v Honda Motor Co.* (1996, CA10 Colo) 75 F3d 1414, CCH Prod Liab Rep ¶ 14473.

In murder prosecution, videotape made day after murder was properly admitted as reenactment of what witness saw on night of murder, even though defendant claimed scenes were inaccurate, where (1) video was offered to show jurors relative locations of victims' apartment, witness' apartment, rear stairway, and driveway of apartment building; (2) once witness confirmed that video accurately showed area where she was and where she saw assailants, court could conclude that tape was reasonable representation of physical layout of apartment building and witness' vantage point; (3) tape was not admitted to show lighting conditions, and therefore, fact that tape was made in daylight although murder occurred at night was not issue; and (4) defendant failed to demonstrate how inaccuracies could have made videotape misleading, since inaccuracies were either obvious to jurors or brought to their attention. *People v Rodrigues* (1994) 8 Cal 4th 1060, 36 Cal Rptr 2d 235, 885 P2d 1, 94 CDOS 9194, 94 Daily Journal DAR 17083, mod, reh den 9 Cal 4th 579a, 95 CDOS 1143, 95 Daily Journal DAR 2108 and mod, reh den (Feb 17, 1995).

In negligence and products-liability action against truck manufacturer based on accident in which truck overturned and burned, trial court did not abuse its discretion in disallowing playing of videotape depicting accident involving different type of truck; tape depicted dissimilar product (truck battery was located elsewhere) to prove different result (absence of fire after rupture of fuel tank) from similar occurrence. Further, court did allow testimony establishing same facts. *Browning v Paccar, Inc.* (1994) 214 Ga App 496, 448 SE2d 260, 94 Fulton County D R 2901.

In personal injury action resulting from plaintiff bus passenger's having been injured when bus door closed on plaintiff's purse while she was exiting bus, trial court erred in admitting videotape offered by defendant and showing different woman exiting bus in question several times, without incident; defendant failed to lay sufficient foundation to show that depiction on tape was substantially similar to accident. *Phiropoulos v Bi-State Dev. Agency* (1995, Mo App) 908 SW2d 712.

In prosecution for indecency with child, trial court erred in allowing jury to view

videotapes depicting male homosexual activity, without admitting items into evidence, where they were not related to events surrounding indecency charge. *Brown v State* (1994, Tex App El Paso) 880 SW2d 249.

In products liability action involving allegedly defective all-terrain vehicle (ATV), trial court did not err in admitting videotape of plaintiff's ATV where tape showed vehicle without a rider and was used by plaintiff's expert in making his calculations regarding speed and angle at which ATV's flip over. *Laing v American Honda Motor Co.* (1993, La App 2d Cir) 628 So 2d 196, cert den (La) 1994 La LEXIS 792.

Footnotes

Footnote 68. *Chicago G. W. R. Co. v Robinson* (CA8 Neb) 101 F2d 994, cert den 307 US 640, 83 L Ed 1520, 59 S Ct 1037; *Baker v State* (Fla) 241 So 2d 683; *Zolber v Winters*, 109 Idaho 824, 712 P2d 525; *Streit v Kestel* (Hamilton Co) 108 Ohio App 241, 9 Ohio Ops 2d 245, 161 NE2d 409, motion overr.

A motion picture of another person operating the machine on which the plaintiff lost three fingers was properly admitted in evidence, though taken some time after the plaintiff's accident, where there was testimony that the condition, manner of operation, and location of the machine were the same both before and after the accident as at the time the motion pictures were made. *Richardson v Missouri K. T. R. Co.* (Tex Civ App) 205 SW2d 819, writ dism w o j.

Footnote 69. *Zolber v Winters*, 109 Idaho 824, 712 P2d 525; *Brown v North American Mfg. Co.*, 176 Mont 98, 576 P2d 711 (ovrld on other grounds by *Zahrte v Sturm, Ruger & Co.*, 203 Mont 90, 661 P2d 17, CCH Prod Liab Rep ¶ 9552); *Howell v Missouri K. T. R. Co.* (Tex Civ App Eastland) 380 SW2d 842, writ ref n r e (Nov 4, 1964) (holding that although motion pictures were made at a time when it was not raining and when some of the possible obstructions in the area had been moved, the admission of the motion pictures in evidence was not error since they aided, rather than confused, the jury in deciding the issues, the dissimilarity of conditions being made abundantly clear by explanation).

A videotape film of a reenactment of a homicide was properly admitted over defendant's objection that the room did not have the same physical environment as the scene of the shooting where the reenactment occurred in an office of a state trooper's post and the defendant had agreed to participate in the videotaped representation of his account of the shooting. *Morgan v State* (Ala App) 518 So 2d 186.

Videotape of demonstrations and simulated explosion of bomb was admissible as reconstructed bomb was substantially similar to the device provided by the defendant and was relevant in the prosecution for solicitation to first-degree murder as evidence of the instrumentality to be used in the murder. *Loy v State*, 310 Ark 33, 832 SW2d 499, motion den (Ark) 1992 Ark LEXIS 654 and post-conviction proceeding (Ark) 1993 Ark LEXIS 130.

Footnote 70. *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154.

Footnote 71. *Pisel v Stamford Hospital*, 180 Conn 314, 430 A2d 1, 36 ALR4th 94.

In negligent homicide case in which car hit bicyclist, videotape offered by defense as attempted recreation of the event was properly excluded where videotape appeared to take sides, suggested that the sun blinded the defendant to approach of bicyclist, speeds of vehicles in videotape were fixed arbitrarily, defendant's left turn was not pictured as sharp enough to conform to other testimony, and certain circumstances testified to as bearing on the accident were not shown. *Commonwealth v Nadworny*, 30 Mass App 912, 566 NE2d 625, review den 409 Mass 1104, 569 NE2d 832.

Footnote 72. *Pursche v Atlas Scraper & Engineering Co.* (CA9 Cal) 300 F2d 467, 132 USPQ 104, 5 FR Serv 2d 275, cert den 371 US 911, 9 L Ed 2d 170, 83 S Ct 251, 135 USPQ 502, reh den 371 US 959, 9 L Ed 2d 507, 83 S Ct 499; *Fisher v Suko* (ND) 111 NW2d 360; *State v Clarke* (Tex Civ App Waco) 383 SW2d 953.

In a prosecution for the death of another resulting from a motor vehicle collision at an intersection, the trial court did not err in refusing to permit the defendant to introduce motion pictures to demonstrate the defendant's contention that a stop sign was obscured, where still photographs clearly demonstrated the visibility of the stop sign, the defendant at no time testified that the stop sign was obscured, and the motion pictures were made so far away from the stop sign involved that it was highly speculative that they pictured the true condition existing at the time. *Barry v State* (Okla Crim) 369 P2d 652.

In prosecution for murder, trial court did not err in refusing defendants' request to admit in evidence film reconstructing events of crime so as to impeach testimony of police officer, where actual events took place at night with portion of available illumination coming from nearby gas station, where jury had already viewed at night areas in question, where cinematographer making film worked in daylight and at one time apparently pointed camera into sun, where cinematographer's camera-lens nighttime portrayal of scene did not necessarily duplicate power-of-magnification capabilities of binoculars used by police surveying events, and where there was dispute as to accuracy of location of vehicle used by police surveillance team and there was no evidence that cars were of same height, width, and window space. *State v Tillinghast* (RI) 465 A2d 191.

Footnote 73. *Lopez v State* (Tex App Fort Worth) 651 SW2d 413, remanded on other grounds (Tex Crim) 664 SW2d 85, motion for rehearing on PDR granted (Nov 30, 1983) and on remand on other grounds (Tex App Fort Worth) 667 SW2d 624 (court reversed defendant's conviction for aggravated delivery of marijuana because the trial court admitted a videotaped recreation of the offense).

6. Maps, Diagrams, Drawings, and Models [988-995]

§ 988 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Maps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, 74 are admissible in evidence, to aid the jury in understanding the testimony of a witness. 75 The use of such items as testimony of the objects represented rests fundamentally upon the theory that they represent a method of pictorial communication of a qualified witness, which the witness may use instead of, or in addition to, some other method. 76 Evidence of this character is helpful in aiding the jury to visualize the objects and scenes in the action, 77 and the contention that such evidence is calculated to improperly influence the jury has generally been rejected. 78 Nonetheless, a distorted drawing so colorful so as to distract jury's attention should not be admitted. 79

Diagrammatic representations admittedly not of the specific object being testified about, but of such objects generically, or of one of the same species, are often employed in illustrating testimony relating to the subject of proof. 80

The practice in some states permits the use of a map, plat, or drawing in the examination of a witness, as a mere means of communicating his individual answers by illustration, without such item having been previously admitted in evidence in the technical sense. 81 If an objection is made to such use or admission, the ruling of the trial judge properly depends on the character of the representation or paper and the circumstances under which it is produced or offered. 82 According to some cases, however, the sketch or diagram must be in such form that it can be made part of the record. 83

The admission into evidence of a map, plat, diagram, or other drawing, 84 the manner and circumstances of its use, 85 and its delivery to the jury upon their retirement, 86 are largely within the discretion of the trial judge, and the trial judge's ruling will not be disturbed unless there has been an abuse of such discretion. 87 A map or diagram has been commonly allowed to illustrate a witness' testimony relating to the scene of a crime. 88

§ 988 ----Generally [SUPPLEMENT]

Practice Aids: Admissibility in evidence of composite picture or sketch produced by police to identify offender 23 ALR5th 672.

Case authorities:

Although exhibit used to calculate individual lost wages of employees laid off need not have been excluded as part of settlement between union and employer, its exclusion was harmless since employees failed to prove that union acted arbitrarily in implementing settlement and it would not have made difference in outcome since it did not distinguish between work that had been properly eliminated and work improperly transferred to other union. *Nida v Plant Protection Ass'n Nat'l* (1993, CA6 Ohio) 7 F3d 522, 144 BNA LRRM 2530, 126 CCH LC ¶ 10888.

In action arising out of boundary line dispute, trial court properly admitted plat prepared by surveyor, where, although it was true that plat did not meet technical requirements that would have made it presumptive evidence, plat was admitted for limited purpose of

illustrating other competent testimony regarding boundary, and although property owner contended that surveyor failed to determine and use "350' contour line" to which reference was made in deeds to both parcels of property, argument was not supported by record, which showed that surveyor found and relied upon contour line and plainly marked it on plat he prepared for trial. *Purcell v C. Goldstein & Sons* (1994) 264 Ga 443, 448 SE2d 174, 94 Fulton County D R 3050.

In prosecution for robbery of bar, admission of handdrawn map by detective of area bounded by restaurant, bar, and driveway was not erroneous, where map was admitted for purpose of showing location of streets, driveway, bar, and restaurant, detective testified that map was not drawn to scale, but that he had measured distance at two separate times using odometers of two unmarked police cars, and trial justice gave cautionary instruction. *State v Menard* (1996, RI) 669 A2d 536.

Footnotes

Footnote 74. § 990.

Footnote 75. *United States v Means* (CA5 Miss) 695 F2d 811, 12 Fed Rules Evid Serv 249, later proceeding (SD Miss) 695 F Supp 288; *United States v Feaster* (SD Ala) 341 F Supp 524, 72-2 USTC ¶ 9596, 30 AFTR 2d 72-5382, affd (CA5 Ala) 494 F2d 871, 74-1 USTC ¶ 9472, 34 AFTR 2d 74-5048, cert den 419 US 1036, 42 L Ed 2d 313, 95 S Ct 522; *United States v Howard* (CA7 Ill) 774 F2d 838, 19 Fed Rules Evid Serv 475; *United States v Williams* (CA8 Iowa) 657 F2d 199, 8 Fed Rules Evid Serv 1391; *United States v King* (CA8 Minn) 616 F2d 1034, 80-1 USTC ¶ 9251, 5 Fed Rules Evid Serv 961, 45 AFTR 2d 80-921, cert den 446 US 969, 64 L Ed 2d 829, 100 S Ct 2950; *Griffin v Gregory* (Ala) 355 So 2d 691; *Jones v State*, 33 Ala App 451, 34 So 2d 483; *Rutledge v State*, 41 Ariz 48, 15 P2d 255; *Marsh v Washburn*, 11 Conn App 447, 528 A2d 382; *Pittman v State*, 178 Ga App 693, 344 SE2d 511; *People v Barber* (3d Dist) 116 Ill App 3d 767, 72 Ill Dec 472, 452 NE2d 725; *Taylor v State* (Ind) 511 NE2d 1036; *Johnson v State* (Ind) 472 NE2d 892; *State v De Berg* (Iowa) 288 NW2d 348; *State v Seely*, 212 Kan 195, 510 P2d 115, 73 ALR3d 183; *Neeley v Commonwealth* (Ky) 591 SW2d 366; *State v Kent* (La App 1st Cir) 489 So 2d 1354; *Commonwealth v Shagoury*, 6 Mass App 584, 380 NE2d 708, cert den 440 US 962, 59 L Ed 2d 775, 99 S Ct 1506; *State v Schaffer* (Minn App) 378 NW2d 115; *Gandy v State* (Miss) 373 So 2d 1042; *Scheble v Missouri Clean Water Com.* (Mo App) 734 SW2d 541; *State v Rotella*, 196 Neb 741, 246 NW2d 74; *State v Dustin*, 122 NH 544, 446 A2d 1186; *State v James*, 321 NC 676, 365 SE2d 579; *State v Jackson*, 309 NC 26, 305 SE2d 703; *State v Cobbins*, 66 NC App 616, 311 SE2d 653; *Wofford v State* (Okla Crim) 581 P2d 905; *Commonwealth v Cullen*, 340 Pa Super 233, 489 A2d 929; *State v Hartman* (SD) 256 NW2d 131; *State v Delk* (Tenn Crim) 692 SW2d 431; *Cranfil v State* (Tex Crim) 525 SW2d 518; *State v Gollon* (App) 115 Wis 2d 592, 340 NW2d 912.

A map which was a single exhibit giving a graphic representation of the severe forest fire season cited by both parties in their arguments was properly admitted. *Jacobsen v State*, 236 Mont 91, 769 P2d 694.

For discussion of charts, maps, and diagrams used as demonstrative aids, but not put in evidence, see 75A Am Jur 2d, Trial §§ 505, 506.

Annotation: Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044.

Practice References 2 Am Jur Trials 669, Preparing and Using Maps.

3 Am Jur Trials 507, Preparing and Using Diagrams.

Maps and Diagrams. 5 Am Jur Trials 553, Introducing and Marking Exhibits § 18.

Footnote 76. *Sanders v Walden*, 214 Ark 523, 217 SW2d 357, 9 ALR2d 1040; *Kroeger v Safranek*, 161 Neb 182, 72 NW2d 831.

The trial court in a motor vehicle accident case did not err in admitting investigating officer's diagram showing position of automobiles, skid marks, and gouge marks in pavement, where officer was not allowed to testify as to location of point of impact and chart was merely a diagram of the accident scene. *State v Rotella*, 196 Neb 741, 246 NW2d 74.

Footnote 77. *Sanders v Walden*, 214 Ark 523, 217 SW2d 357, 9 ALR2d 1040; *Bunger v Grimm*, 142 Ga 448, 83 SE 200; *Kroeger v Safranek*, 161 Neb 182, 72 NW2d 831.

Footnote 78. *Howell v Baskins*, 213 Ark 665, 212 SW2d 353; *Harvey v State*, 175 Ga App 120, 332 SE2d 912; *Johnson v State (Ind)* 472 NE2d 892; *State v Prestridge (La)* 399 So 2d 564 (superseded by statute on other grounds as stated in *State v Green (La App 3d Cir)* 562 So 2d 35); *Commonwealth v Crawley*, 514 Pa 539, 526 A2d 334; *Bradshaw v Seattle*, 43 Wash 2d 766, 264 P2d 265, 42 ALR2d 800.

There was no abuse of discretion in the admission of an illustration of the murder victim's wounds with a sketched machete superimposed thereon or with a machete similar to the murder weapon. The illustration was not particularly inflammatory and was helpful and relevant on the issue of specific intent to kill in showing the exact location, nature, and extent of the injuries. *Commonwealth v O'Shea*, 523 Pa 384, 567 A2d 1023, cert den 498 US 881, 112 L Ed 2d 180, 111 S Ct 225.

Annotation: 9 ALR2d 1044 § 31.

Footnote 79. *Wichita v Jennings*, 199 Kan 621, 433 P2d 351.

Footnote 80. *Golden Eagle Farm Products, Inc. v Approved Dehydrating Co. (CA2 NY)* 147 F2d 359, cert den 325 US 868, 89 L Ed 1987, 65 S Ct 1407; *State v Murphy (Tenn Crim)* 678 SW2d 913.

Annotation: 9 ALR2d 1044 § 13.

Footnote 81. *Alabama Power Co. v Jones*, 212 Ala 206, 101 So 898; *State v White*, 171 NC 785, 87 SE 984.

◆ **Observation:** The use of a map, drawing, or plat for purposes of illustration must be distinguished from its admission in evidence. In the latter case, the instrument possesses within itself evidential characteristics tending to establish a particular fact, while in the former case the witness' testimony is the evidence and the map or diagram

is merely an aid to its understanding. Crocker v Lee, 261 Ala 439, 74 So 2d 429.

In a truck collision suit, a diagram of the scene of the collision, although not formally introduced in evidence, was held admissible because of the nature and character of its frequent use. Arrick v Fanning, 35 Ala App 409, 47 So 2d 708.

In murder prosecution, trial court did not err in permitting medical examiner testifying as expert witness to use, in presence of jury, a drawing prepared by previous witness but not introduced into evidence, in answering question as to whether presence of spatter of blood on gun was consistent "blow back blood" where all facts necessary to formation of medical examiner's opinion were already in evidence. Smith v Commonwealth, 239 Va 243, 389 SE2d 871, cert den 498 US 881, 112 L Ed 2d 177, 111 S Ct 221.

Annotation: 9 ALR2d 1044 § 14.

Footnote 82. Suburban Land Co. v Arlington, 219 Mass 539, 107 NE 432.

In prosecution for murder, trial court did not abuse discretion in excluding roughly drawn diagram of premises used by defendant's attorney for purpose of testing credibility of witness as to physical location of objects, buildings, and position of deceased and accused, where jury had benefit of diagram in understanding testimony of witness, and no prejudice resulted to defendant from exclusion of diagram as formal exhibit. Wilson v Commonwealth (Ky) 551 SW2d 569.

Annotation: 9 ALR2d 1044 § 16.

Footnote 83. People v Haggai, 332 Mich 467, 52 NW2d 186; State v Jones, 51 NM 141, 179 P2d 1001 (blackboard sketch disapproved).

Footnote 84. United States v Drougas (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by Cola v Reardon (CA1 Mass) 787 F2d 681) and (criticized on other grounds by United States v Lau (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881); Weiss v Johnson (CA2 NY) 206 F2d 350, 53-2 USTC ¶ 9541, 44 AFTR 284, cert den 346 US 924, 98 L Ed 417, 74 S Ct 310; Crocker v Lee, 261 Ala 439, 74 So 2d 429; McGovern v Board of County Com'rs, 115 Colo 347, 173 P2d 880; McCotter Transport Co. v Hall (Sup) 51 Del 473, 148 A2d 110; State ex rel. McKinney v Richardson, 76 Idaho 9, 277 P2d 272; Smith v Ohio Oil Co. (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680; Schweitzer v State (Ind) 531 NE2d 1386; Wilson v Commonwealth (Ky) 551 SW2d 569; Tan v Bosley, 216 Md 93, 139 A2d 727; Crawford v Meridian (Miss) 186 So 2d 250; Jacobsen v State, 236 Mont 91, 769 P2d 694; Chambers v Robert (App, Franklin Co) 81 Ohio L Abs 133, 160 NE2d 673, affd 170 Ohio St 202, 10 Ohio Ops 2d 136, 163 NE2d 165; Kelso v State, 96 Okla Crim 367, 255 P2d 284; Commonwealth v Crawley, 514 Pa 539, 526 A2d 334; State v Aarhus, 80 SD 569, 128 NW2d 881; State v Fears (Tenn Crim) 659 SW2d 370, cert den 465 US 1082, 79 L Ed 2d 768, 104 S Ct 1450 and (superseded by statute on other grounds as stated in State v Finney (Tenn Crim) LEXIS slip op); Anchor Motor Freight, Inc. v Paul, 198 Va 480, 95 SE2d 179; Blair v Preece, 180 W Va 501, 377 SE2d 493, cert den 492 US 923, 106 L Ed 2d 599, 109 S Ct 3253.

Annotation: 9 ALR2d 1044 § 16.

Footnote 85. *United States v Espinosa* (CA10 NM) 771 F2d 1382, 19 Fed Rules Evid Serv 860, cert den 474 US 1023, 88 L Ed 2d 561, 106 S Ct 579; *People v Jones* (2nd Dist) 205 Cal App 2d 460, 23 Cal Rptr 418; *McGovern v Board of County Com'rs*, 115 Colo 347, 173 P2d 880.

Sketch of collision scene made by investigating officer was inadmissible where it purported to identify accident scene and show position of automobiles and roadway at time of accident. *Gandy v State* (Miss) 355 So 2d 1096, appeal after remand (Miss) 373 So 2d 1042.

Annotation: 9 ALR2d 1044 § 15.

Footnote 86. *Baker v Zimmerman*, 179 Iowa 272, 161 NW 479.

In prosecution for sexual assault, trial court properly exercised its discretion in allowing jury to inspect sketch of girl on which child victim circled spot where defendant had touched her, since sketch would be helpful to jury because jurors probably could not see where victim pointed to on sketch when she testified. *State v Gollon* (App) 115 Wis 2d 592, 340 NW2d 912.

As to the propriety of allowing maps and plats, and summaries and charts into the jury room, see 75B Am Jur 2d, Trial §§ 1680, 1681.

Annotation: 9 ALR2d 1044 § 17.

Footnote 87. *United States v Means* (CA5 Miss) 695 F2d 811, 12 Fed Rules Evid Serv 249, later proceeding (SD Miss) 695 F Supp 288; *Wagner v State* (Ala App) 489 So 2d 623; *State v Mariano*, 152 Conn 85, 203 A2d 305, cert den 380 US 943, 13 L Ed 2d 962, 85 S Ct 1025; *State v Johnson*, 3 Hawaii App 472, 653 P2d 428; *People v Singletary* (1st Dist) 73 Ill App 3d 239, 29 Ill Dec 177, 391 NE2d 440; *Wissman v State* (Ind) 540 NE2d 1209 (among conflicting authorities noted on other grounds in *Farrell v State* (Ind App) 612 NE2d 124); *Schweitzer v State* (Ind) 531 NE2d 1386; *Taylor v State* (Ind) 511 NE2d 1036; *Hedges v State* (Ind) 443 NE2d 62; *King v State*, 251 Miss 161, 168 So 2d 637; *State v Baum* (Mo App) 714 SW2d 804; *Jacobsen v State*, 236 Mont 91, 769 P2d 694; *Harris v State* (Okla Crim) 383 P2d 39; *Garrett v State*, 95 Okla Crim 44, 239 P2d 439; *Commonwealth v Crawley*, 514 Pa 539, 526 A2d 334; *Commonwealth v Trudell*, 371 Pa Super 353, 538 A2d 53, app den 519 Pa 665, 548 A2d 255; *State v Hartman* (SD) 256 NW2d 131; *State v Aarhus*, 80 SD 569, 128 NW2d 881; *Cole v State* (Tenn Crim) 512 SW2d 598; *Casselberry v State* (Tex App El Paso) 631 SW2d 542, petition for discretionary review ref (May 26, 1982); *State v Chapman*, 84 Wash 2d 373, 526 P2d 64.

Trial court abused its discretion in sustaining defendant's objection to plaintiff's map, where maker of map testified that it was correct in all respects and represented measurements made by him on grounds and location of objects marked thereon, and where map, taken in conjunction with maker's testimony, obviously shed light on one of major issues between parties. *Sam Raine Constr. Co. v Lakeview Estates, Inc.* (Ala) 407 So 2d 542.

In an automobile accident case, it was reversible error for the court to admit in evidence

an inset to a map of the scene in the absence of evidence that red clay, the focal point of the inset, was part of the debris that resulted from the impact, and where the discovery of the clay was remote in time from the accident. *Gunn v Grice* (Miss) 204 So 2d 177.

Footnote 88. *Carter v Texas*, 177 US 442, 44 L Ed 839, 20 S Ct 687; *State v Russo*, 38 Conn Supp 426, 450 A2d 857; *Anthony v State* (Ind) 540 NE2d 602; *Underwood v State* (Ind) 535 NE2d 507, cert den 493 US 900, 107 L Ed 2d 206, 110 S Ct 257, reh den 493 US 985, 107 L Ed 2d 524, 110 S Ct 524; *Wooden v State* (Ind) 486 NE2d 441; *State v Bird*, 240 Kan 288, 729 P2d 1136, cert den 481 US 1055, 95 L Ed 2d 849, 107 S Ct 2194, later proceeding 244 Kan 248, 768 P2d 284; *Neeley v Commonwealth* (Ky) 591 SW2d 366; *State v Pleasant* (La App 1st Cir) 489 So 2d 1005, cert den (La) 493 So 2d 1218; *State v Jenkins* (La App 1st Cir) 476 So 2d 478; *State v Simpson* (La App 3d Cir) 464 So 2d 1104; *State v Woodbury* (Me) 403 A2d 1166; *Ashley v State* (Miss) 423 So 2d 1311; *State v Anderson* (Mo App) 555 SW2d 362; *State v Wong*, 125 NH 610, 486 A2d 262; *State v Aarhus*, 80 SD 569, 128 NW2d 881; *Casselberry v State* (Tex App El Paso) 631 SW2d 542, petition for discretionary review ref (May 26, 1982).

Police drawings of murder scene were properly admitted in wrongful death action where the drawing showed that the assailant was not a professional, was familiar with the business, knew the decedent, and that the robbery was not a motive. *Nachtsheim v Wartnick* (Minn App) 411 NW2d 882.

§ 989 By whom and when maps, drawings or diagrams can be made

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Maps, drawings, and diagrams may be made by the witness while testifying, either by his or her own hand, 89 or by directions to counsel, 90 or they may be made prior to the trial, either by the witness 91 or another. 92

◆ Practice guide: The questions of the accuracy, possible bias, or lack of knowledge of a person who made a drawing, and of the effect of the drawing upon a witness as leading, are open to opposing counsel in cross-examination and argument. 93

As the touchstone for admissibility of all exhibits is proper authentication, 94 and as long as the witness is able to testify that an exhibit used for illustrative purposes is a fair and accurate representation of the scene it portrays, it is irrelevant that the witness did not prepare the exhibit. 95

§ 989 ----By whom and when maps, drawings or diagrams can be made [SUPPLEMENT]

Case authorities:

In prosecution for child molestation of three young girls, trial court properly admitted

pictures which were drawn by two girls and reflected their sexual interaction with defendant, where although defendant claimed that pictures showed unindicted offenses, pictures were admissible as part of res gestae of charged offenses. *Johnson v State* (1994) 214 Ga App 319, 447 SE2d 663, 94 Fulton County D R 2677, reconsideration den (Jul 29, 1994).

Footnotes

Footnote 89. *United States v Rosenberg* (CA2 NY) 195 F2d 583, cert den 344 US 838, 97 L Ed 652, 73 S Ct 20, reh den 344 US 889, 97 L Ed 687, 73 S Ct 134 and cert den 344 US 838, 97 L Ed 652, 73 S Ct 21, reh den 344 US 889, 97 L Ed 687, 73 S Ct 180 and reh den 347 US 1021, 98 L Ed 1142, 74 S Ct 860 and motion den 355 US 860, 2 L Ed 2d 67, 78 S Ct 91; *Petrich v Hansen* (CA9 Wash) 204 F2d 261; *Leonard v State*, 197 Ga App 221, 398 SE2d 250; *State v Molina*, 47 Hawaii 391, 390 P2d 132 (sketch of "brass knuckles"); *State v Molina*, 47 Hawaii 391, 390 P2d 132; *People v Hamilton* (1st Dist) 80 Ill App 3d 794, 36 Ill Dec 179, 400 NE2d 599; *Smith v State* (Ind) 432 NE2d 1363; *Evans v Commonwealth*, 230 Ky 411, 19 SW2d 1091, 66 ALR 360; *State v Jenkins* (La App 1st Cir) 476 So 2d 478; *Whalen v Shivek*, 326 Mass 142, 93 NE2d 393, 33 ALR2d 74; *State v Lee*, 293 NC 570, 238 SE2d 299; *Barrett v State*, 190 Tenn 366, 229 SW2d 516, 18 ALR2d 789; *Casselberry v State* (Tex App El Paso) 631 SW2d 542, petition for discretionary review ref (May 26, 1982).

In prosecution for manslaughter, diagrams made by witnesses as they testified were admissible as depictions of scene of auto accident, as observed by witnesses, particularly where inferences to be drawn from position of vehicles was left to jury. *Gandy v State* (Miss) 373 So 2d 1042.

Annotation: Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044 § 3.

Footnote 90. *Henley v Lollar*, 35 Ala App 182, 44 So 2d 791; *People v Figueroa*, 134 Cal 159, 66 P 202.

Practice guide: It is not uncommon, and usually not improper, for counsel, in examining a witness, to make a sketch on a blackboard, elicit from the witness a statement that it is a fair representation of a scene or an event, and then from time to time refer to it in his examination by asking questions relative to distances or objects shown on the sketch, since in such cases the witness is merely using the drawing or photograph of it as a visual or graphic means of expressing himself or herself. *McCotter Transport Co. v Hall* (Sup) 51 Del 473, 148 A2d 110.

In a child molestation case in which the prosecuting attorney asked the victim to circle, on an anatomically correct diagram, the parts of her body with which defendant wanted her to touch him, diagram was properly admitted into evidence where it tended to show whether defendant sought to have victim place any part of her body in contact with his and, thus, was relevant to determination of whether defendant was guilty of child molestation. *Pittman v State*, 178 Ga App 693, 344 SE2d 511.

Annotation: 9 ALR2d 1044 § 4.

Footnote 91. *Bosarge v State*, 273 Ala 329, 139 So 2d 302; *Sanders v Walden*, 214 Ark 523, 217 SW2d 357, 9 ALR2d 1040; *Capone v Sloan*, 149 Conn 538, 182 A2d 414; *Lively v Thompson*, 88 Ga App 31, 75 SE2d 846; *McKee v Chase*, 73 Idaho 491, 253 P2d 787; *Anderson v Elliott*, 244 Iowa 670, 57 NW2d 792; *State v Becnel* (La App 5th Cir) 441 So 2d 339; *Emery v F. P. Asher, Jr., & Sons, Inc.*, 196 Md 1, 75 A2d 333; *King v State*, 251 Miss 161, 168 So 2d 637; *State v London*, 131 Mont 410, 310 P2d 571; *O'Neil v Union Nat. Life Ins. Co.*, 162 Neb 284, 75 NW2d 739; *Memory v Wells*, 242 NC 277, 87 SE2d 497; *Kohler v Stephens*, 74 ND 655, 24 NW2d 64; *Graham v Arall, Inc.*, 80 SD 13, 117 NW2d 491; *Banker v McLaughlin* (Tex Civ App) 200 SW2d 699, affd 146 Tex 434, 208 SW2d 843, 8 ALR2d 1231; *Moore v Warren*, 203 Va 117, 122 SE2d 879.

Sketches made by a witness to illustrate the type of drawings passed by him to one charged with espionage were admissible. *United States v Rosenberg* (CA2 NY) 195 F2d 583, cert den 344 US 838, 97 L Ed 652, 73 S Ct 20, reh den 344 US 889, 97 L Ed 687, 73 S Ct 134 and cert den 344 US 838, 97 L Ed 652, 73 S Ct 21, reh den 344 US 889, 97 L Ed 687, 73 S Ct 180 and reh den 347 US 1021, 98 L Ed 1142, 74 S Ct 860 and motion den 355 US 860, 2 L Ed 2d 67, 78 S Ct 91.

A United States Weather Bureau climatologist was properly allowed to testify, in explanation of a weather map prepared in his official capacity, as to the path followed by a tropical storm, despite the contention that both the map and the testimony based thereon were hearsay. *Beaty Shopping Center, Inc. v Monarch Ins. Co.* (CA4 SC) 315 F2d 467, 7 FR Serv 2d 900.

A plat with which a highway safety patrolman illustrated his testimony in an action arising out of an accident in an intersection was admissible where the officer described marks on the highway, the location of vehicles, and the manner of preparing the plat. *National Alfalfa Dehydrating & Milling Co. v Sorensen* (CA8 Neb) 220 F2d 858.

A map made by a surveyor, although not evidence independent of his testimony, is properly admissible in connection with his testimony for illustration and explanation of his evidence. *Blair v Preece*, 180 W Va 501, 377 SE2d 493, cert den 492 US 923, 106 L Ed 2d 599, 109 S Ct 3253.

Annotation: 9 ALR2d 1044 §§ 5-8.

Footnote 92. *State v Hooper*, 3 Conn Cir 143, 209 A2d 539; *Doby v State*, 173 Ga App 348, 326 SE2d 506, later proceeding 179 Ga App 285, 346 SE2d 89; *Ross v McLain* (Ky) 246 SW2d 1012 (drawing by counsel, in preparation for trial); *Arrowood v South Carolina & G. E. R. Co.*, 126 NC 629, 36 SE 151.

A diagram which is a fair representation of road conditions and skid marks at the scene of a collision between two trucks is admissible, no matter by whom the diagram was made, so long as the trial judge is satisfied that it is a correct portrayal of facts sought to be established. *Grayson v Williams* (CA10 Wyo) 256 F2d 61.

A witness may use a drawing made by another as a means of portraying to the jury facts which are within his own knowledge. *McKee v Chase*, 73 Idaho 491, 253 P2d 787.

The admission into evidence, in a proceeding for the condemnation of land in connection

with a flood control project, of a chart showing the average frequency of overflow of a river over a long period of years, being an exception to the hearsay rule, was proper. *J. M. Crom v County of Cameron* (Tex Civ App San Antonio) 310 SW2d 664.

Annotation: 9 ALR2d 1044 §§ 9-12.

Footnote 93. *Allely v Fickel*, 243 Iowa 105, 49 NW2d 544.

Footnote 94. For discussion of authentication requirements, generally, see §§ 945 et seq.

Footnote 95. *James v Mizell*, 289 Ala 84, 265 So 2d 866; *Allely v Fickel*, 243 Iowa 105, 49 NW2d 544; *State v James*, 321 NC 676, 365 SE2d 579; *King County v Farr*, 7 Wash App 600, 501 P2d 612, review den 81 Wash 2d 1009.

In prosecution for transportation and sale in interstate commerce of stolen soybean meal, trial court properly admitted into evidence diagram illustrating process for loading soybean meal at soybean storage facility at which theft occurred, where employee of facility testified at trial regarding his familiarity with operation at facility and accuracy of exhibit. *United States v Williams* (CA8 Iowa) 657 F2d 199, 8 Fed Rules Evid Serv 1391.

In a condemnation proceeding, admission of profile maps and construction plans which depicted appellant's property vis-a-vis highway expansion project was not error in spite of objection that evidence was not properly authenticated, where engineer responsible for preparation and planning of project testified that evidence in question was prepared under his supervision and was accurate depiction of information contained in field notes concerning project prepared and filed in his office, since his testimony was enough to establish correctness. *Panos v Department of Transp.*, 162 Ga App 53, 290 SE2d 295.

In prosecution for murder, court properly admitted diagram of crime scene prepared by evidence custodian and crime lab technician on basis of measurements provided by another officer. *State v Andrews* (La) 369 So 2d 1049.

Trial court did not abuse discretion in admitting diagram of floor plan of murder victim's home over defendant's objection that no proper foundation had been laid for exhibit and that there had been no showing that it was drawn to scale where, although person who prepared sketch did not testify, unequivocal testimony of witness, who was familiar with interior of home, that diagram was accurate was sufficient foundation to warrant admitting exhibit. *State v Thibodeau*, 89 SD 404, 233 NW2d 326.

§ 990 Authentication or verification

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a general rule, maps, plats and diagrams must be properly authenticated and shown to be accurate before they can be admitted. 96 The use or admission, to illustrate or embody testimony, of a diagrammatic representation not made in court is generally

conditioned upon some evidence that it is correct. 97 As long as the witness has personal knowledge of the subject matter and the diagram is accurate, drawings drafted out of court are admissible despite a hearsay objection because the in-court authentication of the drawing is the assertion permitting cross-examination of its accuracy, and this is sufficient to satisfy a hearsay objection. 98 Maps and diagrams used merely to illustrate testimony of witnesses are not subject to as strict proof of accuracy as those offered as independent evidence. 99 Ordinarily, testimony that the exhibit is a fair and accurate portrayal of the scene at the time of the incident is sufficient to satisfy this requirement. 1 A map or plat, even though kept in a public office and in general use there for reference, cannot be admitted as evidence without verification by proof of its correctness as to the matter for which it is sought to be used. 2 But the question of proper verification—that is, testimony that the diagrammatic representation is correct before exhibition to the trier of facts, or before admission in evidence—seldom arises in connection with a representation made by a witness while testifying, since the witness' act of making the map, drawing, or diagram under oath at the request of counsel is sufficient to show that the map, drawing, or diagram is a true representation so far as the witness can make it so. 3

If a surveyor's plat is offered to show the location of a boundary line, the testimony must be that the measurements given on the plat are actually correct. 4

In general, where a map, plat, or other drawing is to be offered as embodying in itself the knowledge of the witness, to which he, in this form, deposes, the verifying witness must be shown to have such personal knowledge of the facts as to qualify him to testify to their correct representation in the drawing, and it must be stated by him explicitly to be correct, or to be a true representation of what it purports to show. 5 If accuracy is not required in the testimony which the drawing is designed to express, accuracy is not required in the drawing itself, and it may be admitted though admittedly inaccurate in every detail, provided it is reasonably accurate and correct. 6 It need not represent all the area or objects that may be material to the issue. 7 If the portrayal is of objects of a fixed and permanent nature, and the interval of time between the event in issue and the making of the map, plat, or other drawing is reasonable in relation to that fact, there is a presumption of continuity of conditions which will support the admission or use of the drawing in the absence of evidence of change. 8 When the drawing of a place is made to include also movable objects therein, it is not usually admissible without testimony that those objects were there, in the places shown by the drawing, at the time of the event. 9

The question of the sufficiency of the verification or authentication of a diagrammatic representation is addressed to the discretion of the trial judge. 10 After a map, plat, or other drawing has been used by counsel on both sides, as in the nature of a "chalk," in examining their witnesses, it is usually no error for the judge to admit it in evidence. 11

§ 990 ----Authentication or verification [SUPPLEMENT]

Case authorities:

Hand-drawn sketch seized from defendant's kitchen during search of his residence was properly authenticated by agent who was familiar with layout of defendant's property based on his personal observation and it was plainly permissible for agent to liken map's marked locations and numbers to location and numbers of marijuana plants on property.

Footnotes

Footnote 96. *Mitchell v State* (Tex Crim) 650 SW2d 801, reh den (Jun 15, 1983) and cert den 464 US 1073, 79 L Ed 2d 221, 104 S Ct 985, reh den 465 US 1074, 79 L Ed 2d 755, 104 S Ct 1431 and habeas corpus granted (Tex Crim) 853 SW2d 1, reh den (Apr 14, 1993) and cert den (US) 126 L Ed 2d 142, 114 S Ct 183.

Footnote 97. *McGovern v Board of County Com'rs*, 115 Colo 347, 173 P2d 880; *Justen v Schaaf*, 175 Ill 45, 51 NE 695; *Jarbet Co. v Hengst* (Tex Civ App) 260 SW2d 88; *Owens v Seattle*, 49 Wash 2d 187, 299 P2d 560, 61 ALR2d 417.

A subdivision map is admissible if there is evidence of its genuineness and correctness from a reliable source. *Georgia Power Co. v Green*, 207 Ga 250, 61 SE2d 146.

In a prosecution for murder, it was prejudicial error to admit into evidence a scale drawing made by the state's witness, purporting to show the living room and entrance way of defendant's apartment, with lettering showing the location of 3 bullet holes, where there was no proof that the holes were related to the shooting of the victim or that they were in fact bullet holes, and there was no showing that if they were bullet holes, that the bullets were fired by defendant. *Stallings v State*, 250 Ind 256, 235 NE2d 488.

Any relevant map, by whomever made, may be presented to a witness familiar with the locality, and, upon his affirmative answer to the question whether it is correct, may be admitted. *Allely v Fickel*, 243 Iowa 105, 49 NW2d 544.

In prosecution for murder, diagram of murder scene drawn by detective investigating case and testifying for prosecution, though inaccurate, was admissible where inaccuracies were fully brought out before jury. *State v Woodbury* (Me) 403 A2d 1166.

In homicide prosecution, trial court did not err in allowing witness to testify with aid of diagram depicting scene of crime where witness testified diagram was fair and accurate representation of buildings around intersection where crime occurred and most of his testimony supported diagrams accuracy. *State v Oden*, 72 NC App 360, 324 SE2d 285, review den 313 NC 609, 330 SE2d 614.

In an action against a municipality by a motorist whose car went out of control and collided with an oncoming vehicle upon striking a body of accumulated water in the street, exhibits consisting of a graph and a horizontal map made from data collected by employees of the city's engineering department 3 months after the accident and showing the street levels at the place of the accident, though not objectionable as self-serving evidence, were held inadmissible as substantive evidence, in the absence of preliminary testimony as to the accuracy of the data by someone who could be cross-examined with respect thereto. *Owens v Seattle*, 49 Wash 2d 187, 299 P2d 560, 61 ALR2d 417.

As to authentication and identification requirements of writings, generally, see §§ 1032 et seq.

As to the use of charts, maps, diagrams, and other visual aids displayed at trial but not put

in evidence, see 75A Am Jur 2d, Trial §§ 505, 506.

Annotation: Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044 §§ 19-23.

Practice References 44 Am Jur POF2d 707, Foundation for admission of map, diagram, or chart.

Footnote 98. State v Furlough (Tenn Crim) 797 SW2d 631, related proceeding (Tenn Crim) 1993 Tenn Crim App LEXIS 769.

Hearsay and hearsay exceptions are discussed, generally, in §§ 658 et seq.

Footnote 99. Ross v McLain (Ky) 246 SW2d 1012.

Footnote 1. Thomas v Dixon, 88 NC App 337, 363 SE2d 209.

In action brought by decedent's family against state for negligent design and maintenance of highway ramp, a properly authenticated professional artist's sketch of the ramp as it existed at the time of the accident was admissible in evidence where the artist's sketch was based on the testimony of witnesses familiar with the highway ramp as it existed at the time of the injury where the highway ramp had been altered soon after the decedent's motorcycle accident and no photographs were available to plaintiff's counsel. Norris v State, 46 Wash App 822, 733 P2d 231.

Footnote 2. Chirac v Reinecker, 27 US 613, 2 Pet 613, 7 L Ed 538; Gilman Paper Co. v Newman (Fla App D1) 398 So 2d 887; Kearce v Maloy, 166 Ga 89, 142 SE 271; White v Edenton, 173 NC 32, 91 SE 601.

In litigation concerning subdivision's sewage system, state natural resources department's maps of subdivision were admissible as perceptual aids for the trier of fact where registered professional engineer testified that maps were drawn to scale by tracing all street and lot lines from official plats, and where engineer located all objects marked on maps by direct observations that they were placed exactly where they were located. Scheble v Missouri Clean Water Com. (Mo App) 734 SW2d 541.

For discussion of self-authenticating ancient documents, see § 1382.

Annotation: 9 ALR2d 1044 § 23.

Footnote 3. Patterson v State, 128 Fla 539, 175 So 730.

In prosecution for child molestation, there was sufficient foundation for introduction of drawing of pistol by 11-year-old victim while on the stand, where she described gun, when she saw it, and for how long, and also said drawing did not look exactly like the gun but was as accurate as she was able to draw it. Smith v State (Ind) 432 NE2d 1363.

In prosecution for robbery and assault, diagram depicting crime scene was admissible despite author's unwillingness to testify that the diagram "precisely" depicted scene. Wofford v State, 152 Ga App 739, 263 SE2d 707.

Annotation: 9 ALR2d 1044 § 18.

Footnote 4. *Chirac v Reinecker*, 27 US 613, 2 Pet 613, 7 L Ed 538; *Farrior v Payton*, 57 Hawaii 620, 562 P2d 779; *Gahan v Lymer*, 196 Wis 313, 220 NW 532.

Admission of map in ejectment suit involving boundary-line dispute was reversible error where map resulted from private survey for persons not involved in action, and drawn by surveyor who did not testify and who was not shown to be dead at the time of trial. *Golden v Rollins*, 266 Ala 640, 98 So 2d 409.

If a surveyor's map is offered by a party as direct evidence to show his title to land as bounded therein, or where the surveyor testifies that he located the boundaries from records in the assessor's office and by the fact that the party had paid taxes on the land as so bounded, it is error to admit the map, generally. *Banks v Watrous*, 134 Conn 592, 59 A2d 723, 4 ALR2d 286.

Trial court properly excluded certified copies of maps purporting to show boundary lines of defendants' property where no foundational witnesses were called to establish accuracy and correctness of boundary lines in question. *Farrior v Payton*, 57 Hawaii 620, 562 P2d 779.

While a recognized tolerance exists in surveying as well as in other particular and professional work, yet the scale of one inch to 800 feet is such that even the width of a line drawn upon the map must represent several feet, and, consequently, a map of a subdivision of land drawn on such scale is too uncertain to fix the location of the land in a suit involving title, such map should be excluded. *Heirs of Barrow v Champion Paper & Fibre Co.* (Tex Civ App) 327 SW2d 338, writ ref n r e (Jan 13, 1960) and reh'g of writ of error overr (Feb 17, 1960), error ref n r e.

Annotation: 9 ALR2d 1044 § 19.

Footnote 5. *Langran v Hodges*, 60 Ga App 567, 4 SE2d 489; *Loumparoff v Housing Authority of Dallas* (Tex Civ App) 261 SW2d 224.

In a suit by colporteurs challenging policy forbidding solicitation at sports complex, drawings and charts made by witness but based on unauthenticated videotapes recorded by another not under his supervision were inadmissible. *International Soc. for Krishna Consciousness, Inc. v New Jersey Sports & Exposition Authority* (DC NJ) 532 F Supp 1088, 10 Fed Rules Evid Serv 472, affd (CA3 NJ) 691 F2d 155.

In prosecution for manslaughter, trial court's error in permitting police officer to testify regarding sketch of crime scene that he drew based on information entirely provided to him by eyewitness was harmless, where sketch was already properly introduced through eyewitness, and where police officer's testimony was merely cumulative. *State v Randolph*, 190 Conn 576, 462 A2d 1011.

Maps, like photographs, may be shown to be correct by persons who know them to be correct even though they did not prepare the maps or make the photographs. *Crawford v Meridian* (Miss) 186 So 2d 250.

Annotation: 9 ALR2d 1044 § 21.

Footnote 6. *Arnold v Frigid Food Express Co.*, 9 Ariz App 472, 453 P2d 983; *Sanders v Walden*, 214 Ark 523, 217 SW2d 357, 9 ALR2d 1040; *McGovern v Board of County Com'rs*, 115 Colo 347, 173 P2d 880; *State v Aarhus*, 80 SD 569, 128 NW2d 881; *Hughes v State*, 126 Tenn 40, 148 SW 543; *Banker v McLaughlin* (Tex Civ App) 200 SW2d 699, affd 146 Tex 434, 208 SW2d 843, 8 ALR2d 1231.

In wrongful death action arising out of collision between decedent's automobile and defendant's train, hand-drawn diagram of accident site was admissible, where diagram assisted all eyewitnesses in their testimony and clarified events preceding the collision for the jury, and where the only discrepancy in diagram concerned length of decedent's skid marks, which was brought to the jury's attention. *Burke v Toledo, P. & W. R. Co.* (1st Dist) 148 Ill App 3d 208, 101 Ill Dec 358, 498 NE2d 682 (among conflicting authorities noted on other grounds in *Augenstein v Pulley* (5th Dist) 191 Ill App 3d 664, 138 Ill Dec 724, 547 NE2d 1345).

A rough sketch of a camp settlement area drawn by a sheriff to illustrate his testimony was admissible, although not drawn to scale and not correct in all particulars. *Baggett v State*, 219 Miss 583, 69 So 2d 389.

Annotation: 9 ALR2d 1044 § 30.

Footnote 7. *People v Carbona* (1st Dist) 27 Ill App 3d 988, 327 NE2d 546, cert den 424 US 914, 47 L Ed 2d 319, 96 S Ct 1114 and (criticized on other grounds by *People v Ambro* (2d Dist) 153 Ill App 3d 1, 106 Ill Dec 75, 505 NE2d 381) as stated in *People v Elder* (3d Dist) 219 Ill App 3d 223, 161 Ill Dec 872, 579 NE2d 420 (trial court properly allowed, for demonstrative purposes, use of diagram depicting floor plan of foyer area and staircase of victim's home where, with the aid of witness testimony before jury, defense counsel was able to insert subsequent markings on the diagram showing four items allegedly missing, counsel for both sides used the diagram in their presentations, jury had a complete view of the scene, and the diagram appeared complete in every detail).

Annotation: 9 ALR2d 1044 § 29.

Footnote 8. *Chastain v Brown*, 263 Ala 440, 82 So 2d 904; *Kepley v Kirk*, 191 NC 690, 132 SE 788.

Charts of accident scene prepared four and one-half years after two-vehicle collision were properly admitted. Any alleged discrepancy between the charts and the scene at the time of the accident went to weight of the evidence rather than its admissibility. *Richards v Everett* (La App 4th Cir) 513 So 2d 350, cert den (La) 514 So 2d 1182.

Annotation: 9 ALR2d 1044 § 24.

Footnote 9. *State v Smith*, 68 NJL 609, 54 A 411.

Annotation: 9 ALR2d 1044 § 24.

Footnote 10. *Moose v Vesey*, 225 Minn 64, 29 NW2d 649; *Babcock v Gray*, 165 Or 398, 107 P2d 846.

Annotation: 9 ALR2d 1044 § 27.

Footnote 11. Owensby v State (Ind) 467 NE2d 702, post-conviction proceeding (Ind App) 549 NE2d 407; State v Chin Ting (RI) 136 A 8; Collar v McMullin, 107 W Va 440, 148 SE 496, appeal after remand 107 W Va 645, 150 SE 2.

Annotation: 9 ALR2d 1044 § 28.

§ 991 Drawings and diagrams not to scale

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A drawing or diagram not drawn to scale may be admitted into evidence where the jury is informed that the drawing or diagram is not drawn to scale, 12 so long as the drawing or diagram is sufficiently explanatory or illustrative to be of potential help to the trier of fact. 13 However, if a sketch is likely to be misleading because it was not drawn to scale, it should be excluded. 14 Similarly, a map, lacking a scale, which is not relevant to the proposition for which it is offered, that is, to show that the defendant could not have traveled from the scene of the crime to the site of his arrest during the time elapsed, is properly excluded. 15

Footnotes

Footnote 12. Grayson v Williams (CA10 Wyo) 256 F2d 61; Fresno City Lines, Inc. v Herman, 97 Cal App 2d 366, 217 P2d 987; People v Barber (3d Dist) 116 Ill App 3d 767, 72 Ill Dec 472, 452 NE2d 725; Underwood v State (Ind) 535 NE2d 507, cert den 493 US 900, 107 L Ed 2d 206, 110 S Ct 257, reh den 493 US 985, 107 L Ed 2d 524, 110 S Ct 524; Patel v State (Ind) 533 NE2d 580; State v Bird, 240 Kan 288, 729 P2d 1136, cert den 481 US 1055, 95 L Ed 2d 849, 107 S Ct 2194, later proceeding 244 Kan 248, 768 P2d 284; State v Simpson (La App 3d Cir) 464 So 2d 1104; Vasseghi v McNutt (Mo App) 811 SW2d 453; State v Jackson (Mo App) 663 SW2d 312, later proceeding (Mo App) 729 SW2d 253; State v Aarhus, 80 SD 569, 128 NW2d 881; State v Delk (Tenn Crim) 692 SW2d 431; Barnes v Scott, 35 Tenn App 135, 243 SW2d 133.

Footnote 13. Wissman v State (Ind) 540 NE2d 1209 (among conflicting authorities noted on other grounds in Farrell v State (Ind App) 612 NE2d 124); Taylor v State (Ind) 511 NE2d 1036.

In prosecution for possession of marijuana with intent to distribute and conspiracy to distribute, trial court did not abuse its discretion in admitting hand-drawn, unscaled map depicting area in which airplane in which marijuana was transported landed, vehicles used to transport marijuana were found, and in which several defendants were arrested, where map's probative value was not substantially outweighed by danger of misleading jury or confusing issues, where prejudice was minimized as exhibit was merely used to supplement oral testimony, where map was not taken by jurors to jury room, and where

map was not alluded to in closing argument. *United States v Espinosa* (CA10 NM) 771 F2d 1382, 19 Fed Rules Evid Serv 860, cert den 474 US 1023, 88 L Ed 2d 561, 106 S Ct 579.

Trial court properly admitted drawing of gas station robbery scene, even though drawing had not been drawn to scale, where jury was informed that drawing was not prepared to scale, where two witnesses testified that the drawing was a fair representation of pertinent area, and where one witness said that the drawing aided him in describing the scene of the robbery. *Wooden v State* (Ind) 486 NE2d 441.

Footnote 14. *Walker v State*, 35 Ala App 167, 44 So 2d 798; *State v Becnel* (La App 5th Cir) 441 So 2d 339.

In an action for wrongful death and pain and suffering commenced after plaintiffs' decedent was killed in a motor vehicle accident, the trial court properly excluded a transparent overlay which purported to represent the distances at the accident scene, since the measurements were made by pacing the distances and did not present accurate figures for the jury's consideration. *Feldsberg v Nitschke*, 49 NY2d 636, 427 NYS2d 751, 404 NE2d 1293.

A sketch of an accident scene, obviously not drawn to scale and unsupported by testimony as to actual measurements taken, was hearsay and could not properly be admitted as independent evidence of the measurements, but in view of other evidence on the same point, it did not present such misleading information as to make its use prejudicial. *Krcmar v Reichert*, 26 Wis 2d 263, 131 NW2d 916.

Footnote 15. *Commonwealth v Hopkins*, 1 Mass App 858, 303 NE2d 739.

§ 992 Effect of markings, legends or other extraneous matter

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Properly verified or authenticated maps, plats, diagrams, and drawings are not rendered inadmissible in evidence because of marks, memoranda, legends, or other extraneous matter thereon, where the individual who made the marks or writings, or another witness familiar with the facts, explains them or testifies as to their correctness. 16 When objectionable marks or writings are excluded, expunged, or erased, the instrument becomes properly admissible. 17 But it is clear that where the person who made the marks or notations did so not from his own personal knowledge, but from what he heard from others, or if the one who made the marks or notations is not produced as a witness, the map, diagram, or drawing containing such marks or notations is inadmissible in evidence. 18

In some instances, although the admission in evidence of diagrams, maps, containing marks, legends, or other writings is error, it does not constitute such prejudicial error as will warrant reversal of the judgment or verdict of the lower court. 19 This is particularly true where the marks, legends, or other writings are of themselves harmless

Footnotes

Footnote 16. *Napier v Little*, 137 Ga 242, 73 SE 3 (plat); *State ex rel. State Highway Com. v Delisle* (Mo) 425 SW2d 938 (drawing); *Martin v Sloan* (Mo) 377 SW2d 252; *Allied Hotels, Ltd. v Barden* (Okla) 389 P2d 968 (map); *Spokane v Patterson*, 46 Wash 93, 89 P 402 (map).

In action for injuries sustained by employee when he fell on steps of boardinghouse furnished by his employer, where there was some dispute as to whether lights were on at the scene of the accident, it was not error for the court to receive map as exhibit without removing marks placed on the map for the purpose of indicating where lights were located. *Clark v Pennsylvania R. Co.* (CA2 NY) 328 F2d 591, 8 FR Serv 2d 16.33, Case 1, cert den 377 US 1006, 12 L Ed 2d 1054, 84 S Ct 1943.

Annotation: Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044 § 33.

Footnote 17. *Kleinschmidt v Scribner*, 54 Idaho 185, 30 P2d 362; *Allied Hotels, Ltd. v Barden* (Okla) 389 P2d 968; *Atlantic C. L. R. Co. v Dawes*, 103 SC 507, 88 SE 286.

Annotation: 9 ALR2d 1044 § 33.

Footnote 18. *Aronson v McDonald* (CA9 Alaska) 248 F2d 507; *Terminal Taxi Co. v Flynn*, 156 Conn 313, 240 A2d 881 (diagram of automobile accident scene was inadmissible where notation showing paths of vehicles after impact was made from what officer heard from others); *People v Olbrot* (1st Dist) 106 Ill App 3d 367, 62 Ill Dec 270, 435 NE2d 1242, habeas corpus proceeding (CA7 Ill) 756 F2d 1295; *Mitchell v Farr*, 32 Tenn App 200, 222 SW2d 218; *Prince v Flukinger* (Tex Civ App Texarkana) 381 SW2d 75 (holding that plats containing hearsay memoranda, and depicting lines and the location of markers and monuments based on conclusions or speculations, are inadmissible).

However, a chart or drawing made by the defendant by tracing over a plat prepared by an engineer was admissible for the purpose of clarifying testimony regarding the location of objects and places which otherwise would be difficult to locate and describe, and the fact that the subject matter of the notations thereon was hearsay to the witness did not render the exhibit objectionable where such notations were not directly or indirectly related to the subject matter of the action. *State v Vaughan*, 243 Ind 221, 184 NE2d 143.

A plan sheet prepared by a witness from information obtained from photographs and from a later examination of the site of an automobile collision is inadmissible as representing a witness' reconstruction of what had happened. *Smith v Hardy*, 228 SC 112, 88 SE2d 865.

Annotation: 9 ALR2d 1044 § 34.

Footnote 19. *State v Randolph*, 190 Conn 576, 462 A2d 1011; *Krcmar v Reichert*, 26 Wis 2d 263, 131 NW2d 916.

Footnote 20. *State v Estrella*, 257 Iowa 462, 133 NW2d 97; *Long v State* (Tex App Fort Worth) 649 SW2d 363, petition for discretionary review ref (Jul 13, 1983) and (superseded by statute on other grounds as stated in *Zwack v State* (Tex App Houston (14th Dist)) 757 SW2d 66).

The practice of permitting witnesses, in an action to recover for injuries sustained in an automobile collision, to mark a map drawn to scale with small circles and crosses in various colors to indicate their respective recollections as to the location of snowdrifts and of the open lane which had been cleared through the drift, and of permitting recorded testimony of this type to go to the jury, is frowned upon, but in view of the evidence produced in the instant case from both sides, such practice was not prejudicial. *Dibert v Ross Pattern & Foundry Development Co. (Champaign Co)* 105 Ohio App 264, 6 Ohio Ops 2d 73, 152 NE2d 369, motion overr.

§ 993 Models and replicas, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Models or replicas of an object or instrumentality or of a site or premises involved in a matter in issue are admissible in evidence in the trial of a civil 21 or criminal 22 action, in the discretion of the trial court, whose determination in such respect is reviewable only for manifest error or an abuse of discretion. 23 It has been said, however, that courts should approach the admission of models and things offered exclusively for illustrative purposes with wariness and circumspection, to the end that fact be not confused with fancy, and artistic interpretations push aside and take over the role of the truth of the matter in question. 24 Under some circumstances, the admissibility in evidence of particular models of objects or instrumentalities, or of sites or premises, may be denied. 25

Models and objects offered in evidence for purely illustrative purposes must not only be relevant and material in character to the ultimate fact sought to be demonstrated by their use, but, additionally, must be supported by proof showing such evidence to be substantially like the real thing and substantially similar in operation and function to the object or contrivance in issue. 26 A model or replica should be excluded where the jury is apt to be misled by it or by its use. 27 However, the fact that a model differs in some respects from the original will not prevent its admission in evidence or its use for purposes of demonstration or illustration, where such dissimilarity is clearly explained to the jury, or where the difference is not such as to mislead the jury. 28

A witness' use of a model of an object or instrumentality, or of a site or premises, involved in an accident or incident, for purposes of demonstration, without such model's being placed in evidence, has been recognized in a number of cases as proper, under the circumstances considered, 29 but under some circumstances, such use of a model has been denied. 30

Footnotes

Footnote 21. *New York Life Ins. Co. v Gamer* (CA9 Mont) 106 F2d 375, cert den 308 US 621, 84 L Ed 518, 60 S Ct 294; *Tucson v La Forge*, 8 Ariz App 413, 446 P2d 692; *Martindale v Mountain View* (1st Dist) 208 Cal App 2d 109, 25 Cal Rptr 148 (model of electrically operated signal used at railroad crossings); *Church v Headrick & Brown*, 101 Cal App 2d 396, 225 P2d 558; *Martinez v W.R. Grace Co.* (Colo App) 782 P2d 827 (scale model of speed bump); *Forest Preserve Dist. v Tabin* (1st Dist) 115 Ill App 2d 267, 253 NE2d 99; *Hogan v Cooke Pontiac Co.* (Ky) 346 SW2d 529 (action wherein the plaintiff contended that the accident was caused by defective brakes on the automobile purchased from the defendant); *Davis v New Jersey Zinc Co.*, 116 NJL 103, 182 A 850.

In an action to recover damages for setting fire to a house, models illustrating the use of the instrumentality which was claimed to have caused the fire were properly admitted in evidence. *Gerrard v Porcheddu*, 243 Ill App 562.

Where issue was defective design of three-piece helmet school furnished to student hockey player, which involved availability of more safely designed one piece helmet, there was sufficient evidence of safer helmet's availability during period involved to justify inference that school officials were aware, or should have been aware, of one-piece helmet, thus supporting admission of one-piece helmet in evidence. *Everett v Bucky Warren, Inc.*, 376 Mass 280, 380 NE2d 653.

When original item of real evidence is unavailable, a substantially similar item may be relevant and admissible, depending upon circumstances of the case. *State v Royball* (Utah) 710 P2d 168 (criticized on other grounds by *State v Wade* (Utah) 725 P2d 1316, 40 Utah Adv Rep 6).

Annotation: Eminent domain: admissibility of photographs or models of property condemned, 23 ALR3d 825 § 11.

Propriety, in trial of civil action, of use of model of object or instrumentality, or of site or premises, involved in the accident or incident, 69 ALR2d 424 § 3.

Practice References 3 Am Jur Trials 377, Preparing and Using Models.

– 5 Am Jur Trials 505, Mapping the Trial–Order of Proof § 39 (models and charts).

Footnote 22. *People v Dwyer*, 24 Cal App 2d 639, 75 P2d 653; *State v Roy*, 220 La 1017, 58 So 2d 323; *Commonwealth v Noxon*, 319 Mass 495, 66 NE2d 814; *State v Mitchell* (Mo App) 751 SW2d 65; *State v Willis*, 109 NC App 184, 426 SE2d 471, stay gr 333 NC 465, 428 SE2d 186 and writ den, stay dissolved, review den 333 NC 795, 431 SE2d 29; *State v Spirko*, 59 Ohio St 3d 1, 570 NE2d 229, reh den 60 Ohio St 3d 704, 573 NE2d 121 and cert den (US) 116 L Ed 2d 254, 112 S Ct 312; *State v Gray*, 64 Wash 2d 979, 395 P2d 490.

Styrofoam model of murder victim's head offered to show location and manner of wound was properly admitted into evidence. *Brown v State* (Fla App D1) 550 So 2d 527, 14 FLW 2457, review den (Fla) 560 So 2d 232; *State v Shaw* (Mo App) 839 SW2d 30; *Vollbaum v State* (Tex App Waco) 833 SW2d 652, petition for discretionary review ref (Oct 21, 1992).

Annotation: Propriety, at federal criminal trial, of allowing material, object, or model of object allegedly used in criminal act to be taken into jury room during deliberations, 62 ALR Fed 950.

Footnote 23. *In re Beverly Hills Fire Litigation* (CA6 Ky) 695 F2d 207, cert den 461 US 929, 77 L Ed 2d 300, 103 S Ct 2090; *Grandquest v Williams*, 273 Ala 140, 135 So 2d 391; *Kovrig v Vasquez*, 10 Ariz App 101, 456 P2d 947; *Martindale v Mountain View* (1st Dist) 208 Cal App 2d 109, 25 Cal Rptr 148; *Board Of County Comrs. v Vail Associates, Ltd.*, 171 Colo 381, 468 P2d 842; *Sellew v Middletown*, 121 Conn 331, 185 A 67; *Burke v Toledo, P. & W. R. Co.* (1st Dist) 148 Ill App 3d 208, 101 Ill Dec 358, 498 NE2d 682 (among conflicting authorities noted on other grounds in *Augenstein v Pulley* (5th Dist) 191 Ill App 3d 664, 138 Ill Dec 724, 547 NE2d 1345); *Ferguson v Chrysler Corp.* (La App 1st Cir) 292 So 2d 791; *Cooke v Walter Kidde & Co.*, 8 Mass App 902, 394 NE2d 968; *Tritt v Judd's Moving & Storage, Inc.* (Franklin Co) 62 Ohio App 3d 206, 574 NE2d 1178; *Lane v Hatfield*, 173 Or 79, 143 P2d 230; *Coastal Industrial Water Authority v Trinity Portland Cement Div., General Portland Cement Co.* (Tex Civ App Houston (1st Dist)) 523 SW2d 462, writ ref n r e (Dec 3, 1975) and reh'g of writ of error overr (Jan 14, 1976); *Brown v Quick Mix Co., Div. of Koehring Co.*, 75 Wash 2d 833, 454 P2d 205.

Trial court did not abuse discretion in admitting in evidence in wrongful death action a replica of "road closed" sign where original no longer existed, replica matched photographs of original sign, and judge gave jury cautionary instruction. *Cravens v County of Wood* (CA6 Ohio) 856 F2d 753, 26 Fed Rules Evid Serv 1035.

Annotation: 69 ALR2d 424 § 4.

Footnote 24. *State v Gray*, 64 Wash 2d 979, 395 P2d 490.

Footnote 25. *Shepard v General Motors Corp.* (CA1 NH) 423 F2d 406; *Young v Price*, 50 Hawaii 430, 50 Hawaii 459, 442 P2d 67; *Schuller v Hy-Vee Food Stores, Inc.* (Iowa) 328 NW2d 328, later proceeding (Iowa App) 407 NW2d 347; *Logan v Empire Dist. Electric Co.*, 99 Kan 381, 161 P 659; *Flynn v First Nat. Stores, Inc.*, 296 Mass 521, 6 NE2d 814; *Hadrian v Milwaukee E. R. & T. Co.*, 241 Wis 122, 1 NW2d 755, reh'g 241 Wis 131, 3 NW2d 700 and mod 241 Wis 131, 5 NW2d 765.

In wrongful death action brought against truck manufacturer, alleging that accident was caused by defective spacer block in truck's suspension, trial court did not err in refusing to allow introduction of model of manufacturer's redesigned spacer block to show that, had truck been equipped with redesigned block, the accident would not have occurred, where refusal did not affect any substantial rights because manufacturer conceded alternate design was practical and feasible, jury was informed of component's role in maintaining truck stability and was told that redesigned block could have been installed at time of accident. *Foster v Ford Motor Co.* (CA5 Tex) 621 F2d 715, CCH Prod Liab Rep ¶ 8740, 6 Fed Rules Evid Serv 306, 29 UCCRS 455.

In an action against the manufacturer of a vehicle for injuries sustained in an automobile accident, in which the plaintiff claimed the accident to have resulted from a defective right front A-frame, an abuse of discretion has been held not committed in rejecting the plaintiff's offer in evidence of a model of a right front A-frame constructed by an expert

witness for the plaintiff, photographs thereof, and analytical computations based upon tests of the model, where the testimony of the expert, based upon a photograph of the A-frame involved in the accident, was received in evidence. *Sedlack v General Motors Corp.* (CA7 Ill) 253 F2d 116, 69 ALR2d 420.

There is no abuse of discretion in excluding an exhibit like the one injuring the plaintiff in a personal injury action where the plaintiff had other means of conveying to the jury the same message. *Fuches v S.E.S. Co.* (Iowa App) 459 NW2d 642.

Model was properly excluded in products liability action. Appellant wanted to use the model to illustrate a possible alternative design which might have prevented the accident but that was not an issue before the jury, as the issue was whether the design in question was or was not defective. *Mackowick v Westinghouse Electric Corp.*, 373 Pa Super 434, 541 A2d 749, CCH Prod Liab Rep ¶ 11788, app gr 520 Pa 606, 553 A2d 969 and affd 525 Pa 52, 575 A2d 100, CCH Prod Liab Rep ¶ 12457.

Annotation: 69 ALR2d 424 § 3.

Footnote 26. *Lies v Farrell Lines, Inc.* (CA9 Cal) 641 F2d 765, 7 Fed Rules Evid Serv 1501; *Detroit Marine Engineering, Inc. v Maloy* (Fla App D1) 419 So 2d 687, CCH Prod Liab Rep ¶ 9367; *Provident Life & Acci. Ins. Co. v Everett*, 177 Okla 588, 61 P2d 679; *State v Gray*, 64 Wash 2d 979, 395 P2d 490.

In action against tenant for negligently causing fire in house, tenant's expert witness was permitted to use stove, similar to one that had been in house at time of fire, at trial, where owner had removed original stove from house for tests and had lost it and where tenant testified that stove used at trial was similar to one that had been in house. *State Farm Fire & Casualty Co. v Sawyer* (Ala) 522 So 2d 248.

Annotation: 69 ALR2d 424 § 5.

Practice References Foundation for admission of prepared model. 7 Am Jur Proof of Facts 601, Maps, Diagrams, and Models, Proof 2.

Footnote 27. *Barney v Rickard*, 157 US 352, 39 L Ed 730, 15 S Ct 642; *Lies v Farrell Lines, Inc.* (CA9 Cal) 641 F2d 765, 7 Fed Rules Evid Serv 1501; *State v Gray*, 64 Wash 2d 979, 395 P2d 490.

Annotation: 69 ALR2d 424 § 5.

Footnote 28. *Roland v Langlois* (CA7 Ill) 945 F2d 956, 34 Fed Rules Evid Serv 207; *Sterkel v Fruehauf Corp.* (CA8 Neb) 975 F2d 528, reh den (CA8) 1992 US App LEXIS 28377; *Jackson v International Harvester Co.*, 190 Ga App 765, 380 SE2d 306; *McMahon v Dubuque*, 107 Iowa 62, 77 NW 517.

In products liability action against tire manufacturer and other defendants after rear tire on driver's car "blew out," demolishing car and causing physical injuries to driver, trial court properly allowed manufacturer's expert witness to use cut-away sample of radial tire that was not the same as tire involved in accident, where only difference between tire involved in accident and sample tire used by expert was surface tread design, where manufacturer's expert testified that this difference was wholly irrelevant to content of his

testimony, and where driver's expert proposed that tire failed for reason unrelated to tread design. *Dawson v Mazda Motors of America, Inc.* (La App 1st Cir) 517 So 2d 283.

Where issue was defective design of three-piece helmet school furnished to student hockey player, which involved availability of more safely designed one-piece helmet, there was sufficient evidence of safer helmet's availability during period involved to justify inference that school officials were aware, or should have been aware, of one-piece helmet, thus supporting admission of model of one-piece helmet in evidence. *Everett v Bucky Warren, Inc.*, 376 Mass 280, 380 NE2d 653.

Annotation: 69 ALR2d 424 § 5.

Footnote 29. *Saldania v Atchison, T. & S. F. R. Co.* (CA7 Ill) 241 F2d 321; *Bloecher v Duerbeck*, 338 Mo 535, 92 SW2d 681; *Tarr v Keller Lumber & Constr. Co.*, 106 W Va 99, 144 SE 881, 60 ALR 570.

Annotation: 69 ALR2d 424 § 3[c].

Footnote 30. *Adskim v Oregon W. R. & N. Co.*, 134 Or 574, 294 P 605; *Chicago, R. I. & G. R. Co. v Harris* (Tex Civ App) 28 SW2d 611, writ diss.

Annotation: 69 ALR2d 424 § 3[c].

§ 994 --Objects similar to one used in crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A model, reproduction, or replica of an unavailable object is admissible in criminal cases so long as it fairly represents the object which it is offered to demonstrate and so long as it is relevant to a material issue. 31 When the actual weapon used in a crime is unavailable, a model or replica of the weapon may be admitted into evidence as a demonstrative aid, 32 but only if the exhibit constitutes an accurate and reasonable reproduction of the object involved. 33 Accordingly, an object which is not an exact replica of the original may be admissible if: (1) the original is not available, but if it were available, the original would be admissible; (2) it is relevant and material to the issue in controversy; (3) its probative value outweighs any inflammatory effect; and (4) the jury is instructed that the object is not the object used in the commission of the crime, and is to be considered by the jury solely as evidence that demonstrates or illustrates what the object used in the offense looks like. 34 However, when the substituted object is not an exact replica and it differs from the actual object in its distinguishing characteristics, the probative value of the non-exact weapon or instrumentality will be very slight. 35

Where the victim of a crime identifies a weapon as similar to that used in the commission of a crime, the weapon is admissible for illustrative purposes whether or not it is the identical weapon. 36

Footnotes

Footnote 31. *People v Seals* (1st Dist) 153 Ill App 3d 417, 106 Ill Dec 316, 505 NE2d 1107; *State v Mitchell* (Mo App) 751 SW2d 65; *State v Spirko*, 59 Ohio St 3d 1, 570 NE2d 229, reh den 60 Ohio St 3d 704, 573 NE2d 121 and cert den (US) 116 L Ed 2d 254, 112 S Ct 312.

Footnote 32. *State v Mitchell* (Mo App) 751 SW2d 65; *People v Felder* (1st Dept) 182 App Div 2d 495, 582 NYS2d 20, app den 80 NY2d 830, 587 NYS2d 915, 600 NE2d 642; *Commonwealth v O'Shea*, 523 Pa 384, 567 A2d 1023, cert den 498 US 881, 112 L Ed 2d 180, 111 S Ct 225.

Footnote 33. *Brown v State* (Fla App D1) 550 So 2d 527, 14 FLW 2457, review den (Fla) 560 So 2d 232.

Footnote 34. *Miskis v State* (Tex App Houston (14th Dist)) 756 SW2d 350, petition for discretionary review ref (Nov 9, 1988).

Footnote 35. *Simmons v State* (Tex Crim) 622 SW2d 111; *Miskis v State* (Tex App Houston (14th Dist)) 756 SW2d 350, petition for discretionary review ref (Nov 9, 1988).

As to the admissibility, relevancy, and materiality of articles taken from the accused, see 29 Am Jur 2d, Evidence §§ 288-290.

Footnote 36. *Cauley v State*, 206 Ga App 233, 424 SE2d 822; *State v Flores* (Minn) 418 NW2d 150, habeas corpus proceeding (CA8 Minn) 906 F2d 1300, cert den 498 US 945, 112 L Ed 2d 322, 111 S Ct 359; *State v Ward* (Minn App) 361 NW2d 418; *Owens v State* (Okla Crim) 747 P2d 959, on reh, vacated, in part, reaffirmed, in part (Okla Crim) 1988 Okla Crim App LEXIS 26.

It was not improper for the prosecution to admit, in first-degree murder prosecution, a gun similar to the one the defendant had purchased, even though the victim's body was never found and there was no direct evidence that victim was shot. *United States v Russell* (CA4 Va) 971 F2d 1098, 36 Fed Rules Evid Serv 642, cert den (US) 122 L Ed 2d 161, 113 S Ct 1013.

Upon a showing that the pistols were basically the same, a .25 caliber pistol was, for demonstrative purposes, admissible in a murder prosecution even though the actual murder weapon was a .22 caliber pistol. *Ferrell v State*, 305 Ark 511, 810 SW2d 29.

Instrumentalities used in, and articles illustrative of, a crime are discussed in §§ 937, 938.

§ 995 Medical or anatomical charts or models; skeleton

<p>View Entire Section Go to Parallel Reference Table</p>

Medical or anatomical charts showing a human skeleton or a part of a human body have been admissible, in the discretion of the trial court, in a number of cases. 37 The test as to the admissibility of medical and anatomical charts is their capacity to inform the jury, and where they are accurate and fully explained, they are admissible even though abstract. 38

Both in criminal 39 and civil 40 cases, where the problem of the admissibility of a skeleton or model of a human body or a part thereof has been presented, the view has generally been followed that if the jury or court will be enlightened by the introduction of such evidence, it is admissible within the trial court's discretion. Such a model, if otherwise relevant and admissible, may be received in evidence even though it may be of a shocking or gruesome character. 41 However, a model may be excluded on the ground that is cumulative of expert testimony. 42

Mannequins or models of the human body may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime, 43 and any discrepancy between the size of the mannequin or model and that of the victim can be pointed out to the jury. 44 In this regard, a trial court may properly allow a child witness to use an anatomically correct doll when describing and demonstrating how sexual abuse occurred, 45 since such a testimonial aid would likely assist the jury in understanding the witness' testimony. 46

Footnotes

Footnote 37. *Cavallaro v Welch*, 138 Conn 331, 84 A2d 279; *Lackey v State*, 215 Miss 57, 60 So 2d 503; *State v Ray*, 43 NJ 19, 202 A2d 425; *Commonwealth v Crawley*, 514 Pa 539, 526 A2d 334; *Stedman Fruit Co. v Smith* (Tex Civ App) 28 SW2d 622, writ dismissed, error dismissed.

If anatomical charts will aid the jury in following a doctor's testimony, a sound exercise of discretion would allow their use. *State v Ray*, 43 NJ 19, 202 A2d 425.

Practice References Preparing and using medical diagrams. 3 Am Jur Trials 507, Preparing and Using Diagrams §§ 14 et seq.

Use of blackboards and charts to show or compute damages. 5 Am Jur Trials 921, Showing Pain and Suffering §§ 60, 61.

Footnote 38. *Lackey v State*, 215 Miss 57, 60 So 2d 503.

Any inaccuracy as to the scale of a chart of the body of the deceased, which showed the location of wounds in the accused's chest and was prepared under the direction of the doctor who performed the autopsy, did not affect the admissibility of the chart in a murder prosecution. *Chapin v State*, 167 Tex Crim 390, 320 SW2d 341.

Footnote 39. *Ford v State*, 222 Ark 16, 257 SW2d 30; *State v Weston*, 155 Or 556, 64 P2d 536, 108 ALR 1402; *Marion v State* (Tex Crim) 387 SW2d 56.

Annotation: Propriety, in trial of criminal case, of use of skeleton or model of human body or part, 83 ALR2d 1097.

Footnote 40. *Christian v Hertz Corp.* (CA7 Ill) 313 F2d 174 (model of human spine); *First Federal Sav. & Loan Ass'n v Wylie* (Fla) 46 So 2d 396; *Flanagan v Redondo* (Ill App 1st Dist) 172 Ill Dec 407, 595 NE2d 1077; *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680.

Annotation: Propriety, in trial of civil action, of use of skeleton or model of human body or part, 58 ALR2d 689 et seq.

Practice References Foundation for admission of skeletal model. 7 Am Jur Proof of Facts 601, Maps, Diagrams, and Models, Proof 3.

—Preparing and using medical models. 3 Am Jur Trials 377, Preparing and Using Models §§ 56 et seq.

Footnote 41. *Smith v Ohio Oil Co.* (4th Dist) 10 Ill App 2d 67, 134 NE2d 526, 58 ALR2d 680 (holding, in an action for bodily injuries, that a ruling of the trial court, during the testimony of a medical witness, permitting the use of a plastic model of a human skeleton to assist the explanations, notwithstanding the defendant's objections on the ground that it was unnecessary to an understanding of the issues, was gruesome, and tended only to arouse emotion rather than explain anything, was not erroneous under the circumstances); *Carnine v Tibbetts*, 158 Or 21, 74 P2d 974 (skeleton); *State v Weston*, 155 Or 556, 64 P2d 536, 108 ALR 1402 (wherein the court refused to exclude a cast of the part of the deceased's forearm and hand which received shots fired by the defendant, there being a question as to whether the shots fired by the defendant contributed, with shots fired by another person, to hasten the death of the decedent; *Marion v State* (Tex Crim) 387 SW2d 56 (use of plastic skull, by pathologist, to clarify cause of death for jury).

Annotation: 83 ALR2d 1097.

58 ALR2d 689.

Footnote 42. *Wood v Browning-Ferris Industries of Georgia, Inc.*, 206 Ga App 707, 426 SE2d 186, 92 Fulton County D R 2903, cert den (Ga) 1993 Ga LEXIS 164 (model of back joints and disarticulation properly excluded as cumulative of expert testimony).

Footnote 43. *Ivey v State* (Ala App) 369 So 2d 1276, 3 ALR4th 367, cert den (Ala) 369 So 2d 1281; *Ford v State*, 222 Ark 16, 257 SW2d 30; *People v Cummings*, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, mod, reh den 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and time for gr or den reh extended (Jul 2, 1993) and cert den (US) 128 L Ed 2d 219 and cert den (US) 128 L Ed 2d 219; *People v Henenberg*, 55 Ill 2d 5, 302 NE2d 27, appeal after remand (2d Dist) 37 Ill App 3d 464, 346 NE2d 11; *People v Mitchell* (1st Dist) 78 Ill App 3d 458, 33 Ill Dec 823, 397 NE2d 156; *State v Paulsen* (Iowa) 265 NW2d 581; *State v Segura* (La App 3d Cir) 464 So 2d 1116, cert den (La) 468 So 2d 1203; *State v Philbrick* (Me) 436 A2d 844, appeal after remand (Me) 481 A2d 488, post-conviction proceeding (Me) 565 A2d 995 and (criticized on other grounds by *State v Hewes* (Me) 558 A2d 696); *State v Holmes* (Mo) 609 SW2d 132; *State v Weston*, 155 Or 556, 64 P2d 536, 108 ALR 1402; *Bryant v State* (Tenn Crim) 539 SW2d 816; *Simms v State* (Wyo) 492 P2d 516, cert den 409 US 886, 34 L Ed 2d 142, 93 S Ct 104.

Footnote 44. *People v Cummings*, 4 Cal 4th 1233, 18 Cal Rptr 2d 796, 850 P2d 1, 93 CDOS 3146, 93 Daily Journal DAR 5512, mod, reh den 5 Cal 4th 362a, 93 CDOS 4717, 93 Daily Journal DAR 8107 and time for gr or den reh extended (Jul 2, 1993) and cert den (US) 128 L Ed 2d 219 and cert den (US) 128 L Ed 2d 219.

Footnote 45. *State v Watson* (La App 1st Cir) 484 So 2d 870, cert den (La) 488 So 2d 1018; *Williams v State* (Miss) 539 So 2d 1049; *People v McGuire* (4th Dept) 152 App Div 2d 945, 543 NYS2d 822, app den 74 NY2d 849, 546 NYS2d 1014, 546 NE2d 197; *State v Fletcher*, 322 NC 415, 368 SE2d 633; *State v Hewett*, 93 NC App 1, 376 SE2d 467; *State v Hart*, 57 Ohio App 3d 4, 566 NE2d 174, motion overr 40 Ohio St 3d 710, 534 NE2d 849; *Reyna v State* (Tex App Corpus Christi) 797 SW2d 189; *Vera v State* (Tex App San Antonio) 709 SW2d 681, petition for discretionary review ref (May 13, 1987).

Footnote 46. *State v Eggert* (Minn App) 358 NW2d 156.

But see *People v Fletcher* (1st Dist) 156 Ill App 3d 405, 108 Ill Dec 929, 509 NE2d 625, app den (Ill) 113 Ill Dec 307, 515 NE2d 116, where it was error for prosecutor, in closing argument, to recount victim's testimony while sitting in witness chair and using anatomical dolls victim had used while she testified.

7. Experiments, Tests, Demonstrations and Polls [996-1022]

a. In General [996-1001]

§ 996 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Experiments, demonstrations, and tests often serve to put the jury in the possession of knowledge, important to their determination of the issues, which they could not readily or accurately obtain from the testimony of the witnesses, and which, often, may afford evidence more satisfactory or reliable than oral testimony. 47 The courts, while not favoring the making of tests and experiments by the jury itself, 48 now very generally permit relevant experiments, demonstrations, or tests by others to be performed in court in the presence of the jury, 49 or permit evidence to be given of experiments, demonstrations, or tests performed out of court, 50 when they are made under similar conditions and like circumstances to those existing in the case at issue, 51 for the purpose of aiding the trier of facts, in either a criminal 52 or civil 53 case, in determining the issues of fact. Additionally, under proper circumstances, the results of a survey or poll of public or consumers' opinion, recognition, preference, or the like, is admissible. 54

Experimental evidence is subject to exclusion at the trial court's discretion if its prejudicial effect outweighs its probative value. 55 The evidence of the experiment must not consume undue time, confuse the issues, or mislead the jury, and such a test is merely a circumstance to be considered in connection with other evidence in the case. 56 Thus, the ultimate test for the admissibility of an experiment as evidence is whether it tends to enlighten the jury and enable the jurors to more intelligently consider the issues presented. 57 It has been held that evidence of the results of experiments is to be used only for the purpose of evidencing the tendency, capacity, or quality of a certain state of facts to produce a certain result, 58 and that it cannot be used for the purpose of showing that by the doing of certain acts, a result was accomplished. 59 The results of an experiment or test are not admissible where the experiment or test is inconclusive or raises a number of collateral issues. 60

The usual experiment consists of the arranging of conditions approximating those attendant upon the fact in issue and observing data emanating from such arranged conditions, the sole purpose of such an experiment being to obtain information for use in a particular lawsuit. 61 However, with respect to experiments or tests which have no relation to any lawsuit and which are made for the sole purpose of obtaining scientific knowledge, since this type of evidence is free from the taint of interest or bias that might accompany the usual experiment evidence, greater latitude should be shown in admitting such evidence. 62

The performance of experiments, demonstrations, or tests rests in the sound discretion of the trial court, and this discretion will not be interfered with on appeal unless it is apparent that it has been abused. 63 As a concomitant of this principle, the question of the similarity of conditions prevailing at the time of the experiment or test to those which prevailed at the time of the occurrence in question is one that lies within the sound discretion of the trial court, to be decided in the light of all the surrounding facts and circumstances. 64 Although tests and demonstrations in the courtroom are not lightly to be rejected when they would play a positive and helpful role in the ascertainment of truth, courts must be alert to the danger that, when ill-designed or not properly relevant to the point at issue, they will divert or otherwise prejudice the purposes of the trial; when there is such a threat, the trial court itself must decide, in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice. 65 Accordingly, permission to perform or to give evidence of the results of such an experiment or test cannot be demanded as a matter of right. 66

§ 996 ----Generally [SUPPLEMENT]

Case authorities:

Although court's authority to call and examine witnesses includes authority to order demonstrations, court abandoned its proper role and assumed role of advocate when it refused to order demonstration of whether it was possible for arrestee to hit head on window inside police car without first having his law clerk conduct test in car. *Espinoza v Dunn* (1994, CA9 Cal) 38 F3d 462, 94 CDOS 7982, 94 Daily Journal DAR 14777.

Footnotes

Footnote 47. *Lincoln Taxi Co. v Rice* (Ky) 251 SW2d 867; *Tuite v Union Pacific Stage, Inc.*, 204 Or 565, 284 P2d 333; *Sewell v MacRae*, 52 Wash 2d 103, 323 P2d 236.

Footnote 48. 75B Am Jur 2d, Trial §§ 1556, 1557.

Footnote 49. § 997.

Footnote 50. § 998.

Footnote 51. § 1003.

Footnote 52. *Greenwell v Commonwealth* (Ky) 317 SW2d 859; *State v Truster* (Mo) 334 SW2d 104; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *State v Blair*, 147 Mont 87, 410 P2d 450; *State v Phillips*, 228 NC 595, 46 SE2d 720.

Footnote 53. *Moore v Chesapeake & O. R. Co.* (SD W Va) 493 F Supp 1252, affd (CA4 W Va) 649 F2d 1004; *General Acci. Fire & Life Assur. Corp. v Zapel* (CA5 La) 231 F2d 917; *Hackman v Beckwith*, 245 Iowa 791, 64 NW2d 275; *Hurly v Star Transfer Co.*, 141 Mont 176, 376 P2d 504; *Fisher v Suko* (ND) 111 NW2d 360; *Tuite v Union Pacific Stage, Inc.*, 204 Or 565, 284 P2d 333; *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53; *Sewell v MacRae*, 52 Wash 2d 103, 323 P2d 236.

Practice References 3 Am Jur Trials 427, Preparing and Using Experimental Evidence.

Footnote 54. § 1015.

Footnote 55. *Beck v State, DOT & Public Facilities* (Alaska) 837 P2d 105.

Footnote 56. *DiRosario v Havens* (2nd Dist) 196 Cal App 3d 1224, 242 Cal Rptr 423.

For general discussion of the exclusion of evidence on grounds of prejudice, confusion, or waste of time, see §§ 324 et seq.

Footnote 57. *Jenkins v Snohomish County Public Utility Dist. No. 1*, 105 Wash 2d 99, 713 P2d 79.

Footnote 58. *Hammons v Schrunk*, 209 Or 127, 305 P2d 405.

Footnote 59. *Hammons v Schrunk*, 209 Or 127, 305 P2d 405, wherein the court rejected evidence offered in the nature of an experiment to prove that with reasonable diligence the service of a summons could have been made.

Footnote 60. *Sewell v MacRae*, 52 Wash 2d 103, 323 P2d 236.

Footnote 61. *Foster v Agri-Chem, Inc.*, 235 Or 570, 385 P2d 184.

Footnote 62. *Foster v Agri-Chem, Inc.*, 235 Or 570, 385 P2d 184.

Footnote 63. *Virginian R. Co. v Armentrout* (CA4 W Va) 166 F2d 400, 4 ALR2d 1064; *Atkins v United States* (CA5 Fla) 240 F2d 849, cert den 353 US 974, 1 L Ed 2d 1136, 77 S Ct 1058, reh den 354 US 943, 1 L Ed 2d 1541, 77 S Ct 1396; *Millers' Nat. Ins. Co. v Wichita Flour Mills Co.* (CA10 Kan) 257 F2d 93, 1 FR Serv 2d 261, 76 ALR2d 385; *Odell v Frueh* (2nd Dist) 146 Cal App 2d 504, 304 P2d 45, 76 ALR2d 345; *People v Skinner*, 123 Cal App 2d 741, 267 P2d 875; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Marko v Stop & Shop, Inc.*, 169 Conn 550, 364 A2d 217; *Randall v State*, 73 Ga App 354, 36 SE2d 450, cert den 329 US 749, 91 L Ed 645, 67 S Ct 72; *Monlux v General Motors Corp.*, 68 Hawaii 358, 714 P2d 930; *State v Copenbarger*, 52 Idaho 441, 16 P2d 383; *Hardman v Helene Curtis Industries, Inc.* (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033; *Schlabach v State* (Ind App) 459 NE2d 740; *Hackman v Beckwith*, 245 Iowa 791, 64 NW2d 275; *Malone v New York Life Ins. Co.*, 148 Kan 555, 83 P2d 639; *State v De Zeler*, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137; *Council v Duprel*, 250 Miss 269, 165 So 2d 134; *State v Jones* (Mo) 749 SW2d 356, cert den 488 US 871, 102 L Ed 2d 155, 109 S Ct 186, post-conviction proceeding (Mo) 784 SW2d 789, cert den 498 US 881, 112 L Ed 2d 175, 111 S Ct 215; *Keith v Jos. G. Schmersahl Co. (Mo)* 371 SW2d 334; *State v Keller*, 126 Mont 142, 246 P2d 817; *Crecelius v Gamble-Skogmo, Inc.*, 144 Neb 394, 13 NW2d 627; *State v Gear*, 115 NJ Super 151, 278 A2d 511, certif den 59 NJ 270, 281 A2d 532; *Hodgkins v Christopher*, 58 NM 637, 274 P2d 153; *People v Koullias* (2d Dept) 96 App Div 2d 869, 465 NYS2d 748; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Larson v Meyer* (ND) 135 NW2d 145 (ovrld on other grounds by *Hopkins v McBane* (ND) 427 NW2d 85, 77 ALR4th 391); *Fisher v Suko* (ND) 111 NW2d 360; *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154; *Curtis & Gartside Co. v Pribyl*, 38 Okla 511, 134 P 71; *Foster v Agri-Chem, Inc.*, 235 Or 570, 385 P2d 184; *Tuite v Union Pacific Stage, Inc.*, 204 Or 565, 284 P2d 333; *Beasley v Ford Motor Co.*, 237 SC 506, 117 SE2d 863; *Ferrell v Commonwealth*, 177 Va 861, 14 SE2d 293; *Funderburk v Commonwealth*, 6 Va App 334, 368 SE2d 290; *American Products Co. v Villwock*, 7 Wash 2d 246, 109 P2d 570, 132 ALR 1010; *State v Hardway*, 182 W Va 1, 385 SE2d 62.

Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152 § 2.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 § 2.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536 § 2[a].

Admissibility of evidence as to manner or ease of firing gun, in civil action involving issue of accidental death or suicide, 63 ALR2d 1150.

Footnote 64. § 1004.

Footnote 65. *People v Acevedo*, 40 NY2d 701, 389 NYS2d 811, 358 NE2d 495.

Footnote 66. *Spires v State*, 50 Fla 121, 39 So 181 (criticized on other grounds by *Johnson v State* (Fla) 442 So 2d 193) as stated in *Rindfleisch v Carnival Cruise Lines, Inc.* (Fla App D3) 498 So 2d 488, 11 FLW 2322, 1987 AMC 944, review den (Fla) 508 So 2d 15.

§ 997 In presence of jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At the discretion of the trial judge, 67 the courts generally permit a party to make or perform an experiment, demonstration, or test in open court before the jury when it will prove, tend to prove, or throw light upon, the issues in the case on trial, 68 provided such experiments or tests are made under similar conditions and like circumstances to those existing in the case at issue. 69 Thus, jurors may be shown the method of taking and identifying fingerprints; 70 the similarities between genuine and disputed writings; 71 or the jurors may be allowed to examine under a microscope the markings on bullets, in order to identify the gun from which the bullets were fired. 72

Tests and experiments in the courtroom may be used in order to demonstrate the trustworthiness and competency of an expert. 73

Footnotes

Footnote 67. *People v Chapman* (4th Dist) 207 Cal App 2d 557, 24 Cal Rptr 568; *Green v State*, 223 Ind 614, 63 NE2d 292; *Commonwealth v Burke*, 344 Mass 243, 182 NE2d 127; *State v De Zeler*, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137; *State v Jacobson*, 348 Mo 258, 152 SW2d 1061, 138 ALR 1154; *State v Nichols*, 236 Or 521, 388 P2d 739; *Commonwealth v Morgan*, 358 Pa 607, 58 A2d 330; *Ferrell v Commonwealth*, 177 Va 861, 14 SE2d 293; *State v Roby*, 43 Wash 2d 652, 263 P2d 273; *State v Taft*, 144 W Va 704, 110 SE2d 727.

Footnote 68. *People v Skinner*, 123 Cal App 2d 741, 267 P2d 875; *People v Sturman*, 56 Cal App 2d 173, 132 P2d 504; *People v Black*, 45 Cal App 2d 87, 113 P2d 746, app dismd 315 US 782, 86 L Ed 1189, 62 S Ct 634, reh den 315 US 828, 86 L Ed 1223, 62 S Ct 796; *State v Marcus*, 240 Iowa 116, 34 NW2d 179; *Tackman v Brotherhood of American Yeoman*, 132 Iowa 64, 106 NW 350; *Hogan v Cooke Pontiac Co. (Ky)* 346 SW2d 529; *O'Doherty v Catonsville Plumbing & Heating Co.*, 269 Md 371, 306 A2d 248; *Carpenter v Carpenter*, 78 NH 440, 101 A 628; *Leonard v Southern Pac. Co.*, 21 Or 555, 28 P 887; *Sykes v Norfolk & W. R. Co.*, 200 Va 559, 106 SE2d 746; *State v Gray*, 64 Wash 2d 979, 395 P2d 490; *State v Roby*, 43 Wash 2d 652, 263 P2d 273.

In a prosecution for distribution of marijuana, the trial court could properly have allowed the defense to attempt to impeach the testimony of an undercover agent, that he had only simulated smoking marijuana with the defendant and others, by permitting a demonstration by the agent of such simulated smoking, the defense hoping to show thereby that the simulation would be obvious and that the agent thus must have actually smoked the cigarette. *State v Mays (La)* 315 So 2d 766.

Footnote 69. § 1003.

Footnote 70. *Shelton v Commonwealth*, 280 Ky 733, 134 SW2d 653; *State v Huffman*, 209 NC 10, 182 SE 705; *Smith v State*, 54 Okla Crim 236, 18 P2d 282.

Footnote 71. *State v Jacobson*, 348 Mo 258, 152 SW2d 1061, 138 ALR 1154.

For discussion of the methods of authenticating documentary evidence, generally, see §§ 1040 et seq.

Footnote 72. *Evans v Commonwealth*, 230 Ky 411, 19 SW2d 1091, 66 ALR 360; *Cantu v State*, 141 Tex Crim 99, 135 SW2d 705, cert den 312 US 689, 85 L Ed 1126, 61 S Ct 617.

Footnote 73. *People v Renteria* (2nd Dist) 181 Cal App 2d 214, 5 Cal Rptr 119, 78 ALR2d 1275, cert den 368 US 855, 7 L Ed 2d 53, 82 S Ct 92.

Qualification of expert witnesses is discussed in 31A Am Jur 2d, Expert and Opinion Evidence §§ 55 et seq.

§ 998 Out of presence of jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence may be given of experiments, demonstrations, and tests made out of court and not in the presence of the jury upon the same principles which permit them to be conducted in the jury's presence. 74 It is a matter peculiarly within the discretion of the court to decide the admissibility of such evidence in the light of all the surrounding facts and circumstances. 75 The test for exclusion is whether the experiment would confuse rather than aid the jury. 76

If the conduct of an experiment or a demonstration designed to show how an accident happened is fraught with peril to those in the vicinity, the trial court's discretion should be exercised in favor of an experiment performed outside the presence of the jury because there can be no justification for unnecessarily subjecting persons in the courtroom to any real danger of physical harm, and, if the judge requires or suggests the use of safety equipment in the conduct of the demonstration, and the parties, or one of them, at the time of the accident were not using safety equipment, the jury is almost certain to infer that one or more parties was negligent in failing to use the equipment or in failing to furnish it to others. 77

Films or videotapes of experiments by accident reconstructionists, physicists, engineers, or other witnesses qualified as experts on the cause of accidents, offered merely to illustrate the principles used in forming an opinion, do not require adherence to the facts and are admissible in evidence, provided such films or tapes are not misleading in and of themselves, and provided it is made clear that they are offered only as illustrations of the principle involved. 78 However, it is essential that the jury be carefully instructed as to the extent to which they can use and consider the films or videotapes. 79

The criteria for establishing the admissibility of crash test films are: (1) that the data be relevant, (2) that the tests be conducted under conditions substantially similar to those of the actual occurrence, and (3) that their presentation not consume undue amounts of time, not confuse the issues, and not mislead the jury. 80

Footnotes

Footnote 74. *Millers' Nat. Ins. Co. v Wichita Flour Mills Co.* (CA10 Kan) 257 F2d 93, 1 FR Serv 2d 261, 76 ALR2d 385; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Hardman v Helene Curtis Industries, Inc.* (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033; *State v De Zeler*, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53.

In a product liability action concerning an allegedly defective stepladder, a videotape demonstration supporting theory of manufacturer's expert as to how plaintiff's injuries must have occurred was admissible. *Koehn v R.D. Werner Co.* (Colo App) 809 P2d 1045, cert den (Colo) 1991 Colo LEXIS 261.

In personal injury action alleging injuries were caused by defective front-seat locking mechanism on an automobile manufactured by defendant, videotape of field test performed on seat mechanism was properly admitted into evidence where videotape was not used to advance new theory of causation, plaintiffs were able to review test data and therefore were not unfairly surprised or prejudiced by videotape, and where dissimilarities between experimental conditions and conditions of accident were of little import in that experiment did not purport to be a re-enactment of accident but, rather, a demonstration of the force principles claimed by defendant to have caused deformity in mechanism. *Rullo v General Motors Corp.*, 208 Conn 74, 543 A2d 279.

As to effect of absence of accused during experiment or test, see § 999.

Footnote 75. § 996.

Footnote 76. *University of Texas v Hinton* (Tex App Austin) 822 SW2d 197.

Footnote 77. *Orwick v Belshan*, 304 Minn 338, 231 NW2d 90.

Annotation: Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution, 41 ALR4th 877.

Footnote 78. *Loevsky v Carter*, 70 Hawaii 419, 773 P2d 1120.

As to the admissibility of motion pictures and videotapes, generally, see §§ 979 et seq.

Footnote 79. *Loevsky v Carter*, 70 Hawaii 419, 773 P2d 1120.

Footnote 80. *Whitehead v American Motors Sales Corp.* (Utah) 801 P2d 920, 148 Utah Adv Rep 6, CCH Prod Liab Rep ¶ 12658.

§ 999 Absence of accused during experiment or test

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The absence of the accused during the making of an experiment or test does not render inadmissible testimony concerning such experiment or test, 81 and some of the cases hold that such absence of the accused goes to the weight, rather than the admissibility, of such evidence. 82 Thus, evidence, otherwise admissible, of experiments involving firearms is usually not excluded because of the absence of the accused during the performance of such experiments. 83 So too, the presence of the defendant, or notice to him, is not required at postmortem examinations, and his absence therefrom will not make inadmissible testimony concerning such examination. 84

Footnotes

Footnote 81. *Goodall v United States*, 86 US App DC 148, 180 F2d 397, 17 ALR2d 1070, cert den 339 US 987, 94 L Ed 1389, 70 S Ct 1009; *People v Nelson*, 90 Cal App 27, 265 P 366 (testimony of a fire captain as to his fitting a wrench over a gas valve and finding that it fitted exactly); *Hicks v State*, 146 Ga 221, 91 SE 57 (experiments by witnesses testing the opportunity of an eyewitness to the homicide for seeing the actual shooting); *Bell v State*, 71 Ga App 430, 31 SE2d 109; *People v Fisher*, 340 Ill 216, 172 NE 743; *State v Criger*, 151 Kan 176, 98 P2d 133; *State v Criger*, 151 Kan 176, 98 P2d 133; *Greenwell v Commonwealth (Ky)* 317 SW2d 859; *Corens v State*, 185 Md 561, 45 A2d 340 (chemical analysis of bloodstains in the absence of and without notice to the accused); *Corens v State*, 185 Md 561, 45 A2d 340; *Anderson v State*, 146 Tex Crim 222, 172 SW2d 310 (state chemist's test, before the jury, of the alcoholic content of liquor); *Anderson v State*, 146 Tex Crim 222, 172 SW2d 310; *Kent v State*, 121 Tex Crim 396, 50 SW2d 817.

Footnote 82. *Greenwell v Commonwealth (Ky)* 317 SW2d 859; *Corens v State*, 185 Md 561, 45 A2d 340.

Annotation: Absence of accused during making of tests or experiments as affecting admissibility of testimony concerning them, 17 ALR2d 1078 § 2.

Footnote 83. *Goodall v United States*, 86 US App DC 148, 180 F2d 397, 17 ALR2d 1070, cert den 339 US 987, 94 L Ed 1389, 70 S Ct 1009; *Tanner v State*, 161 Ga 193, 130 SE 64; *Bell v State*, 71 Ga App 430, 31 SE2d 109; *People v Fisher*, 340 Ill 216, 172 NE 743; *Kent v State*, 121 Tex Crim 396, 50 SW2d 817.

Annotation: 17 ALR2d 1078 § 3.

Footnote 84. *Laney v United States*, 54 App DC 56, 294 F 412; *Lowe v People*, 76 Colo 603, 234 P 169; *Benge v Commonwealth*, 265 Ky 503, 97 SW2d 54.

Annotation: 17 ALR2d 1078 § 4.

§ 1000 Necessity that expert conduct experiment

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A recurring contention has been that evidence of an experiment is not admissible unless it was conducted by an expert. No general rule can be stated in this connection, other than, perhaps, the descriptive comment that the degree of expertness required depends on the nature of the experiment and all the circumstances. 85 An expert is not required where the testimony does not constitute an expert opinion, but merely a statement of the observation of certain effects, 86 nor is an expert required to conduct a simple experiment or test, 87 such as an experiment or test with regard to visibility or a line of vision, 88 or the existence of a paper that will dissolve when placed in water. 89 However, it is improper to admit into evidence the results of a morphine analyzer where the witness is not an expert with regard to the analyzer. 90

Footnotes

Footnote 85. *Mehochko v Gold Seal Co.* (5th Dist) 66 Ill App 2d 54, 213 NE2d 581, 19 ALR3d 1003; *Otey v Hoyt*, 47 NC 70.

The court improperly admitted into evidence at a probation revocation hearing testimony of a laboratory supervisor as to the results of an analysis of the accused's urine conducted with the aid of a morphine analyzer, where the witness was not an expert with regard to the analyzer, where the person who operated the analyzer was neither shown to have been an expert nor shown to have been under the supervision of the witness, and where no records from the laboratory where the test was performed were either introduced into evidence or seen by the witness. *Roberts v State* (Tex Crim) 537 SW2d 461.

Expert and opinion evidence of experiments is discussed, generally, in 31A Am Jur 2d, Expert and Opinion Evidence § 389.

Annotation: Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 § 2.

Footnote 86. *People v Brotherton*, 47 Cal 388.

A bystander to an experiment may testify to occurrences during that experiment bearing upon its result, provided that an understanding of the facts which he witnessed does not require expertise that he does not possess. *Odell v Frueh* (2nd Dist) 146 Cal App 2d 504, 304 P2d 45, 76 ALR2d 345.

Annotation: Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 § 2.

Footnote 87. *Standard Oil Co. v Reagan*, 15 Ga App 571, 84 SE 69.

Footnote 88. Arrowood v South Carolina & G. E. R. Co., 126 NC 629, 36 SE 151; Smith v State, 2 Ohio St 511.

Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152 § 2.

Footnote 89. State v Gear, 115 NJ Super 151, 278 A2d 511, certif den 59 NJ 270, 281 A2d 532.

Testimony by non-experts is generally discussed in 31A Am Jur 2d, Expert and Opinion Evidence §§ 26-31.

Practice References 22 Am Jur Proof of Facts 385, Identification of Substances by Instrumental Analysis.

Footnote 90. Roberts v State (Tex Crim) 537 SW2d 461.

As to the admissibility of medical tests by electronic devices, generally, see § 1020.

§ 1001 Reliability of scientific technique used by expert witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal and Uniform Rules of Evidence, if the witness qualifies as an expert, the proponent must show that the scientific, technical, or other specialized knowledge to which the expert is privy will assist the trier of fact to understand the evidence or to determine a fact which is in issue. 91 In determining whether the scientific knowledge will assist the trier of fact so as to be admissible under the Federal Rules of Evidence, the following factors should be considered: (1) whether the theory or technique can and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a particular scientific technique; and (4) whether the technique is generally accepted in the relevant scientific community. 92 The assessment of reliability of a technique permits, but does not require, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance of the theory or technique within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible. A known technique that has been able to attract only minimal support within the scientific community may properly be viewed with skepticism. 93 This inquiry is a flexible one and the focus must be solely on principles and methodology, not on the conclusions that such principles and methodology generate. 94

§ 1001 ----Reliability of scientific technique used by expert witness [SUPPLEMENT]

Case authorities:

"General acceptance" or Frye test for admissibility of expert testimony is not incorporated into Fed Evid Rule 702. Under rule, trial judge must determine whether expert proposes to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. This requires preliminary assessment of whether reasoning or methodology underlying proposed testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to facts in issue. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993, US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632.

In determining whether a scientific method of proof is reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. *State v Goode* (1995) 341 NC 513, 461 SE2d 631.

Footnotes

Footnote 91. FRE Rule 702; Uniform Rules of Evidence Rule 702.

Testimony by experts is generally discussed in 31A Am Jur 2d, Expert and Opinion Evidence §§ 32 et seq.; 32B Am Jur 2d, Federal Rules of Evidence §§ 432-435.

Footnote 92. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632 (holding that the rule adopted in *Frye v United States*, 54 App DC 46, 293 F 1013, 34 ALR 145—that expert opinion based on a scientific technique is inadmissible unless the technique is generally accepted as reliable in the relevant scientific community—was superseded by the adoption of the Federal Rules of Evidence).

Footnote 93. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632.

Footnote 94. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (US) 125 L Ed 2d 469, 113 S Ct 2786, 93 CDOS 4825, 93 Daily Journal DAR 8148, 27 USPQ2d 1200, CCH Prod Liab Rep ¶ 13494, 37 Fed Rules Evid Serv 1, 23 ELR 20979, 7 FLW Fed S 632.

Annotation: Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases, 105 ALR Fed 299.

b. Authentication or Verification [1002-1004]

§ 1002 Generally

[View Entire Section](#)

Before one may be permitted to make an experiment or test in court or to introduce evidence of an experiment or test made out of court, preliminary proof must be given showing that the results of the experiment or test can be relied on as a substantive fact. 95 This means that it must be shown that the person who made, or is to make, the experiment or test is competent to do so, that the apparatus was or is of the kind, and in the condition, suitable for the experiment or test, and that the experiment or test was or will be honestly and fairly made, 96 under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy. 97

The proponent of experimental evidence bears the burden of production and proof on the question whether such evidence rests on an adequate foundation. 98

Footnotes

Footnote 95. *Crecelius v Gamble-Skogmo, Inc.*, 144 Neb 394, 13 NW2d 627.

Footnote 96. *Crecelius v Gamble-Skogmo, Inc.*, 144 Neb 394, 13 NW2d 627.

Footnote 97. § 1003.

Annotation: Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Practice References 15 Am Jur Proof of Facts 115, Identification of Substances by Neutron Activation Analysis.

Footnote 98. *People v Bonin*, 47 Cal 3d 808, 254 Cal Rptr 298, 765 P2d 460, reh den (Cal) 1989 Cal LEXIS 1016 and motion gr 493 US 805, 107 L Ed 2d 14, 110 S Ct 44 and stay gr (Cal) 1989 Cal LEXIS 1638 and cert den 494 US 1039, 108 L Ed 2d 641, 110 S Ct 1506 and stay gr (Cal) 1990 Cal LEXIS 2852, habeas corpus proceeding (Cal) 1990 Cal LEXIS 4349, habeas corpus den (CD Cal) 807 F Supp 589, 93 Daily Journal DAR 407, motion den (CD Cal) 807 F Supp 586, 93 Daily Journal DAR 405, motion den (CA9 Cal) 999 F2d 425, 93 CDOS 5416, 93 Daily Journal DAR 9196.

§ 1003 Similarity of conditions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One desiring to make an experiment or test in court or to introduce evidence of an experiment or test made out of court should first show that the experiment or test is to be made or was made, as the case may be, under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy; 99

otherwise, the courts will not, as a general rule, permit the making of the experiments or tests or the introduction of evidence. 1 This is so because of the danger of misleading the members of the jury, who may attach exaggerated significance to the tests results. 2 It is clear, however, that the conditions need not be identical with those existing at the time of the occurrence, but it is sufficient if there is a substantial similarity of conditions. 3 Demonstrations of experiments used to merely illustrate the principles forming an expert opinion do not require strict adherence to the facts. 4 Minor variations in the essential conditions go to the weight, rather than to the admissibility, of the evidence. 5

There is no precise test or gauge to determine when the requirement of substantial similarity has been satisfied. This depends largely upon the purpose for which such evidence is to be introduced. 6 However, there are several principles that may be used to guide the court in determining substantial similarity, including: whether the similarities are likely to distort the results of the experiment to the degree that the evidence is now relevant; whether the similarities can be adjusted for or explains that their effect on the results can be understood by the jury; the purpose of the experiment and the degree to which the matter under experiment is a subject of precise science; and whether the experiment would be considered valid by a person skilled or knowledgeable in the field which the experiment concerns. 7 Speaking generally, however, the measure of permissible variation of the conditions of the experiment or test from those of the occurrence is measured by considering whether such variation is liable to confuse or mislead the jury. 8 When the conditions are so dissimilar from those of the occurrence in question as to tend to confuse or mislead the jury, the evidence of an experiment or test should be rejected. 9

Footnotes

Footnote 99. *Nachtsheim v Beech Aircraft Corp.* (CA7 Wis) 847 F2d 1261, 25 Fed Rules Evid Serv 1153; *Goodall v United States*, 86 US App DC 148, 180 F2d 397, 17 ALR2d 1070, cert den 339 US 987, 94 L Ed 1389, 70 S Ct 1009; *People v Buchtel* (3rd Dist) 221 Cal App 2d 397, 34 Cal Rptr 437, cert den 377 US 942, 12 L Ed 2d 309, 84 S Ct 1356; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Blanco v State*, 150 Fla 98, 7 So 2d 333; *Monlux v General Motors Corp.*, 68 Hawaii 358, 714 P2d 930; *Hackman v Beckwith*, 245 Iowa 791, 64 NW2d 275; *State v Criger*, 151 Kan 176, 98 P2d 133; *Torrey v Congress Square Hotel Co.*, 145 Me 234, 75 A2d 451 (superseded by statute on other grounds as stated in *Simon v Kennebunkport* (Me) 417 A2d 982, 21 ALR4th 465); *Commonwealth v Plissner*, 295 Mass 457, 4 NE2d 241; *State v De Zeler*, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137; *State v Myers*, 351 Mo 332, 172 SW2d 946; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *Franks v Jirton*, 146 Neb 585, 20 NW2d 597; *State v Spicer*, 50 NC App 214, 273 SE2d 521, app dismd 302 NC 401, 279 SE2d 356; *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154; *Enghlin v Pittsburg C. R. Co.*, 169 Okla 106, 36 P2d 32, 94 ALR 1180; *Tippit v State* (Okla Crim) 332 P2d 222; *Foster v Agri-Chem, Inc.*, 235 Or 570, 385 P2d 184; *Leonard v Southern Pac. Co.*, 21 Or 555, 28 P 887; *Leonard v Nichols Homeshield, Inc.*, 384 Pa Super 1, 557 A2d 743, CCH Prod Liab Rep ¶ 12118, app den 525 Pa 584, 575 A2d 115; *Commonwealth v Craven*, 138 Pa Super 436, 11 A2d 191; *McDowell v Floyd*, 240 SC 158, 125 SE2d 4.

Reconstruction experiments are incompetent unless the essential elements of the experiment are shown to be substantially similar to those existing at the time of the

accident. *People v Haas* (5th Dist) 203 Ill App 3d 779, 148 Ill Dec 667, 560 NE2d 1365, app den 135 Ill 2d 561, 151 Ill Dec 387, 564 NE2d 842 and (criticized on other grounds by *People v Crowe* (4th Dist) 232 Ill App 3d 955, 174 Ill Dec 96, 598 NE2d 293).

Practice References 5 Am Jur Trials 505, Mapping the Trial—Order of Proof § 40 (experiments).

Footnote 1. *Glowacki v A. J. Bayless Markets, Inc.*, 76 Ariz 295, 263 P2d 799; *Beresford v Pacific Gas & Electric Co.*, 45 Cal 2d 738, 290 P2d 498, 54 ALR2d 910; *Spires v State*, 50 Fla 121, 39 So 181 (criticized on other grounds by *Johnson v State* (Fla) 442 So 2d 193) as stated in *Rindfleisch v Carnival Cruise Lines, Inc.* (Fla App D3) 498 So 2d 488, 11 FLW 2322, 1987 AMC 944, review den (Fla) 508 So 2d 15; *Chicago, S. L. & P. R. Co. v Champion*, 9 Ind App 510, 36 NE 221, reh overr 9 Ind App 526, 37 NE 21; *Pond v Anderson*, 241 Iowa 1038, 44 NW2d 372; *Avery v Thompson*, 117 Me 120, 103 A 4; *State use of Chima v United R. & E. Co.*, 162 Md 404, 159 A 916, 83 ALR 1307; *Commonwealth v Tucker*, 189 Mass 457, 76 NE 127; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *Hightower v Alley*, 132 Mont 349, 318 P2d 243; *Franks v Jirdon*, 146 Neb 585, 20 NW2d 597; *State v Harris*, 100 NJL 184, 124 A 603; *State v Stewart*, 30 NM 227, 231 P 692, appeal after remand 34 NM 65, 277 P 22; *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53; *Kohlhagen v Cardwell*, 93 Or 610, 184 P 261, 8 ALR 11; *McDowell v Floyd*, 240 SC 158, 125 SE2d 4; *Ft. Worth & D. R. Co. v Williams* (Tex) 375 SW2d 279, reh'g of cause overr (Feb 26, 1964); *Konold v Rio Grande W. R. Co.*, 21 Utah 379, 60 P 1021; *Portsmouth Transit Co. v Brickhouse*, 200 Va 844, 108 SE2d 385, 78 ALR2d 147; *Amsbary v Grays H. R. & L. Co.*, 78 Wash 379, 139 P 46, 8 ALR 1.

In prosecution for possession of marijuana, trial court's refusal to permit defense attorney to conduct in court experiment to test arresting officer's ability to differentiate odor of marijuana by permitting counsel to submit five plastic baggies, one containing marijuana and the other four containing other substances, to such officer did not constitute abuse of discretion, nor violate accused's Sixth Amendment rights, since conditions of proposed experiment differed substantially from those which existed at time of principal event. *United States v Vallejo* (CA5 Tex) 541 F2d 1164.

In a prosecution for second-degree rape where the alleged crime occurred in a motel room in which the victim was staying, the trial court did not err in excluding experimental evidence designed to show the extent to which occupants of adjoining rooms could have heard any loud noises coming from the room occupied by the prosecuting witness on the night of the alleged rape, since there was no showing that the circumstances of the experiment were substantially similar to the actual occurrence. *State v Bailey*, 36 NC App 728, 245 SE2d 97.

In a motor vehicle collision case, where an expert witness had taken motion pictures of experiments conducted with model cars in relation to the impact of cars and their reaction after impact, the lower court did not err in refusing to admit the film in evidence or to permit it to be shown to the jury as a visual demonstration of how the accident could have happened or in explanation or confirmation of the opinion of the expert witness, where there was no evidence connecting the demonstration or experiment with the conditions and circumstances at the time of the accident. *Fisher v Suko* (ND) 111 NW2d 360.

Footnote 2. *Leonard v Nichols Homeshield, Inc.*, 384 Pa Super 1, 557 A2d 743, CCH Prod Liab Rep ¶ 12118, app den 525 Pa 584, 575 A2d 115.

Footnote 3. *Dorsett v American Isuzu Motors, Inc.* (ED Pa) 805 F Supp 1212, affd without op (CA3 Pa) 977 F2d 567, cert dismd (US) 122 L Ed 2d 498, 113 S Ct 1071; *Robinson v Morrison*, 272 Ala 552, 133 So 2d 230; *Dritt v Morris*, 235 Ark 40, 357 SW2d 13; *DiRosario v Havens* (2nd Dist) 196 Cal App 3d 1224, 242 Cal Rptr 423; *Odell v Frueh* (2nd Dist) 146 Cal App 2d 504, 304 P2d 45, 76 ALR2d 345; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Rullo v General Motors Corp.*, 208 Conn 74, 543 A2d 279; *Morton v Hardwick Stove Co.* (Fla App D2) 138 So 2d 807, cert den (Fla) 149 So 2d 48; *Monlux v General Motors Corp.*, 68 Hawaii 358, 714 P2d 930; *People v Pfanschmidt*, 262 Ill 411, 104 NE 804; *Tackman v Brotherhood of American Yeoman*, 132 Iowa 64, 106 NW 350; *Smith's Adm'x v Middlesboro Electric Co.*, 164 Ky 46, 174 SW 773; *State use of Chima v United R. & E. Co.*, 162 Md 404, 159 A 916, 83 ALR 1307; *Field v Gowdy*, 199 Mass 568, 85 NE 884; *People v Auerbach*, 176 Mich 23, 141 NW 869; *State v Blair*, 147 Mont 87, 410 P2d 450; *Hurly v Star Transfer Co.*, 141 Mont 176, 376 P2d 504; *State v Commercial Casualty Ins. Co.*, 125 Neb 43, 248 NW 807, 88 ALR 790; *Healey v Bartlett*, 73 NH 110, 59 A 617; *Hodgkins v Christopher*, 58 NM 637, 274 P2d 153; *People v Mariner* (2d Dept) 147 App Div 2d 659, 538 NYS2d 61, app den 74 NY2d 666, 543 NYS2d 409, 541 NE2d 438; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Larson v Meyer* (ND) 135 NW2d 145 (ovrld on other grounds by *Hopkins v McBane* (ND) 427 NW2d 85, 77 ALR4th 391); *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154; *Tuite v Union Pacific Stage, Inc.*, 204 Or 565, 284 P2d 333; *Ragan v MacGill*, 134 Or 408, 292 P 1094, 72 ALR 860; *Hughes v State*, 126 Tenn 40, 148 SW 543; *Israel v State*, 89 Tex Crim 382, 230 SW 984, 15 ALR 453; *Palmer v Oregon S. L. R. Co.*, 34 Utah 466, 98 P 689; *Sewell v MacRae*, 52 Wash 2d 103, 323 P2d 236; *Amsbary v Grays H. R. & L. Co.*, 78 Wash 379, 139 P 46, 8 ALR 1; *State v Hardway*, 182 W Va 1, 385 SE2d 62.

The trial court in a murder case did not err in admitting evidence of an experiment as to lighting conditions at the murder scene where the evidence offered on voir dire supported the trial court's finding that the conditions at the time of the experiment were substantially similar to those existing at the time of the alleged murder, although the evidence on voir dire was conflicting as to the conditions on those two days. *State v Spicer*, 50 NC App 214, 273 SE2d 521, app dismd 302 NC 401, 279 SE2d 356.

Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152 § 2.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 § 2.

Footnote 4. *Nachtsheim v Beech Aircraft Corp.* (CA7 Wis) 847 F2d 1261, 25 Fed Rules Evid Serv 1153; *Four Corners Helicopters, Inc. v Turbomeca, S.A.* (CA10 Colo) 979 F2d 1434, CCH Prod Liab Rep ¶ 13373, 37 Fed Rules Evid Serv 225.

Footnote 5. *Four Corners Helicopters, Inc. v Turbomeca, S.A.* (CA10 Colo) 979 F2d 1434, CCH Prod Liab Rep ¶ 13373, 37 Fed Rules Evid Serv 225; *Dritt v Morris*, 235 Ark 40, 357 SW2d 13; *People v Dyer*, 11 Cal 2d 317, 79 P2d 1071; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *State v Holota*, 2 Conn Cir 45, 194 A2d 69; *People v Pfanschmidt*, 262 Ill 411, 104 NE 804; *People v Mariner* (2d Dept) 147 App Div 2d 659, 538 NYS2d 61,

app den 74 NY2d 666, 543 NYS2d 409, 541 NE2d 438; *Norfleet v New York City Transit Authority* (2d Dept) 124 App Div 2d 715, 508 NYS2d 468, app den 69 NY2d 605, 513 NYS2d 1026, 505 NE2d 953; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154; *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53; *Norfolk & W. R. Co. v Henderson*, 132 Va 297, 111 SE 277.

Variance between the real scene of the accident and the reconstruction of the accident affected the weight of the evidence but not its admissibility. *De Rosa v Kolb*, 90 Or App 548, 752 P2d 1282, review den 306 Or 101, 757 P2d 1362.

Footnote 6. *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53.

Annotation: 78 ALR2d 152 § 2.

Footnote 7. *Beck v State, DOT & Public Facilities (Alaska)* 837 P2d 105.

Footnote 8. *Dritt v Morris*, 235 Ark 40, 357 SW2d 13; *Kling v Denver*, 138 Colo 567, 335 P2d 876; *Healey v Bartlett*, 73 NH 110, 59 A 617; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Vogel v Wells*, 57 Ohio St 3d 91, 566 NE2d 154; *Loibl v Niemi*, 214 Or 172, 327 P2d 786.

Videotaped simulation of an unwanted acceleration of an automobile could be shown to the jury even though the experiment was admittedly conducted under different circumstances, where the differences were adequately explained to the jury and limiting instructions were given by the judge. *Norris v Gatts (Alaska)* 738 P2d 344.

Annotation: 78 ALR2d 152 § 2.

Footnote 9. *Pond v Anderson*, 241 Iowa 1038, 44 NW2d 372; *Done v State*, 202 Miss 418, 32 So 2d 206; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *Franks v Jiridon*, 146 Neb 585, 20 NW2d 597; *Crispin v Volkswagenwerk AG*, 248 NJ Super 540, 591 A2d 966, certif den 126 NJ 385, 599 A2d 162; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Larson v Meyer (ND)* 135 NW2d 145 (ovrld on other grounds by *Hopkins v McBane (ND)* 427 NW2d 85, 77 ALR4th 391); *Erickson's Dairy Products Co. v Northwest Baker Ice Machine Co.*, 165 Or 553, 109 P2d 53; *Leonard v Nichols Homeshield, Inc.*, 384 Pa Super 1, 557 A2d 743, CCH Prod Liab Rep ¶ 12118, app den 525 Pa 584, 575 A2d 115; *Ft. Worth & D. R. Co. v Williams (Tex)* 375 SW2d 279, reh'g of cause overr (Feb 26, 1964).

§ 1004 --Court's discretion; proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, results of an experiment or test are admissible only upon a showing that the experiment or test is to be made or was made under conditions and circumstances similar

to those prevailing at the time of the occurrence involved in the controversy. 10 The question of similarity of conditions is one that lies within the sound discretion of the trial court, to be decided in the light of all the surrounding facts and circumstances. 11 But this discretion of the trial court concerns the determination of the sufficiency of the proof of similarity, rather than any discretion of the court to refuse to hear any preliminary proof as to similarity. In other words, the court cannot, on the ground of dissimilarity of conditions, reject experimental or demonstrative evidence, otherwise relevant to the issues, without giving the offeror an opportunity to show the similarity of conditions. 12 A party has a right to present evidence of the similarity of conditions attending the experiment or test with those attending at the time and place of the occurrence in question, as the basis of presenting evidence as to the results of such an experiment or test. 13

Generally, the burden is on the party offering the evidence to show sufficient similarity of conditions, 14 and this is especially so where the evidence is strongly favorable to the party offering it. 15 A greater amount of latitude is permitted where the evidence is offered in rebuttal of evidence of experiments given on behalf of the other party than where it is sought to demonstrate the truth or falsehood of a substantive matter in issue. 16

Footnotes

Footnote 10. § 1003.

Footnote 11. *People v Auerbach*, 176 Mich 23, 141 NW 869; *Beasley v Ford Motor Co.*, 237 SC 506, 117 SE2d 863.

Usually an experiment is admissible only when performed under conditions substantially similar to those existing in the case being tried, but the trial court has a wide discretion in this respect. *Foster v Agri-Chem, Inc.*, 235 Or 570, 385 P2d 184.

Footnote 12. *Amsbary v Grays H. R. & L. Co.*, 78 Wash 379, 139 P 46, 8 ALR 1.

Footnote 13. *Tuite v Union Pacific Stage, Inc.*, 204 Or 565, 284 P2d 333.

Footnote 14. *People v Bonin*, 47 Cal 3d 808, 254 Cal Rptr 298, 765 P2d 460, reh den (Cal) 1989 Cal LEXIS 1016 and motion gr 493 US 805, 107 L Ed 2d 14, 110 S Ct 44 and stay gr (Cal) 1989 Cal LEXIS 1638 and cert den 494 US 1039, 108 L Ed 2d 641, 110 S Ct 1506 and stay gr (Cal) 1990 Cal LEXIS 2852, habeas corpus proceeding (Cal) 1990 Cal LEXIS 4349, habeas corpus den (CD Cal) 807 F Supp 589, 93 Daily Journal DAR 407, motion den (CD Cal) 807 F Supp 586, 93 Daily Journal DAR 405, motion den (CA9 Cal) 999 F2d 425, 93 CDOS 5416, 93 Daily Journal DAR 9196; *Skelly Oil Co. v Jordan*, 186 Okla 130, 96 P2d 524.

At a hearing on a motion to suppress, evidence of an experiment conducted by the defense in a marijuana prosecution to impeach the testimony of police officers that two automobiles, each containing an approximate 300-pound load in its trunk, appeared to be weighted down prior to an arrest, was inadmissible where defendants failed to show either that there was substantial similarity between the conditions of the experiment and the conditions surrounding the events observed by the police so as to fulfill the

requirement of basic relevancy, or that the lack of similarity was inconsequential. *State v Arroyo* (Fla App D3) 422 So 2d 50, appeal after remand (Fla App D3) 454 So 2d 21.

Footnote 15. *Skelly Oil Co. v Jordan*, 186 Okla 130, 96 P2d 524.

Footnote 16. *Illinois C. R. Co. v Burns*, 32 Ill App 196.

Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152 § 2.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 § 2.

c. Subject Matter of Experiments, Demonstrations, and Tests [1005-1022]

(1). In General [1005, 1006]

§ 1005 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The scope of the subject matter of experiments or tests which may be used as evidence is very wide. 17 The use of such evidence generally rests within the sound discretion of the trial judge. 18 The only definite limitation regarding the subject matter of an experiment or test is that evidence of this character must be received only where the experiment is of such a nature as to aid the jury in its deliberations; if it would tend to mislead or confuse them, it should not be received. 19 Experiments or tests as to matters within the range of ordinary knowledge or experience will, as a rule, be permitted. 20

Under proper circumstances, a demonstration or experiment to show the operation of a mechanical device or appliance is admissible. 21 Experiments or tests with the human body tending to show the nature and extent of injuries are also generally admissible. 22 In criminal cases, evidence is admissible to show: the results of an experiment to determine the illumination provided by automobile headlights; 23 the presence of copper in the victim's body to show how electrocution occurred; 24 the time required to travel from one point to another; 25 the course taken by logs thrown into a river in which the victim's body was found; 26 the possibility of fitting a human body in the luggage compartment of an automobile; 27 the possibility of opening a lock by using a piece of celluloid; 28 the distance within which an automobile without brakes would stop; 29 and what could be observed or heard from a certain vantage point. 30

§ 1005 ----Generally [SUPPLEMENT]

Case authorities:

The trial court did not abuse its discretion by failing to suppress expert testimony comparing body fluids and hairs contained in a rape kit with those of the defendant as a sanction under GS § 15A-910 for the State's destruction of the rape kit, thereby preventing defendant from invoking his right to inspect and test the evidence, where the State informed defendant that he could have access to or copies of any tests performed as well access to any physical evidence, but defendant made no attempt to test the evidence during the many months before trial during which the evidence was still in the State's possession. *State v Graham* (1995) 118 NC App 231, 454 SE2d 878, review den 340 NC 262, 456 SE2d 834.

In an appeal from a termination of parental rights where the father allegedly sexually abused his daughter, the Court of Appeals held that the mother did not establish the reliability of the penile plethysmograph, where there was no medical testimony presented on the issue of reliability, the 2 experts who analyzed the results gave conflicting interpretations, and one expert admitted that a knowledgeable person could manipulate the results of the test. *In Interest of A.V.* (1993, Tex App Fort Worth) 849 SW2d 393, writ den (Jun 30, 1993).

Footnotes

Footnote 17. *Hackman v Beckwith*, 245 Iowa 791, 64 NW2d 275.

As to the admissibility of DNA tests for the purpose of identification, see § 574.

For discussion of experiments as a subject of expert and opinion evidence, generally, see 31A Am Jur 2d, Expert and Opinion Evidence § 389.

As to admissibility, on the issue of paternity, of results of blood-grouping tests, see 10 Am Jur 2d, Bastards §§ 32, 118.

As to experiments or tests relating to electricity and electrical devices, see 26 Am Jur 2d, Electricity, Gas, and Steam § 189.

As to the admissibility of a test or experiment, after a motor vehicle accident, as bearing on the speed or control of an automobile at the time of the accident, see 8 Am Jur 2d, Automobiles and Highway Traffic §§ 1065, 1066.

For discussion of the admissibility of a test or experiment, after a motor vehicle accident, of the operator's line of vision as to persons or objects, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1067.

Annotation: Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 ALR4th 897 § 1.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 ALR4th 588.

Admissibility and weight of blood-grouping tests in disputed paternity cases, 43

ALR4th 579.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases, 37 ALR4th 167.

Blood grouping tests, 46 ALR2d 1000.

Footnote 18. § 996.

Footnote 19. *Spires v State*, 50 Fla 121, 39 So 181 (criticized on other grounds by *Johnson v State* (Fla) 442 So 2d 193); *Gulf, C. & S. F. R. Co. v Whitfield* (Tex Civ App) 206 SW 380.

Footnote 20. *Orthopedic Equipment Co. v Eutsler* (CA4 Va) 276 F2d 455, 79 ALR2d 390 (in an action against the manufacturer of a surgical nail marked "OEC 9x40," brought by a patient with a fractured leg, for injuries sustained from the use of a nail which was too thick to fit the canal prepared with a 9-mm medullary reamer or drill, error has been held not committed in permitting a machinist called by the plaintiff to use in court, for the purpose of establishing the diameter of the nail, a specially manufactured gauge consisting of holes machined in a block of metal where it was explicitly stated in the presence of the jury that the gauge was not intended to simulate the human bone).

The discretion of a trial court in admitting evidence of experiments performed out of the presence of the jury is not abused in a prosecution for murder by the admission of testimony of experiments to show the reasonable driving time between the place of the crime and the place where the body was found, and that the decedent's body could have been transported in the trunk of the defendant's car, where dissimilarities in the conditions and circumstances of the experiments, and those pertaining to the issues involved, are neither material nor misleading. *State v De Zeler*, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137.

Footnote 21. *Davis v Walter*, 259 Iowa 837, 146 NW2d 247 (exact replica of amber hazard light on defendant's tractor); *Ragan v MacGill*, 134 Or 408, 292 P 1094, 72 ALR 860.

In a civil action where the plaintiff contended that the accident was caused by defective brakes on the automobile purchased from the defendant, a model wheel assembly, a true replica of the one in the plaintiff's automobile, was admissible as a useful aid to the jury in understanding the evidence and in obtaining a clear comprehension of the physical facts; also, experiments or demonstrations with the model assembly were permissible. *Hogan v Cooke Pontiac Co. (Ky)* 346 SW2d 529.

Footnote 22. *Tackman v Brotherhood of American Yeoman*, 132 Iowa 64, 106 NW 350.

Footnote 23. *Stevens v People*, 97 Colo 559, 51 P2d 1022.

Footnote 24. *Commonwealth v Noxon*, 319 Mass 495, 66 NE2d 814.

Footnote 25. *People v Dyer*, 11 Cal 2d 317, 79 P2d 1071; *People v Glab*, 15 Cal App 2d 120, 59 P2d 195; *Hamby v People*, 109 Colo 572, 128 P2d 993; *Commonwealth v Bonomi*, 335 Mass 327, 140 NE2d 140.

Footnote 26. Trammell v State, 193 Ark 21, 97 SW2d 902; State v Holland, 216 NC 610, 6 SE2d 217.

Footnote 27. State v De Zeler, 230 Minn 39, 41 NW2d 313, 15 ALR2d 1137.

Footnote 28. People v Sturman, 56 Cal App 2d 173, 132 P2d 504.

Footnote 29. People v Crawford, 41 Cal App 2d 198, 106 P2d 219.

Footnote 30. Ippolito v United States (CA6 Ohio) 108 F2d 668; Day v State, 185 Ark 710, 49 SW2d 380; Bland v State, 210 Ga 100, 78 SE2d 51.

§ 1006 Effect of consumption of evidence as result of testing

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally, with respect to hard physical evidence, such as blood, 31 drugs, 32 urine, 33 and gun powder, 34 the necessary consumption or destruction of the evidence in state crime laboratories does not violate the accused's rights, even though the accused is thus prevented from subjecting any of the hard physical evidence to tests by his own expert. 35 However, in some cases, the courts have indicated that before subjecting a substance to a test that is likely to consume the entire substance, the prosecution has a duty to notify the accused so that the accused may have his own expert present at the test. 36

The Fourteenth Amendment's due process clause did not require law enforcement agencies to preserve breath samples in order to introduce breath analysis tests at trial, 37 and unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process. 38

Footnotes

Footnote 31. Carlson v Minnesota (CA8 Minn) 945 F2d 1026; People v Madson (Colo App) 689 P2d 639; State v Alfonso, 3 Conn App 225, 486 A2d 1136; Baker v State, 250 Ga 187, 297 SE2d 9, appeal after remand 251 Ga 464, 306 SE2d 917; State v Boyd (La) 359 So 2d 931; State v Dechaine (Me) 572 A2d 130, cert den 498 US 857, 112 L Ed 2d 122, 111 S Ct 156 and motion for new trial denied (Me) 630 A2d 234; State v Reilly (Me) 446 A2d 1125; State v Carlson (Minn) 267 NW2d 170, habeas corpus proceeding (CA8 Minn) 945 F2d 1026; State v Hollander, 201 NJ Super 453, 493 A2d 563, certif den 101 NJ 335, 501 A2d 983, habeas corpus den (DC NJ) 1992 US Dist LEXIS 20200; State v Kaye, 176 NJ Super 484, 423 A2d 1002, certif den 87 NJ 316, 434 A2d 69 and (criticized on other grounds by State v Mercer, 211 NJ Super 388, 511 A2d 1233); State v Kersting, 50 Or App 461, 623 P2d 1095, 40 ALR4th 579, affd 292 Or 350, 638 P2d 1145 and (disapproved on other grounds by State v Brown, 297 Or 404, 687 P2d 751).

Annotation: Consumption or destruction of physical evidence due to testing or

analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court, 40 ALR4th 594 § 5[a].

Footnote 32. *Lee v State* (Alaska) 511 P2d 1076; *State v T.L.W.* (Fla App D2) 457 So 2d 566, 9 FLW 2185; *State v Atkins* (Fla App D2) 369 So 2d 389; *Jones v State* (Fla App D3) 360 So 2d 1293; *Partain v State*, 238 Ga 207, 232 SE2d 46; *Seay v State* (Ind) 529 NE2d 106; *Schwartz v State*, 177 Ind App 258, 379 NE2d 480; *State v Lightle*, 210 Kan 415, 502 P2d 834, cert den 410 US 941, 35 L Ed 2d 607, 93 S Ct 1406; *State v White* (La App 2d Cir) 535 So 2d 929, cert den (La) 537 So 2d 1161; *Hampton v State* (Miss) 498 So 2d 384; *Poole v State* (Miss) 291 So 2d 723, cert den 419 US 1019, 42 L Ed 2d 292, 95 S Ct 492; *State v Willers* (Mo App) 794 SW2d 315.

Annotation: 40 ALR4th 594 § 4[a].

Footnote 33. *Jones v McCaughtry* (WD Wis) 775 F Supp 309, affd (CA7 Wis) 965 F2d 473, cert den (US) 121 L Ed 2d 272, 113 S Ct 360; *State v Riley*, 24 Conn Supp 235, 1 Conn Cir 523, 189 A2d 518.

Annotation: 40 ALR4th 594 § 6.

Footnote 34. *State v Boyer* (La) 406 So 2d 143.

For discussion of the admissibility of results of residue detection tests to determine whether accused handled or fired gun, see § 1016.

As to the admissibility of tests to determine distance from which gun was fired, see § 1017.

Annotation: 40 ALR4th 594 § 7.

Footnote 35. But see *People v Garries* (Colo) 645 P2d 1306, later proceeding (AFCMR) 19 MJ 845, affd (CMA) 22 MJ 288, cert den 479 US 985, 93 L Ed 2d 578, 107 S Ct 575, petition den sub nom *Nkosi v Lowe* (AFCMR) 38 MJ 552, post-conviction proceeding (AFCMR) 1994 CMR LEXIS 152 and (disapproved on other grounds by *Solorio v United States*, 483 US 435, 97 L Ed 2d 364, 107 S Ct 2924), in which test results were properly suppressed in prosecution for murder in which police seized eight bloodstained articles and subjected them to series of destructive tests which rendered them useless for further testing by defendant's expert.

For discussion of the admissibility of the results of an analysis of the chemical or physical quality of a material or substance, generally, see § 1012.

Annotation: 40 ALR4th 594 §§ 8, 9.

Footnote 36. See *State v Herrera* (Fla App D3) 365 So 2d 399, cert den (Fla) 373 So 2d 459, stating that it would be the better practice, although not constitutionally mandated, for the state to delay the testing of minuscule quantities of suspected drugs until the defense has been given fair opportunity to be present during testing; *State v Gaddis* (Tenn) 530 SW2d 64, stating that good faith demands that no test or analysis be made except by agreement between the prosecutor and defense counsel, or until such time as defense counsel may arrange to have his own expert present at the test.

Where state, in good faith, found it absolutely necessary to totally exhaust available physical evidence in order to make chemical analysis, admission of results of such testing is not violative of defendant's rights of due process, although better practice would dictate that, when a limited amount of such evidence is available, defendant be notified of proposed testing so that his own experts may be present, if desired. *State v Carlson* (Minn) 267 NW2d 170, habeas corpus proceeding (CA8 Minn) 945 F2d 1026.

Annotation: 40 ALR4th 594 4[c].

Footnote 37. *California v Trombetta*, 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528.

As to the admissibility of tests of alcoholic content of blood, see § 1021.

Annotation: Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Footnote 38. See *Arizona v Youngblood*, 488 US 51, 102 L Ed 2d 281, 109 S Ct 333, reh den 488 US 1051, 102 L Ed 2d 1007, 109 S Ct 885 and on remand (App) 164 Ariz 61, 790 P2d 759, 50 Ariz Adv Rep 91, review gr (Ariz) 1990 Ariz LEXIS 169 holding that the Due Process Clause did not require the state to preserve semen samples in a sexual assault prosecution even though the samples might have been useful to the respondent.

Annotation: 40 ALR4th 594 § 3.

(2). Tests to Determine Truth [1007-1011]

§ 1007 Polygraph examinations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The polygraph test operates on the principle that stress causes physiological changes in the body which can be measured to indicate whether the subject of the examination is telling the truth. During an examination in which a polygraph is used, sensors are attached to the subject so that the polygraph can mechanically record the subject's physiological responses to a series of questions. 39 The courts almost uniformly reject the results of polygraph tests when offered in evidence for the purpose of establishing the guilt or innocence of one accused of a crime, whether the accused or the prosecution seeks its introduction, for the reason that the polygraph has not as yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception. 40

◆ Reminder: General acceptance in the field in which scientific evidence belongs is not a necessary precondition to the admissibility of scientific evidence under the

Federal Rules of Evidence. 41 Nonetheless, some courts have permitted evidence of polygraph evidence under special circumstances. 42 Furthermore, some courts reject the per se rule of exclusion of polygraph tests in criminal cases and leave the admissibility of lie-detector results to the discretion of the trial judge. 43

§ 1007 ----Polygraph examinations [SUPPLEMENT]

Practice Aids: Misconceptions and reevaluation–Polygraph admissibility after Rock and Daubert, 1996 U Ill LR 2:363 (1996).

Case authorities:

A polygraph examination of a witness is inadmissible at trial, since such evidence is no more reliable than a polygraph examination of a defendant. *People v Gard* (1994) 158 Ill 2d 191, 198 Ill Dec 415, 632 NE2d 1026.

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in an prosecution resulting from defendant's attempt to hire someone to kill her former husband and a woman he was seeing where the person who was hired, testifying for the State, offered to take a polygraph test. The offer was unintentionally elicited by defendant after intense cross-examination and during a trial revealing inconsistencies in the witness's testimony, the trial court allowed the defendant's motion to strike the statement and immediately instructed the jury to disregard the statement, and the court further asked the jury if they could in fact disregard the statement, to which they answered in the affirmative. *State v Suggs* (1995) 117 NC App 654, 453 SE2d 211.

Footnotes

Footnote 39. *Heisse v Vermont* (DC Vt) 519 F Supp 36.

Footnote 40. *United States v Tedder* (CA4 SC) 801 F2d 1437, 21 Fed Rules Evid Serv 939, cert den 480 US 938, 94 L Ed 2d 775, 107 S Ct 1585, later proceeding 296 SC 500, 374 SE2d 294; *United States v Murray* (CA6 Mich) 784 F2d 188, 20 Fed Rules Evid Serv 186; *Bashor v Risley* (CA9 Mont) 730 F2d 1228, cert den 469 US 838, 83 L Ed 2d 77, 105 S Ct 137; *United States v Falsia* (CA9 Cal) 724 F2d 1339, 14 Fed Rules Evid Serv 1228; *United States v Soundingsides* (CA10 Wyo) 820 F2d 1232, 23 Fed Rules Evid Serv 98, reh den (CA10 Wyo) 825 F2d 1468, 23 Fed Rules Evid Serv 942 and (criticized on other grounds by *United States v Lashmett* (CA7 Ill) 965 F2d 179, 35 Fed Rules Evid Serv 1060); *United States v Russo* (CA11 Fla) 796 F2d 1443, 21 Fed Rules Evid Serv 552; *United States v Beck* (CA11 Ga) 729 F2d 1329, 15 Fed Rules Evid Serv 506, cert den 469 US 981, 83 L Ed 2d 318, 105 S Ct 383; *Christopher v Florida* (SD Fla) 582 F Supp 633, later proceeding (Fla) 489 So 2d 22, 11 FLW 248, habeas corpus proceeding (CA11 Fla) 824 F2d 836, cert den 484 US 1077, 98 L Ed 2d 1019, 108 S Ct 1057 and appeal after remand, remanded (Fla) 583 So 2d 642, 16 FLW S 410; *Moore v Marsh* (DC Dist Col) 568 F Supp 785; *Wilkie v State* (Alaska App) 715 P2d 1199; *State v Montes*, 136 Ariz 491, 667 P2d 191; *People v Kronemyer* (4th Dist) 189 Cal App 3d 314, 234 Cal Rptr 442; *People v Seldomridge* (5th Dist) 154 Cal App 3d 362, 201 Cal Rptr 377; *People v Aalbu* (Colo) 696 P2d 796; *People v Robinson* (Colo App) 713 P2d 1333; *Molino v Board of Public Safety*, 154 Conn 368, 225 A2d 805; *Majewski v State*

(Fla App D1) 487 So 2d 32, 11 FLW 450, 11 FLW 935, later proceeding (Fla App D1) 489 So 2d 875, 11 FLW 1304; *Parker v State*, 256 Ga 543, 350 SE2d 570, cert den 480 US 940, 94 L Ed 2d 781, 107 S Ct 1592, reh den 481 US 1060, 95 L Ed 2d 861, 107 S Ct 2206; *People v Boyle* (5th Dist) 161 Ill App 3d 1054, 113 Ill Dec 158, 514 NE2d 1169, app den (Ill) 117 Ill Dec 227, 520 NE2d 388 and cert den 488 US 898, 102 L Ed 2d 232, 109 S Ct 243; *Collura v Board of Police Comrs.* (2d Dist) 135 Ill App 3d 827, 90 Ill Dec 436, 482 NE2d 143, affd 113 Ill 2d 361, 101 Ill Dec 640, 498 NE2d 1148; *Grigsby v State* (Ind) 503 NE2d 394; *Patterson v State* (Ind) 495 NE2d 714, appeal after remand (Ind) 532 NE2d 604; *Marbley v State* (Ind) 461 NE2d 1102; *Lambert v State* (Ind) 448 NE2d 288; *Brown v State* (Ind) 448 NE2d 10, habeas corpus proceeding (ND Ind) 612 F Supp 1576 and habeas corpus proceeding (CA7 Ind) 791 F2d 598, 20 Fed Rules Evid Serv 863; *Schraven v State* (Ind App) 446 NE2d 994; *State v Mason*, 238 Kan 129, 708 P2d 963; *Holland v Commonwealth* (Ky) 703 SW2d 876; *Roberts v Commonwealth* (Ky) 657 SW2d 943; *State v Humphrey* (La) 445 So 2d 1155; *State v Wilson* (La App 4th Cir) 463 So 2d 655, cert den (La) 466 So 2d 466; *Johnson v State*, 303 Md 487, 495 A2d 1, cert den 474 US 1093, 88 L Ed 2d 907, 106 S Ct 868; *Commonwealth v Mendes*, 406 Mass 201, 547 NE2d 35; *People v Rogers*, 140 Mich App 576, 364 NW2d 748; *State v Anderson* (Minn) 379 NW2d 70, cert den 476 US 1141, 90 L Ed 2d 694, 106 S Ct 2248; *State v Mahany* (Mo App) 748 SW2d 762; *State v Hensley* (Mo App) 655 SW2d 810; *State v O'Neal* (Mo App) 651 SW2d 634; *State v Smith*, 220 Mont 364, 715 P2d 1301; *Santillanes v State*, 102 Nev 48, 714 P2d 184, appeal after remand 104 Nev 699, 765 P2d 1147; *State v Fraction*, 206 NJ Super 532, 503 A2d 336; *State v Anthony* (App) 100 NM 735, 676 P2d 262; *People v Shedrick*, 66 NY2d 1015, 499 NYS2d 388, 489 NE2d 1290; *People v Lester* (3d Dept) 99 App Div 2d 611, 472 NYS2d 162; *State v Woodruff* (Clark Co) 10 Ohio App 3d 326, 10 Ohio BR 532, 462 NE2d 457; *Weatherly v State* (Okla Crim) 733 P2d 1331; *State v La Stair*, 81 Or App 558, 726 P2d 1193, review den 302 Or 614, 733 P2d 449; *State v Bodenschatz*, 62 Or App 606, 662 P2d 1, petition den 295 Or 446, 668 P2d 382; *Commonwealth v Rodriguez*, 343 Pa Super 486, 495 A2d 569; *State v Pressley*, 290 SC 251, 349 SE2d 403; *State v Waff* (SD) 373 NW2d 18, habeas corpus proceeding (SD) 427 NW2d 118; *State v Elliott* (Tenn Crim) 703 SW2d 171, post-conviction proceeding (Tenn Crim) 1992 Tenn Crim App LEXIS 633; *State v Hailey* (Tenn Crim) 658 SW2d 547; *Stewart v State* (Tex App Texarkana) 705 SW2d 232, petition for discretionary review ref (Sep 17, 1986); *Odum v Commonwealth*, 225 Va 123, 301 SE2d 145; *State v Rupe*, 101 Wash 2d 664, 683 P2d 571, appeal after remand, en banc 108 Wash 2d 734, 743 P2d 210, cert den 486 US 1061, 100 L Ed 2d 934, 108 S Ct 2834, reh den 487 US 1263, 101 L Ed 2d 976, 109 S Ct 25, post-conviction proceeding 115 Wash 2d 379, 798 P2d 780; *State v Cummings*, 44 Wash App 146, 721 P2d 545, review den 106 Wash 2d 1017; *State v Acord*, 175 W Va 611, 336 SE2d 741, habeas corpus proceeding (CA4 Va) 904 F2d 903, cert den 498 US 986, 112 L Ed 2d 534, 111 S Ct 523; *State v Sheppard*, 172 W Va 656, 310 SE2d 173; *State v Gum*, 172 W Va 534, 309 SE2d 32; *State v Lukasik* (App) 115 Wis 2d 134, 340 NW2d 62; *Schmunk v State* (Wyo) 714 P2d 724.

Annotation: Physiological or psychological truth and deception tests, 23 ALR2d 1306.

Modern status of rule relating to admission of results of lie detector (polygraph) test in federal criminal trials, 43 ALR Fed 68.

Practice References 14 Am Jur Proof of Facts 2d 1, Reliability of Polygraph Examination.

Footnote 41. § 1001.

Footnote 42. *United States v Hall* (CA10 NM) 805 F2d 1410, 22 Fed Rules Evid Serv 69 (evidence that defendant had taken and failed three polygraph tests was properly admitted where issue was raised as to quality of police investigation and limiting instruction was given to jury); *Ford v State*, 256 Ga 375, 349 SE2d 361 (defense counsel made no objection when witness made reference to results of polygraph examination); *Cargill v State*, 255 Ga 616, 340 SE2d 891, cert den 479 US 1101, 94 L Ed 2d 180, 107 S Ct 1328, reh den 481 US 1024, 95 L Ed 2d 519, 107 S Ct 1914 (defendant could not complain of introduction of evidence concerning results of polygraph examination where he himself opened door to such testimony).

Footnote 43. *United States v Tucker* (CA7 Ill) 773 F2d 136, 19 Fed Rules Evid Serv 757, cert den 478 US 1021, 92 L Ed 2d 742, 106 S Ct 3337 and cert den 478 US 1022, 92 L Ed 2d 742, 106 S Ct 3338, reh den 478 US 1035, 92 L Ed 2d 774, 107 S Ct 23, later proceeding (ND Ill) 675 F Supp 1515, 9 FR Serv 3d 1014, later proceeding (CA7 Ill) 836 F2d 334, cert den 488 US 855, 102 L Ed 2d 115, 109 S Ct 143, later proceeding (CA7 Ill) 858 F2d 1264, 7 UCCRS2d 159 (among conflicting authorities noted on other grounds in *A. Marcus, Inc. v Farrow* (ND Ill) 94 BR 513) and cert den 490 US 1105, 104 L Ed 2d 1018, 109 S Ct 3154; *United States v Greichunos* (ND Ill) 572 F Supp 220; *State v Pendergist* (La App 1st Cir) 444 So 2d 306, cert den (La) 447 So 2d 1068 (evidence of a polygraph examination may be admissible in a post-trial proceeding at the discretion of the trial judge).

In narcotics prosecution, trial court properly exercised discretion in admitting information about coconspirator's polygraph test where the trial judge offered to admonish the jury not to consider that evidence with regard to defendant, but counsel for defendant refused admonition. *United States v Betancourt* (CA6 Ky) 838 F2d 168, 24 Fed Rules Evid Serv 744, reh den (CA6) 1988 US App LEXIS 5904 and cert den 486 US 1013, 100 L Ed 2d 210, 108 S Ct 1748.

§ 1008 --Tests taken upon stipulation as to admissibility of results

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

When the parties to an action have stipulated as to the admissibility of polygraph tests results, the courts are not in agreement as to whether the results of the polygraph tests taken upon stipulation are admissible. One line of authority seems to support the view that the results of a lie detector test taken upon a stipulation that the results will be admissible are not admissible. 44 Other courts, however, follow the view that the results of lie detector tests are admissible when the test is taken pursuant to a stipulation that the results will be admissible on the theory that since the accused would undoubtedly rely on the results if positive, it would be unreasonable to allow the accused to defeat the introduction of lie detector tests results because the results are unfavorable. 45 While there is some authority to the effect that lie detector tests are not admissible in

attorney disciplinary proceedings, 46 some courts have taken the view that the results of lie detector tests are admissible, upon stipulation between the parties, in proceedings to discipline attorneys. 47 One court reasoned that a stipulation was required to compensate for the fact that polygraph evidence lacked scientific acceptance. 48

Many courts allow the results of lie detector tests taken upon a stipulation to be admitted in evidence in criminal cases only if certain conditions are met. 49 These conditions may include that the accused, his counsel, and the prosecutor all sign a stipulation providing for the defendant's submission to the test and for the subsequent admission at trial of the graph and the expert's opinion, 50 and that the stipulation of admissibility of the tests results remain subject to the discretion of the trial judge, so that if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions, the trial judge may refuse to accept such evidence. 51 Further, the court may require that if the evidence is admitted, the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime, but, at most, tends only to indicate that at the time of the examination the defendant was not telling the truth. 52 Lastly, the court may require that if the graphs of the examiner's opinion are offered into evidence, the opposing party must have the right to cross-examine the examiner with respect to his qualifications and training, the conditions under which the test was administered, and the limitations and the possibility of error in the technique for polygraph examination. 53

Although results of a polygraph test may be admitted on stipulation of the parties, subject to certain conditions which relate to the accused's knowledge of his rights and the trial court's discretion relating to conduct of test, there is no requirement that the prosecutor consent to the defendant's offer to stipulate to admission of results of his polygraph examination. 54

§ 1008 --Tests taken upon stipulation as to admissibility of results [SUPPLEMENT]

Case authorities:

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in an prosecution resulting from defendant's attempt to hire someone to kill her former husband and a woman he was seeing where the person who was hired, testifying for the State, offered to take a polygraph test. The offer was unintentionally elicited by defendant after intense cross-examination and during a trial revealing inconsistencies in the witness's testimony, the trial court allowed the defendant's motion to strike the statement and immediately instructed the jury to disregard the statement, and the court further asked the jury if they could in fact disregard the statement, to which they answered in the affirmative. *State v Suggs* (1995) 117 NC App 654, 453 SE2d 211.

Footnotes

Footnote 44. *Foster v State*, 285 Ark 363, 687 SW2d 829, appeal after remand 290 Ark 495, 720 SW2d 712, reh den 290 Ark 498, 722 SW2d 869 and cert den 482 US 929, 96 L Ed 2d 700, 107 S Ct 3213; *Hughes v State* (Del Sup) 490 A2d 1034; *Marsh v Lake Forest Hospital* (2d Dist) 166 Ill App 3d 70, 116 Ill Dec 612, 519 NE2d 504, app den 121 Ill 2d 571, 122 Ill Dec 439, 526 NE2d 832; *State ex rel. Fields v Maggio* (La) 368 So 2d

1016; *Akonom v State*, 40 Md App 676, 394 A2d 1213; *Commonwealth v Mendes*, 406 Mass 201, 547 NE2d 35; *People v Liddell*, 63 Mich App 491, 234 NW2d 669; *State v Litzau* (Minn App) 377 NW2d 53; *State v Biddle* (Mo) 599 SW2d 182; *State v Grier*, 307 NC 628, 300 SE2d 351, appeal after remand 314 NC 59, 331 SE2d 669; *Fulton v State* (Okla Crim) 541 P2d 871; *Commonwealth v Rodriguez*, 343 Pa Super 486, 495 A2d 569; *Rutledge v St. Paul Fire & Marine Ins. Co.* (App) 286 SC 360, 334 SE2d 131 (results of polygraph examination of insured inadmissible despite stipulation); *State v Land* (Tenn Crim) 681 SW2d 589; *Lewis v State* (Tex Crim) 500 SW2d 167; *State v Frazier*, 162 W Va 602, 252 SE2d 39 (criticized on other grounds by *State v Haller*, 178 W Va 642, 363 SE2d 719).

In a criminal case, the state has rights which should not be bartered away via a stipulation that assigns probative value to evidence which in reality has none because the scientific experts have not yet accepted it as a reliable and accurate means of ascertaining truth or deception. *State v Hill* (Montgomery Co) 40 Ohio App 2d 16, 69 Ohio Ops 2d 9, 317 NE2d 233.

Annotation: Admissibility of polygraph or similar lie detector test results, or willingness to submit to test, on issues of coverage under insurance policy, or insurer's good-faith belief that claim was not covered, 7 ALR5th 143 § 4[b].

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence, 53 ALR3d 1005 § 3.

Modern status of rule relating to admission of results of lie detector (polygraph) test in federal criminal trials, 43 ALR Fed 68 §§ 3, 6[b].

Footnote 45. *Herman v Eagle Star Ins. Co.* (CD Cal) 283 F Supp 33, affd (CA9 Cal) 396 F2d 427 (polygraph admissible in action for recovery on insurance policy where insured agreed to take the test); *Green v State* (Fla App D2) 437 So 2d 784; *McGhee v State*, 253 Ga 278, 319 SE2d 836; *Titara v State* (Ind) 447 NE2d 587; *State v Marti* (Iowa) 290 NW2d 570.

Accused knowingly and intelligently chose to waive his rights to object to admission of polygraph test results into evidence where he assured trial court that he had adequately discussed decision with his lawyers, wished to take the test, and had advice of counsel that he need not take test, and where he had agreed to requirement that results might be used even if unfavorable. *United States v Oliver* (CA8 Mo) 525 F2d 731, cert den 424 US 973, 47 L Ed 2d 743, 96 S Ct 1477.

Trial judge did not err in excluding results of polygraph test where bank robbery defendant arranged for such test on his own and sought stipulation of admissibility, which prosecution refused, only after receiving favorable results; it would be obviously unfair to allow defendant to test waters before he sought stipulation and require prosecutor to so stipulate when defendant had favorable results, yet allow defendant to refuse such stipulation when results are unfavorable. *United States v Beck* (CA11 Ga) 729 F2d 1329, 15 Fed Rules Evid Serv 506, cert den 469 US 981, 83 L Ed 2d 318, 105 S Ct 383.

Annotation: 7 ALR5th 143 § 4[a].

53 ALR3d 1005 § 4.

Footnote 46. § 1009.

Footnote 47. *In re Swartz*, 141 Ariz 266, 686 P2d 1236; *Arden v State Bar*, 43 Cal 3d 713, 239 Cal Rptr 68, 739 P2d 1236, 79 ALR4th 559; *Florida Bar v Rayman* (Fla) 238 So 2d 594.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576 § 3[b].

Footnote 48. *Arden v State Bar*, 43 Cal 3d 713, 239 Cal Rptr 68, 739 P2d 1236, 79 ALR4th 559.

Footnote 49. *Wynn v State* (Ala App) 423 So 2d 294; *State v Montes*, 136 Ariz 491, 667 P2d 191; *Bosworth v State*, 178 Ga App 86, 342 SE2d 22; *Minneman v State* (Ind) 441 NE2d 673, cert den 461 US 933, 77 L Ed 2d 307, 103 S Ct 2099; *State v Roach*, 223 Kan 732, 576 P2d 1082; *Aguilar v State*, 98 Nev 18, 639 P2d 533; *State v South*, 136 NJ Super 402, 346 A2d 437, certif den 69 NJ 387, 354 A2d 315; *State v Albert*, 303 NC 173, 277 SE2d 439; *State v Souel*, 53 Ohio St 2d 123, 7 Ohio Ops 3d 207, 372 NE2d 1318; *State v Grisby*, 97 Wash 2d 493, 647 P2d 6, cert den 459 US 1211, 75 L Ed 2d 446, 103 S Ct 1205, later proceeding 121 Wash 2d 419, 853 P2d 901 and (superseded by statute on other grounds as stated in *State v Bartholomew*, 101 Wash 2d 631, 683 P2d 1079); *Cullin v State* (Wyo) 565 P2d 445.

A stipulation must be clear, unequivocal and complete. *State v Hollander*, 201 NJ Super 453, 493 A2d 563, certif den 101 NJ 335, 501 A2d 983, habeas corpus den (DC NJ) 1992 US Dist LEXIS 20200.

Annotation: 53 ALR3d 1005 § 5.

Footnote 50. *Gilstrap v State*, 256 Ga 20, 342 SE2d 667 (Trial judge did not err in refusing to consider post-trial polygraph examination administered to defendant where consent order recited only that state had consented to administration of examination but not that state had stipulated to admissibility of results of examination).

In conviction of restaurant manager for his repeated failure to deposit daily restaurant receipts in owner's bank account, trial court properly admitted into evidence results of polygraph test to which defendant had voluntarily submitted and which he had failed, where court determined that defendant's oral stipulation to use of polygraph and admissibility of its results operated as waiver of any evidentiary objection based on scientific unreliability which would preclude admissibility, but did not preclude evidence of scientific unreliability and defense counsel's ability to comment on such evidence in argument. *Davis v State* (Fla App D4) 516 So 2d 953, 11 FLW 2238, ctfed ques ans, approved (Fla) 520 So 2d 572, 13 FLW 157.

The signature of the state police officer involved in the making of agreement on the polygraph test did not suffice for signature of prosecuting attorney. *Helton v State* (Ind) 479 NE2d 538.

Results of polygraph examination would not be admissible where stipulation was signed

only by defendant, and not by prosecution. *State v Skelton*, 41 Or App 497, 599 P2d 1171.

Footnote 51. *State v Valdez*, 91 Ariz 274, 371 P2d 894.

In prosecution for rape, trial court erred in admitting testimony of polygraph examiner inasmuch as examiner was not licensed pursuant to state law and, thus, was not "qualified" as contemplated by stipulation providing that both defendant and victim would submit to polygraph examinations administered by qualified individual with results of such examinations being admissible at trial. *Holcomb v State*, 268 Ark 138, 594 SW2d 22, appeal after remand 271 Ark 619, 609 SW2d 78.

Footnote 52. *State v Valdez*, 91 Ariz 274, 371 P2d 894.

Footnote 53. *State v Valdez*, 91 Ariz 274, 371 P2d 894.

In prosecution for second-degree murder, trial court properly admitted results of defendant's polygraph examination, which parties had stipulated would be admissible, where defendant's participation in examination had been free and voluntary, where defendant was allowed to cross-examine examiner as to his expertise and all other points that bore on accuracy of polygraph, and where jury was instructed that examiner's testimony as to results of test was not conclusive but was to be taken only as expert opinion. *State v Rebeterano* (Utah) 681 P2d 1265.

Footnote 54. *Ex parte Clements* (Ala) 447 So 2d 695.

Defendants were not denied due process of law when prosecutor refused to stipulate to admission of polygraph test results and by trial judge's refusal to accept results in evidence when offered in motion to correct errors, where, before trial, defense was in possession of polygraph test results inconclusive as to one defendant but which indicated that one defendant knew something about the incident, and where second polygraph test, conducted after trial, which indicated that defendants were telling truth when they stated they had not engaged in sexual intercourse with victim, was not newly discovered evidence, since third party had told both defendants on day after kidnapping and rape that he and another were persons involved in that incident. *Dean v Duckworth* (CA7 Ind) 748 F2d 367, cert den 469 US 1214, 84 L Ed 2d 335, 105 S Ct 1188 (applying Ind law).

§ 1009 --Admissibility in particular types of cases or proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The courts almost uniformly reject the results of lie detector tests when offered in evidence in actions for malicious prosecution to assess the knowledge available to the defendant at the time the criminal prosecution was begun. 55 However, there is authority for the view that the results of polygraph examinations are admissible in malicious prosecution actions where they are introduced to either show probable cause or

the information available to the defendant when the decision was made to initiate a criminal prosecution. 56

Many courts also refuse to admit the results of an insured's polygraph test as substantive evidence to show the guilt or innocence of the insured regarding an alleged false insurance claim in a civil suit for recovery of insurance proceeds, 57 or to establish an insurer's good-faith basis for denial of a claim, since such evidence is considered too unreliable to afford a basis for an insurer's refusal of coverage. 58 However, there is authority for the view that evidence that an insured had failed a polygraph test is admissible in an insurer's good-faith defense for refusing to pay an insurance claim since such evidence is probative on the issue of whether the insurer had a reasonable basis for denying coverage. 59

A polygraph examination has been held admissible for use in a child custody case. 60

Some courts refuse to admit lie detector tests results in attorney discipline proceedings because lie detector evidence lacks scientific reliability or objective trustworthiness. 61

Some courts will admit the results of lie detector tests that are taken pursuant to a stipulation by the parties that the results will be admissible. 62

§ 1009 --Admissibility in particular types of cases or proceedings [SUPPLEMENT]

Case authorities:

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in an prosecution resulting from defendant's attempt to hire someone to kill her former husband and a woman he was seeing where the person who was hired, testifying for the State, offered to take a polygraph test. The offer was unintentionally elicited by defendant after intense cross-examination and during a trial revealing inconsistencies in the witness's testimony, the trial court allowed the defendant's motion to strike the statement and immediately instructed the jury to disregard the statement, and the court further asked the jury if they could in fact disregard the statement, to which they answered in the affirmative. *State v Suggs* (1995) 117 NC App 654, 453 SE2d 211.

Footnotes

Footnote 55. *Barnier v Szentmiklosi* (CA6 Mich) 810 F2d 594, 22 Fed Rules Evid Serv 697; *Southern Bell Tel. & Tel. Co. v Roper* (Fla App D3) 438 So 2d 1046, later proceeding (Fla App D3) 482 So 2d 538, 11 FLW 326; *Munford, Inc. v Anglin*, 174 Ga App 290, 329 SE2d 526; *Kairys v Douglas Stereo, Inc.*, 83 Md App 667, 577 A2d 386, 5 BNA IER Cas 801; *Brown v Best Products, Inc.*, 18 Ohio St 3d 32, 18 Ohio BR 69, 479 NE2d 852; *Sabag v Continental South Dakota (SD)* 374 NW2d 349.

Annotation: Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 ALR5th 663 § 3[a].

Footnote 56. *Criss v Springfield Township*, 56 Ohio St 3d 82, 564 NE2d 440, 10 ALR5th 1064, reh den 57 Ohio St 3d 611, 566 NE2d 1232 and reh den 57 Ohio St 3d

Annotation: 10 ALR5th 663 § 3[b].

Footnote 57. *Mize v Harford Ins. Co.* (WD Va) 567 F Supp 550; *Murphy v Cincinnati Ins. Co.* (CA6 Mich) 772 F2d 273; *Aetna Ins. Co. v Barnett Bros., Inc.* (CA8 Iowa) 289 F2d 30 (applying Iowa law); *Bryant v State Farm Fire & Casualty Ins. Co.* (Ala) 447 So 2d 181 (inadmissible absent stipulation); *Godwin v Farmers Ins. Co.* (App) 129 Ariz 416, 631 P2d 571; *Elder v Coronet Ins. Co.* (1st Dist) 201 Ill App 3d 733, 146 Ill Dec 978, 558 NE2d 1312, app withdrawn 139 Ill 2d 594, 159 Ill Dec 106, 575 NE2d 913; *Neises v Solomon State Bank*, 236 Kan 767, 696 P2d 372; *Britton v Farmers Ins. Group (Truck Ins. Exchange)*, 221 Mont 67, 721 P2d 303 (results not admissible under statute); *Senders v CNA Ins. Cos.*, 212 NJ Super 518, 515 A2d 820 (recognizing inadmissibility absent stipulation); *Terpstra v Niagara Fire Ins. Co.*, 26 NY2d 70, 308 NYS2d 378, 256 NE2d 536, 43 ALR3d 1369; *Conti v Republic Underwriters Ins. Co.* (Okla) 782 P2d 1357; *Wilson v Donegal Mut. Ins. Co.*, 410 Pa Super 31, 598 A2d 1310; *Rutledge v St. Paul Fire & Marine Ins. Co.* (App) 286 SC 360, 334 SE2d 131 (inadmissible even with stipulation); *Memphis Bank & Trust Co. v Tennessee Farmers Mut. Ins. Co.* (Tenn App) 619 SW2d 395; *Bufkin v Texas Farm Bureau Mut. Ins. Co.* (Tex App Tyler) 658 SW2d 317; *Industrial Indem. Co. v Kallevig*, 114 Wash 2d 907, 792 P2d 520, 7 ALR5th 1014.

Annotation: Admissibility of polygraph or similar lie detector test results, or willingness to submit to test, on issues of coverage under insurance policy, or insurer's good-faith belief that claim was not covered, 7 ALR5th 143 § 3[a].

Footnote 58. *Britton v Farmers Ins. Group (Truck Ins. Exchange)*, 221 Mont 67, 721 P2d 303; *Memphis Bank & Trust Co. v Tennessee Farmers Mut. Ins. Co.* (Tenn App) 619 SW2d 395.

Annotation: 7 ALR5th 143 § 10.

Footnote 59. *Moskos v National Ben Franklin Ins. Co.* (1st Dist) 60 Ill App 3d 130, 17 Ill Dec 389, 376 NE2d 388; *Moss v Nationwide Mut. Ins. Co.* (Franklin Co) 24 Ohio App 3d 145, 24 Ohio BR 234, 493 NE2d 969; *Conti v Republic Underwriters Ins. Co.* (Okla) 782 P2d 1357.

Footnote 60. *Henderson v Henderson*, 93 NM 405, 600 P2d 1195.

Footnote 61. *In re Kennedy* (Del Sup) 472 A2d 1317, cert den 467 US 1205, 81 L Ed 2d 346, 104 S Ct 2388, later proceeding (Del Sup) 503 A2d 1198; *In re Moyer*, 77 NM 253, 421 P2d 781; *Office of Disciplinary Counsel v Wittmaack*, 513 Pa 609, 522 A2d 522.

Annotation: Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576 3[a].

Footnote 62. § 1008.

§ 1010 Truth serum tests

Truth serum tests occupy much the same position as lie detector tests, 63 and no court has as yet recognized the admissibility of the results of such tests, at least for the purpose of proving the truth of the matter asserted, 64 although their admissibility for other purposes, such as on the question of insanity 65 or sex deviation, 66 has been recognized.

Footnotes

Footnote 63. For discussion of lie detector or polygraph tests, generally, see §§ 1007-1009.

Footnote 64. *People v Jones*, 42 Cal 2d 219, 266 P2d 38; *People v Bynum*, 192 Colo 60, 556 P2d 469 (sodium amytal); *Fetters v State* (Del Sup) 436 A2d 796 (sodium amytal examination); *Zeigler v State* (Fla) 402 So 2d 365, cert den 455 US 1035, 72 L Ed 2d 153, 102 S Ct 1739 (sodium butathol test); *Harper v State*, 249 Ga 519, 292 SE2d 389; *Cross v State*, 136 Ga App 400, 221 SE2d 615; *State v Linn*, 93 Idaho 430, 462 P2d 729; *State v Rosencrantz* (App) 110 Idaho 124, 714 P2d 93; *People v Slago* (2d Dist) 58 Ill App 3d 1009, 16 Ill Dec 392, 374 NE2d 1270 (sodium amytal); *State v Conley*, 6 Kan App 2d 280, 627 P2d 1174; *People v Simonds*, 135 Mich App 214, 353 NW2d 483, app gr 422 Mich 936 (testimony based on truth serum sessions is inadmissible because it is unreliable and has not gained general acceptance in the scientific community); *People v Cox*, 85 Mich App 314, 271 NW2d 216 (sodium brevitol); *Warden, Nevada State Prison v Lischko*, 90 Nev 221, 523 P2d 6; *State v Levitt*, 36 NJ 266, 176 A2d 465, 91 ALR2d 1112; *State v Blome*, 209 NJ Super 227, 507 A2d 283, certif den 104 NJ 458, 517 A2d 444; *Jones v State* (Okla Crim) 542 P2d 1316; *Commonwealth v Talley*, 456 Pa 574, 318 A2d 922; *State v Ward* (Tenn Crim) 712 SW2d 485 (criticized on other grounds by *State v Furlough* (Tenn Crim) 797 SW2d 631); *Castillo v State* (Tex Crim) 739 SW2d 280, 81 ALR4th 225, reh den (Nov 4, 1987) and cert den and app dismd 487 US 1228, 101 L Ed 2d 924, 108 S Ct 2889 and (criticized on other grounds by *Geesa v State* (Tex Crim) 820 SW2d 154) as stated in *Guillen v State* (Tex App Houston (14th Dist)) 1993 Tex App LEXIS 84, petition for discretionary review ref (Mar 3, 1993); *Orange v Commonwealth*, 191 Va 423, 61 SE2d 267; *State v White*, 60 Wash 2d 551, 374 P2d 942, cert den 375 US 883, 11 L Ed 2d 113, 84 S Ct 154.

Results of sodium pentothal examination of defendant were properly denied entry into evidence, even though admission was requested by defendant. *Dean v State* (Tex App Corpus Christi) 636 SW2d 8.

Annotation: Physiological or psychological truth and deception tests, 23 ALR2d 1306, § 3.

Footnote 65. Although the admissibility of the results of an examination made while the accused is subject to "truth drugs" is questionable if the statements are offered to prove the truth of the matter asserted, the use of drugs did not bar a psychiatrist from giving his expert analysis of the accused's answers to questions while under the influence of drugs for the purpose of determining the defendant's sanity at the time of the commission of the

alleged offenses. *People v Cartier*, 51 Cal 2d 590, 335 P2d 114 (criticized on other grounds by *People v Cruz* (2nd Dist) 264 Cal App 2d 350, 70 Cal Rptr 603).

Footnote 66. A psychiatrist's testimony regarding the results of a "truth serum" examination of the defendant was admissible, in a prosecution for a sex offense, to show whether the defendant was a sexual deviate. *People v Jones*, 42 Cal 2d 219, 266 P2d 38, recognizing the inadmissibility of statements of one under the effects of truth drugs where the statements are offered for the purpose of proving the truth of the matter asserted.

§ 1011 Voice stress tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The voice stress evaluation test, like the polygraph test, 67 is based on the theory that an individual will undergo certain physiological changes when he or she is not telling the truth, and that these changes can be monitored and interpreted by using a voice stress evaluator machine. 68 Tests results from a voice stress evaluation are generally inadmissible in criminal 69 and civil 70 proceedings, due to the test's unreliability. However, there is authority for the view that tests results from a psychological stress test evaluation may be admissible in a civil proceeding, at the discretion of the trial judge, upon a proper showing that the operator of the test was an expert, that the testing procedure is reliable, and that the actual test administered on the individual was valid. 71

Footnotes

Footnote 67. As to polygraph tests, generally, see §§ 1007-1009.

Footnote 68. *Heisse v Vermont* (DC Vt) 519 F Supp 36.

Annotation: Admissibility of voice stress evaluation test results or of statements made during test, 47 ALR4th 1202 § 2[a].

Footnote 69. *United States v Traficant* (ND Ohio) 566 F Supp 1046, 13 Fed Rules Evid Serv 1478; *People v Lippert* (5th Dist) 125 Ill App 3d 489, 80 Ill Dec 824, 466 NE2d 276, 47 ALR4th 1183; *State v Thompson* (La) 381 So 2d 823; *Smith v State*, 31 Md App 106, 355 A2d 527; *State v Ochalla* (Minn) 285 NW2d 683; *People v Tarsia* (3d Dept) 67 App Div 2d 210, 415 NYS2d 120, affd 50 NY2d 1, 427 NYS2d 944, 405 NE2d 188; *State v Rogers*, 52 NC App 676, 279 SE2d 881; *Sabag v Continental South Dakota* (SD) 374 NW2d 349.

Annotation: 47 ALR4th 1202 § 3[a].

Footnote 70. *Barrel of Fun, Inc. v State Farm Fire & Casualty Co.* (CA5 La) 739 F2d 1028, 16 Fed Rules Evid Serv 187; *Joubert v Travelers Indem. Co.* (CA5 La) 736 F2d 191, 15 Fed Rules Evid Serv 1596; *Neises v Solomon State Bank*, 236 Kan 767, 696 P2d

372; Sabag v Continental South Dakota (SD) 374 NW2d 349.

Footnote 71. Simon Neustadt Family Center, Inc. v Bludworth (App) 97 NM 500, 641 P2d 531 (disapproved on other grounds by Melnick v State Farm Mut. Auto. Ins. Co., 106 NM 726, 749 P2d 1105, 3 BNA IER Cas 730).

Reliability of scientific technique under the Federal Rules of Evidence is discussed in § 1001.

Annotation: 47 ALR4th 1202 § 4.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases, 105 ALR Fed 299.

(3). Other Types of Experiments, Demonstrations and Tests [1012-1022]

§ 1012 Analysis of chemical or physical qualities of materials or substances, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The general rules regarding the admissibility of experiments or tests, performed both in and out of court, 72 have been applied to experiments or tests to determine such matters as the flammability and explosiveness of substances or materials, 73 the suitability of building materials, 74 the cause or extent of slipperiness of materials or substances, 75 the effect of foods, drinks, and drugs, including the adulteration thereof, 76 the effect of beauty and cosmetic preparations, 77 the quality of seed, 78 the poisonous quality of feed, 79 the effect of gases 80 and insecticides, 81 and other experiments or tests to determine the chemical or physical qualities or character of the material or substance. 82

§ 1012 ----Analysis of chemical or physical qualities of materials or substances, generally [SUPPLEMENT]

Case authorities:

Results of blood genetic marker tests were properly admitted in evidence where doctor employed by laboratory where blood tests were performed was qualified, without objection, as expert in field of genetic blood testing and paternity evaluation, and doctor testified, without objection, that such tests were accepted by scientific and medical community. People v Crawford (1992, 2d Dept) 183 AD2d 775, 583 NYS2d 506, app den 80 NY2d 902, 588 NYS2d 828, 602 NE2d 236.

Footnotes

Footnote 72. §§ 996 et seq.

Footnote 73. *People v Freeman*, 107 Cal App 2d 44, 236 P2d 396; *Metropolitan Property & Liability Ins. Co. v Shepherd*, 166 Ga App 300, 304 SE2d 74 (flammable character of carpet); *Hardman v Helene Curtis Industries, Inc.* (1st Dist) 48 Ill App 2d 42, 198 NE2d 681, 12 ALR3d 1033 (flammable character of hair spray).

It was within the discretion of the trial court to permit an expert witness, in a trial for conspiring to sabotage dry-cleaning establishments, to conduct before the jury an experiment for the purpose of demonstrating the flame reaction and other dangerous qualities of metallic potassium. *People v Black*, 45 Cal App 2d 87, 113 P2d 746, app dismd 315 US 782, 86 L Ed 1189, 62 S Ct 634, reh den 315 US 828, 86 L Ed 1223, 62 S Ct 796.

In trial for arson, court erred in admitting into evidence wood sample purportedly taken from fire scene and test results that it contained traces of gasoline, where prosecution's own expert conceded at trial that test was invalid since there was substantial possibility that sample was contaminated after its removal from fire scene. *People v Koullias* (2d Dept) 96 App Div 2d 869, 465 NYS2d 748.

In an action arising from fire under the hood of an automobile, allegedly caused by the escape of gasoline, an offer to show, by an experiment with a hot plate, that gasoline in contact with a hot metal surface would not ignite was properly rejected in the trial court's discretion, there being nothing to show that the temperatures or conditions were comparable. *Beasley v Ford Motor Co.*, 237 SC 506, 117 SE2d 863.

Generally, as to the admissibility of experimental evidence in explosion cases, see 31A Am Jur 2d, Explosions and Explosives, §§ 187-188.

Annotation: Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354 §§ 3, 4.

Footnote 74. *John A. Johnson & Sons, Inc. v United States* (CA4 Md) 153 F2d 534, cert den 328 US 865, 90 L Ed 1636, 66 S Ct 1372.

The result of a controlled experiment has been held admissible in evidence in an action for breach of warranty by the contractor-builder of a school against the manufacturer-seller of an antialkaloid product which had been applied to a concrete floor block, on the question whether the defendant's product had caused the floor block to adhere to the concrete slab which had been poured upon the top of it, even though the two slabs had been treated with a bond-breaking agent, where the conditions under which the experiment was conducted were substantially similar, although not identical, to those existing at the time of the original occurrence. *Odell v Frueh* (2nd Dist) 146 Cal App 2d 504, 304 P2d 45, 76 ALR2d 345.

Where the tensile strength of materials is an issue, evidence may be received as to tests of the tensile strength of materials that are, in all respects, similar to those whose tensile strength is in controversy. *State v Commercial Casualty Ins. Co.*, 125 Neb 43, 248 NW

807, 88 ALR 790; Perfecting Service Co. v Product Development & Sales Co., 259 NC 400, 131 SE2d 9.

Annotation: 76 ALR2d 354 § 5.

Footnote 75. Moore v Chesapeake & O. R. Co. (SD W Va) 493 F Supp 1252, affd (CA4 W Va) 649 F2d 1004; Dritt v Morris, 235 Ark 40, 357 SW2d 13; Keith v Jos. G. Schmersahl Co. (Mo) 371 SW2d 334 (slipperiness of plastic material covering steps in model home); Ewing v Russell, 81 SD 563, 137 NW2d 892. (slipperiness of waxed floor); McAllister v Magnolia Petroleum Co. (Tex Civ App Dallas) 319 SW2d 411, writ ref n r e (Feb 11, 1959) and reh'g of writ of error overr (Mar 11, 1959), error ref n r e.

The trial court properly excluded evidence of experiments conducted to determine the length of time required for a puddle of water on concrete to contract and form a ring around the contracted perimeter, in the absence of competent evidence showing the floors experimented upon to be the same or substantially the same as the floor on which the plaintiff had slipped. Glowacki v A. J. Bayless Markets, Inc., 76 Ariz 295, 263 P2d 799.

Annotation: 76 ALR2d 354 § 6.

Footnote 76. Carl v State, 87 Ala 17, 6 So 118; Ohio County Drug Co. v Howard, 201 Ky 346, 256 SW 705, 31 ALR 1355.

In connection with a libel charging that a food product was adulterated in that it was decomposed, the court in Bruce's Juices, Inc. v United States (CA5 Fla) 194 F2d 935, in rejecting the contention of the claimant that the government's mold count method of showing decomposition, admitted by the court below, was erroneous, said that the objection went to the weight, and not to the admissibility, of the evidence.

It was not error to allow biochemist to testify as to his findings with respect to contents of soft drink bottle, even though tests were conducted almost a year after plaintiff drank from the bottle. Neubauer v Coca Cola Bottling Co. (2d Dist) 96 Ill App 2d 18, 238 NE2d 437.

Annotation: 76 ALR2d 354 § 7.

Footnote 77. Sicard v Kremer, 133 Ohio St 291, 10 Ohio Ops 367, 13 NE2d 250, reh den.

In an action for damages caused to plaintiff's hair by peroxide bleach, trial court properly excluded testimony of defense expert concerning results of tests conducted on another where description of test lacked detail and exactitude, where possibility of skewing of test results had not been protected against, and where test had been conducted by only one person. Sacks v Roux Laboratories, Inc., 25 Mass App 672, 521 NE2d 1050, CCH Prod Liab Rep ¶ 11782.

Annotation: 76 ALR2d 354 § 8.

Footnote 78. Pline v Asgrow Seed Co. (App) 102 Idaho 827, 642 P2d 64.

Annotation: 76 ALR2d 354 § 10.

Footnote 79. *McAleavy v Lowe*, 259 Wis 463, 49 NW2d 487.

Where it appeared that the plaintiffs' cattle had become afflicted with a disease known as "hyperkeratosis," there was no evidence that the disease was acquired in any manner other than eating the defendants' feed, which the plaintiffs claimed to have been poisoned, and it appeared that by the time the disease was diagnosed all the feed in question had been consumed, the court has held that the trial court did not err in admitting the testimony of an expert concerning experiments showing that a brand of lubricant used in the defendants' feed mill contained a substance called chlorinated naphthalene, and that this substance caused hyperkeratosis in cattle which the expert had had under observation for some time prior to the experiment. *Chickasha Cotton Oil Co. v Hancock* (Okla) 306 P2d 330.

Annotation: 76 ALR2d 354 § 11.

Footnote 80. *James v Bailey Reynolds Chandelier Co.*, 325 Mo 1054, 30 SW2d 118.

Footnote 81. *Council v Duprel*, 250 Miss 269, 165 So 2d 134; *Simpson v American Oil Co.*, 219 NC 595, 14 SE2d 638.

In action by potato growers against chemical company in which it was alleged that herbicide Eptam was responsible for destruction of crop, chemical company's evidence showing characteristics and testing of herbicide, though not shown to have been performed under conditions similar to those existing at plaintiffs' potato ranch at time chemical was used, was properly admitted to aid jury in understanding function and behavior of herbicide and to controvert claims that chemical was inadequately tested. *Rayner v Stauffer Chemical Co.* (App) 120 Ariz 328, 585 P2d 1240.

Experiments as to the carbon monoxide content of a room were held inadmissible where the conditions at the time of the experiment were not shown to have been the same or similar as at the time of the occurrence in question. *Hammer v Slive* (2d Dist) 35 Ill App 2d 447, 183 NE2d 49.

Annotation: 76 ALR2d 354 § 12.

Footnote 82. *Marsee v United States Tobacco Co.* (WD Okla) 639 F Supp 466, 20 Fed Rules Evid Serv 1245, affd (CA10 Okla) 866 F2d 319, CCH Prod Liab Rep ¶ 12023, 27 Fed Rules Evid Serv 694 (animal studies on effects of nitrosamines and polonium 210 to show smokeless tobacco products containing those elements caused plaintiff's cancer); *Schlabach v State* (Ind App) 459 NE2d 740 (results of tests on substance alleged to be LSD); *Commonwealth v Daye*, 411 Mass 719, 587 NE2d 194 (elemental analysis of bullet lead); *State v Jones* (Mo) 749 SW2d 356, cert den 488 US 871, 102 L Ed 2d 155, 109 S Ct 186, post-conviction proceeding (Mo) 784 SW2d 789, cert den 498 US 881, 112 L Ed 2d 175, 111 S Ct 215 (in murder trial, trace chemist permitted to testify concerning his comparison of soil samples from area in which victim's body was discovered and soil residue found on gloves traced to defendant, and his opinion that two samples could have had common origin); *State v Gear*, 115 NJ Super 151, 278 A2d 511, cert den 59 NJ 270, 281 A2d 532 (demonstration of disintegration of lottery slips placed in water); *Funderburk v Commonwealth*, 6 Va App 334, 368 SE2d 290 (forensic scientist was properly permitted to testify in murder trial concerning tests she performed on samples of blood taken from defendant, victim, defendant's brother, and stains found on

defendant's clothing, in order to determine blood types and enzymes present).

Expert and opinion evidence pertaining to physical or chemical change is generally discussed in 31A Am Jur 2d, Expert and Opinion Evidence § 400.

Annotation: Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation, 9 ALR5th 369.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 ALR4th 897.

Admissibility of evidence of neutron activation analysis, 50 ALR3d 117.

76 ALR2d 354 § 13.

Practice References 10 Am Jur Proof of Facts 2d 365, Nondestructive Testing of Material—X-Ray, Gamma Ray, and Neutron Radiography.

29Am Jur Proof of Facts 461, Identification of Substances by Thin-Layer Chromatography and Paper Chromatography.

§ 1013 Visibility or line of vision

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The testimony of witnesses concerning experiments conducted by them to demonstrate or determine the ability of one to see a particular person, object, situation, or the like, are admissible, 83 so long as the conditions existing at the time of the experiment are at least substantially similar to those which prevailed at the time of the occurrence in controversy. 84 In the event that the conditions surrounding the event in controversy and the conditions under which the experiment were conducted are so dissimilar so as to mislead and confuse the trier of fact, evidence of the experiment should be excluded. 85

Footnotes

Footnote 83. Dempsey v Shell Oil Co. (Fla App D4) 589 So 2d 373, 16 FLW D 2856; Brennan v Wisconsin Cent. (2nd Dist) 227 Ill App 3d 1070, 169 Ill Dec 321, 591 NE2d 494, app den 146 Ill 2d 623, 176 Ill Dec 793, 602 NE2d 447.

Opinion testimony as to the visibility of persons and objects is discussed, generally, in 31A Am Jur 2d, Expert and Opinion Evidence § 366.

As to the visibility of person's or objects in motor vehicle accident cases, see 8 Am Jur 2d, Automobiles and Highway Traffic § 1067.

As to the visibility of person's or objects in railroad accident cases, see 65 Am Jur 2d,

Railroads § 628.

Annotation: Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152 § 10.

Practice References Experimental evidence as to visibility. 3 Am Jur Trials 427, 476, Preparing and Using Experimental Evidence.

Footnote 84. Robinson v Morrison, 272 Ala 552, 133 So 2d 230; McGough v Hendrickson, 58 Cal App 2d 60, 136 P2d 110; Dempsey v Shell Oil Co. (Fla App D4) 589 So 2d 373, 16 FLW D 2856; Beckner v Chalkley, 19 Md App 239, 310 A2d 569; Hurly v Star Transfer Co., 141 Mont 176, 376 P2d 504; Hodgkins v Christopher, 58 NM 637, 274 P2d 153; McQueen v Goldey (Butler Co) 20 Ohio App 3d 41, 20 Ohio BR 44, 484 NE2d 712; McDowell v Floyd, 240 SC 158, 125 SE2d 4; Ft. Worth & D. R. Co. v Williams (Tex) 375 SW2d 279, reh'g of cause overr (Feb 26, 1964); Reynolds v Riggs, 234 Va 653, 363 SE2d 713.

Annotation: 78 ALR2d 152 § 2.

Footnote 85. Tritt v Judd's Moving & Storage, Inc. (Franklin Co) 62 Ohio App 3d 206, 574 NE2d 1178; Reynolds v Riggs, 234 Va 653, 363 SE2d 713.

Defendant failed to make any showing of harm suffered as a result of allowing victim to bring lamp into courtroom to demonstrate how the apartment was lit on the night of the defendant's alleged assault. Mathis v State, 184 Ga App 455, 361 SE2d 856.

In prosecution for taking indecent liberties with child, in which prosecution witness testified as to what she saw through window of mobile home which was illuminated by two blinking yellow lights, trial court did not abuse discretion in denying defense motion to conduct in-court demonstration of lights and what could be seen by them. State v Morton, 217 Kan 642, 538 P2d 675.

Annotation: 78 ALR2d 152 § 11.

§ 1014 Re-enactment of crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts support a view permitting the introduction of evidence, in the form of testimony of a qualified witness, of a pretrial demonstration of a crime by an accused, where the prosecution can support its offering by showing that participation on the part of the accused was voluntary and that the testimony is relevant and material to the matter in issue. 86 A number of courts also support the propriety of a demonstration by the defendant during the trial and in the presence of the jury, re-enacting the events surrounding the commission of a crime, either where the defendant voluntarily performs on request, or waives the objection of his constitutional privilege against self-incrimination by offering affirmative evidence on direct examination, rendering

proper the prosecution's request, upon cross-examination, for a demonstration in rebuttal. 87 Further, the prosecution may be allowed to conduct a demonstration in the presence of the jury which recreates the scene of a homicide by arranging articles in substantially the same position as they were at the time of the homicide, if the demonstration allows the jury to more intelligently consider the prosecution's theory of the case or to rebut the defendant's theory of the case, and if the probative value of such demonstration is not substantially outweighed by the danger of unfair prejudice. 88

Footnotes

Footnote 86. *Dunn v State*, 277 Ala 39, 166 So 2d 878; *State v Beck* (La App 2d Cir) 445 So 2d 470, cert den (La) 446 So 2d 315; *State v Ortega*, 77 NM 7, 419 P2d 219; *State v Goyet*, 120 Vt 12, 132 A2d 623.

Forcing of robbery suspect to re-enact crime for benefit of victim and later presenting witness testimony as to event did not violate accused's Fifth Amendment right against self-incrimination, where a few hours before re-enactment, defendant had been identified in lineup and where upon request of accused's counsel at trial, jury was instructed not to consider testimony relating to re-enactment for any purpose. *Avery v Procunier* (CA5 Tex) 750 F2d 444.

In prosecution for burglary, trial court did not abuse discretion in requiring defendant to demonstrate wearing of gun and holster while on witness stand where defendant was charged with burglary while armed with deadly weapon, where defendant testified that he wore gun for purpose of self-defense on night of his arrest, and where prosecutor forwarded proposition that large size of gun and placement of holster made gun awkward weapon for self-defense; although forced demonstration by defendant may have had some tendency to prejudice jury, relevancy of demonstration outweighed possible undesirable effect. *Maxwell v State* (Ind App) 408 NE2d 158.

In trial for second-degree murder based on allegation that defendant shook his infant in a manner sufficient to have caused bilateral subdural hemorrhage, which eventually resulted in infant's death, it was not error to permit police officer, to whom defendant made statement, to demonstrate to jury manner in which defendant had shown him he shook the infant since police officer was merely testifying to what defendant had told and shown him concerning manner in which he shook his infant. *State v Lane*, 39 NC App 33, 249 SE2d 449.

As to filmed re-enactments of a crime, see §§ 986, 987.

Annotation: Admissibility of evidence of accused's re-enactment of crime, 100 ALR2d 1257 § 3.

Footnote 87. *Coats v State*, 253 Ala 290, 45 So 2d 35; *Price v State*, 82 Md App 210, 570 A2d 887, cert den 320 Md 16, 575 A2d 742; *State v Robinson* (Mo App) 516 SW2d 40; *State v Roby*, 43 Wash 2d 652, 263 P2d 273.

Judge did not err in refusing permission for defendant in assault prosecution to demonstrate how he was carrying cinder block and how and where he contacted victim's body, where defense had been allowed to demonstrate various actions by eight different

witnesses. *Vilicic v State*, 152 Ga App 207, 262 SE2d 502.

In prosecution for neglect of child, trial court did not abuse its discretion by forcing the defendant, accused of deliberately submerging his infant in scalding water, to demonstrate his version of the incident, where defendant claimed that he accidentally spilled scalding water onto his daughter, and defendant's difficulty recreating the incident merely went to his credibility as a witness. *Sipress v State* (Ind App) 562 NE2d 758.

Annotation: Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

100 ALR2d 1257 § 4.

Footnote 88. *State v Hardway*, 182 W Va 1, 385 SE2d 62.

§ 1015 Public surveys or polls

[View Entire Section](#)
[Go to Parallel Reference Table](#)

While the taking of surveys or polls of public or consumers' opinion, preference, or the like, is a comparatively modern technique, relatively early on the courts expressed a need for something in the nature of a competent survey or poll of public opinion, notwithstanding recognition of the possibility of using members of the public as witnesses in court. 89 A number of decisions have found the results of a survey or opinion poll inadmissible because of defects in the methods or conduct of the survey, including bias in the questions asked or the way in which they were asked. 90 On the other hand, the admissibility of the results of a survey or poll of public or consumers' opinion, recognition, preference, or the like, has been recognized or upheld in a number of cases. 91 on the ground of sheer necessity for admission, 92 or on the ground that the witness, in testifying to the results of a poll or survey, is merely indicating the state of mind of the interviewees, thus eliminating the necessity that they be cross-examined, 93

In evaluating consumer perception or opinion surveys, especially when they are conducted by reputable professionals, it is generally thought that any technical deficiencies ought to go to the weight accorded them and not to their admissibility into evidence. 94 Thus, alleged technical deficiencies in conduct of survey, such as poor sampling, inexperienced interviewers, poorly designed questions, and other errors in execution, affect a survey's weight but not its admissibility. 95

Footnotes

Footnote 89. *Parke-Davis & Co. v H. K. Mulford Co.* (CC NY) 189 F 95, mod on other grounds (CA2 NY) 196 F 496; *A. E. Staley Mfg. Co. v Staley Milling Co.* (CA7 Ill) 253 F2d 269, 116 USPQ 546, cert den 357 US 926, 2 L Ed 2d 1370, 78 S Ct 1371, 117

USPQ 498; *People v Nelson* (2d Dist) 88 Ill App 3d 196, 43 Ill Dec 476, 410 NE2d 476.

Consumer perception or opinion surveys are of undeniable importance in trademark infringement and unfair competition cases, as they are the most practical and useful way of assessing public opinion. *Nestle Co. v Chester's Market, Inc.* (DC Conn) 571 F Supp 763, 219 USPQ 298, 15 Fed Rules Evid Serv 778, motion to vacate den (DC Conn) 596 F Supp 1445, 225 USPQ 394, 40 FR Serv 2d 1127, revd on other grounds (CA2 Conn) 756 F2d 280, 225 USPQ 537, 40 FR Serv 2d 1192, on remand (DC Conn) 609 F Supp 588 and (criticized on other grounds by *In re Memorial Hospital of Iowa County, Inc.* (CA7 Wis) 862 F2d 1299).

Annotation: Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619 § 2.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USCS §§ 1063, 1114, and 1125), 98 ALR Fed 20.

Footnote 90. *Nestle Co. v Chester's Market, Inc.* (DC Conn) 571 F Supp 763, 219 USPQ 298, 15 Fed Rules Evid Serv 778, motion to vacate den (DC Conn) 596 F Supp 1445, 225 USPQ 394, 40 FR Serv 2d 1127, revd on other grounds (CA2 Conn) 756 F2d 280, 225 USPQ 537, 40 FR Serv 2d 1192, on remand (DC Conn) 609 F Supp 588 and (criticized on other grounds by *In re Memorial Hospital of Iowa County, Inc.* (CA7 Wis) 862 F2d 1299); *Bristol-Myers Co. v Federal Trade Com.* (CA4) 185 F2d 58; *Sears, Roebuck & Co. v All States Life Ins. Co.* (CA5 Tex) 246 F2d 161, 114 USPQ 19, cert den 355 US 894, 2 L Ed 2d 192, 78 S Ct 268, 115 USPQ 427.

Annotation: 76 ALR2d 619 § 15.

Footnote 91. *Public Utilities Com. v Pollak*, 343 US 451, 96 L Ed 1068, 72 S Ct 813; *McNeilab, Inc. v American Home Products Corp.* (SD NY) 675 F Supp 819, 6 USPQ2d 2001, later proceeding (SD NY) 686 F Supp 73, reaffirmed, on reconsideration (SD NY) 682 F Supp 769 and affd (CA2 NY) 848 F2d 34, 6 USPQ2d 2007; *Safeway Stores, Inc. v Safeway Ins. Co.* (MD La) 657 F Supp 1307, affd (CA5 La) 791 F2d 929; *W.T. Rogers Co. v Keene* (CA7 Wis) 778 F2d 334, 228 USPQ 145; *Gilbert/Robinson, Inc. v Carrie Beverage-Missouri, Inc.* (ED Mo) 758 F Supp 512, 19 USPQ2d 1481, affd (CA8 Mo) 989 F2d 985, 26 USPQ2d 1378, reh, en banc, den (CA8) 1993 US App LEXIS 11700 and cert den (US) 126 L Ed 2d 282, 114 S Ct 338; *Standard Oil Co. v Standard Oil Co.* (CA10 Wyo) 252 F2d 65, 116 USPQ 176, 76 ALR2d 600; *Stanley v Columbia Broadcasting System, Inc.*, 35 Cal 2d 653, 221 P2d 73, 86 USPQ 520, 23 ALR2d 216.

Survey evidence gathered for later use in trademark infringement litigation is not invariably suspect or irrelevant to the issue of secondary meaning. *American Footwear Corp. v General Footwear Co.* (CA2 NY) 609 F2d 655, 204 USPQ 609, cert den 445 US 951, 63 L Ed 2d 787, 100 S Ct 1601, 205 USPQ 680.

As to the admissibility of surveys or polls under the residual hearsay exception, see § 683.

Annotation: 76 ALR2d 619 § 3.

Footnote 92. See Eighth Ave. Coach Corp. v New York, 170 Misc 243, 10 NYS2d 170, affd 259 App Div 870, 20 NYS2d 402, affd 286 NY 84, 35 NE2d 907.

Annotation: 76 ALR2d 619 § 5.

Footnote 93. Standard Oil Co. v Standard Oil Co. (CA10 Wyo) 252 F2d 65, 116 USPQ 176, 76 ALR2d 600.

The results of a reaction test conducted among consumers in a specified area by trained interviewers is admissible hearsay evidence to show the state of mind of the extrajudicial declarant, where such state of mind is relevant. Miles Laboratories, Inc. v Frolich (SD Cal) 195 F Supp 256, 130 USPQ 18, affd (CA9 Cal) 296 F2d 740, 132 USPQ 122, cert den 369 US 865, 8 L Ed 2d 84, 82 S Ct 1030.

Annotation: 76 ALR2d 619 § 6.

Practice References 18 Am Jur POF2d 305, Admissibility of opinion survey.

Footnote 94. Nestle Co. v Chester's Market, Inc. (DC Conn) 571 F Supp 763, 219 USPQ 298, 15 Fed Rules Evid Serv 778, motion to vacate den (DC Conn) 596 F Supp 1445, 225 USPQ 394, 40 FR Serv 2d 1127, revd on other grounds (CA2 Conn) 756 F2d 280, 225 USPQ 537, 40 FR Serv 2d 1192, on remand (DC Conn) 609 F Supp 588 and (criticized on other grounds by In re Memorial Hospital of Iowa County, Inc. (CA7 Wis) 862 F2d 1299); E. I. Du Pont de Nemours & Co. v Yoshida International, Inc. (ED NY) 393 F Supp 502, 185 USPQ 597.

Footnote 95. Jellibeans, Inc. v Skating Clubs of Georgia, Inc. (CA11 Ga) 716 F2d 833, 222 USPQ 10 (criticized on other grounds by Wesco Mfg., Inc. v Tropical Attractions of Palm Beach, Inc. (CA11 Fla) 833 F2d 1484, 5 USPQ2d 1190).

Reliability of scientific technique is discussed in § 1001.

§ 1016 Tests regarding firearms; ballistic tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of ballistics tests are admissible at the discretion of the trial court, 96 whether such tests are made before or after commencement of the trial, 97 provided that a proper foundation as to the competency of the person administering the tests and the methods used is laid. 98 Accordingly, the following experiments and tests have been deemed admissible at the discretion of the trial judge: experiments concerned with the manner or ease of firing a gun, 99 tests by gun experts to determine whether a particular gun could be discharged accidentally, 1 tests to reveal gunshot residue, 2 tests to determine the distance from which a gun was fired, 3 results of trace metal detection techniques to show that the accused handled the gun at issue, 4 and results of neutron activation analysis test to show that the accused had fired the gun at issue. 5 The conditions surrounding tests with a gun to determine the manner in which it could be

discharged need not be identical with those existing at the time of the occurrence in question; there need only be a substantial similarity. 6 However, the results of a paraffin test to determine whether the accused had recently fired a gun, as well as evidence of the accused's refusal to take such a test, have been deemed inadmissible on the ground that a paraffin test is not reliable. 7

Evidence, otherwise admissible, of experiments involving firearms is usually not excluded because of the absence of the accused during the performance of such experiments. 8

Footnotes

Footnote 96. *Goodall v United States*, 86 US App DC 148, 180 F2d 397, 17 ALR2d 1070, cert den 339 US 987, 94 L Ed 1389, 70 S Ct 1009; *Collins v State*, 250 Ala 58, 33 So 2d 18; *McKenna v People*, 124 Colo 112, 235 P2d 351; *Wynes v State*, 182 Ga 434, 185 SE 711 (powder-burn experiment); *Bell v State*, 71 Ga App 430, 31 SE2d 109; *State v Criger*, 151 Kan 176, 98 P2d 133 (direction of fire upon accidental discharge); *State v Phillips*, 228 NC 595, 46 SE2d 720; *State v Farrell* (App, Cuyahoga Co) 64 Ohio L Abs 481, 112 NE2d 408, motion overr; *Cooper v State*, 61 Okla Crim 318, 67 P2d 981; *Williams v State*, 147 Tex Crim 178, 179 SW2d 297; *State v Leuch*, 198 Wash 331, 88 P2d 440.

Law Reviews: Giannelli, Ballistics Evidence: Firearms Identification. 27 Crim L Bull 95 (1991).

Annotation: Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 ALR4th 1072.

Expert evidence to identify gun from which bullet or cartridge was fired, 26 ALR2d 892 § 4.

Practice References Ballistic tests. 3 Am Jur Trials 427, Preparing and Using Experimental Evidence.

29 Am Jur Proof of Facts 65, Firearms Identification.

15 Am Jur Proof of Facts 115, Identification of Substances by Neutron Activation Analysis.

Footnote 97. *Goodall v United States*, 86 US App DC 148, 180 F2d 397, 17 ALR2d 1070, cert den 339 US 987, 94 L Ed 1389, 70 S Ct 1009.

Footnote 98. *Chatom v State* (Ala) 348 So 2d 838.

Footnote 99. *State v Richardson* (Mo) 321 SW2d 423.

In murder case, prosecution was properly permitted to present demonstration of man sitting in driver's seat of automobile pointing shotgun at passenger's side to show impossibility of firing gun under such circumstances and thus refute defendant's version of shooting, where man used for demonstration was approximately same height and

weight as person accused by defendant, and car used in demonstration was same make and model as that involved in shooting and had identical dimensions. *People v Estrada* (3d Dept) 109 App Div 2d 977, 486 NYS2d 794.

Annotation: Admissibility of evidence as to manner or ease of firing gun, in civil action involving issue of accidental death or suicide, 63 ALR2d 1150.

Footnote 1. *Massachusetts Mut. Life Ins. Co. v Brei* (CA2 NY) 311 F2d 463, 6 FR Serv 2d 5, 100 ALR2d 634; *Canada Life Assur. Co. v Houston* (CA9 Cal) 241 F2d 523, 63 ALR2d 1130.

Footnote 2. *Chatom v State* (Ala) 348 So 2d 838 (atomic absorption test); *State v Crowder*, 285 NC 42, 203 SE2d 38, vacated, in part 428 US 903, 49 L Ed 2d 1207, 96 S Ct 3205 (flameless atomic absorption spectrophotometry).

Chemist who was called as defense witness and who testified on direct examination that primer residue test on defendant's hand was inconclusive and, therefore, did not prove that defendant had fired gun, was properly permitted to state on cross-examination that some residue had been found on back of defendant's right index finger and thumb, which was consistent with firing gun, and to explain that test was inconclusive, rather than either positive or negative, because only one of primer residue metals, barium, was found, and positive result occurs only when both barium and antimony are present in significant quantities. *United States v Barton* (CA10 NM) 731 F2d 669, 15 Fed Rules Evid Serv 844.

In a second-degree murder prosecution in which the prosecution's criminologist testified as to his finding of gunshot residue particles on defendant's hand by use of a scanning electron microscope technique, the prosecution, in order to have such testimony admitted, was not required to establish by expert testimony the general acceptance of such a technique in the scientific community because there is a unanimity of scientific opinion regarding the value and reliability of the use of a scanning electron microscope for gunshot residue particle analysis. *People v Palmer* (1st Dist) 80 Cal App 3d 239, 145 Cal Rptr 466, 1 ALR4th 1056.

In a prosecution for first-degree murder, the trial court properly admitted testimony by a forensic chemist that he performed tests on swabbings taken from defendant's hands, that gunshot residue was present on defendant's hand, and that defendant could have fired a gun with his left hand. *State v Sparks*, 297 NC 314, 255 SE2d 373.

Footnote 3. § 1017.

Footnote 4. *State v Snyder*, 190 NJ Super 626, 464 A2d 1209.

Footnote 5. *State v Spencer*, 298 Minn 456, 216 NW2d 131.

Footnote 6. *Canada Life Assur. Co. v Houston* (CA9 Cal) 241 F2d 523, 63 ALR2d 1130.

Footnote 7. *Clarke v State*, 218 Tenn 259, 402 SW2d 863, cert den 385 US 942, 17 L Ed 2d 222, 87 S Ct 303.

Footnote 8. § 999.

§ 1017 --Tests to determine distance from which gun fired

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The results of a test to determine the distance from which a weapon had been fired may be shown if the test was conducted under conditions substantially similar to those involved in the commission of the crime. 9 Ordinarily, this type of test is conducted by a ballistics expert, or by a law enforcement officer or other person experienced in the use and handling of guns. 10

The extent to which the conditions differ may be considered by the jury in determining the weight of such evidence. 11 However, if the conditions are materially different, the results of the test will be excluded. 12 Whether the test conditions were sufficiently similar is a question to be resolved by the trial judge, in his discretion, and his ruling will not be disturbed unless there has been an abuse of such discretion. 13

Footnotes

Footnote 9. *Nichols v State*, 267 Ala 217, 100 So 2d 750; *State v Polan*, 78 Ariz 253, 278 P2d 432; *State v Criger*, 151 Kan 176, 98 P2d 133; *Epperson v Commonwealth*, 227 Ky 404, 13 SW2d 247; *Done v State*, 202 Miss 418, 32 So 2d 206; *State v Truster (Mo)* 334 SW2d 104; *State v Foulds*, 127 NJL 336, 23 A2d 895; *State v Atwood*, 250 NC 141, 108 SE2d 219, 86 ALR2d 602; *Cooper v State*, 61 Okla Crim 318, 67 P2d 981; *Rhea v State*, 208 Tenn 559, 347 SW2d 486; *Williams v State*, 147 Tex Crim 178, 179 SW2d 297.

In prosecution for manslaughter, trial judge properly admitted into evidence firearm expert's comparison between powder dispersion shown on photograph of victim's head and that shown on pattern tests made under similar conditions in laboratory with .357 Magnum pistol in order to determine distance from which pistol was fired. *State v Castagna*, 170 Conn 80, 364 A2d 200.

Trial court erred in permitting prosecution witness to testify to results of test-firing weapon at various objects at prescribed distances, absent showing that these objects possessed characteristics substantially similar to human skin or that they reflected powder burns in same manner as human skin. *People v Cohen*, 50 NY2d 908, 431 NYS2d 446, 409 NE2d 921, on remand (2d Dept) 77 App Div 2d 627, 430 NYS2d 640, appeal after remand (2d Dept) 87 App Div 2d 77, 450 NYS2d 497, affd 58 NY2d 844, 460 NYS2d 18, 446 NE2d 774, cert den 461 US 930, 77 L Ed 2d 302, 103 S Ct 2092.

Cardboard target tests were properly admitted where tests were introduced to demonstrate extent of spread, rather than penetration of pellets, as proof of distance between weapon and victim, and any difference between penetration of cardboard and penetration of body and victim who was clothed and who carried package of cigarettes was irrelevant). *State v Bates*, 48 Ohio St 2d 315, 2 Ohio Ops 3d 453, 358 NE2d 584, vacated, in part 438 US 910, 57 L Ed 2d 1154, 98 S Ct 3135.

Testimony relating to out-of-court experiment conducted with defendant's gun which involved firing gun from various distances into test gown similar to that worn by victim, to determine residue pattern and at what distance gun left gunpowder residue, was admissible where conditions surrounding experiment were substantially similar to those existing at time of victim's death. *State v Kahan*, 268 SC 240, 233 SE2d 293.

Annotation: Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 ALR5th 497.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 86 ALR2d 611.

Footnote 10. *Nichols v State*, 267 Ala 217, 100 So 2d 750; *State v Polan*, 78 Ariz 253, 278 P2d 432; *West v State*, 200 Ga 566, 37 SE2d 799; *State v Criger*, 151 Kan 176, 98 P2d 133; *Brown v State*, 176 Miss 448, 169 So 837; *State v Tourville (Mo)* 295 SW2d 1, cert den 352 US 1018, 1 L Ed 2d 554, 77 S Ct 575; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Shepherd v State*, 51 Okla Crim 209, 300 P 421; *Williams v State*, 147 Tex Crim 178, 179 SW2d 297.

Footnote 11. *United States v Russell (CA4 Va)* 971 F2d 1098, 36 Fed Rules Evid Serv 642, cert den (US) 122 L Ed 2d 161, 113 S Ct 1013; *Nichols v State*, 267 Ala 217, 100 So 2d 750; *West v State*, 200 Ga 566, 37 SE2d 799; *State v Bass*, 186 La 139, 171 So 829; *Brown v State*, 176 Miss 448, 169 So 837; *State v Phillips*, 228 NC 595, 46 SE2d 720; *Shepherd v State*, 51 Okla Crim 209, 300 P 421.

Footnote 12. *Miller v State*, 250 Ind 656, 236 NE2d 585; *State v Truster (Mo)* 334 SW2d 104; *Roberts v State*, 117 Tex Crim 418, 35 SW2d 175.

Where the bullet penetrated the human body without passing through the victim's clothing, the requirement of substantial similarity between conditions of the test and those of the actual shooting necessitates the exclusion of the results of a test conducted by firing the gun from varying distances at such targets as pasteboard, paper, cloth, or other substances and materials, because such targets are significantly different in nature and texture from human flesh. *Rowe v State*, 120 Fla 649, 163 So 22; *Roberts v State (Fla App D1)* 189 So 2d 543 (manila paper targets); *Epperson v Commonwealth*, 227 Ky 404, 13 SW2d 247 (cloth targets); *State v Bass*, 186 La 139, 171 So 829 (cardboard targets); *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471 (cotton pasted upon cardboard, tin cans filled with tomatoes, and the body of a dressed, picked chicken were used as targets).

Footnote 13. *State v Polan*, 78 Ariz 253, 278 P2d 432; *State v Phillips*, 228 NC 595, 46 SE2d 720; *State v Goins*, 24 NC App 468, 211 SE2d 481, cert den 287 NC 262, 214 SE2d 434; *Andrews v State (Okla Crim)* 555 P2d 1079.

§ 1018 Voice recognition

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Testimony of identification of a person by having heard his voice has been regarded as legitimate and competent to establish identity in both civil and criminal cases, 14 and in attempting to devalue voice recognition testimony in the minds of the jurors, defense attorneys have sought to introduce evidence, tests, and demonstrations of its liability to error. 15 Voice analysis evidence by means of a sound spectrograph or "voiceprint"—an electromagnetic instrument which analyzes sound and disperses it into an array of its time, frequency, and intensity components—is not so inherently unreliable or misleading as to require its exclusion from a jury's consideration in every case, and where the record demonstrates that virtually all safeguards designed to assure reliability and to prevent misleading of the jury are employed, spectrographic voice analysis evidence is admissible. 16 However, there is authority for the view that voice spectrography results are not admissible in criminal prosecutions because the technique is not generally accepted in the scientific community. 17

◆ Observation: In light of the conflict among judicial and legal authorities as to the reliability of voice spectrographic evidence, it is improper to admit voice spectrographic evidence without a preliminary inquiry into reliability. 18

§ 1018 ----Voice recognition [SUPPLEMENT]

Case authorities:

Even though a robbery victim stated that she did not need to hear defendant speak in order to identify him, the trial court did not err in requiring defendant to demonstrate his voice to the victim and the jury for purposes of voice identification. *State v Locklear* (1994) 117 NC App 255, 450 SE2d 516.

Footnotes

Footnote 14. § 566.

Footnote 15. *State v Ferris*, 212 Neb 835, 326 NW2d 185, appeal after remand 216 Neb 606, 344 NW2d 668; *State v Reynolds*, 43 Or App 619, 603 P2d 1223, affd 289 Or 533, 614 P2d 1158, later proceeding 69 Or App 465, 684 P2d 37, adhered to, clarified, on reconsideration 71 Or App 571, 692 P2d 648, review den 298 Or 597, 695 P2d 50.

Annotation: Identification of accused by his voice, 70 ALR2d 995 § 8.

Practice References Recognition by sounds. 3 Am Jur Trials 427, Preparing and Using Experimental Evidence §§ 46, 47.

Footnote 16. *United States v Williams* (CA2 NY) 583 F2d 1194, 3 Fed Rules Evid Serv 1063, cert den 439 US 1117, 059 L Ed 2d 77, 99 S Ct 1025; *United States v Smith* (CA7 Ill) 869 F2d 348, 27 Fed Rules Evid Serv 938; *Commonwealth v Lykus*, 367 Mass 191, 327 NE2d 671, later proceeding 406 Mass 135, 546 NE2d 159; *State ex rel. Trimble v Hedman*, 291 Minn 442, 192 NW2d 432, 49 ALR3d 903; *People v Bein*, 114 Misc 2d

1021, 453 NYS2d 343; State v Williams, 4 Ohio St 3d 53, 4 Ohio BR 144, 446 NE2d 444; State v Wheeler (RI) 496 A2d 1382.

In a preliminary proceeding in criminal charges against a juror, there was no error in receiving into evidence the testimony of a professional voiceprint examiner concerning the result of a voiceprint test identifying defendant as the person involved in a recorded telephone conversation, where it appeared that voiceprint identification has received general acceptance by recognized experts in the field who would be expected to be familiar with its use, and has therefore reached the standard of scientific acceptance and reliability necessary for its admissibility into evidence. Hodo v Superior Court of Riverside County (4th Dist) 30 Cal App 3d 778, 106 Cal Rptr 547.

Annotation: Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

70 ALR2d 995, supp § 9.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases, 105 ALR Fed 299 §§ 2, 4.

Practice References 19 Am Jur Proof of Facts 423, Spectrogram Voice Identification.

Footnote 17. People v Drake (Colo) 748 P2d 1237 (superseded by statute on other grounds as stated in People v Davis (Colo) 794 P2d 159); Cornett v State (Ind) 450 NE2d 498.

Spectrographic analysis of speech has not been generally accepted in relevant scientific community as producing uniformly reliable results, hence, it was error for trial judge to allow expert testimony concerning spectrographic comparisons in prosecution for conspiracy to distribute heroin for sale, but error was harmless where defendant himself introduced spectrographic evidence, arguing that it exculpated him, in spite of which jury found him guilty beyond reasonable doubt. State v Gortarez, 141 Ariz 254, 686 P2d 1224.

In action by restaurant owner against insurer for fire-loss recovery, voice print evidence was not admissible, where evidence on scientific reliability of instrument was inconclusive, testimony of knowledgeable expert did not establish its general acceptance within professional community, authoritative scientific literature did not demonstrate that there was any measure of universal acceptance of device's reliability, and there was not general judicial acceptance of voice print analysis. Windmere, Inc. v International Ins. Co., 105 NJ 373, 522 A2d 405.

Assuming without deciding that it was improper to admit spectrographic (voice print) evidence against defendant in his prosecution for aggravated sexual assault, the overwhelming evidence against defendant rendered the error, if any, harmless. Pope v State (Tex App Dallas) 756 SW2d 401, petition for discretionary review ref (Apr 19, 1989).

§ 1019 Hypnosis

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The courts are not in agreement as to the admissibility of hypnotically induced evidence. Some courts have expressed the view that a witness in a civil case who has undergone hypnosis may properly testify as to those events or facts recalled by him prior to or after such hypnosis. 19 However, there is also authority for the view that a witness in a civil case who has undergone hypnosis cannot testify to hypnotically induced recall, and can only testify, if the proper foundation is established, as to those facts or events recalled prior to the hypnosis. 20

As a general rule, in criminal cases, testimony concerning matters consciously recalled for the first time through pretrial hypnosis are inadmissible per se when offered in evidence for the purpose of establishing the guilt or innocence of the accused because hypnotism has not been scientifically accepted as a reliable means of producing historically accurate memory, and the admission of such testimony may violate the defendant's constitutional right to confront the witnesses against him. 21 In addition, hypnotically-induced testimony is not ordinarily admissible in criminal cases because of the concern that hypnotized subjects are unusually susceptible to suggestion. 22 However, a per se rule of inadmissibility covering hypnotically refreshed testimony by witnesses generally, may not be applied so as to exclude such testimony by criminal defendants in all cases, without regard to the particular circumstances. 23 This is so because a per se rule of excluding from evidence an accused's hypnotically refreshed recollection testimony violates the accused's constitutional rights to testify on his own behalf, to have compulsory process and conduct his own defense, and to due process of law. 24

Some courts have rejected the per se rule of inadmissibility of hypnotically refreshed testimony and have recognized that testimony concerning recollections refreshed or enhanced through pretrial hypnosis is generally admissible in a criminal proceeding, with the fact of such hypnosis going only to the testimony's weight and credibility, not to its admissibility or to the witnesses competence. 25 Other courts, however, have adopted the view that the admissibility of hypnotically refreshed testimony depends on the circumstances of each case, in light of such factors as the hypnotist's qualifications, the appropriateness of using hypnosis in the particular case, the presence or absence of undue suggestion, compliance or noncompliance with procedures calculated to insure the reliability of hypnotic recall, the extent such recall is corroborated by independent evidence, the witness' attitude, motivations, and amenability to cross-examination, and the testimony's probative value as compared to its potentially prejudicial effect. 26 Nonetheless, even courts recognizing the admissibility of hypnotically refreshed testimony where procedural safeguards are followed have ruled that testimony involving an uncorroborated personal identification of the defendant, whom the witness was not able to identify until undergoing pretrial hypnosis, is inadmissible per se in criminal

proceedings where the witness had reason to know when hypnotized that the defendant was already under suspicion. 27

§ 1019 ----Hypnosis [SUPPLEMENT]

Practice Aids: Sufficiency of evidence that witness in criminal case was hypnotized, for purpose of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony. 16 ALR5th 841.

Trial Report: Third Party Suit Against Therapists for Implanting False Memory of Childhood Molestation. 57 Am Jur Trials 313.

Case authorities:

Testimony by a witness that he was "positive" and had "no doubt whatsoever" that he saw defendant with the victim on the morning the victim was murdered did not violate the ban on hypnotically refreshed testimony and was properly admitted where the record shows that the witness positively identified defendant during pre-hypnosis interviews and that the witness's testimony referred to facts he related before his hypnotic session. *State v Baker* (1994) 338 NC 526, 451 SE2d 574.

Footnotes

Footnote 19. *Kline v Ford Motor Co.* (CA9 Cal) 523 F2d 1067; *Wyller v Fairchild Hiller Corp.* (CA9 Alaska) 503 F2d 506, 19 FR Serv 2d 229.

Footnote 20. *Lemieux v Superior Court of Arizona*, 132 Ariz 214, 644 P2d 1300, 31 ALR4th 1231.

Plaintiff's self-hypnotically refreshed recollections regarding collision were not admissible as evidence in an action to recover for injuries sustained in an automobile accident where plaintiff could not and did not prove, by clear and convincing evidence, under totality of evidence, that plaintiff's testimony as refreshed by means of self-hypnosis was reliable. *West v Howard* (Lucas Co) 77 Ohio App 3d 168, 601 NE2d 528, motion overr 63 Ohio St 3d 1411, 585 NE2d 835.

As to the effect of hypnosis on the competency of a witness, see 81 Am Jur 2d Witnesses § 173.

Annotation: Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 ALR4th 1239.

Footnote 21. *Contreras v State* (Alaska) 718 P2d 129, later proceeding (Alaska App) 767 P2d 1169 (disapproved on other grounds by *State v Bumpus* (Alaska) 820 P2d 298); *State v Poland*, 144 Ariz 388, 698 P2d 183, later proceeding 144 Ariz 412, 698 P2d 207, cert gr, in part 474 US 816, 88 L Ed 2d 49, 106 S Ct 60, motion gr 474 US 943, 88 L Ed 2d 284, 106 S Ct 341 and affd 476 US 147, 90 L Ed 2d 123, 106 S Ct 1749; *People v Hayes*, 49 Cal 3d 1260, 265 Cal Rptr 132, 783 P2d 719; *State v Davis* (Del Super) 490 A2d 601; *Stokes v State* (Fla) 548 So 2d 188, 14 FLW 349; *Walraven v State*, 255 Ga

276, 336 SE2d 798; State v Moreno, 68 Hawaii 233, 709 P2d 103; People v Zayas, 131 Ill 2d 284, 137 Ill Dec 568, 546 NE2d 513; People v Lampkin (3d Dist) 193 Ill App 3d 570, 140 Ill Dec 642, 550 NE2d 278; Daniels v State (Ind) 528 NE2d 775, vacated on other grounds 491 US 902, 105 L Ed 2d 691, 109 S Ct 3182, on remand (Ind) 561 NE2d 487; State v Haislip, 237 Kan 461, 701 P2d 909, cert den 474 US 1022, 88 L Ed 2d 558, 106 S Ct 575, later proceeding (Kan App) 769 P2d 682, habeas corpus den (DC Kan) 788 F Supp 482, affd (CA10 Kan) 992 F2d 1085, cert den (US) 126 L Ed 2d 214, 114 S Ct 263; State v Culpepper (La App 5th Cir) 434 So 2d 76; State v Metscher, 297 Md 368, 464 A2d 1052; Commonwealth v Dodge, 391 Mass 636, 462 NE2d 1363; People v Lee, 434 Mich 59, 450 NW2d 883, reh den 434 Mich 1203 and cert den 498 US 879, 112 L Ed 2d 171, 111 S Ct 211; State v Blackman (Mo App) 826 SW2d 76, later proceeding (Mo App) 1994 Mo App LEXIS 206; State v Patterson, 213 Neb 686, 331 NW2d 500, habeas corpus proceeding (CA8 Neb) 791 F2d 107, cert den 479 US 1036, 93 L Ed 2d 842, 107 S Ct 890; People v Eybergen, 130 Misc 2d 1, 494 NYS2d 803, affd (1st Dept) 131 App Div 2d 981, 515 NYS2d 1003; State v Flack, 312 NC 448, 322 SE2d 758; Harmon v State (Okla Crim) 700 P2d 212; Commonwealth v Smoyer, 505 Pa 83, 476 A2d 1304; State v Tuttle (Utah) 780 P2d 1203, 106 Utah Adv Rep 6, cert den 494 US 1018, 108 L Ed 2d 498, 110 S Ct 1323; Hall v Commonwealth, 12 Va App 198, 403 SE2d 362; State v Yapp, 45 Wash App 601, 726 P2d 1003.

Annotation: Admissibility of hypnotically refreshed or enhanced testimony, 77 ALR4th 927 § 4.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442.

Footnote 22. State v Ture (Minn) 353 NW2d 502, 45 ALR4th 575; State v Grimmert (Minn App) 459 NW2d 515.

Footnote 23. Rock v Arkansas, 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704, 22 Fed Rules Evid Serv 1128; Haakanson v State (Alaska App) 760 P2d 1030; People v Aguilar (2nd Dist) 218 Cal App 3d 1556, 267 Cal Rptr 879, review den (Cal) 1990 Cal LEXIS 2622; Morgan v State (Fla) 537 So 2d 973, 14 FLW 23; State v Holden (La App 2d Cir) 554 So 2d 121; Commonwealth v Kater, 409 Mass 433, 567 NE2d 885, appeal after remand 412 Mass 800, 592 NE2d 1328.

Annotation: 77 ALR4th 927 § 8.

Footnote 24. Rock v Arkansas, 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704, 22 Fed Rules Evid Serv 1128.

Footnote 25. United States v Narciso (ED Mich) 446 F Supp 252; United States v Awkard (CA9 Cal) 597 F2d 667, 4 Fed Rules Evid Serv 826, 50 ALR Fed 594, cert den 444 US 885, 62 L Ed 2d 116, 100 S Ct 179 and cert den 444 US 969, 62 L Ed 2d 383, 100 S Ct 460; United States v Adams (CA9 Cal) 581 F2d 193, cert den 439 US 1006, 58 L Ed 2d 683, 99 S Ct 621, habeas corpus proceeding (CA9) 1991 US App LEXIS 241; State v Brown (ND) 337 NW2d 138; State v King, 84 Or App 165, 733 P2d 472, review den 303 Or 455, 737 P2d 1248, habeas corpus dismissed sub nom King v Brown (CA9 Or) 8 F3d 1403, 93 CDOS 8163, 93 Daily Journal DAR 13927; State v Glebock (Tenn Crim) 616 SW2d 897 (criticized on other grounds by State v Pilkey (Tenn) 776 SW2d 943); Prime v State (Wyo) 767 P2d 149.

Annotation: 77 ALR4th 927 § 3.

Footnote 26. *Barnes v Henderson* (ED NY) 725 F Supp 142, 29 Fed Rules Evid Serv 476, affd without op (CA2 NY) 923 F2d 843, cert den 499 US 925, 113 L Ed 2d 255, 111 S Ct 1323; *Beachum v Tansy* (CA10 NM) 903 F2d 1321, cert den 498 US 904, 112 L Ed 2d 225, 111 S Ct 269; *Chamblee v State* (Ala App) 527 So 2d 173; *People v Romero* (Colo) 745 P2d 1003, cert den 485 US 990, 99 L Ed 2d 506, 108 S Ct 1296; *State v Bainbridge*, 117 Idaho 245, 787 P2d 231; *House v State* (Miss) 445 So 2d 815; *State v Hurd*, 173 NJ Super 333, 414 A2d 291, affd 86 NJ 525, 432 A2d 86; *State v Hutchinson*, 99 NM 616, 661 P2d 1315; *State v Johnston*, 39 Ohio St 3d 48, 529 NE2d 898, reh den 40 Ohio St 3d 707, 534 NE2d 850, later proceeding (Franklin Co) 64 Ohio App 3d 238, 580 NE2d 1162; *State v Boykin* (SD) 432 NW2d 60, habeas corpus proceeding (SD) 471 NW2d 165; *Horst v State* (Tex App Amarillo) 758 SW2d 311, petition for discretionary review ref (May 3, 1989) and motion for rehearing on PDR denied (Jun 7, 1989) and (superseded by statute on other grounds as stated in *Bodin v State* (Tex Crim) 807 SW2d 313); *State v Armstrong*, 110 Wis 2d 555, 329 NW2d 386, cert den 461 US 946, 77 L Ed 2d 1304, 103 S Ct 2125.

In a prosecution for a contract murder, the testimony of a prosecution witness whose memory had been refreshed by hypnosis prior to trial was admissible where, even though most of the safeguards required of a hypnosis session were lacking, the witness' pre and post-hypnosis statements were substantially similar, and where the defendant's expert testified that the witness was either feigning or not in a suggestible state while under hypnosis; such claim clearly undercutting any assertion that the procedures used, even if suggestive, created pseudo-memories. *People v Lucas*, 107 Misc 2d 231, 435 NYS2d 461.

Annotation: 77 ALR4th 927 § 5.

Footnote 27. *United States v Harrelson* (CA5 Tex) 754 F2d 1153, 17 Fed Rules Evid Serv 738, later proceeding (CA5 Tex) 754 F2d 1186, 17 Fed Rules Evid Serv 747, reh den, en banc (CA5 Tex) 765 F2d 1120 and cert den 474 US 922, 88 L Ed 2d 262, 106 S Ct 255 and reh den, en banc (CA5 Tex) 766 F2d 186 and cert den 474 US 908, 88 L Ed 2d 241, 106 S Ct 277 and cert den 474 US 1034, 88 L Ed 2d 578, 106 S Ct 599, later proceeding (WD Tex) 638 F Supp 1389, appeal after remand (CA5 Tex) 807 F2d 398, cert den 484 US 832, 98 L Ed 2d 66, 108 S Ct 106, post-conviction proceeding (CA5 Tex) 957 F2d 192; *United States v Valdez* (CA5 Tex) 722 F2d 1196, 14 Fed Rules Evid Serv 1375.

Annotation: 77 ALR4th 927 § 6.

§ 1020 Medical tests by electronic devices

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In a number of cases it has been held, by way of analogy to the admissibility of X-ray photographs when proper proof of their correctness and accuracy is produced, 28 that

reports and graphs of thermographic studies utilizing infrared photography to diagnose nerve and muscle injuries, 29 electroencephalographic, 30 electrocardiogramic, 31 and other electronic medical tests 32 are admissible in evidence within the discretion of the trial court. The accuracy of the instruments making the test, as well as the competency of the technician performing it, must be shown before such evidence may be admitted. 33 The identification of a graph as being that of the individual examined may be established by the custodian of the record, who need not have been personally present when the test was made. 34

Footnotes

Footnote 28. §§ 977, 978.

Footnote 29. *Cherico v National R. Passenger Corp.* (ED Pa) 758 F Supp 258, 32 Fed Rules Evid Serv 345, *affd* without op (CA3 Pa) 968 F2d 12; *Fleming v United States Dept. of Agriculture* (CA6) 713 F2d 179; *Troutman v Valley Nat. Bank* (App) 170 Ariz 513, 826 P2d 810, 107 Ariz Adv Rep 16; *Garrett v New Orleans Public Service, Inc.* (La App 4th Cir) 459 So 2d 746; *Procida v McLaughlin*, 195 NJ Super 396, 479 A2d 447.

Determination of whether reliability and acceptability of liquid crystal thermography in relevant scientific community has been adequately proven in given case lies within sound discretion of trial court, which did not abuse that discretion in refusing to admit medical opinion evidence based on thermographic examination in behalf of plaintiff in order to show permanency of injuries. *Crawford v Shivashankar* (Fla App D1) 474 So 2d 873, 10 FLW 2019, 56 ALR4th 1097.

In plaintiff's action to recover damages for personal injuries suffered in an automobile accident, the trial court erred in precluding plaintiff's chiropractic physician from testifying regarding liquid crystal thermography, as used by qualified health-care professionals to reveal the presence of soft tissue injuries, since it is a sufficiently reliable and acceptable scientific-medical diagnostic procedure to justify admissibility of testimony and evidence relating to a particular thermography study, under appropriate circumstances, to aid the jury in its deliberations. *Fay v Mincey* (Fla App D2) 454 So 2d 587.

Trial court abused its discretion in admitting thermographic evidence where the foundation for the admission of the evidence had not been established because the testimony of plaintiff's three experts to establish the general scientific acceptance of thermography was not disinterested. *Kluck v Borland*, 162 Mich App 695, 413 NW2d 90.

Annotation: Thermographic tests: admissibility of test results in personal injury suits, 56 ALR4th 1105.

Practice References Foundation for admission of thermogram. 46 Am Jur Proof of Facts 2d 275.

Footnote 30. *Melford v Gaus & Brown Constr. Co.* (1st Dist) 17 Ill App 2d 497, 151 NE2d 128, 66 ALR2d 528; *Hinrichs v Young* (Mo) 403 SW2d 642; *Young v Liddington*, 50 Wash 2d 78, 309 P2d 761.

Annotation: Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Footnote 31. *Kramer v John Hancock Mut. Life Ins. Co.*, 336 Mass 465, 146 NE2d 357.

Annotation: 66 ALR2d 536.

Footnote 32. *Stacey v Caldwell*, 186 Ga App 293, 367 SE2d 73 (in action for being struck from behind by another automobile, it was proper for the trial court to admit into evidence a computer report of plaintiff's electromyographic study which indicated nerve damage in patient, where doctor, who performed test on plaintiff, testified as to manner of making such reports and their reliability and where he testified that the report had been maintained in his medical records).

As to the admissibility of blood tests for identification purposes, see § 573.

Law Reviews: Admissibility of novel scientific evidence, 4 Vill Envt LJ 1 (1993).

Annotation: 66 ALR2d 536.

Footnote 33. *Melford v Gaus & Brown Constr. Co.* (1st Dist) 17 Ill App 2d 497, 151 NE2d 128, 66 ALR2d 528; *Quadlander v Kansas City Public Service Co.*, 240 Mo App 1134, 224 SW2d 396; *Atkins v Graves* (Tex Civ App Fort Worth) 367 SW2d 372, writ ref n r e (Jun 26, 1963).

Where trial court refused to permit defendant's medical witnesses to testify as to validity of a discogram test, apparently on the ground that they were not qualified to give opinion because they had not themselves used such a test, the court could not hold that exclusion of testimony constituted prejudicial error, in view of defendant's failure to make offer of proof to show what testimony of doctors as to validity of test would have been. *Rhodig v Cummings*, 160 Colo 499, 418 P2d 521.

Annotation: 66 ALR2d 536 § 2[c].

Practice References Authentication of electrocardiograms. 4 Am Jur Proof of Facts 627, Electrocardiograms, Proofs 1, 2.

–Authentication of electroencephalogram. 4 Am Jur Proof of Facts 641, Electroencephalograms, Proof 1.

Use of CAT scans in litigation. 8 Am Jur Proof of Facts 3d 145.

Footnote 34. *Freedman v Mutual Life Ins. Co.*, 342 Pa 404, 21 A2d 81, 135 ALR 1249.

In an action for bodily injuries, error has been held not committed in admitting in evidence electroencephalograms and reports based thereon where the exhibits are sufficiently identified as tests of the injured person and where the testimony of the medical expert under whose supervision the tests were taken justified an inference that they correctly and accurately portrayed the condition they purported to represent. *Melford v Gaus & Brown Constr. Co.* (1st Dist) 17 Ill App 2d 497, 151 NE2d 128, 66

ALR2d 528.

Testimony of deceased doctor's widow, who had worked in his office for a time, that electroencephalograms administered to plaintiff were kept by doctor in regular and ordinary course of business as medical practitioner, was sufficient and proper foundation for their admission into evidence. *Jezowski v Beach*, 59 Misc 2d 224, 298 NYS2d 360.

Annotation: 66 ALR2d 536 § 3.

§ 1021 Tests of alcoholic content of blood

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The ratio of alcohol to blood in an accused's body is a measure of his intoxication. This ratio may be determined by a chemical test of the accused's blood, ³⁵ urine, ³⁶ or breath. ³⁷ Accordingly, the results of an alcohol breath test, such as the test using the "Harger drunkometer," ³⁸ the "Intoxilyzer 5,000," ³⁹ or the "breathalyzer," ⁴⁰ are admissible in evidence. ⁴¹ It has been held that the "drunkometer" is sufficiently established as scientifically reliable and accurate for determining the alcoholic content of blood to admit testimony of the reading obtained upon a properly conducted test, without antecedent expert testimony that the reading is a trustworthy index of alcohol in the blood, or as to why it is. ⁴² However, there is some authority holding inadmissible testimony concerning the "Harger drunkometer," it being held that there is no general acceptance by the medical profession, or general scientific recognition, of the results of a drunkometer test as accurately establishing the alcoholic content of blood. ⁴³ Methods of making blood alcohol tests are often prescribed by statute. ⁴⁴

§ 1021 ----Tests of alcoholic content of blood [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 1, Proof of Criminal Identity or Paternity Through Polymerase Chain Reaction (PCR) Testing.

Driving Under the Influence: Tactical Considerations in Sobriety Checkpoint Cases. 59 Am Jur Trials 79.

Case authorities:

In prosecution for reckless murder by operating vehicle at high rate of speed and under influence of alcohol, trial court erred in admitting results of blood alcohol test where, following his arrest, defendant had objected to taking of test; state law enforcement agency had no authority to take blood sample after refusal by arrested party. *Thrower v State* (1988, Ala App) 539 So 2d 1127.

In DUI prosecution, trial court properly suppressed results of blood alcohol test where implied consent advisory had been read to defendant, after which defendant had refused

to consent to test; after proper arrest for DUI, test can be taken with or without driver's consent, but once decision was made to use implied consent law (under which refusal to submit to test could lead to license suspension), police could not force driver to submit to testing. *State v Scott* (1991, Minn App) 473 NW2d 375.

Exclusionary rule did not preclude administrative agency from considering evidence of driver's alcohol consumption obtained at sobriety checkpoint subsequently found to have been unconstitutional; applying rule to exclude evidence that driver, having violated condition of his licensure by consuming alcohol, was inimical to public safety would not deter future unlawful police conduct to any significant degree. *Ascher v Commissioner of Pub. Safety* (1995, Minn App) 527 NW2d 122.

In DUI prosecution, trial court properly suppressed results of blood alcohol test where defendant had refused to consent to giving blood sample and no exigent circumstances existed to justify drawing sample without a warrant; defendant arrived at hospital at 9:15 p.m., and blood sample was not taken until 10:06 p.m., which was long enough interval that warrant could have been obtained. Further, state statute precluded any blood test being taken against will of defendant except under specific circumstances that did not exist in this case. *State v Moylett* (1992) 313 Or 540, 836 P2d 1329, appeal after remand 123 Or App 600, 860 P2d 886, review pending (Jan 18, 1994).

In DUI prosecution, trial court erred in admitting results of blood alcohol test where (1) test was performed after defendant had exercised his statutory right to refuse test, (2) statute specifically provided that testing should not be done after such refusal, and (3) there was no legitimate medical purpose for drawing blood; conviction was reversed and new trial was granted since test result had more than de minimum effect on jury. *Commonwealth v Eisenhart* (1992) 531 Pa 103, 611 A2d 681.

Trial court in DUI prosecution erred in admitting evidence of defendant's refusal to submit to intoxication test where defendant had not, as required by statute, been informed orally and in writing of consequences of refusal, one of which consequences was admissibility of evidence of refusal in subsequent prosecution; however, error was harmless in that, under circumstances of case, it had no discernible impact on jury. *Schaum v State* (1992, Tex App Dallas) 833 SW2d 644.

Trial court may have erred in admitting evidence of defendant's refusal to submit to alcohol- screening test where there was statutory right to refuse test; however, any such error was harmless in view of overwhelming evidence of defendant's intoxication while behind wheel of his car. *State v Curavoo* (1991) 156 Vt 72, 587 A2d 963.

Footnotes

Footnote 35. *Schmerber v California*, 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826; *People v Tucker*, 88 Cal App 2d 333, 198 P2d 941; *Block v People*, 125 Colo 36, 240 P2d 512, cert den 343 US 978, 96 L Ed 1370, 72 S Ct 1076, reh den 344 US 848, 97 L Ed 659, 73 S Ct 6; *People v Schumann* (2d Dist) 120 Ill App 3d 518, 76 Ill Dec 43, 458 NE2d 182; *State v Charlson*, 261 Iowa 497, 154 NW2d 829; *State v Sturtevant*, 96 NH 99, 70 A2d 909; *State v Cary*, 49 NJ 343, 230 A2d 384, 24 ALR3d 1255, on remand 99 NJ Super 323, 239 A2d 680, remanded 53 NJ 256, 250 A2d 15, appeal after remand 56 NJ 16, 264 A2d 209; *People v Young*, 42 Misc 2d 540, 248 NYS2d 287; *State v Webb*,

265 NC 546, 144 SE2d 619; Commonwealth v Tanchyn, 200 Pa Super 148, 188 A2d 824, cert den 375 US 866, 11 L Ed 2d 92, 84 S Ct 138; State v Pierce, 120 Vt 373, 141 A2d 419; Caldwell v Commonwealth, 205 Va 277, 136 SE2d 798; Joelson v State (Wyo) 674 P2d 229.

Annotation: Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Footnote 36. United States v Nesmith (DC Dist Col) 121 F Supp 758; People v Dee (Colo) 638 P2d 749; Ridgell v United States (Mun Ct App Dist Col) 54 A2d 679; Bovey v State, 197 Misc 302, 93 NYS2d 560; Columbus v Thompson (App, Franklin Co) 55 Ohio L Abs 302, 89 NE2d 604; Toms v State, 95 Okla Crim 60, 239 P2d 812; Rippee v State (Tex Crim) 384 SW2d 717.

Footnote 37. Nagem v Phenix City (Ala App) 488 So 2d 1379; Thayer v Anchorage (Alaska App) 686 P2d 721; Fuenning v Superior Court of County of Maricopa, 139 Ariz 590, 680 P2d 121; State v Lujan (App) 139 Ariz 236, 677 P2d 1344; Marx v State, 291 Ark 325, 724 SW2d 456; Wells v State, 285 Ark 9, 684 SW2d 248); McNair v State, 177 Ga App 502, 339 SE2d 773; Harris v State, 172 Ga App 66, 321 SE2d 803; Clarke v State, 170 Ga App 852, 319 SE2d 16; People v Caruso (2d Dist) 201 Ill App 3d 930, 147 Ill Dec 372, 559 NE2d 545; Oller v State (Ind App) 469 NE2d 1227, reh den (Ind App) 472 NE2d 610; Van Allen v State (Ind App) 467 NE2d 1210; State v Hershey (Iowa) 348 NW2d 1; State v McNaught, 238 Kan 567, 713 P2d 457, 12 Media L R 1890; State v Hunninghake, 238 Kan 155, 708 P2d 529; State v Franklin (La App 1st Cir) 461 So 2d 640; State v Taber (Me) 474 A2d 877; State v Pickering (Me) 462 A2d 1151; Casper v State, 70 Md App 576, 521 A2d 1281, cert den 310 Md 129, 527 A2d 50; Wells v Commissioner of Public Safety (Minn App) 392 NW2d 721; Heitkamp v State (Minn App) 363 NW2d 849; Kooi v Commissioner of Public Safety (Minn App) 363 NW2d 487; Bielejeski v Commissioner of Public Safety (Minn App) 351 NW2d 664; State v Junes (Minn App) 350 NW2d 496; Bradford v Director of Revenue (Mo App) 735 SW2d 208; Williams v Director of Revenue (Mo App) 721 SW2d 797; People v Cancel, 137 Misc 2d 260, 520 NYS2d 509; People v Drumm, 122 Misc 2d 1051, 472 NYS2d 989; People v Tilley, 120 Misc 2d 1040, 466 NYS2d 983; State v Guthmiller (ND) 350 NW2d 600; Bales v State (Okla Crim) 674 P2d 578; Gandara v State (Tex App El Paso) 661 SW2d 749, petition for discretionary review ref (Apr 4, 1984); Murray City v Hall (Utah) 663 P2d 1314; State v Dwinell (App) 119 Wis 2d 305, 349 NW2d 739.

Footnote 38. Woolley v Hafner's Wagon Wheel, Inc., 22 Ill 2d 413, 176 NE2d 757; Toms v State, 95 Okla Crim 60, 239 P2d 812; McKay v State, 155 Tex Crim 416, 235 SW2d 173.

Footnote 39. Commonwealth v Smythe, 23 Mass App 348, 502 NE2d 162.

Footnote 40. Blydenburg v David (Mo) 413 SW2d 284.

Footnote 41. Generally, as to the admissibility of such tests in prosecutions for driving a motor vehicle while intoxicated, see 7A Am Jur 2d, Automobiles and Highway Traffic §§ 377-380.

Practice References Blood alcohol content as evidenced by intoximeter test. 6 Am Jur Proof of Facts 465, Intoxication, Proof 3.

Footnote 42. *State, City of St. Louis Park v Quinn*, 289 Minn 184, 182 NW2d 843; *State v Johnson*, 42 NJ 146, 199 A2d 809.

Footnote 43. *People v Morse*, 325 Mich 270, 38 NW2d 322.

Footnote 44. *Thayer v Anchorage* (Alaska App) 686 P2d 721; *Mosley v State*, 22 Ark App 29, 732 SW2d 861; *Haegele v Commissioner of Public Safety* (Minn App) 353 NW2d 704.

§ 1022 --Proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, proof that a test of alcohol concentration was conducted in conformance with prescribed methods is necessary as a prerequisite to the admissibility of the evidence. 45 However, some courts take the view that under the terms of the particular statute construed, proof of conformance is not a prerequisite to the admissibility of the test results, but affects only the weight to be accorded the tests. 46

The prosecution, in using as evidence in a criminal case any of the various chemical tests to determine the alcohol content of the blood, must present prima facie proof that both the test chemicals and the sample are free from adulteration which could conceivably introduce error into the results of the test. 47 Moreover, the prosecution must prove, beyond a reasonable doubt, 48 that the blood analyzed was that of the defendant. 49 Also, the essential links in the chain of evidence relied on to identify the blood analyzed as being the blood taken, 50 and the custody and integrity of the blood specimen, 51 must be established. In proving the identity of a specimen, legal presumptions, such as that articles regularly mailed are delivered in substantially the same condition in which they were sent, may be relied on, unless rebutted; 52 but where the substance has passed through several hands, the evidence must not be left to conjecture as to who had it and what was done with it between the taking and the analysis. 53

◆ **Reminder:** The Fourteenth Amendment's due process clause does not require law enforcement agencies to preserve breath samples in order to introduce breath analysis tests at trial. 54

In civil cases also, it must be proved, as a foundation for the admissibility of evidence of tests for blood alcohol content, that the blood tested was that of the party or person in question, 55 that the continuous custody of the blood sample has been accounted for until its analysis for alcoholic content, 56 and that the blood specimen was properly preserved or cared for until the analysis, so that the results of the tests are reliable. 57 But it has been held that, in a civil case, the foundation laid for the introduction of evidence of a blood analysis need not preclude every possibility of a doubt as to the identity of the specimen or the possibility of a change of condition in the blood. 58 If the routine and procedures of a laboratory are shown by the evidence as having been

commonly accepted by the medical profession, and the business of the laboratory is the securing, handling, and analysis of blood specimens, among other types of specimens, those routines and procedures ought to be acceptable to the courts. 59 The fact that the internal workings of a laboratory permit one or more employees to handle a blood specimen and to transport it should not bar the admission into evidence of the results of blood tests, nor should the fact that a blood specimen is something that could conceivably be tampered with make that evidence inadmissible. 60

§ 1022 --Proof [SUPPLEMENT]

Practice Aids: Driving Under the Influence: Tactical Considerations in Sobriety Checkpoint Cases. 59 Am Jur Trials 79.

Footnotes

Footnote 45. Thayer v Anchorage (Alaska App) 686 P2d 721 (results of breathalyzer test were admissible where municipality established that test was performed according to methods approved by State Department of Health and Social Services); Mosley v State, 22 Ark App 29, 732 SW2d 861 (no showing that test was performed according to method approved by health department); Haegele v Commissioner of Public Safety (Minn App) 353 NW2d 704 (breathalyzer officer failed to perform step 3 of 21-step checklist established by Bureau of Criminal Apprehension).

Annotation: Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods, 96 ALR3d 745.

Footnote 46. People v Adams (1st Dist) 59 Cal App 3d 559, 131 Cal Rptr 190; State v Charlson, 261 Iowa 497, 154 NW2d 829; Shumate v Commonwealth, 207 Va 877, 153 SE2d 243.

Footnote 47. State v Erdman, 64 Wash 2d 286, 391 P2d 518.

It has been held that the testimony that the general practice was to place sodium fluoride in all bottles prepared for blood samples, coupled with the testimony of the chief toxicologist that no inaccuracies were detected, constituted prima facie proof as to the identity of the powder and the consequent accuracy of the blood alcohol test, and with this established, some burden must be placed upon the defendant to come forward with some proof, evidence, or indication that impugns the accuracy of the test. State v Erdman, 64 Wash 2d 286, 391 P2d 518.

Footnote 48. Newton v Richmond, 198 Va 869, 96 SE2d 775; Rodgers v Commonwealth, 197 Va 527, 90 SE2d 257.

Footnote 49. State v Reenstierna, 101 NH 286, 140 A2d 572, holding that state's evidence, in a prosecution for drunken driving, failed to show that the blood analyzed for alcohol content was that taken from the defendant.

The admission of a blood-test result as to the alcoholic content of blood was held proper

where the blood was identified as the defendant's by evidence that the expert who took the blood sample labeled it and personally conducted the test. *State v Webb*, 76 Idaho 162, 279 P2d 634.

Footnote 50. *Wagner v Osborn* (3rd Dist) 225 Cal App 2d 36, 37 Cal Rptr 27 (holding identification evidence sufficient); *State v Gagnon*, 151 Me 501, 121 A2d 345 (holding identification evidence insufficient); *State v Fornier*, 103 NH 152, 167 A2d 56 (holding chain-of-custody identification sufficient); *Columbus v Marks* (Franklin Co) 118 Ohio App 359, 25 Ohio Ops 2d 228, 194 NE2d 791 (stating requirement of foundation for admission of expert testimony); *Rodgers v Commonwealth*, 197 Va 527, 90 SE2d 257.

Discrepancy in testimony as to amount of blood drawn from defendant for blood-alcohol test did not prove break in chain of custody or that there was tampering with blood sample where evidence showed that the blood was drawn by technician at hospital into two self-sealing vials which were labeled with defendant's name and number, vials were placed in envelope bearing name and number and put in refrigerator in custody of corrections officer at hospital by police officer, envelope was transported to state crime lab where it was tested, envelope was fastened with staples when it was received, and there was nothing to indicate that anyone had tampered with the tubes. *Cunningham v State*, 255 Ga 35, 334 SE2d 656.

Evidence that a specimen of blood to be tested for alcohol was taken from the defendant's body, placed in a container, and delivered to the sheriff; that the sheriff retained it in his possession until he delivered it to the person in charge of the city and county public health laboratory; and that the person to whom the blood was delivered at the laboratory made the examination and test of the specimen immediately after it was placed in his custody, was sufficient to establish the requisite tracing and identification of the specimen. *Hoffman v State*, 160 Neb 375, 70 NW2d 314.

In drunk driving prosecution, state was not required to produce as witnesses every person present when blood was withdrawn from defendant in order to make results of blood test admissible, and testimony of nurse, who was present, was sufficient to establish circumstances surrounding taking of sample. *State v Sarvis*, 265 SC 144, 217 SE2d 38.

Annotation: Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216 §§ 4 et seq.

Footnote 51. *State v Gagnon*, 151 Me 501, 121 A2d 345; *People v Lyall*, 372 Mich 607, 127 NW2d 345.

All persons who handle the blood specimen should be ready to identify it and testify to its custody and unchanged condition. *People ex rel. Buckhout v Sansalone*, 208 Misc 491, 146 NYS2d 359.

Evidence of blood test admissible where blood sample was handed from county coroner to sheriff, then to highway patrol, then to chemist. *Bean v Riddle* (Mo) 423 SW2d 709.

Footnote 52. *Rodgers v Commonwealth*, 197 Va 527, 90 SE2d 257.

In prosecution for operating motor vehicle on public highway with .10 percent or more

alcohol in defendant's blood, there was clear chain of testimony relating to sample preservation from taking thereof by arresting officer, through certified mail transmission, receipt, and testing. *State v Batchelor*, 135 Vt 366, 376 A2d 737.

Footnote 53. *Rodgers v Commonwealth*, 197 Va 527, 90 SE2d 257.

The report of a blood alcohol test by the state crime laboratory was erroneously admitted in evidence where it was not accompanied by evidence identifying the blood sample analyzed with the defendant and showing the chain of custody from the time it was taken to the time it was analyzed, nor by expert testimony showing its probative value on the question of the defendant's intoxication. *Pittman v State*, 110 Ga App 625, 139 SE2d 507.

Results of alcohol intoxications tests were admissible where officer testified that blood sample was taken from accused, under very clean and sterile conditions, by a registered nurse, and that proper procedures were utilized in handling and mailing of blood sample to Office of State Toxicologist. *State v Hanson* (ND) 345 NW2d 845.

Annotation: 96 ALR3d 745.

Footnote 54. § 1006.

Footnote 55. *Dobson v Industrial Acci. Com.*, 114 Cal App 2d 782, 251 P2d 349; *Neuwelt v Roush*, 119 Ind App 481, 85 NE2d 506; *Bean v Riddle* (Mo) 423 SW2d 709; *Bruyere v Castellucci*, 98 RI 129, 200 A2d 226.

Footnote 56. *Bruyere v Castellucci*, 98 RI 129, 200 A2d 226; *Benton v Pellum*, 232 SC 26, 100 SE2d 534 (holding that proof did not show continuity in the chain of custody of the defendant's blood sample).

Report of blood alcohol test was admissible to prove insured's intoxication at the time of death where there was sufficient evidence as to identity and chain of custody of sample, including testimony of doctor who took specimen, witness who carried it to crime laboratory, and toxicologist who received it and ran routine test. *Interstate Life & Acci. Ins. Co. v Whitlock*, 112 Ga App 212, 144 SE2d 532.

In a personal injury action arising out of an automobile accident, a proper foundation was not laid for the admission in evidence of the results of a blood alcohol test on the plaintiff, in the absence of a showing as to when, how, by whom, and in what manner or condition, the blood specimen was received by the laboratory to which it was mailed, and as to how, in what manner, and by whom, it was delivered to another laboratory which performed the test. *Apodaca v Baca*, 73 NM 104, 385 P2d 963.

Annotation: 21 ALR2d 1216 §§ 4 et seq.

Footnote 57. *Columbus v Marks* (Franklin Co) 118 Ohio App 359, 25 Ohio Ops 2d 228, 194 NE2d 791, stating that even though reliable when taken, the specimen can become unreliable because not properly preserved or cared for.

In a beneficiary's action on an automobile accident insurance policy excluding coverage if the insured was under the influence of intoxicants, an uncertified copy of a report of

the coroner, a medical expert, as to a blood alcohol test was inadmissible where the coroner was not positive whether the blood sample was taken in his presence, and the evidence did not show who took the sample, whether it was taken before the injection of embalming fluid, or how it was handled, if, in fact, it was actually taken from the insured's body. *Robinson v Life & Casualty Ins. Co.*, 255 NC 669, 122 SE2d 801.

Annotation: Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident, 5 ALR4th 1194.

Footnote 58. *Woolley v Hafner's Wagon Wheel, Inc.*, 22 Ill 2d 413, 176 NE2d 757.

Footnote 59. *Woolley v Hafner's Wagon Wheel, Inc.*, 22 Ill 2d 413, 176 NE2d 757.

Footnote 60. *Woolley v Hafner's Wagon Wheel, Inc.*, 22 Ill 2d 413, 176 NE2d 757.

G. Documentary Evidence [1023-1429]

Research References

18 USCS §§ 3500, 3505; 28 USCS Appx, Federal Rules of Evidence, Rules 104, 106, 803, 901-903, 1001-1008

FR Civ P, Rule 44

FR Crim P, Rule 26.2

Uniform Rules of Evidence, Rules 104, 106, 803, 901-903, 1001-1008

Restatement, Contracts 2d §§ 210, 214-218

ALR Digests: Evidence §§ 558-711

ALR Index: Best and Secondary Evidence; Documentary Evidence

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:1131-22:1153; 12 Federal

Procedure, L Ed, Evidence §§ 33:481-33:583

1 Federal Procedural Forms, L Ed, Actions in District Court §§ 1:1522, 1:1523, 1:1544, 1:1552, 1:1553; 7A Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:689, 20:690

9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 13.2, 13.3, 18, 31-41; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Forms 11, 12; 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Form 1381; 22 Am Jur Pl & Pr Forms (Rev), Seals, Forms 7, 8

1 Am Jur Legal Forms 2d, Acknowledgments §§ 7:11-7:464; 4A Am Jur Legal Forms 2d, Clerks of Court §§ 58:14, 58:15

2 Am Jur Trials 409, Locating Public Records; 5 Am Jur Trials 505, Mapping the Trial—Order of Proof—Best Evidence; 5 Am Jur Trials 553, Introducing and Marking Exhibits; 15 Am Jur Trials 373, Discovery and Evaluation of Medical Records; 44 Am Jur Trials 317, Forensic Document Examination in Medical Malpractice Trials; 45 Am Jur Trials 1, Determining Preliminary Facts Under Federal Rule 104; 48 Am Jur Trials 1, Audio Recordings: Evidence, Experts and Technology

1 Am Jur Proof of Facts 475, Authentication of Almanac; 1 Am Jur Proof of Facts 500, Alteration of Instruments; 2 Am Jur Proof of Facts 467, Best and Secondary Evidence; 3 Am Jur Proof of Facts 745, Mutual Mistake—Physical Condition of Realty; 7 Am Jur Proof of Facts 215, Life Expectancy; 10 Am Jur Proof of Facts 49, Rain and Other Weather Phenomena; 10 Am Jur Proof of Facts 251, Refreshing Recollection; 10 Am

Jur Proof of Facts 281, Remarriage; 12 Am Jur Proof of Facts 281, Acknowledgments; 16 Am Jur Proof of Facts 273, Computer Print-Outs as Evidence; 16 Am Jur Proof of Facts 665, Charred Documents; 17 Am Jur Proof of Facts 1, Tape Recordings as Evidence; 19 Am Jur Proof of Facts 423, Spectrogram Voice Identification; 20 Am Jur Proof of Facts 265, Questioned Typewriting; 21 Am Jur Proof of Facts 783, Sending and Receipt of Telegrams; 2 Am Jur POF2d 545, Reliability of Scientific Devices–Telephone Calling Line Identification; 14 Am Jur POF2d 234, Admissibility of Computerized Business Records; 21 Am Jur POF2d 1, Law of Foreign Jurisdiction; 26 Am Jur POF2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade; 31 Am Jur POF2d 443, Contradiction of Expert Witness Through Use of Authoritative Treatise; 34 Am Jur POF2d 509, Foundation for Offering Business Records in Evidence; 35 Am Jur POF2d 147, Foundation for the Admission of Secondary Evidence; 36 Am Jur POF2d 605, Foundation for Telephone Conversation; 39 Am Jur POF2d 1, Cause of Death as Determined from Autopsy; 45 Am Jur POF2d 631, Age of Person; 46 Am Jur POF2d 695, Intent of Parties to Ambiguous Deed; 50 Am Jur POF2d 321, Ancient Documents; 5 Am Jur POF3d 191, Meteorological Conditions at a Particular Time or Place; 15 Am Jur POF3d 595, Questioned Document Examination–Identification of Handwriting on Document
Gard, Jones on Evidence (6th ed) §§ 12:1-12:37; 17:1-17:83
Hunter, Federal Trial Handbook §§ 1.5, 1.6, 44.1-44.28, 55.10-55.13, 55.18-55.32
Louisell and Mueller, Federal Evidence §§ 445-466, 470, 471, 505-548
Torcia, Wharton's Criminal Evidence (14th ed) §§ 469-488

1. In General [1023-1027]

§ 1023 Nature of documentary evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Documentary evidence is generally defined as evidence in the form of a writing or writings. 61 A document may be defined as any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of such means, intended to be used for the purpose of recording that matter. 62

◆ Comment: Since the essence of documentary evidence is the recording of statements or information, it would appear that a sound recording of a statement may also be deemed documentary evidence. 63 The Federal and Uniform Rules of Evidence refer to "writings" and "recordings," which consist of letters, words, sounds, or numbers, or their equivalent, set down by, among other things, handwriting, typewriting, printing, or mechanical or electronic recording. 64

Footnotes

Footnote 61. *Ticknor v Ticknor*, 23 Misc 2d 257, 200 NYS2d 661.

Footnote 62. *Arnold v Pawtuxet Val. Water Co.*, 18 RI 189, 26 A 55.

Footnote 63. Gard, *Jones on Evidence* (6th ed) § 17:2 ("A writing or document, in addition to handwritten or printed or typewritten instruments, which first come to mind, should include inscribed chattels, photographic or other mechanical reproductions and sound recordings, even though in the case of sound recordings the inscribed marks may not be visible to the eye and may be read only with the use of mechanical devices.").

See also *Curtis v Bradley*, 65 Conn 99, 31 A 591 (documentary evidence includes "every tangible object capable of making a truthful statement").

Footnote 64. FRE 1001(1); Uniform Rules of Evidence, Rule 1001(1).

§ 1024 Use and restrictions on use

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To be admissible, documentary evidence, like oral testimony, must be relevant and competent. 65 To the extent that a document operates to establish a fact, it may be admitted as direct proof of that fact. 66 A properly admitted document is generally regarded as only prima facie evidence of a fact which may be disproved by other evidence. 67 Recitals in a document may, however, be binding on a party as admissions or declarations. 68

Documentary evidence, like oral testimony, must be relevant to be admissible. 69 Documentary evidence is also subject to general exclusionary rules such as the rule against hearsay, 70 the best evidence rule, 71 and the parol evidence rule. 72 Evidentiary rules concerning privileged communications may bar disclosure of documents relating to such communications. 73 Where, however, such a document comes into the hands of a third person who is neither a member of the protected relation nor an agent or representative of one who is, the document is no longer privileged, and admissible in evidence to the same extent as any other writing. 74

◆ Observation: In many instances, evidence codes specifically exempt certain documents from the application of exclusionary rules. Thus, Rule 803 of the Uniform Rules of Evidence and the Federal Rules of Evidence exempts from the hearsay rule numerous classes of documents such as records of vital statistics 75 family records, 76 and records of regularly conducted business activity, 77 while best evidence objections to the introduction of a copy of a document made by a process which accurately reproduces the original are largely obviated by Rule 1003. 78

If a person is not legally competent to testify, 79 the law will not permit him or her to make a memorandum of a fact and have it introduced as evidence of that fact. 80

§ 1024 ----Use and restrictions on use [SUPPLEMENT]

Case authorities:

Assuming rule applies to discoverability as well as admissibility, documents provided to settlement committee in prison overcrowding case were not protected since plaintiffs did not seek documents to prove liability for or invalidity of claim or its amount, but to rebut defendants' claim of changed circumstances and thereby oppose petition to modify settlement agreement. *Small v Hunt* (1994, ED NC) 152 FRD 509.

Even if admission of other money orders sent by defendant from prison were improperly admitted in mail fraud trial for operating money order scam from prison, error was harmless since defendant had already confessed his involvement in scam and evidence against him was overwhelming. *United States v Brown* (1993, CA5 Miss) 7 F3d 1155.

Evidence of plaintiff's president's falsified documents which he sent to person in support of finder's fee for orders placed with plaintiff by defendant, although critical of president's character, were substantive evidence relating to disputed issues of relationship between plaintiff and defendant, custom and practice, damages, and plaintiff's reputation in plaintiff's action alleging that defendant misappropriated its trade secrets, specifically advertising insert it designed for defendant. *Web Communications Group v Gateway* 2000 (1995, ND Ill) 160 FRD 108, summary judgment gr, count dismd, motion den, motion to strike den (1995, ND Ill) 889 F Supp 316.

In § 1983 action by diagnosed paranoid schizophrenic who claimed that police officers used excessive force in subduing him while he advanced toward them with hatchet, district court did not abuse its discretion in excluding certified documents showing number of involuntary commitment petitions that had been filed in county court over three-year period since documents did not indicate in which, if any, police had played role and thus did not make fact of consequence more or less probable. *McKeel v City of Pine Bluff* (1996, CA8 Ark) 73 F3d 207.

Cocaine distribution defendant manifested adoption of paper found in his pocket upon arrest, hence paper containing three columns and letters, which were consistent with some of prices and quantities of cocaine defendant negotiated with agent, was admissible. *United States v Carrillo* (1994, CA9 Nev) 16 F3d 1046, 94 CDOS 1212, 94 Daily Journal DAR 2133.

District court in age discrimination case did not err in excluding summary of documents purportedly showing that older employees were placed at bottom of ranking lists and younger ones at top, where party offering summary was unable to explain meaning of item contained in summary. *Vasey v Martin Marietta Corp.* (1994, CA10 Colo) 29 F3d 1460, 65 BNA FEP Cas 663, 128 CCH LC ¶ 57709.

Computer software firm shall be permitted to introduce documents into evidence subject to requirement that all prejudicial titles be redacted, where competitor provided documents containing revenue and related statistics for certain types of software during settlement negotiations occurring after it had already lost on liability issue by default, and titles on some documents could be construed as admission that it had copied firm's software, because titles which could be construed prejudicially as admission of liability are protected under FRE 408, but tabular evidence in documents was otherwise discoverable. *Computer Assocs. Int'l v American Fundware* (1993, DC Colo) 831 F Supp

In prosecution for marijuana importation conspiracy court properly admitted deposit slips showing substantial deposits in single account in Panamanian bank and application form to obtain checks from that bank where documents were seized on vessel on which defendants and marijuana were apprehended, deposit dates preceded beginning of vessel's voyage, deposit slips were signed by defendants, bore typical bank markings, were kept in circumstances where person who has access to account would have kept important documents concerning account, and admission was consistent with general requirement to provide speedy, inexpensive and fair trial designed to reach truth. *United States v Munoz* (1994, CA11 Fla) 16 F3d 1116, 8 FLW Fed C 1, petition for certiorari filed (Jun 8, 1994).

Arresting officer's one-paragraph synopsis report of information received from number of undifferentiated sources, which contained term "refused Medical aid" (attributed to victim), was not Rosario material as to one lay witness where (1) that witness was not quoted or referred to as source of information in report, and (2) although officer who wrote report testified at trial, neither hearsay information nor exchange concerning medical aid related to subject matter of his testimony. *People v Machado* (1993, Sup) 159 Misc 2d 94, 603 NYS2d 273.

Monthly billing statements of law firm were properly admitted in evidence where there was extensive testimony by law firm as to how statements were compiled and reviewed for accuracy, and no irregularity as to time and task of recordkeeping or compilation of billing statements was evidenced either on direct or cross-examination. *Fawer, Brian, Hardy & Zatzkis v Howes* (1994, La App 4th Cir) 639 So 2d 329, cert den (La) 1994 La LEXIS 2533.

Footnotes

Footnote 65. *Slater v Missionary Sisters of Sacred Heart* (1st Dist) 20 Ill App 3d 464, 314 NE2d 715 (disapproved on other grounds by *Gatlin v Ruder*, 137 Ill 2d 284, 148 Ill Dec 188, 560 NE2d 586).

Footnote 66. *Diamond v Davis* (Sup) 38 NYS2d 93, affd 265 App Div 919, 39 NYS2d 412, affd 292 NY 552, 54 NE2d 683.

Footnote 67. *Evans v Penn Mut. Life Ins. Co.*, 322 Pa 547, 186 A 133.

Footnote 68. As to admissions and declarations generally, see §§ 754 et seq.

Footnote 69. *Southern P. Co. v Schoer* (CA8 Utah) 114 F 466; *Lacy v Meador*, 170 Ala 482, 54 So 161; *Peterson v Peterson*, 74 Cal App 2d 312, 168 P2d 474; *Smith v Riviere* (Tex Civ App) 248 SW2d 526.

Footnote 70. *Auletta v Fried* (Fla App D4) 388 So 2d 1067.

As to the rule against hearsay, generally, see §§ 658 et seq.

Footnote 71. *People v Wohlleben* (2nd Dist) 261 Cal App 2d 461, 67 Cal Rptr 826.

As to the best evidence rule, generally, see §§ 1049 et seq.

Footnote 72. *Farm Stores, Inc. v School Feeding Corp.* (1st Dept) 79 App Div 2d 504, 433 NYS2d 453, affd 53 NY2d 910, 440 NYS2d 633, 423 NE2d 56, later proceeding (2d Dept) 102 App Div 2d 249, 477 NYS2d 374, app dismd, motion to dismiss app den 63 NY2d 741, 480 NYS2d 208, 469 NE2d 529 and affd 64 NY2d 1065, 489 NYS2d 877, 479 NE2d 222.

As to the parol evidence rule, generally, see §§ 1092 et seq.

Footnote 73. *State ex rel. Hyder v Superior Court of Maricopa County*, 128 Ariz 253, 625 P2d 316, later proceeding (App) 138 Ariz 458, 675 P2d 718, cert den 469 US 870, 83 L Ed 2d 149, 105 S Ct 219 (attorney-client privilege); *Pacheco v Ortiz*, 11 Ohio Misc 2d 1, 11 Ohio BR 43, 463 NE2d 670 (physician-patient privilege).

Footnote 74. 81 Am Jur 2d, Witnesses § 289.

Footnote 75. § 1374.

Footnote 76. § 1256.

Footnote 77. §§ 1300-1318.

Footnote 78. § 1085.

Footnote 79. As to competency to testify, generally, see 81 Am Jur 2d, Witnesses §§ 163 et seq.

Footnote 80. *Post v Kenerson*, 72 Vt 341, 47 A 1072.

§ 1025 Effect of admission by opposing party as to contents of, or fact sought to be proved by, document

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some cases, parties have been permitted to introduce documentary evidence notwithstanding admissions by opposing parties as to the contents of the documents or as to the facts sought to be proved thereby. 81 In other cases, however, it has been held that a document could not be introduced in evidence where all that it tended to prove had been admitted by the opposing party. 82 In such cases the document offered in evidence may be rejected on the ground that it is immaterial. 83

Footnotes

Footnote 81. *Dalton v Calhoun County Dist. Court*, 164 Iowa 187, 145 NW 498; *Branner*

v Nichols, 61 Kan 356, 59 P 633; Kimball & Austin Mfg. Co. v Vroman, 35 Mich 310; Turner v Providence Hospital (App, Hamilton Co) 19 Ohio Ops 3d 211, motion overr.

Footnote 82. Wyatt v Pacific E. R. Co., 156 Cal 170, 103 P 892; Holt County v Scott, 53 Neb 176, 73 NW 681; Rowland v Hall, 121 App Div 459, 106 NYS 55; Blackburn v St. Paul Fire & Marine Ins. Co., 117 NC 531, 23 SE 456.

Footnote 83. Ratliff v Ratliff, 131 NC 425, 42 SE 887.

§ 1026 Right of party introducing document to impeach or explain it

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One introducing documentary proof bearing upon an issue generally is bound by its recitals in that respect. 84 He or she is not allowed to impeach or contradict it, or to accept part which is in his favor and repudiate another part which is opposed to his claim or defense. 85 However, this rule does not apply to conclude an issue where the documentary evidence is not offered on that issue. 86 Thus, a party is not bound by the recitals of a document which he introduces for the purpose of impeaching it on the ground of fraud. 87 A party may also introduce documentary evidence prepared by his adversary without being bound by it. 88 And a party who introduces a document in evidence is not precluded from impeaching it by evidence which goes to its invalidity or which tends to show that it has not in law the effect that it purports to have. 89

◆ Observation: Notwithstanding the general rule against impeachment of one's own witness, a party may prove the truth of particular facts in contradiction of the testimony of his or her witness. 90 By analogy to this rule, a party introducing documentary evidence may prove that the actual facts are other than as stated therein. 91

Footnotes

Footnote 84. Snell Isle, Inc. v Commissioner (CA5 Fla) 90 F2d 481, 37-2 USTC ¶ 9341, 19 AFTR 860, cert den 302 US 734, 82 L Ed 568, 58 S Ct 120; Barnsdall Refining Corp. v Birnamwood Oil Co. (DC Wis) 32 F Supp 308; Dodds v Stellar, 77 Cal App 2d 411, 175 P2d 607; Nicolai-Neppach Co. v Smith, 154 Or 450, 58 P2d 1016, 107 ALR 1124, adhered to 154 Or 470, 60 P2d 979, 107 ALR 1136; Traders & General Ins. Co. v Smith (Tex Civ App Texarkana) 369 SW2d 847.

Footnote 85. Snell Isle, Inc. v Commissioner (CA5 Fla) 90 F2d 481, 37-2 USTC ¶ 9341, 19 AFTR 860, cert den 302 US 734, 82 L Ed 568, 58 S Ct 120; Merchants' Bank of Macon v Rawls, 7 Ga 191; Hulbert v Hammond, 41 Mich 343, 1 NW 1040; Williams v Williams (Tex Civ App Eastland) 336 SW2d 757, writ dism w o j (Oct 5, 1960) and reh'g of writ of error overr (Nov 23, 1960).

Footnote 86. Jenkins v Tanner (Tex Civ App) 166 SW2d 167.

Footnote 87. *Snell Isle, Inc. v Commissioner* (CA5 Fla) 90 F2d 481, 37-2 USTC ¶ 9341, 19 AFTR 860, cert den 302 US 734, 82 L Ed 568, 58 S Ct 120; *Topletz v Thompson* (Tex Civ App Dallas) 342 SW2d 151.

Footnote 88. *Jefferson Sav. & Loan Asso. v Lifetime Sav. & Loan Asso.* (CA9 Cal) 396 F2d 21.

Footnote 89. *Ottinger v Siegfried* (CA10 Okla) 349 F2d 647; *Brown v Grzeskowiak*, 230 Ind 110, 101 NE2d 639; *McDowell v Staley*, 231 NC 65, 55 SE2d 798; *Pigg v International Hospitals, Inc.* (Tex Civ App Dallas) 421 SW2d 169, writ ref n r e (Feb 7, 1968) and reh of writ of error overr (Mar 20, 1968).

Footnote 90. 81 Am Jur 2d, Witnesses § 985.

Footnote 91. *Cassell v First Nat. Bank*, 169 Ill 380, 48 NE 701; *Ballard v Aetna Casualty & Surety Co.* (Tex Civ App Corpus Christi) 391 SW2d 510, writ ref n r e (Oct 6, 1965) and reh of writ of error overr (Nov 3, 1965), error ref n r e.

§ 1027 Recitals as evidence of facts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The recitals of an instrument introduced in evidence may be considered as evidence against the parties to the instrument 92 and generally against the parties only. 93 The recitals of an instrument are not ordinarily admissible against third persons as proof of the facts recited, being as to them *res inter alios acta*. 94 The recitals of a deed other than an ancient deed 95 are not competent evidence of the fact recited as against a stranger to the instrument, nor are they binding upon him. 96

Footnotes

Footnote 92. *Snell Isle, Inc. v Commissioner* (CA5 Fla) 90 F2d 481, 37-2 USTC ¶ 9341, 19 AFTR 860, cert den 302 US 734, 82 L Ed 568, 58 S Ct 120; *Eaton v New York Life Ins. Co.*, 315 Pa 68, 172 A 121, 95 ALR 462.

As to the binding effect of recitals on the party introducing the document, see § 1026.

Footnote 93. *O'Bannon v Myers's Exrs.*, 36 Ala 551; *Morse v Bellows*, 7 NH 549.

Footnote 94. *Hegler v Faulkner*, 153 US 109, 38 L Ed 653, 14 S Ct 779; *General Motors Acceptance Corp. v Capitol Garage, Inc.*, 154 Conn 593, 227 A2d 548; *Dyer v Marriott*, 89 Kan 515, 131 P 1185; *In re Hulett's Estate*, 66 Minn 327, 69 NW 31; *Reams v Sinclair*, 88 Neb 738, 130 NW 562; *Bell v Peabody*, 63 NH 233; *Shinn v Roberts*, 20 NJL 435; *Pickering v Peskind* (Cuyahoga Co) 43 Ohio App 401, 13 Ohio L Abs 312, 183 NE 301; *Hagan v Holderby*, 62 W Va 106, 57 SE 289.

Footnote 95. As to recitals in an ancient deed as evidence, see § 1253.

Footnote 96. § 1249.

2. Introduction of Part of Writing [1028-1031]

§ 1028 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under Rule 106 of the Uniform Rules of Evidence and the Federal Rules of Evidence, whenever a writing or recorded statement or part of it is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

97 Under Rule 106, admission of the unadmitted portion of a document is not a matter of right, but rather rests within the sound discretion of the trial court. 98

Rule 106 permits a party whose adversary has introduced part of a document in evidence to require the adversary to interrupt the presentation of his or her case to introduce the remainder of the document. 99

◆ Observation: Rule 106 does not address whether a party who could, but does not, invoke Rule 106 during the course of an adversary's case may subsequently introduce the remainder of the document into evidence as part of his or her own case. It seems clear, however, that the Rule is not intended to preclude such tactics, and that failure to invoke the Rule during presentation of an adversary's case does not constitute a waiver of the right to introduce the remainder of the document at a later time as part of one's own evidence. 1

§ 1028 ----Generally [SUPPLEMENT]

Case authorities:

In private suit alleging violation of Endangered Species Act by state's permitting deer hunting, court properly excluded evidence consisting of highlighted portion of sentences from document which were taken out of context and allegedly misleading. *American Bald Eagle v Bhatti* (1993, CA1 Mass) 9 F3d 163, 24 ELR 20173, summary op at (CA1 Mass) 22 M.L.W. 511, 14 R.I.L.W. 606.

Footnotes

Footnote 97. FRE 106; Uniform Rules of Evidence Rule 106.

Footnote 98. *United States v Soures* (CA3 NJ) 736 F2d 87, 116 BNA LRRM 2761, 101 CCH LC ¶ 11067, 15 Fed Rules Evid Serv 1456, cert den 469 US 1161, 83 L Ed 2d 927, 105 S Ct 914; *United States v Gold* (CA11 Fla) 743 F2d 800, 17 Fed Rules Evid Serv 669, cert den 469 US 1217, 84 L Ed 2d 341, 105 S Ct 1196; *State v Coffman*, 227 Neb 149, 416 NW2d 243.

Annotation: Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 ALR Fed 892 § 3.

Footnote 99. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

Footnote 1. *Monlux v General Motors Corp.*, 68 Hawaii 358, 714 P2d 930.

See also Notes of Advisory Committee to Rule 106 of Federal Rules of Evidence (stating that Rule 106 does not in any way circumscribe the right of an adverse party to develop the matter on cross-examination or as part of his own case).

Practice References Louisell and Mueller, Federal Evidence § 49.

§ 1029 Introduction of otherwise inadmissible evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

According to some authority, Rule 106 permits introduction of material which would otherwise be inadmissible under generally applicable rules of evidence. 2 A contrary view, however, holds that Rule 106 does not render admissible evidence that is otherwise inadmissible. 3 Even if Rule 106 permits the admission of otherwise inadmissible evidence, any material admitted thereunder is probably subject to restriction under Rule 105 as to the purpose for which it may be considered by the trier of fact. 4

Footnotes

Footnote 2. § 361.

Footnote 3. § 361.

Footnote 4. Louisell and Mueller, Federal Evidence § 49.

As to Rule 105 generally, see § 321.

§ 1030 Application to sound recordings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 106 of the Uniform Rules of Evidence and the Federal Rules of Evidence is applicable to sound recordings of statements. 5 However, the mere fact that a proffered recording consists of excerpts from conversations which were much longer than the recording does not require admission of the complete recordings of the entire conversations for the sole purpose of allowing the jury to compare the length of the excerpted recording against the length of the entire conversations. 6 Where portions of a sound recording otherwise admissible under Rule 106 are inaudible and therefore of no value as evidence, the decision to admit or exclude the audible portions of the recording lies within the sound discretion of the trial court. 7

Footnotes

Footnote 5. In re Air Crash Disaster at John F. Kennedy International Airport (CA2 NY) 635 F2d 67, 7 Fed Rules Evid Serv 21, later proceeding (CA2 NY) 682 F2d 406 (trial court properly required under Rule 106 that all four channels of a flight recorder be played together, disallowing airline's request to play only the channel which picked up intra-cockpit conversation); United States v Shields (ND Ill) 783 F Supp 1094, on reconsideration, reconsideration den, in part (ND Ill) 1991 US Dist LEXIS 15390, later proceeding (ND Ill) 1991 US Dist LEXIS 15409, later proceeding (ND Ill) 1991 US Dist LEXIS 15413, later proceeding (ND Ill) 783 F Supp 1106, later proceeding (ND Ill) 1991 US Dist LEXIS 15729, later proceeding (ND Ill) 1992 US Dist LEXIS 2157, later proceeding (ND Ill) 1992 US Dist LEXIS 3556, later proceeding (ND Ill) 1992 US Dist LEXIS 7303, later proceeding (CA7 Ill) 999 F2d 1090, 38 Fed Rules Evid Serv 496, reh, en banc, den (CA7 Ill) 1993 US App LEXIS 21884 and cert den (US) 127 L Ed 2d 74, 114 S Ct 877.

Footnote 6. United States v Abrams (CA5 Tex) 947 F2d 1241, 34 Fed Rules Evid Serv 1347, corrected, reh den (CA5) 1991 US App LEXIS 29799 and cert den (US) 120 L Ed 2d 869, 112 S Ct 2992 (noting that the relative lengths of the complete recording and the excerpted recording could have been shown through testimony of the witness who prepared the recordings).

Footnote 7. § 1238.

§ 1031 Application to related but separate writings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 106 of the Uniform Rules of Evidence and the Federal Rules of Evidence may be invoked to require the admission into evidence of related but separate writings, as, for example, a series of letters between the parties dealing with the same subject. 8 The question in such circumstances is what grouping constitutes a fair and reasonably complete unit of material; such a unit may be a single document or a number of documents. 9

◆ Comment: One writer has noted that there is almost no pre-Rule authority under which a proponent of one letter could be required to introduce another letter at the same time. 10

Footnotes

Footnote 8. *Chirnside v Lincoln Tel. & Tel. Co.*, 224 Neb 784, 401 NW2d 489.

Footnote 9. *United States v Boylan* (CA1 Mass) 898 F2d 230, 29 Fed Rules Evid Serv 1223, cert den 498 US 849, 112 L Ed 2d 106, 111 S Ct 139.

Footnote 10. *Louisell and Mueller*, Federal Evidence § 52.

3. Requirement of Authentication [1032-1048]

a. In General [1032-1035]

§ 1032 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To be admissible, documentary evidence must generally be authenticated, that is, it must be shown to be what its proponent claims it to be. 11 Authentication is the process by which the relevancy of a document is established by connecting it with a person, place or thing. 12 This requirement existed at common law, 13 and it has also been recognized by Rule 901(a) of the Uniform Rules of Evidence and the Federal Rules of Evidence, which provides that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. 14

◆ Comment: Rule 901(a) does not so much impose a requirement of authenticity as it assumes the existence of such a requirement. The source of the requirement under the Rules is probably best regarded as Rules 401 and 402, which define relevancy and make it a condition of admissibility. 15

Although Rule 901(a) speaks of authenticity as a condition precedent to the admission of evidence, common-law authority permits introduction of documentary evidence on the condition that a foundation for its introduction, including authenticity, be subsequently laid. 16

◆ Observation: The requirement of authentication or identification recognized by Rule 901(a) is not limited to documentary evidence, but applies also to real or demonstrative evidence. 17

§ 1032 ----Generally [SUPPLEMENT]

Case authorities:

INS Form I-213, Record of Deportable Alien, was properly authenticated pursuant to certification process, and therefore admissible in alien's deportation hearing, where it was certified by INS's Los Angeles district director. *Espinoza v INS* (1995, CA9) 45 F3d 308, 95 CDOS 311, 95 Daily Journal DAR 544, reprinted as *amd, reh, en banc, den* (1995, CA9) 1995 US App LEXIS 7699.

Although assumption agreements might not qualify as "instruments" under UCC Article 3, language of Rule 902 encompasses broader range of self-authenticating documents than Article 3, and documents in question were properly authenticated pursuant to Rule 901. *United States v Varner* (1994, CA11 Ga) 13 F3d 1503, 38 Fed Rules Evid Serv 1244, 28 FR Serv 3d 268, 22 UCCRS2d 1065, 7 FLW Fed C 1231.

Footnotes

Footnote 11. *Vouras v State* (Del Sup) 452 A2d 1165; *Gardner v Navistar Int'l Transp. Corp.* (4th Dist) 213 Ill App 3d 242, 157 Ill Dec 88, 571 NE2d 1107, CCH Prod Liab Rep ¶ 12891, app den 141 Ill 2d 539, 162 Ill Dec 486, 580 NE2d 112; *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767.

Footnote 12. *Farm Credit Bank v Huether* (ND) 454 NW2d 710.

Footnote 13. *Pressley v State*, 207 Ga 274, 61 SE2d 113; *Motor Car Sales Co. v Brown*, 115 Kan 344, 223 P 309; *People v Manganaro*, 218 NY 9, 112 NE 436.

Footnote 14. FRE 901(a); Uniform Rules of Evidence, Rule 901(a).

Footnote 15. See the Notes of the Advisory Committee on Rules to FRE 901, saying that authentication represents a special aspect of relevancy.

Footnote 16. *Pratt v Phelps*, 23 Cal App 755, 139 P 906.

Footnote 17. *United States v Dombrowski* (CA7 Ill) 877 F2d 520, 28 Fed Rules Evid Serv 250, cert den 496 US 907, 110 L Ed 2d 272, 110 S Ct 2592 (photograph of crime scene was adequately authenticated under FRE 901).

As to real or demonstrative evidence, see §§ 934 et seq.

Law Reviews: LaRocca, Authentication, Identification, and the Best Evidence Rule. 36 La L Rev 185 (1975).

§ 1033 Necessity and nature of authentication in particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Compliance with the requirement of authentication is not excused by the fact that an adverse party has received copies of documents or has failed to contest their legitimacy. 18 It is, however, permissible for parties to stipulate to the authenticity of a document and thereby forgo proof of the matter. 19 A party who could require proof of authenticity may also waive his or her right to require such proof. 20

The facts which must be shown to authenticate a document will vary according to the proponent's purpose in offering the document. A document such as a report of a scientific analysis of a substance taken from a human body is typically offered for the purpose of showing the truth of the statements contained in it; in such a case authentication of the report would include evidence indicating that the analysis was free from mistake or tampering. 21 If a document is offered to show that a particular person (such as an opposing party) made the statements contained in it, its authentication must include evidence that the document was in fact written by or is otherwise attributable to him or her. 22 But where the evidentiary value of a writing does not depend on a showing of the truth of its contents, or that a particular person wrote it, its authentication need not relate to such matters, but need only extend to whatever facts are necessary to permit a finding that the document is what its proponent claims it to be. 23 Authentication in the form of proof that a particular person authored or executed a document is not required when only the content of the document 24 or the fact of its existence 25 is at issue.

Oral testimony about a document, as distinguished from the document itself, requires no extrinsic evidence of authenticity to be admissible. 26

§ 1033 ----Necessity and nature of authentication in particular circumstances [SUPPLEMENT]

Case authorities:

There is no requirement to authenticate signatures on a certificate of radar accuracy before the document can be admitted into evidence. *Commonwealth v Gordon* (1993,

Super Ct) 633 A2d 1199.

Hearing officer in workers' compensation proceeding erred in admitting into evidence letters written by claimant's treating physician regarding claimant's condition, since letters were not properly authenticated as required by medical reports exception to hearsay rule, and although court was not bound to follow technical evidentiary rules in workers' compensation case, hearsay evidence that was clearly inadmissible should not have been considered. *Theus v Schumpert Medical Ctr.* (1994, La App 2d Cir) 637 So 2d 631.

Footnotes

Footnote 18. *United States v Pent-R-Books, Inc.* (CA2 NY) 538 F2d 519, 1 Fed Rules Evid Serv 259, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175; *Haury & Smith Realty Co. v Piccadilly Partners I* (Tenn App) 802 SW2d 612 (admission into evidence of unauthenticated document was error notwithstanding that parties against whom it was offered had not taken the stand to deny the execution of it).

Footnote 19. § 1040.

Footnote 20. *People v More* (Colo App) 668 P2d 968 (disapproved on other grounds by *People v Gallegos* (Colo) 692 P2d 1074).

Footnote 21. *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 723 P2d 971.

Footnote 22. *Haury & Smith Realty Co. v Piccadilly Partners I* (Tenn App) 802 SW2d 612 (document proffered by plaintiff, which purported to designate corporation as managing agent of defendant partnership, was not admissible in evidence absent showing that partnership had executed the document).

Footnote 23. *United States v Mazyak* (CA5 Fla) 650 F2d 788, 8 Fed Rules Evid Serv 1288, cert den 455 US 922, 71 L Ed 2d 464, 102 S Ct 1281 and (criticized on other grounds by *United States v Michelena-Orovio* (CA5 La) 702 F2d 496, 12 Fed Rules Evid Serv 1794) (letter addressed to all four defendants, and introduced for the purpose of showing that the defendants were associated with each other and with the boat where the letter was found, was properly authenticated by evidence that the letter had been found on the boat manned by the defendants; no evidence was required as to whether the person who signed the letter had actually written it, or as to whether the statements in the letter were true).

Footnote 24. *Agnew v State*, 51 Md App 614, 446 A2d 425.

Footnote 25. *People v Adamson*, 118 Cal App 2d 714, 258 P2d 1020; *Agnew v State*, 51 Md App 614, 446 A2d 425.

Footnote 26. *United States v Cowley* (CA9 Cal) 720 F2d 1037, 14 Fed Rules Evid Serv 1274, cert den 465 US 1029, 79 L Ed 2d 692, 104 S Ct 1290.

§ 1034 Effect of authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Once prima facie evidence of a document's authenticity has been offered, the document is authenticated against all parties for the purpose of determining its admissibility into evidence. 27 Where a party admits the authenticity of a document in one case and the same document is proffered as evidence against the same party in a different case, the party against whom the evidence is proffered must, to keep the document out of evidence, rebut the force of his or her prior admission as to authenticity. 28

A prima facie showing of authenticity sufficient to admit a document into evidence does not remove the issue of its authenticity from the case altogether; it remains for the trier of fact to determine whether the document is in fact what its proponent says it is. 29 For this reason, evidence offered to authenticate a document must itself be admissible. 30

Doubts arising from the authenticity of a document based on the fact that the evidence of its authenticity was supplied by its proponent may affect the weight to be given such evidence, although they do not affect its admissibility. 31 The trier of fact may ultimately disbelieve the proponent's proof as to authenticity and entirely disregard, or substantially discount, the persuasive impact of the evidence. 32 It is generally still open for the opposing party to argue at trial that the document is not genuine, 33 that it is different from the one originally signed, 34 or is a forgery. 35 However, if after all the evidence is in the jury could not reasonably conclude that the authenticity of the document has not been established, the court may withdraw the issue from the jury's consideration. 36

Footnotes

Footnote 27. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, rev'd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 28. *Cathey v Johns-Manville Sales Corp.* (CA6 Tenn) 776 F2d 1565, CCH Prod Liab Rep ¶ 10880, 19 Fed Rules Evid Serv 1126, cert den 478 US 1021, 92 L Ed 2d 740, 106 S Ct 3335.

Footnote 29. *United States v Caldwell* (CA11 Ga) 776 F2d 989, 19 Fed Rules Evid Serv 537.

Footnote 30. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, rev'd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶

67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by Pfeiffer v Marion Ctr. Area Sch. Dist. (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 31. McDermott v Strauss, 283 Ark 444, 678 SW2d 334.

Footnote 32. United States v Whittington (CA5 La) 783 F2d 1210, 20 Fed Rules Evid Serv 171, adhered to, reh den (CA5 La) 786 F2d 644, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269.

Footnote 33. McQueeney v Wilmington Trust Co. (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in Aetna Casualty & Surety Co. v Gosdin (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360).

Footnote 34. United States v Whittington (CA5 La) 783 F2d 1210, 20 Fed Rules Evid Serv 171, adhered to, reh den (CA5 La) 786 F2d 644, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269.

Footnote 35. United States v Koziy (CA11 Fla) 728 F2d 1314, 15 Fed Rules Evid Serv 250, 77 ALR Fed 363, cert den 469 US 835, 83 L Ed 2d 70, 105 S Ct 130 and (among conflicting authorities on other grounds noted in Maikovskis v Immigration & Naturalization Service (CA2) 773 F2d 435) and (criticized on other grounds by United States v Kungys (CA3 NJ) 793 F2d 516).

Footnote 36. In re James E. Long Constr. Co. (CA4 Va) 557 F2d 1039, 1 Fed Rules Evid Serv 997.

§ 1035 Distinction between authenticity of document and admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although a document must generally be authenticated to be admissible in evidence, its mere authentication does not invariably mean that it is admissible. 37 A document must meet generally applicable standards of relevance to be admissible. 38 Its admissibility may be barred by an applicable rule of privilege notwithstanding its authenticity. 39 The document may be hearsay, in which case, if the document is to be offered for the purpose of showing the truth of the assertions made in it, its proponent must, to secure its admission, establish that it comes within an exception to the hearsay rule. 40 Similarly, an objection to a document based on the "best evidence" rule cannot be overcome merely by evidence of its authenticity. 41

◆ Observation: Under Rule 403 of the Uniform Rules of Evidence and the Federal Rules of Evidence, a document which is both relevant and sufficiently authenticated may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion, or by considerations of undue delay, waste of

time, or needless presentation of cumulative evidence. 42

Footnotes

Footnote 37. *Bokkelen v Grumman Aerospace Corp.* (ED NY) 432 F Supp 329, 2 Fed Rules Evid Serv 51.

Footnote 38. *Peterson v Peterson*, 74 Cal App 2d 312, 168 P2d 474.

Footnote 39. *In re Coddington's Will*, 307 NY 181, 120 NE2d 777.

Footnote 40. *Bokkelen v Grumman Aerospace Corp.* (ED NY) 432 F Supp 329, 2 Fed Rules Evid Serv 51; *Wright v Lewis* (Tex App Corpus Christi) 777 SW2d 520, writ den (Jan 24, 1990) and reh'g of writ of error overr (Feb 28, 1990); *Nelson v Zeimetz* (App) 150 Wis 2d 785, 442 NW2d 530.

Footnote 41. *FCX, Inc. v Caudill*, 85 NC App 272, 354 SE2d 767 (construing state rules of evidence substantially similar to Federal Rules).

As to the "best evidence" rule, see §§ 1049 et seq.

Footnote 42. As to Rule 403, generally, see §§ 324 et seq.

b. Quantum and Type of Evidence Required for Authentication [1036-1039]

§ 1036 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The authentication requirement under Rule 901(a) of the Uniform Rules of Evidence and the Federal Rules of Evidence is in the category of relevancy dependent upon the fulfillment of a condition of fact, and is governed by the principles set forth in Rule 104(b), which provides that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court must admit the evidence upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. 43 Thus, all that is required for admission of a document under Rule 901(a) is prima facie evidence of authenticity; 44 its authenticity need not be established beyond a reasonable doubt in order to warrant its admission into evidence. 45 Thus, to secure admission of a document allegedly belonging to the accused in a criminal case, the prosecution need only prove a rational basis from which the jury may conclude that the document did in fact belong to the accused. 46 The document need not be identified by the person from whom it was obtained if by other witnesses the prosecution can show a rational basis from which the jury can find that the document belonged to the accused. 47 The authenticity of a document may be established by circumstantial evidence. 48

Whether sufficient evidence of authenticity has been offered to permit admission of a document into evidence under Rule 901 is a matter within the sound discretion of the trial court. 49 This is also the rule at common law. 50

Footnotes

Footnote 43. *In re James E. Long Constr. Co.* (CA4 Va) 557 F2d 1039, 1 Fed Rules Evid Serv 997.

As to Rule 104(b), generally, see § 307.

Practice References 45 Am Jur Trials 1, Determining Preliminary Facts Under Federal Rule 104.

Footnote 44. *United States v Sinclair* (DC Del) 433 F Supp 1180; *Alexander Dawson, Inc. v NLRB* (CA9) 586 F2d 1300, 99 BNA LRRM 3105, 84 CCH LC ¶ 10864, 3 Fed Rules Evid Serv 780.

Footnote 45. *United States v Sinclair* (DC Del) 433 F Supp 1180; *State v Campbell*, 103 Wash 2d 1, 691 P2d 929, cert den 471 US 1094, 85 L Ed 2d 526, 105 S Ct 2169, habeas corpus den (CA9 Wash) 829 F2d 1453, cert den 488 US 948, 102 L Ed 2d 369, 109 S Ct 380, reh den 488 US 1023, 102 L Ed 2d 815, 109 S Ct 827, later proceeding 112 Wash 2d 186, 770 P2d 620, later proceeding (CA9 Wash) 927 F2d 444, 91 CDOS 1507, 91 Daily Journal DAR 2481, motion gr, petition den (CA9) 1991 US App LEXIS 18550, withdrawn by publisher, reported at (CA9) 940 F2d 549, 91 CDOS 6333, 91 Daily Journal DAR 9603, 91 Daily Journal DAR 9878, mand den (US) 116 L Ed 2d 669, 112 S Ct 674, 92 CDOS 429, 92 Daily Journal DAR 562, habeas corpus den (CA9 Wash) 978 F2d 1502, 92 CDOS 2761, 92 Daily Journal DAR 4397, reh, en banc, gr (CA9) 978 F2d 1519, 92 CDOS 8411, 92 Daily Journal DAR 13863, habeas corpus dismissed (CA9 Wash) 982 F2d 1321, 92 CDOS 10273, 92 Daily Journal DAR 17287, amd, reh, en banc, den (CA9 Wash) 997 F2d 512, 93 CDOS 4185, 93 Daily Journal DAR 7179, 93 Daily Journal DAR 7484, later proceeding (CA9) 992 F2d 984, 93 CDOS 3394, 93 Daily Journal DAR 5840, 93 Daily Journal DAR 6121, application den (US) 124 L Ed 2d 66, 113 S Ct 1965, 93 Daily Journal DAR 6152, appeal after remand (CA9) 998 F2d 763, 93 CDOS 5615, habeas corpus den (CA9 Wash) 18 F3d 662, 94 CDOS 927, 94 Daily Journal DAR 1624, concurring op in part and dissenting op in part at (CA9 Wash) 94 CDOS 938, 94 Daily Journal DAR 1639 and later proceeding (CA9) 18 F3d 729, later proceeding (CA9 Wash) 94 CDOS 1779, 94 Daily Journal DAR 3187 and reh, en banc, den (CA9) 94 CDOS 2764 and cert den (US) 127 L Ed 2d 685, 114 S Ct 1337.

Footnote 46. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887 and (criticized on other grounds by *United States v DiNapoli* (CA2 NY) 8 F3d 909, 38 Fed Rules Evid Serv 277) (drug ledger).

Footnote 47. *United States v Serna* (CA2 NY) 799 F2d 842, 21 Fed Rules Evid Serv 661, cert den 481 US 1013, 95 L Ed 2d 494, 107 S Ct 1887 and (criticized by *United States v DiNapoli* (CA2 NY) 8 F3d 909, 38 Fed Rules Evid Serv 277) (drug ledger).

Footnote 48. *Link v Mercedes-Benz of N. Am., Inc.* (CA3 Pa) 788 F2d 918, 1986-1 CCH

Trade Cases ¶ 67050, 20 Fed Rules Evid Serv 701; *United States v Eisenberg* (CA8 Minn) 807 F2d 1446, 22 Fed Rules Evid Serv 352; *State v Best* (App) 146 Ariz 1, 703 P2d 548; *Farm Credit Bank v Huether* (ND) 454 NW2d 710.

Footnote 49. *Nolin v Douglas County* (CA11 Ga) 903 F2d 1546, 30 Fed Rules Evid Serv 641, 16 FR Serv 3d 1445 (among conflicting authorities on other grounds noted in *Shahar v Bowers* (ND Ga) 58 BNA FEP Cas 668, 59 CCH EPD ¶ 41590, 8 BNA IER Cas 1841) and (ovrld on other grounds by *McKinney v Pate* (CA11 Fla) 1994 US App LEXIS 10130); *State v Washington* (App) 132 Ariz 429, 646 P2d 314.

Footnote 50. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580.

§ 1037 Necessity of establishing chain of custody

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It has been said that establishing the chain of custody of a document is not necessary under the Federal Rules of Evidence where there is prima facie evidence of its authenticity which satisfies the requirements of Rule 901(a).⁵¹ Thus, where a litigant sought the admission into evidence of seven completed job application forms, the fact that their chain of custody could not be established did not preclude their admission where other applications were identified by the applicants, and where it could reasonably be concluded that since all the applications appeared to come from the same source and were on the same form, and since the majority were conceded to be authentic applications for employment, a prima facie case for the authenticity of the seven disputed applications under the Federal Rules had been made.⁵²

However, under the substantially similar Uniform Rules of Evidence, the courts' discussion of the admission of documents has in some cases included an observation that a suitable chain of custody was established.⁵³

◆ Comment: Neither the Uniform Rules of Evidence nor the Federal Rules of Evidence specifically require demonstration of a chain of custody for admission of documentary evidence, although in many instances the authentication of a document will involve testimony as to its custody. The observation by courts in some cases under the Uniform Rules that a proper chain of custody was established for certain documents probably does not mean that such a showing was required for their admission; if a witness with knowledge had testified that the documents were what their proponent said they were, the documents probably would have been admitted with any question as to their custody bearing on their weight rather than their admissibility.⁵⁴

Footnotes

Footnote 51. *Louis Vuitton S.A. v Spencer Handbags Corp.* (CA2 NY) 765 F2d 966, 227

USPQ 377, 18 Fed Rules Evid Serv 837; *Alexander Dawson, Inc. v NLRB* (CA9) 586 F2d 1300, 99 BNA LRRM 3105, 85 CCH LC ¶ 10864, 3 Fed Rules Evid Serv 780.

Footnote 52. *Alexander Dawson, Inc. v NLRB* (CA9) 586 F2d 1300, 99 BNA LRRM 3105, 85 CCH LC ¶ 10864, 3 Fed Rules Evid Serv 780.

Footnote 53. *State ex rel. Corbin v Goodrich* (App) 151 Ariz 118, 726 P2d 215 (adequate chain of custody was established for documents seized by police officer); *Yarborough v State* (Tex App Fort Worth) 652 SW2d 831, petition for discretionary review ref (Oct 26, 1983) and (superseded by statute on other grounds as stated in *Bodin v State* (Tex Crim) 807 SW2d 313) (chain of custody was properly established for letters written by accused to his ex-wife).

Footnote 54. See *State v Emery*, 141 Ariz 549, 688 P2d 175 (foundation for evidence can be established by either chain of custody or identification testimony).

§ 1038 Necessity of subscribing witness' testimony—at common law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, when a written instrument attested by a subscribing witness is offered into evidence, its execution must be proved by that witness if he or she is available as a witness and competent to testify, 55 unless the document is an ancient one which is self-proving. 56 Under this rule, evidence of the genuineness of handwriting of a party to show the execution of an attested instrument is not sufficient and does not dispose with the necessity of calling the attesting witness if he or she is available. 57 A witness is unavailable, and the necessity of eliciting his or her testimony is excused, if he or she is dead, 58 insane, 59 not competent to testify, 60 outside the jurisdiction of the court, 61 or otherwise incapable of being produced as a witness. 62 The attendance in court of an attesting witness is also excused if after diligent inquiry he or she cannot be found. 63

The rule relating to testimony of an attesting witness applies not only to deeds and other instruments of a formal character, but also to contracts, 64 and to instruments not evidencing contracts, such as notices to quit, receipts, and like papers. 65 The application of the rule is especially called for if the document is one which the law requires to be attested by subscribing witnesses. 66

At common law, an admission in court as to the execution of the instrument, made for the purpose of dispensing with proof by the attesting witness, will excuse the necessity of producing him or her, 67 but an extrajudicial admission will not suffice. 68

In proving the execution of an instrument other than a will, it is not necessary, if there are two or more attesting witnesses, to call more than one of them; the evidence of one of the attesting witnesses will establish a prima facie case for the execution of the instrument. 69

Footnotes

Footnote 55. *Stamper v Griffin*, 20 Ga 312; *Gardner v Ladue*, 47 Ill 211; *Lyons v Holmes*, 11 SC 429.

Footnote 56. As to self-authenticating ancient documents, generally, see § 1201.

Footnote 57. *McAlpin v Lee*, 57 Ga 281.

Footnote 58. *Stebbins v Duncan*, 108 US 32, 27 L Ed 641, 2 S Ct 313.

Footnote 59. *Ellis v Doe*, 10 Ga 253; *Neely v Neely*, 17 Pa 227.

Footnote 60. *Cox v Davis*, 17 Ala 714; *Le Roy v Jacobosky*, 136 NC 443, 48 SE 796.

Footnote 61. *Cox v Davis*, 17 Ala 714; *Valentine v Piper*, 29 Mass 85.

Footnote 62. *Rieves v Smith*, 184 Ga 657, 192 SE 372, 112 ALR 368.

Footnote 63. *Cox v Davis*, 17 Ala 714; *Le Roy v Jacobosky*, 136 NC 443, 48 SE 796.

Footnote 64. *Sanborn v Cole*, 63 Vt 590, 22 A 716.

Footnote 65. *International & G. N. R. Co. v McRae*, 82 Tex 614, 18 SW 672.

Footnote 66. *Brynjolfson v Northwestern Elevator Co.*, 6 ND 450, 71 NW 555.

Footnote 67. *Planters' & Merchants' Bank v Willis & Co.*, 5 Ala 770; *Forsythe v Hardin*, 62 Ill 206.

Footnote 68. *Hogland v Sebring*, 4 NJL 105.

Footnote 69. *Eichelberger v Sifford*, 27 Md 320; *Shirley v Fearn*, 33 Miss 653; *McGowan v Reid*, 27 SC 262, 3 SE 337.

As to the necessity of producing all subscribing witnesses to a will, see 80 Am Jur 2d, Wills § 1008.

§ 1039 --Under statutes or codes of evidence

<p>View Entire Section Go to Parallel Reference Table</p>

The common-law rule requiring the execution of an attested instrument to be proved by at least one attesting witness has in many jurisdictions been modified by the enactment of statutes or rules of evidence providing that some documents require no attestation unless their genuineness is questioned, 70 or that the testimony of the maker of the instrument

will suffice to prove its execution. 71 Under some statutes attested documents may be proved as though they had no subscribing witnesses. 72 An instrument which has been acknowledged or recorded according to law need not be proved by the testimony of an attesting witness. 73

Rule 903 of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that the testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. 74

◆ **Comment:** It appears that no federal law requires such testimony. As an example of the sort of state laws within the scope of Rule 903, the Advisory Committee Note to Rule 903 pointed out statutes governing the execution of wills.

◆ **Observation:** The necessity of attesting witnesses' testimony to authenticate a will has in some jurisdictions been obviated by the enactment of statutes making wills "self-proving" through the execution by the attesting witnesses of affidavits attached to the will. 75 Furthermore, even where state law requires the testimony of a subscribing witness for the authentication of a will or other document, this requirement would apply only to proof of the execution of a document; where a document is offered for some other purpose, such as proof of delivery or that a writing constitutes an admission, Rules 901 and 902 would govern its authentication for that purpose. 76

Footnotes

Footnote 70. *Rice v James Hanrahan & Sons*, 20 Mass App 701, 482 NE2d 833, CCH Prod Liab Rep ¶ 10698, 41 UCCRS 1641, review den 396 Mass 1104, 486 NE2d 731 (printed copies of rules and regulations promulgated by a department, commission, board or officer of the state).

Footnote 71. *Lovejoy v Franklin* (Ala App) 426 So 2d 841.

Footnote 72. *Robertson v Burstein*, 105 NJL 375, 146 A 355, 65 ALR 324.

Footnote 73. *Mee v Benedict*, 98 Mich 260, 57 NW 175; *Garrett v Hanshue*, 53 Ohio St 482, 42 NE 256.

Forms: Acknowledgments. 1 Am Jur Legal Forms 2d, Acknowledgments §§ 7:1 et seq.

Footnote 74. FRE 903; Uniform Rules of Evidence Rule 903.

Footnote 75. 80 Am Jur 2d, Wills § 1008.

Footnote 76. *Pyle & Mockbee*, Authentication and Identification. 49 Miss L J 151 (1978).

c. Methods of Authentication [1040-1048]

(1). In General [1040-1043]

§ 1040 Generally; pretrial authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 901(b) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides an illustrative list of methods of authentication or identification conforming to the requirements of the rule of authentication or identification as stated in Rule 901(a). 77 These illustrations are not the only permissible methods of authentication under the Rules. 78

◆ Comment: The examples given in Rule 901(b) are drawn largely from the experience embodied in the common law and in prior statutes. 79 They do not represent a dramatic departure from the common law, 80 and for that reason they may have persuasive effect even in states which have not adopted the Uniform or Federal Rules.

Under the Rules, the parties may stipulate to the authenticity of a document. 81 Other methods by which a document may be authenticated prior to trial include:

- A request for an admission as to its authenticity pursuant to FR Civ P, Rule 36
- Securing an admission of authenticity at a pretrial conference under FR Civ P, Rule 16
- Attachment of a document as an appendix to pleadings under FR Civ P, Rule 10(c)
- Use of interrogatories propounded under FR Civ P, Rule 33
- An admission of authenticity obtained in the course of a deposition taken pursuant to FR Civ P, Rules 30 and 31 82

§ 1040 ----Generally; pretrial authentication [SUPPLEMENT]

Case authorities:

Exhibit purporting to be photocopy of bank check drawn on Bank of China and made payable to defendant was properly authenticated where check was delivered to Customs agent by Chinese national to whom defendant delivered illegally exported firearms, along with three- page invoice in defendant's handwriting describing credit in Chinese national's favor in exact amount as check. *United States v Holmquist* (1994, CA1 Mass) 36 F3d 154.

Footnotes

Footnote 77. *Finance Co. of America v Bankamerica Corp.* (DC Md) 493 F Supp 895, 209 USPQ 992, 7 Fed Rules Evid Serv 1449, 30 FR Serv 2d 1148.

Footnote 78. *Bury v Marietta Dodge* (CA11 Ga) 692 F2d 1335, 12 Fed Rules Evid Serv 265, reh den (CA11 Ga) 701 F2d 947; *Farmers Union Oil Co. v Wood* (ND) 301 NW2d 129.

Footnote 79. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

Footnote 80. *Westwood v State* (Wyo) 693 P2d 763.

Footnote 81. *Ponderosa System, Inc. v Brandt* (CA10 Wyo) 767 F2d 668, 18 Fed Rules Evid Serv 1193.

Forms: Stipulation as to admissibility of documentary evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 13.2.

Stipulation as to admissibility of public records. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 13.3.

Footnote 82. *Pyle & Mockbee, Authentication and Identification.* 49 Miss L J 151 (1978).

Forms: Stipulation—Admitting documents or copies of abstracts thereof and waiving rules relating to introduction of documentary evidence. 1 Federal Procedural Forms, L Ed, Actions in District Court § 1:1523.

Request—For admission of facts and genuineness of documents—General form. 11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Form 1381.

§ 1041 Testimony of witness with knowledge; generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 901(b)(1) of the Uniform Rules of Evidence and the Federal Rules of Evidence, testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to authenticate a document. 83 The opinion of a nonexpert witness is sufficient under the Rule if it is based on the personal knowledge of the witness. 84 To identify a document sufficiently to authenticate it, a witness need not be able to attest familiarity with every page of it. 85 However, a witness who lacks independent knowledge of the circumstances surrounding the making of a document cannot lay the foundation described by Rule 901(b)(1) for the admission of the document into evidence. 86

Even where testimony does not deal directly with any particular document, it may still be used as circumstantial proof of authenticity. Answers to interrogatories may be considered as authentication testimony where the answers directly identify a document's source or author, corroborate the contents of particular documents, indicate the presence of a purported author at a meeting or a meeting's limited attendance, or otherwise establish the document's authenticity. 87

◆ Practice guide: Rule 901(b)(1) does not require that any witness by his or her testimony alone authenticate or identify a particular document; any combination of items of evidence illustrated in Rule 901(b) will suffice as long as the standard set forth in Rule 901(a) is met. 88

§ 1041 ----Testimony of witness with knowledge; generally [SUPPLEMENT]

Case authorities:

Radiotelegrams sent from or received by vessel which was dumping incinerator ash into oceans were authenticated by testimony of several witnesses, including ship's radio operator, captain, secretary in defendant's office where some were received, and defendant himself, as well as by their appearance and content, ship's log, and messages in radiotelegams and their relationship to each other. *United States v Reilly* (1994, CA3 Del) 33 F3d 1396.

In action by police officers against city for violations of Fair Labor Standards Act, policy statement offered by city is authenticated by testimony of director of personnel, because director contributed to document and prepared it for meeting with city officials, so director was witness with knowledge that document is what it is claimed to be. *Kermit C. Sanders Lodge No. 13, Fraternal Order of Police v City of Smyrna* (1994, ND Ga) 862 F Supp 351, 2 BNA WH Cas 2d 440, 129 CCH LC ¶ 33170.

Footnotes

Footnote 83. FRE 901(b)(1); Uniform Rules of Evidence, Rule 901(b)(1).

Footnote 84. *State v Fischer* (Fla App D5) 387 So 2d 473.

Footnote 85. *United States v Whittington* (CA5 La) 783 F2d 1210, 20 Fed Rules Evid Serv 171, adhered to, reh den (CA5 La) 786 F2d 644, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269.

Footnote 86. *Fortier v Dona Anna Plaza Partners* (CA10 NM) 747 F2d 1324, 17 Fed Rules Evid Serv 612.

Footnote 87. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797, later proceeding (ED Pa) 505 F Supp 1313, 7 Fed Rules Evid Serv 305, summary judgment gr (ED Pa) 513 F Supp 1100, 1981-1 CCH Trade Cases ¶ 64155, 8 Fed Rules Evid Serv 289, supp op (ED Pa) 513 F Supp 1334, 1981-1 CCH Trade Cases ¶ 64155, 31 FR Serv 2d 833 and affd in part and revd in part (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules

Evid Serv 401, revd, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by Pfeiffer v Marion Ctr. Area Sch. Dist. (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 88. LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185 (1975).

§ 1042 --Adequacy of particular testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The requirement of authentication as illustrated by Rule 901(b)(1) has been held satisfied by—

—testimony by a witness identifying a notepad as his own and stating that it was a record of money owed him, and that with the exception of one word all the handwriting in it was his own. 89

—testimony by a witness admitting the making of a prior inconsistent statement and that the statement was true, and testimony by another witness that the first witness had read the statement and agreed to its veracity. 90

—testimony by a bank president identifying a certificate of insurance (and a canceled check representing payment of an insurance premium), introduced to show that the bank which the defendant had robbed was federally insured. 91

—testimony by qualified representatives of insurance companies as to the companies' recordkeeping practices and procedures and that each of the insurance files sought to be introduced was prepared and kept by the company in the regular course of its business. 92

—testimony by an expert witness on soil testing, foundation engineering, and parking lot design that he conducted an investigation reported in a subsurface report concerning a shopping center site, including testimony at length about the investigation and its results and an identification of the subsurface report at trial. 93

—testimony of two expert witnesses called to authenticate certain Ukrainian employment forms introduced to show that the defendant in a deportation proceeding had been affiliated with the Ukrainian police during World War II, one expert testifying that the documents introduced were very similar to such documents that he had seen in the past, and the other expert, testifying that the documents were not executed after their purported dates. 94

—a union coordinator's testimony that an employee had in his presence signed an

agreement authorizing the union to represent him. 95

While search warrant applications and supporting affidavits are best authenticated by submission of certified copies, they may be authenticated by the testimony of a police officer who identifies the documents. 96

§ 1042 --Adequacy of particular testimony [SUPPLEMENT]

Case authorities:

Audiotapes of undercover cocaine purchases were properly authenticated where agent testified that he equipped confidential informant with electronic monitoring equipment, monitored each transaction as it was occurring, and visually observed transaction while simultaneously listening to voices over wire. *United States v Polk* (1995, CA5 Miss) 56 F3d 613, reh den (1995, CA5 Miss) 1995 US App LEXIS 20015.

Telephone company employee was proper person to authenticate telephone records where she testified that she was telephone company's keeper of records for entire Iowa area code in question, that company makes and retains records of long-distance telephone calls in normal course of business, that records are initially stored in Dubuque and later transferred without alteration to Minneapolis and Denver for storage, and that records at issue had been subpoenaed from Denver records center which forwarded it to company's security office which, in turn, sent copies to employee for use in trial. *United States v Coohey* (1993, CA8 Iowa) 11 F3d 97.

Footnotes

Footnote 89. *United States v Davis* (CA10 Okla) 780 F2d 838, 19 Fed Rules Evid Serv 1224.

Footnote 90. *United States v Williams* (CA9 Wash) 668 F2d 1064, 9 Fed Rules Evid Serv 1304.

Footnote 91. *United States v Hadley* (CA8 Mo) 671 F2d 1112, 9 Fed Rules Evid Serv 1694.

Footnote 92. *United States v Panza* (CA2 NY) 750 F2d 1141, 17 Fed Rules Evid Serv 339.

Footnote 93. *Fortier v Dona Anna Plaza Partners* (CA10 NM) 747 F2d 1324, 17 Fed Rules Evid Serv 612.

Footnote 94. *United States v Koziy* (CA11 Fla) 728 F2d 1314, 15 Fed Rules Evid Serv 250, 77 ALR Fed 363, cert den 469 US 835, 83 L Ed 2d 70, 105 S Ct 130 and (among conflicting authorities on other grounds noted in *Maikovskis v Immigration & Naturalization Service* (CA2) 773 F2d 435) and (criticized on other grounds by *United States v Kungys* (CA3 NJ) 793 F2d 516).

Footnote 95. *NLRB v General Wood Preserving Co.* (CA4) 905 F2d 803, 134 BNA

LRRM 2491, 115 CCH LC ¶ 10140, cert den 498 US 1016, 112 L Ed 2d 595, 111 S Ct 590, 135 BNA LRRM 3176, 117 CCH LC ¶ 10462.

Footnote 96. United States v Wright (CA8 Mo) 704 F2d 420, 12 Fed Rules Evid Serv 1718.

§ 1043 Source of document

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The fact that the party against whom a document is to be offered in evidence produced the document may provide circumstantial evidence of its authenticity. 97 A document is also authenticated where a person in a position to vouch for its authenticity produces it and represents it to be the document described in a subpoena. 98 Such authentication can also be accomplished by counsel acting as agent of the person to whom the subpoena is directed, 99 The fact that documents are produced by a party in answer to an explicit discovery request, while not dispositive on the issue of authentication, is probative. 1

The place where a document was found can be circumstantial evidence of its authenticity, 2 and such evidence can be considered along with evidence of the document's distinctive characteristics. 3

§ 1043 ----Source of document [SUPPLEMENT]

Case authorities:

In admiralty action for limitation of liability arising out of grounding of vessel and oil spill, report of United States Coast Guard containing investigating officer's conclusions regarding apparent cause of grounding, assessment of fault, and recommendations for future procedures is admissible, because report is trustworthy since (1) delay in preparation of final report was due to criminal investigations connected with accident, (2) there is no reason to suspect that report was prepared with possible bias with view to litigation, and (3) trustworthiness of report is not diminished by fact that it was prepared by Coast Guard investigator and not Marine Board of investigators. In re Complaint of Nautilus Motor Tanker Co. (1994, DC NJ) 862 F Supp 1251.

Footnotes

Footnote 97. Zenith Radio Corp. v Matsushita Electric Industrial Co. (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797.

Footnote 98. United States v Brown (CA7 Wis) 688 F2d 1112, 11 Fed Rules Evid Serv 708.

Footnote 99. *United States v Brown* (CA7 Wis) 688 F2d 1112, 11 Fed Rules Evid Serv 708.

Footnote 1. *McQueeney v Wilmington Trust Co.* (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360).

Footnote 2. *United States v Eisenberg* (CA8 Minn) 807 F2d 1446, 22 Fed Rules Evid Serv 352 (letter found in alleged coconspirator's suitcase); *United States v Lewis* (CA8 Mo) 759 F2d 1316, 18 Fed Rules Evid Serv 13, cert den 474 US 994, 88 L Ed 2d 357, 106 S Ct 406, 106 S Ct 407, later proceeding (CA8 Mo) 836 F2d 419, cert den 487 US 1222, 101 L Ed 2d 915, 108 S Ct 2880 and (among conflicting authorities on other grounds noted in *United States v Nichols* (CA10 Utah) 841 F2d 1485) and (disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1) as stated in *United States v Newton* (CA8 Mo) 912 F2d 212 (drug ledger found in apartment used by defendants); *Burgess v Premier Corp.* (CA9 Wash) 727 F2d 826, CCH Fed Secur L Rep ¶ 99699, 15 Fed Rules Evid Serv 241 (criticized on other grounds by William Z. Salcer, Panfeld, *Edelman v Envicon Equities Corp.* (CA2 NY) 744 F2d 935, CCH Fed Secur L Rep ¶ 91673) (documents found in corporation's warehouse); *United States v Reyes* (CA10 NM) 798 F2d 380, 20 Fed Rules Evid Serv 1405 (handwritten note seized from defendant's residence); *State v Mercer*, 89 NC App 714, 367 SE2d 9 (documents found in residence of which defendant was the sole occupant).

Footnote 3. *United States v De Gudino* (CA7 Ill) 722 F2d 1351, 14 Fed Rules Evid Serv 1692 (criticized on other grounds by *United States v Ordonez* (CA9 Cal) 737 F2d 793, 15 Fed Rules Evid Serv 1972); *United States v Helmel* (CA8 Iowa) 769 F2d 1306, 19 Fed Rules Evid Serv 397; *United States v Smith* (CA11 Fla) 918 F2d 1501, 31 Fed Rules Evid Serv 1408, 115 ALR Fed 721, cert den (US) 116 L Ed 2d 117, 112 S Ct 151 and cert den (US) 116 L Ed 2d 207, 112 S Ct 253 and supp op (CA11 Fla) 945 F2d 365.

As to evidence of distinctive characteristics as a basis for authentication of a document, see § 1046.

(2). Distinctive Characteristics and the Like [1044-1048]

§ 1044 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 901(b)(4) of the Uniform Rules of Evidence and the Federal Rules of Evidence, the requirement of authentication or identification as a condition precedent to admissibility may be satisfied by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. 4 Under the Rule, the characteristics of the offered item itself, considered in the light of

circumstances, afford authentication techniques of great variety. 5 The contents of a document can support a claim of authenticity, 6 as can its specificity, regularity, and official appearance. 7 Language patterns appearing in a document may indicate authenticity or its opposite. 8

Footnotes

Footnote 4. FRE 901(b)(4); Uniform Rules of Evidence Rule 901(b)(4).

Footnote 5. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 6. *Link v Mercedes-Benz of N. Am., Inc.* (CA3 Pa) 788 F2d 918, 1986-1 CCH Trade Cases ¶ 67050, 20 Fed Rules Evid Serv 701; *Alexander Dawson, Inc. v NLRB* (CA9) 586 F2d 1300, 99 BNA LRRM 3105, 84 CCH LC ¶ 10864, 3 Fed Rules Evid Serv 780; *State v Haugen* (ND) 392 NW2d 799.

Footnote 7. *McQueeney v Wilmington Trust Co.* (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360).

Footnote 8. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

As to establishment of a document's authenticity through distinctive characteristics of its author's spelling, usage, or other such matters, see § 1219.

§ 1045 Restricted knowledge of document's contents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 901(b)(4), 9 a document can be tied to a particular person, and thus authenticated, by a showing that it discusses matters of which only that person could have been aware. 10 The inference of authenticity raised by such a showing does not vanish, but rather diminishes, as more people know the information contained in the document. 11 Even if other persons have knowledge of the matters contained in the document, it is open to the proponent of the document to show that such persons in fact did not author the document. 12

◆ Observation: When this "knowledge" method of authentication is used, analysis of the document's handwriting or typewriting is not necessary. 13 Telephone conversations may also be authenticated by this method. 14

Footnotes

Footnote 9. FRE 901(b)(4); Uniform Rules of Evidence Rule 901(b)(4).

Footnote 10. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

McQueeney v Wilmington Trust Co. (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in Aetna Casualty & Surety Co. v Gosdin (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360); United States v Helmle (CA8 Iowa) 769 F2d 1306, 19 Fed Rules Evid Serv 397; United States v One 56-Foot Motor Yacht Named The Tahuna (CA9 Cal) 702 F2d 1276, 12 Fed Rules Evid Serv 1264, 36 FR Serv 2d 1124.

Footnote 11. McQueeney v Wilmington Trust Co. (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in Aetna Casualty & Surety Co. v Gosdin (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360).

Footnote 12. LaRocca, Authentication, Identification, and the Best Evidence Rule. 36 La L Rev 185 (1975).

See also Pyle & Mockbee, Authentication and Identification. 49 Miss L J 151 (1978) (expressing the view that authentication under FRE 904(b)(4) based on document's content should not be restricted to situations where the alleged author is the only person having knowledge of its contents; the requirement of FRE 901(a) is satisfied where the content of the document supports a finding that it is what its proponent claims).

Footnote 13. United States v Helmle (CA8 Iowa) 769 F2d 1306, 19 Fed Rules Evid Serv 397.

As to authentication by analysis of handwriting, generally, see §§ 1212-1219.

As to authentication by analysis of typewriting, generally, see § 1220.

Footnote 14. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

As to authentication of telephone conversations, generally, see §§ 1227-1232.

§ 1046 Particular characteristics and circumstances as establishing authenticity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The signature of an employee on a letter appearing below the company's letterhead, together with proof that the letter was mailed by someone, is sufficient to authenticate under Rule 901(b)(4) that a letter was mailed by the company, at least in the absence of something highly suspicious in the appearance or content of the letterhead itself or the accompanying written matter, or counterproof indicating mistake or fraud. 15 A three-page typed document, unsigned and undated, has been held sufficiently

authenticated under Rule 901(b)(4) as written by the defendant in a drug smuggling prosecution, where the document (1) referred to the defendant's wife by name; (2) referred to various aliases proven by other evidence to have been used by the defendant; (3) contained a telephone number registered in the name of the defendant's long-time girlfriend; and (4) listed bank account numbers next to proven aliases of the defendant. 16

Authentication of a particular item has also been established under Rule 901(b)(4) by evidence—

—indicating that the cashier's check which its proponent sought to authenticate was purchased by a person having the same name as the defendant, that one of the members of the conspiracy to distribute heroin told the undercover agent that the source of the drugs was a particular town (where the check was sent), and that the defendant was shown to have been a senior partner in the enterprise. 17

—that the handwritten notes for which authentication was sought included the name of the defendant and initials of his coconspirators, notations of numbers of ounces of drugs, subtractions and additions of 6-digit figures, and phone numbers, and that the notes were seized from the defendant's residence. 18

—that documents introduced as the plaintiff's Sea Service records appeared to be standard official Coast Guard forms, that each was signed and dated by the plaintiff, that each included the plaintiff personal United States Merchant Mariners document number, and that the specificity, regularity, and official appearance of the documents increased the likelihood of their being authentic. 19

—indicating that Howard Johnson's place mats found in an accused conspirator's apartment originated from the restaurant and motel that the conspirators used as a meeting place, and depicted the first names of many of the conspirators involved in a particular smuggling operation coupled with various 4- and 5-digit numbers which were totaled, the surrounding circumstances indicating that the writings pertained to the conspiracy alleged and were made in furtherance of the conspiracy. 20

§ 1046 ----Particular characteristics and circumstances as establishing authenticity [SUPPLEMENT]

Case authorities:

Circumstances established authenticity of money order receipt for rent for apartment in which defendant was arrested; receipt bore his name and address of apartment, was type likely to be saved only by rent-payor or landlord, was found neatly stored in seemingly uninhabited apartment, defendant had been in apartment during rental period covered by receipt, and was only one who possessed key. *United States v Paulino* (1994, CA1 RI) 13 F3d 20, summary op at (CA1 RI) 14 R.I.L.W. 726, 22 M.L.W. 887.

Footnotes

Footnote 15. *California Asso. of Bioanalysts v Rank* (CD Cal) 577 F Supp 1342 (reports

appeared under letterhead of Department of Health, Education, and Welfare and were signed by officials of that agency, addressed to director of state department of health services, and received by that department).

Footnote 16. *United States v Newton* (CA1 RI) 891 F2d 944, 29 Fed Rules Evid Serv 526.

Footnote 17. *United States v Gutierrez* (CA10 Colo) 576 F2d 269, cert den 439 US 954, 58 L Ed 2d 345, 99 S Ct 351.

Footnote 18. *United States v Reyes* (CA10 NM) 798 F2d 380, 20 Fed Rules Evid Serv 1405.

Footnote 19. *McQueeney v Wilmington Trust Co.* (CA3 Pa) 779 F2d 916, 1986 AMC 969, 19 Fed Rules Evid Serv 673, 84 ALR Fed 1 (among conflicting authorities on other grounds noted in *Aetna Casualty & Surety Co. v Gosdin* (CA11 Ga) 803 F2d 1153, 21 Fed Rules Evid Serv 1360).

Footnote 20. *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681) and (criticized on other grounds by *United States v Lau* (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881).

§ 1047 Process or system

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 901(b)(9), evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result is sufficient to meet the requirement of authentication or identification as a condition precedent to admissibility. 21 This method of authentication involves situations in which the accuracy of the result is dependent upon a process or system which produces it, such as X-rays or computers. 22 A court is not foreclosed by this Rule from taking judicial notice of the accuracy of the process or system. 23

In addition to X-rays and computer printouts, Rule 901(b)(9) may be used to authenticate evidence collected by means of electronic medical tests, 24 surveys and polls, 25 and test and experiment results generally. 26

◆ Comment: One writer has expressed the view that courts have trivialized the authentication requirement under Rule 901 as applied to computer printouts of business record information. Noting that under Rule 901(b)(9) a court may take judicial notice of the accuracy of a system or process, the writer points out that, although a court properly takes notice of the scientific and engineering principles underlying computerized data processing, a particular result generated by a given data processing system is not a proper subject for judicial notice, and that any particular printout offered as evidence must be authenticated as the accurate result of a system or process.

The writer contends that both the complexity of modern data processing and the significant time lapses between a transaction and its subsequent processing mean that computerized business records present complex hearsay problems that, like the multiple levels of hearsay within hearsay, call for independent and substantial Rule 901(b)(9) authentication. The hearsay rule exception in Rule 803(6) for business records, in combination with system authentication, should comprise the two components of a comprehensive foundation for computerized business records. 27

Footnotes

Footnote 21. FRE 901(b)(9); Uniform Rules of Evidence Rule 901(b)(9).

Footnote 22. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

As to the authentication of X-rays, generally, see § 978.

Practice References 14 Am Jur POF2d 234, Admissibility of Computerized Business Records § 30.

Computer Print-Outs as Evidence. 16 Am Jur Proof of Facts 273.

Footnote 23. Advisory Committee Notes to Federal Rules of Evidence, FRE 901.

For a discussion of judicial notice, see §§ 24 et seq.

Footnote 24. Pyle & Mockbee, Authentication and Identification, 49 Miss LJ 151, 177 (1978).

Footnote 25. Union Carbide Corp. v Ever-Ready, Inc. (CA7 Ill) 531 F2d 366, 188 USPQ 623, 1976-1 CCH Trade Cases ¶ 60790, cert den 429 US 830, 50 L Ed 2d 94, 97 S Ct 91, 191 USPQ 416 and (superseded by statute on other grounds as stated in Scandia Down Corp. v Euroquilt, Inc. (CA7 Ill) 772 F2d 1423, 227 USPQ 138, 3 FR Serv 3d 195); Randy's Studebaker Sales, Inc. v Nissan Motor Corp. (CA10 Utah) 533 F2d 510, 1976-1 CCH Trade Cases ¶ 60803, 1 Fed Rules Evid Serv 1133.

Footnote 26. Pyle & Mockbee, Authentication and Identification, 49 Miss LJ 151, 177 (1978).

Footnote 27. Peritz, Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence, 80 NW U L Rev 956 (Winter 1986).

As to the hearsay rule exception for business records, generally, see §§ 1290 et seq.

§ 1048 Methods provided for by statute or court rules

[View Entire Section](#)

Under Rule 901(b)(10) of the Federal Rules of Evidence, authentication or identification as a condition precedent to admissibility may be made by any method provided by act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority. 28 Rule 901(b)(10) of the Uniform Rules of Evidence makes the same provision with respect to methods of authentication provided by the constitution, laws, or court rules of the enacting state. 29

Under Rule 910(b)(10), any method of authentication—whether provided by Rule 901, other rules, or statutes—which facilitates authentication with the greatest ease may be used. 30

Acts of Congress which provide methods of authentication or identification under the Federal Rule include:

- 7 USCS § 2217, which provides for the authentication of an oath, affirmation, or affidavit administered or taken by an officer, agent, or employee of the Department of Agriculture by the seal of the Department
- 8 USCS § 1454(e), which authorizes the Attorney General to make and issue certifications of any part of naturalization records of any court, or of any certificate of naturalization or citizenship, for use in complying with any state or federal statute or in any judicial proceeding
- 15 USCS § 1061, which provides for trademark acknowledgments and verifications by a person within the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States or before any official authorized to administer oaths in the foreign country concerned whose authority is proved by a certificate of a diplomatic or consular officer of the United States or apostille of an official designated by the foreign country which, by treaty or convention, accords like effect to apostilles of designated officials in the United States
- 18 USCS § 3190, which provides for the authentication of depositions, warrants, or other papers, offered in evidence in an extradition hearing, by certification by the principal diplomatic or consular officer of the United States in the foreign country seeking extradition
- 22 USCS § 4221, which provides for the authentication by a consular officer of any oath, affirmation, affidavit, deposition, or notarial act made before such officer
- 28 USCS § 753(b), which provides for the authentication of records of proceedings by court reporters
- 28 USCS § 1738, which provides for the authentication of acts of the legislature of any state, territory, or possession of the United States, by the seal of such state, territory, or possession, and authentication of records and judicial proceedings of any court of any state, territory, or possession by attestation of the clerk and seal of the court, if a seal exists, together with the certificate of a judge of the court that the attestation is in proper form 31

- 28 USCS § 1739, which provides for the authentication of nonjudicial records or books kept in any public office of any state, territory, or possession of the United States by attestation of custodian of such records or books and the seal of his office annexed, if there is a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of a governor, secretary of state, chancellor, or keeper of the great seal of the state, territory, or possession, that the attestation is in due form and by the proper officers 32

- 38 USCS § 5712, which provides for the authentication by the seal of the Veterans' Administration of any oath, affirmation, affidavit, or examination administered or taken by employee

- 42 USCS § 269(b), which provides for the certification of bills of health by the proper consular or other officer of the United States over his official signature and seal

- 43 USCS § 13, which provides for the authentication of papers on file in the General Land Office of the United States by certificate under seal of the Commissioner of General Land Office

Rules prescribed by the Supreme Court which provide methods of authentication or identification include:

- FR Civ P, Rule 30(f), which deals with the authentication of depositions by certification of the officer taking the deposition

- FR Civ P, Rule 44, which deals with the authentication of domestic and foreign official records in civil proceedings 33

- FR Civ P, Rule 80(c), which deals with the authentication of records of proceedings by court reporters

- FR Crim P, Rule 27, which provides that the provision of FR Civ P, Rule 44 are applicable in criminal proceedings 34

The Federal Rules of Civil Procedure also provide various means by which pretrial authentication of a document may be effected. 35

Footnotes

Footnote 28. FRE 901(b)(10).

Footnote 29. Uniform Rules of Evidence Rule 901(b)(10). The provision of the rule "as provided by the Supreme Court of this state" is optional; the Variations from the Official Text indicate that some states have made reference to rules prescribed by the state Supreme Court, while other states have not enacted the optional provision.

Footnote 30. Pyle & Mockbee, Authentication and Identification, 49 Miss LJ 151, 181 (1978).

Footnote 31. § 1408.

Footnote 32. § 1386.

Footnote 33. As to the provisions of FR Civ P, Rule 44, see §§ 1388, 1393.

Footnote 34. §§ 1388, 1393.

Footnote 35. § 1040.

4. Best and Secondary Evidence [1049-1091]

a. In General; Best Evidence Rule [1049-1052]

§ 1049 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The best evidence rule provides that in establishing the terms of a writing, where such terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than serious fault of the proponent. 36

The best evidence rule does not purport to include substitution of weaker for stronger evidence, but merely comprehends the situation where evidence offered is clearly substitutionary in its nature, although directed to same issue as original evidence which is withheld. 37 The underlying purpose of the best evidence rule is the prevention of fraud or mistake in proof of the contents of a writing. 38 Accordingly, the rule does not preclude a witness from testifying to facts recorded in a writing from his or her personal knowledge. 39

Without using the term "best evidence," the Federal Rules of Evidence have adopted the best evidence rule, and provide that to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in the Federal Rules of Evidence or by an act of Congress. 40

◆ Practice guide: An objection based on the best evidence rule is waived if not raised during trial. 41

Footnotes

Footnote 36. *People v Bizieff* (5th Dist) 226 Cal App 3d 1689, 277 Cal Rptr 678, 91 CDOS 944, 91 Daily Journal DAR 1237, review den (Cal) 1991 Cal LEXIS 1684; *Kwai Paul Lam v Northern Illinois Gas Co.* (1st Dist) 114 Ill App 3d 325, 70 Ill Dec 660, 449 NE2d 1007; *Buffalo Ins. Co. v United Parking Stations, Inc.*, 277 Minn 134, 152 NW2d

81; *State v Simpson* (Mo App) 718 SW2d 143; *Commonwealth v Johnson*, 373 Pa Super 312, 541 A2d 332, app den 520 Pa 596, 552 A2d 250 and (among conflicting authorities on other grounds noted in *Commonwealth v McHugh*, 11 Pa D & C4th 449).

As to limitations on the application of the best evidence rule, see § 1050.

Law Reviews: Nance, *The Best Evidence Principle*. 73 Iowa LR 227 (January, 1988).

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 ALR3d 824.

Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Practice References *Foundation for Admission of Secondary Evidence*. 35 Am Jur Proof of Facts 2d 147 § 1.

Mapping the trial—Order of proof—Best evidence rule. 5 Am Jur Trials 505 § 37.

Forms: Notice—Production of original document. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 31.

—Of instruments to be offered in evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 31.1.

Footnote 37. *State v Flaucher* (Iowa) 223 NW2d 239.

Footnote 38. *United States v Yamin* (CA5 La) 868 F2d 130, 10 USPQ2d 1300, 27 Fed Rules Evid Serv 755, cert den 492 US 924, 106 L Ed 2d 603, 109 S Ct 3258; *People v Bizieff* (5th Dist) 226 Cal App 3d 1689, 277 Cal Rptr 678, 91 CDOS 944, 91 Daily Journal DAR 1237, review den (Cal) 1991 Cal LEXIS 1684; *U. S. Homes, Inc. v Yates* (Iowa) 174 NW2d 402.

Footnote 39. *R & R Associates, Inc. v Visual Scene, Inc.* (CA1 RI) 726 F2d 36, 14 Fed Rules Evid Serv 1844; *D'Angelo v United States* (DC Del) 456 F Supp 127, 3 Fed Rules Evid Serv 735, affd without op (CA3 Del) 605 F2d 1194 and affd without op (CA3 Del) 605 F2d 1197; *D'Angelo v United States* (DC Del) 456 F Supp 127, 3 Fed Rules Evid Serv 735, affd without op (CA3 Del) 605 F2d 1194 and affd without op (CA3 Del) 605 F2d 1197; *Allen v State* (Ala App) 555 So 2d 1185, reh den (Ala App) 1989 Ala Crim App LEXIS 2492 and cert den (Ala) 1990 Ala LEXIS 84; *Johnson v State* (Ala App) 541 So 2d 1112; *Lopez v State* (Ind) 527 NE2d 1119; *State v Brown*, 177 W Va 633, 355 SE2d 614.

In an action for personal injury and property damage arising from an automobile collision, the court erred in excluding plaintiff's proffered testimony as to medical expenditures for prescriptions and medication upon defendant's objection that the best evidence would be the receipts. *Gonzalez v Hoffman*, 9 Mich App 522, 157 NW2d 475.

Footnote 40. FRE Rule 1002.

Federal Rule 1002 has adopted the best evidence rule with modifications geared to reconcile the Rule's primary purpose with the proven accuracy of modern copying techniques. *Union Nat. Bank v Providence Washington Ins. Co.* (WD Pa) 1 Fed Rules Evid Serv 930.

The Uniform Rules of Evidence are almost identical to the Federal Rules of Evidence. See 13 ULA 209.

See also, Uniform Rules of Evidence, Rule 1002.

As to the application of the best evidence rule to particular writings, see §§ 1074 et seq.

As to the application of the rule to recordings, see § 1069.

As to the application of the rule to photographs, see § 1070.

Footnote 41. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797, later proceeding (ED Pa) 505 F Supp 1313, 7 Fed Rules Evid Serv 305, summary judgment gr (ED Pa) 513 F Supp 1100, 1981-1 CCH Trade Cases ¶ 64155, 8 Fed Rules Evid Serv 289, supp op on other grounds (ED Pa) 513 F Supp 1334, 1981-1 CCH Trade Cases ¶ 64155, 31 FR Serv 2d 833 and affd in part and revd in part on other grounds (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded on other grounds 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

§ 1050 Limitations on scope of best evidence rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The best evidence rule applies only to documentary evidence, 42 which includes words and symbols recorded on any tangible thing. 43 The rule does not apply to duplicate originals of documents. 44 Nor does the rule apply to proof of the nature, appearance or condition of physical objects; such facts may be proved by parol evidence without the necessity of introducing the objects in evidence or accounting for their absence. 45

The best evidence rule applies, and an original is required, only when a writing is introduced to prove the contents of a writing, recording, or photograph, or to establish the existence of such documents; the rule does not come into play when a party uses a document to prove the existence of an independent fact, as to which the writing is merely collateral or incidental. 46

Additional specific limitations on the application of the best evidence rule may be provided by statute. 47

§ 1050 ----Limitations on scope of best evidence rule [SUPPLEMENT]

Case authorities:

In suit on homeowners' insurance policy, exclusion of underwriting manager's testimony on basis of "best evidence rule" was erroneous since, although witness's answers would have been based in part on content of insurer's underwriting guidelines, witness would not necessarily have been required to state contents of guidelines in order to answer question, hence best evidence rule was not implicated. *Allstate Ins. Co. v Swann* (1994, CA11 Ala) 27 F3d 1539, 8 FLW Fed C 468.

Footnotes

Footnote 42. *Reed v State* (Miss) 536 So 2d 1336.

The admission of witnesses' testimony as to what they heard a homicide defendant say on a television news broadcast did not violate the best evidence rule. *Perkins v State*, 260 Ga 292, 392 SE2d 872, op withdrawn, substituted op confirming prior op (Ga) 1990 Ga LEXIS 292.

Footnote 43. As to the applicability of the best evidence rule to inscribed chattels, see § 1078.

Footnote 44. As to the admission of duplicate originals in lieu of original documents, see §§ 1085 et seq.

Footnote 45. *Kirby v State* (Ala App) 548 So 2d 1075; *Johnson v State*, 289 Ark 589, 715 SW2d 441, later proceeding (Ark) LEXIS slip op; *Johnson v State*, 289 Ark 589, 715 SW2d 441, later proceeding (Ark) LEXIS slip op; *McCoy v State*, 185 Ga App 221, 363 SE2d 628; *State v Maupin*, 42 Ohio St 2d 473, 71 Ohio Ops 2d 485, 330 NE2d 708.

The admission into evidence of a package of spark plugs identical to the ones allegedly stolen by the defendant did not violate the best evidence rule. *Taylor v State* (Ind) 511 NE2d 1036.

A photograph of property alleged to be the object of a theft, otherwise admissible, may be admitted as evidence without regard to the availability of the property itself. *State v Madison* (La App 2d Cir) 535 So 2d 1024; *Mornes v State* (Okla Crim) 755 P2d 91.

As to parol evidence, generally, see §§ 1092 et seq.

Footnote 46. *United States v Gonzales-Benitez* (CA9 Ariz) 537 F2d 1051, cert den 429 US 923, 50 L Ed 2d 291, 97 S Ct 323; *Spurgeon v State* (Ala App) 560 So 2d 1116, reh den (Ala App) 1990 Ala Crim App LEXIS 22 and cert den (Ala) 1990 Ala LEXIS 298; *State v Comollo*, 21 Conn App 210, 572 A2d 1037, app den 215 Conn 811, 576 A2d 542; *Brady v State*, 259 Ga 573, 385 SE2d 653; *Shivers v State*, 188 Ga App 744, 374 SE2d

233; U. S. Homes, Inc. v Yates (Iowa) 174 NW2d 402; State v Coleman (Mo) 441 SW2d 46; State v Holland (Mo App) 781 SW2d 808; Peninger v State (Okla Crim) 811 P2d 609; Gutierrez v State (Tex App Corpus Christi) 745 SW2d 529, petition for discretionary review ref (May 25, 1988); Goetsch v State, 45 Wis 2d 285, 172 NW2d 688.

FRE Rule 1004(4).

Uniform Rules of Evidence, Rule 1004(4).

The best evidence rule did not apply to witnesses' testimony that union referrals were given out unfairly, where the purpose of such testimony was not to prove the contents of the out-of-work list, but to show merely that the list was not always adhered to. United States v Carlock (CA5 La) 806 F2d 535, 124 BNA LRRM 2334, 105 CCH LC ¶ 12150, 22 Fed Rules Evid Serv 164, later proceeding (CA5 La) 806 F2d 556, 105 CCH LC ¶ 12133, 22 Fed Rules Evid Serv 174 (criticized on other grounds by United States v Hudson (CA1 Me) 970 F2d 948, 36 Fed Rules Evid Serv 297) and cert den 480 US 949, 94 L Ed 2d 796, 107 S Ct 1611, 126 BNA LRRM 2960 and cert den 480 US 950, 94 L Ed 2d 798, 107 S Ct 1613, 126 BNA LRRM 2960.

A court's refusal to require the production of promissory notes which were the fruits of a mail fraud scheme was proper, since the notes were only collaterally involved and were introduced not for the proof of their exact terms, but rather only to show the method by which the scheme was effected. Blachly v United States (CA5 La) 380 F2d 665.

The best evidence rule did not apply to exclude testimony concerning an insurance policy covering the victim which was found by the testifying witness when she was collecting the defendant's personal belongings where such testimony was not offered to prove the contents or terms of the policy but to show the defendant's knowledge that the policy existed. State v Clark, 324 NC 146, 377 SE2d 54.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 4.

Footnote 47. Scofield v State (Ala App) 496 So 2d 96 (criticized on other grounds by Grantham v State (Ala App) 580 So 2d 53) (involving a statute expressly providing that reports of a state toxicologist and copies thereof are public records which are admissible when offered into evidence).

As to admission of secondary evidence under exceptions to the best evidence rule, see §§ 1053 et seq.

§ 1051 --Effect of expert testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In addition to the general limitation that an original is required only where the object is to

prove the contents of a writing, recording, or photograph, 48 Rule 1002 of the Federal Rules of Evidence is limited in its application by Rule 703 of the Federal Rules, which allows an expert to give an opinion based on matters not in evidence. 49 For example, in a copyright infringement action, it was held that expert testimony could properly be used to develop proof of the defendant's gross revenues attributable to the infringement when financial records sufficiently detailed to show the infringer's profits were not available. 50 Further, hospital records, which may be admitted under the business records exception to the hearsay rule, 51 commonly contain reports interpreting X-rays by staff radiologists, who qualify as experts, and these reports may not be excluded from the records by Rule 1002 of the Federal Rules of Evidence. 52

Footnotes

Footnote 48. § 1050.

Footnote 49. *United States v Gavic* (CA8 Minn) 520 F2d 1346, 1 Fed Rules Evid Serv 16.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1002.

Footnote 50. *Estate of Vane v Fair, Inc.* (CA5 Tex) 849 F2d 186, 7 USPQ2d 1479, reh den (CA5) 1988 US App LEXIS 18019 and cert den 488 US 1008, 102 L Ed 2d 783, 109 S Ct 792.

Footnote 51. FRE Rule 803(6) and Uniform Rules of Evidence, Rule 803(6), as discussed generally in §§ 1300 et seq.

Footnote 52. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1002.

Annotation: Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 ALR2d 406.

§ 1052 --Testimony or written admission of party against whom item is offered

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some jurisdictions follow the view that a party's own statements and admissions are admissible in evidence against that party, although such statements and admissions may involve what must necessarily be contained in some writing, deed, or record. 53

Under Rule 1007 of the Federal Rules of Evidence, the contents of a writing, recording, or photograph may be proved by the testimony or deposition of the party against whom offered or by the opponent's written admission, without accounting for the nonproduction of the original. 54 This rule recognizes the risk of inaccuracy with respect to oral admissions of what a writing contains, and therefore limits the use of admissions to those made in the course of giving testimony or in writing, unless the nonproduction of the

original is accounted for and secondary evidence generally has become admissible under Rule 1004 of the Federal Rules of Evidence. 55

◆ Observation: FR Evid, Rule 1007 does not apply where the contents of a document are sought to be proved by the testimony of a party other than one against whom such proof is offered. 56

Footnotes

Footnote 53. *Aviation Enterprises, Inc. v Cline* (Mo App) 395 SW2d 306; *Gardner v Columbia Police Dept.*, 216 SC 219, 57 SE2d 308; *McDaniel v Commonwealth*, 183 Va 481, 32 SE2d 667.

Footnote 54. FRE Rule 1007.

See also Uniform Rules of Evidence, Rule 1007.

Footnote 55. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1007.

For a discussion of FRE Rule 1004, see §§ 1053 et seq.

Forms: Stipulation—Admitting copies in lieu of original documents. 1 Federal Procedural Forms, L Ed § 1:1522.

Stipulation—Admitting documents or copies or abstracts thereof and waiving rule to introduction of documentary evidence. 1 Federal Procedural Forms, L Ed § 1:1523.

Footnote 56. *Union Nat. Bank v Providence Washington Ins. Co.* (WD Pa) 1 Fed Rules Evid Serv 930.

b. Exceptions to Best Evidence Rule; Circumstances When Secondary Evidence is Admissible [1053-1068]

(1). In General [1053-1058]

§ 1053 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the original writing, recording, or photograph cannot be produced by the party by whom the evidence is offered within a reasonable time by the exercise of reasonable diligence, secondary evidence of the contents of the writing may be admissible. 57 Basically, the rule requiring production of the original as proof of contents has developed

as a rule of preference, and thus if the failure to produce the original is satisfactorily explained, secondary evidence is admissible. 58 The introduction of secondary evidence is generally permitted where the proponent is able to show that the original is lost or destroyed, 59 is not obtainable, 60 or is in the possession of the opponent. 61 In addition, a summary of the original evidence may be admitted where the original is voluminous or complicated. 62

The determination of whether to admit secondary evidence under one of these exceptions is within the discretion of the trial court. 63 In making such a determination, a court is not bound by the Federal Rules of Evidence except those with respect to privileges. 64 Clear and convincing evidence of authenticity and accuracy of secondary evidence is not required for admission under Rule 1004 of the Federal Rules of Evidence, but rather the proponent must present a sufficient foundation so that a reasonable juror could be convinced that the secondary evidence correctly reflects the contents of the original. 65

In jurisdictions which have adopted the Federal Rules of Evidence, the best evidence rule does not recognize "degrees" of secondary evidence. 66 If available and if properly authenticated, the proponent can present more than one type of secondary evidence to prove the contents of the original writing. 67 However, in some jurisdictions that have not adopted the Federal Rules of Evidence, where the original is not available and consequently a fact may be proved by secondary evidence, the proponent of the secondary evidence must produce the best secondary evidence which exists and which is within his or her power to produce. 68

Footnotes

Footnote 57. Velasquez v Freeman, 244 Or 40, 415 P2d 514, 53 CCH LC ¶ 51511.

FRE Rule 1004.

Uniform Rules of Evidence, Rule 1004.

Footnote 58. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1004.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 1.

Footnote 59. § 1054.

Footnote 60. § 1056.

Footnote 61. § 1057.

Footnote 62. As to the admissibility of summaries as secondary evidence, see §§ 1059 et seq.

Footnote 63. Graybar Electric Co. v Sawyer (Me) 485 A2d 1384; Wayne Smith Constr. Co. v Wolman, Duberstein, & Thompson (App) 294 SC 140, 363 SE2d 115.

As to whether particular issues of fact are for the court or the jury, see § 1058.

Footnote 64. *Seiler v Lucasfilm, Ltd.* (ND Cal) 613 F Supp 1253, 83 ALR Fed 535, affd (CA9 Cal) 797 F2d 1504, 230 USPQ 856, 21 Fed Rules Evid Serv 406, mod on other grounds (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92 (applying FRE Rule 104(a)).

Forms: Objection—To notice to produce documents—Grounds—Privileged communications. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 34.

Footnote 65. *United States v Gerhart* (CA8 Iowa) 538 F2d 807, 1 Fed Rules Evid Serv 286.

Footnote 66. *United States v United States Trust Co.* (DC Mass) 660 F Supp 1085; *Wine Corners, Inc. v Castel Wines International, Ltd.* (ND NY) 16 Fed Rules Evid Serv 825.

Once an enumerated condition of FRE Rule 1004 is met, the proponent may prove the contents of a writing by any secondary evidence, subject to an attack by the opposing party not as to admissibility, but to the weight to be given the evidence. *United States v Gerhart* (CA8 Iowa) 538 F2d 807, 1 Fed Rules Evid Serv 286.

There is no requirement under FRE Rule 1004 that a copy of a document be introduced in preference to oral testimony concerning the document. *United States v Standing Soldier* (CA8 SD) 538 F2d 196, 1 Fed Rules Evid Serv 255, cert den 429 US 1025, 50 L Ed 2d 627, 97 S Ct 646 and (criticized on other grounds by *United States v Ylida* (CA5 Tex) 643 F2d 348).

Footnote 67. *Burroughs Wellcome Co. v Commercial Union Ins. Co.* (SD NY) 632 F Supp 1213, motion gr, in part (SD NY) 713 F Supp 694, motion gr (SD NY) 1990 US Dist LEXIS 1993.

Footnote 68. *Murphy v Nielsen* (3rd Dist) 132 Cal App 2d 396, 282 P2d 126; *State v Wolfley*, 75 Kan 406, 89 P 1046, reh den 75 Kan 413, 93 P 337; *Miller v Keaton*, 260 Mo 708, 168 SW 1140.

§ 1054 Original lost or destroyed

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Secondary evidence of the contents of a writing, recording, or photograph is admissible where all of the originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. 69 The burden of proof in establishing loss or destruction of an original is on the proponent of the secondary evidence. 70 The proponent may be required to demonstrate some degree of diligence in the search for an allegedly lost or destroyed original in order to meet this burden. 71 The proponent also has the burden of additionally establishing, by clear and convincing evidence, the existence and execution of the original writing and the contents of the writing. 72

§ 1054 ----Original lost or destroyed [SUPPLEMENT]

Case authorities:

In prosecution for theft by deception, trial court properly admitted photocopies of checks as secondary evidence under best evidence rule, where victim destroyed checks at defendant's direction and thus copies of checks were admissible to replace destroyed originals. *Woods v State* (1993, Ala App) 641 So 2d 316.

Footnotes

Footnote 69. *Flick v Borg-Warner Corp.* (CA3 Pa) 892 F2d 285 (holding that the loss of a copy of a document does not foreclose establishing its contents through the testimony of the draftsman, those who read the document, or others who might have knowledge of its provisions); *Neier v United States* (DC Kan) 127 BR 669, 91-1 USTC ¶ 50234, 68 AFTR 2d 91-5122; *Rosshirt v Cincinnati Ins. Co.*, 176 Ga App 537, 336 SE2d 612; *Carriage House v Louisiana Power & Light Co.* (La App 4th Cir) 505 So 2d 171; *State v Young (Me)* 560 A2d 1095; *Gibson v State (Miss)* 580 So 2d 739; *State v Strothers (Mo App)* 798 SW2d 723; *State v Snyder (Mo App)* 748 SW2d 781; *Gutierrez v State (Tex App Corpus Christi)* 745 SW2d 529, petition for discretionary review ref (May 25, 1988); *State v Detrick*, 55 Wash App 501, 778 P2d 529.

FRE Rule 1004(1); Uniform Rules of Evidence, Rule 1004(1).

In a suit to recover compensation for nonscheduled overtime work, an employee was entitled to present as secondary evidence any admissions made by the employer, where the employer lost or destroyed the records that would have documented the actual hours worked. *Falcone v EDO Corp.* (2d Dept) 141 App Div 2d 498, 529 NYS2d 123, 111 CCH LC ¶ 56043.

Annotation: Federal Rules of Evidence: Admissibility, pursuant to Rule 1004(1), of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 ALR Fed 554.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 1.

Footnote 70. *Burroughs Wellcome Co. v Commercial Union Ins. Co.* (SD NY) 632 F Supp 1213, motion gr, in part (SD NY) 713 F Supp 694, motion gr (SD NY) 1990 US Dist LEXIS 1993; *United States v Marcantoni* (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063; *United States v England* (CA5 Tex) 480 F2d 1266, cert den 414 US 1041, 38 L Ed 2d 332, 94 S Ct 543; *United States v Gerhart* (CA8 Iowa) 538 F2d 807, 1 Fed Rules Evid Serv 286; *United States v Standing Soldier* (CA8 SD) 538 F2d 196, 1 Fed Rules Evid Serv 255, cert den 429 US 1025, 50 L Ed 2d 627, 97 S Ct 646 and (criticized on other grounds by *United States v Ylda* (CA5 Tex) 643 F2d 348); *Seiler v Lucasfilm, Ltd.* (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92; *United States v Conry* (CA9 Cal) 631 F2d 599, 81-2 USTC ¶ 9618, 47

Footnote 71. *Burroughs Wellcome Co. v Commercial Union Ins. Co.* (SD NY) 632 F Supp 1213, motion gr, in part (SD NY) 713 F Supp 694, motion gr (SD NY) 1990 US Dist LEXIS 1993; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Spellman v State* (Ala App) 500 So 2d 110; *Rybak v Provenzale* (2d Dist) 181 Ill App 3d 884, 130 Ill Dec 852, 537 NE2d 1321, app den (Ill) 136 Ill Dec 606, 545 NE2d 130; *Weisman v Hopf-Himsel, Inc.* (Ind App) 532 NE2d 29, mod on other grounds, on reh (Ind App) 535 NE2d 1222.

Uncontradicted testimony of agents of a real estate developing company that they could not find a contract was adequate under FRE Rule 1004(1) to establish that the original document had been lost other than through the plaintiffs' bad faith; oral testimony of those familiar with the contract was thus admissible to prove its content. *Titcomb v Saco Mobile Home Sales, Inc.* (Me) 544 A2d 754.

Footnote 72. *Bradley v Nall* (Ala) 505 So 2d 1062, later proceeding (Ala) 540 So 2d 711, later proceeding (Ala) 594 So 2d 54; *Connecticut Bank & Trust Co. v Wilcox*, 201 Conn 570, 518 A2d 928; *Rybak v Provenzale* (2d Dist) 181 Ill App 3d 884, 130 Ill Dec 852, 537 NE2d 1321, app den (Ill) 136 Ill Dec 606, 545 NE2d 130.

Practice References Best and Secondary Evidence, 2 Am Jur Proof of Facts 467, Proof 1.

§ 1055 --Proving loss or destruction without bad faith on part of proponent

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts condition the admissibility of secondary evidence upon a satisfactory showing by the proponent that the original has been lost or destroyed without bad faith,⁷³ or on a finding of a sufficient basis for concluding that the originals were lost or destroyed without any bad faith on the part of the proponent.⁷⁴ Under the Federal Rules of Evidence, the sufficiency of preliminary proof as to whether the proponent has lost or destroyed the original of a writing in bad faith is a matter of law for the court to decide, and the judge's determination as to the standard of proof applicable will not be disturbed in the absence of clear evidence of mistake amounting to an error of law.⁷⁵

The absence of any evidence of bad faith on the part of the proponent may be accorded significance by the court in evaluating a showing of loss or destruction of an original writing.⁷⁶

Bad faith will not be inferred where the proponent testifies that destruction of the original in issue was due to the negligence of employees.⁷⁷ Furthermore, the fact that the original was not inadvertently destroyed but was deliberately destroyed does not mean that evidence is not admissible under the Federal Rules of Evidence so long as the

destruction was not in bad faith. 78 Even intentional destruction in violation of law or regulations requiring the preservation of the documents has been found not indicative of bad faith so as to exclude secondary evidence of the destroyed originals. 79

Loss or destruction of an original without bad faith can be shown by circumstantial evidence of a routine practice of destruction of documents. 80 On the other hand, inconsistent or incredible testimony not corroborated by any neutral or independent party, and suspicious circumstances surrounding the loss or destruction of alleged originals, can give rise to an inference of bad faith on the part of the proponent and influence the court to deny admissibility. 81

Footnotes

Footnote 73. *Klein v Frank* (CA5 Fla) 534 F2d 1104; *Bendix Corp. v United States*, 220 Ct Cl 507, 600 F2d 1364, 204 USPQ 617, 26 CCF ¶ 83396, appeal after remand 230 Ct Cl 247, 676 F2d 606, 29 CCF ¶ 82336 (criticized on other grounds by *Dynamics Corp. of America v United States* (CA FC) 766 F2d 518, 226 USPQ 622, 32 CCF ¶ 73683).

If a party has voluntarily destroyed a written instrument, he or she cannot prove its contents secondarily unless he or she repels every inference of a fraudulent design in its destruction. *Kwai Paul Lam v Northern Illinois Gas Co.* (1st Dist) 114 Ill App 3d 325, 70 Ill Dec 660, 449 NE2d 1007.

Annotation: Federal Rules of Evidence: Admissibility, pursuant to Rule 1004(1), of other evidence of contents of writing, recording, or photograph, where originals were allegedly lost or destroyed, 83 ALR Fed 554.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 7.

Footnote 74. *United States v Marcantoni* (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063.

Footnote 75. *Seiler v Lucasfilm, Ltd.* (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92, holding that the proponent may be required to prove to the satisfaction of the court that it is "more probable than not" that the originals of the writings were lost or destroyed without bad faith, where (1) there are peculiar and suspicious circumstances surrounding the "discovery" and production of the secondary evidence in the case, requiring a "rigid inquiry," and (2) the documents at issue are the very foundation of the plaintiff's claim.

Footnote 76. *United States v Cambindo Valencia* (CA2 NY) 609 F2d 603, 4 Fed Rules Evid Serv 1197, 5 Fed Rules Evid Serv 570, cert den 446 US 940, 64 L Ed 2d 795, 100 S Ct 2163 and (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988); *United States v Marcantoni* (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063; *United States v Standing Soldier* (CA8 SD) 538 F2d 196, 1 Fed Rules Evid Serv 255, cert den 429 US 1025, 50 L Ed 2d 627, 97 S Ct 646 and (criticized on other grounds by *United States v Ylda* (CA5 Tex) 643 F2d 348); *Diplomat Homes, Inc. v Commercial Standard Ins. Co.* (WD Mo) 394 F Supp 558.

As to proof of loss or destruction of an original writing, generally, see § 1054.

Footnote 77. *Estate of Gryder v Commissioner* (CA8) 705 F2d 336, 83-1 USTC ¶ 9331, 13 Fed Rules Evid Serv 304, 51 AFTR 2d 83-1207, cert den 464 US 1008, 78 L Ed 2d 709, 104 S Ct 525.

Footnote 78. *United States v Balzano* (CA1 RI) 687 F2d 6, 11 Fed Rules Evid Serv 847.

So long as there is no evidence of any intentional conduct indicating fraud and a desire to destroy the document and thereby suppress the truth, secondary evidence of a deliberately destroyed original may be admissible. *Murray v District of Columbia Bd. of Education* (DC Dist Col) 31 BNA FEP Cas 988, 33 CCH EPD ¶ 34074, 13 Fed Rules Evid Serv 554.

Footnote 79. *Murray v District of Columbia Bd. of Education* (DC Dist Col) 31 BNA FEP Cas 988, 33 CCH EPD ¶ 34074, 13 Fed Rules Evid Serv 554 (board of education's loss of application forms and other application materials of plaintiff alleging employment discrimination, in violation of city municipal code and federal regulations requiring that such records be maintained, was more serious than mere laxity or oversight but did not amount to bad faith).

Footnote 80. *United States v Balzano* (CA1 RI) 687 F2d 6, 11 Fed Rules Evid Serv 847; *Burroughs Wellcome Co. v Commercial Union Ins. Co.* (SD NY) 632 F Supp 1213, motion gr, in part (SD NY) 713 F Supp 694, motion gr (SD NY) 1990 US Dist LEXIS 1993; *Wright v Farmers Co-op of Arkansas & Oklahoma* (CA8 Ark) 681 F2d 549, 10 Fed Rules Evid Serv 1250.

Footnote 81. *Seiler v Lucasfilm, Ltd.* (ND Cal) 613 F Supp 1253, 83 ALR Fed 535, affd (CA9 Cal) 797 F2d 1504, 230 USPQ 856, 21 Fed Rules Evid Serv 406, mod on other grounds (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92 (plaintiff claimed originals of art work allegedly appropriated by defendants were destroyed in flood, but neither plaintiff nor any other witness offered by plaintiff could explain source of water, there being no evidence of any rainfall during time at which damage allegedly occurred nor of any leakage from household plumbing or any other plausible explanation for extensive water damage suffered).

§ 1056 Original not obtainable

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where no original can be obtained by any available judicial process or procedure, the original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible. 82 However, the proponent of the secondary evidence must produce some evidence which has a logical tendency to establish the nonavailability of the original. 83 For example, when the original is in the possession of a third person, the

inability to procure it from that person by resort to process or other judicial procedure, including a subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction, is a sufficient explanation of nonproduction and no further showing is required. 84 When a subpoena has been served on the parties but the original has not been produced in response to the subpoena, the FR Evid, Rule 1004(2) standard of unavailability has been met. 85 Whether the subpoena issued is a trial subpoena or a grand jury subpoena makes no difference. 86 Under Rule 1004(2) of the Federal Rules of Evidence, a police officer's testimony as to the serial numbers of \$10 bills examined at the defendants' residence has been held admissible, where the bills could not be found when the police officer returned to the residence with a search warrant, and where even assuming that the defendants were amenable to a subpoena directing the production of the bills at trial, it would be unrealistic to expect that they would have readily produced the bills that would have made the prosecution's case against them complete. 87

Footnotes

Footnote 82. *Smith v Ward* (Ky) 256 SW2d 385.

FRE Rule 1004(2); Uniform Rules of Evidence, Rule 1004(2).

Footnote 83. *Lende v Ferguson*, 237 Iowa 738, 23 NW2d 824.

Practice References Best and Secondary Evidence. 2 Am Jur Proof of Facts 467, Proof 2.

Footnote 84. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1004.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 8.

Footnote 85. *United States v Taylor* (CA9 Cal) 648 F2d 565, 7 Fed Rules Evid Serv 1850, cert den 454 US 866, 70 L Ed 2d 168, 102 S Ct 329 and on remand (SD Cal) 527 F Supp 863 and (criticized on other grounds by *United States v Khoury* (CA11 Fla) 901 F2d 948).

Footnote 86. *United States v Taylor* (CA9 Cal) 648 F2d 565, 7 Fed Rules Evid Serv 1850, cert den 454 US 866, 70 L Ed 2d 168, 102 S Ct 329 and on remand (SD Cal) 527 F Supp 863 and (criticized on other grounds by *United States v Khoury* (CA11 Fla) 901 F2d 948).

Footnote 87. *United States v Marcantoni* (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063.

§ 1057 Original in possession of opponent

[View Entire Section](#)

The original is not required and secondary evidence of the contents of a writing, recording, or photograph is admissible if at the time when an original was under control of the party against whom the document is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the opponent does not produce the original at the hearing. 88 Under Rule 1004(3) of the Federal Rules of Evidence, in order for secondary evidence to be admitted under such circumstances, the proponent must establish: (1) possession or control by the opponent; (2) demand or notice made by the proponent signifying that the document will be needed; and (3) failure or refusal by the opponent to provide the document in court. 89

Footnotes

Footnote 88. FRE Rule 1004(3); Uniform Rules of Evidence, Rule 1004(3).

A party who has an original in his or her control has no need for protection of the rule requiring an original, if put on notice that proof of contents will be made, since the party can ward off secondary evidence by offering the original. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1004.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 9.

Best and Secondary Evidence. 2 Am Jur Proof of Facts 467, Proof 2.

Forms: Notice to produce original documents on which action is based. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 31.

Notice—Production of documents—Use of secondary evidence on failure to produce. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 32.

Objection—To notice to produce documents—Grounds—Prior motion to dismiss pending. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 33.

—Privileged communications. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 34.

—Possibility of prejudicial nature of documents requested. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 35.

—Requested documents not in possession of defendant. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 36.

—Request for disclosure too broad. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 37.

—Availability at pretrial conference of information requested. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 38.

§ 1058 Issues of fact for court or jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The admissibility of secondary evidence, including whether a proponent has demonstrated the foundational requirements, 90 and whether the proponent has made a sufficient showing of the search for the original documents and of the fact of loss of the originals, 91 is a determination to be made in the discretion of the trial court. 92 However, the issue is for the trier of fact to determine, as in the case of other issues of fact, when an issue is raised as to: (1) whether the asserted writing ever existed; (2) whether another writing, recording, or photograph produced at the trial is the original; or (3) whether other evidence of contents correctly reflects the contents. 93

Thus, the question whether the loss of originals has been established, or of the fulfillment of other conditions specified in Rule 1004 of the Federal Rules of Evidence, is for the judge; but Rule 1008 is meant to insure that the jury rather than the court decides a preliminary question of fact when it goes beyond the mere administration of the Rule preferring the original as evidence of contents, and into the merits of the controversy. 94

Under Rule 1008 of the Federal Rules of Evidence, the court decides the preliminary questions as to the lack of an original and whether the proponent has presented a sufficient foundation so that a reasonable juror could be convinced that the secondary evidence offered correctly reflects the contents of the original. 95 However, where a plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of the loss of the original, and the defendant counters with evidence that no such contract was ever executed, a jury question is raised as to the existence of the contract by reason of FR Evid, Rule 1008. 96 This decision is not one for uncontrolled discretion of the jury, but is subject to the control exercised generally by a judge over jury determinations. 97 Thus, proof of routine practices may compel an inference that the original did in fact exist and may be a factor considered by the court in ruling upon the admissibility of secondary evidence. 98

Footnotes

Footnote 90. *United States v Gerhart* (CA8 Iowa) 538 F2d 807, 1 Fed Rules Evid Serv 286; *Seiler v Lucasfilm, Ltd.* (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92.

Footnote 91. *Seiler v Lucasfilm, Ltd.* (ND Cal) 613 F Supp 1253, 83 ALR Fed 535, affd (CA9 Cal) 797 F2d 1504, 230 USPQ 856, 21 Fed Rules Evid Serv 406, mod on other grounds (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92; *Spellman v State* (Ala App) 500 So 2d 110.

A trial court did not abuse its discretion in admitting testimony as to the contents of letters written to the witness in which the defendant confessed to murder; testimony that the witness had thrown the letters away established a sufficient excuse for the failure to produce the originals. *Commonwealth v Cessna*, 371 Pa Super 89, 537 A2d 834.

Footnote 92. *Wright v Farmers Co-op of Arkansas & Oklahoma* (CA8 Ark) 681 F2d 549, 10 Fed Rules Evid Serv 1250; *United States v Shoels* (CA10 Colo) 685 F2d 379, 11 Fed Rules Evid Serv 340, cert den 462 US 1134, 77 L Ed 2d 1370, 103 S Ct 3117; *Marksill Specialties, Inc. v Barger* (Ind App) 428 NE2d 65.

As to proving loss or destruction of the original document without bad faith on the part of the proponent, see § 1055.

Footnote 93. FRE Rule 1008; Uniform Rules of Evidence, Rule 1008.

Footnote 94. *Seiler v Lucasfilm, Ltd.* (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1008.

Footnote 95. *United States v Gerhart* (CA8 Iowa) 538 F2d 807, 1 Fed Rules Evid Serv 286.

Footnote 96. *Seiler v Lucasfilm, Ltd.* (ND Cal) 613 F Supp 1253, 83 ALR Fed 535, affd (CA9 Cal) 797 F2d 1504, 230 USPQ 856, 21 Fed Rules Evid Serv 406, mod on other grounds (CA9 Cal) 808 F2d 1316, 1 USPQ2d 1789, 22 Fed Rules Evid Serv 601, cert den 484 US 826, 98 L Ed 2d 53, 108 S Ct 92.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1008.

Footnote 97. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1008.

In this connection, see FRE Rule 104(b), discussed in §§ 307 et seq., which provides that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Footnote 98. *United States v Balzano* (CA1 RI) 687 F2d 6, 11 Fed Rules Evid Serv 847; *United States v Miller* (DC Md) 584 F Supp 519, 85-1 USTC ¶ 9158, 55 AFTR 2d 85-574; *United States v Conry* (CA9 Cal) 631 F2d 599, 81-2 USTC ¶ 9618, 47 AFTR 2d 81-320.

FRE Rule 1004(1); Uniform Rules of Evidence, Rule 1004(1).

Evidence of a routine practice of a conveyor in reserving a mineral interest in property transferred is relevant to prove conduct under FRE Rule 406 and is admissible in lieu of the original deed under FRE Rule 1004(1). *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

(2). Admissibility of Summaries [1059-1068]

§ 1059 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the best evidence rule, a witness may give a summary based on an inspection of a number of documents, or the summary itself may be admitted in evidence, if the underlying documents are so numerous and intricate as to make an examination of them in court impractical, 99 the underlying documents themselves are competent as evidence, 1 and the underlying documents are made accessible to the opposing party so that the correctness of the summary may be tested on cross-examination. 2

◆ Practice guide: The party seeking admission of a summary must give reasonable notice to the opposing party of its intention to use the summary as evidence. 3

The trial court has broad discretion in admitting or rejecting summaries and in imposing conditions under which they may be admitted. 4

The testimony of an accountant or auditor is frequently admitted in as summary evidence of documents or books, where the accountant or auditor has examined such documents and is able to testify as to their contents. 5

Footnotes

Footnote 99. Barr v State (Okla Crim) 761 P2d 897; International Union, United Auto., etc. v American Metal Products Co., 56 Tenn App 526, 408 SW2d 682.

A recapitulation of computer printout sheets was not admissible on behalf of the plaintiff, the assignee of an open account who sought to recover charges on the account, where although the plaintiff's witness testified that the original invoices were available she did not review them, where no attempt was made to produce or explain the failure to produce the original invoices in court, and where the production of only the required 11 invoices would not be burdensome to the plaintiff. Harned v Credit Bureau (Wyo) 513 P2d 650.

As to the admission of summaries under the Federal Rules of Evidence, see § 1060.

Annotation: Admissibility of evidence summaries under Uniform Evidence Rule 1006, 59 ALR4th 971.

Footnote 1. Holt v Community Dev. & Constr. Corp. (Tex Civ App Beaumont) 575 SW2d 395, writ ref n r e (Apr 4, 1979).

A summary of scale tickets showing deliveries of corn at an elevator during a period when a farmer alleged that a grain elevator company was refusing to accept corn and a

summary of contracts between other farmers and the company for delivery of corn during the relevant period were not admissible in a contract action between the farmer and the company, since the scale tickets themselves were hearsay and contracts with other farmers were irrelevant. *Crowder v Aurora Co-operative Elevator Co.*, 223 Neb 704, 393 NW2d 250, 2 UCCRS2d 1292, 59 ALR4th 949.

As to specific requirements in showing the admissibility of the underlying documents, see § 1066.

Footnote 2. *Crowder v Aurora Co-operative Elevator Co.*, 223 Neb 704, 393 NW2d 250, 2 UCCRS2d 1292, 59 ALR4th 949; *Holt v Community Dev. & Constr. Corp. (Tex Civ App Beaumont)* 575 SW2d 395, writ ref n r e (Apr 4, 1979); *State v Chenette*, 151 Vt 237, 560 A2d 365.

But see *Rhodes v Amwest Sur. Ins. Co.*, 207 Ga App 441, 428 SE2d 581, 93 Fulton County D R 610, cert den (Ga) 1993 Ga LEXIS 452, holding that a computer-generated summary of claims and expenses paid by a surety under a surety bond was admissible in a suit by the surety against the indemnitors of the bonds, despite the fact that the underlying records were not readily accessible to the court and the parties, where an auditor charged with investigating and paying the claims and expenses under the bonds testified that she investigated all the claims involved and that the costs and expenses listed on the summary accurately reflected the surety's liability.

As to specific requirements in making the underlying documents available, see § 1065.

Practice References Best and secondary evidence. 2 Am Jur Proof of Facts 467, Proof 4.

Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 11.

Footnote 3. *Union Electric Co. v Mansion House Center North Redevelopment Co. (Mo)* 494 SW2d 309, 80 ALR3d 396.

Annotation: Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

Footnote 4. § 1063.

Footnote 5. *Giddens v State (Ala App)* 565 So 2d 1277, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 1032; *Hartford Acci. & Indem. Co. v Luper (Okla)* 421 P2d 811.

The trial court erred in excluding an auditor's summary of an examination of defendant corporation's records on the ground that the records themselves were the best evidence of defendant's business transactions where plaintiff showed that the auditor was a qualified witness who had examined defendant's records and that the records were so voluminous that their production was impracticable. *State ex rel. Ingram v North Carolina Farm Bureau Ins. Agency, Inc.*, 303 NC 287, 278 SE2d 248.

§ 1060 Under Rule 1006 of Federal Rules of Evidence, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the Federal Rules of Evidence, the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. 6 The originals, or duplicates, must be made available for examination, copying, or both, by other parties at a reasonable time and place, and the court may order that they be produced in court. 7 Since only "writings, recordings, or photographs" may be the subject of a FR Evid, Rule 1006 summary, such a summary cannot properly incorporate a witness' personal knowledge as the basis for any of the matters summarized. 8 Thus, FR Evid, Rule 1006 does not authorize the admission of summaries of testimony of an out-of-court witness, 9 and a witness may not present an oral generalized review of records which have not been admitted in evidence unless one of the other specific exceptions to the best evidence rule of FR Evid, Rule 1002 is shown to be applicable. 10 FR Evid, Rule 1006 does, however, authorize a nonexpert witness to summarize *documentary* evidence already presented by other witnesses. 11 The mere fact that the documents at issue are already in evidence assures neither that they can be conveniently examined in court nor that they had been examined in court. 12

An exhibit containing summaries of other exhibits in evidence may be admissible under FR Evid, Rule 1006 even though the other exhibits could have been and were examined at the time of their admission, where such other exhibits are numerous and would be difficult to comprehend without the summary exhibit. 13

◆ Practice guide: While the better practice is to require that summary charts be prepared by the witness, the fact that they were not prepared by the witness does not prevent their use where this does not hamper the opponent's ability to cross-examine the witness and the opponent is not prejudiced; 14 nor does FR Evid, Rule 1006 require that a summary be prepared by someone independent of the party offering the summary. 15

When a chart does not contain complicated calculations requiring the need of an expert for accuracy, the witness who presents the summary chart needs no special expertise. 16

◆ Caution: Summary charts can be misused and a trial judge must carefully handle their preparation and use 17 so as not to confuse or mislead the jury. 18

**§ 1060 ----Under Rule 1006 of Federal Rules of Evidence, generally
[SUPPLEMENT]****Case authorities:**

Testimony about narcotics/RICO defendants' new worth, based on defendants' abundant

financial records, was properly admitted as summary testimony of voluminous evidence to corroborate evidence of defendants' unexplained income and was not subject to same rigorous evidentiary requirements applicable to tax evasion cases since net worth in tax cases goes to element of offense while in drug prosecutions it is corroborative only. *United States v Gonzalez* (1994, CA11 Fla) 21 F3d 1045, 8 FLW Fed C 251.

In action by commercial lessor to recover amounts due under lease, trial court erred in admitting, on behalf of lessor, summaries of 36 monthly statements reflecting charges for base rent, common area fee, insurance, property tax, merchant dues, and any payments made by lessee; original records were at no time produced by lessor, but Rule 1006 requires that party offering summaries make records available to other parties' satisfaction. *Trolley Square Assocs. v Nielson* (1994, Utah App) 886 P2d 61, 252 Utah Adv Rep 30.

Footnotes

Footnote 6. FRE Rule 1006.

See also Uniform Rules of Evidence, Rule 1006.

FRE Rule 1006 does not require that it be literally impossible to examine the underlying records before a summary or chart may be utilized, or even that it not be feasible to admit the records into evidence; all that is required for the Rule to apply is that the underlying writings be voluminous and that in-court examination not be convenient. *United States v Stephens* (CA5 Miss) 779 F2d 232, 19 Fed Rules Evid Serv 1541; *United States v Scales* (CA6 Ohio) 594 F2d 558, 4 Fed Rules Evid Serv 917, cert den 441 US 946, 60 L Ed 2d 1049, 99 S Ct 2168.

Annotation: Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

Use and admissibility in evidence in federal tax evasion prosecutions, of summaries of, or charts summarizing, testimony or exhibits in evidence, 16 ALR Fed 542.

Footnote 7. FRE Rule 1006.

Summary evidence may be admissible even though not all underlying documentation has been admitted so long as underlying evidence is admissible and available to the opponent so that proper cross-examination may be had. *United States v Strissel* (CA4 Md) 920 F2d 1162, 30 Fed Rules Evid Serv 1079.

Footnote 8. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 9. *United States v Goss* (CA5 Tex) 650 F2d 1336, 8 Fed Rules Evid Serv 1292 (criticized on other grounds by *United States v McGuire* (CA6 Ky) 744 F2d 1197, 16 Fed Rules Evid Serv 707) and (criticized on other grounds by *United States v Gray* (CA5 Tex) 751 F2d 733) as stated in *United States v Hunt* (CA5 Tex) 794 F2d 1095, later

proceeding (ND Tex) 688 F Supp 265, later proceeding (CA5 Tex) 857 F2d 1471, later proceeding (CA5 La) 891 F2d 1165, post-conviction proceeding, app dismd (CA5 Tex) 940 F2d 130, reh den (CA5) 1991 US App LEXIS 25054 and (criticized on other grounds by United States v Seligsohn (CA3 Pa) 981 F2d 1418) and (criticized on other grounds by United States v Gunter (CA5 Tex) 876 F2d 1113).

Footnote 10. United States v Marshall (CA5 La) 762 F2d 419, 18 Fed Rules Evid Serv 375 (holding that to admit such oral summary evidence can constitute reversible error).

For a list of these other specified exceptions, see § 1053.

Footnote 11. United States v Lavergne (CA5 La) 805 F2d 517, 124 BNA LRRM 2126, 105 CCH LC ¶ 12113, 22 Fed Rules Evid Serv 100; United States v Lemire, 232 US App DC 100, 720 F2d 1327, 14 Fed Rules Evid Serv 833, cert den 467 US 1226, 81 L Ed 2d 874, 104 S Ct 2678.

Footnote 12. United States v Lemire, 232 US App DC 100, 720 F2d 1327, 14 Fed Rules Evid Serv 833, cert den 467 US 1226, 81 L Ed 2d 874, 104 S Ct 2678.

Footnote 13. United States v Scales (CA6 Ohio) 594 F2d 558, 4 Fed Rules Evid Serv 917, cert den 441 US 946, 60 L Ed 2d 1049, 99 S Ct 2168.

Footnote 14. United States v Lemire, 232 US App DC 100, 720 F2d 1327, 14 Fed Rules Evid Serv 833, cert den 467 US 1226, 81 L Ed 2d 874, 104 S Ct 2678.

Footnote 15. Frank Music Corp. v Metro-Goldwyn-Mayer, Inc. (CA9 Cal) 772 F2d 505, 227 USPQ 687, appeal after remand (CA9 Cal) 886 F2d 1545, 12 USPQ2d 1412, cert den 494 US 1017, 108 L Ed 2d 496, 110 S Ct 1321.

Footnote 16. United States v Jennings (CA5 Miss) 724 F2d 436, 14 Fed Rules Evid Serv 1625, cert den 467 US 1227, 81 L Ed 2d 877, 104 S Ct 2682, later proceeding (Miss) 533 So 2d 443.

As to requirements regarding the accuracy of charts, summaries, or calculations under FRE Rule 1006, see § 1067.

Footnote 17. United States v Jennings (CA5 Miss) 724 F2d 436, 14 Fed Rules Evid Serv 1625, cert den 467 US 1227, 81 L Ed 2d 877, 104 S Ct 2682, later proceeding (Miss) 533 So 2d 443.

Footnote 18. United States v Schuster (CA5 Miss) 777 F2d 264, 19 Fed Rules Evid Serv 187, vacated on other grounds, remanded, app dismd (CA5 Miss) 778 F2d 1132.

§ 1061 --Summaries as "evidence" which jury must consider

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the word "evidence" does not appear in the text of FR Evid, Rule 1006, summaries may be treated as evidence under this Rule where, in the court's discretion, examination of the underlying documents in a trial setting cannot be done conveniently. 19 This construction of FR Evid, Rule 1006 is compelled by the Rule's history and by the fact that the Rule requires only the availability of the underlying documents. 20 Where the underlying documents are introduced as well as the summaries, the court may instruct the jury that the summaries (and the witness' explanation of them) are not evidence in and of themselves and that if the summaries do not correctly reflect the underlying evidence the jury should disregard them. 21 The court may do this in order to insure that the jury will not rely on the conclusory matter in the summaries as independent proof of a defendant's guilt and thus prejudice the defendant's trial. 22

Summaries may be admissible in order to show what the underlying documents do not contain where those underlying documents would have been admissible for the same purpose. 23

Some courts take the position that pedagogical charts are not themselves evidence and, absent the consent of all the parties, should not be sent to the jury room with other exhibits. 24 Elsewhere, however, a pedagogical summary can itself be admitted in evidence where the trier of fact will find it helpful and will not be unduly influenced by the exhibit. 25 If a summary of a pedagogical nature is sent to the jury, it should be accompanied by a limiting instruction which informs the jury of the summary's purpose and that it does not itself constitute evidence. 26

◆ **Caution:** Because summaries are elevated under FR Evid, Rule 1006 to the category of evidence, care must be taken to omit argumentative matter in their preparation so that a jury will not be led to believe that such matter is itself evidence of the assertion it makes. 27

Footnotes

Footnote 19. *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26, reh den (CA5 Tex) 557 F2d 823, cert den 434 US 862, 54 L Ed 2d 135, 98 S Ct 190.

Annotation: Admissibility of summaries of writings, recordings, or photographs under Rule 1006 of the Federal Rules of Evidence, 50 ALR Fed 319.

Footnote 20. *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26, reh den (CA5 Tex) 557 F2d 823, cert den 434 US 862, 54 L Ed 2d 135, 98 S Ct 190.

Footnote 21. *United States v Lavergne* (CA5 La) 805 F2d 517, 124 BNA LRRM 2126, 105 CCH LC ¶ 12113, 22 Fed Rules Evid Serv 100; *United States v Schuster* (CA5 Miss) 777 F2d 264, 19 Fed Rules Evid Serv 187, vacated on other grounds, remanded, app dismd (CA5 Miss) 778 F2d 1132; *Sedco International, S. A. v Cory* (SD Iowa) 522 F Supp 254, 9 Fed Rules Evid Serv 607, affd (CA8 Iowa) 683 F2d 1201, 11 Fed Rules Evid Serv 542, 34 FR Serv 2d 1255, cert den 459 US 1017, 74 L Ed 2d 512, 103 S Ct 379.

Footnote 22. *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26, reh den (CA5 Tex) 557 F2d 823, cert den 434 US 862, 54 L Ed 2d 135, 98 S Ct 190.

Footnote 23. *United States v Scales* (CA6 Ohio) 594 F2d 558, 4 Fed Rules Evid Serv 917, cert den 441 US 946, 60 L Ed 2d 1049, 99 S Ct 2168.

Footnote 24. *United States v Stephens* (CA5 Miss) 779 F2d 232, 19 Fed Rules Evid Serv 1541; *Pierce v Ramsey Winch Co.* (CA5 Tex) 753 F2d 416, 1985-1 CCH Trade Cases ¶ 66429, 20 Fed Rules Evid Serv 494, 1 FR Serv 3d 356; *United States v Soulard* (CA9 Hawaii) 730 F2d 1292, 84-1 USTC ¶ 9386, 15 Fed Rules Evid Serv 1090, 53 AFTR 2d 84-1128 (charts used as testimonial aids during testimony of expert witnesses and during closing argument).

As to the distinction between FRE Rule 1006 summaries and pedagogical devices, see § 1068.

For discussion of the propriety of giving summaries of evidence to the jury for its use during deliberations, generally, see 75B Am Jur 2d, Trial § 1681.

Footnote 25. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 26. *Gomez v Great Lakes Steel Div. Nat. Steel Corp.* (CA6 Mich) 803 F2d 250, 41 BNA FEP Cas 1864, 41 CCH EPD ¶ 36620, 21 Fed Rules Evid Serv 1227; *United States v Howard* (CA7 Ill) 774 F2d 838, 19 Fed Rules Evid Serv 475; *United States v Harenberg* (CA10 NM) 732 F2d 1507, 15 Fed Rules Evid Serv 1502 (criticized on other grounds by *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054); *United States v Gold* (CA11 Fla) 743 F2d 800, 17 Fed Rules Evid Serv 669, cert den 469 US 1217, 84 L Ed 2d 341, 105 S Ct 1196.

Footnote 27. *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26, reh den (CA5 Tex) 557 F2d 823, cert den 434 US 862, 54 L Ed 2d 135, 98 S Ct 190.

§ 1062 Under other provisions of Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the requirement under Rule 1006 of the Federal Rules of Evidence that the underlying materials must be made available for examination or copying 28 cannot be met because those underlying materials are unavailable, it may be possible to admit the summary as secondary evidence of the underlying materials if the requirements of the lost-or-destroyed exception under FR Evid, Rule 1004(1) or the public records exception under FR Evid, Rule 1005 are satisfied. 29 There is also authority for allowing a summary of purely testimonial evidence, which, strictly speaking, could not be said to come within the requirements of FR Evid, Rule 1006, but could be allowed under FR Evid, Rule 611(a), 30 under which a court is required to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2)

avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. 31

◆ Practice guide: Where some of the underlying materials are available and some unavailable, the summary can be admitted partly under FR Evid, Rule 1006 and partly under FR Evid, Rule 1004 or 1005. 32

Footnotes

Footnote 28. § 1060.

Footnote 29. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

For a discussion of FRE Rule 1004(1), see § 1054.

For a discussion of FRE Rule 1005, see § 1090.

Footnote 30. *United States v Scales* (CA6 Ohio) 594 F2d 558, 4 Fed Rules Evid Serv 917, cert den 441 US 946, 60 L Ed 2d 1049, 99 S Ct 2168.

Footnote 31. For a discussion of FRE Rule 611(a), see 81 Am Jur 2d, Witnesses §§ 717, 849.

Footnote 32. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

§ 1063 Court's discretion

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The admission of a summary rests within the sound discretion of the trial court, and a decision whether to admit a summary will be reversed only for an abuse of that discretion. 33 There can be no abuse of discretion if the requirement of providing a reasonable time and place to examine the originals or duplicates by opposing parties is complied with, if a proper foundation as to the accuracy and authenticity of the summaries is laid, and if use of the summaries would save the court much time and inconvenience. 34 Even if it is determined that the trial court abused its discretion in allowing the use of summary charts, it may be that no reversible error will be found if the reviewing court determines that the defendant was not prejudiced because full cross-examination and the trial court's admonitions to the jury served to minimize the risk

of prejudice. 35 The court has considerable discretion in determining whether the volume of the underlying documents is sufficient for the Rule to apply. 36

Footnotes

Footnote 33. *United States v Bentley* (CA7 Ill) 825 F2d 1104, 23 Fed Rules Evid Serv 212, cert den 484 US 901, 98 L Ed 2d 198, 108 S Ct 240, post-conviction proceeding (CA7 Ill) 850 F2d 327, cert den 488 US 970, 102 L Ed 2d 537, 109 S Ct 501, reh den 488 US 1051, 102 L Ed 2d 1008, 109 S Ct 885 and (among conflicting authorities on other grounds noted in *United States v Jackson* (CA11 Ga) 923 F2d 1494, 102-46 Fulton County D R 18B); *United States v Driver* (CA7 Ill) 798 F2d 248, 21 Fed Rules Evid Serv 540; *United States v Howard* (CA7 Ill) 774 F2d 838, 19 Fed Rules Evid Serv 475; *Barr v State* (Okla Crim) 761 P2d 897; *State v Karras* (SD) 438 NW2d 213, cert den 493 US 834, 107 L Ed 2d 73, 110 S Ct 111.

The trial court in an embezzlement prosecution properly exercised its discretion to admit a spreadsheet summary of an automobile dealership's transaction records as evidence that a clerical employee had been skimming cash payments made on car purchases, where the underlying materials were voluminous and a general correlation between the records and the summary was established by the testimony of several car buyers whose cash payments were not reflected in the dealer's books, notwithstanding that the summary reflected hearsay reports to the manager who prepared the summary. *People v Wiesneske* (1st Dist) 234 Ill App 3d 29, 175 Ill Dec 252, 599 NE2d 1266.

Footnote 34. *United States v Denton* (CA6 Mich) 556 F2d 811, cert den 434 US 892, 54 L Ed 2d 178, 98 S Ct 269.

Footnote 35. *United States v Schuster* (CA5 Miss) 777 F2d 264, 19 Fed Rules Evid Serv 187, vacated on other grounds, remanded, app dismd (CA5 Miss) 778 F2d 1132; *United States v Jennings* (CA5 Miss) 724 F2d 436, 14 Fed Rules Evid Serv 1625, cert den 467 US 1227, 81 L Ed 2d 877, 104 S Ct 2682, later proceeding (Miss) 533 So 2d 443.

Footnote 36. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

§ 1064 Foundation requirements

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Summaries are admissible only when a proper foundation has been laid. 37 This involves making the underlying documents available to the opposing party for inspection, 38 and showing the admissibility of the underlying documents. 39 A proper foundation for the introduction of a summary may be established through the testimony of the person who is

responsible for the summary's preparation, 40 or the person who supervised preparation of the summary, 41 No adequate foundation is laid for the admission of a summary or list where the person offering the summary or list is unable to testify that such summary or list accurately reflects and summarizes the underlying material. 42 One proper method of laying a foundation for the admission of summary charts is to admit the documentation on which the summary is based. 43

§ 1064 ----Foundation requirements [SUPPLEMENT]

Case authorities:

Union's accounting summary of defendant-employer's payroll was properly used on summary judgment motion in union's action seeking unpaid ERISA benefit contributions and would have survived evidentiary attack at trial after proper foundation and showing of purpose for which it was offered. *Tamarin v Adam Caterers* (1993, CA2 NY) 13 F3d 51, 17 EBC 2147, 127 CCH LC ¶ 10967.

Footnotes

Footnote 37. *United States v Driver* (CA7 Ill) 798 F2d 248, 21 Fed Rules Evid Serv 540; *United States v Robinson* (CA8 Iowa) 774 F2d 261.

Footnote 38. § 1065.

Footnote 39. § 1066.

Footnote 40. *United States v Denton* (CA6 Mich) 556 F2d 811, cert den 434 US 892, 54 L Ed 2d 178, 98 S Ct 269; *United States v Robinson* (CA8 Iowa) 774 F2d 261 (summary prepared by FBI agent).

Footnote 41. *United States v Behrens* (CA10 Okla) 689 F2d 154, 11 Fed Rules Evid Serv 1149, cert den 459 US 1088, 74 L Ed 2d 934, 103 S Ct 573.

Footnote 42. *Needham v White Laboratories, Inc.* (CA7 Ill) 639 F2d 394, CCH Prod Liab Rep ¶ 8875, 7 Fed Rules Evid Serv 1435, 30 FR Serv 2d 1670, cert den 454 US 927, 70 L Ed 2d 237, 102 S Ct 427, 32 FR Serv 2d 1038, appeal after remand (CA7 Ill) 847 F2d 355.

Footnote 43. *United States v Stephens* (CA5 Miss) 779 F2d 232, 19 Fed Rules Evid Serv 1541.

§ 1065 --Making underlying documents available

<p>View Entire Section Go to Parallel Reference Table</p>

Rule 1006 of the Federal Rules of Evidence requires as a foundation not only that the contents of writings, recordings, or photographs be voluminous and inconvenient to examine in court, 44 but also that the originals or duplicates be made available for examination or copying by other parties at a reasonable time and place; unlike the original documents, the summaries themselves need not be made available in advance of trial. 45 Ordinarily, the "reasonable time" within which the originals or duplicates of the underlying materials must be made available will be at some point before trial, since the object is to give opposing counsel a meaningful opportunity to prepare challenges to the materials; however, the trial court may permit the matter to be dealt with during trial. 46 If the underlying documents are in fact made available for inspection, the requirement of the Rule is satisfied even if opposing counsel fails to take the opportunity to review the documents. 47 The right to examine the underlying data can be waived if it is not raised in a specific and timely fashion. 48

A computer printout of the information contained on a diskette constitutes a duplicate within the meaning of the FR Evid, Rule 1006 requirement that originals or duplicates of information contained in charts, summaries, or calculations must be made available for examination, copying, or both at a reasonable time and place. 49

Where the proponent of a summary cannot provide the opponent with the underlying documents because they no longer exist, the summary exhibit is inadmissible. 50

◆ Comment: The framers of Rule 1006 of the Federal Rules of Evidence clearly contemplated a pretrial resolution of any issues that may be raised concerning the use of summaries. The Rule, by requiring that the underlying documents be made available to opposing counsel, encourages counsel to eliminate objectionable matter and to stipulate to the form of the summary. This process greatly reduces the frequency of such objections as the prejudicial effect of summaries. 51

Footnotes

Footnote 44. § 1060.

Footnote 45. *United States v Foley* (CA4 Md) 598 F2d 1323, 1979-1 CCH Trade Cases ¶ 62577, 4 Fed Rules Evid Serv 658, cert den 444 US 1043, 62 L Ed 2d 728, 100 S Ct 727, 100 S Ct 728.

Composite videotapes allegedly showing tele-evangelist's attempts during broadcast to solicit funds were properly admitted into evidence notwithstanding that original broadcast tapes totalling over 200 hours were not introduced, since it was undisputed that defendant's counsel had access to original broadcast tapes at least 6 months prior to trial and requiring government to formally introduce underlying tapes into evidence would have served no useful purpose. *United States v Bakker* (CA4 NC) 925 F2d 728, 32 Fed Rules Evid Serv 303 (criticized on other grounds by *United States v Morrison* (CA10 Colo) 938 F2d 168).

Footnote 46. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 47. *Frank Music Corp. v Metro-Goldwyn-Mayer, Inc.* (CA9 Cal) 772 F2d 505, 227 USPQ 687, appeal after remand (CA9 Cal) 886 F2d 1545, 12 USPQ2d 1412, cert den 494 US 1017, 108 L Ed 2d 496, 110 S Ct 1321.

Footnote 48. *Stich v United States* (CA3 NJ) 730 F2d 115, 15 Fed Rules Evid Serv 730, cert den 469 US 917, 83 L Ed 2d 229, 105 S Ct 294.

Footnote 49. *United States v Foley* (CA4 Md) 598 F2d 1323, 1979-1 CCH Trade Cases ¶ 62577, 4 Fed Rules Evid Serv 658, cert den 444 US 1043, 62 L Ed 2d 728, 100 S Ct 727, 100 S Ct 728.

As to the admission of duplicates, generally, see § 1085.

Footnote 50. *Hackett v Housing Authority of San Antonio* (CA5 Tex) 750 F2d 1308, 17 Fed Rules Evid Serv 69, cert den 474 US 850, 88 L Ed 2d 121, 106 S Ct 146.

Footnote 51. *United States v Smyth* (CA5 Tex) 556 F2d 1179, 2 Fed Rules Evid Serv 26, reh den (CA5 Tex) 557 F2d 823, cert den 434 US 862, 54 L Ed 2d 135, 98 S Ct 190.

Forms: Stipulation—Admitting documents or copies or abstracts thereof and waiving rule to introduction of documentary evidence. 1 Federal Procedural Forms, Actions in District Court § 1:1523.

§ 1066 --Showing admissibility of underlying documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

As a condition precedent to the admissibility in evidence of a chart, summary, or calculation under Rule 1006 of the Federal Rules of Evidence, the proponent of the exhibit must lay a proper foundation for the admission of the original materials on which the exhibit is based, or for the parties to stipulate as to the admissibility of the original materials. 52 Since the proponent must establish that the underlying documents are themselves admissible, the same general foundation must be laid as if the underlying materials were actually being offered in evidence, minus the sort of item-by-item in-court identification which ordinarily attends that process. 53

A summary may be excluded if the underlying evidence is inadmissible because it is irrelevant. 54 Moreover, a summary based on underlying hearsay documents is inadmissible, 55 unless the proponent can demonstrate the admissibility of the underlying materials under an exception to the hearsay rule, such as that under FR Evid, Rule 803(6) for records kept in the ordinary course of business, 56 the public records exception (FR Evid, Rule 803(8)(C)), or the exception under FR Evid, Rule 803(24) for statements not specifically covered by any of the other exceptions but having equivalent circumstantial guaranties of trustworthiness. 57 A showing under FR Evid, Rule 803(6) must be made by the custodian of the documents or by some other qualified

witness. 58 A summary of both inadmissible and admissible hearsay should not be admitted under FR Evid, Rule 1006; the proponent is entitled to admission only of those portions that he or she can demonstrate are entirely admissible. 59 Similarly, charts which are derived from exhibits that have been held inadmissible at trial, are inadmissible in a posttrial proceeding in the case. 60

◆ Observation: Exhibits admitted under FR Evid, Rule 1006 which merely summarize the information received by the jury through oral testimony or other exhibits received into evidence do not constitute hearsay. 61

Although the underlying documents must be admissible in order to establish a foundation for the summary, they need not be admitted into evidence in every case, since an absolute requirement of admission would be at odds with the last sentence of FR Evid, Rule 1006 providing that ordering the materials to be produced in court is discretionary with the trial judge. 62

◆ Practice guide: If summary evidence is independently admissible in its own right, such as a business record under FR Evid, Rule 803(6), there is no need to comply with FR Evid, Rule 1006 in order to have the evidence admitted. 63

§ 1066 --Showing admissibility of underlying documents [SUPPLEMENT]

Case authorities:

The trial court should not have considered affidavits as proof that the intent of the parties to insurance contracts was other than that appearing on the face thereof in an action determine which of two excess insurance clauses applied. The pleadings do not contain any allegation of fraud or mistake and the policy, as written, is not ambiguous. Use of the word "valued" rather than "valid" does not make the meaning of INA's clause uncertain because "valued" is a term of art which is used to describe a particular type of insurance policy. *Universal Leaf Tobacco Co. v Oldham* (1994) 113 NC App 490, 439 SE2d 179.

Footnotes

Footnote 52. *United States v Driver* (CA7 Ill) 798 F2d 248, 21 Fed Rules Evid Serv 540; *United States v Shirley* (CA9 Or) 884 F2d 1130, 28 Fed Rules Evid Serv 1054; *United States v Meyers* (CA9 Mont) 847 F2d 1408, 25 Fed Rules Evid Serv 1317; *United States v Johnson* (CA9 Ariz) 594 F2d 1253, 4 Fed Rules Evid Serv 663, 50 ALR Fed 310, cert den 444 US 964, 62 L Ed 2d 376, 100 S Ct 451.

Forms: Stipulation—Admitting documents or copies or abstracts thereof and waiving rule to introduction of documentary evidence. 1 Federal Procedural Forms, Actions in District Court § 1:1523.

Footnote 53. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 54. *Marathon Le Tourneau Co., Longview Div. v NLRB* (CA5) 699 F2d 248, 112 BNA LRRM 3129, 96 CCH LC ¶ 14083, 12 Fed Rules Evid Serv 878; *Anderson v USAir, Inc.*, 260 US App DC 183, 818 F2d 49, 22 Fed Rules Evid Serv 1770, 7 FR Serv 3d 1311.

Footnote 55. *Hackett v Housing Authority of San Antonio* (CA5 Tex) 750 F2d 1308, 17 Fed Rules Evid Serv 69, cert den 474 US 850, 88 L Ed 2d 121, 106 S Ct 146; *Paddock v Dave Christensen, Inc.* (CA9 Or) 745 F2d 1254, 5 EBC 2542, 117 BNA LRRM 2963, 102 CCH LC ¶ 11228, 16 Fed Rules Evid Serv 1280; *United States v Johnson* (CA9 Ariz) 594 F2d 1253, 4 Fed Rules Evid Serv 663, 50 ALR Fed 310, cert den 444 US 964, 62 L Ed 2d 376, 100 S Ct 451.

As to hearsay evidence, generally, see §§ 658 et seq.

Footnote 56. *Ford Motor Co. v Auto Supply Co.* (CA8 Neb) 661 F2d 1171, 9 Fed Rules Evid Serv 249; *Paddock v Dave Christensen, Inc.* (CA9 Or) 745 F2d 1254, 5 EBC 2542, 117 BNA LRRM 2963, 102 CCH LC ¶ 11228, 16 Fed Rules Evid Serv 1280; *Phoenix v Com/Systems, Inc.* (CA9 Ariz) 706 F2d 1033, 13 Fed Rules Evid Serv 557; *State Office Systems, Inc. v Olivetti Corp. of America* (CA10 Kan) 762 F2d 843, 18 Fed Rules Evid Serv 727, 41 UCCRS 1309; *United States v Kaatz* (CA10 Colo) 705 F2d 1237, 83-1 USTC ¶ 9156, 12 Fed Rules Evid Serv 743, 51 AFTR 2d 83-743.

Footnote 57. *Keith v Volpe* (CD Cal) 618 F Supp 1132, later proceeding (CD Cal) 643 F Supp 37, later proceeding (CA9 Cal) 784 F2d 1457, later proceeding (CD Cal) 644 F Supp 1312, later proceeding (CD Cal) 644 F Supp 1317, affd (CA9 Cal) 858 F2d 467, 26 Fed Rules Evid Serv 1249, 12 FR Serv 3d 323, cert den 493 US 813, 107 L Ed 2d 28, 110 S Ct 61 and (criticized on other grounds by *United States v Western Elec. Co.*, 283 US App DC 299, 900 F2d 283, 1990-1 CCH Trade Cases ¶ 68973).

Footnote 58. *Ford Motor Co. v Auto Supply Co.* (CA8 Neb) 661 F2d 1171, 9 Fed Rules Evid Serv 249.

Footnote 59. *Paddock v Dave Christensen, Inc.* (CA9 Or) 745 F2d 1254, 5 EBC 2542, 117 BNA LRRM 2963, 102 CCH LC ¶ 11228, 16 Fed Rules Evid Serv 1280.

Footnote 60. *Boyd v Ozark Air Lines* (ED Mo) 419 F Supp 1061, 13 BNA FEP Cas 529, 12 CCH EPD ¶ 11210, affd (CA8 Mo) 568 F2d 50, 17 BNA FEP Cas 827, 15 CCH EPD ¶ 7863.

Footnote 61. *Moore v Johns-Manville Sales Corp.* (CA5 Tex) 781 F2d 1061, CCH Prod Liab Rep ¶ 10864, 19 Fed Rules Evid Serv 1461.

Footnote 62. *United States v Johnson* (CA9 Ariz) 594 F2d 1253, 4 Fed Rules Evid Serv 663, 50 ALR Fed 310, cert den 444 US 964, 62 L Ed 2d 376, 100 S Ct 451, stating that there may be times when a court will, in its discretion, insist that the underlying materials, rather than the summaries, be introduced into evidence, but a court may conclude that the formal step of introducing into evidence the underlying documents is not necessary to satisfy the foundation requirement under FRE Rule 1006.

For a general discussion of FRE Rule 1006, see § 1060.

Footnote 63. *United States v Sanders* (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv

§ 1067 Accuracy of charts, summaries, or calculations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To be admissible under FR Evid, Rule 1006, summary evidence must accurately reflect the underlying documents. 64 However, charts need not be encyclopedic to be admissible. 65 A claim of inaccuracy does not make summary charts inadmissible where the trial court is satisfied that the summaries are reasonably accurate and there is evidence to support them. 66

While in some jurisdictions the trial judge must conduct a hearing to determine the accuracy of a summary, in other jurisdictions it is sufficient that the defendant be allowed to thoroughly test the summary through cross-examination of the witness who prepared it and that the jury be instructed as to the proper use of the summary; such safeguards protect against the prejudicial use of erroneous summaries. 67 Some courts require the trial court, out of the presence of the jury, to carefully examine the summary charts to determine that everything contained in them is supported by the evidence. 68

A party presenting a summary exhibit is under no obligation to include the opponent's version of the facts in its exhibit. 69 Alleged inaccuracies in the underlying documents themselves should not affect the admissibility of a summary under FR Evid, Rule 1006, since these can be brought out by way of cross-examination and simply affect the weight and sufficiency of the summary evidence. 70 When the figures on a chart have not been properly established and keyed to the underlying evidence, a cautionary instruction may be inadequate to avoid prejudicial error. 71

Footnotes

Footnote 64. *United States v Sorrentino* (CA1 Mass) 726 F2d 876, 84-1 USTC ¶ 9196, 15 Fed Rules Evid Serv 194, 53 AFTR 2d 84-799; *United States v Conlin* (CA2 NY) 551 F2d 534, 77-1 USTC ¶ 9291, 39 AFTR 2d 77-1112, cert den 434 US 831, 54 L Ed 2d 91, 98 S Ct 114 (tax prosecution); *Gomez v Great Lakes Steel Div. Nat. Steel Corp.* (CA6 Mich) 803 F2d 250, 41 BNA FEP Cas 1864, 41 CCH EPD ¶ 36620, 21 Fed Rules Evid Serv 1227; *United States v Scales* (CA6 Ohio) 594 F2d 558, 4 Fed Rules Evid Serv 917, cert den 441 US 946, 60 L Ed 2d 1049, 99 S Ct 2168; *United States v Driver* (CA7 Ill) 798 F2d 248, 21 Fed Rules Evid Serv 540; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *Davis & Cox v Summa Corp.* (CA9 Cal) 751 F2d 1507, 17 Fed Rules Evid Serv 774, 1 FR Serv 3d 695 (superseded on other grounds by statute as stated in *Northrop Corp. v Triad International Marketing S.A.* (CA9 Cal) 842 F2d 1154) and (criticized on other grounds by *Chapman & Cole v ITEL Container Int'l B.V.* (CA5 Tex) 865 F2d 676, 13 FR Serv 3d 124).

Annotation: Admissibility of summaries of writings, recordings, or photographs under Rule 1006 of the Federal Rules of Evidence, 50 ALR Fed 319.

Practice References Louisell and Mueller, Federal Evidence § 600.

Footnote 65. *United States v Bentley* (CA7 Ill) 825 F2d 1104, 23 Fed Rules Evid Serv 212, cert den 484 US 901, 98 L Ed 2d 198, 108 S Ct 240, post-conviction proceeding (CA7 Ill) 850 F2d 327, cert den 488 US 970, 102 L Ed 2d 537, 109 S Ct 501, reh den 488 US 1051, 102 L Ed 2d 1008, 109 S Ct 885 and (among conflicting authorities on other grounds noted in *United States v Jackson* (CA11 Ga) 923 F2d 1494, 102-46 Fulton County D R 18B).

Footnote 66. *State v Karras* (SD) 438 NW2d 213, cert den 493 US 834, 107 L Ed 2d 73, 110 S Ct 111; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 67. *United States v Radseck* (CA7 Ind) 718 F2d 233, 84-1 USTC ¶ 9309, 14 Fed Rules Evid Serv 56, 53 AFTR 2d 84-807, cert den 465 US 1029, 79 L Ed 2d 693, 104 S Ct 1291.

The jury determines the accuracy of the numbers contained in a summary chart. *State v Karras* (SD) 438 NW2d 213, cert den 493 US 834, 107 L Ed 2d 73, 110 S Ct 111.

Footnote 68. *United States v Soulard* (CA9 Hawaii) 730 F2d 1292, 84-1 USTC ¶ 9386, 15 Fed Rules Evid Serv 1090, 53 AFTR 2d 84-1128.

Footnote 69. *United States v Radseck* (CA7 Ind) 718 F2d 233, 84-1 USTC ¶ 9309, 14 Fed Rules Evid Serv 56, 53 AFTR 2d 84-807, cert den 465 US 1029, 79 L Ed 2d 693, 104 S Ct 1291.

Footnote 70. *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation* (SD Ohio) 624 F Supp 1212, later proceeding (DC Mass) 646 F Supp 856, CCH Prod Liab Rep ¶ 11177, affd (CA1 Mass) 830 F2d 1190, CCH Prod Liab Rep ¶ 11553, 24 Fed Rules Evid Serv 152 and affd (CA6 Ohio) 857 F2d 290, 11 FR Serv 3d 1267, cert den 488 US 1006, 102 L Ed 2d 779, 109 S Ct 788; *Frank Music Corp. v Metro-Goldwyn-Mayer, Inc.* (CA9 Cal) 772 F2d 505, 227 USPQ 687, appeal after remand (CA9 Cal) 886 F2d 1545, 12 USPQ2d 1412, cert den 494 US 1017, 108 L Ed 2d 496, 110 S Ct 1321.

Footnote 71. *United States v Citron* (CA2 NY) 783 F2d 307, 86-1 USTC ¶ 9228, 20 Fed Rules Evid Serv 38, 57 AFTR 2d 86-779, appeal after remand (CA2 NY) 853 F2d 1055, 88-2 USTC ¶ 9552, 26 Fed Rules Evid Serv 601, 62 AFTR 2d 88-5357.

§ 1068 Distinction between Federal Rule 1006 summary and pedagogical device

[View Entire Section](#)

A summary admitted under Rule 1006 of the Federal Rules of Evidence must accurately reflect the contents of the underlying documents 72 and must not function as a pedagogical device that unfairly emphasizes part of the proponent's proof or creates the impression that disputed facts have been conclusively established or that inferences have been directly proved. 73

◆ Definition: A pedagogical summary is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted. 74

An expert witness may present a summary of one side's case based on testimony and physical evidence previously admitted; under such circumstances, it is proper to instruct the jury that the summary is not evidence, that the accuracy and reliability of the summary is to be determined by the testimony and exhibits admitted into evidence, that the expert's opinion is to be afforded only such weight as the jury feels it deserves, and that they could disregard the expert's opinion entirely. 75 Such evidence has been admitted as against objections that it improperly emphasizes and repeats the party's evidence and unlawfully bolsters the credibility of the party's witnesses. 76

Some summaries partake of the nature of both a FR Evid, Rule 1006 summary and a pedagogical device. 77 A party's assumptions included in a summary do not make the summary inadmissible, so long as the underlying supporting evidence has been previously presented to the jury, the court has made it clear that the ultimate decision as to what weight should be given to the evidence is for the jury, 78 and the opponent has the opportunity to challenge the assumptions or conclusions on cross-examination. 79

Footnotes

Footnote 72. § 1067.

Footnote 73. *United States v Drougas* (CA1 Mass) 748 F2d 8, 16 Fed Rules Evid Serv 1002 (criticized on other grounds by *Cola v Reardon* (CA1 Mass) 787 F2d 681) and (criticized on other grounds by *United States v Lau* (CA1 Puerto Rico) 828 F2d 871, 23 Fed Rules Evid Serv 881).

Projections of future lost profits are not admissible as summaries under FRE Rule 1006, since they are interpretations of past data and projections of future events and not a simple compilation of voluminous records; however such projections may be admissible as opinion testimony under FRE Rules 701, 702. *State Office Systems, Inc. v Olivetti Corp. of America* (CA10 Kan) 762 F2d 843, 18 Fed Rules Evid Serv 727, 41 UCCRS 1309.

Footnote 74. *Gomez v Great Lakes Steel Div. Nat. Steel Corp.* (CA6 Mich) 803 F2d 250, 41 BNA FEP Cas 1864, 41 CCH EPD ¶ 36620, 21 Fed Rules Evid Serv 1227; *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *United States v Harenberg* (CA10 NM) 732 F2d 1507, 15 Fed Rules Evid Serv 1502

(criticized on other grounds by *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054).

As to demonstrative evidence, generally, see §§ 934 et seq.

Footnote 75. *United States v Kapnison* (CA10 NM) 743 F2d 1450, 16 Fed Rules Evid Serv 990, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017 and (criticized on other grounds by *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054).

Footnote 76. *United States v Kapnison* (CA10 NM) 743 F2d 1450, 16 Fed Rules Evid Serv 990, cert den 471 US 1015, 85 L Ed 2d 299, 105 S Ct 2017 and (criticized on other grounds by *United States v McDonald* (CA5 Tex) 837 F2d 1287, 24 Fed Rules Evid Serv 1054) (court cites FRE Rule 1006 for general proposition that use of summaries is proper).

Footnote 77. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; *United States v Gold* (CA11 Fla) 743 F2d 800, 17 Fed Rules Evid Serv 669, cert den 469 US 1217, 84 L Ed 2d 341, 105 S Ct 1196 (summary of defendants' fraudulent Medicare practices admitted, consisting of information derived either from other exhibits received into evidence or from oral testimony).

Summary charts which fairly summarize the evidence and are used as an aid in understanding the testimony already introduced are admissible where the witness who prepared the charts is subject to cross-examination with all of the documents used to prepare the summary. *United States v Orlowski* (CA8 Mo) 808 F2d 1283, 87-1 USTC ¶ 9107, 22 Fed Rules Evid Serv 348, 59 AFTR 2d 87-416, cert den 482 US 927, 96 L Ed 2d 697, 107 S Ct 3210 and (not followed on other grounds by *Hefti v Commissioner*, 97 TC 180).

Footnote 78. *United States v Jennings* (CA5 Miss) 724 F2d 436, 14 Fed Rules Evid Serv 1625, cert den 467 US 1227, 81 L Ed 2d 877, 104 S Ct 2682, later proceeding (Miss) 533 So 2d 443; *United States v Means* (CA5 Miss) 695 F2d 811, 12 Fed Rules Evid Serv 249, later proceeding (SD Miss) 695 F Supp 288.

Footnote 79. *United States v Radseck* (CA7 Ind) 718 F2d 233, 84-1 USTC ¶ 9309, 14 Fed Rules Evid Serv 56, 53 AFTR 2d 84-807, cert den 465 US 1029, 79 L Ed 2d 693, 104 S Ct 1291.

c. Application of Best Evidence Rule to Particular Types of Evidence [1069-1091]

(1). In General [1069-1073]

§ 1069 Tape recordings

Tape recordings generally fall within the scope of the best evidence rule, 80 although there is authority to the contrary. 81 Where the best evidence rule applies to tape recordings, if the ultimate inquiry in a case is to discover what sounds are embodied on tape recordings, the tapes themselves would be the "best evidence," but where the content of the tapes is not itself a factual issue relevant to the case and the inquiry concerns the content of the conversations, the tape recordings would be admissible as evidence of those conversations, but testimony by the participants would be equally admissible and sufficient to establish what was said. 82

§ 1069 ----Tape recordings [SUPPLEMENT]

Case authorities:

Transcripts of telephone conversations that occurred in Spain were properly admitted under best evidence rule since prosecution was not at fault for absence of original tapes because they were destroyed by Spanish National Police in ordinary course of business, transcripts were evidence of recordings' contents, and Spanish police officers who initially transcribed recordings were cross-examined by defense counsel. *United States v Ross* (1994, CA11 Fla) 33 F3d 1507, 8 FLW Fed C 715.

In narcotics prosecution, no adequate foundation was laid for admission of tape recording of drug transaction where there was no evidence to show that tape was accurate recording of transaction. *Wyatt v State* (1992, Ala App) 620 So 2d 77.

In murder prosecution, trial court did not err in admitting tape recording of witness' shocked and emotional reaction to news of victim's death where defense counsel had opened door to such state-of- mind evidence by directing accusatory questions at witness suggesting that he, rather than defendant, had committed murder. *Nelson v United States* (1991, Dist Col App) 601 A2d 582.

In drug prosecution, copy of original tape recording was properly admitted, even though original was available, where original tape contained extraneous matters including every conversation informant had after being fitted with body transmitter, and entire conversation of informant and defendant had been copied. *Lawson v State* (1993, Ind App) 619 NE2d 964.

Tape recording of victim of alleged molestation and child welfare worker was properly admitted where (1) it was consistent with victim's testimony and rebutted defendant's charge of recent fabrication, or improper influence or motive; (2) welfare worker did not repeat any of conversation about molestation; and (3) victim could have been called for further cross- examination. *Kielblock v State* (1994, Ind App) 627 NE2d 816, reh den (Mar 8, 1994) and transfer den (May 16, 1994).

Best evidence rule did not bar admission of both tapes and transcripts of tapes of conversations monitored by state investigators, as contents and terms of tapes were not in

dispute, and prosecution was attempting to demonstrate content of conversations, not content of tapes. *State v Khalsa* (1995, Iowa App) 542 NW2d 263.

In criminal prosecution, trial court did not err in failing to order prosecution to provide tape recording of witness' prior statement, which defense counsel wanted to use to impeach witness at trial, where defense counsel had transcript of recording that prosecution stipulated was accurate and counsel used transcript to impeach witness; best evidence rule did not apply since content of recording was not being used as evidence. *State v Fleer* (1993, Mo App) 851 SW2d 582.

Trial court did not err in admitting audio portion of defendant's videotaped sobriety test, where audio portion was merely another example of collection of physical evidence, both visual and aural, and where defendant did not allege that tape contained any testimonial responses. *Spradling v State* (1994, Tex App Houston (1st Dist)) 880 SW2d 792.

In prosecution for possession of marijuana, admission of tape recording of call requesting police to pick up marijuana was error where state failed to conduct proper foundation to allow trial court to admit tape for impeachment. *Stapleton v State* (1994, Tex App Houston (14th Dist)) 879 SW2d 130, petition for discretionary review ref (Jun 29, 1994).

In prosecution for possession of cocaine with intent to distribute, trial court did not err in admitting tape recording of defendant's inculpatory statement even though entire statement was not taped, where only reason entire statement was not taped was that defendant started making statement before officer could get to his tape recorder and turn it on, and where both officers present testified as to substance of defendant's unrecorded statement. *State v Peterson* (1993, La App 4th Cir) 619 So 2d 786.

In rape prosecution, trial court did not err in refusing to admit tape recording of messages allegedly left by victim on defendant's telephone answering machine where, although messages were provocative and would have shed light on victim's and defendant's relationship, they were irrelevant to whether victim consented to sexual intercourse on date of alleged rape. *State v Probst* (1993, La App 1st Cir) 623 So 2d 79, cert den (La) 629 So 2d 1167.

Footnotes

Footnote 80. *State v Holmes* (Franklin Co) 36 Ohio App 3d 44, 521 NE2d 479, appeal after remand (Ohio App, Franklin Co) 1989 Ohio App LEXIS 103, dismd, motion overr 42 Ohio St 3d 714, 538 NE2d 1065 and cert den 493 US 856, 107 L Ed 2d 119, 110 S Ct 162; *State v Coker* (Tenn) 746 SW2d 167, cert den 488 US 871, 102 L Ed 2d 149, 109 S Ct 180.

The best evidence rule generally requires that where a confession is taped, the actual tape, rather than a transcription of the tape, must be admitted. *State v Strothers* (Mo App) 798 SW2d 723.

Annotation: Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598.

Footnote 81. *Hill v State* (Ala App) 516 So 2d 876; *In Interest of F. L. P.*, 184 Ga App

164, 361 SE2d 43.

Footnote 82. United States v Gonzales-Benitez (CA9 Ariz) 537 F2d 1051, cert den 429 US 923, 50 L Ed 2d 291, 97 S Ct 323.

The best evidence rule does not apply where the government sought to prove the contents of a conversation which was recorded, and not the contents of the tape recording. United States v Rose (CA7 Ill) 590 F2d 232, 4 Fed Rules Evid Serv 374, cert den 442 US 929, 61 L Ed 2d 297, 99 S Ct 2859.

Where the contents of a confession on a tape recording, not the contents of the recording itself, were at issue, the testimony of a police officer who participated in the conversation, describing the interrogation recorded on the tape was admissible. Burdine v State (Tex Crim) 719 SW2d 309, cert den 480 US 940, 94 L Ed 2d 779, 107 S Ct 1590, reh den 481 US 1043, 95 L Ed 2d 828, 107 S Ct 1988 and (superseded by statute on other grounds as stated in Long v State (Tex Crim) 823 SW2d 259) and (superseded by statute on other grounds as stated in Barnes v State (Tex Crim) 1994 Tex Crim App LEXIS 21).

Annotation: Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence, 57 ALR3d 746.

Making, selling, or distributing counterfeit or "bootleg" tape recordings or phonograph records as violation of federal law, 25 ALR Fed 207.

Practice References Tape Recordings as Evidence. 17 Am Jur Proof of Facts 1.

§ 1070 Photographs and X-rays

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs, when properly identified, are admissible as appropriate aids to the jury in applying evidence relating to persons, things, or places, 83 but when they are offered as evidence of the person or thing photographed, they are mere secondary evidence supported by the testimony of a qualified witness. 84 However, the best evidence rule does not exclude photographic evidence merely because some witness can testify concerning the conditions portrayed in the picture. 85 Secondary evidence of the contents of an X-ray photograph is also regarded as inadmissible if the X-ray photograph itself is available. 86 However, the best evidence rule will not operate to exclude evidence concerning X-ray photographs which is purely explanatory in character and which is offered by expert witnesses in an effort to explain what might otherwise be unintelligible to the lay mind. 87

§ 1070 ----Photographs and X-rays [SUPPLEMENT]

Practice Aids: X-rays and the best evidence rule, 213 New York LJ 28:3 (1995).

Case authorities:

Best evidence rule does not establish absolute bar to admission of secondary evidence (physician's X-ray report) based on unavailable X-ray image; as in case of any other lost original, once absence of X-ray film is excused, all competent secondary evidence is generally admissible to prove its contents. *Schozer v William Penn Life Ins. Co.* (1994) 84 NY2d 639.

Footnotes

Footnote 83. §§ 960 et seq.

Footnote 84. *Kansas C. S. R. Co. v Morris*, 80 Ark 528, 98 SW 363; *Baustian v Young*, 152 Mo 317, 53 SW 921.

FRE Rule 1002 would apply to situations arising in which the contents of a photograph are sought to be proved, for example with copyright, defamation, and invasion of privacy by photograph or motion picture, and to situations which the photograph is offered as having independent probative value, for example an automatic photograph of a bank robber or an X-ray. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1002.

For a general discussion of FRE Rule 1002, see § 1049.

Annotation: Admissibility of photographs of stolen property, 94 ALR3d 357.

Footnote 85. *Godvig v Lopez*, 185 Or 301, 202 P2d 935; *Brown v State*, 186 Tenn 378, 210 SW2d 670.

In a prosecution for simple burglary, photographs depicting actual items alleged to have been stolen, including radios, billiard table, and television set, were admissible where the defendant was not shown to have been prejudiced under the best evidence rule. *State v Bates* (La) 397 So 2d 1331.

In a prosecution for theft of an iron fence, the photograph of the fence was admissible in evidence despite the defendant's contention that the best evidence was the fence itself, where the defendant made no showing that he was prejudiced by the introduction of the photograph rather than the fence itself, and the stolen fence was a four foot high pike wrought iron fence, and the recovered portion was 31 feet long, so that it was obvious that it would be impractical to introduce the fence into evidence. *State v Dilworth* (La) 358 So 2d 1254, 94 ALR3d 351.

Footnote 86. *Hammond v Bloomington Canning Co.*, 190 Ill App 511; *Elzig v Bales*, 135 Iowa 208, 112 NW 540.

Footnote 87. *Asch v Washburn Lignite Coal Co.*, 48 ND 734, 186 NW 757.

Such authority as is available on the question indicates that a report interpreting an X-ray

picture, offered independently or in connection with the radiograph will not be admitted, as objectionable to the best evidence rules, in the absence of the person making the report. See *Baltimore & O. R. Co. v Zapf*, 192 Md 403, 64 A2d 139, 6 ALR2d 400.

§ 1071 Motion pictures

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The best evidence standard embodied in Rule 1002 of the Federal Rules of Evidence 88 applies to the introduction of films where the contents of a motion picture are what is sought to be proved, as, for example, in the case of a prosecution for interstate shipment of obscene films. 89 However, exact proof of the contents of allegedly obscene films under Federal Rule 1002 is not essential to prove that the films were seen in certain places, and oral testimony is sufficient to establish this element of the offense, since the best evidence rule is not applicable in such instances. 90 Where a witness testifies that a motion picture is an accurate reproduction of the matter it purports to portray, the fact that it is not the original film or that it has been cut to the extent of adding titles showing the time certain pictured events occurred does not necessarily make the film inadmissible. 91

§ 1071 ----Motion pictures [SUPPLEMENT]

Practice Aids: Video Technology. 58 Am Jur Trials 481.

Footnotes

Footnote 88. § 1049.

Footnote 89. *United States v Levine* (CA5 Fla) 546 F2d 658, 2 Media L R 1971, 2 Fed Rules Evid Serv 655, reh den (CA5 Fla) 551 F2d 687 and (disapproved on other grounds by *United States v Lane*, 474 US 438, 88 L Ed 2d 814, 106 S Ct 725) as stated in *United States v Bruun* (CA7 Ill) 809 F2d 397.

Footnote 90. *United States v Levine* (CA5 Fla) 546 F2d 658, 2 Media L R 1971, 2 Fed Rules Evid Serv 655, reh den (CA5 Fla) 551 F2d 687 and (disapproved on other grounds by *United States v Lane*, 474 US 438, 88 L Ed 2d 814, 106 S Ct 725) as stated in *United States v Bruun* (CA7 Ill) 809 F2d 397.

Footnote 91. *International Union, United Auto., Aircraft & Agricultural Implement Workers v Russell*, 264 Ala 456, 88 So 2d 175, 37 BNA LRRM 2782, 30 CCH LC ¶ 69850, 62 ALR2d 669, affd 356 US 634, 2 L Ed 2d 1030, 78 S Ct 932, 42 BNA LRRM 2142, 34 CCH LC ¶ 71546, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1379.

§ 1072 Judicial records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The best evidence of the contents of a judicial act or proceeding is the record of such act or proceeding, 92 or a copy of the record where copies are admissible or must be used as proof of such records. 93 Also, upon cross-examination of a witness it may be shown that he or she made contradictory statements in a prior suit, without producing the prior record on the subject. 94 Such practices do not violate the best evidence rule, but are merely an extension of the application of the rule to specific instances, where a strict interpretation would operate to defeat the ends of justice. 95

Secondary evidence of the contents of judicial records is admissible where it is shown that such records cannot be produced, as where they have been lost or destroyed. 96 Also, if the matter sought to be proved is not a matter of record, or if the record is incomplete in such respect, secondary evidence as to such matter is admissible. 97

There are contradicting views as to whether the best evidence rule applies with regard to written records of testimony from a prior proceeding to preclude oral testimony regarding such prior testimony. 98

Footnotes

Footnote 92. *County of Macon v Shores*, 97 US 272, 7 Otto 272, 24 L Ed 889; *Twentieth Century–Fox Film Corp. v Lardner* (CA9 Cal) 216 F2d 844, 51 ALR2d 728, cert den 348 US 944, 99 L Ed 739, 75 S Ct 365, reh den 348 US 965, 99 L Ed 753, 75 S Ct 522; *State v Cullum*, 2 Conn Cir 51, 194 A2d 73; *Florida Land Inv. Co. v Williams*, 84 Fla 157, 92 So 876, 26 ALR 171, appeal after remand 98 Fla 1258, 116 So 642; *Osmak v American Car & Foundry Co.*, 328 Mo 159, 40 SW2d 714, 77 ALR 722; *Slocinski v Radwan*, 83 NH 501, 144 A 787, 63 ALR 643; *Gauldin v Madison*, 179 NC 461, 102 SE 851, 10 ALR 1497; *Gutierrez v State* (Tex App Corpus Christi) 745 SW2d 529, petition for discretionary review ref (May 25, 1988).

In an action for the conversion of two promissory notes, in which it was claimed that the defendant had notice of the plaintiff's asserted interest in the notes by a previous action to which the defendant was a party, the petition in the previous action should, under the best evidence rule, be admitted in evidence to show that rights in the proceeds of the notes were litigated in the previous action, rather than testimony stating a conclusion as to what was alleged or claimed in such action. *Fourth Nat. Bank v Dyer* (Okla) 350 P2d 481, 85 ALR2d 1345.

Footnote 93. As to the admissibility of copies of originals, see §§ 1085 et seq.

A witness may not testify that another witness has been convicted of crime, over the objection that the record of conviction, if any, is the best evidence. *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471.

Testimony in a manslaughter prosecution regarding a protective order which directed the decedent to stay away from the defendant was properly excluded in the absence of the original order or a copy of the original order. *People v Stallings* (2d Dept) 128 App Div 2d 908, 513 NYS2d 835.

Footnote 94. *Toplitz v Hedden*, 146 US 252, 36 L Ed 961, 13 S Ct 70.

Footnote 95. *State ex rel. Kelly v Wolfer*, 119 Minn 368, 138 NW 315.

Footnote 96. *Miller v Keaton*, 260 Mo 708, 168 SW 1140; *Parrott v Dickson*, 151 SC 114, 148 SE 704, 63 ALR 965.

Secondary evidence is not admissible to identify a record of conviction until the absence of the presiding magistrate who rendered the judgment, or his successor, is accounted for. *Junior v State*, 76 Ark 483, 89 SW 467.

A statement by a magistrate who issued a warrant for arrest that it was brought back to him but he did not keep it and did not know what was done with it is not sufficient to show its loss so as to admit secondary evidence of its contents. *Randolph v Commonwealth*, 145 Va 883, 134 SE 544, 47 ALR 1084.

Footnote 97. *Hodgson v Vermont*, 168 US 262, 42 L Ed 461, 18 S Ct 80, holding that if the record does not itself identify the offense or offenses for which conviction has been had, such identification may be made on the trial of a subsequent prosecution by parol testimony.

Footnote 98. § 927.

§ 1073 Foreign laws

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The best evidence rule applies where the law of a sister state or a foreign country is in issue. 99 The common law of another state or country may be proved by the testimony of lawyers, jurists, and others who are shown to have knowledge of such laws, such evidence being regarded as the best evidence under the circumstances. 1 However, with respect to written foreign law, parol proof is not admissible; the courts in most jurisdictions, in some instances under the mandate of a statute, 2 require a foreign statute to be proved by a duly authenticated copy of the statute, 3 or at least, by an official compilation of the statutes of such foreign jurisdiction. 4

If the interpretation of a statute and its application to a particular case require a knowledge of the judicial decisions and local practice, the face of the statute must be supplemented by evidence from experts familiar with the law of the jurisdiction in question. 5

Under the Federal Rules of Civil Procedure 6 and the Federal Rules of Criminal

Procedure, 7 a party who intends to raise an issue concerning the law of a foreign country must give written notice in his or her pleadings or other reasonable written notice, and the court, in determining foreign law, may consider any relevant material or source, including testimony. 8

Footnotes

Footnote 99. *Nashua Sav. Bank v Anglo-American Land, Mortg. & Agency Co.*, 189 US 221, 47 L Ed 782, 23 S Ct 517; *In re Lando's Estate*, 112 Minn 257, 127 NW 1125; *Wentz v Chicago, B. & Q. R. Co.*, 259 Mo 450, 168 SW 1166.

Footnote 1. *Pierce v Indseth*, 106 US 546, 16 Otto 546, 27 L Ed 254, 1 S Ct 418.

Footnote 2. *Baggett v Davis*, 124 Fla 701, 169 So 372; *Atlantic C. L. R. Co. v Baker*, 143 SC 445, 141 SE 688.

As to parol evidence, generally, see §§ 1092 et seq.

Footnote 3. *Nashua Sav. Bank v Anglo-American Land, Mortg. & Agency Co.*, 189 US 221, 47 L Ed 782, 23 S Ct 517; *Rudolph Hardware Co. v Price*, 164 Iowa 353, 145 NW 910.

Footnote 4. *Hunter v West* (Tex Civ App San Antonio) 293 SW2d 686; *Rudolph Hardware Co. v Price*, 164 Iowa 353, 145 NW 910.

Footnote 5. *United States v Pink*, 315 US 203, 86 L Ed 796, 62 S Ct 552, holding that an official declaration of Russian law by an officer of the Russian government having authority to interpret such law is within the term "written authorities," as used in a state statute authorizing courts to consider such authorities even though not introduced in evidence on the trial, and such a declaration, though not printed, constitutes "other written law," proof of which is provided for in such statute.

As to the conclusiveness of expert testimony on foreign law, see 31A Am Jur 2d, Expert and Opinion Evidence § 143.

Footnote 6. Rule 44.1, Federal Rules of Civil Procedure.

For a general discussion of Rule 44.1, see 75A Am Jur 2d, Trial § 810.

Footnote 7. Rule 26.1, Federal Rules of Criminal Procedure.

For a general discussion of Rule 26.1, see 32B Am Jur 2d, Federal Rules of Evidence § 1.

Footnote 8.

Forms: Notice of intent to raise issue concerning foreign law. 1 Federal Procedural Forms, Actions in District Court § 1:1553.

Annotation: Raising and determining issue of foreign law under Rule 44.1 of Federal Rules of Civil Procedure, 62 ALR Fed 521.

Federal or state law as governing federal court's authority, in diversity action after *Erie R. Co. v Tompkins*, to take judicial notice of law of sister state or foreign country, 7 ALR Fed 921.

(2). Private Documents and Writings, In General [1074-1078]

§ 1074 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The best evidence rule is not restricted to public documents and writings; it applies with equal force to documents and writings of a private character. 9 Where the contents of a private document are in issue, the document itself is the best evidence of such contents, and it must either be produced or its absence must be properly accounted for before parol evidence regarding the contents of the document will be admitted. 10 Thus, where a contract is reduced to writing, the writing is the best evidence of the contract, and oral proof of the contract is not allowed unless some valid excuse can be shown for the nonproduction of the contract. 11

Where a private document or writing is not available, as where it has been lost or destroyed, 12 secondary evidence of its contents is admissible.

§ 1074 ----Generally [SUPPLEMENT]

Case authorities:

Court properly precluded defendants from using evidence from federal agent's personnel file in cross-examining him since only item arguably serving their purposes was letter indicating that agent had erroneously reported hours of court attendance. *United States v Ortiz* (1993, CA7 Ill) 5 F3d 288.

Portion of bank employee's written statement in which he admitted to falsifying credit references and accepting money for doing so could be severed from remainder of his statement and introduced into evidence if employee were not available as witness notwithstanding rule of completeness incorporated into Rule 106; remainder of statement was not needed to counteract any "prejudicial impression" since statements against interest were not incomplete or misleading. *First Nat'l Bank v Lustig* (1993, ED La) 150 FRD 548, motion den (ED La) 1993 US Dist LEXIS 13303, summary judgment den, motion den (ED La) 1993 US Dist LEXIS 13754, motion den (ED La) 1993 US Dist LEXIS 14096, motion den (ED La) 1993 US Dist LEXIS 14128, motion den (ED La) 1993 US Dist LEXIS 14134, motion den (ED La) 1993 US Dist LEXIS 14100, motion den (ED La) 1993 US Dist LEXIS 14104, motion den (ED La) 1993 US Dist LEXIS 14466, motion den (ED La) 1993 US Dist LEXIS 14896, motion den (ED La) 1993 US

There was error which was not prejudicial in a first-degree murder prosecution where the court admitted statements from the victim's diary which recounted assaults upon her and a threat to kill her by defendant. Although the State contended that the statements were admissible as tending to show a bad relationship between the victim and defendant and were not offered to prove the truth of the statements, to the extent the State relies upon the assaults and threat contained in the diary to establish the relationship between Karen and defendant, it is using the diary entry for the truth of the matter asserted. To whatever minimal extent the victim's relationship with defendant is probative of defendant's state of mind, which was the central issue in the case, that probative value is substantially outweighed by the danger that the jury would misuse the diary entry, which sets forth two assaults by defendant upon Karen and a threat to take her life, as proof that defendant actually committed these acts. However, most of the diary entry was repetitive of other testimony, which went much further in describing the assault and threat. The only harmful statement in the diary entry not contained in the other testimony was that defendant had hit the victim in the head and slapped her across the face on a particular occasion, but there was other testimony of an assault around that time and, in light of the subsequent more severe assault and the weighty evidence against defendant, including his inculpatory statements, there is no reasonable possibility that the admission of the diary entry affected the outcome of the trial. G.S. § 15A-1443(a). *State v Hardy* (1994) 339 NC 207, 451 SE2d 600.

Footnotes

Footnote 9. *Morgan v State*, 213 Ark 493, 211 SW2d 108.

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Practice References Age of Person. 45 Am Jur Proof of Facts 2d 631.

Footnote 10. *Morgan v State*, 213 Ark 493, 211 SW2d 108.

Footnote 11. *Sherman v Sherman*, 290 Ky 237, 160 SW2d 637; *Horn v Hansen*, 56 Minn 43, 57 NW 315; *Ohio S. R. Co. v Morey*, 47 Ohio St 207, 24 NE 269.

As to the admission of parol proof to contradict or vary a contract in writing, see §§ 1092 et seq.

Footnote 12. *Gregg v Forsyth*, 65 US 179, 24 How 179, 16 L Ed 731; *Mahaffy v Faris*, 144 Iowa 220, 122 NW 934 (contract); *Aesoph v Golden* (Minn App) 367 NW2d 639 (note evidencing obligation).

In Louisiana, where a will has been destroyed, secondary proof is admissible to prove its contents and to carry it to probate. *Gaines v Hennen*, 65 US 553, 24 How 553, 16 L Ed 770.

§ 1075 Letters

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The best evidence rule may be invoked to exclude the testimony of a witness of facts communicated by him or her to another by letter, where the letter itself can be produced.

13 The original letter is the best evidence of its contents and before secondary evidence of its contents is admissible, the nonproduction of the original letter must be accounted for, as by showing that it has been destroyed, 14 or that it is lost and diligent efforts to locate it have been unsuccessful. 15 Where the evidence shows the letter to be beyond the possession of the person seeking to prove its contents, secondary evidence of such contents may be received. 16 Moreover, parol evidence is admissible to prove, apart from its contents, the fact of sending a letter 17 and even to prove the contents of a letter where the letter is collateral to the matter at issue. 18

§ 1075 ----Letters [SUPPLEMENT]

Case authorities:

In prosecution for first degree murder and conspiracy to commit murder arising out the killing of defendant's wife by defendant and his brother, introduction of letters written by defendant's former girlfriend, who had been granted immunity from prosecution in return for her testimony, to defendant's brother, which contained various statements consistent with her version of events surrounding murder, did not violate defendant's right to due process and deprive him of fair trial, even if they were written at suggestion of police officer with ultimate purpose of seizing letters from brother's jail cell, since defendant was not prejudiced by their admission. They did not contain any information that was not given in girlfriend's testimony and they were offered by state, on redirect examination of girlfriend, as prior consistent statements to rebut defendant's charges of recent fabrication. *State v Apelt* (1993) 176 Ariz 349, 861 P2d 634, related proceeding 176 Ariz 369, 861 P2d 654.

In breach-of-warranty claims against seller and manufacturer of photographic emulsion and backcoat sauce for 3-D photographs, customer complaint letters were not admissible under business records exception to hearsay rule, where, inter alia, letters lacked trustworthiness, letters were not business records of either party, letter writers were not under oath, and opposing party had no opportunity to cross-examine letter writers. *Minnesota Mining & Mfg. Co. v Nishika Ltd.* (1994, Tex App Beaumont) 881 SW2d 451, op withdrawn, substituted op, on reh (Tex App Beaumont) 885 SW2d 603, 130D motion filed (Nov 7, 1994).

Footnotes

Footnote 13. *Simpson & Co. v Dall*, 70 US 460, 3 Wall 460, 18 L Ed 265; *Brilliant Coal Co. v Sparks*, 16 Ala App 665, 81 So 185, cert den 203 Ala 131, 82 So 161; *Slaughter v Heath*, 127 Ga 747, 57 SE 69; *Baum v Industrial Com.*, 288 Ill 516, 123 NE 625, 6 ALR 1242; *Wilson v Sorge*, 256 Minn 125, 97 NW2d 477.

In a prosecution for armed robbery and kidnapping where the defendant pled not guilty by reason of insanity, the trial court did not err in excluding testimony by defendant's father concerning defendant's discharge from the army and the nature of his discharge, since the father was testifying with respect to a letter which arrived at defendant's home; the father testified that he could not read well and that someone had read the letter to him; the father was therefore not in a position to testify about the letter and its contents, and the writing itself was the best evidence of its contents and was subsequently admitted into evidence. *State v Boone*, 302 NC 561, 276 SE2d 354.

Footnote 14. *Marcotte's Estate v Clay*, 170 Kan 189, 224 P2d 998.

Footnote 15. *Standard Acci. Ins. Co. v Rose*, 314 Ky 233, 234 SW2d 728.

Footnote 16. *Farmers Sav. Bank v Noel*, 193 Iowa 685, 187 NW 555, 21 ALR 1116; *Boardman v Lorentzen*, 155 Wis 566, 145 NW 750.

Footnote 17. *Hall v Simmons*, 50 Ga App 634, 179 SE 272.

Footnote 18. *State v Hayes*, 138 NC 660, 50 SE 623.

§ 1076 Telegrams

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where an issue involves facts stated in a telegram, under the best evidence rule the original telegram, if available, should be produced as proof of the contents of the message; secondary evidence of such contents is admissible only when the original telegram cannot be produced, 19 such as where it has been lost or destroyed. 20 This rule does not apply where the telegram was not reduced to writing, but rather was delivered orally. 21 Also, where the contents of the telegram are not in issue, parol evidence is admissible to show that a telegram was delivered. 22

The principal controversy regarding the application of the best evidence rule to the use of telegrams as evidence arises in the determination of what is an original telegram, whether the original is the communication sent or the one received; the answer depends largely upon which party was responsible for its transmission; generally, if the person sending the telegram takes the initiative and the telegraph company is thereby considered to be his or her agent, the message as delivered to the other party is the original. 23 However, if the person to whom the message is sent takes the risk of transmission or is the employer of the telegraph company, the message as delivered to the operator for transmission is considered the original. 24 Where correspondence is initiated by telegraph, the original of a message sent in reply is the one delivered to the telegraph company for transmission, and not the one received at the place to which it is sent. 25 The message actually delivered to the person to whom it is addressed is viewed as admissible as original evidence in an action against a telegraph company for damages for delay in the transmission of the message. 26 If there is only a single communication, the

telegram as delivered at the place of destination is the best evidence. 27

Footnotes

Footnote 19. *Ginsberg v Ginsberg*, 361 Ill 499, 198 NE 432.

Footnote 20. *Western Union Tel. Co. v Collins*, 45 Kan 88, 25 P 187.

Footnote 21. *Terre Haute & I. R. Co. v Stockwell*, 118 Ind 98, 20 NE 650.

Footnote 22. *Western Union Tel. Co. v Cline*, 8 Ind App 364, 35 NE 564.

Footnote 23. *Collins v Western Union Tel. Co.*, 145 Ala 412, 41 So 160; *Anheuser-Busch Brewing Co. v Hutmacher*, 127 Ill 652, 21 NE 626; *Magie v Herman*, 50 Minn 424, 52 NW 909.

Footnote 24. *Anheuser-Busch Brewing Co. v Hutmacher*, 127 Ill 652, 21 NE 626.

Footnote 25. *Bond v Hurd*, 31 Mont 314, 78 P 579 (ovrld on other grounds by State ex rel. *Interstate Lumber Co. v District Court of First Judicial Dist.*, 54 Mont 602, 172 P 1030).

Footnote 26. *Collins v Western Union Tel. Co.*, 145 Ala 412, 41 So 160.

Footnote 27. *Collins v Western Union Tel. Co.*, 145 Ala 412, 41 So 160; *Cobb v Glenn Boom & Lumber Co.*, 57 W Va 49, 49 SE 1005.

§ 1077 Title instruments; deeds, leases, and mortgages

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In cases involving questions of title, ownership, and right to possession in the proof of deeds, leases, and mortgages and other instruments of title, the best evidence rule requires that the instrument itself be produced, unless a sufficient foundation is laid for the production of secondary evidence of the contents of such instrument, 28 such as by showing its loss or destruction 29 or that it is in the possession or control of an adverse party who has neglected to produce it after notice to do so. 30 Where, however, the issue of title or ownership, or the precise character thereof, is collaterally involved, the rule requiring the production of the instrument of title is relaxed to permit proof of a prima facie ownership from one properly qualified to offer such proof. 31

The best evidence rule does not require the production of an instrument evidencing the sale of property to prove the fact of sale; parol evidence is admissible for such purpose. 32

Footnotes

Footnote 28. *Georgia P. R. Co. v Strickland*, 80 Ga 776, 6 SE 27; *Collar v Collar*, 86 Mich 507, 49 NW 551; *Kimble v Mayor & Common Council of Newark*, 91 NJL 249, 102 A 637; *Brynjolfson v Dagner*, 15 ND 332, 109 NW 320; *Cundey v Hall*, 208 Pa 335, 57 A 761; *Littlefield v Bowen*, 90 Wash 286, 155 P 1053.

A person not in possession of real property, either actual or constructive, can prove legal title only by production of the original documents of title or legally authorized certified copies thereof, or if they cannot be produced and their nonproduction or absence is satisfactorily accounted for, then under the best evidence rule the contents of the original documents may be proved by parol evidence. *Yates v State*, 206 Tenn 118, 332 SW2d 186.

Annotation: Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 ALR3d 824.

Footnote 29. *Wiggins v Stapleton Baptist Church*, 282 Ala 255, 210 So 2d 814, holding that to justify admission of secondary evidence of the contents of a lost deed, especially when exclusively oral, the following facts must be established to the satisfaction of the court: the existence and execution of the original paper, as a genuine document; the substance of its contents; and its loss, destruction, absence from the state, or other satisfactory reason for failure to produce the original, which may be shown by such diligent search for it as would raise a reasonable presumption of such loss or absence.

Footnote 30. *Skidmore v State*, 57 Tex Crim 497, 123 SW 1129 (criticized on other grounds by *Battles v State*, 63 Tex Crim 147, 140 SW 783) as stated in *Montgomery v State* (Tex Crim) 1991 Tex Crim App LEXIS 146, on remand (Tex App Dallas) 821 SW2d 314, petition for discretionary review ref (Tex Crim) 827 SW2d 324, reh den (May 6, 1992).

Footnote 31. *Farr v Zoning Bd. of Appeals*, 139 Conn 577, 95 A2d 792; *Shanks v Robertson*, 101 Kan 463, 168 P 316, 1 ALR 1140 (ovrld on other grounds by *Kratina v Board of Comrs.*, 219 Kan 499, 548 P2d 1232); *Tucker v Welsh*, 17 Mass 160; *Johnson v Carlin*, 121 Minn 176, 141 NW 4; *Littlefield v Bowen*, 90 Wash 286, 155 P 1053.

In an action for forcible entry and detainer, title to the real property is only an incident, the object being to show a sufficient right of possession to sustain the judgment therefor in the absence of proof to the contrary; in such a case it is not essential for the plaintiff to produce documentary evidence of title. *Van Valkenberg v Venters*, 200 Okla 504, 197 P2d 284.

Footnote 32. *Hightower v Keaton*, 167 Ga 94, 144 SE 759.

§ 1078 Memoranda and inscriptions

[View Entire Section](#)

The best evidence rule may apply to private memoranda to the same extent that it applies to private writings generally, and the memoranda where available must be introduced in evidence to prove the contents of them. 33 However, a memorandum that records a past recollection is not independent evidence of the matters noted in the memorandum; it is only secondary evidence of such facts, the primary evidence being the knowledge of the witness. 34 In the event such primary evidence is not available, resort may be had to the secondary evidence, or to the use of the memorandum. 35

A memorandum of the contents of a writing or document is not admissible in evidence to prove the contents where the writing or document itself is available. 36

There are certain writings and inscriptions which cannot be properly classified as documents, and to which the best evidence rule is not applicable, but which the law regards simply as matters of description and identity and as susceptible, primarily, of parol proof, such as a direction on a parcel, words written on a tag of a valise, labels attached to jugs or decanters and indicating their contents, price tags on garments, 37 and markings on railroad cars and waybills. 38 Under the best evidence rule, an "inscribed chattel" is an object which is both a writing and a chattel. 39 It is a matter of trial court discretion as to whether or not to admit secondary evidence of inscribed chattels in the face of a best evidence objection. 40 In addition, the best evidence rule does not extend to mere notices which persons are not expected to keep. 41

Footnotes

Footnote 33. *The Merritt*, 84 US 582, 17 Wall 582, 21 L Ed 682; *Blackburn v Crawford*, 70 US 175, 3 Wall 175, 18 L Ed 186.

Receipted expense bills, given by a carrier to the shipper and which contain all the information relative to claims for overcharges, are the best evidence of the overcharges. *Berthold-Jennings Lumber Co. v St. Louis, I. M. & S. R. Co.* (CA8 Mo) 80 F2d 32, 102 ALR 688, cert den 297 US 715, 80 L Ed 1001, 56 S Ct 591.

Duplicate deposit slips are properly excluded from evidence as showing deposits, where no attempt is made to produce the original slips or to account therefor. *Schmidt v Barr*, 333 Ill 494, 165 NE 131, 65 ALR 1.

Footnote 34. *Campbell v State*, 21 Okla Crim 242, 206 P 622, 29 ALR 369; *Hughes v Taylor*, 29 Tenn App 548, 198 SW2d 337.

Footnote 35. *Key v Duffin*, 175 Ky 348, 194 SW 355; *National Ulster County Bank v Madden*, 114 NY 280, 21 NE 408; *Manchester Assur. Co. v Oregon R. & N. Co.*, 46 Or 162, 79 P 60 (ovrld on other grounds by *State v Sutton*, 253 Or 24, 450 P2d 748).

Footnote 36. *Peoples Nat. Bank v Manos Bros., Inc.*, 226 SC 257, 84 SE2d 857, 45 ALR2d 1070.

Footnote 37. *Benjamin v State*, 12 Ala App 148, 67 So 792.

Footnote 38. *Mitchell v Louisville & N. R. Co.*, 310 Ill App 563, 35 NE2d 81, revd on other grounds 379 Ill 522, 42 NE2d 86.

Footnote 39. *People v Bizieff* (5th Dist) 226 Cal App 3d 1689, 277 Cal Rptr 678, 91 CDOS 944, 91 Daily Journal DAR 1237, review den (Cal) 1991 Cal LEXIS 1684 (holding that a credit card falls under the state's best evidence rule as an inscribed chattel).

Footnote 40. *People v Mastin* (4th Dist) 115 Cal App 3d 978, 171 Cal Rptr 780 (photographs of inscribed chattels).

In a prosecution for trafficking in counterfeit watches, FRE Rule 1002 did not bar admission of testimony about counterfeit marks on the back of watches, without introduction of the watches themselves, since an object bearing a mark is both chattel and writing and the trial judge had discretion to treat it as chattel to which best evidence rule did not apply. *United States v Yamin* (CA5 La) 868 F2d 130, 10 USPQ2d 1300, 27 Fed Rules Evid Serv 755, cert den 492 US 924, 106 L Ed 2d 603, 109 S Ct 3258.

Footnote 41. *Holloman v Southern R. Co.*, 172 NC 372, 90 SE 292.

(3). Business Records [1079-1081]

§ 1079 Corporate records, generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Where the acts of a corporation are recorded in the corporate books and records, those books and records are the best evidence of such acts, and if available, the rules of evidence require their production as proof of those acts. 42 Secondary evidence is not ordinarily admissible to prove acts of a corporation properly evidenced by its records; 43 and if the charter or the statutes require records to be kept of all proceedings and declare those records the only proper evidence of the acts of the corporation, no other evidence is competent to prove such acts. 44 Where, however, corporate acts are not recorded in the books and records of a corporation, or where such books and records are so carelessly or imperfectly kept as not to show the acts of the corporation, such acts and resolutions may be proved by parol, in the absence of any provisions of law requiring such matters to appear of record, thereby making the record the only evidence of them. 45

A witness shown to be familiar with the books or records of a private corporation or business may testify as to the contents of such books or records, where, from the circumstances of the case, such testimony is necessary to an expeditious disposition of the issue or an understanding of the matters contained in such books or records. 46 The position of a person in the corporation on whose behalf the witness testifies may be shown by the witness' parol testimony, without contravening the best evidence rule. 47

Matters which are not properly subjects of record, although entries are made of them, may be proved by the testimony of the person making the minutes. 48

Where it is shown that corporate records are not available or cannot be produced, as where they are lost or have been destroyed, secondary evidence of the contents of such records is ordinarily admissible. 49

§ 1079 ----Corporate records, generally [SUPPLEMENT]

Practice Aids: The Business Appraiser as Expert Witness. 59 Am Jur Trials 155.

Case authorities:

Accounting history of insurance broker's financial relationship with automobile dealers' group was not admissible as business record since broker refused to produce computer tapes from which its witness asserted history had been compiled, and witness's affidavit disclosed that testing of history showed it contained inaccuracies, suggesting that history required significant selection and interpretation of data, not simply downloading of information previously computerized in regular course of business. *Potamkin Cadillac Corp. v B.R.I. Coverage Corp.* (1994, CA2 NY) 38 F3d 627.

Footnotes

Footnote 42. *J. R. Watkins Medical Co. v Martin*, 132 Ark 108, 200 SW 283, 2 ALR 1230; *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *Paola Gas Co. v Paola Glass Co.*, 56 Kan 614, 44 P 621; *Commissioner of Banks v Cosmopolitan Trust Co.*, 253 Mass 205, 148 NE 609, 41 ALR 658; *Haven v N. H. Asylum for Insane*, 13 NH 532.

Parol testimony as to the regulations of an insurance company is not admissible where such regulations are printed or written. *North Carolina Mut. Life Ins. Co. v Banks*, 24 Tenn App 660, 148 SW2d 54.

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Footnote 43. *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *State v Mahmood*, 45 Wash App 200, 724 P2d 1021, review den 107 Wash 2d 1002.

Footnote 44. *J. R. Watkins Medical Co. v Martin*, 132 Ark 108, 200 SW 283, 2 ALR 1230.

Footnote 45. *Denver & R. G. R. Co. v Arizona & C. R. Co.*, 233 US 601, 58 L Ed 1111, 34 S Ct 691; *Garmany v Lawton*, 124 Ga 876, 53 SE 669; *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *Ten Eyck v Pontiac, O. & P. A. R. Co.*, 74 Mich 226, 41 NW 905; *State ex rel. Copper Butte Mines v Guertin*, 106 Minn 248, 119 NW 43; *Edgerly v Emerson*, 23 NH 555.

Footnote 46. *Lewy v United States* (CA7 Ill) 29 F2d 462, 62 ALR 388, cert den 279 US 850, 73 L Ed 993, 49 S Ct 346.

The president of a corporation who has firsthand knowledge as to the existence and extent of another's interest in the capital stock of the corporation for which stock certificates have not been issued is a competent witness in that regard notwithstanding the objection that the books of the corporation are the best evidence of the matter. In re Ko-Ed Tavern, Inc. (CA3 NJ) 129 F2d 806, 142 ALR 357.

Interrogatory answers that were based solely on the defendant's review of available corporate records were inadmissible under the best evidence rule; the answer constituted merely the defendant's opinion as to the content of the underlying records. Freitas v Emhart Corp. (DC Mass) 715 F Supp 1149, CCH Prod Liab Rep ¶ 12209, 28 Fed Rules Evid Serv 371.

To the extent that a foundation has been laid that a witness has personal knowledge of a corporate affair, he or she can testify to that affair. State v Mahmood, 45 Wash App 200, 724 P2d 1021, review den 107 Wash 2d 1002.

As to the admissibility summaries of corporate records, see §§ 1059 et seq.

Footnote 47. Star Grocer Co. v Bradford, 70 W Va 496, 74 SE 509.

Footnote 48. Mandel v Swan Land & Cattle Co., 154 Ill 177, 40 NE 462.

Footnote 49. Mandel v Swan Land & Cattle Co., 154 Ill 177, 40 NE 462; McClellan v Owens, 335 Mo 884, 74 SW2d 570, 95 ALR 711; Martin v State, 46 Okla Crim 411, 287 P 424, 85 ALR 512; Starwich v Washington Cut Glass Co., 64 Wash 42, 116 P 459.

§ 1080 Meetings of corporate directors, stockholders, or members

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The written record of meetings of directors, stockholders, or members of private corporations or associations, is the best evidence as to the proceedings at such meetings, and under the best evidence rule oral evidence is inadmissible to prove what took place, or to prove the contents of the minutes at such meetings unless a sufficient foundation is laid by explaining the absence of the written record. 50 However, where no record is made of the proceedings at meetings of directors, stockholders, or members of private corporations, or such record has been lost or destroyed, 51 or the records of a corporation are absent from the jurisdiction, or otherwise not available, 52 oral evidence is admissible to prove the proceedings of such meetings, or to prove the contents of the record. Similarly, oral evidence is also admissible to prove such proceedings or contents where there are omissions in records, or where the records do not purport to be complete accounts of the proceedings of meetings. 53

The best evidence rule does not exclude oral proof which merely supplements or explains the recorded proceedings and meetings of directors, stockholders, or members of private corporations. 54

In addition, secondary evidence which contradicts the corporate minutes may be admitted where all relevant corporate documents are in evidence. 55

**§ 1080 ----Meetings of corporate directors, stockholders, or members
[SUPPLEMENT]**

Practice Aids: The Business Appraiser as Expert Witness. 59 Am Jur Trials 155.

Footnotes

Footnote 50. *Denver & R. G. R. Co. v Arizona & C. R. Co.*, 233 US 601, 58 L Ed 1111, 34 S Ct 691; *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *Brintnall v Professional Investors of Iowa, Inc. (Iowa)* 218 NW2d 453; *Reorganized Church of Jesus Christ v Universal Surety Co.*, 177 Neb 60, 128 NW2d 361; *Pegram-West, Inc. v Winston Mut. Life Ins. Co.*, 231 NC 277, 56 SE2d 607; *Dennis v Joslin Manuf'g Co.*, 19 RI 666, 36 A 129.

Annotation: Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259 § 3[a].

Footnote 51. *Denver & R. G. R. Co. v Arizona & C. R. Co.*, 233 US 601, 58 L Ed 1111, 34 S Ct 691; *Handley v Stutz*, 139 US 417, 35 L Ed 227, 11 S Ct 530; *Garmany v Lawton*, 124 Ga 876, 53 SE 669; *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *Iowa Drug Co. v Souers*, 139 Iowa 72, 117 NW 300; *Ten Eyck v Pontiac, O. & P. A. R. Co.*, 74 Mich 226, 41 NW 905; *National Surety Co. v Wingate*, 153 Okla 132, 5 P2d 376.

Annotation: 48 ALR2d 1259 § 4.

Footnote 52. *Larson v A. W. Larson Const. Co.*, 36 Wash 2d 271, 217 P2d 789; *Walnut Park Lumber & Coal Co. v Roane*, 171 Wash 362, 17 P2d 896.

Annotation: 48 ALR2d 1259 § 5.

Footnote 53. *Floyd v Jay County Rural Electric Membership Corp. (Ind App)* 405 NE2d 630; *Iowa Drug Co. v Souers*, 139 Iowa 72, 117 NW 300; *Sears v Kings C. E. R. Co.*, 152 Mass 151, 25 NE 98; *State ex rel. Copper Butte Mines v Guertin*, 106 Minn 248, 119 NW 43; *Rueb v Rehder*, 24 NM 534, 174 P 992, 1 ALR 423; *Walnut Park Lumber & Coal Co. v Roane*, 171 Wash 362, 17 P2d 896; *Huebner v Advance Refrigerator Co.*, 200 Wis 233, 227 NW 868, 66 ALR 1325.

The best evidence rule did not prohibit the use of parol evidence to show what occurred at a condominium association directors' meeting or to show omission from the minutes of the meeting, where the record supported the claim by the proponent of the parol evidence that it did not offer testimony to alter the minutes but rather because the minutes did not record the board's approval of a roof-repair assessment. *Wimbledon Townhouse Condominium I, Asso. v Wolfson (Fla App D4)* 510 So 2d 1106, 12 FLW 1894.

Annotation: 48 ALR2d 1259 § 3[b].

Footnote 54. *Mason Hall Corp. v Dicker* (Mun Ct App Dist Col) 141 A2d 190; *Northland Produce Co. v Stephens*, 116 Minn 23, 133 NW 93; *Respass v Rex Spinning Co.*, 191 NC 809, 133 SE 391.

Although parol evidence is admissible to aid, correct, and supplement corporate minutes, whether or not the plaintiff consented to the termination of his employment contract at a directors' meeting was a fact question which should have been submitted to the jury, where the minutes contained no reference to the plaintiff's alleged consent and the plaintiff denied giving his consent and had no recollection of the events of the meeting. *Montgomery v Greene County Clay Products Co.*, 205 Pa Super 515, 210 A2d 911.

As to the admissibility of parol evidence to vary or contradict corporate records, see § 1102.

Annotation: 48 ALR2d 1259 § 8.

Footnote 55. *Floyd v Jay County Rural Electric Membership Corp.* (Ind App) 405 NE2d 630.

Evidence, including a corporation's annual report and other corporate documents, as well as the testimony of various witnesses, was admissible on the question whether the defendants were corporate officers at time a certain loan was made to the corporation, even though such evidence contradicted the minutes of stockholders' meeting. *Houck v Martin* (4th Dist) 82 Ill App 3d 205, 37 Ill Dec 531, 402 NE2d 421.

§ 1081 Books of account

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Books of account are generally regarded as primary evidence of the facts they contain and are admissible 56 as the best evidence of such facts without proof of the unavailability of other evidence. 57 Insofar as books of account are admissible as evidence of the facts they contain, the best evidence rule usually requires their production, or some excuse for nonproduction, before allowing proof of a secondary character. 58 An audit made by, or testimony given by, a private auditor is inadmissible in evidence as proof of the original records, books of account, or reports, since such proof is not the best evidence available 59 and also violates the rule excluding hearsay testimony. 60

The best evidence rule does not require the introduction of books of account and does not exclude parol testimony as to the contents of such books where a witness has independent knowledge of the facts stated in the books. 61 Where the proponent is attempting not to prove the contents of books of account, but to show certain facts independent of the

books, such books are not necessarily the only evidence nor the best evidence of the facts, and the proponent may make out his or her case as to such facts by the testimony of a witness. 62 Books of account are always competent to refresh the memory of a witness who has personal knowledge of a transaction, and the fact that the latter may be more accurate is a matter for the jury. 63 In addition, as a relaxation of the best evidence rule, the court may allow in evidence a summary of books or documents which are voluminous or complicated. 64

§ 1081 ----Books of account [SUPPLEMENT]

Practice Aids: The Business Appraiser as Expert Witness. 59 Am Jur Trials 155.

Footnotes

Footnote 56. As to the admissibility of account books, generally, see §§ 1290 et seq.

Footnote 57. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Footnote 58. *Drumm-Flato Com. Co. v Edmisson*, 208 US 534, 52 L Ed 606, 28 S Ct 367; *Bergdoll v Pollock*, 95 US 337, 5 Otto 337, 24 L Ed 512, 4 AFTR 4583; *Flame Coal Co. v United Mine Workers (CA6 Ky)* 303 F2d 39, 50 BNA LRRM 2272, 45 CCH LC ¶ 17626, 97 ALR2d 1136, cert den 371 US 891, 9 L Ed 2d 125, 83 S Ct 186, 51 BNA LRRM 2380, 46 CCH LC ¶ 17889; *Bear v Swift & Co.*, 259 Ala 668, 68 So 2d 718; *Interstate Finance Corp. v Commercial Jewelry Co.*, 280 Ill 116, 117 NE 440; *Paola Gas Co. v Paola Glass Co.*, 56 Kan 614, 44 P 621; *Harper v Davis*, 115 Md 349, 80 A 1012; *Davis v Supreme Council R. A.*, 195 Mass 402, 81 NE 294; *Coro Federal Credit Union v Cameo Club of Newport*, 91 RI 131, 161 A2d 410; *City Council of Greenville v Ormand*, 51 SC 58, 28 SE 50; *Hay v Peterson*, 6 Wyo 419, 45 P 1073 (criticized on other grounds by *Gardner v State*, 27 Wyo 316, 196 P 750, 15 ALR 1040).

Footnote 59. *Flame Coal Co. v United Mine Workers (CA6 Ky)* 303 F2d 39, 50 BNA LRRM 2272, 45 CCH LC ¶ 17626, 97 ALR2d 1136, cert den 371 US 891, 9 L Ed 2d 125, 83 S Ct 186, 51 BNA LRRM 2380, 46 CCH LC ¶ 17889; *Rouw v Arts*, 174 Ark 79, 294 SW 993, 52 ALR 1263.

Footnote 60. § 659.

Footnote 61. *R. Hoe & Co. v Commissioner (CA2)* 30 F2d 630, 5 USTC ¶ 1370, 7 AFTR 8475; *Argue v Monte Regio Corp.*, 115 Cal App 575, 2 P2d 54.

In a contract action, an employee of one party was authorized to state the contents of invoices admitted into evidence despite the contention that the invoices themselves constituted the best evidence of an allegedly unpaid account. *Campbell v Regal Typewriter Co. (Ala)* 341 So 2d 120.

Footnote 62. 81 Am Jur 2d, Witnesses § 792.

Footnote 63. Perry v Ryback, 302 Pa 559, 153 A 770.

Footnote 64. As to the admissibility of summaries as secondary evidence, generally, see §§ 1059 et seq.

(4). Public Records [1082-1084]

§ 1082 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Public records and documents of a public character are subject to the operation of the best evidence rule, and where the contents of such records or documents are material to an inquiry, the records or documents, or in proper cases, certified copies of such records or documents, 65 should be produced. 66 Proof of a secondary character is permitted only where a valid excuse can be given for the nonproduction of such records or documents 67 or certified copies, 68 such as their loss or destruction. 69 Thus, official accounts of the Treasury Department, 70 grants of public lands, 71 and record of confiscation by the government, 72 are provable only by the original records or by certified copies, in the absence of a sufficient foundation for a finding of their loss or destruction so as to permit secondary evidence. In an election contest, the best evidence to determine the results of an election are the official ballots themselves, providing they remain in substantially the same condition as at the time of the election and have not been altered. 73

§ 1082 ----Generally [SUPPLEMENT]

Case authorities:

Judicial findings of fact are not public records within meaning of hearsay exception; judge in civil trial is not investigator, but judge, and committee comments to rule make drafters' intent plain—that rule is to relate to findings of agencies and offices of executive branch. *Nipper v Snipes* (1993, CA4 SC) 7 F3d 415, 38 Fed Rules Evid Serv 23.

Hearsay statements on 911 tape can be admitted into evidence as either public record or business record, but because citizens who call 911 are not under any duty to report, recorded statement by citizen must satisfy separate hearsay exception, such as present sense impression or excited utterance; statement by 911 caller who is witness to violent arrest of suspect by police could qualify under either exception. *Bemis v Edwards* (1995, CA9 Or) 45 F3d 1369, 95 CDOS 640, 95 Daily Journal DAR 1149.

Certificate of Indebtedness introduced in U.S. summary judgment motion is admissible as exception to hearsay rule under FRE 803(8) in action to recover on promissory note, where certificate is public record of public office, because presumption is that document

was accurately prepared and debtor has failed to point out any circumstances indicating lack of trustworthiness. *United States v Wright* (1993, DC Utah) 850 F Supp 965.

Written statements by police officers that persons other than defendant occupied and sold drugs from apartment in which defendant was arrested were not admissible under business records exception to hearsay rule since nothing indicated that statements reflected officers' personal knowledge or that information was provided by someone with personal knowledge acting in regular course of business. *United States v Warren* (1994, App DC) 42 F3d 647.

Footnotes

Footnote 65. As to the admissibility of copies of public records, generally, see § 1090.

Footnote 66. *Williams v Conger*, 125 US 397, 31 L Ed 778, 8 S Ct 933, reh den 131 US 390, 33 L Ed 201, 9 S Ct 793; *J. R. Watkins Medical Co. v Martin*, 132 Ark 108, 200 SW 283, 2 ALR 1230; *Board of County Comrs. v Snellgrove* (Okla) 428 P2d 272.

In a prosecution for operating a motor vehicle while adjudged an habitual traffic offender, a certified computer printout of the defendant's driving record, attested as a true and complete copy by the commissioner of bureau of motor vehicles, was properly admitted. *Weaver v State* (Ind App) 404 NE2d 1180.

Annotation: Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Footnote 67. *J. R. Watkins Medical Co. v Martin*, 132 Ark 108, 200 SW 283, 2 ALR 1230; *Maxcy-Barton Organ Co. v Glen Bldg. Corp.*, 355 Ill 228, 189 NE 326, 95 ALR 321; *State v Allison*, 330 Mo 773, 51 SW2d 51, 85 ALR 471; *Brokeshoulder v Brokeshoulder*, 84 Okla 249, 204 P 284, 34 ALR 441; *Randolph v Commonwealth*, 145 Va 883, 134 SE 544, 47 ALR 1084; *Frye v King County*, 151 Wash 179, 275 P 547, 62 ALR 476, appeal after remand 157 Wash 291, 289 P 18.

Footnote 68. § 1085.

Footnote 69. *Belk v Meagher*, 104 US 279, 14 Otto 279, 26 L Ed 735; *Hogan v Kurtz*, 94 US 773, 4 Otto 773, 24 L Ed 317; *Hedrick v Hughes*, 82 US 123, 15 Wall 123, 21 L Ed 52; *Commonwealth v Overstreet* (Ky) 252 SW2d 28.

Footnote 70. *United States v Gilmore*, 74 US 491, 7 Wall 491, 19 L Ed 282; *Williams v United States*, 42 US 290, 1 How 290, 11 L Ed 135.

Footnote 71. *Peralta v United States*, 70 US 434, 3 Wall 434, 18 L Ed 221; *United States v Castro*, 65 US 346, 24 How 346, 16 L Ed 659.

Footnote 72. *Sabariego v Maverick*, 124 US 261, 31 L Ed 430, 8 S Ct 461.

Footnote 73. 26 Am Jur 2d, Elections § 345.

§ 1083 Appointment and authority of public officers

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The commission of a public officer is the best evidence of his or her appointment and authority. 74 However, the best evidence rule is relaxed somewhat with regard to proving the appointment and acts of public officers; such appointment and acts may be proved by the fact that one acted notoriously as a public officer, without producing the commission of appointment. 75

Footnotes

Footnote 74. State ex rel. Atty. Gen. v Johnson, 35 Fla 2, 16 So 786.

Footnote 75. Plymouth v Painter, 17 Conn 585; Barry v Smith, 191 Mass 78, 77 NE 1099; State v Taylor, 70 Vt 1, 39 A 447.

As to public officers, generally, see 63A Am Jur 2d, Public Officers and Employees.

§ 1084 Proceedings of public bodies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The official records of proceedings of public bodies, such as municipalities or city councils, furnish the best evidence of the acts recorded in those records, and parol testimony is not admissible in the absence of evidence that such records have been lost or destroyed. 76 Thus, a municipal ordinance is properly proved by the introduction in evidence of the original record of the ordinance, properly identified and authenticated. 77 However, where no such record exists of a specific matter, parol proof is admissible in explanation or proof of such matter, without violating the best evidence rule. 78 In addition, parol evidence is admissible when the proponents are not seeking to prove the contents of an official record. 79

Footnotes

Footnote 76. El Dorado v Faulkner, 107 Ark 455, 155 SW 516; Spalding v Lebanon, 156 Ky 37, 160 SW 751; Campbell v Elkins, 58 W Va 308, 52 SE 220.

Parol evidence is not admissible to prove an ordinance or resolution of city council. Dalrymple v Fields, 633 SW2d 362, 276 Ark 185.

Footnote 77. *Grafton v S. Paul, M. & M. R. Co.*, 16 ND 313, 113 NW 598.

Footnote 78. *Erlanger v Berkemeyer* (CA6 Ky) 207 F2d 832, 38 ALR2d 918, cert den 346 US 915, 98 L Ed 411, 74 S Ct 275; *Denver v Spencer*, 34 Colo 270, 82 P 590; *Charlotte v Alexander*, 173 NC 515, 92 SE 384; *Childrey v Huntington*, 34 W Va 457, 12 SE 536.

Footnote 79. *Rhyne v Bates*, 667 P2d 1131, 35 Wash App 529, holding that oral testimony concerning compliance with a section of the Contractor's Registration Act was not inadequate due to the requirements of the official records rule, in that the contractors were not trying to prove the contents of an official record, but merely the fact that at the time of the contract, they had in their possession a valid certificate of registration.

(5). Duplicates and Copies of Originals [1085-1091]

(a). In General [1085, 1086]

§ 1085 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

◆ Definition: A "duplicate" is defined for purposes of the best evidence rule as a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography including enlargements and miniatures, by mechanical or electronic re-recording, by chemical reproduction, or by other equivalent techniques which accurately reproduce the original; copies subsequently produced manually, either handwritten or typed, are not within this definition. 80

The best evidence rule has a limited application to duplicate originals, 81 which are admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under the circumstances it would be unfair to admit the duplicate in lieu of the original. 82 In addition, some jurisdictions will not allow duplicates to be admitted in lieu of the original where there is a genuine question raised as to the continuing effectiveness of the original. 83

The burden of challenging the admissibility of a copy rests with the party against whom it is offered, 84 and claims that the original is inaccurate or that admission of a copy would be unfair must be based on substance, not mere speculation. 85 Whether offered documents constitute accurate duplicates and can be accepted in evidence is within the sound discretion of the trial court. 86

Where there is a dispute about changes made on duplicates, both the claimed unaltered version and the corrected counterpart should be admitted. 87

Footnotes

Footnote 80. *People v Bizieff* (5th Dist) 226 Cal App 3d 1689, 277 Cal Rptr 678, 91 CDOS 944, 91 Daily Journal DAR 1237, review den (Cal) 1991 Cal LEXIS 1684; *State v Brown*, 177 W Va 633, 355 SE2d 614.

FRE Rule 1001(4); Uniform Rules of Evidence, Rule 1001(4).

A transcript of a tape recorded confession could not be received into evidence as a duplicate. *Atkins v State* (Del Sup) 523 A2d 539.

A computerized business record prepared subsequent to a written report, which contains a more detailed and complete description of the transaction in question than that contained in the computer record, does not qualify as an "original" within the meaning of the best evidence rule. *In re Gulph Woods Corp.* (BC ED Pa) 82 BR 373, 24 Fed Rules Evid Serv 891.

Footnote 81. *State v Sanders* (Mo) 365 SW2d 480; *Morris v Langhausen*, 155 Mont 362, 472 P2d 860.

Footnote 82. *In re Gulph Woods Corp.* (BC ED Pa) 82 BR 373, 24 Fed Rules Evid Serv 891; *United States v Skillman* (CA9 Cal) 922 F2d 1370, 91 CDOS 230, 91 Daily Journal DAR 161, 31 Fed Rules Evid Serv 1133, cert dismd (US) 116 L Ed 2d 275, 112 S Ct 353 and (criticized on other grounds by *United States v Rodriguez-Razo* (CA9 Cal) 962 F2d 1418, 92 CDOS 3878, 92 Daily Journal DAR 6133); *People v Bizieff* (5th Dist) 226 Cal App 3d 1689, 277 Cal Rptr 678, 91 CDOS 944, 91 Daily Journal DAR 1237, review den (Cal) 1991 Cal LEXIS 1684; *State v Booker* (Del Super) 547 A2d 618; *Tillman v Smith* (Fla App D5) 472 So 2d 1353, 10 FLW 1824, appeal after remand (Fla App D5) 504 So 2d 775, later proceeding (Fla App D5) 526 So 2d 730, 13 FLW 1277, review den (Fla) 534 So 2d 401, appeal after remand (Fla App D5) 533 So 2d 928, 13 FLW 2528 and appeal after remand (Fla App D5) 560 So 2d 344, 15 FLW D 1139; *People v Schram*, 98 Mich App 292, 296 NW2d 840 (criticized on other grounds by *People v Wallach*, 110 Mich App 37, 312 NW2d 387) and (criticized on other grounds by *People v Chernowas*, 111 Mich App 1, 314 NW2d 505) and (superseded on other grounds by statute as stated in *People v Woods*, 416 Mich 581, 331 NW2d 707); *Omaha World-Herald Co. v Nielsen*, 369 NW2d 631, 220 Neb 294; *State v Brown*, 177 W Va 633, 355 SE2d 614.

FRE Rule 1003; Uniform Rules of Evidence, Rule 1003.

The use of a copy of the voucher for a gun taken from a defendant instead of the original voucher was proper since the voucher was a multi-copy form; all such duplicates or counterparts are regarded as original and admissible as such without the necessity of either producing or accounting for the absence of the other. *People v Sims* (2d Dept) 127 App Div 2d 712, 511 NYS2d 906.

As to unfairness as grounds for requiring the original, see § 1086.

As to particular types of documents admitted as duplicates, see §§ 1087 et seq.

Annotation: Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence, 72 ALR Fed 732.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 2.

Forms: Notice—Intention to offer duplicate of writing as evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 39.

Footnote 83. *Smith v Ward*, 643 SW2d 549, 278 Ark 62, holding that although the original unprobated, unrevoked will of a testator was not effective as a document eligible for probate, where it was effective as evidence of the testator's devise of property to her stepson following the death of her husband, the devisee for like, a duplicate of the will was admissible as having "continuing effectiveness."

Uniform Rules of Evidence, Rule 1003(1).

Footnote 84. *United States v Garmany* (CA11 Ala) 762 F2d 929, 18 Fed Rules Evid Serv 679, cert den 474 US 1062, 88 L Ed 2d 785, 106 S Ct 811; *United States v Di Matteo* (CA11 Fla) 716 F2d 1361, 14 Fed Rules Evid Serv 575, vacated on other grounds, remanded on other grounds 469 US 1101, 83 L Ed 2d 767, 105 S Ct 769, on remand (CA11 Fla) 759 F2d 831, 17 Fed Rules Evid Serv 1445, cert den 474 US 860, 88 L Ed 2d 143, 106 S Ct 172; *People v Garcia* (2nd Dist) 201 Cal App 3d 324, 247 Cal Rptr 94, review den (Aug 10, 1988).

When a print of a microfilm copy of bank checks, kept by the bank in its regular course of business, is properly identified by the custodian of records as a complete and accurate reproduction thereof, such prints are "duplicates" under the Federal Rules of Evidence and the microfilm itself need not be produced. *United States v Carroll* (CA1 RI) 860 F2d 500, 26 Fed Rules Evid Serv 1310.

The fact that margins are missing from a copy of a document as well as one to three letters of the starting word on each line of the copy does not prevent the admission of the copy under FRE Rule 1003 where only one reasonable interpretation can be given to the document's language, the document is legible at every important point at issue in the case, and irrelevant terms of the document are clear. *Federal Deposit Ins. Corp. v Rodenberg* (DC Md) 571 F Supp 455, 15 Fed Rules Evid Serv 701, 37 UCCRS 665 (part of guarantor's signature and name of witness were not legible, but guarantor did not deny signing documents).

Footnote 85. *People v Garcia* (2nd Dist) 201 Cal App 3d 324, 247 Cal Rptr 94, review den (Aug 10, 1988).

A copy of an audio recording is not inadmissible merely because one can conjure up hypothetical possibilities that tampering has occurred. *United States v Balzano* (CA1 RI) 687 F2d 6, 11 Fed Rules Evid Serv 847.

Footnote 86. *Federal Deposit Ins. Corp. v Rodenberg* (DC Md) 571 F Supp 455, 15 Fed Rules Evid Serv 701, 37 UCCRS 665.

Forms: Affidavit or declaration—Custodian of business records. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 40.

—Custodian of hospital records. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 41.

Footnote 87. *United States v Webster* (CA5 Miss) 750 F2d 307, 18 Fed Rules Evid Serv 1221, cert den 471 US 1106, 85 L Ed 2d 855, 105 S Ct 2340 and cert den 471 US 1106, 85 L Ed 2d 855, 105 S Ct 2340 and cert den 471 US 1106, 85 L Ed 2d 856, 105 S Ct 2341 (government introduced both original of receipt given to defendant for aviation fuel and two photocopies of defendant's carbon copy of receipt discovered in his possession when he was arrested).

§ 1086 Unfairness or necessity as grounds for requiring original

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 1003 of the Federal Rules of Evidence, reasons for requiring an original may be present when only a part of the original is reproduced and the remainder is needed for reasons of fairness, such as where the remainder is necessary for cross-examination, or where the remainder may disclose matters that qualify the part offered or that are otherwise useful to the opposing party. 88 Thus, admission of a file copy of a deed under FR Evid, Rule 1003 is unfair for the purpose of proving the contents of the original conformed copy where the most critical part of the original conformed copy is not completely reproduced in the "duplicate." 89 However, the copy may not be unfair for other purposes and may be admissible for these purposes. 90

It may be unfair to admit a duplicate where the original could be of considerable value in ascertaining its authorship. 91 Similarly, photocopies of canceled checks may be excluded from evidence under FR Evid, Rule 1003 where the proponent cannot satisfactorily match copies of the backs of the checks with copies of the fronts. 92

Footnotes

Footnote 88. *United States v Moore* (CA4 Md) 710 F2d 157, 13 Fed Rules Evid Serv 1127, 72 ALR Fed 727, cert den 464 US 862, 78 L Ed 2d 169, 104 S Ct 192; *Amoco Production Co. v United States* (DC Utah) 455 F Supp 46, 3 Fed Rules Evid Serv 1177, 61 OGR 113, revd on other grounds (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1003.

Annotation: Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence, 72 ALR Fed 732.

Footnote 89. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67

OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160 (file copy did not reproduce clause reserving mineral rights).

Footnote 90. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160 (case remanded to consider appellants' argument that file copy was admissible to show that original deed was prepared on standard form, that it bore same identification number as county recorder's copy and Federal Land Bank ledger, and that it demonstrated physical length of land description, supporting theory that flapped attachment was used on original deed).

Footnote 91. *Fox v Peck Iron & Metal Co.* (BC SD Cal) 25 BR 674 (criticized on other grounds by *In re Eblen* (BC ND Cal) CCH Bankr L Rptr ¶ 73984).

Footnote 92. *Ruberto v Commissioner* (CA2) 774 F2d 61, 85-2 USTC ¶ 9720, 19 Fed Rules Evid Serv 1332, 56 AFTR 2d 85-6107, on remand TC Memo 1987-623, PH TCM ¶ 87623, 54 CCH TCM 1388.

(b). Particular Types of Duplicates [1087-1091]

§ 1087 Photocopies

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

In some jurisdictions, photographic or photostatic reproductions of writings are not considered duplicate originals and are therefore not admissible in evidence over the objection of an adverse party unless a basis is laid for their reception by showing that the original cannot be produced. 93 However, other jurisdictions have generally modified these common-law restrictions as to photocopies by statute or court rule; thus, "photocopy" or "xerox" copies of writings may be admitted into evidence as duplicates unless a genuine question as to their authenticity is raised. 94

§ 1087 ----Photocopies [SUPPLEMENT]

Practice Aids: Evidence: Photocopies of business records, 141 Chi Daily L Bull 86:1 (1995).

Case authorities:

Defense document—Xerox picture—accurately represented what state's witness previously examined and was not excludable as secondary evidence for being photocopy of original. *Snelling v State* (1994) 215 Ga App 263, 450 SE2d 299, 94 Fulton County D R 3860.

Footnotes

Footnote 93. *Edwards v State* (Ala App) 505 So 2d 1297; *Grant v State*, 198 Ga App 732, 403 SE2d 58.

A trial judge did not err in allowing introduction in evidence of a Xerox copy of a statement made by the defendant where a police officer testified that the document was an accurate reproduction of the statement made and signed by the defendant, and that the original could not be found, and where the defendant did not dispute the accuracy of the copy. *Maixner v State* (Tex App Beaumont) 757 SW2d 21.

Footnote 94. *People v Garcia* (2nd Dist) 201 Cal App 3d 324, 247 Cal Rptr 94, review den (Aug 10, 1988); *Stuckey v State* (Ind App) 560 NE2d 88; *Rachel v Commonwealth* (Ky) 523 SW2d 395; *Bass v State* (Miss) 328 So 2d 665; *Schnucks Twenty-Five, Inc. v Bettendorf* (Mo App) 595 SW2d 279; *People v May* (4th Dept) 162 App Div 2d 977, 557 NYS2d 203, app den 76 NY2d 861, 560 NYS2d 1000, 561 NE2d 900 (applying statute providing exception to best evidence rule for business records that are copied or reproduced); *In re Helms*, 55 NC App 68, 284 SE2d 553, petition den 305 NC 300, 291 SE2d 149; *State v Fricke* (Hamilton Co) 13 Ohio App 3d 331, 13 Ohio BR 409, 469 NE2d 1035; *Schulz v St. Mary's Hospital*, 81 Wis 2d 638, 260 NW2d 783.

FRE Rules 1001(4), 1003.

A photograph of a receipt for allegedly stolen property was properly introduced in evidence, where the defendant's attorney, although raising the question of best evidence, did not contest the receipt's existence, language or contents, and waived any error by failing to raise timely and specific objections to its admission. *Bray v State* (Ind) 430 NE2d 1162.

In a criminal prosecution for drug offenses, photocopies of laboratory submission forms that accompanied packets of cocaine through a series of laboratory tests were properly admitted into evidence as sufficiently trustworthy to satisfy the best evidence rule, where testimony established that the photocopies were exact duplicates of the original forms and it was the laboratory's standard procedure to reproduce these documents and where a statute specifically authorized the use of photocopies when produced in the regular course of business. *People v Flores* (2d Dept) 138 App Div 2d 512, 526 NYS2d 125, app den 72 NY2d 859, 532 NYS2d 509, 528 NE2d 899.

In a prosecution for grand larceny, the court properly admitted photostatic copies of a store receipt under best evidence rule where there was neither a dispute over accuracy of the photostatic copy nor any question about the authenticity of the original receipt. *Bolton v State* (Tenn Crim) 617 SW2d 909.

Annotation: Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Admissibility of duplicates under Rules 1001(4) and 1003 of Federal Rules of Evidence, 72 ALR Fed 732.

§ 1088 Carbon copies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a carbon copy of a document or writing is signed or otherwise executed with all necessary formalities, it ranks as a duplicate original as would a copy produced by any other method and formally signed or attested; each copy of the writing is regarded as primary evidence of its contents and may be admitted in evidence without any explanation of the failure to produce the original. 95 Even where it does not appear that the carbon copy was signed or otherwise executed by the parties, such a copy may be regarded as a duplicate original and hence admitted in evidence without explanation of the failure to produce the first, or "original," document or instrument. 96

A carbon copy will not be received in evidence without proper authentication or identification; testimony that the carbon impression offered was made at the same time and by the same writing instrument, whether pencil or typewriter, as the first or "ribbon" copy, is essential. 97

Footnotes

Footnote 95. *Toho Bussan Kaisha, Ltd. v American President Lines, Ltd.* (CA2 NY) 265 F2d 418, 76 ALR2d 1344 (disapproved on other grounds by *Walker v Sheldon*, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497); *Stern Equipment Co. v Portell* (Mun Ct App Dist Col) 116 A2d 601; *International Harvester Co. v Elfstrom*, 101 Minn 263, 112 NW 252; *Morris v Langhausen*, 155 Mont 362, 472 P2d 860; *Maston v Glen Lumber Co.*, 65 Okla 80, 163 ¶ 128.

Annotation: Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342 § 4.

Footnote 96. *United States v Manton* (CA2 NY) 107 F2d 834, cert den 309 US 664, 84 L Ed 1012, 60 S Ct 590; *Walker Invest., Inc. v American Express Field Warehousing Corp.* (CA5 Fla) 276 F2d 591; *American Surety Co. v Blake*, 54 Idaho 1, 27 P2d 972, 91 ALR 153; *Davis v Williams Bros. Const. Co.*, 207 Ky 404, 269 SW 289; *Eastover Co. v All Metal Fabricators, Inc.*, 221 Md 428, 158 A2d 89; *Rubenstein v Metropolitan Life Ins. Co.*, 118 W Va 367, 190 SE 531.

A carbonized duplicate original of a breath test report is admissible in evidence without accounting for nonproduction of the original, and accordingly a police officer's testimony in a prosecution for driving while intoxicated, based on his having refreshed his memory from the duplicate original which was not introduced into evidence, was admissible. *Davis v State* (Ala App) 387 So 2d 882.

Annotation: 65 ALR2d 342 § 5.

Footnote 97. American Surety Co. v Blake, 54 Idaho 1, 27 P2d 972, 91 ALR 153; Liberty Chair Co. v Crawford, 193 NC 531, 137 SE 577, 51 ALR 1496; Bouknight v Langdeau (Tex Civ App Austin) 333 SW2d 670, writ granted (Tex) 3 Tex Sup Ct Jour 395 and affd in part and revd in part on other grounds 162 Tex 42, 344 SW2d 435, reh of cause overr (Apr 5, 1961); Sance v Burnett (Tex Civ App Fort Worth) 316 SW2d 761.

With respect to the admissibility in evidence of carbon copies of letters containing declarations against interest by a party to the suit, offered as memoranda kept by the declarant in his files, testimony showing that the files were accurately maintained by a competent secretary and that carbon copies of all letters which the declarant wrote were deposited in them vouches for the fact that the carbon copies constituted utterances by the party. Hall v Pierce, 210 Or 98, 307 P2d 292, 65 ALR2d 316, reh den 210 Or 145, 309 P2d 997 and motion to dismiss app den 210 Or 148, 309 P2d 998.

A carbon copy of a search warrant was a duplicate original produced at the same time as the original, and the detective who prepared the warrant testified that the warrant was produced in multiplicate; thus, admission of the copy without proof that the original was unavailable did not violate the best evidence rule. Commonwealth v Johnson, 373 Pa Super 312, 541 A2d 332, app den 520 Pa 596, 552 A2d 250 and (among conflicting authorities on other grounds noted in Commonwealth v McHugh, 11 Pa D & C4th 449).

Annotation: 65 ALR2d 342 §§ 10, 16.

§ 1089 Re-recordings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Audio or video re-recordings are generally admissible as duplicates, provided their authenticity is established and the original recording is made available for comparison.

98 Re-recordings may also be admitted as duplicates where it is established that the original recording has been lost or destroyed. 99

Footnotes

Footnote 98. People v Stephens, 117 Cal App 2d 653, 256 P2d 1033; State v Lyskoski, 47 Wash 2d 102, 287 P2d 114.

Duplicates of tape recordings can be introduced at trial if the requirements of FRE Rule 1003 are complied with. United States v Di Matteo (CA11 Fla) 716 F2d 1361, 14 Fed Rules Evid Serv 575, vacated on other grounds, remanded on other grounds 469 US 1101, 83 L Ed 2d 767, 105 S Ct 769, on remand (CA11 Fla) 759 F2d 831, 17 Fed Rules Evid Serv 1445, cert den 474 US 860, 88 L Ed 2d 143, 106 S Ct 172.

The best evidence rule did not preclude the admission in evidence in a criminal

prosecution of a re-recording of a tape-recorded conversation between the defendant and a prosecution witness where the re-recording became necessary because the original was of insufficient quality to be understood, where the original was also received in evidence, where the re-recording was properly identified by the witness involved and by the person who made the re-recording, and where the defense objection to the admission of the re-recording failed to indicate that any controversy existed as to its content; in effect, the re-recording was the original recording made useable by resort to approved electronic recording techniques, rather than a copy used contrary to a best evidence rule "to prove the content" of the original. *People v Marcus* (2nd Dist) 31 Cal App 3d 367, 107 Cal Rptr 264, 58 ALR3d 594.

The trial court in an attempted murder prosecution properly admitted copies of tape recorded conversations between defendant and an undercover agent, notwithstanding the fact that the copies had been enhanced by an expert in voice analysis to make the spoken words more audible, where the original recordings had been satisfactorily authenticated, and where the expert authenticated the enhanced copies as faithfully reproducing the originals. *Golden v State* (Fla App D1) 429 So 2d 45, petition den (Fla) 431 So 2d 988 and cause dismd (Fla) 438 So 2d 833.

A duplicate tape recording requires no more foundation than does the original for admission into evidence. *King v State* (Ind) 540 NE2d 1203.

Generally, as to the admissibility of sound recordings in evidence, see § 583.

Annotation: Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598 § 10[b].

Footnote 99. *State v Booker* (Del Super) 547 A2d 618; *Hurt v State* (Okla Crim) 303 P2d 476.

In a prosecution for first-degree murder, the best evidence rule did not preclude the admission into evidence of a second recording made of the defendant's statement to police, although the first recorded statement was not admitted, where the first statement was of poor quality and the second statement was recorded on same cassette thus erasing the first statement. *State v McDonald* (La) 387 So 2d 1116, cert den 449 US 957, 66 L Ed 2d 222, 101 S Ct 366, habeas corpus proceeding (CA5 La) 806 F2d 613, cert den 481 US 1070, 95 L Ed 2d 874, 107 S Ct 2465.

The admission into evidence of a re-recording of a taped conversation did not violate the best evidence rule where the erasure of the original tape was not a deliberate attempt to destroy evidence, there was evidence that the secondary tape recording was an accurate and faithful reproduction of the original tape, and there was a proper foundation laid for the playing of the tape to the jury. *People v Hughes* (3d Dept) 124 App Div 2d 344, 507 NYS2d 285.

§ 1090 Copies of public records

[View Entire Section](#)

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilation in any form, if otherwise admissible, may be proved by a copy, certified as correct or testified to be correct by a witness who has compared it with the original; and if a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. 1 Rule 1005 does not purport to guarantee the admissibility of the contents of public records, but only insures that these contents may, under the conditions specified in the Rule, be introduced by way of copy rather than production of the original, if the contents of the original record are "otherwise admissible." 2

The requirement of "otherwise admissible" under FR Evid, Rule 1005 is not satisfied where a copy of a public record is incapable of being properly authenticated, or where it would be unfair to admit the copy in lieu of the original under FR Evid, Rule 1003. 3 Public records call for somewhat different treatment than other documents, since removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian, and thus under FR Evid, Rule 1005, no explanation need be given for failure to produce the original of a public record where a copy offered in evidence has been certified or compared. 4

Under FR Evid, Rule 1005, no other evidence of lesser dignity is admissible when a properly recorded copy is available as evidence, and only if both the original and a FR Evid, Rule 1005 copy are unavailable may other evidence be used. 5

In lieu of certification of a copy as correct, a copy of a public record may be testified to be correct by a witness who has compared it with the original. 6

◆ Practice guide: Even where copies of an official record are neither certified as correct nor sworn to be correct by a witness who has compared them with the originals in accordance with FR Evid, Rule 1005, these copies may be admissible in evidence under FR Evid, Rule 1003 where no issue is raised as to their authenticity. 7

Footnotes

Footnote 1. FRE Rule 1005; Uniform Rules of Evidence, Rule 1005.

The use of a district court computer printout to prove prior misdemeanor convictions in the sentencing phase of a trial was proper where the printouts were certified by the district court clerk as being true and accurate copies of the underlying records. *Hill v Commonwealth* (Ky App) 779 SW2d 230.

When introducing a copy of an official document into evidence, the reproduction does not have to be a photocopy of the original; it is entirely appropriate for the commonwealth to utilize any means of reproduction (for example, photocopy, typed or even hand-written), and so long as the certified copy is proper on its face, such reproduction must be accepted by the courts with the same force and effect as the original. *Commonwealth, Dept. of Transp. Bureau of Traffic Safety v Stevens*, 99 Pa

Cmwlth 563, 514 A2d 233.

The best evidence of the contents of a judicial act or proceeding is the record itself or a certified copy. *Gutierrez v State* (Tex App Corpus Christi) 745 SW2d 529, petition for discretionary review ref (May 25, 1988).

For a discussion of certification of copies of public records under FRE Rule 902(4), see § 1186.

Annotation: Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 ALR2d 1227.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784.

Sufficiency, under Federal Civil Procedure Rule 44(a)(1), of authentication of copy of domestic official record, 2 ALR Fed 306.

Practice References Foundation for Admission of Secondary Evidence. 35 Am Jur Proof of Facts 2d 147 § 2.

Footnote 2. *United States v Ruffin* (CA2 NY) 575 F2d 346, 78-1 USTC ¶ 9269, 2 Fed Rules Evid Serv 1307, 41 AFTR 2d 78-1021 (criticized on other grounds by *United States v De Bright* (CA9 Ariz) 710 F2d 1404) and (among conflicting on other grounds authorities noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Panzardi-Lespier* (CA1 Puerto Rico) 918 F2d 313, 31 Fed Rules Evid Serv 846).

Footnote 3. *Amoco Production Co. v United States* (DC Utah) 455 F Supp 46, 3 Fed Rules Evid Serv 1177, 61 OGR 113, revd on other grounds (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

For a discussion of FRE Rule 1003, see § 1085.

For a discussion of FRE Rules 803 and 804, see §§ 679 et seq.

Footnote 4. Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 1005.

Practice References Hunter, *Federal Trial Handbook* 2d § 59.6.

Footnote 5. *Amoco Production Co. v United States* (DC Utah) 455 F Supp 46, 3 Fed Rules Evid Serv 1177, 61 OGR 113, revd on other grounds (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Footnote 6. *Deyling v Flowers* (Cuyahoga Co) 10 Ohio App 3d 19, 10 Ohio BR 25, 460 NE2d 280.

There is substantial compliance with FRE Rule 1005 where a witness testifies that a copy was made by him or her from the original, even though the witness does not specifically state that the copy is a correct copy, since the witness' failure to indicate otherwise would be taken as an indication that the copy is an accurate duplicate of the original. *United States v Rodriguez* (CA5 Tex) 524 F2d 485, 1 Fed Rules Evid Serv 143, reh den (CA5 Tex) 528 F2d 928 and cert den 424 US 972, 47 L Ed 2d 741, 96 S Ct 1474.

Footnote 7. *United States v Barnes* (SD NY) 443 F Supp 137, 2 Fed Rules Evid Serv 779, affd (CA2 NY) 604 F2d 121, cert den 446 US 907, 64 L Ed 2d 260, 100 S Ct 1833, habeas corpus proceeding (CA2 NY) 814 F2d 888 and (criticized on other grounds by *United States v Gomberg* (CA3 Pa) 715 F2d 843).

For a discussion of FRE Rule 1003, see § 1085.

§ 1091 --Particular records admissible

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 1005 of the Federal Rules of Evidence authorizes the admission into evidence of computer printouts of data gathered by a federal agency. 8 However, the contents of a computer printout purporting to report what a person had told an IRS employee were not "otherwise admissible" within the meaning of FR Evid, Rule 1005, where the printout did not fit within any of the hearsay exceptions set forth in FR Evid, Rule 803 and 804. 9 Certified exemplified copies of docket entries from a state court are admissible under FR Evid, Rule 1005. 10

While the language of FR Evid, Rule 1005 encompasses deeds, mortgages, 11 and other documents filed in a county recorder's office, it is the actual record maintained by the public office which is the object of the Rule, not the original deed from which the record is made; if the original deed is returned to the parties after it is recorded, it is not a public record as contemplated by FR Evid, Rule 1005. 12 However, FR Evid, Rule 1005 cannot be applied to exclude all evidence of an original deed other than the recorded version when the very question in controversy is whether the original deed was correctly transcribed onto the recorded version. 13

Since vehicle registration is a matter of public record, a copy of an official vehicle registration certificate is admissible in evidence under FR Evid, Rule 1005 where there is testimony by a witness that the copy was made from the original. 14

Footnotes

Footnote 8. *Seese v Volkswagenwerk A. G.* (CA3 NJ) 648 F2d 833, CCH Prod Liab Rep ¶ 8951, 8 Fed Rules Evid Serv 45, cert den 454 US 867, 70 L Ed 2d 168, 102 S Ct 330 and (criticized on other grounds by *Shipp v General Motors Corp.* (CA5 Tex) 750 F2d 418, CCH Prod Liab Rep ¶ 10344, 17 Fed Rules Evid Serv 346, 1 FR Serv 3d 114) (statistical information on fatal accidents gathered by National Highway Traffic and

Safety Administration's Fatal Accident Reporting System).

Annotation: Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Footnote 9. *United States v Ruffin* (CA2 NY) 575 F2d 346, 78-1 USTC ¶ 9269, 2 Fed Rules Evid Serv 1307, 41 AFTR 2d 78-1021 (criticized on other grounds by *United States v De Bright* (CA9 Ariz) 710 F2d 1404) and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Panzardi-Lespier* (CA1 Puerto Rico) 918 F2d 313, 31 Fed Rules Evid Serv 846).

Footnote 10. *United States v Tombrello* (CA11 Ala) 666 F2d 485, 9 Fed Rules Evid Serv 1153, cert den 456 US 994, 73 L Ed 2d 1291, 102 S Ct 2279.

Footnote 11. Generally, as to the application of the best evidence rule to deeds and mortgages, see § 1077.

Footnote 12. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Footnote 13. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Footnote 14. *United States v Rodriguez* (CA5 Tex) 524 F2d 485, 1 Fed Rules Evid Serv 143, reh den (CA5 Tex) 528 F2d 928 and cert den 424 US 972, 47 L Ed 2d 741, 96 S Ct 1474 (vehicle registration).

5. Parol or Extrinsic Evidence Affecting Writings [1092-1145]

a. In General; Parol Evidence Rule [1092-1105]

§ 1092 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The parol evidence rule generally precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract—a writing the parties have adopted as the expression of their final agreement. 15 The rule applies to exclude both oral and written extrinsic evidence. 16 It also operates to exclude evidence that

varies or contradicts both the express and the implied terms of a written agreement. 17

The parol evidence rule applies when there is a single and final memorial of the understanding of the parties; when that takes place, all prior and contemporaneous negotiations are excluded and are superseded by such written memorial. 18

The parol evidence rule is subject to many limitations and exceptions 19 which permit the reception of parol evidence where, for example, the writing in question is ambiguous 20 or incomplete, 21 or is attended by fraud, 22 mistake, 23 or erroneous omission. 24 In addition, since application of the rule presupposes the existence of a valid contract, parol evidence is admissible for the purpose of challenging the existence or validity of the contract. 25

§ 1092 ----Generally [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Introduction of Evidence Over Parol Evidence

Case authorities:

In action by bank to recover deficiency from guarantors of promissory note, parol evidence that alleged oral statements made by employee of bank assured guarantors that 5-year term could be substituted for 3-year term was inadmissible, where note and written guaranty plainly stated term as 3 years and, absent ambiguity in loan documents, parol evidence tending to vary or contradict terms had to be excluded. *Cusimano v First Md. Sav. & Loan* (1994, Dist Col App) 639 A2d 553, 23 UCCRS2d 14.

Footnotes

Footnote 15. *Northern Assur. Co. v Grand View Bldg. Asso.*, 183 US 308, 46 L Ed 213, 22 S Ct 133; *Viceroy Fluid Power International, Inc. v Banks Engineering Co.* (WD Pa) 680 F Supp 725, 6 UCCRS2d 184; *Dixon v S & S Loan Serv.* (SD Ga) 754 F Supp 1567; *Kupka v Morey* (Alaska) 541 P2d 740, 17 UCCRS 1383; *Wagner v Glendale Adventist Medical Center* (2nd Dist) 216 Cal App 3d 1379, 265 Cal Rptr 412, 115 CCH LC ¶ 56252; *Wickenheiser v Ramm Vending Promotion, Inc.* (Fla App D5) 560 So 2d 350, 15 FLW D 1138; *Hornsby v Holt*, 359 SE2d 646, 257 Ga 341; *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887; *Koester v Weber, Cohn & Riley, Inc.* (1st Dist) 193 Ill App 3d 1045, 550 NE2d 1004, app den 132 Ill 2d 546, 144 Ill Dec 258, 555 NE2d 377; *Echols v State* (Iowa App) 440 NW2d 402; *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301; *Geiger v Pierce*, 233 Mont 18, 758 P2d 279; *Five Points Bank v White*, 231 Neb 568, 437 NW2d 460; *Empire West Cos. v Albuquerque Testing Laboratories, Inc.*, 110 NM 790, 800 P2d 725; *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440, 566 NE2d 639; *Stamp v Honest Abe Log Homes, Inc.* (Tenn App) 804 SW2d 455; *C & C Partners v Sun Exploration & Production Co.* (Tex App Dallas) 783 SW2d 707, 111 OGR 308, writ den (Jun 20, 1990) and reh overr (Sep 6, 1990); *Isbrandtsen v North Branch Corp.*, 150 Vt 575, 556 A2d 81; *Collia v McJunkin*, 178 W Va 158, 358 SE2d 242, cert den 484 US 944, 98 L Ed 2d 357, 108 S Ct 330; *Bethurem v Hammett* (Wyo) 736 P2d 1128.

Annotation: Which of conflicting descriptions in deeds or mortgages of fractional quantity of interest intended to be conveyed prevails, 12 ALR4th 795.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259 § 7.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227 § 4.

As to conflicting descriptions in deeds, generally, see 23 AJ2d, Deeds § 197.

As to conflicting descriptions in mortgages, generally, see 55 AJ2d, Mortgages §§ 175, 177.

Footnote 16. *Evensen v Pubco Petroleum Corp.* (CA10 NM) 274 F2d 866, 14 OGR 1021; *In re Estate of Gaines*, 15 Cal 2d 255, 100 P2d 1055; *Hall v Hall*, 777 P2d 255, 116 Idaho 483; *Hubacek v Ennis State Bank*, 159 Tex 166, 317 SW2d 30, reh'g of cause overr (Nov 12, 1958) and on remand (Tex Civ App Waco) 322 SW2d 409, writ diss w o j 159 Tex 576, 325 SW2d 124, reh'g of writ of error overr (Jul 8, 1959); *Bond v Wiegardt*, 36 Wash 2d 41, 216 P2d 196.

The real objection to the use of parol evidence is not that it is oral as distinguished from written, but that it is extrinsic, and tends to prove what is not a term of the contract. *Hubacek v Ennis State Bank*, 159 Tex 166, 317 SW2d 30, reh'g of cause overr (Nov 12, 1958) and on remand (Tex Civ App Waco) 322 SW2d 409, writ diss w o j 159 Tex 576, 325 SW2d 124, reh'g of writ of error overr (Jul 8, 1959).

As to the application of the parol evidence rule to particular types of writings, see §§ 1099 et seq.

Footnote 17. § 1094.

Footnote 18. *In re Estate of Gaines*, 15 Cal 2d 255, 100 P2d 1055; *Mangini v Wolfschmidt, Ltd.* (2nd Dist) 165 Cal App 2d 192, 331 P2d 728, appeal after remand (2nd Dist) 192 Cal App 2d 64, 13 Cal Rptr 503.

The parol evidence rule as applied to contracts is simply that as a matter of substantive law, a certain act—that is, the act of embodying the complete terms of an agreement in a writing—becomes the contract of the parties. *In re Estate of Gaines*, 15 Cal 2d 255, 100 P2d 1055.

Except as stated in Restatement 2d, Contracts § 214, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing. Restatement, Contracts 2d § 215.

As to the "exceptions" to the parol evidence rule according to § 214 of the Restatement, see §§ 1106 and , see §§ 1116.

Footnote 19. For a discussion of the various exceptions to the parol evidence rule, see §§ 1106 et seq.

Footnote 20. §§ 1134 et seq.

Footnote 21. §§ 1116 et seq.

Footnote 22. As to the admissibility of parol evidence in the case of fraud, see 37 Am Jur 2d, Fraud and Deceit §§ 451-453.

Footnote 23. § 1112.

Footnote 24. § 1120.

Footnote 25. §§ 1108 et seq.

As to the application of the parol evidence rule to informal memoranda of agreements, see § 1101.

§ 1093 Parol evidence rule as one of substantive law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule is a rule of substantive law, rather than a mere rule of evidence. 26 The rule has nothing to do with the probative value of one fact as persuasive of the probable existence of another fact; rather, it deals with the question of where the terms of a legal act are to be found. 27 Although the parol evidence rule is not itself a rule of interpretation, it fixes the subject matter for interpretation, 28 and where applicable, it defines the limits of a contract. 29

Footnotes

Footnote 26. In re RBS Industries, Inc. (BC DC Conn) 115 BR 417, 20 BCD 1136, later proceeding (BC DC Conn) 115 BR 419; Associated Hardware Supply Co. v Big Wheel Distributing Co. (CA3 Pa) 355 F2d 114, 9 FR Serv 2d 56c.41, Case 9, 3 UCCRS 1, 17 ALR3d 998; Lower Kuskokwim School Dist. v Alaska Diversified Contractors, Inc. (Alaska) 734 P2d 62, appeal after remand (Alaska) 778 P2d 581, cert den 493 US 1022, 107 L Ed 2d 744, 110 S Ct 725; Formento v Encanto Business Park (App) 154 Ariz 495, 744 P2d 22; Cooper v Vaughan, 81 Ga App 330, 58 SE2d 453; Midkiff v Castle & Cooke, Inc., 45 Hawaii 409, 368 P2d 887; Williams v Williams, 251 Iowa 260, 100 NW2d 185; Johnson v Johnson, 297 Ky 268, 178 SW2d 983 (among conflicting authorities noted in Miles v Dawson (Ky) 830 SW2d 368); Burrowes Corp. v Read, 151 Me 92, 116 A2d 127; Salzman v Maldaver, 315 Mich 403, 24 NW2d 161, 168 ALR 381; Apple Valley Red-E-Mix, Inc. v Mills-Winfield Engineering Sales, Inc. (Minn App) 436 NW2d 121, 8 UCCRS2d 21; Central Production Credit Assn. v Reed (Mo App) 805 SW2d 300; Charles A. Burton, Inc. v Durkee, 158 Ohio St 313, 49 Ohio Ops 174, 109 NE2d 265; O'Brien v O'Brien, 362 Pa 66, 66 A2d 309, 10 ALR2d 714; McQuiddy Printing Co. v Hirsig, 23 Tenn App 434, 134 SW2d 197; Arkansas Oak Flooring Co. v

Mixon (Tex Civ App Texarkana) 369 SW2d 804; Isbrandtsen v North Branch Corp., 150 Vt 575, 556 A2d 81; Whitt v Godwin, 205 Va 797, 139 SE2d 841; Equitable Life Leasing Corp. v Cedarbrook, Inc., 52 Wash App 497, 761 P2d 77; North Am. Uranium v Johnston, 77 Wyo 332, 316 P2d 325.

Footnote 27. Milton v Burton, 79 Fla 266, 84 So 147.

Footnote 28. Warinner v Nugent, 362 Mo 233, 240 SW2d 941, 26 ALR2d 278.

Footnote 29. Florence v Tri-State Sav. & Loan Co. (App, Hamilton Co) 68 Ohio Ops 2d 146, 322 NE2d 322.

§ 1094 Rule as affecting express and implied contractual terms

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is inadmissible to vary or contradict either the express or implied terms of a writing expressing the agreement of the parties. 30 The law conclusively presumes that parties to a contract understand its obligations, and evidence is not admissible to show their understanding to have been otherwise. 31 For example, where a reasonable time for the performance of a contract is implied in law, parol evidence of an agreement by the parties that the time for performance is other than a reasonable time is not admissible. 32 There is some authority, however, to the effect that an implication of law arises only in cases in which the parties are silent, and that a parol agreement puts an end to the inference which the law raises, and may be proved to contradict such implication or inference. 33

Footnotes

Footnote 30. The Delaware, 81 US 579, 14 Wall 579, 20 L Ed 779; Title Ins. Co. v Costain Arizona, Inc. (App) 164 Ariz 203, 791 P2d 1086, 60 Ariz Adv Rep 35; McQuiddy Printing Co. v Hirsig, 23 Tenn App 434, 134 SW2d 197; Henderson v Scott Oil & Refining Co. (Tex Civ App) 258 SW 1082, writ dismissed, error dismissed; McGregor v First Farmers'-Merchants' Bank & Trust Co., 180 Wash 440, 40 P2d 144.

Footnote 31. McQuiddy Printing Co. v Hirsig, 23 Tenn App 434, 134 SW2d 197.

Footnote 32. § 1118.

As to the admissibility of extrinsic evidence regarding the time of performance or payment under a written agreement, generally, see § 1130.

Footnote 33. Masterson v Sine, 68 Cal 2d 222, 65 Cal Rptr 545, 436 P2d 561, holding that, where an option clause in a deed did not expressly provide that it contained a complete agreement and the deed was silent on the question of assignability, it was error to exclude evidence to the effect that the parties agreed that the option was not

assignable.

As to incomplete writings and the doctrine of partial integration as an exception to the parol evidence rule, see §§ 1116 et seq.

§ 1095 Effect of integration or merger clause

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule is particularly applicable where the writing contains an integration or a merger clause—a recital that the writing contains the entire agreement between the parties, that all prior negotiations and agreements are merged in that agreement, and that all additions to or alterations or changes in the contract must be in writing and signed by both parties. 34 Such a stipulation announces and demonstrates the all-inclusive nature of the written instrument and furnishes an additional reason for applying the parol evidence rule. 35 While the wording of an integration clause in an agreement is some evidence of integration, it is not conclusive; 36 however, there is also some authority to the contrary. 37 In addition, the absence of a merger clause in a writing does not necessarily open the door to parol evidence. 38

Footnotes

Footnote 34. In re Gulf Oil/Cities Service Tender Offer Litigation (SD NY) 725 F Supp 712, CCH Fed Secur L Rep ¶ 94708, 1989-2 CCH Trade Cases ¶ 68779, amd, on reh (SD NY) CCH Fed Secur L Rep ¶ 94732, 1989-2 CCH Trade Cases ¶ 68803, later proceeding (SD NY) 1990 US Dist LEXIS 5009, later proceeding (SD NY) 1990 US Dist LEXIS 6089, later proceeding (SD NY) 1990 US Dist LEXIS 8649 and later proceeding (SD NY) 1991 US Dist LEXIS 1814, later proceeding (SD NY) 776 F Supp 838, CCH Fed Secur L Rep ¶ 96476, 34 Fed Rules Evid Serv 653, later proceeding (SD NY) 776 F Supp 838, 1991-2 CCH Trade Cases ¶ 69639, costs/fees proceeding (SD NY) 142 FRD 588, CCH Fed Secur L Rep ¶ 96845 (criticized by Dubin v E.F. Hutton Group (SD NY) CCH Fed Secur L Rep ¶ 98161); Giant Food Stores, Inc. v Marketplace Communications Corp. (MD Pa) 717 F Supp 1071; Viceroy Fluid Power International, Inc. v Banks Engineering Co. (WD Pa) 680 F Supp 725, 6 UCCRS2d 184; R. G. Varner Steel Products, Inc. v Puterbaugh, 233 Ark 953, 349 SW2d 805; Fogelson v Rackfay Const. Co., 300 NY 334, 90 NE2d 881, reh den 301 NY 552, 93 NE2d 349.

Where a contract between a gasoline dealer and supplier specified the minimum amount of gasoline that the supplier could be required to deliver in any one month, and by its express terms constituted the entire agreement of the parties, under UCC § 2-202 the dealer was precluded by the parol evidence rule from introducing evidence to show that the contract was intended to be a requirements contract imposing on the supplier an obligation to supply the dealer its entire marketing needs of gasoline. Intermar, Inc. v Atlantic Richfield Co. (ED Pa) 364 F Supp 82, 1973-2 CCH Trade Cases ¶ 74773 (applying Pennsylvania UCC).

Footnote 35. *Fogelson v Rackfay Const. Co.*, 300 NY 334, 90 NE2d 881, reh den 301 NY 552, 93 NE2d 349.

As to incomplete agreements and the doctrine of partial integration, see §§ 1116 et seq.

Footnote 36. *Sierra Diesel Injection Service, Inc. v Burroughs Corp.* (DC Nev) 656 F Supp 426, 3 UCCRS2d 1378, affd (CA9 Nev) 874 F2d 653, 8 UCCRS2d 617, amd, reh den, en banc (CA9 Nev) 890 F2d 108, 9 UCCRS2d 1236.

Although there is an integration clause in a contract, evidence is admissible to show that the parties did not intend the writing to be a complete statement of their transaction. *Luther Williams, Jr., Inc. v Johnson* (Dist Col App) 229 A2d 163.

Footnote 37. *Johnson v Orkin Exterminating Co.* (ED La) 746 F Supp 627, holding that an integration clause in an extermination contract was conclusive in its effect.

Footnote 38. *Bank Leumi Trust Co. v Wulkan* (SD NY) 735 F Supp 72.

§ 1096 Persons affected by rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule generally applies only to the parties to a written agreement, 39 and those who are privy to a party, 40 such as third-party beneficiaries. 41 In some jurisdictions, statutes confine the application of the parol evidence rule to the parties to the writing and their representatives or successors in interest; 42 in such jurisdictions, where there is a contest between a party to the instrument and one who is a stranger to a writing, neither the party nor the stranger is bound by the rule. 43 Furthermore, there is authority for the view that this may be the case even in the absence of a such a limiting statutory provision. 44 Accordingly, parol evidence ordinarily may be used to vary or contradict a written instrument when the litigation is between a party to the instrument and a stranger to the instrument. 45

However, there is authority for the view that the parol evidence rule operates to protect all whose rights stem from or depend upon the instrument, even though they were not parties to it. 46 Under this view, where the writing comes into question only collaterally between one of the parties to the writing and a stranger to the writing, the parol evidence rule does not preclude either party to the action from introducing parol evidence to vary, contradict, or explain the writing. 47

Footnotes

Footnote 39. *Cleveland v Cleveland Electric Illuminating Co.* (ND Ohio) 538 F Supp 1287; *Bessemer Properties, Inc. v Barber* (Fla App D2) 105 So 2d 895; *Kimmel v Iowa Realty Co.* (Iowa) 339 NW2d 374; *Denha v Jacob*, 446 NW2d 303, 179 Mich App 545; *Sullivan v Estate of Eason* (Miss) 558 So 2d 830; *Smith v Falke* (Miss) 474 So 2d 1044;

American Bank v Wegener (Mo App) 776 SW2d 922; SIN, Inc. v Department of Finance (1st Dept) 126 App Div 2d 339, 513 NYS2d 430, app gr 70 NY2d 603, 518 NYS2d 1025, 512 NE2d 551 and affd 71 NY2d 616, 528 NYS2d 524, 523 NE2d 811; McComb v McComb, 226 Va 271, 307 SE2d 877; In re Prior Bros., Inc., 29 Wash App 905, 632 P2d 522, 32 UCCRS 303.

Footnote 40. Fulton v L & N Consultants, Inc. (CA10 Okla) 715 F2d 1413 (applying Okla law); Horn v Hansen, 56 Minn 43, 57 NW 315; Daggett v Corn (Tex Civ App) 54 SW2d 1098, writ dismissed; Garrett v Ellison, 93 Utah 184, 72 P2d 449, 129 ALR 666.

Footnote 41. Suci v Amfac Distributing Corp. (App) 138 Ariz 514, 675 P2d 1333; SIN, Inc. v Department of Finance (1st Dept) 126 App Div 2d 339, 513 NYS2d 430, app gr 70 NY2d 603, 518 NYS2d 1025, 512 NE2d 551 and affd 71 NY2d 616, 528 NYS2d 524, 523 NE2d 811; United States Gypsum Co. v Gleason, 135 Wis 539, 116 NW 238.

Footnote 42. Lemke v Sears, Roebuck & Co. (CA4 Va) 853 F2d 253; Jackson v Donovan (5th Dist) 215 Cal App 2d 685, 30 Cal Rptr 755; Sullivan v Estate of Eason (Miss) 558 So 2d 830; American Bank v Wegener (Mo App) 776 SW2d 922.

Footnote 43. In re Alterman (BC ED Va) 127 BR 356, 3 Fourth Cir & Dist Col Bankr Ct Rep 396; Echo, Inc. v Stafford, 730 SW2d 913, 21 Ark App 201; Penberthy v Vahl, 101 Cal App 2d 1, 224 P2d 907; Neves v Potter (Colo) 769 P2d 1047; Tropicana Products, Inc. v Shirley (Fla App D2) 530 So 2d 493, 13 FLW 2065, review dismissed (Fla) 541 So 2d 1173; Chenevert v Lemoine (La App 3d Cir) 161 So 2d 85, cert den 245 La 1076, 162 So 2d 572; North Dakota Ins. Guaranty Assn. v Agway, Inc. (ND) 462 NW2d 142.

The parol evidence rule cannot be invoked either by or against a stranger to a contract. Denha v Jacob, 179 Mich App 545, 446 NW2d 303.

Footnote 44. Worcester Felt Pad Corp. v Tucson Airport Authority (CA9 Ariz) 233 F2d 44, 59 ALR2d 1121; Shelby County v Baker, 269 Ala 111, 110 So 2d 896; Bowman v Tax Com. (Franklin Co) 61 Ohio App 163, 15 Ohio Ops 129, 28 Ohio L Abs 674, 22 NE2d 524, affd 135 Ohio St 295, 14 Ohio Ops 189, 20 NE2d 916; Carolina Casualty Ins. Co. v Oregon Auto. Ins. Co., 242 Or 407, 408 P2d 198.

If one party to an action may introduce parol evidence to vary or contradict a writing because he or she is a stranger to the writing, all other parties to the action must be granted the same privilege, even though they are parties to the writing. Kassianov v Raissis (1st Dist) 200 Cal App 2d 573, 19 Cal Rptr 614; Orangeburg v Buford, 227 SC 280, 87 SE2d 822.

Footnote 45. In re Alterman (BC ED Va) 127 BR 356, 3 Fourth Cir & Dist Col Bankr Ct Rep 396; Watson v McGee (Ala) 348 So 2d 461; Echo, Inc. v Stafford, 730 SW2d 913, 21 Ark App 201; Neves v Potter (Colo) 769 P2d 1047; Tropicana Products, Inc. v Shirley (Fla App D2) 530 So 2d 493, 13 FLW 2065, review dismissed (Fla) 541 So 2d 1173; Hobbs v Central Equipment Rentals, Inc. (La App 3d Cir) 382 So 2d 238, 66 OGR 487, cert den (La) 385 So 2d 785; Bohle v Thompson, 78 Md App 614, 554 A2d 818, 8 UCCRS2d 897, cert den 316 Md 364, 558 A2d 1206; Kussler v Burlington Northern, Inc., 186 Mont 82, 606 P2d 520; North Dakota Ins. Guaranty Assn. v Agway, Inc. (ND) 462 NW2d 142; Nelson v United Fire Ins. Co., 275 SC 92, 267 SE2d 604; Evans v Tillett Bros. Const. Co. (Tenn App) 545 SW2d 8.

In an action brought by an injured party against a manufacturer and a seller of a lawn mower, the defendants were not entitled to invoke the parol evidence rule in order to preclude the plaintiff from introducing evidence regarding her intent in executing a general release in favor of a homeowner's insurer, since the defendants were strangers to that release. *Lemke v Sears, Roebuck & Co.* (CA4 Va) 853 F2d 253.

Testimony by a partner as to why a seller of real estate placed the title to certain transferred property solely in the partner's brother's name and testimony concerning the agreement underlying the transfer of the deed on another property did not violate the parol evidence rule, as the partner was not a party to the deeds and could therefore testify as to facts surrounding the transfer. *Bassett v Bassett*, 798 P2d 160, 110 NM 559.

Footnote 46. *Transport Indem. Co. v Liberty Mut. Ins. Co.* (CA9 Or) 620 F2d 1368 (applying Or law); *Green v Grant* (Colo App) 635 P2d 236; *Minneapolis, S. P. & S. S. M. R. Co. v Home Ins. Co.*, 55 Minn 236, 56 NW 815; *SIN, Inc. v Department of Finance* (1st Dept) 126 App Div 2d 339, 513 NYS2d 430, app gr 70 NY2d 603, 518 NYS2d 1025, 512 NE2d 551 and affd 71 NY2d 616, 528 NYS2d 524, 523 NE2d 811.

The parol evidence rule applies as to rights which originate in the relation established by, or which are founded on, the written contract even though the question arises as between a stranger to the contract and a party to the contract. *Akamine & Sons, Ltd. v American Secur. Bank*, 50 Hawaii 304, 440 P2d 262, reh den 50 Hawaii 368.

Footnote 47. *Worcester Felt Pad Corp. v Tucson Airport Authority* (CA9 Ariz) 233 F2d 44, 59 ALR2d 1121; *Shelby County v Baker*, 269 Ala 111, 110 So 2d 896; *Marks & Stix v Hardy's Adm'r*, 117 Ky 663, 78 SW 864, and 117 Ky 673, 78 SW 1105; *Fitzgerald v Union Stockyards Co.*, 89 Neb 393, 131 NW 612; *Edgerly v Emerson*, 23 NH 555; *Bowman v Tax Com. (Franklin Co)* 61 Ohio App 163, 15 Ohio Ops 129, 28 Ohio L Abs 674, 22 NE2d 524, affd 135 Ohio St 295, 14 Ohio Ops 189, 20 NE2d 916; *Carolina Casualty Ins. Co. v Oregon Auto. Ins. Co.*, 242 Or 407, 408 P2d 198; *Andersen Yard Co. v Citizens' State Bank*, 187 Wis 60, 203 NW 921.

If one party to an action may introduce parol evidence to vary or contradict a writing because he or she is a stranger to the writing, all other parties to the action must be granted the same privilege, even though they are parties to the writing. *Kassianov v Raissis* (1st Dist) 200 Cal App 2d 573, 19 Cal Rptr 614.

§ 1097 Determination of compliance with rule on judgment on pleadings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A litigant's right to obtain judgment in reliance upon the parol evidence rule may be determined on the pleadings, and judgment may be entered for want of a sufficient answer or reply where the answer or reply sets up an oral agreement invalidated by the rule. 48 Facts which would be excluded from consideration under the parol evidence rule must be ignored for the purpose of motions and other defenses which go to the sufficiency of a pleading. 49

◆ Practice guide: Thus, where the only evidence relied upon to create a factual dispute in opposition to a motion for summary judgment is an oral agreement which is inoperative because of the parol evidence rule, no genuine factual dispute may be said to exist and summary judgment should be granted. 50

Footnotes

Footnote 48. *Randel v Overland Texarkana Co.*, 182 Ark 877, 32 SW2d 1064, 75 ALR 1516; *Salzman v Maldaver*, 315 Mich 403, 24 NW2d 161, 168 ALR 381.

Where the only defense in an action against a building owner for nonpayment of the contract cost of a building was a breach by the plaintiff of an oral promise made prior to the execution of the written contract to complete the plans within a certain time, proof of the defense was barred by the parol evidence rule and the plaintiff was entitled to judgment on the pleadings. *Lefkowitz v Hummel Furniture Co.*, 385 Pa 244, 122 A2d 802.

Annotation: Application and effect of parol evidence rule as determinable upon the pleading, 10 ALR2d 720.

Footnote 49. *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887 (court syllabus).

Footnote 50. *Nutrena Mills, Inc. v Yoder* (ND Iowa) 187 F Supp 415, *affd* (CA8 Iowa) 294 F2d 505.

§ 1098 Effect of failure to object to admission of extrinsic evidence; waiver

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admission of testimony in violation of the parol evidence rule does not make the testimony competent, whether it is admitted without, or over, objection. 51 Such evidence will be disregarded even though no objection is made to its admission. 52 Accordingly, an objection to the admission of parol testimony is not waived merely because such objection was not made at the time the evidence was offered, 53 and parol testimony will not be given effect as long as the objecting party properly requests the trial court to instruct the jury that the previous negotiations were merged in the written contract. 54 Since the parol evidence rule is one of substantive law, 55 the admission, without objection, of such testimony does not preclude the trial court from disregarding it upon a motion to direct a verdict, 56 and an appellate court cannot consider such evidence or give it any weight. 57 However, in some cases, evidence which would have been inadmissible under the parol evidence rule may be considered on appeal where no proper objection was made or exception preserved. 58

One who has submitted evidence of conversations which took place between the parties to a written agreement prior to the time the agreement was made cannot object to the other party giving his or her own version of the same conversations, at least where the conversations were pertinent to an issue to be submitted to the jury. 59 However, where there is no issue of an alleged oral agreement in the case to be submitted to the jury, the raising of the issue of the oral agreement by a party in anticipation of a defense based on such oral agreement does not waive the right to rely on the parol evidence rule. 60

§ 1098 ----Effect of failure to object to admission of extrinsic evidence; waiver [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Introduction of Evidence Over Parol Evidence Rule Objection.

Footnotes

Footnote 51. United States v Croft-Mullins Electric Co. (CA5 Ga) 333 F2d 772, cert den 379 US 968, 13 L Ed 2d 561, 85 S Ct 664; Waters v Lanier, 116 Ga App 471, 157 SE2d 796; Sargent v Coolidge (Me) 399 A2d 1333, appeal after remand (Me) 433 A2d 738; Perry v Gross, 155 Neb 662, 53 NW2d 73; Winoka Village, Inc. v Tate, 16 NJ Super 330, 84 A2d 626; Gajewski v Bratcher (ND) 221 NW2d 614, 81 ALR3d 211, appeal after remand (ND) 240 NW2d 871, appeal after remand (ND) 307 NW2d 826; Mid-American Corp. v Miller (Okla) 372 P2d 14; Taylor v Wells, 188 Or 648, 217 P2d 236; Muckelvaney v Liberty Life Ins. Co., 261 SC 63, 198 SE2d 278; Farmers State Bank v Keiser, 83 SD 354, 159 NW2d 388 (stating Iowa law); Grunwald v Grunwald (Tex Civ App Houston (1st Dist)) 487 SW2d 240, writ ref n r e (Mar 21, 1973) and reh'g of writ of error overr (Apr 18, 1973); Fleetham v Schneekloth, 52 Wash 2d 176, 324 P2d 429; North Am. Uranium v Johnston, 77 Wyo 332, 316 P2d 325.

Annotation: Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 ALR3d 249 § 10.

Footnote 52. Smith v Bear (CA2 NY) 237 F2d 79, 60 ALR2d 1119; Randolph v Fireman's Fund Ins. Co., 255 Iowa 943, 124 NW2d 528, 8 ALR3d 907; Paulink v American Express Co., 265 Mass 182, 163 NE 740, 62 ALR 506; Hardin v Ray (Mo App) 404 SW2d 764; First Nat. Bank v Green Mountain Soil Conservation Dist., 130 Mont 1, 293 P2d 289; Warren v Pulley, 193 Okla 88, 141 P2d 288; Fry v Ashley, 228 Or 61, 363 P2d 555; Whitt v Godwin, 205 Va 797, 139 SE2d 841.

Footnote 53. Pitcairn v Philip Hiss Co. (CA3 Pa) 125 F 110; Brady v Nally, 151 NY 258, 45 NE 547.

Footnote 54. Loomis v New York C. & H. R. R. Co., 203 NY 359, 96 NE 748, reh den 204 NY 588, 97 NE 1108.

Footnote 55. § 1093.

Footnote 56. Mears v Smith, 199 Mass 319, 85 NE 165; Bushnell v Elkins, 34 Wyo 495,

245 P 304, 51 ALR 13.

Footnote 57. 5 Am Jur 2d, Appeal and Error § 737.

Footnote 58. 5 Am Jur 2d, Appeal and Error § 737.

Footnote 59. Bandy v Myers, 141 Ind App 220, 227 NE2d 183.

Footnote 60. F. N. Phillips Co. v Gay's Express, Inc., 112 Vt 49, 20 A2d 102.

§ 1099 Effect of rule on writings and contracts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

All classes of contractual writings and instruments are within the scope of the parol evidence rule; the rule applies not only to contracts which are required by law to be in writing, but to every instrument containing the terms of a contract between the parties to it. 61 Thus, within the principles governing contracts generally, 62 the parol evidence rule applies not only to instruments such as contracts for the sale of goods 63 or lands, 64 contracts of guaranty, 65 and contracts or policies of insurance, 66 but also to such instruments as promissory notes and bills of exchange, 67 bills of lading, 68 deeds, 69 bonds, 70 mortgages, 71 leases, 72 options, 73 subscriptions, 74 and releases. 75

The parol evidence rule does not apply to every contract of which there is written evidence, but only where the parties to an agreement reduce it to writing and agree or intend that the writing shall be their agreement. 76 Thus, informal writings constituting mere memoranda of agreements are not subject to the restrictions of the parol evidence rule. 77

Footnotes

Footnote 61. West v Smith, 101 US 263, 11 Otto 263, 25 L Ed 809.

Annotation: Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Footnote 62. See 17A Am Jur 2d, Contracts.

Footnote 63. 67 Am Jur 2d, Sales § 330.

Footnote 64. 77 Am Jur 2d, Vendor and Purchaser § 61.

Footnote 65. 38 Am Jur 2d, Guaranty § 124.

Footnote 66. 44 Am Jur 2d, Insurance §§ 1999 et seq.

Footnote 67. 12 Am Jur 2d, Bills and Notes §§ 1252 et seq.

Footnote 68. 13 Am Jur 2d, Carriers §§ 293 et seq.

Footnote 69. 23 Am Jur 2d, Deeds § 242.

Footnote 70. 12 Am Jur 2d, Bonds § 43.

Footnote 71. 55 Am Jur 2d, Mortgages § 587.

Footnote 72. 49 Am Jur 2d, Landlord and Tenant §§ 145 et seq.

Footnote 73. Kibler v Caplis, 140 Mich 28, 103 NW 531.

Footnote 74. 73 Am Jur 2d, Subscriptions § 30.

Footnote 75. 66 Am Jur 2d, Release §§ 52, 53.

Footnote 76. Mobile & M. R. Co. v Jurey, 111 US 584, 28 L Ed 527, 4 S Ct 566;
Warinner v Nugent, 362 Mo 233, 240 SW2d 941, 26 ALR2d 278.

The trial court erred in allowing a husband's testimony as to the true intent of he and his former spouse in entering into a property settlement agreement, since such agreement had been reduced to a writing which recited that the parties had agreed to a settlement of all questions including issues as to property rights, and allowance of such testimony constituted a violation of the parol evidence rule. Pearson v Pearson (Fla App D4) 342 So 2d 1018.

Footnote 77. § 1101.

§ 1100 --Unambiguous writings, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the language used in a written instrument is ambiguous or uncertain, parol or extrinsic evidence is admissible to explain, rather than to vary or contradict, the meaning of the language used. 78 However, where the language used in a written instrument has ordinary meaning, or is plain and unambiguous when read in connection with the other provisions of the instrument, parol evidence is not admissible for the purpose of showing the meaning of the language. 79 The words of an instrument, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument. 80 Furthermore, if the instrument, taken as a whole and construing all its provisions together, is clear, parol evidence may not be admitted to construe it. 81 Parol evidence may not be admitted to contradict clear terms of a written agreement, 82 to explain common or technical terms when their meaning is plain and well understood, 83 or,

apart from a latent ambiguity, 84 to create ambiguity where none otherwise exists. 85

In addition, where the language employed in a written instrument is plain and unambiguous, evidence of the practical construction put upon the words by the acts and declarations of the parties, 86 or of a prior course of dealings between the parties, 87 is not admissible to supply an interpretation of the instrument. Nor is evidence of a custom or usage admissible where its effect would be to contradict, vary, qualify, or add to, the plain, unambiguous terms and agreements expressed in a contract, even though the provisions of the contract may be unusual. 88

Extrinsic evidence may be admissible for a purpose other than to show the meaning of the language used, even though the language of the writing is plain and unambiguous; it may be admitted to show mistake 89 or fraud, 90 or the oral part of a contract which has not been completely reduced to writing. 91

Footnotes

Footnote 78. As to ambiguous writings as an exception to the parol evidence rule, generally, see §§ 1134 et seq.

As to the admissibility of parol evidence to show mistake, see § 1112.

As to the admissibility of parol evidence to show a custom or usage, see 21A Am Jur 2d, Customs and Usages §§ 29, 30.

As to the operation and effect of customs and usages, see 21A Am Jur 2d, Customs and Usages §§ 22-31.

Footnote 79. *Arizona v California*, 292 US 341, 78 L Ed 1298, 54 S Ct 735; *College of Virgin Islands v Vitex Corp.* (DC VI) 283 F Supp 379, affd (CA3 VI) 393 F2d 481; *Industrial Chemical & Fiberglass Corp. v North River Ins. Co.* (CA11 Ala) 908 F2d 825; *Pioneer Constructors v Symes*, 77 Ariz 107, 267 P2d 740, 41 ALR2d 668; *People ex rel. Department of Parks & Recreation v West-A-Rama, Inc.* (4th Dist) 35 Cal App 3d 786, 111 Cal Rptr 197; *Friedman v Virginia Metal Products Corp.* (Fla) 56 So 2d 515, 33 ALR2d 956; *Hall v Hall*, 777 P2d 255, 116 Idaho 483; *Jackson v DeFabis* (Ind App) 553 NE2d 1212, reported in full (Ind App) 1990 Ind App LEXIS 501; *Albers v Nelson*, 809 P2d 1194, 248 Kan 575; *Young v Hornbrook, Inc.*, 153 Me 412, 140 A2d 493; *Levi v Schwartz*, 201 Md 575, 95 A2d 322, 36 ALR2d 1241; *Instrumentation Services, Inc. v General Resource Corp.* (Minn) 283 NW2d 902; *Central Hanover Bank & Trust Co. v Herbert*, 1 NJ 426, 64 A2d 75; *Trujillo v CS Cattle Co.*, 790 P2d 502, 109 NM 705; *Namad v Salomon, Inc.*, 74 NY2d 751, 545 NYS2d 79, 543 NE2d 722; *Vestal v Vestal*, 49 NC App 263, 271 SE2d 306; *Kindley v Williams*, 76 SD 225, 76 NW2d 227, 57 ALR2d 1070; *Alba Tool & Supply Co. v Industrial Contractors, Inc.* (Tex) 585 SW2d 662, reh'g of cause overr (Sep 19, 1979); *Plateau Mining Co. v Utah Div. of State Lands & Forestry* (Utah) 802 P2d 720, 148 Utah Adv Rep 16, 112 OGR 546; *Great Falls Hardware Co. v South Lakes Village Center Associates Ltd. Partnership*, 238 Va 123, 380 SE2d 642; *United States Fire Ins. Co. v Northern P. R. Co.*, 30 Wash 2d 722, 193 P2d 868, 2 ALR2d 1065.

The intention of parties to a written instrument alleged to represent a contract could only

be ascertained from language in the written instrument and parol evidence was inadmissible to explain or expand a term in the written instrument pertaining to an unconditional right to cancel, where the language of the instrument was clear and unequivocal. *Gardiakos v Vanguard Communications, Inc.* (1st Dist) 38 Ill App 3d 937, 350 NE2d 210 (criticized on other grounds by *De Witt County Public Bldg. Com. v County of De Witt* (4th Dist) 128 Ill App 3d 11, 83 Ill Dec 82, 469 NE2d 689).

Footnote 80. *Millar-Jefferies Chevrolet Co. v Wakenight*, 180 Ark 288, 21 SW2d 185; *Bennett v Consolidated Realty Co.*, 226 Ky 747, 11 SW2d 910, 61 ALR 453; *Songer v Mack Trucks, Inc.* (1st Dept) 23 App Div 2d 544, 256 NYS2d 313; *Hulin v Veatch*, 148 Or 119, 35 P2d 253, 94 ALR 1319.

Footnote 81. *Lissman v McDonald*, 119 Cal App 2d 228, 258 P2d 1057.

Footnote 82. *ITT Corp. v LTX Corp.* (CA1 Mass) 926 F2d 1258, 14 UCCRS2d 87, on remand (DC Mass) 774 F Supp 681; *J. C. Penney Co. v Koff* (Fla App D4) 345 So 2d 732; *Quickkick, Inc. v Quickkick International* (La App 2d Cir) 341 So 2d 1313, cert den (La) 343 So 2d 1076; *Anchor Casualty Co. v Bird Island Produce, Inc.*, 249 Minn 137, 82 NW2d 48; *Hoagland v Heissler* (3d Dept) 59 App Div 2d 802, 398 NYS2d 767; *Conrad Milwaukee Corp. v Wasilewski*, 30 Wis 2d 481, 141 NW2d 240; *Kilbourne-Park Corp. v Buckingham* (Wyo) 404 P2d 244.

In an action to recover benefits under a health insurance policy that clearly stated that coverage began upon the insurer's approval of the application, parol evidence regarding an oral representation of the insurer's agent that coverage began upon filing of the application was properly excluded. *Continental Life & Accident Co. v Songer* (App) 124 Ariz 294, 603 P2d 921, 18 ALR4th 1099 (criticized on other grounds by *Services Holding Co. v Transamerica Occidental Life Ins. Co.* (Ariz App) 158 Ariz Adv Rep 12).

Footnote 83. § 1145.

Footnote 84. § 1135.

Footnote 85. *Van Syckel v Arsuaga*, 231 US 601, 58 L Ed 393, 34 S Ct 263; *ITT Corp. v LTX Corp.* (CA1 Mass) 926 F2d 1258, 14 UCCRS2d 87, on remand (DC Mass) 774 F Supp 681; *National Surety Corp. v Curators of University of Mo.* (CA8 Mo) 268 F2d 525; *J. C. Penney Co. v Koff* (Fla App D4) 345 So 2d 732; *Trujillo v CS Cattle Co.*, 790 P2d 502, 109 NM 705; *Hulin v Veatch*, 148 Or 119, 35 P2d 253, 94 ALR 1319.

Extrinsic evidence is not admissible to show a completely undisclosed intention of the parties. *Bauer v Taylor* (Tex Civ App) 118 SW2d 826, writ ref, error ref.

Footnote 86. *Denny v Jacobson*, 243 Iowa 1383, 55 NW2d 568; *Everett v Rand*, 152 Me 405, 131 A2d 205; *Woods v Bromley*, 69 Nev 96, 241 P2d 1103; *Reese v First Nat. Bank* (Tex Civ App) 196 SW2d 48, 171 ALR 516, writ ref n r e, error ref n r e.

As to the admissibility of evidence of practical construction by the parties where the language of the instrument is ambiguous or uncertain, see § 1141.

Footnote 87. *In re Davidson's Trust Estate*, 354 Pa 333, 47 A2d 145, 165 ALR 768.

As to the admissibility of evidence of prior dealings of the parties where the language of

the instrument is ambiguous or uncertain, see § 1140.

Footnote 88. See 21A Am Jur 2d, Customs and Usages §§ 29, 30.

As to the admissibility of parol evidence of a custom or usage to explain language in the contract which would otherwise be ambiguous or uncertain, see 21A Am Jur 2d, Customs and Usages § 30.

Footnote 89. § 1112.

Footnote 90. 37 Am Jur 2d, Fraud and Deceit §§ 451-453.

Footnote 91. §§ 1116 et seq.

§ 1101 --Memoranda

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule does not apply to memoranda which merely record the terms of an agreement preliminary to the drafting and execution of a more formal instrument and which do not purport to be contractual agreements 92 —such as letters, telegrams, book entries or accounts, and other miscellaneous writings of an informal nature. 93 Similarly, the parol evidence rule does not apply to written instruments signed and delivered in the execution or carrying out of a contract. 94

Before the parol evidence rule may be applied to preclude the introduction of extrinsic evidence to vary the stipulations of a writing alleged to be a contract between the parties, the writing must be shown to be the parties' contract. 95 An unaccepted written statement by one party to an oral contract, which states that party's version of the agreement, does not reduce the contract to writing in favor of the other person so as to preclude the writer from giving oral evidence of the terms of the contract. 96

Footnotes

Footnote 92. As to memoranda used to evidence in writing that a contract has been made under the statute of frauds, generally, see 72 Am Jur 2d, Statute of Frauds §§ 285 et seq.

Footnote 93. *Wagner v Glendale Adventist Medical Center* (2nd Dist) 216 Cal App 3d 1379, 265 Cal Rptr 412, 115 CCH LC ¶ 56252; *Burton v Lumbermens Mut. Casualty Co.* (La App 4th Cir) 152 So 2d 235, cert den 244 La 895, 154 So 2d 767; *Saperston v Rae-Columbus, Inc.*, 151 Ohio St 11, 38 Ohio Ops 481, 84 NE2d 218; *Harris v Snell* (Okla) 422 P2d 460 (check); *Mossler Acceptance Co. v Tips* (Tex Civ App Galveston) 289 SW2d 295, writ ref n r e, error ref n r e; *Logsdon v Trunk*, 37 Wash 2d 175, 222 P2d 851.

Footnote 94. *Rockett v Ford* (Okla) 326 P2d 787, 9 OGR 733; *Ross v Grimes*, 199 Okla

403, 186 P2d 809; Mossler Acceptance Co. v Tips (Tex Civ App Galveston) 289 SW2d 295, writ ref n r e, error ref n r e.

Footnote 95. §§ 1092, 1099.

Footnote 96. Burton v Lumbermens Mut. Casualty Co. (La App 4th Cir) 152 So 2d 235, cert den 244 La 895, 154 So 2d 767.

§ 1102 --Corporate and association minutes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The proceedings at a corporate meeting may involve the execution of a contract on the part of the corporation, and the minutes of such a meeting may contain the terms of such contract; in such a situation, attempts to vary or contradict the terms of the recorded agreement by parol evidence have been unsuccessful. 97 Similarly, where official minutes of a church committee meeting had been accepted in evidence, written memoranda taken at the meeting—if inconsistent with the contract executed during the meeting—would be properly excluded under the parol evidence rule. 98 However, the parol evidence rule does not prevent extrinsic evidence as to the execution, validity, or delivery of a corporate contract. 99 The exception to the parol evidence rule allowing admission of testimony seeking to explain ambiguous or uncertain language, 1 as well as the exception to the rule embodied in the "partial integration" doctrine, 2 also apply in the case of parol evidence regarding the proceedings at a corporate meeting.

Footnotes

Footnote 97. Brintnall v Professional Investors of Iowa, Inc. (Iowa) 218 NW2d 453.

Annotation: Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259 § 7.

Footnote 98. Reorganized Church of Jesus Christ v Universal Surety Co., 177 Neb 60, 128 NW2d 361.

Footnote 99. Mordka v Mordka Enterprises, Inc. (App) 143 Ariz 298, 693 P2d 953 (evidence used to establish that a corporate resolution fully integrated previous negotiations); Boone v Hall, 100 Cal App 2d 738, 224 P2d 881; Floyd v Jay County Rural Electric Membership Corp. (Ind App) 405 NE2d 630 (parol evidence rule makes exception for proof of fraud).

Corporate records are generally not operative legal transactions for the purpose of the parol evidence rule. Gannon v Baker (Tex) 818 SW2d 754, on remand (Tex App Houston (1st Dist)) 830 SW2d 706, 18 UCCRS2d 557, writ den (Nov 11, 1992); Combs v Lufkin (App) 123 Ariz 210, 598 P2d 1029.

In an action by an employee against her former employer for allegedly unpaid commissions, evidence showing fraud in the inducement of the employment, which was pursuant to a written employment agreement, was not precluded by the parol evidence rule. *Zoeller v Howard Gardiner, Inc.* (Tex Civ App Amarillo) 585 SW2d 920, writ ref n r e (Nov 28, 1979).

Annotation: 48 ALR2d 1259 § 6.

Footnote 1. *Mason Hall Corp. v Dicker* (Mun Ct App Dist Col) 141 A2d 190; *Bennett v Madison Sales Co.*, 264 Ky 728, 95 SW2d 604; *Holmes v Republic Steel Corp.* (Cuyahoga Co) 84 Ohio App 442, 39 Ohio Ops 542, 53 Ohio L Abs 192, 84 NE2d 508; *Malone v Melnick*, 378 Pa 483, 106 A2d 806, 48 ALR2d 1254; *Montgomery v Greene County Clay Products Co.*, 205 Pa Super 515, 210 A2d 911.

Parol testimony was admissible to supplement the minutes of a directors' meeting, absent a by-law or charter requirement of a written record, at which a question arose as to whether certain corporate property was owned jointly or as tenants in common with a named individual. *Chevron Oil Co. v Clark* (SD Miss) 291 F Supp 552, 31 OGR 540, affd in part and revd in part on other grounds (CA5 Miss) 432 F2d 280, 37 OGR 104.

As to ambiguity exception to the parol evidence rule, generally, see §§ 1134 et seq.

Annotation: 48 ALR2d 1259 § 8.

Footnote 2. *Booth v Booth & Bayliss & Commercial School, Inc.*, 120 Conn 221, 180 A 278, 99 ALR 1517; *Redstone v Redstone Lumber & Supply Co.*, 101 Fla 226, 133 So 882.

Minutes of a corporate meeting are only prima facie records of the proceedings, and oral testimony is admissible to show that the minutes are incomplete; the parol evidence rule does not prevent the introduction of oral testimony to supplement minutes which do not disclose the deliberations preceding a decision determining the time at which profit-sharing proceeds would be paid to a former employee. *Lano v Rochester Germicide Co.*, 261 Minn 556, 113 NW2d 460, 44 CCH LC ¶ 17420 (ovrld on other grounds by *Melin v Northwestern Bell Tel. Co.* (Minn) 266 NW2d 183).

As to the doctrine of partial integration, generally, see §§ 1116 et seq.

Annotation: Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259 § 9.

§ 1103 --Receipts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule excluding parol evidence to vary or contradict a writing does not apply to a mere receipt, which is not contractual in nature. 3

However, a writing that is both a receipt and a memorandum of agreement is, if unambiguous, conclusive as to the agreement, and cannot be varied or contradicted by parol evidence. 4 This principle has been frequently applied to bills of lading, which operate both as receipts and contracts. 5

Footnotes

Footnote 3. Davison v Davis, 125 US 90, 31 L Ed 635, 8 S Ct 825; Smart v Owen, 208 Ark 662, 187 SW2d 312; Wagner v Glendale Adventist Medical Center (2nd Dist) 216 Cal App 3d 1379, 265 Cal Rptr 412, 115 CCH LC ¶ 56252; Florida Capital Corp. v Robert J. Bissett Constr., Inc. (Fla App D2) 167 So 2d 595, cert den (Fla) 176 So 2d 511; Fletcher Trust Co. v Hines, 211 Ind 111, 4 NE2d 562, 108 ALR 930; Clark v Thompson, 309 Ky 850, 219 SW2d 22; Augustin v Ziemer, 221 Minn 565, 22 NW2d 925; Child v George Miller Inc., 74 Nev 223, 327 P2d 342; Luna v Flores, 64 NM 312, 328 P2d 82; Agar Packing & Provision Co. v Weldon, 42 Tenn App 175, 300 SW2d 51, 67 ALR2d 1023; Richards v Cornish (Tex Civ App) 190 SW2d 851.

Since receipts are merely prima facie evidence of payment and only admissions in writing, parol evidence is therefore admissible to explain, vary, or contradict the receipt, and the mere fact that the receipt contains the words "in full" in connection with payment does not render parol evidence inadmissible with respect to it. Phillips v Frost (Fla App D2) 147 So 2d 568.

Parol evidence may be introduced to show what demands the receipt was intended to apply to, what instruments were referred to in the receipt, or to show that a mistake was made in the receipt. Smart v Owen, 208 Ark 662, 187 SW2d 312.

An acknowledgment of payment contained in a bill of sale is merely a receipt, which may be contradicted by parol evidence. Smith v Stevens (Miss) 299 So 2d 690.

As to the application of this rule to the receipt clauses of a bill of lading, see 13 Am Jur 2d, Carriers §§ 293 et seq.

As to a bank passbook or deposit slip as generally not being a written contract within this rule, see 10 Am Jur 2d, Banks §§ 346, 347.

Footnote 4. Cleland v Cleland (CP) 7 Ohio Ops 2d 206, 79 Ohio L Abs 566, 152 NE2d 914.

Footnote 5. 13 Am Jur 2d, Carriers §§ 281, 294.

§ 1104 Public and judicial records and documents

<p>View Entire Section Go to Parallel Reference Table</p>

As a general rule, what ought to be of public record must be proved by the record and cannot be contradicted or enlarged by parol evidence. 6 Parol evidence is not admissible to show a motive or intention contrary to the recorded action of the public body, 7 and the necessary presumption arising from a public record cannot be contradicted by parol evidence any more than the express words of the record itself. 8 Such a prohibition is necessary to prevent the confusion which would result if no restraint were placed on the questioning, by a private litigant, of records of public affairs, which cannot be impeached without a direct attack on such records. 9

The parol evidence rule applies not only to records of formal official action, but also to documents and other records of public officers, 10 such as school board records, 11 records in attachment proceedings, 12 records of judgments 13 and executions, 14 and proceedings of land offices. 15 The acts of a court of record are also known by its records alone and cannot be established by parol evidence. 16 Whether parol evidence is admissible to explain or interpret public writings or records depends on the character, purpose, and effect of the offered evidence; generally, ambiguities in judicial or public writings and records may be explained by parol evidence which is not inconsistent with such writings or records. 17 However, unless there is a distinct ambiguity apparent on the face of a public document or record, no extrinsic matter can be considered. 18 This assumes that the validity of the public document or record is not being directly attacked; in the case of such an attack, parol evidence is admissible to show the invalidity of a public record or document regardless of whether or not it is ambiguous.

Footnotes

Footnote 6. *Potomac S.B. Co. v Upper Potomac S.B. Co.*, 109 US 672, 27 L Ed 1070, 3 S Ct 445; *Pope v United States Fidelity & Guaranty Co.*, 200 Ga 69, 35 SE2d 899; *Middlesboro v Welch (Ky)* 275 SW2d 56; *New England Box Co. v C & R. Const. Co.*, 313 Mass 696, 49 NE2d 121, 150 ALR 152; *Eastman v School Dist.*, 120 Mont 63, 180 P2d 472 (ovrld on other grounds by *State ex rel. Saxtorph v District Court, Fergus County*, 128 Mont 353, 275 P2d 209); *Barrett v Hand*, 158 Neb 273, 63 NW2d 185.

Footnote 7. *Barrett v Hand*, 158 Neb 273, 63 NW2d 185.

Evidence to show that an official bond was not intended to apply to the appointment which was held when the bond took effect would contradict the bond. *United States v Le Baron*, 60 US 73, 19 How 73, 15 L Ed 525.

Footnote 8. *Pope v United States Fidelity & Guaranty Co.*, 200 Ga 69, 35 SE2d 899.

Footnote 9. *Loos v New York*, 257 App Div 219, 13 NYS2d 119 (legislative record).

Footnote 10. *Middlesboro v Welch (Ky)* 275 SW2d 56.

The trial court properly refused to allow parol evidence to contradict or modify the terms of a deed or create a reservation of the property by parol where the evidence tended to show that the deed in question was prepared by the plaintiffs' attorney, in whom they testified they had complete trust; the plaintiffs signed the deed without reading it; it must be assumed that the plaintiffs signed the instrument they intended to sign; and there was

no evidence of mental incapacity, mutual mistake of the parties, undue influence, or fraud. *Rourk v Brunswick County*, 46 NC App 795, 266 SE2d 401.

Footnote 11. *Cross v Commonwealth* (Ky App) 795 SW2d 65; *Eastman v School Dist.*, 120 Mont 63, 180 P2d 472 (ovrld on other grounds by State ex rel. *Saxtorph v District Court*, *Fergus County*, 128 Mont 353, 275 P2d 209).

Footnote 12. 6 Am Jur 2d, Attachment and Garnishment § 254.

Footnote 13. 47 Am Jur 2d, Judgments § 172.

Footnote 14. 30 Am Jur 2d, Executions §§ 395 et seq.

Footnote 15. *Stanford v Taylor*, 59 US 409, 18 How 409, 15 L Ed 453 (holding that where a grant of land with indefinite boundaries was confirmed and ordered to be surveyed, conformably to the possession, parol evidence that an official survey was improperly made of the wrong tract is inadmissible).

There was no basis for looking behind patents in order to allow extrinsic evidence of the intent of the original parties at the time of a conveyance of state-owned lands, for the purposes of a claim by the commissioners of the land office that a reservation in the patents reserved an interest in coal, where the notice, certificate of purchase, and patent were specific acts of the commissioners, the entire sale process was regular under the applicable statute, and the words of the patents followed the statute. *State ex rel. Commissioners of Land Office v Butler* (Okla) 753 P2d 1334, 98 OGR 140, cert den 488 US 993, 102 L Ed 2d 583, 109 S Ct 557.

Footnote 16. 20 Am Jur 2d, Courts § 55.

Footnote 17. *Norton v Larney*, 266 US 511, 69 L Ed 413, 45 S Ct 145; *People v Thompson*, 295 Ill 187, 129 NE 155; *Beate v Roberts*, 156 Iowa 575, 137 NW 1006; *James v Hotel Honing Co. (Hamilton Co)* 6 Ohio App 162 (docket or journal of court).

The testimony of a deputy clerk as to the meaning of abbreviations officially made by him upon documents offered in evidence is admissible, since such testimony merely translates the sense of the abbreviations into ordinary language, leaving the recognized meaning unchanged. *Buie v United States* (CA5 Tex) 127 F2d 367, cert den 318 US 766, 87 L Ed 1138, 63 S Ct 660, reh den 319 US 783, 87 L Ed 1727, 63 S Ct 1314 and reh den 319 US 780, 87 L Ed 1725, 63 S Ct 1025.

If the language of the bond of a public official is not sufficiently specific in the designation of his or her office to be free from ambiguity, the ambiguity may be removed by parol evidence. *Kuhl v Chamberlain*, 140 Iowa 546, 118 NW 776.

The letters "J. P." and "C," attached to the signatures of a justice's court judgment, if not fully explained by the instrument itself, may be shown by parol to mean justice of the peace and constable. *Davis v Harnbell* (Tex Civ App) 24 SW 972.

As to the admissibility of parol evidence to clarify ambiguities in written instruments, generally, see §§ 1134 et seq.

Footnote 18. *Presidio County v Clarke*, 38 Tex Civ App 320, 85 SW 475, writ dism w o j.

The provision of the Colorado River Compact forged between several states that, in addition to the apportionment made elsewhere therein, the "lower basin" is given the right to increase its beneficial consumptive use of water by 1,000,000 acre-feet per annum, is not ambiguous so as to admit extrinsic evidence to show its meaning, although the additional waters thereby appropriated are claimed thereunder exclusively by the state seeking to introduce such evidence, on the ground of the geographical situation of the states, where other states were included in the lower basin and the Compact left to later agreement the apportionment of the water among the states in each basin. *Arizona v California*, 292 US 341, 78 L Ed 1298, 54 S Ct 735.

§ 1105 --Records of legislative, judicial, and administrative bodies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence which contradicts the records of local legislative bodies is generally inadmissible when it is offered for the purpose of contradicting, altering, 19 or supplying omissions in such a record. 20 The purpose behind this general rule is both to protect such records from the attacks of outsiders and to preserve them against the uncertainty of individual memories. 21 However, where there is no express statutory provision requiring a complete record to be kept, and the record of a legislative body contains nothing to show whether or not the body took any action, parol evidence is admissible to show that action was in fact taken. 22

Omissions in the records of the proceedings of legislative and administrative bodies may be supplied by parol evidence where the applicable statutes do not make such records the only evidence of such proceedings, nor render invalid their unrecorded proceedings, as long as such testimony does not contradict the records.

Parol evidence is not admissible to show the purpose or motives of legislative bodies in performing legislative acts. 23 However, evidence as to the meaning attached to a technical term by those familiar with such parlance is relevant in determining the meaning of the term as used in legislation. 24

Footnotes

Footnote 19. *Suburban Land Co. v Billerica*, 314 Mass 184, 49 NE2d 1012, 147 ALR 660; *State ex rel. McCrate v Rhodes*, 349 Mo 1071, 163 SW2d 978.

Footnote 20. *Bates v Jenkins* (Ky) 322 SW2d 475.

Footnote 21. *Barrett v Hand*, 158 Neb 273, 63 NW2d 185.

Footnote 22. *Weslaco v Porter* (CA5 Tex) 56 F2d 6; *Joseph v Downers Grove* (CA7 Ill) 104 F2d 974, cert den 308 US 605, 84 L Ed 506, 60 S Ct 142; *Clovis v North*, 64 NM 229, 327 P2d 305.

Footnote 23. *Pilcher v Dothan*, 207 Ala 421, 93 So 16.

Parol testimony of members of a legislative body is not admissible to show what in fact was intended or meant by an ordinance. *Ex parte Goodrich*, 160 Cal 410, 117 P 451.

Footnote 24. *Order of R. Conductors v Swan*, 329 US 520, 91 L Ed 471, 67 S Ct 405, 19 BNA LRRM 2180, 12 CCH LC ¶ 51235.

b. Exceptions to Rule [1106-1145]

(1). In General [1106-1115]

§ 1106 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The parol evidence rule applies, so far as a contract is concerned, only to those elements or parts of the writing which are contractual between the parties; it does not apply to mere recitals of fact. 25 The parol evidence rule applies only to the essential and substantial, as distinguished from the merely formal, parts of a writing. 26 Furthermore, the rule does not apply in situations where extrinsic evidence is given for the purpose of connecting several written instruments and showing that they are all parts of one transaction. 27 In addition, where the writing on which evidence is sought to be introduced is collateral to the issue involved and the action is not based upon the writing, the parol evidence rule does not apply. 28 The facts of each case must control in applying the rule or its exceptions. 29

The parol evidence rule does not, in a controversy between the parties, forbid the use of parol evidence to establish any fact that does not vary, alter, or contradict the terms of the instrument or the legal effect of the terms used. 30 In other words, extrinsic evidence of a fact which is consistent with the terms of, 31 or tends to confirm, 32 the writing may be admitted. In addition, parol evidence of the intention of the parties in executing the instrument, 33 and evidence as to the interpretation put upon a written contract by one of the parties, 34 is also admissible under certain circumstances.

§ 1106 ----Generally [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Introduction of Evidence Over Parol Evidence Rule Objection.

Footnotes

Footnote 25. *Garrett v Ellison*, 93 Utah 184, 72 P2d 449, 129 ALR 666.

As to consideration as a mere contractual recital, see § 1129.

Footnote 26. *Knighton v Des Portes Mercantile Co.*, 119 SC 340, 112 SE 343; *Barmore v Jay*, 13 SCL 371.

Footnote 27. *Bailey v Railroad Co.*, 84 US 96, 17 Wall 96, 21 L Ed 611; *Kam Chin Chun Ming v Kam Hee Ho*, 45 Hawaii 521, 371 P2d 379, reh den 46 Hawaii 13, 373 P2d 141; *Johnsen v Haynie* (Tex Civ App) 70 SW2d 602.

Footnote 28. § 1115.

Footnote 29. *Early v Street*, 192 Tenn 463, 241 SW2d 531.

Footnote 30. *Rime-Shatten Dev. Co. v Birmingham Cable Communications, Inc.* (Ala) 569 So 2d 332; *Maytag Co. v Alward*, 253 Iowa 455, 112 NW2d 654, 96 ALR2d 162.

Evidence that relates to the formation or existence of a contract between the parties or that shows the true relation of the parties to the contract does not violate the parol evidence rule. *Caplan v Stant*, 207 Va 933, 154 SE2d 121.

Footnote 31. *Hunt Foods & Industries, Inc. v Doliner* (1st Dept) 26 App Div 2d 41, 270 NYS2d 937, 3 UCCRS 597; *Remington Rand, Inc. v Sugarland Industries*, 137 Tex 409, 153 SW2d 477; *National Educators Life Ins. Co. v Morgan* (Tex Civ App Amarillo) 295 SW2d 713, writ ref n r e.

As to the doctrine of partial integration, see §§ 1116 et seq.

Footnote 32. *Basshor v Forbes*, 36 Md 154; *Rearich v Swinehart*, 11 Pa 233.

Footnote 33. *Investors Ins. Co. v Dorinco Reinsurance Co.* (CA2 NY) 917 F2d 100, 18 FR Serv 3d 1343; *United States v Fowler* (CA9 Idaho) 913 F2d 1382; *International Brotherhood of Electrical Workers, Local 47 v Southern California Edison Co.* (CA9 Cal) 880 F2d 104, 131 BNA LRRM 3167, 112 CCH LC ¶ 11344 (among conflicting authorities on other grounds noted in *Sisters of Third Order of St. Francis v Swedishamerican Group Health Ben. Trust* (CA7 Ill) 901 F2d 1369, 12 EBC 1491) and (criticized on other grounds by *Pratt v Petroleum Production Management, Inc. Employee Sav. Plan & Trust* (CA10 Kan) 920 F2d 651, 13 EBC 1001, 19 FR Serv 3d 49); *Industrial Chemical & Fiberglass Corp. v North River Ins. Co.* (CA11 Ala) 908 F2d 825; *Stewart v Brennan*, 7 Hawaii App 136, 748 P2d 816, appeal after remand 8 Hawaii App 431, 807 P2d 606; *Hall v Hall*, 777 P2d 255, 116 Idaho 483; *Diefenthal v Longue Vue Management Corp.* (La) 561 So 2d 44.

As to admission of parol evidence as to the parties' intention where the writing contains ambiguities, see §§ 1139 et seq.

Footnote 34. *Claussen v Aetna Casualty & Surety Co.*, 259 Ga 333, 380 SE2d 686, 29 Env't Rep Cas 1901.

§ 1107 Writings related to oral agreement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a contract rests upon an oral agreement, parol evidence is admissible as to the terms of the contract, notwithstanding the existence of memoranda relating to the contract. 35 In addition, where an oral agreement has been acted upon and rights have accrued under it, the subsequent receipt of a written contract varying from the oral agreement does not prevent proof of the oral agreement. 36

Footnotes

Footnote 35. *Burk v Livingston Parish School Board*, 215 La 143, 39 So 2d 891; *Ross v Grimes*, 199 Okla 403, 186 P2d 809.

As to the application of the parol evidence rule to informal memoranda of agreements, see § 1101.

Footnote 36. *Mollison v Rittgers*, 140 Iowa 365, 118 NW 512, holding that the execution of a power of attorney by one who has placed securities in another's hands, several years after this was done, which does not purport to embody the original agreement as to the disposition of the securities, will not, on the theory that it tends to vary the terms of a written instrument, exclude parol evidence of what the original agreement was.

Where goods are shipped under a verbal agreement before any written contract or bill of lading has been tendered to the shipper, the subsequent acceptance of a bill of lading without assenting to its conditions will not conclude the shipper, but rather parol evidence is admissible to show the real contract. *Merchants' Despatch Transp. Co. v Furthmann*, 149 Ill 66, 36 NE 624.

As to the application the parol evidence to a bill of lading, generally, see 13 Am Jur 2d, Carriers § 294.

Under the Restatement 2d of Contracts, agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish that the writing is or is not an integrated agreement. Restatement 2d, Contracts § 214.

A recital of a fact in an integrated agreement may be shown to be untrue. Restatement 2d, Contracts § 218(1).

§ 1108 Existence or nonexistence of contract

[View Entire Section](#)

The parol evidence rule presupposes an action involving an existing valid obligation. 37 Accordingly, parol evidence is always competent to show the nonexistence of the purported contract. 38 For example, parol evidence is admissible to show nonacceptance of an offer, 39 or the lack of an effective delivery of the instrument. 40

Parol evidence is also admissible to show the existence of a contract, 41 or to show conditions precedent to its taking effect. 42 In addition, extrinsic evidence may be admitted to show that an instrument, in a material respect, was executed in blank and was subsequently filled out without authority or improperly. 43

Footnotes

Footnote 37. *Merrill Lynch Private Capital, Inc. v Abou Khadra* (SD NY) 764 F Supp 921 (parol evidence rule did not apply to a purported loan agreement where the lender never signed the agreement); *Dellcar & Co. v Hicks* (ND Ill) 685 F Supp 679; *Miller v Kendall* (Tex App Houston (1st Dist)) 804 SW2d 933, reh overr (Tex App Houston (1st Dist)) 1991 Tex App LEXIS 128 and (disapproved on other grounds by *Ruiz v Conoco, Inc.* (Tex) 36 Tex Sup Ct Jour 412) (parol evidence rule does not apply to recitals of past consideration received).

Footnote 38. *Dellcar & Co. v Hicks* (ND Ill) 685 F Supp 679; *Halldin v Usher*, 49 Cal 2d 749, 321 P2d 746; *Spindler v Krieger* (2d Dist) 16 Ill App 2d 131, 147 NE2d 457; *Cumnock-Reed Co. v Lewis*, 278 Ky 496, 128 SW2d 926; *Warinner v Nugent*, 362 Mo 233, 240 SW2d 941, 26 ALR2d 278; *Western Nat. Ins. Co. v Trent*, 69 Nev 239, 247 P2d 208; 305 East 24th Owners Corp. v *Parman Co.* (1st Dept) 122 App Div 2d 684, 505 NYS2d 999, app gr, motion den (1st Dept) 124 App Div 2d 503, 507 NYS2d 1002 and revd on other grounds, ctfd ques ans 69 NY2d 991, 517 NYS2d 710, 510 NE2d 794; *Chapel Hill Spa Health Club, Inc. v Goodman*, 90 NC App 198, 368 SE2d 60; *Bill Shannon, Inc. v San Clemente* (Tex App San Antonio) 724 SW2d 941; *Rasey v Perryman* (Tex Civ App) 262 SW2d 761; *Moody v Smith*, 9 Utah 2d 139, 340 P2d 83; *Bond v Wiegardt*, 36 Wash 2d 41, 216 P2d 196.

Parol statements of the parties, made at the time of signing a fictitious contract, may be admitted to prove that the instrument never had legal existence or any binding force. *Smilow v Dickerson*, 357 Pa 455, 54 A2d 883.

Footnote 39. *Bond v Wiegardt*, 36 Wash 2d 41, 216 P2d 196.

Footnote 40. *Burke v Dulaney*, 153 US 228, 38 L Ed 698, 14 S Ct 816; *Spindler v Krieger* (2d Dist) 16 Ill App 2d 131, 147 NE2d 457; *Emery v Graber*, 176 Kan 17, 268 P2d 950; *Meek v Bower* (Tex Civ App Houston (1st Dist)) 333 SW2d 175.

Footnote 41. *Marsh v Nichols, Shepard & Co.*, 128 US 605, 32 L Ed 538, 9 S Ct 168.

Footnote 42. § 1113.

Footnote 43. *Western Nat. Ins. Co. v Trent*, 69 Nev 239, 247 P2d 208.

§ 1109 --Effect of intent; sham agreements

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule does not apply to every contract of which there is written evidence, but only where the parties to an agreement reduce it to writing and agree or intend that the writing shall be their agreement. 44 Therefore, parol evidence is admissible to show that a writing which apparently constituted a contract was not intended or understood by either party to be binding as such. 45 The oral testimony in such a case does not vary the terms of the writing, but shows that it was never intended to be a contract or to be of binding force between the parties. 46 For example, as between the parties to a written agreement or their privies, parol evidence is admissible to show that the writing was a sham not intended to create legal relations. 47 The application of this principle must be predicated on proof that the entire contract was intended to be a nullity; parol evidence may not be admitted where at least a portion of the contract is meant to be enforceable. 48 However, there is authority for the view that parol evidence is not admissible to show that a writing was a sham agreement which was not intended to create legal relations, 49 at least where the agreement was made for the illegal or immoral purpose of defrauding or misleading public authorities or a third person. 50

Footnotes

Footnote 44. § 1099.

Footnote 45. *Michels v Olmstead*, 157 US 198, 39 L Ed 671, 15 S Ct 580; *Wal-Mart Stores, Inc. v Crist* (WD Ark) 664 F Supp 1242, revd on other grounds (CA8 Ark) 855 F2d 1326, later proceeding (WD Ark) 123 FRD 590 and cert den 489 US 1090, 103 L Ed 2d 860, 109 S Ct 1558 (sham workers' compensation policies); *FPI Development, Inc. v Nakashima* (3rd Dist) 231 Cal App 3d 367, 282 Cal Rptr 508, 91 CDOS 4707, 91 Daily Journal DAR 7396; *McGuire v Luckenbach*, 131 Colo 333, 281 P2d 997; *White v White*, 183 Kan 162, 326 P2d 306; *Cumnock-Reed Co. v Lewis*, 278 Ky 496, 128 SW2d 926; *Cooley v Major Media Management Corp.* (Minn App) 402 NW2d 815; *W. K. Ewing Co. v Krueger* (Tex Civ App) 152 SW2d 488, writ ref w o m, error ref.

Footnote 46. *Burke v Dulaney*, 153 US 228, 38 L Ed 698, 14 S Ct 816.

In a suit on a promissory note, parol evidence that the note had been executed for plaintiff contractor's benefit to reflect losses for business and tax purposes was properly admitted in support of the contention of the nonexistence of a valid contract rather than to vary the terms of an existing contract. *Bill Shannon, Inc. v San Clemente* (Tex App San Antonio) 724 SW2d 941.

Footnote 47. *Happy Dack Trading Co. v Agro-Industries, Inc.* (SD NY) 602 F Supp 986, 41 UCCRS 1718; *Monica v Pelicas* (1st Dist) 131 Cal App 2d 700, 281 P2d 269;

McGuire v Luckenbach, 131 Colo 333, 281 P2d 997; Jost v Cornelius, 334 Ill App 279, 79 NE2d 310; Succession of Lewis (La App 4th Cir) 157 So 2d 321; Beaman-Marvell Co. v Gunn, 306 Mass 419, 28 NE2d 443; In re Estate of Fullerton (Okla) 375 P2d 933 (superseded by statute on other grounds as stated in Lomon v Citizens Nat. Bank & Trust (Okla) 689 P2d 306).

In a retailer's action against a worker's compensation insurer, parol evidence would be admitted to show that delivered policies were a sham and that a side "deal" existed, where the purpose of the sham was to show regulatory authorities that policies had been issued that complied with the law of the states in which they had to be filed and reviewed. Wal-Mart Stores, Inc. v Crist (WD Ark) 664 F Supp 1242, revd (CA8 Ark) 855 F2d 1326, later proceeding (WD Ark) 123 FRD 590 and cert den 489 US 1090, 103 L Ed 2d 860, 109 S Ct 1558 (applying Ark law).

In an action to recover \$100,000 which plaintiff had allegedly loaned defendant, the parol evidence rule did not preclude consideration of defendants' claim that two letters which they had delivered to plaintiff and which referred to the money as a loan had been written at plaintiff's request in order to assist him with a Canadian gift tax problem and had not been intended to reflect a valid contractual relationship for a loan, in that the rule would be applicable only after the letters had been proven by extrinsic evidence to represent a valid and binding obligation. Monroe v Appeltan (Fla App D2) 419 So 2d 356.

Mortgagors' parol evidence that a mortgage was always a sham and was designed to forestall their creditors was admissible where the plaintiff mortgagee testified that a recital in the mortgage that money had been loaned was wrong. Laspopoulos v Earl (La App 4th Cir) 376 So 2d 965.

Annotation: Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382 § 3[a].

Footnote 48. Bersani v General Acci. Fire & Life Assur. Corp., 36 NY2d 457, 369 NYS2d 108, 330 NE2d 68, holding that parol evidence was not admissible to show an alleged agreement by which property owners, in order to facilitate obtaining a mortgage on property, obtained a standard fire insurance policy on the condition that no claims would be submitted, where, though the insurer's obligations to the owners were not to be enforced, other provisions, such as the insurer's obligation to the mortgagee, were to be enforceable.

Footnote 49. St. Paul v Dahlby, 266 Minn 304, 123 NW2d 586.

Annotation: 71 ALR2d 382 § 4.

Footnote 50. Higby v Hooper, 124 Mont 331, 221 P2d 1043; Carolina Casualty Ins. Co. v Oregon Auto. Ins. Co., 242 Or 407, 408 P2d 198.

In an action by a decedent's grandchildren to annul, on account of simulation, two purported acts of sale in which their grandfather joined his second wife, as vendor, in conveying certain property to a daughter of the second marriage in an alleged attempt to deprive the grandchildren of their potential inheritance, the second wife would not be heard to contradict by parol evidence her authentic acts of sale, between herself as vendor and her daughter as vendee, though such testimony would be available to the

grandchildren in their action seeking to have certain property, acquired during the second marriage, decreed to be community property. Succession of Elrod v Elrod (La App 4th Cir) 218 So 2d 83.

Annotation: 71 ALR2d 382 § 5.

§ 1110 Validity or invalidity of writing

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule presupposes an action based on an existing valid contract, 51 and if the issue is as to the validity or legality of the contract, the rule does not apply, and extrinsic evidence is admitted to determine that issue, 52 whether such evidence tends to establish the validity or invalidity of the contract in question. 53 Such evidence does not vary or contradict the writing, but serves to establish that it has no force or efficacy. 54 For example, parol evidence is admissible to show that a contract valid on its face is a mere cover for an illegal transaction, 55 that its execution was procured by fraud, 56 that it resulted from mutual mistake, 57 or was not supported by consideration. 58

Footnotes

Footnote 51. § 1092.

Footnote 52. McMullen v Hoffman, 174 US 639, 43 L Ed 1117, 19 S Ct 839; Delcar & Co. v Hicks (ND Ill) 685 F Supp 679; Stock v Meek, 35 Cal 2d 809, 221 P2d 15; Tusch Enterprises v Coffin, 740 P2d 1022, 113 Idaho 37; Stromberg v Smith (Minn App) 423 NW2d 107; Buskirk v Nelson, 237 Mont 455, 774 P2d 398, appeal after remand 250 Mont 92, 818 P2d 375; King v Fordice (Tex App Dallas) 776 SW2d 608, 10 UCCRS2d 65, writ den (Dec 20, 1989); Auve v Fagnant, 16 Wash 2d 669, 134 P2d 454.

Footnote 53. Bond v Wiegardt, 36 Wash 2d 41, 216 P2d 196.

Footnote 54. Lynn v Herman, 72 Cal App 2d 614, 165 P2d 54.

Footnote 55. Houghton v Burden, 228 US 161, 57 L Ed 780, 33 S Ct 491; Bowen v Morgillo, 127 Conn 161, 14 A2d 724.

A contract which on its face appears to be legal may be shown to be only part of a contract the other portions of which are illegal. McMullen v Hoffman, 174 US 639, 43 L Ed 1117, 19 S Ct 839.

Footnote 56. 37 Am Jur 2d, Fraud and Deceit §§ 451-453.

Footnote 57. § 1112.

Footnote 58. § 1128.

§ 1111 Explaining absolute conveyance as one of security

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is admissible to show that a conveyance or assignment that is absolute on its face was intended merely as security for the payment of a debt. 59 This question arises most frequently in connection with showing that a deed absolute on its face is in fact a mortgage, 60 or that a bill of sale is in fact a security. 61

Fraud in the inception of the transfer is not an element essential to the admissibility of parol evidence of the nature of the transaction as one for security only. 62

Footnotes

Footnote 59. *Burgess v Seligman*, 107 US 20, 17 Otto 20, 27 L Ed 359, 2 S Ct 10; *Biddle v Biddle*, 363 Pa 426, 70 A2d 281.

In an action contesting ownership of a tract of land and cattle, parol evidence as well as evidence of the written conveyances of the property were properly admitted where, though the written instruments simply conveyed the property to the defendant's grantor and to the defendant, the purpose of the conveyance had in fact been to secure a transaction with respect to another parcel. *Kesler v Rogers* (Utah) 542 P2d 354 (not followed on other grounds by *Biswell v Duncan* (Utah App) 742 P2d 80, 64 Utah Adv Rep 36).

Footnote 60. See 55 Am Jur 2d, *Mortgages* §§ 43-53.

Footnote 61. See 68A Am Jur 2d, *Secured Transactions* § 164.

Footnote 62. *Barry v Coville*, 129 NY 302, 29 NE 307.

§ 1112 Mistake

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is generally admissible to alter the terms of a written contract when it is shown that, by reason of mutual mistake, the true intention of the parties is not expressed. 63 Parol evidence to show such mutual mistake may be interposed as a defense to an action at law on the written agreement, 64 or may be introduced in an action in equity to reform the written contract because of the mutual mistake. 65

Footnotes

Footnote 63. *Applied Genetics Int'l, Inc. v First Affiliated Secur., Inc.* (CA10 Wyo) 912 F2d 1238; *Agristor Leasing v Bertholf* (DC Kan) 753 F Supp 881; *Rime-Shatten Dev. Co. v Birmingham Cable Communications, Inc.* (Ala) 569 So 2d 332; *Parker v Gentry*, 62 Ariz 115, 154 P2d 517; *Boyles Bros. Drilling Co. v Orion Industries, Ltd.* (Colo App) 761 P2d 278, 6 UCCRS2d 1164; *TIE Communications, Inc. v Kopp*, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; *Farm Credit Bank v Isringhausen* (4th Dist) 210 Ill App 3d 724, 155 Ill Dec 235, 569 NE2d 235; *Hancock v Kentucky Cent. Life Ins. Co.* (Ind App) 527 NE2d 720; *Alcorn v Linke*, 257 Iowa 630, 133 NW2d 89; *Cheek v Uptown Square Wine Merchants, W.F., Inc.* (La App 4th Cir) 538 So 2d 663; *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301; *Intershoe, Inc. v Bankers Trust Co.* (1st Dept) 160 App Div 2d 520, 554 NYS2d 514, revd on other grounds, summary judgment gr, motion gr, ctf d ques ans 77 NY2d 517, 569 NYS2d 333, 571 NE2d 641, 14 UCCRS2d 1; *Gilbertson v Gilbertson* (ND) 452 NW2d 79; *Fabbro v Reese*, 206 Okla 655, 246 P2d 324; *Williams v Glash* (Tex) 789 SW2d 261, reh overr (May 30, 1990); *Grahn v Gregory* (Utah App) 800 P2d 320, 146 Utah Adv Rep 47, reh den (Utah App) 1990 Utah App LEXIS 207 and review pending (Utah) 156 Utah Adv Rep 26 and cert den (Utah) 843 P2d 516, 167 Utah Adv Rep 25.

Practice References *Mutual Mistake—Physical Condition of Realty.* 3 Am Jur POF 745 § 4.

Footnote 64. *Rosenbaum v Texas Energies, Inc.*, 241 Kan 295, 736 P2d 888, 96 OGR 259.

In an action brought by a creditor to recover on two notes against a debtor and the guarantor of the notes under a continuing guarantee agreement, parol evidence was admissible to establish mutual mistake or error where the guarantor contended that she had guaranteed only one of the notes in question and that the creditor and the debtor had failed to make permanent financing arrangements as had been agreed. *American Bank & Trust Co. v Vinson* (La App 2d Cir) 528 So 2d 693.

Footnote 65. 66 Am Jur 2d, *Reformation of Instruments* §§ 118, 119.

§ 1113 Conditions precedent and subsequent

[View Entire Section](#)
[Go to Parallel Reference Table](#)

◆ **Definition:** For purposes of parol evidence analysis, a condition precedent is one to be performed before the agreement becomes effective, while a condition which excuses an already binding obligation is a condition subsequent. 66

Parol evidence is generally admissible to show conditions precedent which relate to the delivery or the taking effect of a written instrument. 67 Such evidence does not constitute an oral contradiction or variation of the written instrument, but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed, 68 at least not until the fulfillment of the condition. 69 Parol evidence may not be used to show a condition precedent where such condition contradicts, varies, or negates the terms of written agreement, 70 unless such terms are ambiguous. 71

If it appears or is admitted that a valid contract has come into existence, parol evidence cannot be admitted to show that the contract is subject to a condition subsequent or is to become inoperative in a certain event. 72

Footnotes

Footnote 66. *Rincones v Windberg* (Tex App Austin) 705 SW2d 846.

Footnote 67. *Ware v Allen*, 128 US 590, 32 L Ed 563, 9 S Ct 174; *Bair v General Motors Corp.* (CA6 Mich) 895 F2d 1094; *In re Excalibur Auto. Corp.* (CA7 Wis) 859 F2d 454; *Quaile & Co. v William Kelly Milling Co.*, 184 Ark 717, 43 SW2d 369, 79 ALR 183; *Fontana v Upp*, 128 Cal App 2d 205, 275 P2d 164; *Kitchens v Kitchens* (Fla App D2) 142 So 2d 343; *Chappell v Hasche* (Fla App D2) 98 So 2d 808; *Malir v Maixner*, 174 Kan 26, 254 P2d 282; *Louisiana Nat. Bank v Jumonville* (La App 1st Cir) 563 So 2d 965; *Burrowes Corp. v Read*, 151 Me 92, 116 A2d 127; *Sams v Feldman*, 342 Mich 10, 68 NW2d 780; *Service Fire Ins. Co. v Craft*, 219 Miss 18, 67 So 2d 874; *Child v George Miller Inc.*, 74 Nev 223, 327 P2d 342; *Sherry v Marsh*, 256 App Div 219, 9 NYS2d 494; *Bailey v Westmoreland*, 251 NC 843, 112 SE2d 517; *Fountain Hill Millwork Bldg. Supply Co. v Belzel*, 587 A2d 757, 402 Pa Super 553; *Bissonnette v Hanton City Realty Corp.* (RI) 529 A2d 139; *Baker v Baker*, 143 Tex 191, 183 SW2d 724; *Mapes v Santa Cruz Fruit Packing Corp.*, 26 Wash 2d 145, 173 P2d 182; *Walker v Copeland*, 193 Wash 1, 74 P2d 469; *Scott v Wall*, 55 Wash App 404, 777 P2d 581, 9 UCCRS2d 980; *Miners' & Merchants' Bank v Gidley*, 150 W Va 229, 144 SE2d 711; *North Am. Uranium v Johnston*, 77 Wyo 332, 316 P2d 325.

Parol evidence was properly admitted to show that a third party's payment of an insurance renewal premium was conditioned upon the insured's not having made the payment herself or upon her not having obtained other insurance since the evidence was not offered to contradict or alter the terms of the policy or the receipt for payment but, rather, to establish a condition precedent to the taking effect of the receipt, which unqualifiedly provided for renewal of the policy. *Farmers Ins. Exchange v Farm Bureau Mut. Ins. Co.* (Mo) 522 SW2d 779.

A parol condition that a note was a guaranty for an indebtedness was a condition affecting the delivery of the note for a special purpose rather than a condition affecting payment, and, hence, evidence of such parol condition was properly admitted. *Nawas v Holmes* (Tex Civ App Waco) 541 SW2d 283, 20 UCCRS 133.

As to the admissibility of parol evidence to show that a deed was delivered on condition, see 23 Am Jur 2d, Deeds §§ 92, 123, 124.

Footnote 68. *Bassato v Denicola* (Fla) 80 So 2d 353; *Child v George Miller Inc.*, 74 Nev 223, 327 P2d 342.

Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition. Restatement 2d, Contracts § 217.

Parol evidence is generally permitted to be introduced to show that the parties, prior to or at the time they made a written contract of sale, entered into an agreement that such contract of sale should become operative only on the occurring of a certain condition or contingency, the theory being that such evidence only goes to prove that the instrument never matured as a valid obligation, and that, hence, there could not be any modification or variance or contradiction of a contract as such. *Chappell v Hasche* (Fla App D2) 98 So 2d 808.

Footnote 69. *Kelley v Carson*, 120 Ga App 450, 171 SE2d 150, 7 UCCRS 47; *Baker v Baker*, 143 Tex 191, 183 SW2d 724.

Footnote 70. *Bank Leumi Trust Co. v Wulkan* (SD NY) 735 F Supp 72; *Buchanan v Sinclair Oil & Gas Co.* (DC Tex) 126 F Supp 950, 4 OGR 300; *L. B. Williams Organization, Inc. v Winter*, 106 Cal App 2d 604, 235 P2d 407; *Smith v Standard Oil Co.*, 227 Ga 268, 180 SE2d 691; *Hirsch v S. Berger Import & Mfg. Corp.* (1st Dept) 67 App Div 2d 30, 414 NYS2d 324, app dismd 47 NY2d 1008, 420 NYS2d 221, 394 NE2d 290; *Baker v Baker*, 143 Tex 191, 183 SW2d 724; *North Am. Uranium v Johnston*, 77 Wyo 332, 316 P2d 325.

Parol evidence of a prior oral agreement or custom of dealing between the parties, that the debtor did not have to pay a note according to its terms, but only if he had the funds to do so at the due date, was inadmissible as it was at variance with and contradictory to the written terms of the note. *Bengston v Southtrust Bank of Baldwin County* (Ala App) 500 So 2d 1111.

Where the contract between a law firm and its client clearly stated that the client was to pay \$100 per hour for the firm's services, parol evidence to the effect that the client understood that the fee arrangement under the contract was on a contingency basis was inadmissible. *Nguyen Ngoc Giao v Smith & Lamm, P.C.* (Tex App Houston (1st Dist)) 714 SW2d 144.

Footnote 71. *Blaha v Schwartz* (CP) 7 Ohio Ops 3d 234, holding that parol evidence of an agreement that a contract for sale of realty was conditioned upon the buyer's obtaining financing was admissible notwithstanding the inclusion of an integration clause in the written contract; the contract was ambiguous where the price breakdown for the house included a mortgage and another clause in the contract stated that the buyer was to apply for financing within five days, but no specific mention of a condition to the validity of the agreement was included.

As to the admission of parol evidence to clarify ambiguities, generally, see §§ 1134 et seq.

Footnote 72. *Nutrena Mills, Inc. v Yoder* (ND Iowa) 187 F Supp 415, affd (CA8 Iowa) 294 F2d 505; *Severance v Knight-Counihan Co.*, 29 Cal 2d 561, 177 P2d 4, 172 ALR 1107; *Fontana v Upp*, 128 Cal App 2d 205, 275 P2d 164; *Chappell v Hasche* (Fla App

D2) 98 So 2d 808.

The parol evidence rule prohibited the admission of oral evidence altering the payment terms of a written contract to prepare chapters of a book where the parties' alleged oral agreement that plaintiff would be paid only if the publication were accepted and funded by California was the type of condition that excused one party's obligations under the valid and effective contract, and, as such, was inconsistent with the terms of the written contract. *Rincones v Windberg* (Tex App Austin) 705 SW2d 846.

§ 1114 Date of instrument

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally speaking, parol evidence is admissible to show the true date of the execution and delivery of a contract in order to supply a date where one is lacking, ⁷³ or to contradict the date shown in the body of the instrument, ⁷⁴ even as to instruments which are required by statute to be in writing. ⁷⁵ However, parol evidence of the date of an instrument is not admissible where the date is a vital part of the instrument and a change of date would change the rights of the parties to the instrument. ⁷⁶

Footnotes

Footnote 73. *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301; *Olsen v Reese*, 114 Utah 411, 200 P2d 733; *Cowles Pub. Co. v McMann*, 25 Wash 2d 736, 172 P2d 235, 167 ALR 1164.

Footnote 74. *District of Columbia v Camden Iron Works*, 181 US 453, 45 L Ed 948, 21 S Ct 680; *Ohio Casualty Ins. Co. v Heaney* (ND Ill) 229 F Supp 30; *Artukovich v Pacific States Cast Iron Pipe Co.*, 78 Cal App 2d 1, 176 P2d 962; *Illinois Nat. Bank & Trust Co. v Holmes*, 311 Ill App 286, 35 NE2d 823; *Southdale Center, Inc. v Lewis*, 260 Minn 430, 110 NW2d 857, 6 ALR3d 345; *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301; *2647 Realty Co. v Abrams*, 138 Misc 2d 308, 524 NYS2d 168; *Olsen v Reese*, 114 Utah 411, 200 P2d 733.

Footnote 75. *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301; *Olsen v Reese*, 114 Utah 411, 200 P2d 733.

Footnote 76. *Vermont Invest. Capital, Inc. v Granite Mut. Ins. Co.* (DC Vt) 705 F Supp 1019, *affd without op* (CA2 Vt) 888 F2d 1377 (extrinsic evidence challenging effective date as stated on insurance policy inadmissible); *In re De Los Angeles* (BC ED Okla) 101 BR 722 (parol evidence challenging date of execution of security agreement inadmissible); *Grand Junction Gospel Tabernacle v Orvis*, 113 Colo 408, 157 P2d 619.

Parol evidence as to the postmark date on taxpayers' certified mail receipt was inadmissible in an action to determine the timeliness of the taxpayers' petition challenging a deficiency determination. *Redman v Commissioner* (CA6) 820 F2d 209,

Parol evidence is not admissible to vary or contradict the date appearing on a written agreement where the written agreement specifies the date on which a promissory note becomes payable. *Norden v Friedman* (Mo) 756 SW2d 158, 102 OGR 301.

§ 1115 Writing used as collateral evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The parol evidence rule does not apply in instances where the writing referred to is not relied upon as the basis of the action or defense, but is a mere collateral instrument of evidence. 77 For example, if a writing is introduced in evidence as an admission, rather than as part of the contract between the parties, the person against whom the admission is introduced may explain the meaning that he or she intended to convey. 78

Footnotes

Footnote 77. *Bank v Kennedy*, 84 US 19, 17 Wall 19, 21 L Ed 554; *Doelle v Ireco Chemicals* (CA10 Utah) 391 F2d 6, CCH Fed Secur L Rep ¶ 92172; *Bales v Massey*, 241 Iowa 1084, 43 NW2d 671; *Gulf Federal Sav. Bank v Zoblotsky* (La App 5th Cir) 496 So 2d 1247; *Peek v Wachovia Bank & Trust Co.*, 242 NC 1, 86 SE2d 745; *Transit Enterprises, Inc. v Addicks Tire & Auto Supply, Inc.* (Tex App Houston (1st Dist)) 725 SW2d 459; *Sachse v Lumley*, 524 A2d 599, 147 Vt 584 (mortgage loan commitment letter admissible in action brought on purchase and sale agreement).

In a licensee's action against a licensor for tortious interference with the licensee's business expectancy, parol evidence regarding the license agreement was admissible where proof of the content of the agreement was not key to the licensee's claim. *Western Fireproofing Co. v W.R. Grace & Co.* (CA8 Mo) 896 F2d 286.

Footnote 78. *Cornick v Southwest Iowa Broadcasting Co.*, 252 Iowa 653, 107 NW2d 920, 42 CCH LC ¶ 31081.

(2). Incomplete Writings; Doctrine of Partial Integration [1116-1120]

§ 1116 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An exception to the parol evidence rule applies in situations where there is a "partial integration". 79

◆ Definition: A "partial integration" is a written instrument which has not been adopted by the parties as a complete and exclusive statement of the terms of the agreement. 80 Parol evidence of consistent additional terms may supplement an otherwise incomplete document. 81

Parol evidence is admissible to prove the part of a nonintegrated written agreement that has not been reduced to writing, but is not admissible with regard to the part that has been reduced to writing. 82 In addition, in order to be admitted, the extrinsic evidence must not contradict or be inconsistent with the clear terms of the writing. 83

◆ Observation: As to contracts required to be in writing by the statute of frauds, while parol evidence is admissible to explain ambiguities, 84 it cannot be admitted to supply elements which are missing. 85

§ 1116 ----Generally [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Introduction of Evidence Over Parol Evidence Rule Objection.

Footnotes

Footnote 79. In re Lamica Corp. (BC SD NY) 65 BR 849; A. Kemp Fisheries, Inc. v Castle & Cooke, Inc., Bumble Bee Seafoods Div. (CA9 Wash) 852 F2d 493, 1989 AMC 236 (applying Cal law); TIE Communications, Inc. v Kopp, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; Florida Capital Corp. v Robert J. Bissett Constr., Inc. (Fla App D2) 167 So 2d 595, cert den (Fla) 176 So 2d 511; Pounds v Hospital Authority of Gwinnett County, 191 Ga App 689, 382 SE2d 602, appeal after remand 197 Ga App 598, 399 SE2d 92; Alumet v Bear Lake Grazing Co. (App) 112 Idaho 441, 732 P2d 679, appeal after remand (App) 119 Idaho 979, 812 P2d 286, review gr (Idaho) 1989 Ida LEXIS 181 and superseded on other grounds 119 Idaho 946, 812 P2d 253; Academy Chicago Publishers v Cheever (1st Dist) 200 Ill App 3d 677, 146 Ill Dec 386, 558 NE2d 349, app gr 133 Ill 2d 551, 149 Ill Dec 315, 561 NE2d 685 and revd on other grounds 144 Ill 2d 24, 161 Ill Dec 335, 578 NE2d 981, 18 Media L R 2327; Davis v Kurtz (3d Dist) 165 Ill App 3d 417, 116 Ill Dec 317, 518 NE2d 1297, app den 121 Ill 2d 568, 122 Ill Dec 435, 526 NE2d 828; Schaneman v Wright, 238 Neb 309, 470 NW2d 566, 115 OGR 512; Trujillo v Gonzales, 747 P2d 915, 106 NM 620; United Aircraft Products, Inc. v Warrick (Hamilton Co) 79 Ohio App 165, 34 Ohio Ops 519, 47 Ohio L Abs 504, 72 NE2d 669, 73 USPQ 128; Columbia East Assoc. v Bi-Lo, Inc. (App) 299 SC 515, 386 SE2d 259; First Victoria Nat. Bank v Briones (Tex App Corpus Christi) 788 SW2d 632, writ den (Oct 3, 1990) and reh'g of writ of error overr (Nov 14, 1990); Sherman v Lunsford, 723 P2d 1176, 44 Wash App 858; Kuehn v Safeco Ins. Co. (App) 140 Wis 2d 620, 412 NW2d 126.

Footnote 80. Restatement 2d, Contracts § 210(2).

As to the preliminary question as to whether a particular written agreement is fully integrated, see § 1117.

Footnote 81. *In re Lamica Corp.* (BC SD NY) 65 BR 849; *A. Kemp Fisheries, Inc. v Castle & Cooke, Inc., Bumble Bee Seafoods Div.* (CA9 Wash) 852 F2d 493, 1989 AMC 236 (applying Cal law); *TIE Communications, Inc. v Kopp*, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; *Florida Capital Corp. v Robert J. Bissett Constr., Inc.* (Fla App D2) 167 So 2d 595, cert den (Fla) 176 So 2d 511; *Pounds v Hospital Authority of Gwinnett County*, 191 Ga App 689, 382 SE2d 602, appeal after remand 197 Ga App 598, 399 SE2d 92; *Alumet v Bear Lake Grazing Co.* (App) 112 Idaho 441, 732 P2d 679, appeal after remand (App) 119 Idaho 979, 812 P2d 286, review gr (Idaho) 1989 Ida LEXIS 181 and superseded on other grounds 119 Idaho 946, 812 P2d 253; *Academy Chicago Publishers v Cheever* (1st Dist) 200 Ill App 3d 677, 146 Ill Dec 386, 558 NE2d 349, app gr 133 Ill 2d 551, 149 Ill Dec 315, 561 NE2d 685 and revd 144 Ill 2d 24, 161 Ill Dec 335, 578 NE2d 981, 18 Media L R 2327; *Davis v Kurtz* (3d Dist) 165 Ill App 3d 417, 116 Ill Dec 317, 518 NE2d 1297, app den 121 Ill 2d 568, 122 Ill Dec 435, 526 NE2d 828; *Schaneman v Wright*, 238 Neb 309, 470 NW2d 566, 115 OGR 512; *Trujillo v Gonzales*, 747 P2d 915, 106 NM 620; *United Aircraft Products, Inc. v Warrick* (Hamilton Co) 79 Ohio App 165, 34 Ohio Ops 519, 47 Ohio L Abs 504, 72 NE2d 669, 73 USPQ 128; *Columbia East Assoc. v Bi-Lo, Inc.* (App) 299 SC 515, 386 SE2d 259; *First Victoria Nat. Bank v Briones* (Tex App Corpus Christi) 788 SW2d 632, writ den (Oct 3, 1990) and reh'g of writ of error overr (Nov 14, 1990); *Sherman v Lunsford*, 723 P2d 1176, 44 Wash App 858; *Kuehn v Safeco Ins. Co.* (App) 140 Wis 2d 620, 412 NW2d 126.

If a contract is found to be incomplete, extrinsic evidence may be used to resolve the ambiguity. *Deerfield Specialty Papers, Inc. v Black Clawson Co.* (SD NY) 751 F Supp 1578.

Where, on an agreement for the purchase of a home, the blank for the year had not been filled in, parol evidence was admissible in order to establish the date until which the offer remained valid. *Milliman v Peterman* (La App 5th Cir) 519 So 2d 238, cert den (La) 520 So 2d 752.

Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated. An agreement is not completely integrated if the writing omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing. Restatement 2d, Contracts § 216.

Generally, as to the admissibility of parol evidence to resolve an ambiguity in a written instrument, see § 1134.

Footnote 82. *Masterson v Sine*, 68 Cal 2d 222, 65 Cal Rptr 545, 436 P2d 561; *Roudebush Realty Co. v Toby* (Montgomery Co) 99 Ohio App 524, 59 Ohio Ops 421, 135 NE2d 270; *Miller v Vaughn & Taylor Constr. Co.* (Tex Civ App Fort Worth) 345 SW2d 852, writ ref n r e (Jul 19, 1961) and reh'g of writ of error overr (Oct 3, 1961), error ref n r e;

High Knob, Inc. v Allen, 205 Va 503, 138 SE2d 49; Buyken v Ertner, 33 Wash 2d 334, 205 P2d 628; Scarne's Challenge, Inc. v M. D. Orum Co., 267 Wis 134, 64 NW2d 836; North Am. Uranium v Johnston, 77 Wyo 332, 316 P2d 325.

As to the admissibility of parol evidence on the preliminary question whether or not the written instrument contains the entire contract, see §§ 1117, 1118.

Footnote 83. Deerfield Specialty Papers, Inc. v Black Clawson Co. (SD NY) 751 F Supp 1578; Hulse v Jullard Fancy Foods Co., 61 Cal 2d 571, 39 Cal Rptr 529, 394 P2d 65; Academy Chicago Publishers v Cheever (1st Dist) 200 Ill App 3d 677, 146 Ill Dec 386, 558 NE2d 349, app gr 133 Ill 2d 551, 149 Ill Dec 315, 561 NE2d 685 and revd on other grounds 144 Ill 2d 24, 161 Ill Dec 335, 578 NE2d 981, 18 Media L R 2327; Brazil v Dupree, 197 Or 590, 254 P2d 1041; Valente v Shuman & Richt, P.C., 72 NY2d 805, 532 NYS2d 755, 528 NE2d 1228; Buyken v Ertner, 33 Wash 2d 334, 205 P2d 628; Sherman v Lunsford, 723 P2d 1176, 44 Wash App 858; Kuehn v Safeco Ins. Co. (App) 140 Wis 2d 620, 412 NW2d 126.

Extrinsic evidence is inadmissible if it is inconsistent with or varies the terms, tenor, or contents of the partial integration. Miller v Vaughn & Taylor Constr. Co. (Tex Civ App Fort Worth) 345 SW2d 852, writ ref n r e (Jul 19, 1961) and reh'g of writ of error overr (Oct 3, 1961), error ref n r e.

Footnote 84. 72 Am Jur 2d, Statute of Frauds § 296.

Footnote 85. Gatins v NCR Corp., 180 Ga App 595, 349 SE2d 818, 106 CCH LC ¶ 55756.

As to use of parol evidence to establish the completeness of a memorandum for purposes of satisfying the statute of frauds, see 72 Am Jur 2d, Statute of Frauds § 296.

As to the admissibility of parol evidence to explain ambiguities in a written agreement, generally, see §§ 1134 et seq.

§ 1117 Determining whether writing constitutes partial integration

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the doctrine of partial integration, in order for parol evidence to be admissible to complete a writing, 86 it must first be shown that the writing in question is incomplete in that part of the agreement of the parties has not been reduced to writing; whether a writing is complete may be ascertained in the light of its subject matter, purpose, and circumstances of execution as demonstrated by parol evidence. 87 In some jurisdictions, there is a presumption that in the absence of an averment that there was an omission or mistake made in reducing the agreement to writing, a contract which has been reduced to writing embodies the final and entire agreement of the parties, and where the written contract appears, upon inspection, to be complete, the court may not resort to parol evidence to ascertain whether the written contract embodies the entire agreement.

Where the writing contains an integration or merger clause—a recital that the writing contains the entire agreement between the parties and that all prior negotiations and agreements are merged therein, and that all additions to or alterations or changes in the contract must be in writing and signed by both parties—the parol or extrinsic evidence rule is particularly applicable. 89

Footnotes

Footnote 86. § 1116.

Footnote 87. *Banque Paribas v Dana* (DC Conn) 755 F Supp 523, *affd* without op (CA2 Conn) 940 F2d 649; *Brown v Financial Service Corp., International* (CA5 Fla) 489 F2d 144; *Clark v United States* (CA9 Alaska) 341 F2d 691, 65-1 USTC ¶ 9220, 15 AFTR 2d 313; *Shelton Yacht & Cabana Club, Inc. v Suto*, 150 Conn 251, 188 A2d 493; *Valley Bank v Christensen*, 808 P2d 415, 119 Idaho 496; *Spitz v Brickhouse* (1st Dist) 3 Ill App 2d 536, 123 NE2d 117, 49 ALR2d 673; *Young v Cedar County Work Activity Center, Inc.* (Iowa) 418 NW2d 844; *Guilbeau v C & D Reprographics-Lafayette, Inc.* (La App 3d Cir) 568 So 2d 206, *cert den* (La) 571 So 2d 653; *Ryder v Williams*, 29 Mass App 146, 558 NE2d 1134; *Schmude Oil Co. v Omar Operating Co.*, 184 Mich App 574, 458 NW2d 659, 111 OGR 275, *app den* 437 Mich 879; *Hayes v Hayes*, 394 SE2d 675, 100 NC App 138; *Baldus v Mattern* (ND) 93 NW2d 144; *State Nat. Bank v Academia, Inc.* (Tex App Corpus Christi) 802 SW2d 282, 14 UCCRS2d 662, *reh overr* (Tex App Corpus Christi) 1991 Tex App LEXIS 79 and *writ den* (Jun 5, 1991) and *rehg of writ of error overr* (Sep 5, 1991) (applying Ill law); *Buyken v Ertner*, 33 Wash 2d 334, 205 P2d 628.

A veterinary practice purchase option agreement as presented in evidence was a partially integrated agreement for purposes of the Virginia parol evidence rule, where the agreement defined the veterinary practice that was subject to the purchase option to include assets with the exception of items listed on a named exhibit that was not introduced into evidence; thus, the option agreement as presented as evidence was on its face an incomplete document. *In re Alterman* (BC ED Va) 127 BR 356, 3 Fourth Cir & Dist Col Bankr Ct Rep 396.

Contracts without cost limitations are incomplete and parol testimony is admissible to supply the omission. *Williams Engineering, Inc. v Goodyear* (La) 496 So 2d 1012.

The degree to which it is necessary, if at all, to go outside the writing in particular case and resort to parol evidence to ascertain the extent to which the writing is an integration of the oral stipulations of the parties rests in the sound discretion of the trial court; under no circumstances, however, is it permissible to prove the contract incomplete by going outside the writing and proving that there was an oral, noncollateral stipulation entered into which was not contained in the written agreement. *Jimmerson v Troy Seed Co.*, 236 Minn 395, 53 NW2d 273.

Footnote 88. *Jack H. Brown & Co. v Toys "R" Us, Inc.* (CA5 Tex) 906 F2d 169 (applying Tex law); *Piercy v Citibank N. A.*, 101 Misc 2d 302, 424 NYS2d 76; *Faithful v Gardner* (Tenn App) 799 SW2d 232; *First Nat'l Bank v Clark*, 181 W Va 494, 383 SE2d 298 (superseded by statute on other grounds as stated in *Coonrod v Clark*, 189 W

Va 669, 434 SE2d 29); *Chmill v Friendly Ford-Mercury of Janesville, Inc.* (App) 154 Wis 2d 407, 453 NW2d 197.

In an action by a purchaser against a seller for specific performance of five written documents providing for the sale of realty, where there was a disagreement whether a particular writing was in fact a complete and accurate integration of the contract, parol evidence was admissible to establish that the parties intended one integrated package transaction for the sale of seven contiguous parcels of real estate, and not separate agreements for the sale of the parcels. *Burgan v Pines Co. of Georgia, Ltd.* (Fla App D1) 382 So 2d 1295.

In an action by bank depositors who sought to make a premature withdrawal of time deposit funds, the trial court erred in estopping the bank from asserting the contract between itself and the depositors and in admitting parol evidence with respect to a policy of the bank permitting premature withdrawal provided penalties were paid where the contract was enforceable, where the fair meaning of the contract terms required the depositors to obtain a bank's permission to any premature withdrawal of funds, and where all necessary terms of performance were stated in the contract itself. *Le Bovici v Jamaica Sav. Bank* (2d Dept) 81 App Div 2d 150, 439 NYS2d 688, affd 56 NY2d 522, 449 NYS2d 954, 434 NE2d 1332.

Footnote 89. § 1095.

§ 1118 --Mention of item or element as test of integration

[View Entire Section](#)
[Go to Parallel Reference Table](#)

One test used to determine whether a written instrument has been adopted by the parties as a complete and exclusive statement of the terms of the agreement is whether the particular matter sought to be established by the alleged extrinsic negotiation is fully covered in the contract; if it is, then the contract is integrated and parol evidence with respect to a collateral matter is not admissible. 90 In addition, where the particular subject of the alleged extrinsic negotiation is mentioned or dealt with in the written contract, such contract will be presumed to contain the entire agreement with regard to that subject. 91 On the other hand, it is presumed that the parties did not intend the writing to embody an element of their negotiations which is not mentioned in the writing and on which the law makes no implication. 92 Where the matter is covered by an implication of law, such as an implication that a contract shall be performed within a reasonable time where the matter is not mentioned in the writing, parol evidence of an agreement at variance with the implication is not admissible. 93

The fact that a written contract, apparently complete, is silent on a particular point does not of itself make parol evidence on that point admissible. 94 The existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proved by parol if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them.

Footnotes

Footnote 90. *Associated Catalog Merchandisers, Inc. v Chagnon*, 210 Conn 734, 557 A2d 525, later proceeding 212 Conn 322, 561 A2d 436; *Bryan v St. Andrews Bay Community Hotel Corp.*, 99 Fla 132, 126 So 142.

Footnote 91. *Giant Food Stores, Inc. v Marketplace Communications Corp.* (MD Pa) 717 F Supp 1071; *Associated Catalog Merchandisers, Inc. v Chagnon*, 210 Conn 734, 557 A2d 525, later proceeding 212 Conn 322, 561 A2d 436; *Greenwald v Food Fair Stores Corp.* (Fla App D3) 100 So 2d 200; *Loveland v Epstein Drug Co.*, 227 Mass 311, 116 NE 570.

In an action for specific performance of an option agreement to convey interests in real estate, the admission of parol testimony concerning purchase price and expiration date was not permissible under the partial integration rule, since those terms were included in the parties' written agreement. *Craig v Kessing*, 297 NC 32, 253 SE2d 264.

Footnote 92. *Shelton Yacht & Cabana Club, Inc. v Suto*, 150 Conn 251, 188 A2d 493; *Jackson v Parker*, 153 Fla 622, 15 So 2d 451.

Footnote 93. *Marcus & Co. v K. L. G. Baking Co.*, 122 NJL 202, 3 A2d 627.

As to the admissibility of parol evidence to vary or contradict what the law implies from a written agreement, generally, see § 1094.

Footnote 94. *Seitz v Brewers' Refrigerating Machine Co.*, 141 US 510, 35 L Ed 837, 12 S Ct 46.

Footnote 95. §§ 1122 et seq.

§ 1119 --Questions for court and jury

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Whether a writing is a complete expression of the agreement of the parties and was intended by them as such is a question for the court to determine. 96 Where the issue is fairly raised by the evidence, the court must preliminarily and initially determine whether the writing in question was intended to, and does, constitute a complete integration of the agreement between the parties. 97 If the judge decides that the transaction was completely covered by the writing, he or she does not decide that the negotiations, of which evidence is excluded, did not take place, but merely that if they did take place they are nevertheless legally immaterial; conversely, if the judge decides that the transaction was not completely covered by the writing, he or she does not decide that the negotiations did take place, but merely that if they did they are legally effective. 98 The

judge then leaves to the jury the determination of fact as to whether the negotiations actually took place. 99

Footnotes

Footnote 96. Walley v Bay Petroleum Corp. (CA5 Miss) 312 F2d 540; Clark v United States (CA9 Alaska) 341 F2d 691, 65-1 USTC ¶ 9220, 15 AFTR 2d 313; Slivinsky v Watkins-Johnson Co. (6th Dist) 221 Cal App 3d 799, 270 Cal Rptr 585, 5 BNA IER Cas 832; McNeill & Associates, Inc. v ITT Life Ins. Corp. (Minn App) 446 NW2d 181; Brazil v Dupree, 197 Or 590, 254 P2d 1041; Barber v Rochester, 52 Wash 2d 691, 328 P2d 711; Milwaukee Cold Storage Co. v York Corp., 3 Wis 2d 13, 87 NW2d 505.

Restatement 2d, Contracts § 210(3).

Footnote 97. Walley v Bay Petroleum Corp. (CA5 Miss) 312 F2d 540.

Footnote 98. Barber v Rochester, 52 Wash 2d 691, 328 P2d 711.

Footnote 99. Barber v Rochester, 52 Wash 2d 691, 328 P2d 711.

§ 1120 Supplying omissions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is generally admissible where it does not tend to contradict the terms of a contract or other instrument, 1 but is admitted in order to supply an omission. 2 Where the written contract is ambiguous, uncertain, obscure, or doubtful—that is, where it is obvious that the written contract does not contain the entire agreement of the parties—parol evidence as to the circumstances surrounding the parties at and prior to the execution of the contract, and the oral agreements made at the time of its execution, are admissible in order to ascertain the true intention of the parties, provided that such agreements do not contradict the terms of the written instrument. 3 However, an entire absence of description of the property in a contract to purchase real property cannot be supplied by parol evidence. 4

Omissions in the records of the proceedings of legislative and administrative bodies may be supplied by parol evidence where the applicable statutes do not make such records the only evidence of such proceedings, nor render invalid their unrecorded proceedings, as long as such testimony does not contradict the records. 5

Footnotes

Footnote 1. § 1092.

Footnote 2. TIE Communications, Inc. v Kopp, 218 Conn 281, 589 A2d 329, later

proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; Valente v Shuman & Richt, P.C., 72 NY2d 805, 532 NYS2d 755, 528 NE2d 1228; Spitz v Brickhouse (1st Dist) 3 Ill App 2d 536, 123 NE2d 117, 49 ALR2d 673; Caldwell v United Presbyterian Church (CP) 20 Ohio Ops 2d 364, 88 Ohio L Abs 323, 180 NE2d 638; Dearing v Brush Creek Coal Co., 182 Tenn 302, 186 SW2d 329.

In an action involving a contract silent as to its duration, parol evidence as to the circumstances surrounding the execution of the contract, the situation of the parties, the objects they apparently had in view, and the nature of the subject matter of the agreement, is admissible to show whether the agreement was to endure for a reasonable time or for some particular period. Rosenfeld v Rosenfeld, 390 Pa 39, 133 A2d 829, 66 ALR2d 1013.

As to parol evidence to supply omissions in the names of the parties, see § 1124.

Footnote 3. Caldwell v United Presbyterian Church (CP) 20 Ohio Ops 2d 364, 88 Ohio L Abs 323, 180 NE2d 638; Columbia East Assoc. v Bi-Lo, Inc. (App) 299 SC 515, 386 SE2d 259.

Where a written settlement agreement was silent as to any dismissal of the underlying claims, either with or without prejudice, extrinsic evidence was admissible to construe the agreement. Thompson v United States Dept. of Labor (CA9) 885 F2d 551.

An architect's written contract being silent as to the maximum cost of the house to be designed, parol evidence is admissible to supply the omission. Spitz v Brickhouse (1st Dist) 3 Ill App 2d 536, 123 NE2d 117, 49 ALR2d 673.

As to the admission of parol evidence to clarify ambiguities, generally, see §§ 1134 et seq.

Footnote 4. 77 Am Jur 2d, Vendor and Purchaser § 8.

Footnote 5. Gans v Cookson Hills Electric Cooperative, Inc. (Okla) 288 P2d 707.

Where the minutes of a board of education failed to reflect a vote of the board regarding the superintendent's personnel recommendations, state law provided that parol evidence was admissible in order to correct such an inadvertent omission where there was no dispute as to the outcome of the vote and the fact that it had been taken. Bundren v Peters (ED Tenn) 732 F Supp 1486.

As to the use of parol evidence to supply omissions in written instruments, generally, see § 1120.

(3). Prior or Contemporaneous Collateral Agreements [1121-1123]

§ 1121 Generally

An exception to the parol evidence rule, similar in many respects to the doctrine of partial integration, 6 is known as the "doctrine of collateral contract"; 7 under this doctrine, a prior or contemporaneous oral contract which is independent of, collateral to, and not inconsistent with, the written contract, may be proved by parol evidence. 8 Before evidence of an extrinsic oral agreement is received to vary the terms of a written contract, at least three conditions must exist: (1) the agreement must be collateral in form; (2) it must not contradict the express or implied provisions of the written contract; and (3) it must be one that parties would not ordinarily be expected to embody in the writing—that is, it must not be so clearly connected with the principal transaction as to be part and parcel of it. 9 The admission of such evidence must not alter the scope and meaning of the written instrument. 10

§ 1121 ----Generally [SUPPLEMENT]

Practice Aids: Merk v. Jewel Food Stores: The parol evidence rule applied to collective bargaining agreements – a trend toward more formality in the name of national labor policy? 10 Hofstra Lab LJ 719 (1993).

Footnotes

Footnote 6. § 1116.

Footnote 7. Markoff v Kreiner, 180 Md 150, 23 A2d 19; High Knob, Inc. v Allen, 205 Va 503, 138 SE2d 49; Buyken v Ertner, 33 Wash 2d 334, 205 P2d 628.

Footnote 8. Brennan v Carvel Corp. (CA1 Mass) 929 F2d 801; Stokes v Georgia-Pacific Corp. (CA5 La) 894 F2d 764, reh den (CA5) 1990 US App LEXIS 4453; Dayvault v Baruch Oil Corp. (CA10 Wyo) 231 F2d 413, 6 OGR 507; Bowman v Santa Clara County (1st Dist) 153 Cal App 2d 707, 315 P2d 67; TIE Communications, Inc. v Kopp, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; B. F. Goodrich Co. v Brooks (Fla App D2) 113 So 2d 593; Langenback v Mays, 205 Ga 706, 54 SE2d 401, 11 ALR2d 1221; In re Boller's Estate, 173 Kan 30, 244 P2d 678; Whaley v White (La App 2d Cir) 7 So 2d 751; National Old Line Ins. Co. v Brown, 107 NM 482, 760 P2d 775; Greenfield v Liberty Const. Corp. (Sup) 81 NYS2d 550; GRW Enterprises, Inc. v Davis (Tenn App) 797 SW2d 606, reh den (Tenn App) 1990 Tenn App LEXIS 345 and remanded (Tenn App) 1992 Tenn App LEXIS 658; Hubacek v Ennis State Bank, 159 Tex 166, 317 SW2d 30, reh'g of cause overr (Nov 12, 1958) and on remand (Tex Civ App Waco) 322 SW2d 409, writ dism w o j 159 Tex 576, 325 SW2d 124, reh'g of writ of error overr (Jul 8, 1959); Arkansas Oak Flooring Co. v Mixon (Tex Civ App Texarkana) 369 SW2d 804; Gasperson v Morris (Tex Civ App Fort Worth) 362 SW2d 392, writ ref n r e (Feb 20, 1963), error ref n r e; Garrett v Ellison, 93 Utah 184, 72 P2d 449, 129 ALR 666; High Knob, Inc. v Allen, 205 Va 503, 138 SE2d 49; Buyken v Ertner, 33 Wash 2d 334, 205

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement; (b) that the integrated agreement, if any, is completely or partially integrated; (c) the meaning of the writing, whether or not integrated; (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause; (e) ground for granting or denying rescission, reformation, specific performance, or other remedy. Restatement 2d, Contracts § 214.

The presumption as to the place of payment of a debt under a contract of sale which is silent on the matter is not conclusive, but is subject to rebuttal by evidence of a contemporaneous oral agreement wholly consistent with the terms of the written agreement. *American Industrial Sales Corp. v Airscope, Inc.*, 44 Cal 2d 393, 282 P2d 504, 49 ALR2d 1344.

Annotation: Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227 § 6.

Footnote 9. *United States v Triple A Machine Shop, Inc.* (CA9 Cal) 857 F2d 579, 35 CCF ¶ 75558 (not followed on other grounds by *Hedberg* (ASBCA) 90-1 BCA ¶ 22577) and (not followed on other grounds by *Jefferson Bank & Trust* (GSBCA) 90-3 BCA ¶ 23133); *Namad v Salomon, Inc.* (1st Dept) 147 App Div 2d 385, 537 NYS2d 807, affd 74 NY2d 751, 545 NYS2d 79, 543 NE2d 722; *O'Meara v Pritchett*, 97 Or App 329, 776 P2d 866, review den 308 Or 465, 781 P2d 1214 and (criticized on other grounds by *Wescold, Inc. v Logan Int'l*, 120 Or App 512, 852 P2d 960); *Smith v McClam*, 289 SC 452, 346 SE2d 720.

Proof of an oral agreement under which defendant distiller of alcoholic beverages agreed, contemporaneously, with written contract under which it purchased corporate assets of wholesale liquor distributorship, to relocate 50 percent owners of the distributorship in a new distributorship of their own in a different city, within a reasonable time, was not barred by the parol evidence rule, where (1) it was expectable that an agreement such as one to obtain a new distributorship for certain persons, some of whom were not even parties to the written contract, would not necessarily be integrated into an instrument for the sale of corporate assets; (2) the distiller's representative, who entered into the oral agreement, was an old friend of the promisee, making it not surprising that a handshake would have been thought sufficient; (3) the distiller's representatives who negotiated the sale of corporate assets were different from the person who negotiated the relocation agreement; (4) the written agreement did not contain the customary integration clause; (5) and the oral agreement did not vary or contradict the term of the written agreement. *Lee v Joseph E. Seagram & Sons, Inc.* (CA2 NY) 552 F2d 447, appeal after remand (CA2 NY) 592 F2d 39, 26 FR Serv 2d 1086.

In order for parol evidence of a collateral oral agreement to be admissible, the oral agreement must relate to a fact or matter which does not interfere with or contradict the clear terms of the written contract, or it must relate to a particular matter as to which the written instrument is silent, although it may relate to the same general subject matter. *Dayvault v Baruch Oil Corp.* (CA10 Wyo) 231 F2d 413, 6 OGR 507; *Oklahoma Natural Gas Corp. v Douglas*, 170 Okla 284, 39 P2d 578, 101 ALR 144; *Schmude Oil Co. v Omar Operating Co.*, 184 Mich App 574, 458 NW2d 659, 111 OGR 275, app den 437

Evidence of a parol agreement, made at the time of the execution of the note, that the maker should have the right to set off an account then existing in his or her favor, is not a variance from the contract embodied in the note; an agreement to concede a credit or a counterclaim, as offsetting the obligation of the instrument, would be a separate transaction, not dealt with in the instrument, and therefore valid. *B. F. Goodrich Co. v Brooks* (Fla App D2) 113 So 2d 593.

Footnote 10. *McAleer v United States*, 150 US 424, 37 L Ed 1130, 14 S Ct 160; *Walker v Horne* (DC NC) 149 F Supp 457; *Chase Manhattan Bank v Rood* (CA11 Fla) 698 F2d 435, reh den (CA11 Fla) 703 F2d 582; *Parker v Meneley*, 106 Cal App 2d 391, 235 P2d 101; *Cooper v Vaughan*, 81 Ga App 330, 58 SE2d 453; *Markoff v Kreiner*, 180 Md 150, 23 A2d 19; *Gibson County v Fourth & First Nat. Bank*, 20 Tenn App 168, 96 SW2d 184; *Sears, Roebuck & Co. v Nicholas*, 2 Wash 2d 128, 97 P2d 633.

§ 1122 Determination of collateral or separate character of oral agreement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Whether an alleged oral agreement is separate and distinct from or collateral to a written agreement, so that parol evidence of such an agreement is admissible, depends upon how closely the oral agreement is bound to the written agreement; if the oral agreement is one which, considering the circumstances of the parties, the subject matter, and the nature of the writing, would ordinarily have been embodied in the written instrument, then parol evidence of the oral agreement should be rejected. 11 On the other hand, if the judge concludes that the alleged oral agreement is such an agreement as might normally be made a separate agreement by parties situated as were the parties to the written contract, the judge will allow parol evidence of the agreement to go to the jury. 12 Conversely, where the oral agreement rests upon the same consideration as the written agreement, it is not a distinct collateral agreement, and parol evidence is not admissible to establish such oral agreement. 13

Footnotes

Footnote 11. *Lee v Joseph E. Seagram & Sons, Inc.* (CA2 NY) 552 F2d 447, appeal after remand (CA2 NY) 592 F2d 39, 26 FR Serv 2d 1086; *Warren v Pulley*, 193 Okla 88, 141 P2d 288; *Arkansas Oak Flooring Co. v Mixon* (Tex Civ App Texarkana) 369 SW2d 804.

In the case of a written instrument which prima facie purports to embody the complete obligations of the parties, parol evidence to show a collateral agreement may be admitted only where the circumstances attending the execution of the instrument are such as to show that the parties did not intend it to be a complete and final statement of the whole transaction. *Langley v Pacific Gas & Electric Co.*, 41 Cal 2d 655, 262 P2d 846.

If the prior or contemporaneous oral agreement and the written agreement relate to the

same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary contract must be taken to be covered by the writing. *O'Brien v O'Brien*, 362 Pa 66, 66 A2d 309, 10 ALR2d 714.

Footnote 12. *In re Boller's Estate*, 173 Kan 30, 244 P2d 678; *Arkansas Oak Flooring Co. v Mixon* (Tex Civ App Texarkana) 369 SW2d 804; *Sears, Roebuck & Co. v Nicholas*, 2 Wash 2d 128, 97 P2d 633.

The final test is the intent of the parties, and the question as to what parties would ordinarily be expected to do under the circumstances is an important, and often a controlling, factor in determining that intent. *Markoff v Kreiner*, 180 Md 150, 23 A2d 19.

Footnote 13. *Culver v Wilkinson*, 145 US 205, 36 L Ed 676, 12 S Ct 832.

Annotation: Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227 § 5.

§ 1123 Matters of inducement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some jurisdictions apply a limitation on the parol evidence rule, which provides that parol evidence of matters of inducement is admissible where it clearly shows that except for the oral stipulations, the written contract would not have been executed. 14

In other jurisdictions, parol evidence may be admitted to establish a contemporaneous oral agreement which induces the execution of a written contract, even though it may vary, change, or reform the instrument, so long as the agreement can be shown by evidence to be clear, precise, and indubitable. 15 However, there is authority for the view that parol understandings under such circumstances, although they induce the making of a written contract, are so merged in the writing that parol evidence cannot be introduced to change the contract or to show any intent different from that expressed in the instrument. 16

Footnotes

Footnote 14. *Langenback v Mays*, 205 Ga 706, 54 SE2d 401, 11 ALR2d 1221.

Where the purchasers of land with tourist cabins built on it, seeking an injunction and damages, alleged that as an inducement and consideration for the execution of the written contract of sale, the vendors had orally agreed that they would not thereafter compete with the purchasers in renting tourist cabins in the neighborhood immediately adjacent to the property sold and on the remaining portion of the tract of which the land conveyed was a part, such oral agreement was separate and distinct from and not inconsistent with the written contract, and parol evidence was therefore admissible to establish such agreement. *Langenback v Mays*, 205 Ga 706, 54 SE2d 401, 11 ALR2d 1221.

Annotation: Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227 § 7.

Footnote 15. Chase Manhattan Bank v Rood (CA11 Fla) 698 F2d 435, reh den (CA11 Fla) 703 F2d 582, holding, in an action on a written guaranty by a bank against the guarantor, that the district court erred in admitting testimony from the guarantor regarding his conversation with a bank officer prior to the execution the written guaranty, during which the bank officer allegedly agreed to conditions which would have absolved the guarantor from liability; the testimony did not fall within the exception to the parol evidence rule which allows parol evidence to establish a contemporaneous oral agreement which induced the execution of a written contract, even though it may vary, change, or reform the instrument, since the guarantor's own self-serving testimony, unsupported by any other relevant evidence and contradicted by the testimony of the bank official, did not meet the inducement exception requirement that the agreement be shown by evidence that is clear, precise, and indubitable.

Footnote 16. National Cash Register Co. v Modern Transfer Co., 224 Pa Super 138, 302 A2d 486.

As to the admissibility of parol evidence to show fraud in the inducement of a contract, see 37 Am Jur 2d, Fraud and Deceit § 452.

(4). Relationship, Identity, and Names of Parties [1124-1127]

§ 1124 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Persons with the same interest under the terms of a contract in writing which does not expressly show their relationship generally may prove by parol evidence that relationship and their responsibility as between themselves. 17 This rule is especially applicable where the issue involves the relative liability as between the parties who are the obligors on a contract; between parties jointly obligated ostensibly as principals upon a written instrument, an oral agreement in reference to who shall respond as principal and who as surety may be shown and enforced. 18 Parol evidence may also be used to show that the maker of a note is an accommodation party, if such status is not readily apparent from the text of the instrument. 19

Parol evidence may be admitted in order to identify the beneficiaries of a written agreement, but only where the description of such beneficiaries in the document is ambiguous. 20

Parol evidence is admissible even in contests between an obligor and obligee to show the true relation of the parties. 21 However, unless there is something on the face of the written instrument or in the manner of the signature to create ambiguity or uncertainty,

parol evidence may not be used to rebut the presumption that the person signing the instrument is personally liable on the instrument. 22

Footnotes

Footnote 17. *Davis v Davis*, 128 W Va 257, 36 SE2d 417.

Extrinsic evidence may be admitted to show that joint tenants actually intended property to be held as community property. *Estate of Blair* (4th Dist) 199 Cal App 3d 161, 244 Cal Rptr 627, reh den (Mar 30, 1988).

For the application of this rule in the case of contests between obligors on negotiable instruments, see 12 Am Jur 2d, Bills and Notes § 1288.

Footnote 18. *In re Jamison's Estate* (Mo) 202 SW2d 879.

As to parol evidence to show the accommodation or suretyship relation of persons signing or indorsing negotiable instruments, see 12 Am Jur 2d, Bills and Notes §§ 1274, 1287.

Footnote 19. 12 Am Jur 2d, Bills and Notes § 1287.

Footnote 20. *Johnson v Michigan Mut. Ins. Co.*, 454 NW2d 128, 183 Mich App 277; *Transamerica Occidental Life Ins. Co. v Burke*, 179 W Va 331, 368 SE2d 301.

Footnote 21. *Holmes v Goldsmith*, 147 US 150, 37 L Ed 118, 13 S Ct 288; *Beardsley v Beardsley*, 138 US 262, 34 L Ed 928, 11 S Ct 318; *Roemhild v Jones* (DC Ark) 178 F Supp 609, affd (CA8 Ark) 283 F2d 70.

Footnote 22. *First Secur. Bank, N.A. v Felger* (DC Utah) 658 F Supp 175; *Bank of Pawnee v Joslin* (4th Dist) 166 Ill App 3d 927, 118 Ill Dec 484, 521 NE2d 1177, app den 122 Ill 2d 569, 125 Ill Dec 210, 530 NE2d 238; *Wang v Wang* (SD) 393 NW2d 771, 2 UCCRS2d 972, appeal after remand (SD) 440 NW2d 740, 8 UCCRS2d 1262, later proceeding (SD) 447 NW2d 519, 10 UCCRS2d 890.

Once the identity of a person named in a contract as buyer is determined, that individual may not escape liability on the ground that he or she was acting as agent for another. *Yellow Mfg. Acceptance Corp. v Britz*, 8 Wis 2d 666, 100 NW2d 325, 80 ALR2d 1134.

§ 1125 Identification as signing in personal or representative capacity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where it is uncertain on the face of an instrument whether a person signing the instrument intended to sign in an individual or a representative capacity, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation of the

instrument. 23 An agent's personal liability on contracts executed for his or her principal depends mainly upon the manner in which the agent executed the instrument and upon the agent's intent to be bound; in cases where the instrument is ambiguous in this regard, parol evidence as to the intention of the parties may be introduced. 24 However, if the instrument is not ambiguous or if the agent is attempting, in order to relieve himself or herself of liability, to show, despite the terms of the instrument in which he or she appears as a principal, that he or she was executing the instrument for an undisclosed principal, parol evidence is not admissible. 25

Parol evidence is generally admissible for the purpose of correcting a misnomer in the written instrument, provided the identity of the person named by parol with the person intended to be named by the parties to the instrument is apparent. 26

Footnotes

Footnote 23. *Jones v New York Guaranty & Indem. Co.*, 101 US 622, 11 Otto 622, 25 L Ed 1030; *In re Kam Kuo Seafood Corp.* (BC SD NY) 76 BR 297, 4 UCCRS2d 579, affd (SD NY) 1990 US Dist LEXIS 2584 (corporate officers); *United Packinghouse Workers v Maurer-Neuer, Inc.* (CA10 Kan) 272 F2d 647, 45 BNA LRRM 2135, 38 CCH LC P 65974, cert den 362 US 904, 4 L Ed 2d 555, 80 S Ct 611, 45 BNA LRRM 2832; *Green Springs Assoc., Ltd. v Green Springs Village, Ltd.* (Ala) 577 So 2d 872 (promoter of limited partnership); *Wyandot, Inc. v Gracey Street Popcorn Co.*, 208 Conn 248, 544 A2d 180, 6 UCCRS2d 482 (president of corporation); *84 Lumber Co. v Denni Constr. Co.* (5th Dist) 212 Ill App 3d 441, 156 Ill Dec 644, 571 NE2d 231 (president and secretary of corporation); *American Bank & Trust Co. v Wetland Workover, Inc.* (La App 4th Cir) 523 So 2d 942, cert den (La) 531 So 2d 282 and cert den (La) 531 So 2d 283; *Accounts Management Corp. v Lyman Ranch*, 230 Mont 35, 748 P2d 919, 5 UCCRS2d 1024; *Murphy v Federal Deposit Ins. Corp.*, 787 P2d 370, 106 Nev 26; *Fidelity Union Bank v United Plastics Corp.*, 218 NJ Super 381, 527 A2d 938, 4 UCCRS2d 537; *Bankers Trust Co. v Stahl* (1st Dept) 145 App Div 2d 311, 534 NYS2d 979, app dismd without op 73 NY2d 872, 537 NYS2d 498, 534 NE2d 336; *Wise v Duker* (Summit Co) 57 Ohio App 3d 62, 566 NE2d 1248; *United American Bank v First Citizens Nat. Bank* (Tenn App) 764 SW2d 555, 8 UCCRS2d 1102; *Coveau v Durand* (App) 147 Wis 2d 203, 432 NW2d 662, 8 UCCRS2d 1107.

In an action by a bank to recover on a note executed by a corporation and allegedly personally guaranteed by the president of the corporation and his wife, parol evidence was admissible to determine whether the president of the corporation had executed the guarantee on the reverse side of the note as president or individually where an ambiguity appeared in the addition of the word "president" after his signature. *Bank of Miami v Armenteros* (Fla App D3) 382 So 2d 1336.

As to the admissibility of parol evidence to clarify ambiguities, generally, see §§ 1134 et seq.

Annotation: Admissibility of parol evidence to show whether guaranty of corporation's obligation was signed in officer's representative or individual capacity, 70 ALR3d 1276.

Footnote 24. 3 Am Jur 2d, Agency § 370.

Footnote 25. 3 Am Jur 2d, Agency § 370.

Footnote 26. Southern Cotton Oil Co. v Duskin, 92 Ga App 288, 88 SE2d 421.

§ 1126 Identity of persons intended to be designated in written instrument

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is generally admissible to identify the person or persons intended to be designated by the names used in contracts or instruments where there is some ambiguity or uncertainty in that respect. 27 In particular, this principle has been applied where two persons with the same name are mentioned in the written instrument; 28 where an assumed, fictitious, trade, or business name, 29 or a partnership or association name, 30 is used in a contract; or where the contract is signed by initials only. 31

Footnotes

Footnote 27. Norton v Larney, 266 US 511, 69 L Ed 413, 45 S Ct 145; John Hancock Mut. Life Ins. Co. v Menon (DC Ark) 97 F Supp 320; Greenwood v Mooradian (2nd Dist) 137 Cal App 2d 532, 290 P2d 955; Cotton v Iowa Mut. Liability Ins. Co. (Mo App) 260 SW2d 43; E. Errett Smith, Inc. v Gibson Art Co., 15 Misc 2d 504, 181 NYS2d 707; Treadway v Tewksbury (App, Franklin Co) 38 Ohio L Abs 220, 49 NE2d 955; Southern Surety Co. v Bus Union Station (Tex Civ App) 23 SW2d 484, writ diss; Lynch v Johnson, 196 Va 516, 84 SE2d 419.

A contract attached to a petition could show that a signature was the authorized signature though it was not prefixed by the plaintiff's name, and that the agreement undertaken was on behalf of the principal and not of the signer individually. National Recording Corp. v Bagley Electric Co., 110 Ga App 219, 138 SE2d 198.

Where a writing containing a promise to leave property by will was addressed to "Nephew Olaf" and was signed "your Uncle (father's brother) Ole," that the writing did not on its face identify the parties to the writing, and extrinsic evidence was admissible to show what the particular parties intended. In re Tveekrem's Estate, 169 Wash 468, 14 P2d 3.

As to identification by extrinsic evidence of parties named in a deed, see 23 Am Jur 2d, Deeds §§ 40, 41.

As to parol evidence to identify beneficiaries of an insurance policy, see 44 Am Jur 2d, Insurance § 2002.

Annotation: Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137 §§ 3 et seq.

Footnote 28. *Norton v Larney*, 266 US 511, 69 L Ed 413, 45 S Ct 145; *Snipes v Douglass* (Dist Col App) 319 A2d 326 (by implication).

In an action to recover the balance due upon a conditional sales contract against one who signed the contract in his own name, parol testimony that the defendant's son, having an identical name, was the purchaser and conducted all the negotiations for the purchase and due to his necessary absence, gave a power of attorney to his father to sign the contract for him, was admissible in evidence to prove the identity of the person the parties intended to name as buyer. *Yellow Mfg. Acceptance Corp. v Britz*, 8 Wis 2d 666, 100 NW2d 325, 80 ALR2d 1134.

Annotation: 80 ALR2d 1137 §§ 3[b], 5[a], 11[a].

Footnote 29. *Bibb v Allen*, 149 US 481, 37 L Ed 819, 13 S Ct 950; *West v Federal Deposit Ins. Corp.*, 149 Ga App 342, 254 SE2d 392, 26 UCCRS 1192, *affd* 244 Ga 396, 260 SE2d 89, 27 UCCRS 1335; *Defee v I. S. Berlin Press, Inc.*, 115 Ga App 206, 154 SE2d 452; *M & J Diesel Locomotive Filter Corp. v Nettleton* (2d Dist) 56 Ill App 2d 146, 205 NE2d 659.

In an action for damages for breach of contract, parol evidence was admissible to show that the defendant transportation company was the real party in interest to a contract in which another transportation company was the designated party, where the defendant at the time of making the contract was negotiating to buy the company designated in the contract. *Martin v Bos Lines, Inc.*, 205 Kan 532, 470 P2d 737.

In an action by a university against a labor union to recover on a pledge to the "Flint-Goodridge Hospital Expansion Fund," such hospital being operated by the plaintiff, parol evidence would be admissible to show what was meant by the named promisee or payee of the pledge. *Dillard University v International Longshoremen's Asso.* (La App 4th Cir) 144 So 2d 710, *appeal after remand* (La App 4th Cir) 169 So 2d 221 and *app den* 247 La 342, 170 So 2d 864.

In an action upon a contract for the sale of goods signed "Molen Bros." by Tom Sowell, the plaintiff was entitled to introduce parol evidence to establish its contention that the signature "Molen Bros." was intended to bind the defendants individually, and the defendants were entitled to introduce parol evidence to support their contention that the "Molen Bros." which appeared on the contract was an abbreviation of the name of a corporation, whose real name was Molen Brothers Dry Goods Co., and of which defendants were stockholders, officers, and directors, and that the contract was the contract of the corporation. *Butterick Co. v Molen*, 192 Okla 602, 138 P2d 89.

Annotation: 80 ALR2d 1137 §§ 3[c], 12, 14[b].

Footnote 30. *Southern Surety Co. v Bus Union Station* (Tex Civ App) 23 SW2d 484, *writ diss* (partnership name).

A partnership may adopt the name of only one of its partners in its firm name and it may be competent to establish by parol proof that a contract in that name is that of the partnership. *Henry De Cicco & Co. v Drucker* (1st Dist) 101 Ill App 2d 340, 243 NE2d 456.

Annotation: 80 ALR2d 1137 §§ 3[d], 7, 13[a], 14[c].

Footnote 31. *Salmon Falls Mfg. Co. v Goddard*, 55 US 446, 14 How 446, 14 L Ed 493.

§ 1127 Persons not named as party in written contract

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A person who is not named in, or bound by, the terms of a written contract cannot be rendered liable on it by parol evidence of an intention that he or she should be bound. 32 Authority also exists for the view that if the body of a contract purports to set out the names of the parties to the contract, and a person not named in such contract signs the contract but there is nothing to indicate that such person signed as a party, parol evidence will not be admitted to show that such person intended to become a party by signing. 33 However, there is authority to the contrary. 34

Footnotes

Footnote 32. *Oxford Commercial Corp. v Landau*, 12 NY2d 362, 239 NYS2d 865, 190 NE2d 230, 13 ALR3d 309 (holding that in the case of a fully integrated agreement, where parol evidence is offered to vary its terms, the parol evidence rule operates to protect all whose rights depend upon the instrument even though they were not parties to it).

Footnote 33. *Nutrena Mills, Inc. v Earle*, 14 Wis 2d 462, 111 NW2d 491, 94 ALR2d 686 (ovrld on other grounds by *St. Regis Apartment Corp. v Sweitzer*, 32 Wis 2d 426, 145 NW2d 711).

The rule that a written instrument which purports on its face to be made by persons named therein is not an instrument of a person not named therein but whose signature appears on the instrument, and that parol testimony is not admissible to show his or her intention to be bound, applied to a franchise agreement. However, where the lessees contended that their names did not appear in the lease at the time of signature, did not object to parol testimony relating the capacity and the intent with which they placed their signature thereon, such contention became the issue and the parol evidence rule was abrogated. *Mersereau v Whitesburg Center, Inc.*, 47 Ala App 146, 251 So 2d 765.

Annotation: Person who signs contract but is not named in body thereof as party to contract and liable thereunder, 94 ALR2d 691 § 8[b].

Footnote 34. *McCollum v Steitz* (5th Dist) 261 Cal App 2d 76, 67 Cal Rptr 703, 5 UCCRS 375; *Lassiter v Rotogravure Committee, Inc.* (Tex App Dallas) 727 SW2d 8, writ ref n r e (Jul 15, 1987) and reh of writ of error overr (Sep 16, 1987) (parol evidence was admissible to show that the defendant's signature on a contract was made in his capacity as a corporate president, where such corporation was named as a principal in the contract but did not show that the defendant signed in his representative capacity);

In an action brought by a real estate broker to collect sales commissions due under contracts, the court, rejecting the defendants' argument that although they had signed the contracts in question, they were not liable for the commissions because they were not named as parties in the contracts, held that the fact that the defendants signed the contract created an ambiguity that could be explained by other evidence. *Woodcock v Udell* (Super) 48 Del 69, 97 A2d 878.

Annotation: 94 ALR2d 691 § 8[a].

(5). Consideration [1128, 1129]

§ 1128 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the recital of consideration is an essential element of the contract, parol evidence is inadmissible to vary or contradict the consideration stated. 35 However, in the absence of a recital of consideration which the parties intend to be contractual, parol or extrinsic evidence is admissible to show the true consideration for a contract and that the consideration was greater or less than, or different from, that expressed in the writing, 36 so long as such showing does not change or defeat the legal operation and effect of the writing. 37 Parol or extrinsic evidence is also generally admissible, at least as between the parties themselves, to show that there was an absence or want of consideration, 38 or to show a failure of consideration, 39 nonpayment or nondelivery of the consideration, 40 or illegality of the consideration. 41

The true consideration, or the failure or illegality of the consideration, may be shown by parol evidence in such cases without pleading or proving fraud or mistake. 42 Parol evidence is also admissible to show who paid the consideration. 43

The existence of a consideration not expressed in the agreement may be shown by parol. 44 Additional consideration may be proved by parol, 45 especially where only a nominal sum is specified in the contract, 46 or where the instrument specifies a nominal sum and other good or valuable considerations. 47 Also, oral testimony is admissible to show the fairness and adequacy of consideration. 48

It is not permissible, under the guise of proving by parol the consideration of a written contract, to add to or take from the other provisions of the instrument, to modify or impair the operative effect of such provisions, 49 or wipe out its essential terms, 50 or to change its subject matter. 51

◆ **Caution:** Where lack or failure of consideration is not a valid defense, such as against a holder in due course of a negotiable instrument, parol evidence is not admissible to prove it. 52

Footnotes

Footnote 35. *Central Life Ins. Co. v Thompson*, 182 Ark 705, 33 SW2d 388; *Koeberle v Hotchkiss*, 4 Cal App 2d 252, 40 P2d 911; *Asphalt Paving, Inc. v Ulery* (Fla App D1) 149 So 2d 370; *Hardin v Ray* (Mo App) 404 SW2d 764; *Meyer v Weber*, 233 Mo App 832, 109 SW2d 702; *Warren v Pulley*, 193 Okla 88, 141 P2d 288; *Biersdorf v Putnam*, 181 Or 522, 182 P2d 992; *Beckham v Short* (App) 294 SC 415, 365 SE2d 42, affd 298 SC 348, 380 SE2d 826; *Schrock v Gillingham*, 36 Wash 2d 419, 219 P2d 92.

Where a recited consideration is contractual in nature, the real consideration, if different then recited consideration, may be shown by parol only on allegations of fraud, accident, or mistake. *Moss v Morris* (Tex Civ App) 177 SW2d 1017, writ ref w o m, error ref.

Footnote 36. *Lewis v Bell*, 58 US 616, 17 How 616, 15 L Ed 203; *Guinn v Holcombe*, 780 SW2d 30, 29 Ark App 206; *Guinn v Holcombe*, 29 Ark App 206, 780 SW2d 30; *Johnston v Courtial*, 216 Cal 506, 14 P2d 771; *Wade v Markwell & Co.*, 118 Cal App 2d 410, 258 P2d 497, 37 ALR2d 1363; *Gottlieb v Heyden Chemical Corp.* (Sup) 33 Del Ch 82, 90 A2d 660, adhered to (Sup) 33 Del Ch 283, 92 A2d 594; *Jackson v Parker*, 153 Fla 622, 15 So 2d 451; *Williams v Faile* (Fla App D1) 118 So 2d 599; *Hall v Hall* (App) 112 Idaho 641, 734 P2d 666, affd (Idaho) 1988 Ida LEXIS 141, reh gr (Idaho) 1988 Ida LEXIS 171 and op withdrawn, substituted op affirming previous opinion, on reh 116 Idaho 483, 777 P2d 255; *Polo Nat. Bank v Lester* (2d Dist) 183 Ill App 3d 411, 132 Ill Dec 220, 539 NE2d 783; *Old First Nat. Bank & Trust Co. v Scheuman*, 214 Ind 652, 13 NE2d 551, 119 ALR 1165; *Day v Grubbs*, 235 Ky 741, 32 SW2d 327, 72 ALR 323; *Hogan v McKeithen* (La App 2d Cir) 527 So 2d 982; *Hullaby v Mosely* (La App 2d Cir) 505 So 2d 874; *Biersdorf v Putnam*, 181 Or 522, 182 P2d 992; *Morgan's Home Equipment Corp. v Martucci*, 390 Pa 618, 136 A2d 838; *Smith v McClam*, 346 SE2d 720, 289 SC 452; *Beckham v Short* (App) 294 SC 415, 365 SE2d 42, affd 298 SC 348, 380 SE2d 826; *Beckham v Short* (App) 294 SC 415, 365 SE2d 42, affd 298 SC 348, 380 SE2d 826; *Rubin v Adams* (Tex Civ App Amarillo) 368 SW2d 42, writ ref n r e (Jul 24, 1963), error ref n r e; *Moss v Morris* (Tex Civ App) 177 SW2d 1017, writ ref w o m, error ref; *Young v Schriner*, 190 Va 374, 57 SE2d 33; *Crow v Crow*, 66 Wash 2d 108, 401 P2d 328.

As to the admissibility of parol or extrinsic evidence to affect the consideration to a deed, see 23 Am Jur 2d, Deeds §§ 100-104.

As to parol evidence concerning the consideration for a negotiable instrument, see 12 Am Jur 2d, Bills and Notes §§ 1280-1283.

Footnote 37. *Polo Nat. Bank v Lester* (2d Dist) 183 Ill App 3d 411, 132 Ill Dec 220, 539 NE2d 783.

Footnote 38. *Fire Ins. Asso. v Wickham*, 141 US 564, 35 L Ed 860, 12 S Ct 84; *Fr. Winkler KG v Stoller* (CA3 NJ) 839 F2d 1002, 5 UCCRS2d 650; *FPI Development, Inc. v Nakashima* (3rd Dist) 231 Cal App 3d 367, 282 Cal Rptr 508, 91 CDOS 4707, 91 Daily Journal DAR 7396; *TIE Communications, Inc. v Kopp*, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn

Super LEXIS 3166; *Katz v Innovator of America, Inc.* (La App 1st Cir) 552 So 2d 724; *Hogan v McKeithen* (La App 2d Cir) 527 So 2d 982; *Humble Oil & Refining Co. v Mullican* (Tex Civ App) 190 SW2d 392, *affd* 144 Tex 609, 192 SW2d 770; *De Mentas v Estate of Tallas* (Utah App) 764 P2d 628, 95 Utah Adv Rep 28, review pending (Utah) 101 Utah Adv Rep 3; *Miller v Archer* (Utah App) 749 P2d 1274, 75 Utah Adv Rep 59, *cert den* (Utah) 765 P2d 1278, 98 Utah Adv Rep 3; *Cowles Pub. Co. v McMann*, 25 Wash 2d 736, 172 P2d 235, 167 ALR 1164.

Evidence is admissible to prove whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement. Restatement, Contracts 2d § 218(2).

Footnote 39. *Aetna Life Ins. Co. v May*, 217 Ark 215, 229 SW2d 238; *Katz v Innovator of America, Inc.* (La App 1st Cir) 552 So 2d 724.

Footnote 40. *Southern Discount Co. v Kirkland*, 181 Ga App 263, 351 SE2d 685, *appeal after remand* 187 Ga App 453, 370 SE2d 640; *Freeman v Freeman* (La App 2d Cir) 552 So 2d 636 (criticized on other grounds by *Oliver v Oliver* (La App 2d Cir) 561 So 2d 908); *Sage Holding Corp. v Sage Folding Box Co.*, 571 A2d 431, 391 Pa Super 404; *Thorp Finance Corp. v Le Mire*, 264 Wis 220, 58 NW2d 641, 44 ALR2d 189.

Footnote 41. *Hollywood State Bank v Wilde*, 70 Cal App 2d 103, 160 P2d 846; *Liberty Mut. Ins. Co. v Gilreath*, 191 SC 244, 4 SE2d 126, 129 ALR 1148.

As to the admissibility of parol evidence of the illegality of the consideration for a negotiable instrument as against a holder in due course, see 12 Am Jur 2d, Bills and Notes § 1283.

Footnote 42. *Commonwealth, Dept. of Highways v Schmeh* (Ky) 388 SW2d 131 (conceded by court); *Day v Grubbs*, 235 Ky 741, 32 SW2d 327, 72 ALR 323; *Busby v Guaranty Title & Trust Co.* (Tex Civ App) 93 SW2d 183, *writ dismissed, error dismissed*.

Footnote 43. *Ducie v Ford*, 138 US 587, 34 L Ed 1091, 11 S Ct 417.

Footnote 44. *C & D Invest. Co. v Gulf Transport Co.* (Miss) 526 So 2d 526.

As to the doctrine of partial integration, see §§ 1116 et seq.

Footnote 45. *Weil v California Bank*, 219 Cal 538, 27 P2d 904; *Larnel Builders, Inc. v Nicholas* (Fla App D3) 123 So 2d 284; *Beckham v Short* (App) 294 SC 415, 365 SE2d 42, *affd* 298 SC 348, 380 SE2d 826; *Crow v Crow*, 66 Wash 2d 108, 401 P2d 328.

Footnote 46. *Apple v McCullough*, 239 Ky 74, 38 SW2d 955; *Miller v Archer* (Utah App) 749 P2d 1274, 75 Utah Adv Rep 59, *cert den* (Utah) 765 P2d 1278, 98 Utah Adv Rep 3.

Footnote 47. *Barton v Kuehne* (Tex Civ App) 234 SW2d 84.

As to the admissibility of extrinsic evidence to prove additional consideration for deeds, see 23 Am Jur 2d, Deeds §§ 102, 103.

Footnote 48. *Potter v Bland* (1st Dist) 136 Cal App 2d 125, 288 P2d 569.

Footnote 49. *Paccagnini v Bort* (1st Dist) 41 Ill App 2d (abstract) 216, 190 NE2d 493; *Kane v Union State Bank* (Tex Crim) 384 SW2d 358, writ ref n r e (Jun 2, 1965) and reh'g of writ of error overr (Jul 7, 1965), error ref n r e; *Cochell v Cawthon* (Tex Civ App) 110 SW2d 636, writ dismiss w o j.

Footnote 50. *Tarr v Hicks*, 155 Colo 159, 393 P2d 557.

Footnote 51. *Johnson v Johnson*, 297 Ky 268, 178 SW2d 983 (among conflicting authorities on other grounds noted in *Miles v Dawson* (Ky) 830 SW2d 368).

Footnote 52. See 12 Am Jur 2d, Bills and Notes §§ 1280-1282.

§ 1129 Effect of recital of consideration as element of contract or mere receipt

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of a recital of consideration which the parties intend to be contractual, parol or extrinsic evidence is admissible to show the true consideration for a contract and that the consideration was greater or less than, or different from, that expressed in the writing. 53 When the recital of consideration merely acknowledges the receipt of a fixed sum, such recital is generally considered to be merely a noncontractual receipt. 54

Whether the recital of consideration is contractual or a mere recital of receipt depends on the construction of the written instrument; where an executory promise or agreement is recited as consideration, it is generally regarded as contractual. 55 This determination depends on the intention of the parties as reflected by the written instrument. 56

Even if the recital of consideration is deemed to be contractual in nature, parol evidence is admissible for the purpose of clarifying the amount of consideration where the statement of consideration is ambiguous or uncertain. 57

Footnotes

Footnote 53. § 1128.

Footnote 54. *Hall v Hall* (App) 112 Idaho 641, 734 P2d 666, aff'd (Idaho) 1988 Ida LEXIS 141, reh'g (Idaho) 1988 Ida LEXIS 171 and op withdrawn, substituted op on other grounds, on reh'g 116 Idaho 483, 777 P2d 255 (holding that where the consideration clause in a contract merely recites "for value received," parol evidence is admissible to show the true consideration for the conveyance).

The consideration stated in a deed ordinarily indicates mere receipt of consideration. *Beckham v Short* (App) 294 SC 415, 365 SE2d 42, aff'd 298 SC 348, 380 SE2d 826.

Footnote 55. *Johnson v Johnson* (Tex Com App) 14 SW2d 805, holding that if one

promises in a written contract to pay a sum of money in consideration for delivery of the property in the future, in other words, if the recital of consideration is of a contractual nature for the performance of a future act, parol evidence is inadmissible to show that the undertaking was to deliver some other kind of property.

Footnote 56. *Hullaby v Mosely* (La App 2d Cir) 505 So 2d 874.

Footnote 57. *Stoffel v Stoffel*, 241 Iowa 427, 41 NW2d 16, 14 ALR2d 891.

Generally, as to the admissibility of parol evidence in case of ambiguity or uncertainty, see §§ 1134 et seq.

(6). Time, Mode, and Place of Performance or Payment [1130-1132]

§ 1130 Time of performance or payment

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If the due date of a written instrument, or the date for performance of the agreement embodied in the instrument, is unequivocally stated in the instrument, parol evidence is inadmissible to vary such time. 58 However, where the contract provides a space for the parties to specify the time of performance, but the space is left blank, parol evidence is admissible. 59 Where the parties have designated in the contract a definite time for its performance and have expressly stated that time is of the essence, extrinsic evidence to the contrary is inadmissible; however, where such a contract does not expressly or by necessary implication state whether time is of the essence, parol evidence is generally admissible to show that the time set forth in the instrument was intended to be of the essence. 60 If the contract neither provides the time for performance nor states expressly or by necessary implication whether time is to be regarded as of the essence, parol evidence is admissible in order to determine the intent of the parties in this regard. 61 In addition, parol proof is admissible to show that, at the time of making a contract, time was considered as of the essence, at least when such evidence does not tend to vary or impeach the written agreement. 62

Footnotes

Footnote 58. *Brown v Wiley*, 61 US 442, 20 How 442, 15 L Ed 965; *Edwards v Smith* (Mo) 322 SW2d 770.

Where a contract for the sale of land provided that if, upon examination of the abstract of title, the buyer found defects in the title, the seller must remedy them if this could be done within a reasonable time and at a reasonable expense, parol evidence was inadmissible to establish that the parties to the contract had an understanding that the sale was to be consummated within 60 days from the date of the contract. *Johnson v Schuchardt*, 333 Mo 781, 63 SW2d 17, 89 ALR 914.

Footnote 59. *Milliman v Peterman* (La App 5th Cir) 519 So 2d 238, cert den (La) 520 So 2d 752.

As to the admissibility of parol evidence to show the time of performance of a written agreement when the agreement is silent as to the time of performance, generally, see § 1131.

As to the admissibility of a subsequent parol agreement modifying the time of performance of a written agreement, see § 1133.

Footnote 60. *Johnson v Schuchardt*, 333 Mo 781, 63 SW2d 17, 89 ALR 914.

Footnote 61. *Glenmark Assocs., Inc. v Americare of W. Va., Inc.*, 179 W Va 632, 371 SE2d 353.

Footnote 62. *Johnson v Schuchardt*, 333 Mo 781, 63 SW2d 17, 89 ALR 914; *Wimer v Wagner*, 323 Mo 1156, 20 SW2d 650, 79 ALR 1231.

§ 1131 --Where writing is silent as to time of performance

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a written agreement is silent as to the time of performance, the courts will imply that performance was intended to take place within a reasonable time. 63 Such an instrument represents the integrated contract of the parties, and parol evidence as to the time for performance is generally not admissible to establish a specific time for performance. 64 However, parol evidence as to the time of performance has been admitted under circumstances indicating that the contract was not completely integrated or reduced to writing. 65 In determining that a written contract is incomplete, weight may be given to the fact that reference was made in the contract to an oral agreement respecting the time of performance. 66

There is authority for the view that even though parol testimony may not be used to establish a fixed time for performance, it is admissible to throw light on the question of what is a reasonable time for performance. 67 In addition, parol evidence of an oral agreement as to the time of performance may be admitted where the written instrument is ambiguous in this regard. 68

In the case of contracts calling for payments, where no time for payment is expressed, the law, as a rule, requires the payment to be made immediately. 69

Footnotes

Footnote 63. 17A Am Jur 2d, Contracts § 479.

Footnote 64. *Colorado Woman's College v Bradford-Robinson Printing Co.*, 114 Colo 237, 157 P2d 612; *Gluckman v Holzman*, 29 Del Ch 458, 51 A2d 487; *Giffels & Vallet, Inc. v Edw. C. Levy Co.*, 337 Mich 177, 58 NW2d 899; *Wick v Murphy*, 237 Minn 447, 54 NW2d 805; *Fallgren v Railway Exp. Agency*, 98 NH 333, 100 A2d 835; *Aboczky v Stier*, 126 NJL 109, 18 A2d 262; *Ocean Cape Hotel Corp. v Masfield Corp.*, 63 NJ Super 369, 164 A2d 607; *Lefkowitz v Hummel Furniture Co.*, 385 Pa 244, 122 A2d 802.

Annotation: Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 ALR2d 1269 § 4.

Footnote 65. *Glascoe v Miletich* (Mun Ct App Dist Col) 83 A2d 587; *Jackson v Parker*, 153 Fla 622, 15 So 2d 451 (recognizing admissibility, where time was not dealt with at all in writings, and other missing aspects also apparently essential to explain contract); *Kansas City Bridge Co. v Kansas City Structural Steel Co.* (Mo) 317 SW2d 370, 85 ALR2d 1252 (holding that testimony showing an oral agreement that a supplier would begin to deliver the steel in time for a contractor to commence building a bridge during a certain month, was admissible, in that the contract under which the supplier was to fabricate and furnish to the contractor the necessary steel showed on its face that an important element had been omitted); *Sky Chefs v Pryor*, 38 Tenn App 443, 276 SW2d 485.

Where an architect's contract to prepare plans on its face disclosed that it was incomplete as to the time for performance, evidence of prior oral agreement thereto was admissible to rebut the presumption that the architect had a reasonable time for performance. *Beuc v Morrissey* (Mo) 463 SW2d 851.

Annotation: 85 ALR2d 1269 § 4.

Footnote 66. *Brady v Central Excavators, Inc.*, 316 Mich 594, 25 NW2d 630; *Byrd v Dennis* (Tex Civ App) 222 SW2d 926.

Annotation: 85 ALR2d 1269 § 3.

Footnote 67. *Stark v Shaw* (2nd Dist) 155 Cal App 2d 171, 317 P2d 182, cert den 356 US 937, 2 L Ed 2d 814, 78 S Ct 781; *Kansas City Bridge Co. v Kansas City Structural Steel Co.* (Mo) 317 SW2d 370, 85 ALR2d 1252; *Newman v Jackson*, 192 Okla 461, 138 P2d 76.

Annotation: 85 ALR2d 1269 § 5.

Footnote 68. *7-G Ranching Co. v Stites*, 4 Ariz App 228, 419 P2d 358 (criticized on other grounds by *Phil W. Morris Co. v Schwartz* (App) 138 Ariz 90, 673 P2d 28); *Tamburello v Hereford* (Fla) 70 So 2d 545; *Sky Chefs v Pryor*, 38 Tenn App 443, 276 SW2d 485.

Annotation: 85 ALR2d 1269 § 3.

Footnote 69. As to bills and notes, see 11 Am Jur 2d, Bills and Notes § 286.

As to sales, see 67 Am Jur 2d, Sales §§ 309-311.

§ 1132 Mode, medium, or place of performance or payment

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a written instrument is silent as to the mode or medium of payment required, parol or extrinsic evidence is admissible to show that a particular mode or medium of payment was agreed upon, as long as such evidence is not inconsistent with or contradictory to the terms of the instrument. 70 However, where the manner or means of payment of the money consideration stipulated in an instrument is expressed in the instrument, parol evidence is not admissible if it would vary or contradict those express terms. 71

In addition, where the written agreement does not specify the place of performance or the place at which money is to be paid under the agreement, parol evidence of an agreement relative to the place of performance or payment is admissible. 72

Footnotes

Footnote 70. *Mozingo v North Carolina Nat. Bank*, 31 NC App 157, 229 SE2d 57, 20 UCCRS 953, cert den 291 NC 711, 232 SE2d 204, holding that evidence of an alleged oral agreement by defendant bank to renew plaintiffs' unsecured demand notes until payment could be made from proceeds of the sale of certain apartment projects would not contradict the terms of the demand notes and would be admissible to show the agreed upon method of payment of the notes.

In an action against an auctioneer, who had contracted with plaintiff to sell certain items of personal property at a public auction, to recover that portion of the total gross sales which represented the amount of a bad check accepted by the auctioneer for payment for merchandise purchased at the auction, the trial court properly admitted parol evidence pertaining to all representations clarifying the procedures for handling checks in the auction of plaintiff's property, where the contract was silent as to check collections or guarantees of bad checks. *Joe T. Presswood, Inc. v Houston Industrial Welding School, Inc.* (Tex Civ App Houston (1st Dist)) 585 SW2d 763, writ ref'n r'e (Oct 17, 1979).

As to the admissibility of a subsequent parol agreement modifying the mode, medium, or place of performance of a written agreement, see § 1133.

Footnote 71. *Richardson v Hardwick*, 106 US 252, 16 Otto 252, 27 L Ed 145, 1 S Ct 213.

Footnote 72. *Cox v National Bank*, 100 US 704, 10 Otto 704, 25 L Ed 739.

(7). Subsequent Parol Agreements or Modifications [1133]

§ 1133 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the parol evidence rule prohibits the introduction of evidence of prior or contemporaneous oral statements to vary the terms of a written agreement, 73 the parol evidence rule does not apply to extrinsic evidence regarding a subsequent modification of a written agreement or to the waiver of contractual terms by language or conduct. 74 The parol evidence in such a case does not in any way deny that the original agreement of the parties was that which the writing purports to express, but merely serves to show that the parties have exercised their right to change or abrogate the original agreement or to make a new and independent contract. 75 Parol evidence of the subsequent agreement may be admitted, such as an agreement modifying the time, place, or manner of performance, 76 or an agreement to abandon a written contract. 77 It has been said that this exception to the parol evidence rule does not apply where the agreement in question is one required by law to be in writing. 78

Even though the parties stipulate that the written contract is not to be varied except by an agreement in writing, they may, in the absence of a statutory provision to the contrary, by a subsequent contract not in writing, modify it by mutual consent, 79 and parol evidence is admissible to show the modification of such a contract by a subsequent parol agreement. 80

In addition, evidence is admissible to show the existence of a subsequent parol agreement which is independent of and not inconsistent with a written contract. 81 For example, evidence of parol agreements as to matters not covered by the written contract is admissible, 82 as is evidence regarding a method of discharging a party's liability for a breach of the agreement. 83

Footnotes

Footnote 73. § 1092.

Footnote 74. *Piatt's Admr. v United States*, 89 US 496, 22 Wall 496, 22 L Ed 858; *Federal Deposit Ins. Corp. v Schuhmacher* (ED NY) 660 F Supp 6; *Race, Inc. v Lake & River Recreational Properties, Inc.* (Fla App D1) 573 So 2d 409, 16 FLW D 297; *Gard v Razanskas*, 248 Iowa 1333, 85 NW2d 612, 65 ALR2d 982; *Gravier Co. v Satellite Business Systems* (La App 4th Cir) 519 So 2d 180, cert den (La) 521 So 2d 1150; *La Panta v Heidelberger* (Minn App) 392 NW2d 254; *Bergmann v Bergmann* (Mo App) 740 SW2d 215; *Jensen v Jensen*, 104 Nev 95, 753 P2d 342; *Adamson v Marianne Fabrics, Inc.*, 391 SE2d 249, 301 SC 204; *Brunson v Gladish*, 174 Tenn 309, 125 SW2d 144; *Robbins v Warren* (Tex App Houston (1st Dist)) 782 SW2d 509; *Buyken v Ertner*, 33 Wash 2d 334, 205 P2d 628; *Ohio Valley Contractors, Inc. v Board of Educ.*, 182 W Va 741, 391 SE2d 891.

The parol evidence rule is inapplicable to negotiations or agreements entered into after the contract has been recommended. *Deerfield Specialty Papers, Inc. v Black Clawson*

Co. (SD NY) 751 F Supp 1578.

In an action by the lessors of a nursery for waste to the leased property and conversion of stock plants, testimony of an alleged out-of-court oral agreement reached by the parties in settlement of their dispute which permitted removal of the plants was admissible; a written contract can be modified by a subsequent oral agreement when the oral agreement has been accepted and acted upon by the parties. *Foliage Corp. of Florida, Inc. v Watson* (Fla App D5) 381 So 2d 356.

Practice References Alteration of instruments. 1 Am Jur Proof of Facts 479, Proof 3.

Footnote 75. *Insurance Co. v Norton*, 96 US 234, 6 Otto 234, 24 L Ed 689; *Brunson v Gladish*, 174 Tenn 309, 125 SW2d 144.

Footnote 76. *Jones v New York Guaranty & Indem. Co.*, 101 US 622, 11 Otto 622, 25 L Ed 1030; *Edwards v Smith* (Mo) 322 SW2d 770.

As to the admissibility of parol evidence regarding time, mode, and manner of performance, generally, see §§ 1130 et seq.

Footnote 77. *Jones v New York Guaranty & Indem. Co.*, 101 US 622, 11 Otto 622, 25 L Ed 1030; *George F. Robertson Plastering Co. v Magidson* (Mo) 271 SW2d 538.

Footnote 78. *Torrey v Simon-Torrey, Inc.* (La) 307 So 2d 569.

Footnote 79. 17A Am Jur 2d, Contracts § 527.

Footnote 80. *Larnel Builders, Inc. v Nicholas* (Fla App D3) 123 So 2d 284.

Footnote 81. *Lacy Mfg. Co. v Gold Crown Mining Co.*, 52 Cal App 2d 568, 126 P2d 644; *Campbell v Graham*, 144 Colo 532, 357 P2d 366, 94 ALR2d 1165 (superseded by statute on other grounds as stated in *Moore Electric Co. v Ambassador Builder Corp.* (Colo App) 653 P2d 90); *Emerson v Treadway* (Mo App) 270 SW2d 614; *GRW Enterprises, Inc. v Davis* (Tenn App) 797 SW2d 606, reh den (Tenn App) 1990 Tenn App LEXIS 345 and remanded (Tenn App) 1992 Tenn App LEXIS 658.

Footnote 82. *Emerson v Treadway* (Mo App) 270 SW2d 614.

Footnote 83. *Chohon v Kersey Kinsey Co.* (2nd Dist) 173 Cal App 2d 548, 343 P2d 614, holding that a supplemental agreement entered into by the parties to a building contract after the contractor had breached an express warranty to provide an adequate air-conditioning plant, under which the parties agreed that the owner would do the necessary work to find and correct the trouble, and that he should be allowed a credit or offset on his note for the final payment equal to the reasonable cost of the work done by him, was not inconsistent with the original agreement, since it related to a method of discharging the contractor's obligation for breach of his original agreement.

(8). Ambiguity or Uncertainty of Written Instruments [1134-1145]

(a). In General [1134-1138]

§ 1134 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent and object of the instrument cannot be ascertained from the language used in the instrument, parol or extrinsic evidence may be introduced to determine the meaning of the instrument. 84

Where the meaning of the written terms is ambiguous, extrinsic evidence may be offered to bring out the true intention of the parties. 85 While extrinsic evidence is admissible in order to clarify ambiguity, 86 it may not be admitted to vary the clear terms of a written agreement. 87

Extrinsic evidence is admissible when it is offered for the purpose of reproducing words that are illegible or that have been canceled or erased. 88

The test for determining the admissibility of extrinsic evidence to explain the meaning of a written instrument is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. 89 The courts may employ the following two-step analysis in applying this test: (1) in order to prove the intention of the contracting parties, the court will place itself in the same situation as the parties when the agreement was made by provisionally accepting, without actually receiving, all credible evidence concerning the making of the agreement; (2) if based on this evidence the court determines that the contract is reasonably susceptible to the offered interpretation, it may admit the evidence to so interpret the contract; however, if the court decides that the contract is not reasonably susceptible to the offered interpretation, then the extrinsic evidence is irrelevant and inadmissible to interpret the contract. 90

§ 1134 ----Generally [SUPPLEMENT]

Practice Aids: 36 Am Jur Proof of Facts 3d 331, Introduction of Evidence Over Parol Evidence Rule Objection.

Footnotes

Footnote 84. *Gisborn v Charter Oak Life Ins. Co.*, 142 US 326, 35 L Ed 1029, 12 S Ct 277; *Interstate Fire Ins. Co. v Harmon* (CA5 Ala) 580 F2d 184; *Grant v North River Ins. Co.* (ND Ind) 453 F Supp 1361, (applying Ind law); *John Morrell & Co. v Local Union 304A of United Food & Commercial Workers* (CA8 SD) 913 F2d 544, 135 BNA LRRM 2233, 116 CCH LC P 10289, 31 Fed Rules Evid Serv 629, cert den 500 US 905, 114 L Ed 2d 78, 111 S Ct 1683, 137 BNA LRRM 2056, 118 CCH LC P 10679, later

proceeding (CA8 SD) 992 F2d 205, 143 BNA LRRM 2211, 125 CCH LC P 10666, reh, en banc, den (CA8 SD) 1993 US App LEXIS 18027 and cert den (US) 126 L Ed 2d 455, 114 S Ct 554, 144 BNA LRRM 2872; Rime-Shatten Dev. Co. v Birmingham Cable Communications, Inc. (Ala) 569 So 2d 332; Dempsey v Merchants Nat. Bank, 292 Ark 207, 729 SW2d 150; Barham v Barham, 33 Cal 2d 416, 202 P2d 289; TIE Communications, Inc. v Kopp, 218 Conn 281, 589 A2d 329, later proceeding (Conn Super) 1992 Conn Super LEXIS 2421, later proceeding (Conn Super) 1993 Conn Super LEXIS 599, summary judgment den (Conn Super) 1993 Conn Super LEXIS 3166; Friedman v Virginia Metal Products Corp. (Fla) 56 So 2d 515, 33 ALR2d 956; Babe, Inc. v Baby's Formula Service, Inc. (Fla App D3) 165 So 2d 795, 6 ALR3d 320; Dorsey v Clements, 202 Ga 820, 44 SE2d 783, 173 ALR 509, conformed to 76 Ga App 135, 45 SE2d 226; Molyneux v Twin Falls Canal Co., 54 Idaho 619, 35 P2d 651, 94 ALR 1264; Riemer Bros., Inc. v Marlis Constr. Co. (2d Dist) 64 Ill App 3d 80, 20 Ill Dec 951, 380 NE2d 1160; Caudill v Citizens Bank (Ky) 383 SW2d 350; Diefenthal v Longue Vue Management Corp. (La) 561 So 2d 44; Young v Hornbrook, Inc., 153 Me 412, 140 A2d 493; Brauer v Hobbs, 391 NW2d 482, 151 Mich App 769; Nord v Herreid (Minn) 305 NW2d 337; Covington Cadillac Co. v South Aire, Inc., 242 Miss 716, 136 So 2d 866; Kellermann Contracting Co. v St. Louis (Mo App) 135 SW2d 369; Fillbach v Inland Constr. Corp., 178 Mont 374, 584 P2d 1274; Washington Heights Co. v Frazier, 409 NW2d 612, 226 Neb 127; Lowden Invest. Co. v General Electric Credit Co., 103 Nev 374, 741 P2d 806, 4 UCCRS2d 982; Norman v Beling, 33 NJ 237, 163 A2d 129, 82 ALR2d 417; Concoff v Occidental Life Ins. Co., 4 NY2d 630, 176 NYS2d 660, 152 NE2d 85; International Paper Co. v Corporex Constructors, Inc., 96 NC App 312, 385 SE2d 553; Madler v McKenzie County (ND) 467 NW2d 709, appeal after remand (ND) 496 NW2d 17; Blaha v Schwartz (CP) 7 Ohio Ops 3d 234; Shuler v Barnes (Okla App) 793 P2d 301, 109 OGR 505; Adams v Knoth, 102 Or App 238, 794 P2d 796, reconsideration den (Or App) 1990 Ore App LEXIS 979 and review den 310 Or 422, 799 P2d 151; In re Estate of Hall, 535 A2d 47, 517 Pa 115; Stewart v Mullineaux, 138 Pa Super 43, 10 A2d 122; Brown v Stoker (Tex Civ App) 102 SW2d 248, writ dism w o j; Young v Schriner, 190 Va 374, 57 SE2d 33; Hoover v Sandifur, 25 Wash 2d 791, 171 P2d 1009, 168 ALR 170; Ashland Oil, Inc. v Donahue, 159 W Va 463, 223 SE2d 433, 18 UCCRS 1129; Milaeger Well Drilling Co. v Muskego Rendering Co., 1 Wis 2d 573, 85 NW2d 331, 66 ALR2d 563; Kilbourne-Park Corp. v Buckingham (Wyo) 404 P2d 244.

In an action to establish driveway easements over a portion of defendants' land, the deposition of the former owner (whose death had preceded trial) which dealt with the meaning intended by the parties to be attached to the word "driveway" and the property intended to have been covered thereby, was admissible to aid in the interpretation of the parties' statement that "driveway is combination to be used by both parties to this contract." Tamm, Inc. v Pildis (Iowa) 249 NW2d 823.

As to what constitutes ambiguity that will justify the admission of extrinsic evidence, see § 1138.

As to the clarification of ambiguities in deeds and mortgages, see 23 Am Jur 2d, Deeds § 242 and 55 Am Jur 2d, Mortgages §§ 43-53.

Annotation: Which of conflicting descriptions in deeds or mortgages of fractional quantity of interest intended to be conveyed prevails, 12 ALR4th 795.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259 § 8.

Practice References Intent of Parties to Ambiguous Deed. 46 Am Jur POF 2d 695 §§ 2-5.

Footnote 85. Kerwin v Bank of Douglas, 93 Ariz 269, 379 P2d 978, 13 ALR3d 398; Tracy v Tracy (Mo App) 791 SW2d 924; Graessle v State Highway Com. (Mo App) 784 SW2d 213; Gentry v Stevens (2d Dept) 145 App Div 2d 532, 536 NYS2d 89; Stracka v Peterson (ND) 377 NW2d 580, 88 OGR 149; Baker v Zingelman, 259 Pa Super 441, 393 A2d 908; Houston v McCarthy (Tex Civ App Waco) 340 SW2d 559, writ ref n r e (Feb 22, 1961) and reh'g of writ of error overr (Mar 15, 1961), error ref n r e; Berg v Hudesman, 801 P2d 222, 115 Wash 2d 657; Bittorf v Bittorf, 390 SE2d 793, 182 W Va 594; Cliff & Co. v Anderson (Wyo) 777 P2d 595.

As to the admissibility of parol evidence to clarify specific words and phrases, see § 1142.

Footnote 86. Sundown, Inc. v Canal Square Associates (Dist Col App) 390 A2d 421; Jensen v Pure Plant Food Int'l (SD) 274 NW2d 261.

Footnote 87. § 1100.

Footnote 88. Robinson v Cutter, 163 Mass 377, 40 NE 112; In re Thomas' Will, 76 Minn 237, 79 NW 104; Washington Trust Co. v Keyes, 79 Wash 61, 139 P 638.

Footnote 89. Atlas Assurance Co. v McCombs Corp. (3rd Dist) 146 Cal App 3d 135, 194 Cal Rptr 66.

As to the admissibility of particular types of extrinsic evidence to clarify an ambiguous written instrument, see §§ 1139 et seq.

Footnote 90. Mellon Bank, N.A. v Aetna Business Credit, Inc. (CA3 Pa) 619 F2d 1001, later proceeding (WD Pa) 500 F Supp 1312 (applying Pa law) (holding that trade terms, legal terms of art, numbers, common words of accepted usage and terms of similar nature are to be interpreted in accord with their specialized or accepted usage unless such interpretation would produce irrational results or the contract documents are internally inconsistent); Atlas Assurance Co. v McCombs Corp. (3rd Dist) 146 Cal App 3d 135, 194 Cal Rptr 66.

§ 1135 Effect of ambiguity as patent or latent

[View Entire Section](#)
[Go to Parallel Reference Table](#)

◆ **Definition:** For purposes of the parol evidence rule, a "patent" ambiguity is an uncertainty that appears on the face of the instrument, 91 while a "latent" ambiguity is one which does not appear on the face of the instrument, but which is shown to exist

for the first time by matter collateral to the writing. 92

A few jurisdictions make a distinction between the two types of ambiguities with regard to the admission of parol evidence; in these jurisdictions, a patent ambiguity may not be explained by parol evidence, 93 but may be clarified only by looking at face of the instrument; the context and every legitimate rule of exposition may be enlisted and used, but parol testimony, or extraneous proof of any kind, is inadmissible. 94

The majority of jurisdictions, however, permit the admission of parol evidence to explain an ambiguity whether latent or patent. 95

In all jurisdictions, a latent ambiguity may always be explained or clarified by parol evidence. 96 The resort to parol evidence under these circumstances does not vary or contradict the terms of the instrument, but merely aids the court in ascertaining the true intention of the parties. 97

There is authority for the view that an intermediate class of ambiguities exists, with the nature of both patent and latent ambiguities, 98 which are referred to as "mixed" ambiguities. 99 This intermediate class exists when the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. 1 In such a class of cases, parol evidence is admissible to explain the ambiguities. 2

Footnotes

Footnote 91. *Stoffel v Stoffel*, 241 Iowa 427, 41 NW2d 16, 14 ALR2d 891 (stating that a patent ambiguity occurs where the language itself is doubtful or susceptible of more than one meaning).

Footnote 92. *Hashwani v Barbar* (CA11 Fla) 822 F2d 1038; *Forsyth Mfg. Co. v Castlen*, 112 Ga 199, 37 SE 485; *Hall v Equitable Life Assur. Soc.*, 295 Mich 404, 295 NW 204.

For the purposes of the admission of parol evidence, an ambiguity is latent where the written language is apparently clear and certain but becomes doubtful in the light of something extrinsic or collateral.

A description in a lease of property as being known as a certain address, which address was also the mailing address of two other buildings, was a latent ambiguity. *Ft. Worth Neuropsychiatric Hosp., Inc. v Bee Jay Corp.* (Tex) 600 SW2d 763, reh'g of cause overr (Jul 9, 1980).

Footnote 93. *In re Leonardi's Int'l, Inc.* (BC SD Fla) 119 BR 874, motion den (BC SD Fla) 123 BR 668 (applying Florida law); *First Federal Sav. Bank v Key Markets, Inc.* (Ind) 559 NE2d 600; *Roberts v Roberts' Ex'r*, 299 Ky 646, 186 SW2d 801; *Reed v Reed*, 98 Miss 350, 53 So 691; *Brooks v Hackney*, 100 NC App 562, 397 SE2d 361, rev'd on other grounds 329 NC 166, 404 SE2d 854; *First Nat'l Bank v McGill*, 180 W Va 472, 377 SE2d 464.

As to patent and latent ambiguities in wills, see 80 Am Jur 2d, Wills §§ 1281, 1282.

Footnote 94. *Brooks v Hackney*, 100 NC App 562, 397 SE2d 361, revd on other grounds 329 NC 166, 404 SE2d 854.

The omission in a promissory note of the sum to be paid is a patent ambiguity, which cannot be explained by parol, but the payee must resort to the original contract, treating the note as a nullity. *Payne v Commercial Nat. Bank*, 177 Cal 68, 169 P 1007.

Footnote 95. *Pantone, Inc. v Esselte Letraset, Ltd.* (SD NY) 691 F Supp 768, 8 USPQ2d 1040, affd (CA2 NY) 878 F2d 601, 11 USPQ2d 1454; *Surovcik v D & K Optical, Inc.* (MD Pa) 702 F Supp 1171, summary judgment den (MD Pa) 1988 US Dist LEXIS 14652; *In re Burger* (BC DC Del) 125 BR 894; *Roberts Assoc., Inc. v Blazer Int'l Corp.* (ED Mich) 741 F Supp 650, clarified, adhered to, on reconsideration (ED Mich) 1990 US Dist LEXIS 10570; *Jackman v WMAC Invest. Corp.* (CA7 Wis) 809 F2d 377, 105 CCH LC P 55668; *Kronholm v Kronholm*, 16 Conn App 124, 547 A2d 61, appeal after remand 23 Conn App 577, 582 A2d 1178; *Forsyth Mfg. Co. v Castlen*, 112 Ga 199, 37 SE 485; *Moran v Commonwealth Edison Co.* (3d Dist) 74 Ill App 3d 964, 30 Ill Dec 922, 393 NE2d 1269; *Stoffel v Stoffel*, 241 Iowa 427, 41 NW2d 16, 14 ALR2d 891; *In re Huxtable Living Trust*, 243 Kan 531, 757 P2d 1262; *Lambdin v Dantzebecker*, 169 Md 240, 181 A 353, 102 ALR 277; *Myers v Sunlight Laundry Co.* (Hamilton Co) 10 Ohio App 275; *Haupt v Michaelis* (Tex Com App) 231 SW 706.

As to deeds, see 23 Am Jur 2d, Deeds § 314.

Footnote 96. *Norton v Larney*, 266 US 511, 69 L Ed 413, 45 S Ct 145; *Gibson v Anderson*, 265 Ala 553, 92 So 2d 692; *Barham v Barham*, 33 Cal 2d 416, 202 P2d 289; *Ace Electric Supply Co. v Terra Nova Electric, Inc.* (Fla App D1) 288 So 2d 544; *Shore v Miller*, 80 Ga 93, 4 SE 561; *Williams v Idaho Potato Starch Co.*, 73 Idaho 13, 245 P2d 1045; *De Kalb Bank v Purdy* (2d Dist) 166 Ill App 3d 709, 117 Ill Dec 606, 520 NE2d 957, app den 122 Ill 2d 572, 125 Ill Dec 215, 530 NE2d 243; *First Federal Sav. Bank v Key Markets, Inc.* (Ind) 559 NE2d 600; *Peoples Bank & Trust Co. v Lala* (Iowa App) 392 NW2d 179; *Roberts v Roberts' Ex'r*, 299 Ky 646, 186 SW2d 801; *Keating v Stadium Management Corp.*, 24 Mass App 246, 508 NE2d 121, review den 400 Mass 1103, 511 NE2d 620; *Hall v Equitable Life Assur. Soc.*, 295 Mich 404, 295 NW 204; *Wolf v Miravalle* (Mo) 372 SW2d 28; *Hardin v Ray* (Mo App) 404 SW2d 764; *Proprietors of Claremont v Carlton*, 2 NH 369; *Kupferschmidt v Agricultural Ins. Co.*, 80 NJL 441, 78 A 225; *River Birch Assoc. v Raleigh*, 326 NC 100, 388 SE2d 538; *Thompson v Thompson* (ND) 391 NW2d 608, 91 OGR 92; *Watson v Lamb*, 75 Ohio St 481, 79 NE 1075; *First American Nat. Bank v Hunter* (Tenn App) 581 SW2d 655; *Ft. Worth Neuropsychiatric Hosp., Inc. v Bee Jay Corp.* (Tex) 600 SW2d 763, reh'g of cause overr (Jul 9, 1980); *Kennedy v Griffith*, 98 Utah 183, 95 P2d 752; *Transamerica Occidental Life Ins. Co. v Burke*, 368 SE2d 301, 179 W Va 331; *Hammond v Capital City Mut. Fire Ins. Co.*, 151 Wis 62, 138 NW 92.

Since a latent ambiguity is disclosed only by extrinsic evidence, it may be removed by extrinsic evidence. *Kullman, Salz & Co. v Sugar Apparatus Mfg. Co.*, 153 Cal 725, 96 P 369.

Footnote 97. *Cordas v Wright*, 129 Cal App 2d Supp 867, 277 P2d 520.

Even under the latent ambiguity exception to the parol evidence rule, parol or extrinsic evidence is admissible only to explain an ambiguity, not to change or contradict the language of the written instrument. *Hardin v Ray* (Mo App) 404 SW2d 764.

Footnote 98. Hall v Equitable Life Assur. Soc., 295 Mich 404, 295 NW 204; Ganson v Madigan, 15 Wis 144.

As to the application of this rule to deeds, see 23 Am Jur 2d, Deeds § 314.

Footnote 99. Blair v Wessinger, 39 Cal App 269, 178 P 545.

Footnote 1. Hall v Equitable Life Assur. Soc., 295 Mich 404, 295 NW 204; Schlottman v Hoffman, 73 Miss 188, 18 So 893.

Footnote 2. Ganson v Madigan, 15 Wis 144, holding evidence admissible to explain the meaning of the word "team" in a contract for the sale of a reaper.

§ 1136 Identification of subject matter

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Extrinsic evidence is generally admissible in order to clarify the identification or description of the subject matter in a written instrument where such identification or description is ambiguous or uncertain. 3 Extrinsic evidence may be admitted to aid in the interpretation of an instrument's incomplete description of the subject matter, in order to apply the instrument to its subject matter, provided the subject can be thereby identified and a new description is not introduced into the contract as a result. 4 Parol evidence is not admissible for the purpose of identifying the subject matter of a contract, or clarifying the description set forth in a contract, where such evidence will have the effect of varying or contradicting the express terms of the instrument. 5

Evidence regarding the amount of a commodity intended to be sold and transferred by a written contract, where such amount is not specifically set out in the contract, is admissible under the parol evidence rule; however, parol evidence that directly contradicts the amount of a commodity where such amount is specifically stated in a written contract of sale is not admissible 6 except to show fraud. 7

Footnotes

Footnote 3. Lonergan v Buford, 148 US 581, 37 L Ed 569, 13 S Ct 684; In re S.E. Nichols, Inc. (BC SD NY) 120 BR 745; Maier v Continental Oil Co. (CA7 Ind) 120 F2d 237, cert den 314 US 652, 86 L Ed 523, 62 S Ct 101; Ellis v Klaff, 96 Cal App 2d 471, 216 P2d 15; Crowley v Engelke, 394 Ill 264, 68 NE2d 241; Atwood v Boston, 310 Mass 70, 37 NE2d 131; Schleft v Board of Educ. of Los Alamos Public Schools (App) 109 NM 271, 784 P2d 1014; Burford v Pounders, 145 Tex 460, 199 SW2d 141; Countiss v Baldwin (Tex Civ App) 151 SW2d 235, writ dism, error dismd.

For a discussion of the use of extrinsic evidence to aid the description of the premises involved in an action for specific performance, see 71 Am Jur 2d, Specific Performance

§ 117.

As to the admissibility of extrinsic evidence to aid the description in: a deed, see 23 Am Jur 2d, Deeds §§ 310-320; a mortgage, see 55 Am Jur 2d, Mortgages §§ 120-123; a lease, see 49 Am Jur 2d, Landlord and Tenant § 192; a land contract, see 77 Am Jur 2d, Vendor and Purchaser §§ 8, 85.

Footnote 4. *Lance Roof Inspection Service, Inc. v Hardin* (SD Tex) 653 F Supp 1097, 2 BNA IER Cas 826; *Palm Springs-La Quinta Development Co. v Palm Springs Land & Irrig. Co.*, 36 Cal App 2d 730, 98 P2d 530.

Footnote 5. *Cheney v Carver*, 370 Pa 543, 88 A2d 746; *Angelina County Lumber Co. v Reinhardt* (Tex Civ App) 270 SW2d 259; *Meadow River Lumber Co. v Smith*, 126 W Va 847, 30 SE2d 392.

Footnote 6. 67 Am Jur 2d, Sales § 330.

Footnote 7. 67 Am Jur 2d, Sales § 324.

§ 1137 --Public and judicial records and documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The subject matter of a public or a judicial record or document may be properly identified or clarified by parol evidence. 8 For example, if, in the record of a judgment, the subject matter of the judgment is ambiguous, extrinsic evidence is admissible to ascertain the subject matter. 9 In addition, if the record leaves in doubt what issues were involved in the action and settled by the judgment, parol or extrinsic evidence is admissible to eliminate the uncertainty. 10

Footnotes

Footnote 8. *Miles v Caldwell*, 69 US 35, 2 Wall 35, 17 L Ed 755; *Milbra v Sloss-Sheffield Steel & Iron Co.*, 182 Ala 622, 62 So 176; *Clay v Board of Com'rs*, 30 Idaho 794, 168 P 667; *Charles E. Harding Co. v Harding*, 352 Ill 417, 186 NE 152, 88 ALR 563; *Kuhl v Chamberlain*, 140 Iowa 546, 118 NW 776; *Knickerbocker v Wilcox*, 83 Mich 200, 47 NW 123; *Herrick v Morrill*, 37 Minn 250, 33 NW 849; *Turner v Fleming*, 37 Okla 75, 130 P 551; *Dierstein v Schubkagel*, 131 Pa 46, 18 A 1059; *Smith v Crosby*, 86 Tex 15, 23 SW 10.

Footnote 9. 46 Am Jur 2d, Judgments § 605.

Footnote 10. 46 Am Jur 2d, Judgments § 609.

§ 1138 What constitutes ambiguity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A writing is not ambiguous under the parol evidence rule unless the application of pertinent rules of interpretation leave a real uncertainty as to which one of two or more possible meanings represents the true intention of the parties; 11 whether such ambiguity exists is a question of law for the trial court. 12 The mere fact that there is a dispute between the parties as to the interpretation of a document does not mean that there is an ambiguity justifying the admission of parol evidence for explanatory purposes. 13 In addition, the claimed ambiguity must be such that its clarification has some legal effect. 14

In determining whether an ambiguity exists in a document, the test is not whether particular ambiguous words or phrases are present, but rather whether the character of the written agreement itself is ambiguous. 15 An ambiguity may arise from words which are plain in themselves, but uncertain when applied to the subject matter of the instrument, thereby warranting the admission of parol evidence. 16 In short, an ambiguity, so far as the parol evidence rule is concerned, may arise from the use of words if either their meaning or their application is doubtful or uncertain. 17 A word or term in a contract, to be ambiguous, must have some "stretch" in it—some capacity to connote more than one meaning—before parol evidence is admissible. 18

Footnotes

Footnote 11. *Wilson Arlington Co. v Prudential Ins. Co.* (CA9 Cal) 912 F2d 366; *Tsakres v Owens* (Alaska) 561 P2d 1218; *Leo Eisenberg & Co. v Payson*, 162 Ariz 529, 785 P2d 49, 50 Ariz Adv Rep 3; *Flynn v Sawyer* (Minn) 272 NW2d 904; *Wired Music, Inc. v Great River S.B. Co.* (Mo App) 554 SW2d 466; *Davis v Andrews* (Tex Civ App Dallas) 361 SW2d 419, 17 OGR 426, writ ref n r e (Feb 6, 1962) and reh'g of writ of error overr (Apr 17, 1963), error ref n r e.

Where letter made reference to "a loan" but a series of loans based on continuing line of credit was in fact made, extrinsic evidence was admissible to prove existence of ambiguity in letter as well as to resolve the ambiguity. *Hamada v Valley Nat. Bank*, 27 Ariz App 433, 555 P2d 1121.

In a marriage dissolution proceeding, evidence of an alleged separate parol agreement between the wife and her attorney concerning the attorney fees to be paid should have been received by the trial court at an evidentiary hearing to determine what the parties intended where it was not clear as to whether a provision of the property settlement agreement between the husband and wife required the husband to pay \$2,000 to the attorney in addition to the \$2,500 that the wife had already paid the attorney as a retainer or whether the attorney was entitled to a total fee of only \$2,000. *Morales v Morales* (Fla App D3) 397 So 2d 934, petition den (Fla) 411 So 2d 383.

A contract for sale of realty containing an "as is" provision was sufficiently ambiguous to

justify admission of parol evidence to show what was in the minds of the parties when the contract was made and to clarify the ambiguity. *Partrich v Muscat*, 84 Mich App 724, 270 NW2d 506.

Footnote 12. *Redding Foods, Inc. v Berry* (Tex Civ App Dallas) 361 SW2d 467.

Footnote 13. *In re Marriage of Thomason* (Colo App) 802 P2d 1189; *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887.

Footnote 14. *Uniroyal, Inc. v Heller* (SD NY) 65 FRD 83, 19 FR Serv 2d 457 (applying New York law).

Resort to extrinsic evidence as an aid to interpretation was proper where the language in deeds conveying a right of way easement was ambiguous as to the scope of the interest conveyed. *Badger v Hill* (Me) 404 A2d 222.

Parol evidence was admissible where an agreement not to compete contained an ambiguity regarding assignability. *Griffeth v Sawyer Clothing, Inc.*, 202 Neb 631, 276 NW2d 652.

Footnote 15. *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887; *Colonial Leasing Co. v Larsen Bros. Constr. Co.* (Utah) 731 P2d 483, 49 Utah Adv Rep 4, 3 UCCRS2d 24.

A document may be ambiguous so as to warrant the admission of parol evidence notwithstanding the fact that it contains no words or phrases which are ambiguous in themselves. *Commercial Secur. Co. v Rea* (Tex Civ App) 78 SW2d 707, *affd* 130 Tex 11, 105 SW2d 872.

Footnote 16. *Van Syckel v Arsuaga*, 231 US 601, 58 L Ed 393, 34 S Ct 263; *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887; *Old First Nat. Bank & Trust Co. v Scheuman*, 214 Ind 652, 13 NE2d 551, 119 ALR 1165; *Robertson v Ramsey*, 17 Tenn App 248, 66 SW2d 1022; *King v Dallas* (Tex Civ App Dallas) 374 SW2d 707, *writ ref n r e* (Apr 1, 1964), *error ref n r e*.

In an action by the contractor under a contract for the digging of a well, calling for drilling operations until "sufficient water" is obtained, ambiguity in the meaning of the term "sufficient water" renders it subject to explanation by parol testimony of the negotiations of the parties with respect thereto. *Milaeger Well Drilling Co. v Muskego Rendering Co.*, 1 Wis 2d 573, 85 NW2d 331, 66 ALR2d 563.

Footnote 17. *Harten v Loffler*, 212 US 397, 53 L Ed 568, 29 S Ct 351; *Midkiff v Castle & Cooke, Inc.*, 45 Hawaii 409, 368 P2d 887; *Schwartz v Cahill*, 175 App Div 68, 161 NYS 750, *reh den* 176 App Div 937, 162 NYS 1146 and *revd on other grounds* 220 NY 174, 115 NE 451; *Klueter v Joseph Schlitz Brewing Co.*, 143 Wis 347, 128 NW 43.

Footnote 18. *O'Connor Oil Corp. v Warber*, 30 Wis 2d 638, 141 NW2d 881.

(b). Particular Evidence Admissible [1139-1145]

§ 1139 Generally; proof of surrounding circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the process of interpretation or construction of an integrated agreement which is ambiguous or uncertain in its meaning, all relevant evidence to show that meaning is admissible. 19 If the terms of a written contract are so ambiguous or obscure that the full contractual intention of the parties cannot be understood from a mere inspection of the instrument, the court, in order to properly interpret or construe the instrument, may receive extrinsic evidence of the subject matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding the parties when they entered into the contract. 20 Under the parol evidence rule, a contract of debatable meaning may be construed by resort to the surrounding circumstances for insight regarding the meaning of the words used; 21 such evidence does not contradict or vary the terms of the instrument. 22 With regard to a written contract, evidence regarding proof of surrounding circumstances is admitted in order to place the trial judge in the position of the contracting parties, 23 and parol evidence is often the only means by which the conditions and circumstances surrounding the parties at the time of making the contract may be shown. 24

Parol or extrinsic evidence of a custom or usage may be received to explain or delineate the meaning of terms which would otherwise be ambiguous, uncertain, or equivocal as used in a contract or other written instrument, as where words employed to express a particular condition are ambiguous and cannot be satisfactorily explained by reference to other portions of the contract or instrument. 25

Footnotes

Footnote 19. *Bryan v Vaughn* (Mo App) 579 SW2d 177; *Garden State Plaza Corp. v S. S. Kresge Co.*, 78 NJ Super 485, 189 A2d 448, certif den 40 NJ 226, 191 A2d 63.

Footnote 20. *Lowrey v Hawaii*, 206 US 206, 51 L Ed 1026, 27 S Ct 622; *Arab Corp. v Bruce* (DC La) 50 F Supp 350, affd (CA5 La) 142 F2d 604; *Federal Surety Co. v A. Bentley & Sons Co.* (CA6 Ohio) 51 F2d 24, 78 ALR 1041; *Obermark v Clark*, 216 Ala 564, 114 So 135, 55 ALR 1153; *National Bank of Alaska v J. B. L. & K., Inc.* (Alaska) 546 P2d 579; *Barham v Barham*, 33 Cal 2d 416, 202 P2d 289; *L'Engle v Scottish Union & Nat. Fire Ins. Co.*, 48 Fla 82, 37 So 462; *Moran v Commonwealth Edison Co.* (3d Dist) 74 Ill App 3d 964, 30 Ill Dec 922, 393 NE2d 1269; *Old First Nat. Bank & Trust Co. v Scheuman*, 214 Ind 652, 13 NE2d 551, 119 ALR 1165; *Mealey v Kanealy*, 226 Iowa 1266, 286 NW 500, 131 ALR 945; *Mayse v Grieves*, 130 Kan 96, 285 P 630; *Akins v Covington*, 265 Ky 740, 97 SW2d 588; *Destrehan v Louisiana Cypress Lumber Co.*, 45 La Ann 920, 13 So 230; *Koogle v Cline*, 110 Md 587, 73 A 672; *Sears v Kings C. E. R. Co.*, 152 Mass 151, 25 NE 98; *Michigan Crown Fender Co. v Welch*, 211 Mich 148, 178 NW 684, 13 ALR 896; *Julius Kessler & Co. v Parelius*, 107 Minn 224, 119 NW 1069; *Wood v Security Mut. Life Ins. Co.*, 112 Neb 66, 198 NW 573, 34 ALR 712; *Norman v Beling*, 33 NJ 237, 163 A2d 129, 82 ALR2d 417; *Garden State Plaza Corp. v S. S.*

Kresge Co., 78 NJ Super 485, 189 A2d 448, certif den 40 NJ 226, 191 A2d 63; American Bank of Commerce v M & G Builders, Ltd., 92 NM 250, 586 P2d 1079; Hoisting Engine Sales Co. v Hart, 237 NY 30, 142 NE 342, 31 ALR 536; Tuttle v Burgett's Adm'r, 53 Ohio St 498, 42 NE 427; Speier v Michelson, 303 Pa 66, 154 A 127; Traynham v Yeargin Enterprises, Inc. (App) 304 SC 188, 403 SE2d 329; Bjornson v Rostad, 30 SD 40, 137 NW 567; New River Lumber Co. v Blue Ridge Lumber Co., 146 Tenn 181, 240 SW 763; Cook v Smith, 107 Tex 119, 174 SW 1094, 3 ALR 940; Fox Film Corp. v Ogden Theatre Co., 82 Utah 279, 17 P2d 294, 90 ALR 1299; Fox Film Corp. v Ogden Theatre Co., 82 Utah 279, 17 P2d 294, 90 ALR 1299; Georgiades v Biggs, 197 Va 630, 90 SE2d 850; Clayton v Gilmer County Court, 58 W Va 253, 52 SE 103; Klueter v Joseph Schlitz Brewing Co., 143 Wis 347, 128 NW 43; Parkinson v Roberts, 78 Wyo 478, 329 P2d 823.

In landlord's action to recover from tenant under terms of lease agreement under seal, parol evidence was admissible to establish capacity, as individual or as corporate agent, in which tenant executed agreement. Dundon v Forehand, 152 Ga App 749, 263 SE2d 687.

Provision in divorce agreement, which was basis of ex-husband's claim in wife's estate, that wife "pay one-half of all unanticipated income taxes which may be finally assessed," as well as other provisions of divorce agreement, were ambiguous and parol evidence should have been allowed to explain ex-husband's claim. In re Estate of Murphy, 226 Kan 424, 601 P2d 1096.

As to the consideration of the subject matter, nature, and purpose of the contract, and of the surrounding circumstances in construing a contract, generally, see 17A Am Jur 2d, Contracts §§ 354-356.

Footnote 21. Hanrahan-Wilcox Corp. v Jenison Machinery Co., 23 Cal App 2d 642, 73 P2d 1241; Garden State Plaza Corp. v S. S. Kresge Co., 78 NJ Super 485, 189 A2d 448, certif den 40 NJ 226, 191 A2d 63.

In action by supplier against United States Navy contractor, parol evidence was properly admitted on issue of delivery terms of written contract, despite explicit disclaimer in contract of liability for delays, where meaning of handwritten date notations on contract was ambiguous. Casper v Metal Trades, Inc. (CA4 SC) 604 F2d 299, 27 UCCRS 14, cert den 444 US 981, 62 L Ed 2d 408, 100 S Ct 483 (applying SC law).

Footnote 22. Cavazos v Trevino, 73 US 773, 6 Wall 773, 18 L Ed 813; Hanrahan-Wilcox Corp. v Jenison Machinery Co., 23 Cal App 2d 642, 73 P2d 1241.

Footnote 23. Jersey Island Dredging Co. v Whitney, 149 Cal 269, 86 P 691.

Footnote 24. Obermark v Clark, 216 Ala 564, 114 So 135, 55 ALR 1153.

Footnote 25. 21A Am Jur 2d, Customs and Usages § 25.

§ 1140 Prior or contemporaneous negotiations, dealings, events, or declarations

The parol evidence rule generally does not permit, in order to ascertain the meaning of an ambiguous instrument, the admission of extrinsic evidence of oral declarations of a party to a written instrument made before or at the time of its execution, of an intention or purpose that is not expressed in the written instrument, or that is different from the intention to be derived from the terms of the written instrument. 26 However, where one party has been permitted to introduce extrinsic evidence of the facts and circumstances leading up to, and connected with, the execution of a written contract, the other party may introduce evidence as to the same matters, even if such evidence tends to vary or contradict the writing. 27

Evidence of previous negotiations between the parties to an ambiguous written agreement may be admitted to the extent that such evidence sheds light on how the parties understood the terms of the agreement. 28 The parol evidence rule permits resort to antecedent negotiations to explain the meaning of the words used in a contract of uncertain meaning. 29 However, previous negotiations cannot be admitted to give an integrated agreement a meaning to which the language of the instrument is not reasonably susceptible. 30

Although, as a general rule, testimony concerning events which occurred prior to the execution of a contract is inadmissible in an action for breach of contract, nevertheless such testimony is admissible to clarify an ambiguous portion of the contract. 31 Where parties contract with reference to the provisions of previous dealings, evidence of the terms of such dealings is admissible to show the intention of the parties. 32 However, where the language employed in a written instrument is plain and unambiguous, evidence of a prior course of dealings between the parties is not admissible to modify the plain language used by the parties in the instrument, 33 nor may it be used to supply an interpretation of the instrument. 34

§ 1140 ----Prior or contemporaneous negotiations, dealings, events, or declarations [SUPPLEMENT]

Case authorities:

In grocery store shopper's action to recover from store for injuries shopper sustained when she slipped in store, evidence that store manager promised to pay shopper's medical bills was admissible on issue of existence of contract between parties under which store was obligated to pay such expenses. *Drago v Winn Dixie La.* (1994, La App 4th Cir) 643 So 2d 212.

Footnotes

Footnote 26. *Tuttle v Burgett's Adm'r*, 53 Ohio St 498, 42 NE 427; *Carson v McCaskill*, 111 SC 516, 99 SE 108.

As to the admissibility of parol evidence regarding prior or contemporaneous collateral agreements, generally, see §§ 1121 et seq.

Footnote 27. *Richeson v Wood*, 158 Va 269, 163 SE 339, 82 ALR 1189.

Footnote 28. *Gisborn v Charter Oak Life Ins. Co.*, 142 US 326, 35 L Ed 1029, 12 S Ct 277; *Washington Hosp. v White* (CA3 Pa) 889 F2d 1294 (among conflicting authorities on other grounds noted in *Halderman v Pennhurst State Sch. & Hosp.* (CA3 Pa) 901 F2d 311); *Walther & Cie v U. S. Fidelity & Guaranty Co.* (MD Pa) 397 F Supp 937; *Arrington v Walter E. Heller International Corp.* (1st Dist) 30 Ill App 3d 631, 333 NE2d 50; *Dental Prosthetic Services, Inc. v Hurst* (Iowa) 463 NW2d 36, 5 BNA IER Cas 1647; *Smith v Vose & Sons Piano Co.*, 194 Mass 193, 80 NE 527; *Parkinson v Roberts*, 78 Wyo 478, 329 P2d 823.

Where landlord sought to evict tenant operating adult bookstore and court had to interpret what parties to lease of store intended at time of entering lease which limited use of premises to "bookstore," court properly considered representations of tenant in negotiations leading up to lease that it would operate traditional paperback and magazine bookstore similar to that of earlier tenant. *Central Auto Co. v Reichert* (App) 87 Wis 2d 9, 273 NW2d 360.

Footnote 29. *Garden State Plaza Corp. v S. S. Kresge Co.*, 78 NJ Super 485, 189 A2d 448, certif den 40 NJ 226, 191 A2d 63.

Parol evidence was admissible to determine what the parties intended by the words "cancelled" and "cancellation" in a purchase contract, notwithstanding a written statement that the contract embodied the complete terms of their agreement, where an obvious ambiguity existed; the court would interpret these words according to the meaning given them by one party if the other party knew or had reason to know of the first party's conception. *Sunbury Textile Mills, Inc. v Commissioner* (CA3) 585 F2d 1190, 78-2 USTC P 9781, 25 UCCRS 642, 42 AFTR 2d 78-6181.

Footnote 30. *Garden State Plaza Corp. v S. S. Kresge Co.*, 78 NJ Super 485, 189 A2d 448, certif den 40 NJ 226, 191 A2d 63.

Footnote 31. *Babe, Inc. v Baby's Formula Service, Inc.* (Fla App D3) 165 So 2d 795, 6 ALR3d 320.

Footnote 32. *Curtis v Bradley*, 65 Conn 99, 31 A 591; *W. T. Rawleigh Co. v Miller*, 105 Mont 456, 73 P2d 552.

Where a credit has been given for premiums in previous insurance dealings, such dealings may be looked to in determining whether a cash payment or a credit was intended. *Western Assur. Co. v McAlpin*, 23 Ind App 220, 55 NE 119.

Footnote 33. *Brawley v United States*, 96 US 168, 6 Otto 168, 24 L Ed 622; *Root v Allstate Ins. Co.*, 272 NC 580, 158 SE2d 829.

Footnote 34. § 1100.

§ 1141 Subsequent acts or declarations of parties

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where the language used in a written instrument is equivocal or ambiguous, the parties' subsequent acts or declarations showing the practical construction the parties put upon the words may be resorted to for the purpose of ascertaining the parties' intention, and parol evidence is admissible for this purpose. 35

However, where the language employed in a written instrument is plain and unambiguous, evidence of the practical construction put upon the words by the acts and declarations of the parties is not admissible to supply an interpretation of the instrument. 36

§ 1141 ----Subsequent acts or declarations of parties [SUPPLEMENT]

Case authorities:

A defendant's confession or statement may be considered in connection with the other evidence, but the corpus delicti cannot rest upon the confession or admission alone. Schwab v State (1994, Fla) 636 So 2d 3, 19 FLW S 113.

Footnotes

Footnote 35. Lowrey v Hawaii, 206 US 206, 51 L Ed 1026, 27 S Ct 622; Floyd v Ring Const. Corp. (DC Minn) 66 F Supp 436, affd (CA8 Minn) 165 F2d 125, cert den 334 US 838, 92 L Ed 1763, 68 S Ct 1496; Port of Mobile v Louisville & N. R. Co., 84 Ala 115, 4 So 106; Barham v Barham, 33 Cal 2d 416, 202 P2d 289; Kohn v Kohn, 95 Cal App 2d 708, 214 P2d 71; Portland Body Works v McCullough Motor Supply Co., 72 Ind App 216, 119 NE 180, adhered to 72 Ind App 229, 119 NE 1005 and appeal after remand 86 Ind App 19, 155 NE 710; Woods v Bromley, 69 Nev 96, 241 P2d 1103; First American Nat. Bank v Hunter (Tenn App) 581 SW2d 655.

As to insurance contracts, see 44 Am Jur 2d, Insurance §§ 1999 et seq.

Evidence of statements and conduct of the parties to a real estate purchase agreement, both before and after execution of the agreement, was admissible to explain an ambiguous handwritten term added to the form agreement stating that "Inability to get financing on the basis of credit will void this contract," and the evidence supported the court's determination that the parties intended the handwritten term to encompass a failure to obtain an adequate amount of financing as well as a failure to obtain credit because of personal credit history. Cordaro v Singleton, 31 NC App 476, 229 SE2d 707.

Parol evidence of an agreement that a contract for sale of realty was conditioned upon the buyer's obtaining financing was admissible notwithstanding the inclusion of an

integration clause in the written contract, where the contract was ambiguous where the price breakdown for the house included a mortgage, and where another clause in the contract stated that the buyer was to apply for financing within five days, but where there was no specific mention in the agreement of a condition to the validity of the agreement. *Blaha v Schwartz* (CP) 7 Ohio Ops 3d 234.

As to the admission of subsequent parol agreements or modifications as an exception to the parol evidence rule, see § 1133.

Footnote 36. § 1100.

§ 1142 Words and phrases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence has been admitted to explain a wide variety of particular words and phrases which, in the instruments containing them, were of ambiguous or uncertain meaning, 37 particularly where the words and phrases have technical 38 or local 39 meanings not commonly known, and where abbreviations, symbols, or figures, etc., are used in substitution for words and phrases. 40 Where a new and unusual word or phrase is used in a written instrument, extrinsic evidence is admissible to explain or illustrate the meaning of that word or phrase. 41 However, where the particular words and phrases used in a written agreement have a well-understood general meaning, parol evidence is not admissible for the purpose of showing a meaning other than the generally accepted meaning. 42

Footnotes

Footnote 37. See *Semon, Bache & Co. v Coppes, Zook & Mutschler Co.*, 35 Ind App 351, 74 NE 41 (holding that where a party contracts to take goods currently, parol evidence is admissible of a conversation between the parties, at or before entering into the contract, concerning the word "currently").

An employer's moving expense policy was admissible as parol evidence in order to explain the phrase "to pay moving expenses" contained in a letter offering employment, in an employment contract suit brought against the employer by a former employee. *Echols v State* (Iowa App) 440 NW2d 402.

Generally, as to the construction of particular words or phrases in contracts, see 17A Am Jur 2d, Contracts §§ 371-378.

Footnote 38. § 1143.

Footnote 39. § 1144.

Footnote 40. § 1145.

Footnote 41. *Coughlin v Blair*, 41 Cal 2d 587, 262 P2d 305; *In re Curtis*, 64 Conn 501, 30 A 769; *Western Union Tel. Co. v Merritt*, 55 Fla 462, 46 So 1024; *Western Union Tel. Co. v Collins*, 45 Kan 88, 25 P 187; *Dages v Brake*, 125 Mich 64, 83 NW 1039; *State v Commercial Casualty Ins. Co.*, 125 Neb 43, 248 NW 807, 88 ALR 790; *Newhall v Appleton*, 114 NY 140, 21 NE 105; *Miller v Wiggins*, 227 Pa 564, 76 A 711; *Fairly v Wappoo Mills*, 44 SC 227, 22 SE 108.

Footnote 42. *Johnston v Cox*, 114 Fla 243, 154 So 206.

The meaning of the term "office space" in an agreement by which a corporation hired a real estate broker to locate office space for the corporation was not ambiguous, and the admission of parol evidence to explain the term was improper. *Student Loan Guarantee Foundation, Inc. v Barnes, Quinn, Flake & Anderson, Inc.*, 34 Ark App 139, 807 SW2d 628.

The words "only a single dwelling," in a building restriction, are not words of art, and the testimony of architects, real-estate brokers, and lenders of money upon real estate, is not admissible to explain their meaning. *Hutchinson v Ulrich*, 145 Ill 336, 34 NE 556.

§ 1143 --Technical or trade terms

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Parol evidence is always admissible to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. 43 Similarly, where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, extrinsic evidence is admissible to explain or illustrate the meaning of that word or phrase. 44 Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. 45 Under this rule, parol evidence is admissible to show that apparently ambiguous statements of description and price have a recognized meaning in the trade or business to which the contract relates. 46

A well-recognized technical meaning of a term does not necessarily preclude oral evidence of an intended or understood modified meaning, where the circumstances and language in connection with which it is used tend to obscure it and leave in doubt the light in which the parties to the agreement regarded it. 47

Footnotes

Footnote 43. *Salmon Falls Mfg. Co. v Goddard*, 55 US 446, 14 How 446, 14 L Ed 493; *Buckbee v P. Hohenadel, Jr., Co.* (CA7 Ill) 224 F 14; *McClure & Co. v Cox, Brainard & Co.*, 32 Ala 617; *Berry v Kowalsky*, 95 Cal 134, 30 P 202; *In re Curtis*, 64 Conn 501, 30

A 769; Goetz v Continental Casualty Co., 245 Ill App 350; Western Union Tel. Co. v Collins, 45 Kan 88, 25 P 187; Levi v Schwartz, 201 Md 575, 95 A2d 322, 36 ALR2d 1241; Smith v Vose & Sons Piano Co., 194 Mass 193, 80 NE 527; Maurin v Lyon, 69 Minn 257, 72 NW 72; Conestoga Cigar Co. v Finke, 144 Pa 159, 22 A 868.

As to the construction of technical words, or words of art, in a contract, generally, see 17A Am Jur 2d, Contracts §§ 363, 364.

Footnote 44. Coughlin v Blair, 41 Cal 2d 587, 262 P2d 305; In re Curtis, 64 Conn 501, 30 A 769; Western Union Tel. Co. v Merritt, 55 Fla 462, 46 So 1024; Western Union Tel. Co. v Collins, 45 Kan 88, 25 P 187; Dages v Brake, 125 Mich 64, 83 NW 1039; State v Commercial Casualty Ins. Co., 125 Neb 43, 248 NW 807, 88 ALR 790; Newhall v Appleton, 114 NY 140, 21 NE 105; Miller v Wiggins, 227 Pa 564, 76 A 711; Fairly v Wappoo Mills, 44 SC 227, 22 SE 108.

Parol evidence as to the meaning of the term "discharge port" in a contract for the sale of oil was admissible, as the meaning of the term was not clear on its face. Crescent Oil & Shipping Services, Ltd. v Phibro Energy, Inc. (CA2 NY) 929 F2d 49, 1991 AMC 1224, 13 UCCRS2d 977.

Parol evidence is admissible to prove the special meaning given by an industry to language employed in a contract. Latina v Woodpath Dev. Co., 57 Ohio St 3d 212, 567 NE2d 262.

The testimony of a professor of hotel and restaurant management as to the characteristics of a nightclub was admissible to explain the meaning of the term "nightclub" as used in a lease that prohibited the operation of a restaurant as a nightclub. Hellenic Invest., Inc. v Kroger Co. (Tex App Houston (1st Dist)) 766 SW2d 861.

Footnote 45. Maurin v Lyon, 69 Minn 257, 72 NW 72.

Footnote 46. Maurin v Lyon, 69 Minn 257, 72 NW 72.

In an action to enforce the alleged liability of a tobacco sampler to make good the loss resulting to a buyer from the fact that the tobacco in the cases was not as represented by the tags attached to the samples, evidence is admissible to show what meaning the apparently ambiguous words and figures on the tags conveyed to the trade, and to show that by usage the sampler undertook to make good the losses resulting from untrue statements on the tags. Conestoga Cigar Co. v Finke, 144 Pa 159, 22 A 868.

Footnote 47. Brown v A. F. Bartlett & Co., 201 Mich 268, 167 NW 847.

§ 1144 --Local terms

[View Entire Section](#)
[Go to Parallel Reference Table](#)

If a word is employed which has no definite and specific general meaning, its local

meaning may be proved. 48 However, a party to a written contract may not introduce parol evidence of the interpretation put upon the language of such contract in states other than that according to the laws of which the contract is to be interpreted, to show that he or she intended to employ the language in accordance with the interpretation given to it in such other states, and that the other party had reason to know that the party was doing so. 49

Footnotes

Footnote 48. *Butcher v Smith* (Tex Civ App) 195 SW 1180, error den 110 Tex 617, 223 SW 166.

Evidence as to what the agent of the seller said as to a service denominated in the written contract as "Outcault service de luxe" was admissible in that such designation had a local or trade meaning and such evidence was necessary to make the phrase intelligible. *Outcault Advertising Co. v H. G. Waltner Mercantile Co.*, 96 Kan 689, 153 P 518.

Footnote 49. *Inman Mfg. Co. v American Cereal Co.*, 133 Iowa 71, 110 NW 287.

§ 1145 Figures, abbreviations, and characters; signs and symbols

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where an abbreviation, symbol, or figure used in a written instrument has a plain unambiguous meaning, parol evidence is not admissible to show a meaning different from that called for by its terms. 50 Parol evidence also is not admissible to show the intention of the parties in using abbreviations, signs, symbols, or figures, 51 or to show what was said about their use. 52 However, where their meaning is ambiguous, uncertain, or obscure, parol evidence may be received to show in what sense figures or abbreviations were used in a contract, 53 to explain abbreviations, characters, or marks, as used in a particular business, which are unintelligible to persons unacquainted with such business, 54 and to show the meaning of abbreviations, signs, symbols, figures, and words, in contracts or other writings, which have no apparent meaning, 55 provided such explanation is consistent with other terms of the contract. In some such cases, parol evidence has been admissible on the theory that it merely identified the subject matter of the contract. 56 However, in other cases parol evidence has been admitted on the theory that the abbreviations have a recognized meaning in a given trade, and that the evidence merely translates the abbreviation from the language of the trade into ordinary language. 57 If the language of a writing has a secret meaning, it is proper to show the fact, as codes or ciphers play an important part in business affairs. 58

Footnotes

Footnote 50. *White v Oliver*, 173 Okla 559, 49 P2d 147, 100 ALR 1461.

The term "f. o. b. cars" has a meaning so plain that it is not permissible to explain it by custom or otherwise. *Vogt v Schienebeck*, 122 Wis 491, 100 NW 820.

Footnote 51. *Jaqua v Witham & Anderson Co.*, 106 Ind 545, 7 NE 314; *Vogt v Schienebeck*, 122 Wis 491, 100 NW 820.

Footnote 52. *National Spun Silk Co. v Peerless Silk Mills Corp.*, 97 NJL 190, 116 A 711.

Footnote 53. *Brewer v Horst & Lachmund Co.*, 127 Cal 643, 60 P 418; *People v Thompson*, 295 Ill 187, 129 NE 155; *Griffin v Erskine*, 131 Iowa 444, 109 NW 13 (holding that parol evidence that the abbreviation "Pt." as used in a draft, following the name of the president of a bank, to whom it was made payable, was understood among bankers to refer to "president," is competent as tending to explain what was intended thereby); *Small v Elliott*, 12 SD 570, 82 NW 92.

Footnote 54. *Berry v Kowalsky*, 95 Cal 134, 30 P 202; *Cole v Leach*, 47 Ind App 341, 94 NE 577; *Dages v Brake*, 125 Mich 64, 83 NW 1039; *Maurin v Lyon*, 69 Minn 257, 72 NW 72.

The meaning of the letters "F C" in a memorandum of sale, when they are technical abbreviations used in the wool trade, may be shown by parol evidence. *New England Dressed Meat & Wool Co. v Standard Worsted Co.*, 165 Mass 328, 43 NE 112.

Parol proof was admissible to show that the expressions "bbls" and "Basis 22 1/2," in a memorandum of a contract for the sale of sugar, meant barrels of 350 pounds each at 22 1/2 cents per pound, in *Franklin Sugar Refining Co. v Lipowicz*, 247 NY 465, 160 NE 916, 59 ALR 1414.

Practice References Proof of meaning of abbreviation in commercial writing. 1 Am Jur Proof of Facts 11, Abbreviations, Proof 1.

Meaning of Abbreviation, Word, or Phrase According to Usage of Trade. 26 Am Jur POF2d 229 §§ 4-7.

Footnote 55. *Atlantic C. L. R. Co. v Dahlberg Brokerage Co.*, 170 Ala 617, 54 So 168; *Nowlin v Noteware*, 177 Ark 688, 7 SW2d 791; *Gardiner v McDonogh*, 147 Cal 313, 81 P 964; *Gianelli v Globe Grain & Milling Co.*, 48 Cal App 103, 191 P 720; *Morrison v Alexander*, 26 Ga App 455, 106 SE 734; *People v Thompson*, 295 Ill 187, 129 NE 155; *Kossuth County State Bank v Richardson*, 141 Iowa 738, 118 NW 906; *New England Dressed Meat & Wool Co. v Standard Worsted Co.*, 165 Mass 328, 43 NE 112; *Dages v Brake*, 125 Mich 64, 83 NW 1039; *Lampert Lumber Co. v Minneapolis & S. L. R. Co.*, 127 Minn 195, 149 NW 133; *Dinuba Farmers' Union Packing Co. v J. M. Anderson Grocer Co.*, 193 Mo App 236, 182 SW 1036; *Franklin Sugar Refining Co. v Lipowicz*, 247 NY 465, 160 NE 916, 59 ALR 1414; *Mason Motors Spirit Distributing Co. v Cosden*, 105 Okla 244, 231 P 890; *Small v Elliott*, 12 SD 570, 82 NW 92.

Oral evidence of the representations of an insurer's agent as to the nature of an insurance policy was admissible, notwithstanding a provision in the policy in effect excluding any oral statements by the agent, in order to clarify the abbreviation "G A D 20 Pay," appearing on an application for an insurance policy. *Stengel v Colorado Nat. Life Assur. Co.* (Tex Civ App) 147 SW 1193.

Footnote 56. Kirby Planing Mill Co. v Hughes, 11 Ga App 645, 75 SE 1059; New England Dressed Meat & Wool Co. v Standard Worsted Co., 165 Mass 328, 43 NE 112.

Parol evidence was admissible to show that the word "Bayo," as used in a contract for the sale of beans, means a variety of beans known as "bayous," and that "per 100" means per 100 pounds; parol evidence, though inadmissible to supply an omission, introduce new terms, or contradict or vary the writing, is admissible to identify the subject matter to which the writing refers. Gardiner v McDonogh, 147 Cal 313, 81 P 964.

Parol evidence was admissible to show that the expressions "W. than Snow" and "St. Elmo," in a contract of sale, had reference to a certain type of flour; the admission of such evidence was tantamount merely to identifying the subject matter of the contract, and that the evidence in no wise varied or added to the terms of the contract. Hartwell Grocery Co. v Mountain City Mill Co., 8 Ga App 727, 70 SE 48.

Footnote 57. Maurin v Lyon, 69 Minn 257, 72 NW 72.

Footnote 58. Carland v Western Union Tel. Co., 118 Mich 369, 76 NW 762, holding that the meaning of a cipher telegram may be shown by the sender.

6. Compelling Production of Documents During Trial [1146-1175]

a. In General [1146-1149]

§ 1146 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts may generally, upon proper motion or application, require parties to actions to produce during trial documents in their possession containing evidence pertinent to the issues, 59 except where the documents are privileged. 60 Nonproduction of the documents may open the door for the introduction of secondary evidence of their contents, 61 relieve the opposing party of the burden of producing evidence, 62 or permit the trier of fact to regard allegations contained in the application for production, and concerning what the documents would prove, as admitted by the nonproducing party. 63 Nonproduction of a document may also bar the party from whom production is sought from introducing evidence summarizing the contents of the document. 64

◆ Practice guide: A document may be referred to in testimony without producing it; it is when the document's terms are sought to be put in evidence that the document becomes subject to production. 65

Footnotes

Footnote 59. *Sinclair Refining Co. v Jenkins Petroleum Process Co.*, 289 US 689, 77 L Ed 1449, 53 S Ct 736, 88 ALR 496; *Ex parte Darring*, 242 Ala 621, 7 So 2d 564; *State ex rel. R. W. Filkey, Inc. v Scott* (Mo App) 407 SW2d 79; *Hooker v Eagle Bank of Rochester*, 30 NY 83.

As to the production of documents before trial for the purpose of discovery, see 23 Am Jur 2d, *Depositions and Discovery* §§ 244 et seq.

As to the use of the subpoena duces tecum to compel the production of documents, see 81 Am Jur 2d, *Witnesses* §§ 18-33.

Footnote 60. *Rice v Rice*, 240 Ga 272, 240 SE2d 29; *Gustafson v Gustafson*, 272 NC 452, 158 SE2d 619 (superseded by statute on other grounds as stated in *Re Albemarle Mental Health Center*, 42 NC App 292, 256 SE2d 818).

As to matters privileged from disclosure in litigation, generally, see 81 Am Jur 2d, *Witnesses* §§ 285 et seq.

Footnote 61. *Ex parte Darring*, 242 Ala 621, 7 So 2d 564; *Brownlee v Hot Shoppes, Inc.* (2d Dept) 23 App Div 2d 848, 259 NYS2d 271.

Footnote 62. *Omaha v American Theater Corp.*, 189 Neb 441, 203 NW2d 155.

Footnote 63. *Mayon v New Amsterdam Casualty Co.* (La App 1st Cir) 187 So 2d 767.

Footnote 64. *Hackett v Housing Authority of San Antonio* (CA5 Tex) 750 F2d 1308, 17 Fed Rules Evid Serv 69, cert den 474 US 850, 88 L Ed 2d 121, 106 S Ct 146.

As to the introduction of a summary of a document, generally, see § 1060.

Footnote 65. *Thomasson v Ocean Point Golf, Inc.* (App) 300 SC 29, 386 SE2d 282.

§ 1147 Grounds for denial of application for production

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An application for production of a document during trial may be quashed where it is too extensive or indefinite, 66 or where there is little or no reason to believe that the document sought contains relevant evidence. 67 A mere suspicion that a document contains relevant evidence does not warrant an order for its production, 68 and mere general allegations of the document's relevance are not sufficient. 69 Even an application for production of a document which is arguably relevant to the requesting party's theory of the case may be refused where the document would be inadmissible as hearsay, 70 or where its probative value is outweighed by its potential to confuse or distract the jury. 71

The fact that the opposing party may admit the contents of the document the production of which is sought does not necessarily defeat an application for its production; the trial court may nonetheless in its discretion order the production of the document. 72 Moreover, a party's right to the production of a document is not affected by the fact that the same document is also evidence for the other party. 73 However, an application for production of a document during trial may be denied where the party seeking production has had a full opportunity to examine the document prior to trial. 74 This rule applies where production of the document in question was properly a matter for pretrial discovery and the party seeking production at trial did not avail himself of discovery procedures to secure its production. 75

Footnotes

Footnote 66. *Hill v Willis*, 244 Ga 263, 161 SE2d 281, conformed to 117 Ga App 855, 162 SE2d 299 (notice to produce "all income tax records" for a three-year period was too broad, too indefinite, and too extensive).

Footnote 67. *State v Clemons*, 168 Conn 395, 363 A2d 33, cert den 423 US 855, 46 L Ed 2d 80, 96 S Ct 104; *Cooper v United States* (Dist Col App) 353 A2d 696; *State ex rel. Page v Terte*, 324 Mo 925, 25 SW2d 459.

Footnote 68. *Ex parte Clarke*, 126 Cal 235, 58 P 546; *Globe Acc. Ins. Co. v Helwig*, 13 Ind App 539, 41 NE 976.

Footnote 69. *City Nat. Bank v Wofford*, 189 Ark 914, 75 SW2d 666; *State ex rel. State ex rel. Page v Terte*, 324 Mo 925, 25 SW2d 459.

Footnote 70. *State v Moore* (La) 344 So 2d 973 (criminal defendant's request for production during trial of other complaints which might have been filed against him, for the purpose of informing the jury of past instances of his antisocial behavior to show that he was not in full possession of his faculties and did not know right from wrong at the time of his offense, was properly denied where such complaints would have been inadmissible as hearsay).

Footnote 71. *Rockwell & Bond, Inc. v Flying Dutchman, Inc.*, 74 Mich App 1, 253 NW2d 368.

Footnote 72. *Dalton v Calhoun County Dist. Court*, 164 Iowa 187, 145 NW 498.

Footnote 73. *Dock v Dock*, 180 Pa 14, 36 A 411.

Footnote 74. *State v Perique* (La) 340 So 2d 1369 (upholding trial court's denial of motion for production of tape recordings of police radio communications where defense counsel was given opportunity to hear tapes at in camera inspection, and had full opportunity to hear contents of conversation of police officers and to make use of this information at trial).

Footnote 75. *Aamco Transmission v Air Systems, Inc.* (Ind App) 459 NE2d 1215, 44 ALR4th 1163.

§ 1148 Production of document on demand as affecting admissibility—in favor of producing party

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the "English rule," a paper or document which is produced on the demand of an opposing party and inspected by him or her is thereby made evidence in favor of the producer, even though otherwise it would be inadmissible. 76 This rule has been justified on the grounds that a party should not be allowed to pry into the affairs of his adversary without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both parties. 77

Other courts take the view that the production and inspection of a document on demand does not make it evidence for the producer where it is not otherwise admissible. 78 In support of this view it has been said that the party calling for books and papers is subjected to great hazard if such a request, without more, makes them evidence in the case, and therefore the "English rule" tends to lead to the suppression rather than to the ascertainment of truth. 79

Even where the so-called "English rule" is followed, there have been some limitations placed upon it. The mere production of a document on demand, without its inspection thereafter by the demanding party, does not render it admissible in evidence on behalf of the party producing it. 80 Furthermore, documents admitted under the English rule are not conclusive evidence of the truth of what they contain. 81

Footnotes

Footnote 76. *Morrison v Whiteside*, 17 Md 452; *Amory v Commonwealth*, 321 Mass 240, 72 NE2d 549, 174 ALR 370.

Footnote 77. *Clark v Fletcher*, 83 Mass 53.

Footnote 78. *Scully v Morrison Hotel Corp.* (1st Dist) 118 Ill App 2d 254, 254 NE2d 852; *Morgan v Paine (Me)* 312 A2d 178; *Smith v Rentz*, 131 NY 169, 30 NE 54; *Merlino v Mutual Service Casualty Ins. Co.*, 23 Wis 2d 571, 127 NW2d 741.

Footnote 79. *Smith v Rentz*, 131 NY 169, 30 NE 54.

The theory of the English rule was that a party was not entitled to inspect the documentary evidence of the opposing party, and that if he took the chance of asking that documents be produced without knowing what they contained, he should be penalized, if he examined the documents, by having them admitted in evidence; this is hardly in keeping with modern notions that a lawsuit is not to be conducted as a contest of skill but rather as a search for truth and justice, and that discovery of evidence in the possession of an opponent is to be encouraged. *Merlino v Mutual Service Casualty Ins. Co.*, 23 Wis

2d 571, 127 NW2d 741.

Footnote 80. United States Fidelity & Guaranty Co. v Continental Baking Co., 172 Md 24, 190 A 768; Saunders v Duval's Adm'r, 19 Tex 467.

Footnote 81. Blizzard v Nosworthy, 50 Ga 514.

§ 1149 --In favor of party calling for production

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some cases it has been said that the production of a document on notice to the adverse party, and its inspection by the party calling for it, make it evidence for both parties. 82 However, other authority states that a party to a suit cannot, by a notice to his adversary, have a paper or document produced and after inspecting it make the paper or document competent evidence in his favor, if its contents are otherwise inadmissible. 83 Under this view, a party securing production of a document must demonstrate its relevance to have it admitted into evidence over the opposing party's objection. 84 In any event, a mere notice to produce papers does not require the party giving it to place them in evidence if on inspection he finds nothing to his advantage. 85

Footnotes

Footnote 82. Morrison v Whiteside, 17 Md 452; Decker v George W. Smith & Co., 88 NJL 630, 96 A 915.

Footnote 83. Laufer v Bridgeport Traction Co., 68 Conn 475, 37 A 379 (ovrld on other grounds by Moffitt v Connecticut Co., 86 Conn 527, 86 A 16); Boyle v Boston E. R. Co., 208 Mass 41, 94 NE 247.

Footnote 84. Alabama Power Co. v Tatum, 293 Ala 500, 306 So 2d 251.

Footnote 85. Smith v Rentz, 131 NY 169, 30 NE 54.

**b. Right of Accused in Criminal Case to Production of Statement of Prosecution
Witness [1150-1175]**

(1). In General [1150, 1151]

§ 1150 View that statements are generally available

Courts in a number of states have taken the view that where a prosecution witness has testified on direct examination in the trial of the case, ordinarily the defendant is entitled to the production and inspection of a prior statement of the witness for the purpose of cross-examining or impeaching him at the trial. 86 Production of such statements may be governed by statute. 87 To justify its production, the statement of the witness must be relevant 88 or must relate to the subject matter covered in the witness' testimony on direct examination. 89 Some courts have held that a statement need not be produced if it is of a "confidential" or "privileged" nature. 90 Other courts, however, have rejected claims of confidentiality as a bar to disclosure of a statement, 91 including claims that a statement was protected from disclosure because it constituted the prosecuting attorney's work product. 92

§ 1150 ----View that statements are generally available [SUPPLEMENT]

Case authorities:

Typed report of police officer who interviewed defendant after arrest was properly found to be "identical" to handwritten notes which officer used to prepare report, although handwritten notes could not be located, where officer testified in hearing out of jury's presence that he had placed notes next to typewriter and had typed them "word for word" onto report completed within hour of interview; since handwritten version of identical typewritten report was precisely type of document that would qualify as duplicative equivalent of material already disclosed, there was no Rosario violation in failure to produce handwritten notes. *People v Serrando* (1992, 1st Dept) 184 AD2d 1094, 583 NYS2d 245, app den 80 NY2d 837, 587 NYS2d 922, 600 NE2d 649.

No sanction was warranted for loss of police officer's notes containing serial numbers of "buy money" where officer testified that he wrote serial numbers on piece of paper which contained no other notes and then personally transcribed those numbers on to his typed report, and report was appropriately authenticated. *People v Greany* (1992, 3d Dept) 185 AD2d 376, 585 NYS2d 805, app den 80 NY2d 1027, 592 NYS2d 676, 607 NE2d 823.

Footnotes

Footnote 86. *State v Green*, 103 Ariz 211, 439 P2d 483; *In re Waltreus*, 62 Cal 2d 218, 42 Cal Rptr 9, 397 P2d 1001, cert den 382 US 853, 15 L Ed 2d 92, 86 S Ct 103; *People v Hartgraves*, 31 Ill 2d 375, 202 NE2d 33, cert den 380 US 961, 14 L Ed 2d 152, 85 S Ct 1104; *Burns v State (Ind)* 511 NE2d 1052; *People v Poole*, 48 NY2d 144, 422 NYS2d 5, 397 NE2d 697; *Commonwealth v Gartner*, 475 Pa 512, 381 A2d 114 (not followed on other grounds by *Commonwealth v Haynes*, 395 Pa Super 322, 577 A2d 564); *Hoffman v State (Tex Crim)* 514 SW2d 248.

Annotation: Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d

Footnote 87. *State v Lenarchick*, 74 Wis 2d 425, 247 NW2d 80, 99 ALR3d 906 (statute requiring one party to produce for the other written or recorded statements of witness was applicable to both defense and prosecution and was not restricted to party who called witness).

Footnote 88. *People v Hartgraves*, 31 Ill 2d 375, 202 NE2d 33, cert den 380 US 961, 14 L Ed 2d 152, 85 S Ct 1104; *State v Hale (Mo)* 371 SW2d 249.

If prosecution objects to production of statement on the ground that it is irrelevant, the court shall by in camera inspection decide whether it is relevant; if it finds that some part is relevant and some part not relevant, the court shall excise such part as is not relevant. *State v Thompson*, 273 Minn 1, 139 NW2d 490, cert den 385 US 817, 17 L Ed 2d 56, 87 S Ct 39, habeas corpus proceeding (DC Minn) 286 F Supp 663, post-conviction proceeding 289 Minn 270, 183 NW2d 771, habeas corpus proceeding (DC Minn) 377 F Supp 589, affd (CA8 Minn) 512 F2d 769, cert den 421 US 1014, 44 L Ed 2d 683, 95 S Ct 2421, post-conviction proceeding (Minn) 384 NW2d 461.

Footnote 89. *Miller v State (Alaska)* 462 P2d 421; *State v Ashton*, 95 Ariz 37, 386 P2d 83; *State v Pacheco*, 38 NJ 120, 183 A2d 54; *People v Malinsky*, 15 NY2d 86, 262 NYS2d 65, 209 NE2d 694, on remand 52 Misc 2d 717, 278 NYS2d 15.

Annotation: 7 ALR3d 181 § 9[a].

Footnote 90. *People v Humphries*, 127 Cal App 2d 131, 273 P2d 562; *People v Hartgraves*, 31 Ill 2d 375, 202 NE2d 33, cert den 380 US 961, 14 L Ed 2d 152, 85 S Ct 1104; *People v Malinsky*, 15 NY2d 86, 262 NYS2d 65, 209 NE2d 694, on remand 52 Misc 2d 717, 278 NYS2d 15.

Footnote 91. *State v Grunau*, 273 Minn 315, 141 NW2d 815 (statute, barring disclosure by public officer of communications made to him in official confidence when public interest would suffer by disclosure, does not bar production of statements of prosecution witnesses for purpose of cross-examination or impeachment after such witnesses have testified on direct examination).

Footnote 92. *People v Horton (1st Dept)* 19 App Div 2d 80, 241 NYS2d 224, remanded on other grounds 15 NY2d 722, 256 NYS2d 933, 205 NE2d 199, on remand (1st Dept) 25 App Div 2d 720, 269 NYS2d 675, affd 18 NY2d 355, 275 NYS2d 377, 221 NE2d 909, remittitur and on other grounds 19 NY2d 600, 278 NYS2d 388, 224 NE2d 884 and cert den 387 US 934, 18 L Ed 2d 997, 87 S Ct 2059.

For contra state cases, see § 1151.

As to the production in a federal prosecution of statements which constitute a prosecutor's work product, see § 1157.

§ 1151 View that statements are generally not available absent foundation for production

The view prevailing in some jurisdictions is that ordinarily a defendant is not entitled to inspection of a statement of a prosecution witness for the purpose of cross-examining or impeaching him, even after the witness has testified on direct examination. 93 Production of statements has in some cases been denied on the grounds that they were the prosecuting attorney's work product. 94 In other cases courts have required, before ordering production of a prosecution witness' statement, that the defense lay a foundation for production by showing in what manner the statement may impeach the witness or otherwise aid the defense in the cross-examination of the witness, 95 that the witness has denied making the statement, 96 or that there is an inconsistency between the contents of the statement and the testimony of the witness at the trial. 97 However, even in jurisdictions where a prosecution witness' statement is not producible as of right, it has been held that ordering the production of such a statement lies within the discretion of the trial court. 98

◆ **Observation:** The decision of the United States Supreme Court in the *Jencks* case 99 (holding that where the statement of a prosecution witness is relevant, competent, and outside of any exclusionary rule, the accused is entitled to its production without laying any foundation of inconsistency between the statement and the trial testimony of the witness), did not involve a constitutional issue, but simply established a rule applicable to federal courts and not binding upon state courts. 1 Under other cases decided by the United States Supreme Court, however, production of a prosecution witness' statement can be obtained in some circumstances as a matter of due process. 2

Footnotes

Footnote 93. *State v Smith* (Mo) 431 SW2d 74; *Ellison v State* (Tenn Crim) 549 SW2d 691; *Bellfield v Commonwealth*, 215 Va 303, 208 SE2d 771, cert den 420 US 965, 43 L Ed 2d 444, 95 S Ct 1359; *State v Pristell*, 3 Wash App 962, 478 P2d 743, review den 78 Wash 2d 997.

Annotation: Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d 181 § 4.

Footnote 94. *Fisher v State*, 241 Ark 545, 408 SW2d 894, cert den 389 US 821, 19 L Ed 2d 73, 88 S Ct 43.

A criminal defendant is not entitled to inspect statements of a prosecution witness taken by the prosecuting attorney in preparation for trial. *Adjmi v State* (Fla App D3) 208 So 2d 859, cert den (Fla) 218 So 2d 163 and cert den 395 US 958, 23 L Ed 2d 745, 89 S Ct 2098.

Footnote 95. *State v Salvatore*, 23 Conn Supp 459, 1 Conn Cir 313, 184 A2d 551 (where defense counsel gave no reason why he wanted the statement, except to state that if there was a statement, he should be allowed to cross-examine); *McKenzie v State*, 236 Md

597, 204 A2d 678.

Footnote 96. *State v Nails*, 255 La 1070, 234 So 2d 184.

Footnote 97. *Anderson v State*, 239 Ind 372, 156 NE2d 384; *State v Nails*, 255 La 1070, 234 So 2d 184; *Leonard v State*, 46 Md App 631, 421 A2d 85, affd 290 Md 295, 429 A2d 538; *Mattox v State*, 243 Miss 417, 139 So 2d 653; *State v Aubuchon (Mo)* 381 SW2d 807; *State v Gilman*, 63 Wash 2d 7, 385 P2d 369.

Footnote 98. *McKenzie v State*, 236 Md 597, 204 A2d 678; *Mattox v State*, 243 Miss 417, 139 So 2d 653; *State v Aubuchon (Mo)* 381 SW2d 807; *Erving v State*, 174 Neb 90, 116 NW2d 7, cert den 375 US 876, 11 L Ed 2d 121, 84 S Ct 151; *Commonwealth v Carey*, 201 Pa Super 292, 191 A2d 730; *State v Gilman*, 63 Wash 2d 7, 385 P2d 369.

Footnote 99. *Jencks v United States*, 353 US 657, 1 L Ed 2d 1103, 77 S Ct 1007, 75 Ohio L Abs 465, 40 BNA LRRM 2147, 32 CCH LC ¶ 70731.

Footnote 1. *Mahone v State*, 120 Ga App 234, 170 SE2d 48; *Noel v State*, 247 Ind 426, 215 NE2d 539, cert den 385 US 934, 17 L Ed 2d 214, 87 S Ct 294; *Kanaras v State*, 54 Md App 568, 460 A2d 61.

As to the supersession of the Jencks decision by act of Congress, see § 1152.

Footnote 2. *United States v Bagley*, 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375 (disclosure by the prosecution of impeachment evidence and exculpatory evidence is required as a matter of due process where such evidence is material either to guilt or to punishment).

(2). Federal Prosecutions; the Jencks Act [1152-1175]

(a). In General [1152-1156]

§ 1152 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Jencks Act 3 governs production of statements and reports of prosecution witnesses during federal criminal trials. The Act provides that in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. 4 After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as defined below) of the

witness in the possession of the United States which relates to the subject matter as to which the witness has testified, and if the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. 5

If the United States claims that any statement ordered to be produced contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order delivery of the statement for inspection in camera, and upon such delivery the court shall excise the portions of the statement which do not relate to the subject matter of the testimony of the witness. 6 With such material excised, the court shall direct delivery of the statement to the defendant. If the court has withheld any part of the statement from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. 7 When a statement is delivered to a defendant, the court in its discretion, upon application of the defendant, may recess proceedings for such time as it may determine to be reasonably required for the examination of such statement by the defendant and his preparation for its use in the trial. 8

◆ Definition: Under the Jencks Act, a "statement" of a prosecution witness is (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Government and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription of it, in any, made by the witness to a grand jury. 9

If the United States elects not to comply with an order of the court to deliver to the defendant a statement or portion of it as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared. 10

§ 1152 ----Generally [SUPPLEMENT]

Practice Aids: What is "statement" under provisions of Jencks Act (18 USCS § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure providing for production of statement of witness following witness' direct examination. 125 ALR Fed 1.

Requirement of Jencks Act (18 USCS § 3500(b)) and Rule 26.2(a) of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Footnotes

Footnote 3. 18 USCS § 3500.

Footnote 4. 18 USCS § 3500(a).

Annotation: Statements and reports of government witnesses producible in federal criminal case under Jencks Act (18 USCS § 3500), 5 ALR3d 763.

Validity and construction of Jencks Act (18 USCS § 3500) as to defendant's right to production of statements and reports of government witnesses, 5 L Ed 2d 1014.

Footnote 5. 18 USCS § 3500(b).

Practice References Motion under Jencks Act—For production of statements of witness—After testimony for government. 7 Federal Procedure, L Ed, Criminal Procedure § 20:405.

Footnote 6. 18 USCS § 3500(c).

Footnote 7. 18 USCS § 3500(c).

Footnote 8. 18 USCS § 3500(c).

Footnote 9. 18 USCS § 3500(e).

Footnote 10. 18 USCS § 3500(d).

§ 1153 Historical background; constitutionality

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Jencks Act was enacted in response to the decision of the United States Supreme Court in *Jencks v United States*, 11 in which the Court established various rules for the availability and production of statements of prosecution witnesses in federal criminal trials. By the Act, Congress exercised its power to define the rules that should govern this particular area in the trial of criminal cases instead of leaving the matter to the lawmaking of the courts. 12 The Act, and not the decision of the Supreme Court in the *Jencks* case, governs the production of statements of government witnesses in a federal criminal trial. 13

The Jencks Act is constitutional as an exercise of Congressional power to prescribe rules of procedure for the federal courts. 14 In some instances, however, the statute may be overridden by an accused's constitutional right to disclosure of exculpatory evidence. 15

Footnotes

Footnote 11. *Jencks v United States*, 353 US 657, 1 L Ed 2d 1103, 77 S Ct 1007, 75 Ohio L Abs 465, 40 BNA LRRM 2147, 32 CCH LC ¶ 70731.

Footnote 12. *Palermo v United States*, 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

Footnote 13. *Rosenberg v United States*, 360 US 367, 3 L Ed 2d 1304, 79 S Ct 1231.

Footnote 14. *Palermo v United States*, 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

Footnote 15. *United States v Gleason* (SD NY) 265 F Supp 880, 67-1 USTC ¶ 9297, 19 AFTR 2d 1615; *United States v Quinn* (ND Ga) 364 F Supp 432.

§ 1154 Relationship of Act to Confrontation Clause and Brady rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the Jencks Act has been characterized as intended to assure defendants of their right to confront their accusers under the Sixth Amendment, 16 its provisions are not a constitutional mandate, 17 and its requirements do not rise to constitutional stature. 18 Accordingly, while a violation of the Act may in some circumstances infringe upon an accused's Sixth Amendment rights under the Confrontation Clause by adversely affecting his ability to cross-examine government witnesses, 19 the Confrontation Clause is generally not violated by the government's failure to produce Jencks Act material, where the accused confronts at trial the witness whose statement was sought, has an opportunity to cross-examine him, and does so. 20

Under *Brady v Maryland*, 21 the suppression of evidence favorable to an accused violates due process, irrespective of the good or bad faith of the prosecutor, where such evidence is material to the guilt or punishment of the accused. 22 The government's failure to disclose a particular document which is not subject to production under the Jencks Act (because it is not a "statement" within the meaning of the Act) may nonetheless violate the rule of Brady and its progeny. 23 Some documents producible under the Jencks Act are also subject to disclosure under the rule of Brady and its progeny, and where this is so the Brady doctrine may require production of such documents at a time prior to the time which would be required under the Jencks Act. 24

Footnotes

Footnote 16. *United States v Carter* (CA10 Okla) 613 F2d 256, cert den 449 US 822, 66 L Ed 2d 24, 101 S Ct 81.

Footnote 17. *United States v Beasley* (CA5 Ala) 576 F2d 626, 78-2 USTC ¶ 9586, 42 AFTR 2d 78-6360, reh den (CA5 Ala) 585 F2d 796, 79-1 USTC ¶ 9107, 42 AFTR 2d 78-6369 and cert den 440 US 947, 59 L Ed 2d 636, 99 S Ct 1426, subsequent civil proceeding, summary judgment gr (SD Ala) 1993 US Dist LEXIS 16342, clarified, adopted, dismd (SD Ala) 1994 US Dist LEXIS 959.

Footnote 18. *United States v Haldeman*, 181 US App DC 254, 559 F2d 31, 1 Fed Rules Evid Serv 1203, cert den 431 US 933, 53 L Ed 2d 250, 97 S Ct 2641, reh den 433 US 916, 53 L Ed 2d 1103, 97 S Ct 2992.

Footnote 19. *Krilich v United States* (CA7 Ill) 502 F2d 680, 34 AFTR 2d 74-5725, cert den 420 US 992, 43 L Ed 2d 673, 95 S Ct 1429 and (criticized on other grounds by *Johnson v United States* (CA7 Ill) 805 F2d 1284).

Footnote 20. *United States v Hart* (CA5 Ala) 526 F2d 344, cert den 426 US 937, 49 L Ed 2d 389, 96 S Ct 2653.

Footnote 21. *Brady v Maryland*, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.

Footnote 22. 23 Am Jur 2d, Depositions and Discovery § 450.

Footnote 23. *Chavis v North Carolina* (CA4 NC) 637 F2d 213, 7 Fed Rules Evid Serv 1243.

Footnote 24. *United States v Campagnuolo* (CA5 Fla) 592 F2d 852 (criticized on other grounds by *Government of Virgin Islands v Martinez* (CA3 VI) 780 F2d 302) (although Jencks Act requires prosecutor to allow defendants' counsel to examine witness' grand jury testimony only after he has given his direct testimony at trial, Brady might require prosecutor to disclose grand jury testimony at some time prior to trial).

But see *United States v Anderson* (CA5 Ga) 574 F2d 1347 (when Brady material is contained within Jencks material, disclosure is generally timely if the government complies with the Jencks Act).

§ 1155 Requirement that requested statement be in possession of government

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The Jencks Act applies to statements "in the possession of the United States," 25 which means in the possession of the federal prosecutor. 26 Anything in the control of the trial court, such as court reporter's notes, is not in the possession of the prosecutor and therefore does not fall within the requirements of the Jencks Act. 27 The Act generally does not apply to material in the possession of state authorities, 28 or to statements made to state officials, 29 although such statements may be subject to production under the Act where there has been close cooperation between state and federal officers, 30 or a joint federal-state investigation. 31

◆ Caution: A defendant who makes a specific request for Jencks Act material prior to trial, accepts the assertion by the prosecution that it does not have possession of such material, and lets the matter drop without seeking a ruling from the trial court on the issue has effectively abandoned his or her claim for such material. 32

§ 1155 ----Requirement that requested statement be in possession of government [SUPPLEMENT]

Practice Aids: Requirement of Jencks Act (18 USCS § 3500(b)) and Rule 26.2(a) of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Footnotes

Footnote 25. 18 USCS § 3500(a).

Footnote 26. *United States v Hutcher* (CA2 NY) 622 F2d 1083, 5 Fed Rules Evid Serv 1146, cert den 449 US 875, 66 L Ed 2d 96, 101 S Ct 218; *United States v Trevino* (CA5 Tex) 556 F2d 1265, reh den (CA5 Tex) 562 F2d 1258; *United States v Polizzi* (CA9 Cal) 801 F2d 1543, 21 Fed Rules Evid Serv 1257; *United States v Cagnina* (CA11 Fla) 697 F2d 915, cert den 464 US 856, 78 L Ed 2d 157, 104 S Ct 175.

Footnote 27. *United States v Cagnina* (CA11 Fla) 697 F2d 915, cert den 464 US 856, 78 L Ed 2d 157, 104 S Ct 175.

Footnote 28. *United States v Bermudez* (CA2 NY) 526 F2d 89, cert den 425 US 970, 48 L Ed 2d 793, 96 S Ct 2166; *United States v Conway* (CA3 NJ) 415 F2d 158, cert den 397 US 994, 25 L Ed 2d 401, 90 S Ct 1131; *United States v Molt* (CA7 Ind) 772 F2d 366, 19 Fed Rules Evid Serv 277, cert den 475 US 1081, 89 L Ed 2d 715, 106 S Ct 1458; *Beavers v United States* (CA9 Wash) 351 F2d 507; *United States v Cagnina* (CA11 Fla) 697 F2d 915, cert den 464 US 856, 78 L Ed 2d 157, 104 S Ct 175.

Footnote 29. *United States v Moeckly* (CA8 Minn) 769 F2d 453, 18 Fed Rules Evid Serv 1264, cert den 475 US 1015, 89 L Ed 2d 311, 106 S Ct 1196 and (criticized on other grounds by *United States v Voss* (CA8 Mo) 787 F2d 393) and cert den 476 US 1104, 90 L Ed 2d 357, 106 S Ct 1947, post-conviction proceeding (CA8 Ark) 1992 US App LEXIS 19602.

Footnote 30. *United States v Heath* (CA10 Okla) 580 F2d 1011, cert den 439 US 1075, 59 L Ed 2d 42, 99 S Ct 850.

Footnote 31. *United States v Myerson* (SD NY) 684 F Supp 41.

Footnote 32. *United States v McKenzie* (CA5 Tex) 768 F2d 602, cert den 474 US 1086, 88 L Ed 2d 900, 106 S Ct 861.

§ 1156 Requirement of testimony at trial by witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Jencks Act provides that in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. 33 In this context, the word "trial" means a proceeding conducted for the purpose of determining guilt or innocence, 34 and accordingly the defense is not entitled to production of a witness' statement under the Act after the witness has testified at a preliminary hearing. 35

The bar against compulsory disclosure prior to the testimony of the witness whose statement is sought cannot be circumvented by resort to the Freedom of Information Act 36 or Rule 16 of the Federal Rules of Criminal Procedure. 37

◆ Practice guide: The Jencks Act does not forbid voluntary pretrial disclosure by the prosecution of the statements of government witnesses. 38 Also, a trial court may in its discretion require disclosure by a specified date prior to trial in order to expedite a trial involving many witnesses. 39 Moreover, pretrial disclosure of Jencks material may be required where such material is subject to pretrial disclosure under the Brady doctrine. 40

§ 1156 ----Requirement of testimony at trial by witness [SUPPLEMENT]

Practice Aids: Requirement of Jencks Act (18 USCS § 3500(b)) and Rule 26.2(a) of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Stipulation and order setting case for pretrial conference (including handling of documents under Jencks Act). 64 Fed Proc, L Ed § 20:690

Memorandum setting forth pretrial stipulation and order (including handling of documents under Jencks Act). 64 Fed Proc, L Ed § 20:690

Rules:

(FRCrP, Rule 16), amended in 1994, clarifies the rule's applicability to organizational as well as individual defendants.

Footnotes

Footnote 33. 18 USCS § 3500(a).

Footnote 34. *United States v Murphy* (CA3 Pa) 569 F2d 771, cert den 435 US 955, 55 L Ed 2d 807, 98 S Ct 1588 and (superseded by statute on other grounds as stated in *United States v Rosa* (CA3 Pa) 891 F2d 1074).

Footnote 35. *Robbins v United States* (CA10 NM) 476 F2d 26; *Gibson v Halleck* (DC

Dist Col) 254 F Supp 159.

As to the applicability of the Act to criminal proceedings other than trial, generally, see § 1174.

Law Reviews: Expanding Defendant's Discovery: The Jencks Act at Pretrial Hearings. 24 Buff LR 419 (1975).

Footnote 36. *Barceloneta Shoe Corp. v Compton* (DC Puerto Rico) 271 F Supp 591, 65 BNA LRRM 3063, 56 CCH LC ¶ 12127.

Footnote 37. FR Crim P, Rule 16(a)(2).

Footnote 38. *United States v Murphy* (CA3 Pa) 569 F2d 771, cert den 435 US 955, 55 L Ed 2d 807, 98 S Ct 1588 and (superseded by statute on other grounds as stated in *United States v Rosa* (CA3 Pa) 891 F2d 1074); *United States v Campagnuolo* (CA5 Fla) 592 F2d 852 (criticized on other grounds by *Government of Virgin Islands v Martinez* (CA3 VI) 780 F2d 302); *United States v King* (CA6 Mich) 521 F2d 356.

Practice References Stipulation and order—Setting case for pretrial conference and providing for disclosure of Jencks Act statements of prosecution witnesses prior to their testimony. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:689.

Memorandum—Setting forth pretrial stipulation and order and providing for disclosure of Jencks Act statements at or prior to trial. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:690.

Footnote 39. *United States v Garrison* (ED La) 348 F Supp 1112; *United States v Narciso* (ED Mich) 446 F Supp 252 (disapproved on other grounds by *Sprynczynatyk v General Motors Corp.* (CA8 ND) 771 F2d 1112, 18 Fed Rules Evid Serv 952) and (disapproved on other grounds by *McQueen v Garrison* (CA4 NC) 814 F2d 951, 22 Fed Rules Evid Serv 1048) and (disapproved on other grounds by *Little v Armontrout* (CA8 Mo) 819 F2d 1425, 23 Fed Rules Evid Serv 61) and (disapproved on other grounds by *United States v Griffith* (CA6 Tenn) 864 F2d 421).

Footnote 40. § 1154.

(b). Materials Subject to Production Under Act [1157-1161]

§ 1157 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

While a statement of a witness must "relate" to the witness' trial testimony to be producible under the Jencks Act, 41 the word "relate" as used in the Act does not mean

that the statement must consist of a factual narrative covering the same matters as the trial testimony. A statement "relates" to trial testimony if it is a statement which would tend to impeach the witness' testimony for reasons of bias and interest, 42 or for reasons of faulty memory. 43 Statements are not producible, however, where they do not relate to the matter for which the accused is being prosecuted. 44 Material otherwise within the scope of the Act is not exempt from production on the ground that it constitutes the "work product" of government lawyers. 45

Where the final draft of a report is producible under the Act, its production and submission to the defense does not exempt the prosecution from producing a preliminary draft of the report where such draft has been "adopted or approved" by its author and otherwise meets the Act's requirements for production. 46

A tape recording of an interview between a government agent and a government witness is producible under the Jencks Act after the witness has testified if the recording relates to the witness' testimony. 47 A composite drawing made from photographs and descriptions cannot be considered a recordation or reproduction of words within the meaning of the Jencks Act and is not producible under the Act. 48 However, photographs must be produced on the defense's request if they constitute a part of a written statement made by a government witness. 49

§ 1157 ----Generally [SUPPLEMENT]

Practice Aids: What is "statement" under provisions of Jencks Act (18 USCS § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure providing for production of statement of witness following witness' direct examination. 125 ALR Fed 1.

Requirement of Jencks Act (18 USCS § 3500(b))and Rule 26.2(a)of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Footnotes

Footnote 41. 18 USCS § 3500(b).

Footnote 42. *United States v Borelli* (CA2 NY) 336 F2d 376, cert den 379 US 960, 13 L Ed 2d 555, 85 S Ct 647 and (criticized on other grounds by *United States v Guerro* (CA2 NY) 694 F2d 898) and (among conflicting authorities on other grounds noted in *United States v MMR Corp. (LA)* (CA5 La) 907 F2d 489, 1990-2 CCH Trade Cases ¶ 69136).

Government should have made available to defense letter written by principal government witness to assistant United States Attorney where letter revealed important favors which witness had received from government in past and that he hoped for more in future and where letter, compared with witness's testimony, revealed that he tailored his testimony to what he thought government wanted to hear. *United States v Sperling* (CA2 NY) 506 F2d 1323, cert den 420 US 962, 43 L Ed 2d 439, 95 S Ct 1351 and cert den 421 US 949, 44 L Ed 2d 103, 95 S Ct 1682.

Annotation: Statements and reports of government witnesses producible in federal

criminal case under Jencks Act (18 USCS § 3500), 5 ALR3d 763 § 7.

Footnote 43. *Rosenberg v United States*, 360 US 367, 3 L Ed 2d 1304, 79 S Ct 1231.

Footnote 44. *United States v Wigoda* (CA7 Ill) 521 F2d 1221, 75-2 USTC ¶ 9664, 36 AFTR 2d 75-5633, cert den 424 US 949, 47 L Ed 2d 355, 96 S Ct 1421.

Footnote 45. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 46. *United States v Walden* (CA3 Pa) 578 F2d 966, on remand (ED Pa) 465 F Supp 255, affd (CA3 Pa) 590 F2d 85, cert den 444 US 849, 62 L Ed 2d 64, 100 S Ct 99 (while rough draft, as matter of judge's discretion, need not be disclosed if it is substantially identical to final report, trial court may make such determination only after taking evidence on contents of document).

Footnote 47. *United States v Esposito* (CA7 Ill) 523 F2d 242, cert den 425 US 916, 47 L Ed 2d 768, 96 S Ct 1517 and (criticized on other grounds by *Bailey v Systems Innovation, Inc.* (CA3 Pa) 852 F2d 93, 15 Media L R 1756).

Footnote 48. *United States v Zurita* (CA7 Ind) 369 F2d 474, cert den 386 US 1023, 18 L Ed 2d 462, 87 S Ct 1379.

Footnote 49. *Simmons v United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967, on remand (CA7 Ill) 395 F2d 769, appeal after remand (CA7 Ill) 424 F2d 1235 and (criticized on other grounds by *McGautha v California*, 402 US 183, 28 L Ed 2d 711, 91 S Ct 1454) as stated in *In re Federal Grand Jury Proceedings re Klausner* (CA11 Fla) 975 F2d 1488, 6 FLW Fed C 1282 (photographs shown to eyewitnesses prior to trial to identify defendants did not relate to subject matter as to which witness testified at trial, where photographs were not part of statement approved by witnesses).

§ 1158 Notes of prosecutor or law enforcement officer

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Notes taken by a prosecutor or law enforcement officer pertaining to an interview with a potential government witness may be subject to production under the Jencks Act if the witness testifies at trial. 50 Such notes must relate to the subject matter of the witness's testimony to be within the purview of the Act. 51 They must also have been "adopted or approved" by the witness to constitute producible statements. 52 Where the witness, on cross-examination, testifies that during the interviews, the interviewer read back his notes to the witness for verification of their accuracy, the trial court should conduct an inquiry to determine whether the notes were adopted or approved by the witness. 53 The trial court's ruling on this issue is one of fact and will not be disturbed on appeal unless it is clearly erroneous. 54 A verbal acknowledgment that the notes are accurate is sufficient for the purposes of the Act. 55 However, discussions between the interviewer and the witness as to the general substance of what the witness has said, in

order for the interviewer to be certain that he has correctly understood the witness, do not constitute adoption or approval of the notes within the Act, whose requirements are not met when the interviewer does not read back, or the witness does not read, what the interviewer has written. 56

◆ **Observation:** An oral statement which has never been transcribed in any fashion is not a "statement" within the meaning of the Jencks Act. 57 Moreover, the Act does not require law enforcement officers to make any record of an interview, nor to submit interview notes to the witness for approval so as to generate a statement which is producible under the Act. 58

Notes which are not signed, adopted, or approved by the witness must be a "substantially verbatim" recital of his statements to be producible under the Act, 59 and accordingly notes which consist only of one-word references and short phrases are not producible under the Act. 60

§ 1158 ----Notes of prosecutor or law enforcement officer [SUPPLEMENT]

Practice Aids: What is "statement" under provisions of Jencks Act (18 USCS § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure providing for production of statement of witness following witness' direct examination. 125 ALR Fed 1.

Requirement of Jencks Act (18 USCS § 3500(b))and Rule 26.2(a)of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Case authorities:

In defendant's prosecution for attempted murder of his wife, trial court did not err in refusing to order disclosure, for impeachment purposes, of notes made by investigating officer as to conversation with wife; notes had not been signed or otherwise authenticated by wife, and trial judge had determined that notes were not discoverable either before trial or after wife testified. *Summerford v State* (1993, Ala App) 621 So 2d 1346, cert den (Ala) 621 So 2d 1352.

Footnotes

Footnote 50. *United States v Harris* (CA9 Wash) 543 F2d 1247 (criticized on other grounds by *United States v Martin* (CA5 Ga) 565 F2d 362) and (criticized on other grounds by *United States v Cole* (CA5 Ala) 634 F2d 866); *Rease v United States* (Dist Col App) 403 A2d 322.

Annotation: Statements and reports of government witnesses producible in federal criminal case under Jencks Act (18 USCS § 3500), 5 ALR3d 763 § 13.

Footnote 51. *United States v Wood* (CA9 Wash) 550 F2d 435, 1 Fed Rules Evid Serv 492.

Footnote 52. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 53. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 54. *United States v Strahl* (CA1 Mass) 590 F2d 10, cert den 440 US 918, 59 L Ed 2d 468, 99 S Ct 1237.

Footnote 55. *United States v Loyd* (CA11 Fla) 743 F2d 1555, 17 Fed Rules Evid Serv 182.

Footnote 56. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 57. *United States v Taylor* (CA8 Mo) 599 F2d 832.

Footnote 58. *United States v Martino* (CA5 Fla) 648 F2d 367, vacated, in part, remanded on other grounds (CA5 Fla) 650 F2d 651 and cert den 456 US 943, 72 L Ed 2d 465, 102 S Ct 2006, 102 S Ct 2007 and cert den 456 US 949, 72 L Ed 2d 474, 102 S Ct 2020 and on reh (CA5 Fla) 681 F2d 952, affd 464 US 16, 78 L Ed 2d 17, 104 S Ct 296 and (criticized on other grounds by *United States v Tille* (CA9 Wash) 729 F2d 615, 15 Fed Rules Evid Serv 597).

Footnote 59. § 1152.

Footnote 60. *United States v Consolidated Packaging Corp.* (CA7 Ill) 575 F2d 117, 1978-1 CCH Trade Cases ¶ 61968.

Investigators' notes of interviews with witnesses which were made by them from memory several days after interviews were not "substantially verbatim" under the Jencks Act, even if they contained occasional verbatim recitations of phrases used by persons interviewed. *United States v Hodges* (CA5 Fla) 556 F2d 366, 2 Fed Rules Evid Serv 378, cert den 434 US 1016, 54 L Ed 2d 762, 98 S Ct 735.

One police officer's notes on statements of another were not "statements" within Jencks Act where there was no evidence that such notes were ever approved by officer or that his words were recorded verbatim. *United States v Calhoun* (CA9 Cal) 542 F2d 1094, cert den 429 US 1064, 50 L Ed 2d 781, 97 S Ct 792.

§ 1159 Records of surveillance activities

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Records of surveillance activities are not Jencks Act statements even though they have been transmitted by one government agent to another. 61 Accordingly, even though the law of a particular circuit may require that an government investigator's interview notes be preserved for production under the Act, 62 notes taken in the course of surveillance need not be preserved or produced. 63

Footnotes

Footnote 61. *United States v Bobadilla-Lopez* (CA9 Cal) 954 F2d 519, 92 CDOS 313, 92 Daily Journal DAR 419, cert den (US) 122 L Ed 2d 139, 113 S Ct 987.

Footnote 62. § 1158.

Footnote 63. *United States v Andersson* (CA9 Cal) 813 F2d 1450, 22 Fed Rules Evid Serv 1391 (disapproved on other grounds by *Bourjaily v United States*, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105) as stated in *United States v Dozier* (CA9 Cal) 826 F2d 866, op withdrawn, substituted op (CA9 Cal) 844 F2d 701, cert den 488 US 927, 102 L Ed 2d 331, 109 S Ct 312.

§ 1160 Grand jury testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A statement by a government witness before a grand jury is producible under the Jencks Act to the extent that it relates to the subject matter of his or her trial testimony. 64 Such a statement is producible even though it has not been transcribed. 65 It is not necessary to produce grand jury minutes where the information producible under the Jencks Act is contained in other materials given to the defense. 66

◆ Observation: Although the government is obliged to make a record of all testimony before the grand jury, 67 it is under no obligation to create producible material under the Jencks Act by calling key witnesses before the grand jury. 68

§ 1160 ----Grand jury testimony [SUPPLEMENT]

Practice Aids: What is "statement" under provisions of Jencks Act (18 USCS § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure providing for production of statement of witness following witness' direct examination. 125 ALR Fed 1.

Requirement of Jencks Act (18 USCS § 3500(b))and Rule 26.2(a)of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Case authorities:

District court's exclusion of witnesses' grand jury testimony was correct where it was clear that prosecution had dissimilar motives to develop their testimony to grand jury compared to motive at subsequent criminal trial at which they were unavailable to testify; prosecutor had no interest at grand jury in proving falsity of witnesses' assertion that bid-rigging "club" did not exist since defendants had already been indicted and there was no

putative defendant as to whom probable cause was in issue and grand jury indicated to prosecutor that they did not believe witnesses' denial. *United States v DiNapoli* (1993, CA2 NY) 8 F3d 909, 38 Fed Rules Evid Serv 277.

Footnotes

Footnote 64. *United States v Fanning* (CA5 Fla) 477 F2d 45, reh den (CA5 Fla) 477 F2d 596 and cert den 414 US 1006, 38 L Ed 2d 243, 94 S Ct 365, reh den 414 US 1172, 39 L Ed 2d 121, 94 S Ct 935; *United States v Sturman* (CA6 Ohio) 951 F2d 1466, 34 Fed Rules Evid Serv 704, reh, en banc, den (CA6) 1992 US App LEXIS 531 and cert den (US) 119 L Ed 2d 586, 112 S Ct 2964; *United States v Minkin* (CA8 Mo) 504 F2d 350, cert den 420 US 926, 43 L Ed 2d 396, 95 S Ct 1122; *United States v Watts* (CA9 Cal) 502 F2d 726.

The trial court did not abuse its discretion in refusing to order production under the Jencks Act of a witness' statement concerning certain cocaine transactions which were unrelated to the transactions charged in the indictment. *United States v Lochmondy* (CA6 Mich) 890 F2d 817, 29 Fed Rules Evid Serv 486, post-conviction proceeding (WD Mich) 1990 US Dist LEXIS 8391.

Footnote 65. *United States v Merlino* (CA5 Fla) 595 F2d 1016, reh den (CA5 Fla) 603 F2d 860 and cert den 444 US 1071, 62 L Ed 2d 752, 100 S Ct 1014.

Footnote 66. *United States v Jett* (CA1 Mass) 491 F2d 1078; *Paz v United States* (CA5 Fla) 462 F2d 740, appeal after remand (CA5 Fla) 473 F2d 662, reh den (CA5 Fla) 475 F2d 1404 and cert den 414 US 820, 38 L Ed 2d 52, 94 S Ct 113, 94 S Ct 115, 94 S Ct 47.

Footnote 67. FR Crim P, Rule 6(e)(1).

Footnote 68. *United States v Pastor* (SD NY) 419 F Supp 1318; *United States v Cruz* (CA5 Fla) 478 F2d 408, reh den (CA5 Fla) 478 F2d 1403 and cert den 414 US 910, 38 L Ed 2d 148, 94 S Ct 231, 94 S Ct 258, 94 S Ct 259; *United States v Short* (CA9 Cal) 493 F2d 1170, motion gr on other grounds (CA9 Cal) 500 F2d 676, cert den 419 US 1000, 42 L Ed 2d 275, 95 S Ct 317.

§ 1161 --Relationship of Act to rules governing disclosure of grand jury testimony

<p>View Entire Section Go to Parallel Reference Table</p>

The provisions of the Jencks Act relating to disclosure of a witness' grand jury testimony address only disclosure at trial; pretrial disclosure of such testimony is governed by Rule 6(e) of the Federal Rules of Criminal Procedure, 69 and the Act does not bar the pretrial disclosure of grand jury testimony where the requirements of Rule 6(e) for such disclosure have been met. 70

Although it is common practice for the court to conduct an in camera inspection of grand jury testimony to determine whether its disclosure is warranted under Rule 6(e), 71 grand jury testimony which is producible under the Jencks Act need not be inspected by the court before its delivery to the defense under the Act. 72

The disclosure under Rule 6(e) of evidence presented to a grand jury generally requires a showing of particularized need or compelling necessity. 73 It has been said that the Jencks Act does not require that the defense make any showing of particularized need for grand jury statements producible under the Act, 74 although some courts have applied the "particularized need" requirement in this context also. 75

Footnotes

Footnote 69. *United States v Anderson* (DC Md) 368 F Supp 1253.

Footnote 70. *United States v Dixon* (DC Del) 63 FRD 8; *United States v Anderson* (DC Md) 368 F Supp 1253; *United States v Duffy* (DC Ill) 54 FRD 549.

As to the secrecy of grand jury proceedings, generally, and exceptions to the rule, see 38 Am Jur 2d, Grand Jury §§ 39 et seq.

Footnote 71. *Menendez v United States* (CA5 Fla) 393 F2d 312, cert den 393 US 1029, 21 L Ed 2d 572, 89 S Ct 639.

Footnote 72. *United States v Ramirez* (CA2 NY) 482 F2d 807, cert den 414 US 1070, 38 L Ed 2d 475, 94 S Ct 581.

Footnote 73. *Smith v United States*, 423 US 1303, 46 L Ed 2d 9, 96 S Ct 2.

Footnote 74. *United States v Hall* (WD Okla) 424 F Supp 508, affd (CA10 Okla) 536 F2d 313, cert den 429 US 919, 50 L Ed 2d 285, 97 S Ct 313.

Footnote 75. *United States v Llaca Orbiz* (CA1 Puerto Rico) 513 F2d 816, cert den 423 US 861, 46 L Ed 2d 88, 96 S Ct 117, reh den 423 US 1039, 46 L Ed 2d 415, 96 S Ct 578; *United States v Anderson* (CA4 W Va) 481 F2d 685, affd 417 US 211, 41 L Ed 2d 20, 94 S Ct 2253.

(c). Procedure for Obtaining and Using Statement [1162-1170]

§ 1162 Necessity of motion for production

<p>View Entire Section Go to Parallel Reference Table</p>

Generally, in the absence of a motion by the defense for production of the prior statement of a government witness, no production is required of the prosecution under the Jencks

Act. 76 However, the prosecution's agreement to early disclosure of materials producible under the Jencks Act obviates the need for the defense to move for such disclosure at the end of each government witness's testimony without lessening the prosecution's obligations under the Act. 77 An agreement by the prosecution to turn over to the defense all material producible under the Jencks Act covers statements made by government rebuttal witnesses as well as witnesses called during the presentation of the government's case-in-chief. 78

A request by the defense for production under the Act must be made with sufficient specificity and particularity to give the prosecution adequate notice as to which document should be produced, and to enable the trial court to determine whether the requested document is producible under the Act. 79 A general pretrial request is not sufficient. 80

Footnotes

Footnote 76. *United States v Tellier* (CA2 NY) 255 F2d 441, cert den 358 US 821, 3 L Ed 2d 62, 79 S Ct 33; *United States v Atkinson* (CA4 NC) 512 F2d 1235 (criticized on other grounds by *United States v Hernandez* (CA5 Tex) 580 F2d 188); *Wagner v United States* (CA9 Cal) 264 F2d 524, cert den 360 US 936, 3 L Ed 2d 1548, 79 S Ct 1459, reh den 361 US 857, 4 L Ed 2d 97, 80 S Ct 48.

Annotation: Proper procedure for determining whether alleged statement or report of government witness should be produced on accused's demand, under Jencks Act (18 USCS § 3500), 1 ALR Fed 252.

Footnote 77. *United States v McKenzie* (CA5 Tex) 768 F2d 602, cert den 474 US 1086, 88 L Ed 2d 900, 106 S Ct 861.

Footnote 78. *United States v Newman* (CA5 La) 849 F2d 156, 26 Fed Rules Evid Serv 102.

Footnote 79. *United States v Allen* (CA7 Ill) 798 F2d 985, 21 Fed Rules Evid Serv 596.

Footnote 80. *United States v Peterson* (CA4 Va) 524 F2d 167, cert den 423 US 1088, 47 L Ed 2d 99, 96 S Ct 881 and cert den 424 US 925, 47 L Ed 2d 334, 96 S Ct 1136 and (disapproved on other grounds by *Crosby v United States* (US) 122 L Ed 2d 25, 113 S Ct 748, 93 CDOS 277, 93 Daily Journal DAR 572, 6 FLW Fed S 819) as stated in *United States v Bundick* (CA4 Va) 1993 US App LEXIS 13432; *United States v Burke* (CA9 Cal) 506 F2d 1165, cert den 421 US 915, 43 L Ed 2d 781, 95 S Ct 1576.

§ 1163 Time for motion

<p>View Entire Section Go to Parallel Reference Table</p>

A motion for production should be made at the conclusion of the direct examination of the witness whose statements are sought, 81 and not at the close of the

government's case, 82 nor after the trial has concluded. 83

◆ Practice guide: The identification and production of Jencks Act material may also be addressed at a pretrial conference. In any event, it is preferable for the defense to request and receive Jencks Act statements outside the presence of the jury, to avoid the jury's drawing the inference that if the statements are not ultimately used to impeach the witness, they must have been consistent with the witness's testimony. 84

Requiring defense counsel to request and receive Jencks material in the presence of the jury has been held to be reversible error per se, 85 although other authority has rejected this rule and held that the procedure to be followed is within the discretion of the trial court. 86

Footnotes

Footnote 81. *United States v Simmons* (CA2 NY) 281 F2d 354; *United States v Peterson* (CA4 Va) 524 F2d 167, cert den 423 US 1088, 47 L Ed 2d 99, 96 S Ct 881 and cert den 424 US 925, 47 L Ed 2d 334, 96 S Ct 1136 and (disapproved on other grounds by *Crosby v United States* (US) 122 L Ed 2d 25, 113 S Ct 748, 93 CDOS 277, 93 Daily Journal DAR 572, 6 FLW Fed S 819) as stated in *United States v Bundick* (CA4 Va) 1993 US App LEXIS 13432; *Johnston v United States* (CA10 Kan) 260 F2d 345, cert den 360 US 935, 3 L Ed 2d 1547, 79 S Ct 1454; *United States v Benz* (CA11 Fla) 740 F2d 903, reh den, en banc (CA11 Fla) 756 F2d 885, and cert den 474 US 817, 88 L Ed 2d 51, 106 S Ct 62.

Footnote 82. *United States v Burke* (CA9 Cal) 506 F2d 1165, cert den 421 US 915, 43 L Ed 2d 781, 95 S Ct 1576.

Footnote 83. *United States v Clay* (CA7 Ill) 495 F2d 700, cert den 419 US 937, 42 L Ed 2d 164, 95 S Ct 207.

Failure of the accused to seek production of a statement under the Jencks Act until after the trial has concluded constitutes a waiver of his or her right to relief for nonproduction. *United States v Petito* (CA2 NY) 671 F2d 68, 9 Fed Rules Evid Serv 1594, 76 ALR Fed 785, cert den 459 US 824, 74 L Ed 2d 60, 103 S Ct 56.

Footnote 84. *Beaudine v United States* (CA5 Fla) 414 F2d 397, reh den (CA5 Fla) 418 F2d 500 and cert den 397 US 987, 25 L Ed 2d 395, 90 S Ct 1116; *Gregory v United States*, 125 US App DC 140, 369 F2d 185.

Forms: Stipulation and order—Setting case for pretrial conference and stating that attempt will be made to supply accused with Jencks Act material. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:689; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 11.

Memorandum—Setting forth pretrial stipulation and order and containing parties' agreement as to production of Jencks Act material. 7 Federal Procedural Forms, L Ed, Criminal Procedure § 20:690; 11 Am Jur Pl & Pr Forms (Rev), Federal Criminal Procedure, Form 12.

Footnote 85. *Gregory v United States*, 125 US App DC 140, 369 F2d 185.

Footnote 86. *United States v Nielsen* (CA7 Ill) 392 F2d 849) and appeal after remand 133 US App DC 317, 410 F2d 1016, cert den 396 US 865, 24 L Ed 2d 119, 90 S Ct 143.

§ 1164 Necessity of showing that requested document exists

[View Entire Section](#)
[Go to Parallel Reference Table](#)

For the trial court to act on a motion for production of a witness's prior statement under the Jencks Act, there must be some reason to believe that such a statement exists. A prima facie case for the existence of such a statement may be made by the testimony of the witness on direct examination, 87 or by the witness's testimony on cross-examination as to whether a government agent took his or her statement before trial. 88 In the absence of any showing by the defense of a reason to believe that a requested statement exists, a statement by the prosecution that it does not exist may be accepted by the court. 89

Footnotes

Footnote 87. *Ogden v United States* (CA9 Cal) 303 F2d 724, appeal after remand (CA9 Cal) 323 F2d 818, cert den 376 US 973, 12 L Ed 2d 86, 84 S Ct 1137.

Footnote 88. *Campbell v United States*, 365 US 85, 5 L Ed 2d 428, 81 S Ct 421.

Footnote 89. *United States v Resnick* (CA5 Fla) 483 F2d 354, cert den 414 US 1008, 38 L Ed 2d 246, 94 S Ct 370 and (criticized on other grounds by *United States v McKnight* (CA8 Mo) 771 F2d 388); *United States v Colacurcio* (CA9 Wash) 499 F2d 1401.

§ 1165 Determination whether document should be produced

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The determination whether a particular document is producible under the Jencks Act is for the trial court and not the prosecution. 90 Once issues concerning the producibility of a requested statement have been raised, it is the duty of the court to conduct some sort of inquiry, 91 and this duty cannot be delegated to the jury. 92 The trial court's determination of what material must be produced under the Act is subject to review under the "clearly erroneous" standard. 93

◆ **Caution:** The duty of the court to determine whether a requested document must be produced extends only as far as necessary to resolve issues raised by the parties. Thus,

where the defense asks the court to determine only whether notes of an interview of a government witness were adopted by the witness, and the defense does not in any way place the court on notice that it is relying on, as an alternative ground for production, the contention that the notes should be produced because they are verbatim statements, the judge is not required to determine whether the notes are verbatim statements. 94

Footnotes

Footnote 90. *United States v Conroy* (CA5 Fla) 589 F2d 1258, reh den (CA5 Fla) 594 F2d 241 and reh den (CA5 Fla) 594 F2d 241 and cert den 444 US 831, 62 L Ed 2d 40, 100 S Ct 60.

The administration of the Jencks Act is entrusted to the good sense and experience of the trial judges, subject to appropriately limited review of appellate courts. *United States v Augenblick*, 393 US 348, 21 L Ed 2d 537, 89 S Ct 528, on remand 206 Ct Cl 74, 509 F2d 1157, cert den 422 US 1007, 45 L Ed 2d 669, 95 S Ct 2628.

Annotation: Proper procedure for determining whether alleged statement or report of government witness should be produced on accused's demand, under Jencks Act (18 USCS § 3500), 1 ALR Fed 252 § 6.

Footnote 91. *Saunders v United States*, 114 US App DC 345, 316 F2d 346, appeal after remand 116 US App DC 326, 323 F2d 628, cert den 377 US 935, 12 L Ed 2d 299, 84 S Ct 1339.

Footnote 92. *Ogden v United States* (CA9 Cal) 323 F2d 818, cert den 376 US 973, 12 L Ed 2d 86, 84 S Ct 1137.

Footnote 93. *United States v Cathey* (CA5 Fla) 591 F2d 268, 4 Fed Rules Evid Serv 8.

Footnote 94. *United States v Newton* (CA1 RI) 891 F2d 944, 29 Fed Rules Evid Serv 526.

Where defense requested production of reports prepared by FBI agents of their interviews with witnesses, no hearing as to whether such reports were "statements" under 18 USCS § 3500(e)(1) was required, inasmuch as there was nothing to suggest that the witnesses had ever adopted or approved the reports; however, remand was required to allow District Court to hear evidence as to whether the reports constituted statements by virtue of being "substantially verbatim recitals" of the witness' statements within the meaning of 18 USCS § 3500(e)(2). *United States v Judon* (CA5 Ala) 567 F2d 1289, 2 Fed Rules Evid Serv 1003, appeal after remand (CA5 Ala) 581 F2d 553.

§ 1166 --Manner of determination; burden of proof

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is within the discretion of the court to determine in the most appropriate manner whether a requested document is a producible statement. 95 To determine whether a document is a statement under the Act, the court may—

—conduct a voir dire examination of the declarant on the witness stand. 96

—conduct a hearing outside the presence of the jury to examine evidence extrinsic to the statement. 97

—examine the requested document in camera. 98

◆ Observation: The Act specifically requires in camera inspection to resolve any question as to whether or to what extent the document relates to the subject matter of the witness's testimony. 99

The determination whether a document is producible under the Jencks Act is not an adversary proceeding involving allocations of burdens of proof, but simply a proceeding necessary to aid the court in discharging its responsibility to enforce the Act. 1 Thus, the burden is not upon the defense to prove that a requested document is a producible statement. 2

Footnotes

Footnote 95. *Palermo v United States*, 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

Footnote 96. *United States v Gallagher* (CA3 NJ) 576 F2d 1028, 3 Fed Rules Evid Serv 218 (criticized on other grounds by *United States v Clark* (CA2 NY) 765 F2d 297); *United States v Graves* (CA5 Fla) 428 F2d 196, cert den 400 US 960, 27 L Ed 2d 269, 91 S Ct 360.

Footnote 97. *Campbell v United States*, 365 US 85, 5 L Ed 2d 428, 81 S Ct 421.

Footnote 98. *Palermo v United States*, 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41; *United States v Allen* (CA7 Ill) 798 F2d 985, 21 Fed Rules Evid Serv 596.

Footnote 99. 18 USCS § 3500(c).

Footnote 1. *Campbell v United States*, 365 US 85, 5 L Ed 2d 428, 81 S Ct 421.

Footnote 2. *United States v Smaldone* (CA10 Colo) 484 F2d 311, cert den 415 US 915, 39 L Ed 2d 469, 94 S Ct 1411; *Williams v United States*, 117 US App DC 206, 328 F2d 178, appeal after remand 119 US App DC 177, 338 F2d 286, 5 ALR3d 746.

§ 1167 --Determination whether document relates to subject matter of witness's testimony

The government should identify particular documents, or portions of them, which it believes do not relate to the subject matter of the witness's testimony, rather than requiring the court to search at large through the requested documents to determine what is relevant and what is not. 3 In the absence of particularized objections by the prosecution, the court may routinely permit the defense to inspect whatever the prosecution produces in response to a proper request. 4 Where the issue is joined, however, it is the duty of the court to resolve it and not leave the question to the prosecution. 5

Resolution of the issue involves in camera inspection of the documents in question, 6 although in a case tried without a jury the court's examination of documents containing irrelevant and prejudicial material is not regarded as injurious to the accused. 7 A conviction may be vacated if an appellate court on review cannot be sure that an in camera inspection was conducted. 8 The defense is not permitted to inspect a contested statement in order to argue whether it is entitled to production of the entire statement. 9

Footnotes

Footnote 3. *Rosenberg v United States*, 360 US 367, 3 L Ed 2d 1304, 79 S Ct 1231.

Footnote 4. *Rosenberg v United States*, 360 US 367, 3 L Ed 2d 1304, 79 S Ct 1231.

Footnote 5. *Scales v United States*, 367 US 203, 6 L Ed 2d 782, 81 S Ct 1469, reh den 366 US 978, 6 L Ed 2d 1267, 81 S Ct 1912.

Footnote 6. § 1152.

Footnote 7. *United States v Cimino* (CA2 NY) 321 F2d 509, cert den 375 US 967, 11 L Ed 2d 416, 84 S Ct 486 and cert den 375 US 974, 11 L Ed 2d 418, 84 S Ct 491 and reh den 395 US 941, 23 L Ed 2d 458, 89 S Ct 1992; *United States v Schall* (WD Pa) 371 F2d 912, affd without op (CA3 Pa) 503 F2d 1399 and affd without op (CA3 Pa) 503 F2d 1400, cert den 420 US 993, 43 L Ed 2d 676, 95 S Ct 1432, reh den 421 US 972, 44 L Ed 2d 463, 95 S Ct 1970 and affd without op (CA3 Pa) 503 F2d 1400 and affd without op (CA3 Pa) 503 F2d 1400, cert den 420 US 932, 43 L Ed 2d 406, 95 S Ct 1137.

Footnote 8. *United States v Cleveland* (CA7 Ill) 477 F2d 310, 73-1 USTC ¶ 9357, 31 AFTR 2d 73-1173, appeal after remand (CA7 Ill) 507 F2d 731, 74-2 USTC ¶ 9771, 34 AFTR 2d 74-6095.

Footnote 9. *Palermo v United States*, 360 US 343, 3 L Ed 2d 1287, 79 S Ct 1217, 59-2 USTC ¶ 9532, 3 AFTR 2d 1680, reh den 361 US 855, 4 L Ed 2d 94, 80 S Ct 41.

§ 1168 Excision of unrelated matter

If after in camera inspection of a requested document, the court determines that only part of it relates to the subject matter of the witness's testimony, the court must excise those parts which do not relate to the witness's testimony. 10 The extent of excision is within the discretion of the court. 11

Since the sole basis for excision under the statute is that the excised portions do not relate to the subject matter of the witness's testimony, otherwise producible matter cannot be excised on grounds of internal security 12 or confidentiality of the information. 13 However, insofar as the witness has adopted a writing containing the trial strategy or other work product of the prosecuting attorney, such material may be excised as not relating to the witness's testimony. 14

After excision of material not relating to the witness's statement, the trial court must direct delivery of the material to the defense, 15 with the continuity of the statement unimpaired. 16 If the defendant objects to the excision of any material, the full text of the document in question must be preserved on the record for purposes of appeal. 17

Footnotes

Footnote 10. 18 USCS § 3500(c).

Footnote 11. *United States v Warme* (CA2 NY) 572 F2d 57, cert den 435 US 1011, 56 L Ed 2d 393, 98 S Ct 1885 and cert den 439 US 986, 58 L Ed 2d 658, 99 S Ct 580; *United States v Stephens* (CA6 Mich) 492 F2d 1367, cert den 419 US 852, 42 L Ed 2d 83, 95 S Ct 93 and cert den 419 US 874, 42 L Ed 2d 114, 95 S Ct 136.

Footnote 12. *West v United States* (CA6 Ohio) 274 F2d 885, 45 BNA LRRM 2895, 39 CCH LC ¶ 66218, cert den 365 US 811, 5 L Ed 2d 691, 81 S Ct 688, 47 BNA LRRM 2604, reh den 365 US 875, 5 L Ed 2d 864, 81 S Ct 899 and cert den 365 US 819, 5 L Ed 2d 697, 81 S Ct 701, reh den 365 US 875, 5 L Ed 2d 864, 81 S Ct 906.

Footnote 13. *Ogden v United States* (CA9 Cal) 303 F2d 724, appeal after remand (CA9 Cal) 323 F2d 818, cert den 376 US 973, 12 L Ed 2d 86, 84 S Ct 1137.

Footnote 14. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 15. 18 USCS § 3500(c).

Footnote 16. *Holmes v United States* (CA4 SC) 284 F2d 716, 97 ALR2d 782.

Footnote 17. 18 USCS § 3500(c).

§ 1169 Compliance with disclosure order; recess or continuance following disclosure

The prosecution may comply with a disclosure order under the Jencks Act by submitting to the defense the original 18 or a carbon copy 19 of the statement in question, or by making the statement available for inspection and copying at the prosecutor's office. 20

When a statement is delivered to a defendant under the Jencks Act, the court, upon application of the defendant, may recess proceedings for such time as is reasonably required for the defense to examine the statement and prepare for its use. 21 The grant of such a recess or continuance is within the discretion of the court; 22 refusal by the court to allow the defense sufficient time to review documents is an abuse of discretion. 23 The defendant cannot complain of lack of time to prepare where no formal request for a recess or continuation was made, 24 or where the prosecution produced the statement in question before the witness testified. 25

Footnotes

Footnote 18. *Rosenberg v United States*, 360 US 367, 3 L Ed 2d 1304, 79 S Ct 1231.

Footnote 19. *United States v Tyson*, 152 US App DC 233, 470 F2d 381, cert den 410 US 985, 36 L Ed 2d 182, 93 S Ct 1512.

Footnote 20. *United States v Bloom* (ED Pa) 78 FRD 591.

Footnote 21. 18 USCS § 3500(c).

Footnote 22. *United States v Nabrit* (CA5 Ga) 554 F2d 247; *United States v Williams* (CA7 Ind) 536 F2d 1202; *Sendejas v United States* (CA9 Cal) 428 F2d 1040, cert den 400 US 879, 27 L Ed 2d 116, 91 S Ct 122 and cert den 400 US 879, 27 L Ed 2d 116, 91 S Ct 127.

Footnote 23. *United States v Hinton*, 203 US App DC 187, 631 F2d 769, appeal after remand 285 US App DC 315, 909 F2d 554, reported in full (App DC) 1990 US App LEXIS 13531.

Footnote 24. *Pallotta v United States* (CA1 NH) 404 F2d 1035; *Robertson v United States* (CA5 La) 263 F2d 872.

Footnote 25. *United States v Boyd* (CA6 Ohio) 620 F2d 129, cert den 449 US 855, 66 L Ed 2d 69, 101 S Ct 151; *United States v Rippy*, 196 US App DC 243, 606 F2d 1150, 4 Fed Rules Evid Serv 969.

§ 1170 Return of materials to prosecution

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the prosecution has delivered to the defense the prior statement of a witness producible under the Jencks Act, it is generally not entitled to the return of such material after the defense has finished its cross-examination of the witness. 26 However, where Jencks Act material delivered to the defense constitutes evidence against many other persons, and its disclosure could cause serious security problems, the court may order return of such material at the conclusion of the cross-examination and provide that defense attorneys still be allowed access to the material for use during trial. 27

Footnotes

Footnote 26. *United States v Badalamenti* (SD NY) 626 F Supp 655, later proceeding (SD NY) 626 F Supp 658.

Footnote 27. *United States v Badalamenti* (SD NY) 626 F Supp 655, later proceeding (SD NY) 626 F Supp 658.

(d). Noncompliance with Act [1171-1173]

§ 1171 Destruction of interview notes as violative of Act

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Notes prepared by law enforcement agents of an interview with a potential government witness may be subject to production under the Jencks Act if the witness testifies at trial. 28 Notwithstanding the possibility that such material may at some time be producible under the Act, some authorities have held that the government does not violate the Act by destroying such notes once they have served their purpose of assisting in the preparation of interview reports, 29 at least where such destruction is not in bad faith and is in keeping with standard agency procedure. 30 Where bad faith is required to make out a violation of the Jencks Act from destruction of a government agent's interview notes, an evidentiary hearing to determine the notes were destroyed in bad faith is not required where the accused's allegations of bad faith are merely conjectural. 31

Other authority states that under the Jencks Act the government must preserve such notes, even where they are subsequently incorporated into a formal interview report. 32 Where the Act is violated by the destruction of such notes, however, any conviction is subject to harmless error review. 33

◆ **Comment:** One circuit has distinguished between a government agent's notes of an interview which he or she subsequently uses to prepare a formal report, and notes or

reports of an informant which are used by a government agent to prepare a report, stating that only the latter type of notes need be preserved under the Jencks Act. 34

Footnotes

Footnote 28. § 1158.

Footnote 29. *United States v Sanchez* (CA2 NY) 635 F2d 47, on remand (ED NY) 499 F Supp 622, affd without op (CA2 NY) 647 F2d 163; *United States v Cole* (CA5 Ala) 634 F2d 866, cert den 452 US 918, 69 L Ed 2d 422, 101 S Ct 3055.

Notes are not considered a Jencks Act statement until shown to and affirmed by the witness; once such final statement has been made, it is permissible for the government to destroy interview notes used in preparing it, and it is not violation of Jencks Act to fail to turn such notes over to the defense. *United States v Gates* (CA5 Tex) 557 F2d 1086, cert den 434 US 1017, 54 L Ed 2d 763, 98 S Ct 737.

Footnote 30. *United States v Gantt*, 199 US App DC 249, 617 F2d 831, 5 Fed Rules Evid Serv 553.

Government agents would be well advised to retain handwritten notes until prosecution is terminated, but good faith destruction of rough notes does not violate the Jencks Act. *United States v Mase* (CA2 Conn) 556 F2d 671, cert den 435 US 916, 55 L Ed 2d 508, 98 S Ct 1472.

But see *United States v Truong Dinh Hung* (CA4 Va) 629 F2d 908, appeal after remand (CA4 Va) 667 F2d 1105, cert den 454 US 1144, 71 L Ed 2d 296, 102 S Ct 1004 and (criticized on other grounds by *United States v De Bright* (CA9 Ariz) 730 F2d 1255) and (among conflicting authorities on other grounds noted in *United States v Sarkissian* (CA9 Cal) 841 F2d 959) and (criticized on other grounds by *ACLU Foundation of Southern California v Barr*, 293 US App DC 101, 952 F2d 457, 21 FR Serv 3d 1063) (destruction of Jencks Act material, even pursuant to routine procedure and without bad faith, may violate at least the spirit of the Act, but not where such destruction occurs outside the context of a criminal investigation).

Footnote 31. *United States v Kuykendall* (CA8 Mo) 633 F2d 118.

Footnote 32. *United States v Parker* (CA9 Cal) 549 F2d 1217, 1 Fed Rules Evid Serv 584, cert den 430 US 971, 52 L Ed 2d 365, 97 S Ct 1659.

But see *United States v Angelini* (CA9 Cal) 607 F2d 1305 (where most of government agent's rough notes of investigation had been lost during office move, and there was no evidence that such notes were destroyed pursuant to official agency policy, trial court did not err in failing to strike testimony of agent).

Footnote 33. § 1173.

Footnote 34. *United States v Sanchez* (CA2 NY) 635 F2d 47, on remand (ED NY) 499 F Supp 622, affd without op (CA2 NY) 647 F2d 163 (fact that at time it received informant's report government did not intend to use informant as witness is not adequate

excuse for destroying report).

§ 1172 Sanctions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Jencks Act provides that if the prosecution elects not to comply with an order to produce a witness' statement, the court shall strike the testimony of the witness and continue with the trial, unless the court determines that the interests of justice require it to declare a mistrial. 35 In this context the term "elects" refers to a conscious choice by the prosecution not to disclose a statement in its possession. 36 Where the prosecution's noncompliance with the Act is due to negligence, oversight, or other conduct not amounting to a conscious choice, the trial court is not limited to the response set out in the statute, but rather may apply such remedy as justice requires under the circumstances of the case, 37 particularly where the prosecution belatedly produces the statement without intent to suppress it. 38 If the violation of the Act consists only of tardy disclosure, it may be remedied by recalling the witness for further cross-examination rather than applying the sanctions mentioned in the Act. 39

The testimony of a witness whose statement is not produced (as distinguished from untimely produced) must be stricken, 40 unless the prosecution can show that the statement has in good faith been lost. 41 Furthermore, declaration of a mistrial is mandatory where the prosecution has, on the eve of trial, deliberately destroyed a producible document. 42

◆ Practice Guide: A defendant who believes that the government has failed to produce material covered by the Jencks Act must at the very least alert the trial court to this possibility, and cannot rely upon a multi-pronged pretrial discovery motion to preserve such a claim on appeal. 43

Where a mistrial is ordered for failure to comply with an order to produce, the retrial of an accused is not barred on double jeopardy grounds unless the motive of the prosecutor in not complying with the court's order was to provoke the declaration of a mistrial. 44

Footnotes

Footnote 35. 18 USCS § 3500(d).

Footnote 36. *United States v Pope* (CA6 Ohio) 574 F2d 320, cert den 436 US 929, 56 L Ed 2d 774, 98 S Ct 2828 and cert den 436 US 949, 56 L Ed 2d 792, 98 S Ct 2856 and cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 195.

Footnote 37. *United States v Pope* (CA6 Ohio) 574 F2d 320, cert den 436 US 929, 56 L Ed 2d 774, 98 S Ct 2828 and cert den 436 US 949, 56 L Ed 2d 792, 98 S Ct 2856 and cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 195; *United States v Heath* (CA10 Okla)

580 F2d 1011, cert den 439 US 1075, 59 L Ed 2d 42, 99 S Ct 850.

Footnote 38. United States v Wables (CA7 Ill) 731 F2d 440, 15 Fed Rules Evid Serv 394.

Untimely disclosure does not require striking of testimony or declaration of mistrial where the defendant is not prejudiced and the untimely disclosure was not a willful avoidance or egregious dereliction of the prosecutor's duty under the Act. United States v Dupuy (CA9 Ariz) 760 F2d 1492, 17 Fed Rules Evid Serv 1530.

Footnote 39. United States v Pope (CA6 Ohio) 574 F2d 320, cert den 436 US 929, 56 L Ed 2d 774, 98 S Ct 2828 and cert den 436 US 949, 56 L Ed 2d 792, 98 S Ct 2856 and cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 195; United States v Keine (CA10 Colo) 436 F2d 850, cert den 402 US 930, 28 L Ed 2d 864, 91 S Ct 1531; United States v Valera (CA11 Fla) 845 F2d 923, 25 Fed Rules Evid Serv 1294, cert den 490 US 1046, 104 L Ed 2d 422, 109 S Ct 1953.

Footnote 40. United States v Well (CA9 Cal) 572 F2d 1383; Lee v United States, 125 US App DC 126, 368 F2d 834.

Footnote 41. United States v Love (CA5 Fla) 482 F2d 213, cert den 414 US 1026, 38 L Ed 2d 318, 94 S Ct 453; United States v Williams (CA8 Mo) 604 F2d 1102; United States v Perry, 153 US App DC 89, 471 F2d 1057; United States v Kilmon (NCMR) 10 MJ 543.

Footnote 42. United States v Lonardo (CA6 Ohio) 350 F2d 523.

Footnote 43. United States v McKenzie (CA5 Tex) 768 F2d 602, cert den 474 US 1086, 88 L Ed 2d 900, 106 S Ct 861.

Footnote 44. United States v Leonard (CA10 Okla) 593 F2d 951.

§ 1173 Nondisclosure as harmless error

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a conviction is obtained in a case where the defense did not receive documents to which it was entitled under the Jencks Act, reversal is required unless the nondisclosure was harmless error. 45 The harmless-error standard applies whether nondisclosure is due to prosecutorial negligence, 46 good faith ignorance of the existence of a producible statement, 47 the trial court's erroneous refusal to order production, 48 or the destruction of a government agent's interview notes to which the accused was entitled under the Act. 49

Nondisclosure is harmless error where the use of the undisclosed statement for impeachment purposes would have been merely cumulative and the reviewing court cannot conclude that the statement would have created a reasonable doubt which otherwise did not exist. 50 There is authority to the effect that nondisclosure is

harmless error where there is no substantial deviation between the undisclosed statement and the testimony of the witness at trial, 51 although other authority rejects this rule. 52

◆ Observation: Although rough notes of an interview with a witness are producible under the Jencks Act where such notes are a substantially verbatim recital of the witness's oral statements, 53 failure to produce such notes is probably harmless where the notes are substantially the same as a report based on the notes and released to the defense. 54

Footnotes

Footnote 45. *United States v McKenzie* (CA5 Tex) 768 F2d 602, cert den 474 US 1086, 88 L Ed 2d 900, 106 S Ct 861 (noting that courts should not speculate as to the potential usefulness to the defense of an undisclosed statement).

Footnote 46. *United States v Izzi* (CA1 Puerto Rico) 613 F2d 1205, cert den 446 US 940, 64 L Ed 2d 793, 100 S Ct 2162.

Footnote 47. *United States v Beasley* (CA5 Ala) 576 F2d 626, 78-2 USTC ¶ 9586, 42 AFTR 2d 78-6360, reh den (CA5 Ala) 585 F2d 796, 79-1 USTC ¶ 9107, 42 AFTR 2d 78-6369 and cert den 440 US 947, 59 L Ed 2d 636, 99 S Ct 1426, subsequent civil proceeding, summary judgment gr (SD Ala) 1993 US Dist LEXIS 16342, clarified, adopted, dismd (SD Ala) 1994 US Dist LEXIS 959.

Footnote 48. *Goldberg v United States*, 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338.

Footnote 49. *United States v Indian Boy X* (CA9 Wash) 565 F2d 585, cert den 439 US 841, 58 L Ed 2d 139, 99 S Ct 131.

Although rough interview notes of FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to the defendant under the Jencks Act, their destruction, in the light of the other evidence in the record, as well as the fact that they were apparently destroyed in good faith, was harmless error under the circumstances. *United States v Vella* (CA3 Pa) 562 F2d 275, cert den 434 US 1074, 55 L Ed 2d 779, 98 S Ct 1262.

Violation of Jencks Act, by the destruction of interview notes producible under the Act, should be excused only where it is perfectly clear that defense was not prejudiced. *United States v Crowell* (CA4 Md) 586 F2d 1020, cert den 440 US 959, 59 L Ed 2d 772, 99 S Ct 1500.

Footnote 50. *United States v Kimberlin* (CA7 Ind) 805 F2d 210, 21 Fed Rules Evid Serv 1121, cert den 483 US 1023, 97 L Ed 2d 768, 107 S Ct 3270, later proceeding 488 US 807, 102 L Ed 2d 19, 109 S Ct 39, on remand (CA7 Ind) 898 F2d 1262, 16 FR Serv 3d 147, reh den (CA7) 1990 US App LEXIS 7075 and cert den 498 US 969, 112 L Ed 2d 417, 111 S Ct 434, habeas corpus dismissed (WD Tenn) 798 F Supp 472, affd (CA6 Ohio) 7 F3d 527.

Footnote 51. *United States v Welch* (CA5 Miss) 817 F2d 273, cert den 484 US 955, 98

L Ed 2d 376, 108 S Ct 350.

Footnote 52. United States v Susskind (CA6 Mich) 965 F2d 80.

Footnote 53. § 1152.

Footnote 54. United States v Morrison (CA7 Wis) 946 F2d 484, reh, en banc, den (CA7) 1991 US App LEXIS 27979 and reh, en banc, den (CA7) 1991 US App LEXIS 28184 and on remand (ED Wis) 782 F Supp 80 and cert den (US) 121 L Ed 2d 696, 113 S Ct 826, appeal after remand (CA7 Wis) 983 F2d 1073, reported in full (CA7) 1992 US App LEXIS 33466.

**(e). Incorporation and Extension of Act by Federal Rules of Criminal Procedure
[1174, 1175]**

§ 1174 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The provisions of the Jencks Act have been substantially incorporated into Rule 26.2 of the Federal Rules of Criminal Procedure, due to the notion that provisions which are purely procedural in nature should appear in the Rules, rather than in Title 18 of the United States Code. 55 Rule 26.2 extends the provisions of the Jencks Act by providing that the statements subject to production at trial are not only those of prosecution witnesses, but those of any witness other than the defendant. 56 The Rule does not, however, alter the Jencks Act's schedule for production of statements, 57 nor does it relieve a defendant seeking production of Jencks material from the necessity of making a request for production at the trial stage of the proceedings. 58

The provisions of Rule 26.2 have been incorporated by reference and made generally applicable to—

—hearings on motions to suppress evidence held under Rule 12(b)(3). 59

—sentencing hearings. 60

—proceedings for the revocation or modification of probation or supervised release. 61

—hearings on the detention of a material witness under 18 USCS § 3144. 62

—evidentiary hearings held under Rule 8 of the Rules governing proceedings under 28 USCS § 2255. 63

§ 1174 ----Generally [SUPPLEMENT]

Practice Aids: What is "statement" under provisions of Jencks Act (18 USCS § 3500) and Rule 26.2 of Federal Rules of Criminal Procedure providing for production of statement of witness following witness' direct examination. 125 ALR Fed 1.

Requirement of Jencks Act (18 USCS § 3500(b)) and Rule 26.2(a) of Federal Rules of Criminal Procedure that statement whose production is sought relate to subject of witness' direct testimony. 125 ALR Fed 157.

Rules:

Sentencing hearings are now governed by (FRCrP, Rule 32(c)), as amended in 1994, and (FRCrP, Rule 32(c)(2)) provides for the production of statements at sentencing hearings under Rule 26.2.

Footnotes

Footnote 55. Notes of Advisory Committee on 1979 Amendments to the Federal Rules of Criminal Procedure.

Footnote 56. FR Crim P, Rule 26.2(a).

As to the disclosure by the defense of statements of defense witnesses, see § 1175.

Footnote 57. *United States v Litman* (WD Pa) 547 F Supp 645.

Footnote 58. *United States v Phillips* (CA7 Wis) 854 F2d 273.

Footnote 59. FR Crim P, Rule 12(i).

Footnote 60. FR Crim P, Rule 32(e), per 1993 amendment.

Observation Cases decided prior to the incorporation by reference of Rule 26.2 into Rule 32(e) have held that the Jencks Act does not entitle an accused to the production of a statement contained in a presentence report, inasmuch as such a statement is not "in the possession of the United States" within the meaning of the Act. See *United States v Dansker* (CA3 NJ) 537 F2d 40, 2 Fed Rules Evid Serv 577, cert den 429 US 1038, 50 L Ed 2d 748, 97 S Ct 732 and appeal after remand (CA3 NJ) 561 F2d 485 and appeal after remand (CA3 NJ) 565 F2d 1262, cert dismd 434 US 1052, 54 L Ed 2d 805, 98 S Ct 905 and (criticized on other grounds by *United States v Peacock* (CA5 Ga) 654 F2d 339, 8 Fed Rules Evid Serv 1603) and (disapproved on other grounds by *Griffin v United States* (US) 116 L Ed 2d 371, 112 S Ct 466, 91 Daily Journal DAR 14751) as stated in *United States v Vastola* (CA3 NJ) 989 F2d 1318, digest op at (CA3 NJ) RICO Bus Disp Guide (CCH) ¶ 8225 and reh den (CA3) 1993 US App LEXIS 11223 and on remand (DC NJ) 830 F Supp 250; *United States v Bourne* (CA4 Va) 743 F2d 1026, 16 Fed Rules Evid Serv 64; *United States v Trevino* (CA5 Tex) 556 F2d 1265, reh den (CA5 Tex) 562 F2d 1258.

Footnote 61. FR Crim P, Rule 32.1(c).

Footnote 62. FR Crim P, Rule 46(i).

Footnote 63. Rules Governing Section 2255 Proceedings, Rule 8(d).

§ 1175 Disclosure by defense of statements of defense witnesses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 26.2 of the Federal Rules of Criminal Procedure, after a defense witness other than the defendant has testified under direct examination, the court, upon motion of the government, must order the defendant and his or her counsel to produce for examination and use by the government any statement of the witness that is in the possession of the defense and relates to the subject matter concerning which the witness has testified. 64 The government is not entitled to any prior statements of a defense witness before such witness has testified at trial. 65

◆ Definition: Under Rule 26.2, a "statement" of a witness is (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury. 66

If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court must order that the statement be delivered to the government. 67 If the defense claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera, and upon inspection, the court shall excise the portions of the statement which do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, shall be delivered to the government. 68 Upon delivery of the statement, the court, upon application by the government, may recess proceedings in the trial to permit examination of the statement and preparation for its use in the trial. 69 If the defense elects not to comply with an order to deliver a statement to the government, the court must order that the testimony of the witness be stricken from the record and that the trial proceed. 70

◆ Comment: The extension of Jencks Act responsibilities to the defense by Rule 26.2 has been criticized as creating the potential for disclosure of statements otherwise privileged under the work product doctrine and perhaps under the Sixth Amendment, under circumstances in which no waiver has occurred by testimonial use of the statements during direct examination by the defense, and thereby interfering with the constitutional right to compulsory process by precluding the testimony of a defense witness whose statements are not disclosed. 71

Footnotes

Footnote 64. FR Crim P, Rule 26.2(a).

Footnote 65. United States v Felt (DC Dist Col) 502 F Supp 71.

Footnote 66. FR Crim P, Rule 26.2(f).

Footnote 67. FR Crim P, Rule 26.2(b).

Footnote 68. FR Crim P, Rule 26.2(c).

Footnote 69. FR Crim P, Rule 26.2(d).

Footnote 70. FR Crim P, Rule 26.2(e).

Footnote 71.

Law Reviews: Pulaski, Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Nonconstitutional Considerations. 64 Iowa L Rev 1 (1979).

7. Admissibility, Authentication, or Use of Particular Documents [1176-1429]

a. In General [1176-1179]

§ 1176 Documents not written or executed by party against whom they are offered

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the doctrine of "res inter alios acta," a litigant's rights generally cannot be affected by the words or acts of others with whom he is in no way connected, and for whose words or acts he is not responsible. ⁷² Thus, private writings which come from a source other than the party against whom they are offered must be shown to have been authorized by, or otherwise to be binding upon, him in order to be received in evidence. ⁷³ If no such showing can be made, such writings are excludable under the rule. ⁷⁴

Footnotes

Footnote 72. Erben v Erben (Ala App) 462 So 2d 377.

Footnote 73. Beebe v Kirkpatrick, 321 Ill 612, 152 NE 539, 47 ALR 891; Waltham Watch & Clock Co. v Waltham, 272 Mass 396, 172 NE 579, 71 ALR 960; Virtue v

Creamery Package Mfg. Co., 123 Minn 17, 142 NW 930, reh den 123 Minn 45, 142 NW 1136; Stone v Proctor, 259 NC 633, 131 SE2d 297, 99 ALR2d 593.

Footnote 74. State v Rozeboom, 145 Iowa 620, 124 NW 783; Helton v Asher, 103 Ky 730, 46 SW 22; Hayes v Wabash R. Co., 163 Mich 174, 128 NW 217; Wilbur v Stoepel, 82 Mich 344, 46 NW 724; Virtue v Creamery Package Mfg. Co., 123 Minn 17, 142 NW 930, reh den 123 Minn 45, 142 NW 1136; State Bank of Pike v Brown, 165 NY 216, 59 NE 1; Seaboard A. L. Ry. v Earle, 86 SC 91, 67 SE 1069.

As to the inadmissibility of recitals in an instrument as against a stranger to the instrument, see § 1027.

§ 1177 Documents pertaining to dealings of party with nonparty

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In addition to providing for the exclusion of evidence of the acts or declarations of a nonparty, 75 the doctrine of res inter alios acta generally encompasses the exclusion of evidence as to the dealings of parties to the action with nonparties. 76 However, the doctrine is generally limited to the exclusion of such evidence when it is offered for the purpose of proving that past acts shown by such evidence have reoccurred. 77 Documents pertaining to dealings between a party and a nonparty, offered as proof of matters other than similar acts, are admissible. 78

Footnotes

Footnote 75. § 1176.

Footnote 76. Dorcal, Inc. v Xerox Corp. (Ala) 398 So 2d 665.

Footnote 77. Frank B. Hall & Co. v Buck (Tex App Houston (14th Dist)) 678 SW2d 612, writ ref n r e (Dec 12, 1984) and reh of writ of error overr (Jan 23, 1985) and cert den 472 US 1009, 86 L Ed 2d 720, 105 S Ct 2704.

Footnote 78. Davis v Nelson-Deppe, Inc., 91 Idaho 463, 424 P2d 733 (in action by owner of truck for damages to equipment sustained when it went off a portion of highway being repaired by the defendant, contract between state and defendant to repair the highway was admissible for the limited purpose of showing circumstances relevant to determination of the standard of care owed by the defendant to the plaintiff).

§ 1178 Writings incompetent in part

[View Entire Section](#)

Writings which contain material and competent evidence, or evidence which is material and competent to some issue in the case, are not to be excluded merely because they also contain incompetent evidence, or evidence not competent upon other issues, 79 especially where the inadmissible parts can be so covered up or deleted as to prevent the jury from seeing them. 80 Thus, a document otherwise relevant is admissible in evidence in a negligence action even though it contains a reference to liability insurance, where such reference is deleted or blocked out. 81 However, where a party attempts to introduce a partly admissible document without making any effort to delete or efface those matters in the document which are not admissible, the document may be excluded in its entirety. 82

It has been held that a writing which contains an offer of compromise is not inadmissible for that reason as long as it is competent evidence for other purposes. 83 However, other authority states that in some situations relevant evidence in a writing can be so integral to settlement negotiations contained in the same writing as to be unseverable for the purpose of admissibility, and that in such cases the relevant evidence must be excluded. 84 Written statements, or reports regarding accidents, containing admissions or statements against interests, are admissible notwithstanding they relate to or include matters of opinion or conclusions. 85

Footnotes

Footnote 79. *Southern P. Co. v Schoer* (CA8 Utah) 114 F 466; *In re Coddington's Will*, 307 NY 181, 120 NE2d 777.

Footnote 80. *Yuin v Hilton*, 165 Ohio St 164, 59 Ohio Ops 219, 134 NE2d 719, 57 ALR2d 681.

Footnote 81. *Jamison v A. M. Byers Co.* (CA3 Pa) 330 F2d 657, cert den 379 US 839, 13 L Ed 2d 45, 85 S Ct 74; *Guarnaccia v Wiecenski*, 130 Conn 20, 31 A2d 464.

Footnote 82. *High Voltage Engineering Corp. v Pierce* (CA10 NM) 359 F2d 33, 21 ALR3d 1345 (trial court in personal injury suit properly excluded from evidence a report of the Atomic Energy Commission, which was made after an investigation of the accident at issue, where the defendant, although conceding that a portion of the report dealing with specific safety recommendations was inadmissible, offered the entire report as an exhibit and made no attempt to separate that part of the report which it contended was relevant and admissible from that which was inadmissible).

Footnote 83. *Kennell v Boyer*, 144 Iowa 303, 122 NW 941.

Footnote 84. *Atwater v Gulf Maintenance & Supply, Inc.* (Fla App D1) 424 So 2d 135.

Footnote 85. *Swain v Oregon Motor Stages*, 160 Or 1, 82 P2d 1084, 118 ALR 1225.

§ 1179 Writings not fully executed

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that a private writing is not fully executed by one of the parties to it, or is invalid and ineffectual as a contract or conveyance, does not render it inadmissible where it is not offered to prove its terms, but merely to establish its existence, or is offered as collateral evidence of another fact, such as the state of mind of the party offering it. 86 The fact that a party may show by parol that he executed an instrument in blank, and that it was filled in without authority or improperly, 87 does not render it inadmissible in evidence, where it is otherwise relevant, material, and competent. 88

Footnotes

Footnote 86. Harper v Durden, 177 Ga 216, 170 SE 45, 89 ALR 625; Pulsifer v Walker, 85 NH 434, 159 A 426, 81 ALR 1052.

Footnote 87. § 1108.

Footnote 88. West Coast Credit Corp. v Pedersen, 64 Wash 2d 33, 390 P2d 551 (whether the writing in question expressed the contract between the parties was to be determined by the trier of fact, and it was error to exclude it on the bare assertion of its invalidity by the person who admittedly executed it).

b. Self-authenticating Documents under Uniform Rules of Evidence and Federal Rules of Evidence [1180-1200]

§ 1180 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 902 of the Uniform Rules of Evidence and of the Federal Rules of Evidence provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to certain documents. The Rule collects and incorporates, and in some instances expands, situations developed over the years by case law and statutes providing that authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy, but more often because of practical considerations minimizing the possibility of inauthenticity. 89 The idea behind Rule 902 is that the possibility of fraud, forgery, or misattribution of certain documents is so slight as to justify dispensing with extrinsic evidence of their authenticity. 90 Self-authentication does not eliminate the requirement of relevancy, 91 nor does it foreclose an opposing party from disputing the authenticity of the document. 92 However, one writer has said that facts which

make a document self-authenticating under Rule 902 also constitute cogent and compelling evidence as to its authenticity, and that, accordingly, the trier of fact should be regarded as bound to find such a document authentic unless sufficient counterproof on this issue is adduced. 93

Footnotes

Footnote 89. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 90. *United States v Howard-Arias* (CA4 Va) 679 F2d 363, 10 Fed Rules Evid Serv 1218, cert den 459 US 874, 74 L Ed 2d 136, 103 S Ct 165.

Footnote 91. *United States v Southard* (CA1 RI) 700 F2d 1, 12 Fed Rules Evid Serv 545, cert den 464 US 823, 78 L Ed 2d 97, 104 S Ct 89.

Footnote 92. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

State v Moore (ND) 286 NW2d 274, cert den 446 US 943, 64 L Ed 2d 799, 100 S Ct 2170.

Footnote 93. *Louisell and Mueller*, Federal Evidence § 528.

§ 1181 Domestic public documents under seal—generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to domestic public documents bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and also bearing a signature purporting to be an attestation or execution. 94 Whether based in whole or in part upon judicial notice, the practical considerations underlying this provision are that forgery is a crime and that its detection is fairly easy and certain. 95

◆ Comment: One writer has noted that Rule 902(1) changes the common law since the Rule is applicable to sealed documents from all levels of government, rather than exclusively to documents bearing a state's great seal. 96 Other commentators have pointed out that Rule 902(1) includes public documents bearing the seal of the appropriate office attesting to the absence of specified documents within the records of that office. 97

To be regarded as self-authenticating under Rule 902(1), a proffered document must bear an impression or other mark recognizable by the trial court as a seal of some government

entity or officer; where the court cannot tell whether an impression is a seal or, if it is, whether it is the seal of a government entity or of a notary public, the document is not within the Rule. 98

◆ Observation: Rule 902(1) deals only with original public documents. Self-authenticating certified copies of public documents are treated by a separate subsection of Rule 902. 99

Footnotes

Footnote 94. FRE, Rule 902(1); Uniform Rules of Evidence, Rule 902(1).

Forms: Authenticating certificate—With seal of court—To prove judicial record of another state. 22 Am Jur Pl & Pr Forms (Rev), Seals, Form 7.

Authenticating certificate—By public officer having seal of office—To prove nonjudicial record of another state. 22 Am Jur Pl & Pr Forms (Rev), Seals, Form 8.

Footnote 95. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 96. LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185, 190 (1975).

Footnote 97. Pyle and Mockbee, Authentication and Identification, 49 Miss LJ 151, 185 (1978).

As to the evidentiary effect of the absence of a public record or entry, see §§ 1375-1380.

Forms: Certificate—Proof of lack of record. 1 Federal Procedural Forms, L Ed § 1:1552.

Footnote 98. State v Mueller, 96 Or App 185, 772 P2d 433.

Footnote 99. § 1186.

As to authentication of copies of public documents which are not deemed self-authenticating, see §§ 1381 et seq.

§ 1182 --Particular documents as self-authenticating

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Documents which are self-authenticating under Rule 902(1) include:

- a document under the formal seal of the United States Postal Service (an agency of the

United States for the purposes of Rule 902(1)), and with a signature purporting to be an execution 1

- certificates bearing the purported seal of the Federal Deposit Insurance Corporation, an agency of the United States Government 2
- documents of a sister state evidencing a criminal defendant's prior convictions and bearing the seal and signature of court officials of that state 3
- an order of a state board of medical examiners cancelling the appellant's license to practice medicine 4
- state vehicle registration certificates which had stamped signatures, bore ink initials, and were under seal 5
- an exhibit which included a photocopy of a certificate of vehicle registration, attested to and certified by the state commissioner of the bureau of motor vehicles, the custodian of such records, together with the certificate of the state government that the attached attestation and certificate was executed by the duly appointed, qualified, and acting commissioner of the bureau of motor vehicles of the state and custodian of the records therein, where the documents executed by the governor and the commissioner contained the seals of their respective offices 6

On the other hand, an affidavit originating in an office of the United Nations or its industrial development organization, UNIDO, is not a domestic public document which is self-authenticating under Rule 902(1). 7

Footnotes

Footnote 1. *United States v Moore* (CA8 Mo) 555 F2d 658, 2 Fed Rules Evid Serv 32.

Footnote 2. *United States v Wingard* (CA4 NC) 522 F2d 796, 1 Fed Rules Evid Serv 107, cert den 423 US 1058, 46 L Ed 2d 648, 96 S Ct 792.

Footnote 3. *Amin v State* (Wyo) 695 P2d 1021, postconviction proceeding (Wyo) 774 P2d 597, related proceeding (Wyo) 811 P2d 255.

Footnote 4. *United States v MacKenzie* (CA5 Tex) 601 F2d 221, 4 Fed Rules Evid Serv 1447, cert den 444 US 1018, 62 L Ed 2d 649, 100 S Ct 673.

Footnote 5. *United States v Wexler* (ED Pa) 657 F Supp 966 (noting that initials showed intent of appropriate custodian to attest to accuracy and authenticity of documents and thus met requirements of Rule 902(1)).

Footnote 6. *United States v Trotter* (CA8 Mo) 538 F2d 217, 1 Fed Rules Evid Serv 248, cert den 429 US 943, 50 L Ed 2d 313, 97 S Ct 362.

Footnote 7. *United States v M'Biye*, 211 US App DC 10, 655 F2d 1240, 8 Fed Rules Evid Serv 273.

§ 1183 Domestic public documents not under seal

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(2) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a document purporting to bear the signature in the official capacity of an officer or employee of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, which officer or employee has no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. 8

Since it is easier to forge a document not under seal than a document under seal, Rule 902(2) provides that domestic public documents not under seal are not self-authenticating unless certified by a public officer who has a seal. 9 The view has been expressed that if the document in question is capable of being sealed (because the entity issuing it possesses a seal ordinarily affixed to its documents), the court should reject any attempt to authenticate it under Rule 902(2) and should require authentication under Rule 902(1). 10 Rule 902(2) requires no certification of the delegation of custodial authority; a signed certification by the public officer having actual legal custody of the record is sufficient to satisfy the Rule. 11

Rule 902(2) has been found to apply to a certified report signed by a specialist on the National Firearms Act branch of the Bureau of Alcohol, Tobacco, and Firearms stating that the specialist had made a diligent search of the records and had found no evidence that the firearm described in an indictment had been registered to, or lawfully acquired by, the defendant and had found no application by the defendant to make and register a firearm, the government having attached to the report a document under seal executed by the Chief of the National Firearms Act branch of the Bureau stating that the specialist had proper custody and control of the records, that he was familiar with the specialist's signature, and that the signature on the report appeared to be true. 12 Rule 902(2) has also been applied to affidavits of CIA officials to which the certificate of the General Counsel of the CIA has been attached certifying that each affiant occupied the positions stated in his affidavit, the certificates bearing the CIA official seal. 13

◆ Practice guide: Counsel who cannot authenticate a document without a seal in accordance with Rule 902(2) may try to authenticate it by means of the general authentication provisions of Rule 901(a). 14

Footnotes

Footnote 8. FRE, Rule 902(2); Uniform Rules of Evidence, Rule 902(2).

Footnote 9. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 10. Louisell and Mueller, Federal Evidence § 530.

Footnote 11. *United States v Combs* (CA9 Cal) 762 F2d 1343, 17 Fed Rules Evid Serv 1101 (among conflicting authorities on other grounds noted in *United States v Disla* (CA9 Cal) 805 F2d 1340).

Footnote 12. *United States v Combs* (CA9 Cal) 762 F2d 1343, 17 Fed Rules Evid Serv 1101 (among conflicting authorities on other grounds noted in *United States v Disla* (CA9 Cal) 805 F2d 1340).

Footnote 13. *Hunt v Liberty Lobby* (CA11 Fla) 720 F2d 631, 10 Media L R 1097, 14 Fed Rules Evid Serv 988, appeal after remand (CA11 Fla) 824 F2d 916.

Footnote 14. LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185, 190 (1975).

For a discussion of Rule 901(a), see §§ 1040 et seq.

§ 1184 Foreign public documents—generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(3) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, if accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. Rule 902(3) further provides that a final certification may be made by a secretary of an embassy or a legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomat or consular official of the foreign country assigned or accredited to the United States. However, if reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without certification. 15 It is not necessary to introduce a statement by the affiant that he or she is the official designated to make the necessary certifications under the foreign law as required by Rule 902(3). 16 However, a foreign document cannot be authenticated under the Rule if it appears to have been tampered with. 17

◆ Observation: Rule 902(3) is derived from Rule 44(a)(2) of the Federal Rules of Civil Procedure, 18 and accordingly the notes accompanying Rule 44(a)(2) may be used to

interpret and apply Rule 902(3). 19 Rule 902(3), however, is broader than Rule 44(a)(2) in that it applies to public documents and is not limited to public records. 20 The distinction between "public documents" and "public records," however, is not discussed in the Advisory Committee Notes to either Rule 902 or Rule 44. A "public document" has been defined as an official paper, a document on file in a public office, and a publication printed by order of Congress or either house thereof. 21 A "public record" has been defined as a record required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. 22

Rule 902(3) pertains only to dispensing with extrinsic evidence of a document's authenticity as a condition precedent to admissibility; a motion made under this Rule to dispense with proof of the authenticity of a document which contains hearsay is not sufficient to put the opponent on notice that the proponent intends to offer the document in evidence under the exception to the hearsay rule contained in Rule 803(24). 23

Footnotes

Footnote 15. FRE, Rule 902(3); Uniform Rules of Evidence, Rule 902(3).

Footnote 16. *United States v Howard-Arias* (CA4 Va) 679 F2d 363, 10 Fed Rules Evid Serv 1218, cert den 459 US 874, 74 L Ed 2d 136, 103 S Ct 165.

Footnote 17. *United States v Castaneda-Reyes* (CA11 Fla) 703 F2d 522, 12 Fed Rules Evid Serv 1536, cert den 464 US 856, 78 L Ed 2d 157, 104 S Ct 174.

Footnote 18. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

As to Rule 44(a)(2), see § 1393.

Footnote 19. *United States v De Jongh* (CA1 Puerto Rico) 937 F2d 1, 33 Fed Rules Evid Serv 132.

Footnote 20. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 21. Ballentine's Law Dictionary.

Footnote 22. Ballentine's Law Dictionary.

Footnote 23. *United States v One 1968 Piper Navajo Twin Engine Aircraft* (CA5 Tex) 594 F2d 1040, 4 Fed Rules Evid Serv 906.

As to Rule 803(24), see §§ 683-689.

§ 1185 --Authentication of particular documents

[View Entire Section](#)

Rule 902(3) has been used to authorize the admission of:

- a certified document signed by the general commander of the Naval Force of Honduras and attested to by the Minister of National Defense and Safety of Honduras stating that a search of vessel registration records at the Honduras Naval Command Headquarters revealed no registration for a vessel allegedly operated by marijuana smugglers 24
- a purported record of felonies committed by an accused in Germany 25
- a diplomatic note demonstrating Panama's grant of permission to the Coast Guard to board Panamanian vessels 26
- Mexican official records of birth properly authenticated by certification of American consular officials 27
- three certified Hungarian public documents, each document being accompanied by an English translation and the signatures of the public officials who executed the documents, such signatures being certified as genuine by the Vice Consul of the United States Embassy in Budapest, Hungary 28
- a record of a Japanese proceeding exemplified by a secretary of the Yokohama District Prosecutor's Office, and transmitted under the seal of the Consul of the United States 29

On the other hand, an affidavit originating in the United Nations or its industrial development organization, UNIDO, is not a foreign public document which is self-authenticating under the Rule. 30 A good conduct certificate ostensibly issued by a foreign government is not self-authenticating under Rule 902(3) where the purported signature of the official on the certificate is illegible, the document is devoid of any final certification, the consular official called as a witness cannot verify it, the existence of the document is not revealed to the opposing party until the day it is offered into evidence, and there are no circumstances constituting good cause for its admission notwithstanding its proponent's failure to comply with the Rule. 31

A magistrate is justified in regarding a foreign customs certificate as presumptively authentic when there has been a lengthy period of time since the commencement of the litigation, the opponent has failed to produce any evidence casting doubt upon the validity of the customs certificate, and there is independent deposition testimony supporting the certificate's authenticity. 32 When the requirements of Rule 902(3) are satisfied, and in the absence of conflicting evidence, a court will not assume that documents executed by public officials of communist countries are fabricated and presumptively unreliable. 33

Footnotes

Footnote 24. *United States v Herrera-Britto* (CA11 Fla) 739 F2d 551, 16 Fed Rules Evid Serv 264.

Footnote 25. *Jordan-Maier v State* (Tex App Houston (1st Dist)) 792 SW2d 188.

Footnote 26. *United States v Pena-Jessie* (CA4 Va) 763 F2d 618, 1987 AMC 912.

Footnote 27. *United States v Montemayor* (CA5 Tex) 712 F2d 104, 13 Fed Rules Evid Serv 1575.

Footnote 28. *United States v Regner* (CA9 Cal) 677 F2d 754, 10 Fed Rules Evid Serv 856, cert den 459 US 911, 74 L Ed 2d 175, 103 S Ct 220.

Footnote 29. *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461.

Footnote 30. *United States v M'Biye*, 211 US App DC 10, 655 F2d 1240, 8 Fed Rules Evid Serv 273.

Footnote 31. *United States v De Jongh* (CA1 Puerto Rico) 937 F2d 1, 33 Fed Rules Evid Serv 132.

Footnote 32. *Black Sea & Baltic General Ins. Co. v S.S. Hellenic Destiny* (SD NY) 575 F Supp 685, 1984 AMC 1055.

Footnote 33. *United States v Regner* (CA9 Cal) 677 F2d 754, 10 Fed Rules Evid Serv 856, cert den 459 US 911, 74 L Ed 2d 175, 103 S Ct 220.

§ 1186 Certified copies of public records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(4) of the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a copy of an official record or report, or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public place, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Rule 902(1), Rule 902(2), or Rule 902(3), or complying with any act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority. 34 Rule 902(4) of the Uniform Rules of Evidence reads similarly, but provides that the certification of correctness may be made in accordance with any law of the United States or of the enacting state. 35

Under Rule 902(4), the certificate of the custodian or other person authorized to make the certification qualifies as a public document, receivable as authentic when in conformity with Rule 902(1), Rule 902(2), or Rule 902(3). 36 Thus, copies of official records may be authenticated by certification of the custodian or other person authorized to make them where the certification itself complies with the requirements of Rule 902(1) that the document bears a seal purporting to be that of a department or agency of the United States and a signature purporting to be an attestation or execution. 37 Rule 902(4)

requires only that the custodian certify the accuracy of a copy, and eliminates as unnecessary the requirement of certification of the custodian's authority. 38

◆ Observation: The purpose of Rule 902(4) is to make it unnecessary to remove original records from official custody when they are needed as evidence. Modern copying techniques and the assumed integrity of public officials in making and certifying copies offer some assurance against mistake or fraud.

Certification by the officer having legal custody of the record satisfies the requirements of Rule 902(4). Extrinsic evidence of custody and of delegation is not necessary where there is a signed certification by the public officer having actual legal custody of the documents. There is no requirement in the Rule that the actual custodian of the records also secure further certification of the delegation of custodial authority down from the head of the department or agency entrusted by law with custody of the document. 39

◆ Practice guide: The authentication of a copy under Rule 902(4) may remove objections to the admission of the copy in addition to those based on its authenticity. Thus, under Rule 1005, a copy certified as correct under Rule 902 is not subject to an objection based on the "best evidence" rule. 40 And many public records which can be authenticated under Rule 902(4) fall within the Rules' exceptions to the rule against hearsay, such as the exceptions pertaining to public records generally, 41 property records, 42 judgments of a previous conviction, 43 and judgments as to personal, family, or general history, or property boundaries. 44

Since the method of authentication provided in Rule 902 is not exclusive, a proponent's failure to procure certified copies of the public documents in question does not bar their authentication under Rule 901. 45

◆ Comment: According to the Advisory Committee's Note to Rule 902(4) of the Federal Rules of Evidence, the certification procedure provided under the Rule extends only to public records, reports, and recorded documents, and does not apply to public documents generally; thus, not all documents provable when presented in their original form under FRE, Rule 902(1), Rule 902(2), or Rule 902(3) may be provable by certified copy under FRE, Rule 902(4). However, some commentators have said that this statement should be disregarded, inasmuch as it was not the intent of Congress or the drafters of the Federal Rules of Evidence to exclude self-authentication of certified copies of public documents. These commentators have reasoned that any original public document may be self-authenticated under FRE, Rule 902(1)-(3), and since the Rule surely intends self-authentication of certified copies of such documents and since there is no provision in any of the first three paragraphs of the Rule for certification of copies, self-identification of all public documents should be allowed under Rule 902(4). 46

Footnotes

Footnote 34. FRE, Rule 902(4).

Footnote 35. Uniform Rules of Evidence, Rule 902(4).

Footnote 36. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Forms: Attestation—Of copy of official domestic record by officer having legal custody thereof. 1 Federal Procedural Forms, L Ed § 1:1544.

Attestation—Of copy of official domestic record by deputy. 1 Federal Procedural Forms, L Ed, § 1:1545.

Certificate—Authentication of copies of recorded documents. 4A Am Jur Legal Forms 2d (Rev), Clerks of Court § 58:14.

Certificate—Authentication of copy of pleading. 4A Am Jur Legal Forms 2d (Rev), Clerks of Court § 58:15.

Footnote 37. *United States v Pent-R-Books, Inc.* (CA2 NY) 538 F2d 519, 1 Fed Rules Evid Serv 259, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175.

Footnote 38. *LaRocca, Authentication, Identification, and the Best Evidence Rule*, 36 La L Rev 185, 191 (1975).

Footnote 39. *United States v Beason* (CA5 Tex) 690 F2d 439, 11 Fed Rules Evid Serv 1421, cert den 459 US 1177, 74 L Ed 2d 1023, 103 S Ct 828.

Footnote 40. § 1090.

Footnote 41. FRE, Rule 803(8).

Footnote 42. FRE, Rule 803(14).

Footnote 43. FRE, Rule 803(22).

Footnote 44. FRE, Rule 802(23)).

The hearsay rule and its exceptions are generally discussed in §§ 658 et seq.

Footnote 45. *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1190, 6 Fed Rules Evid Serv 1329, 30 FR Serv 2d 797.

Footnote 46. *Pyle and Mockbee, Authentication and Identification*, 49 Miss LJ 151, 187 (1978).

§ 1187 --Authentication of particular records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The mere fact that a document is kept in a working file of a governmental agency does not automatically qualify it as a public record under Rule 902(4) for purposes of authentication. For example, although the recorded version of a deed is a public record, a

copy of a deed deposited in a working file of an agency is not by that fact alone a public record. 47 Examples of documents which are self-authenticating under Rule 902(4) include properly certified copies of:

- computer data compilations of federal income tax records 48
- a divorce decree issued by a court of another state 49
- a selective service file 50
- a "progress sheet" from the United States Treasury Department showing that a particular salary check made out to a government employee had been placed in the mail 51
- minutes of arraignment and sentencing hearings 52
- a document from the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms (BATF) stating that a defendant has not registered weapons which were manufactured in violation of federal law 53
- BATF documents declaring that the National Firearms Registration and Transfer Record has been searched and no evidence found that any firearms or silencers were registered or had been acquired by lawful manufacture by the defendants 54
- a state court judgment bearing an attestation stamped on the last page of the judgment, which attestation bears the purported signature of a deputy clerk of court, states "the foregoing is a true and correct copy of the official record, now in my lawful custody and possession," and gives the volume and page number of the court's minutes where the judgment can be found 55

In addition, under Rule 902(4) a trial transcript may be admitted into evidence at a contempt hearing; it is as such prima facie a correct statement of the testimony under 28 USCS § 753(b). 56

Footnotes

Footnote 47. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, *affd* (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Footnote 48. *United States v Farris* (CA7 Ill) 517 F2d 226, 75-1 USTC ¶ 9497, 20 FR Serv 2d 1117, 36 AFTR 2d 75-5064, cert den 423 US 892, 46 L Ed 2d 123, 96 S Ct 189.

Footnote 49. *Price v Price* (Cuyahoga Co) 4 Ohio App 3d 217, 4 Ohio BR 323, 447 NE2d 769.

Footnote 50. *United States v Simmons* (CA9 Cal) 476 F2d 33.

Footnote 51. United States v Stone (CA5 Fla) 604 F2d 922, 4 Fed Rules Evid Serv 1495.

Footnote 52. State v Buffalo, 4 Hawaii App 646, 674 P2d 1014, cert den (Hawaii) 744 P2d 781.

Footnote 53. United States v Beason (CA5 Tex) 690 F2d 439, 11 Fed Rules Evid Serv 1421, cert den 459 US 1177, 74 L Ed 2d 1023, 103 S Ct 828.

Footnote 54. United States v Stout (CA11 Fla) 667 F2d 1347, 9 Fed Rules Evid Serv 1466.

Footnote 55. AMFAC Distribution Corp. v Harrelson (CA11 Ala) 842 F2d 304, 25 Fed Rules Evid Serv 370, 10 FR Serv 3d 1148.

Footnote 56. United States v Lumumba (CA2 NY) 794 F2d 806, 20 Fed Rules Evid Serv 1367, cert den 479 US 855, 93 L Ed 2d 125, 107 S Ct 192.

§ 1188 --Statutes under which Federal Rule may be invoked

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(4) of the Federal Rules of Evidence, any form of certification may be used for copies of public records which complies with an act of Congress or a rule prescribed by the Supreme Court pursuant to statutory authority. 57 Acts of Congress providing for certification of copies of public records include:

- 18 USCS § 3190, relating to certification by the principal diplomatic or consular officer residing in a foreign country seeking extradition of copies of papers offered in evidence in an extradition case
- 22 USCS § 4222, relating to certification of copies of Vatican City documents
- 25 USCS § 6, relating to certification by the Commissioner of Indian Affairs of copies of public documents, records, books, maps, or papers belonging to or in the files of said office
- 25 USCS § 199a, relating to certification by the secretary or chief clerk of the Oklahoma historical society of copies of any records, documents, books, or papers held by said society
- 28 USCS § 1736, relating to certification by the secretary of the Senate or the clerk of the House of Representatives of extracts from Journals of the Senate and of the House of Representatives
- 28 USCS § 1738, relating to attestation of clerk of copies of records and judicial proceedings of courts of a state, territory, or possession 58

- 28 USCS § 1739, relating to attestation of custodian of nonjudicial records or books kept in any public office of any state, territory, or possession 59
- 28 USCS § 1740, relating to authentication by consul or vice consul of copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office
- 28 USCS § 1744, relating to certification by Commissioner of Patents and Trademarks of copies of letters patent or of any records, books, papers, or drawings belonging to the Patent Office and relating to patents
- 28 USCS § 1745, relating to certification by Commissioner of Patents and Trademarks of copies of specifications and drawings of foreign letters patent, or applications for foreign letters patent, and of copies of excerpts of the official journals and other official publications of foreign patent offices belonging to the United States Patent Office
- 31 USCS § 704(b), relating to certification by Comptroller General or Assistant Comptroller General of copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the General Accounting Office
- 38 USCS § 202, relating to certification of copies of public documents, records, or papers belonging to or in the files of the Veterans' Administration by certification by the Administrator or his delegate
- 43 USCS § 83, relating to certification by registers and receivers of United States land offices of transcripts of records in their offices
- 44 USCS § 399, relating to certification by Administrator of General Services of copies or reproductions of records in the National Archives
- 44 USCS § 2116(b), relating to certification by the Archivist of the United States and the authentication by the official seal of records in the National Archives
- 46 USCS § 10312(f), relating to certification by the shipping commissioner of a copy of a release executed before such official in connection with a wage dispute involving a merchant seaman

Footnotes

Footnote 57. § 1186.

Footnote 58. As to 28 USCS § 1738, generally, see § 1399.

Footnote 59. As to 28 USCS § 1739, generally, see § 1386.

§ 1189 --Rules under which Federal Rule may be invoked

[View Entire Section](#)

Rules prescribed by the Supreme Court pursuant to statutory authority which provide for certification of copies of public records include Rule 44 of the Federal Rules of Civil Procedure, relating to certification of domestic and foreign official records, 60 and Rule 27 of the Federal Rules of Criminal Procedure, relating to certification of domestic and foreign official records. 61

◆ Comment: Although FR Civ P 44(a) provides certification procedures of the type referred to in FRE, Rule 902(4), 62 FRE, Rule 902(4) is somewhat more expansive than FR Civ P 44(a) as to the methods of authentication and the documents which may be authenticated. FRE, Rule 902(4) reaches not only official records but also documents recorded or filed in a public office as authorized by law; FR Civ P 44(a) does not by its terms include the latter category of documents. Furthermore, under FRE, Rule 902(4), copies of official records may be authenticated by certification of the custodian or other person authorized to make the certification, whereas under FR Civ P 44(a)(1), official domestic records are required to be certified by the custodian of the records. 63 Finally, FRE, Rule 902(4) requires no second certificate attesting to the authority of the first certifier (provided that the first certificate is signed and sealed), while FR Civ P 44(a)(1) requires a second certificate attesting that the first certifier is indeed the custodian of the record in question. 64 Where a proffered document which is within the scope of FCRP 44(a)(1) meets the requirements of FRE, Rule 902(4), it will be viewed as self-authenticating even though it has not been authenticated according to FCRP 44(a)(1). 65

Footnotes

Footnote 60. For further discussion of FR Civ P 44, see §§ 1388, 1393.

Footnote 61. For further discussion of FR Crim P 27, see §§ 1388, 1393.

For a discussion of various Federal Rules of Civil Procedure, including FR Civ P, Rule 10(c), FR Civ P, Rule 16, FR Civ P, Rule 30, FR Civ P, Rule 31, FR Civ P, Rule 33, and FR Civ P, Rule 36, which may be used to obviate the need for certification or authentication, see § 1041.

Footnote 62. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 63. *United States v Pent-R-Books, Inc.* (CA2 NY) 538 F2d 519, 1 Fed Rules Evid Serv 259, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175.

Footnote 64. § 1388.

Footnote 65. *United States v Pent-R-Books, Inc.* (CA2 NY) 538 F2d 519, 1 Fed Rules Evid Serv 259, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175 (administrative record was admissible in evidence even though it did not meet the requirement of FR Civ P 44 that it be certified by an officer having legal custody of such record or by his deputy, where such record met the requirements for self-authentication under FRE, Rule 902).

§ 1190 Official publications

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to official publications; that is, books, pamphlets, or other publications purporting to be issued by public authority. 66 Such official publications are most commonly encountered in connection with statutes, court reports, rules, and regulations. 67

◆ Observation: Although officially published statutes and court reports are within the scope of Rule 902(5), the Rules do not govern the process by which a court informs itself of what the law is, 68 and therefore there appears to be no need to apply Rule 902(5) to such publications for that purpose.

The authenticity of an official document is sufficiently established when a copy of it is offered which purports to have been printed by authority of the government. 69 There is no requirement under the Rule that the public authority issuing the document be of the same jurisdiction as the court in which the document is offered in evidence. 70

Rule 902(5) does not confer admissibility upon all official publications, but merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. 71 Thus, even though the authenticity of documents may be established under Rule 902(5), the documents may be held inadmissible as not sufficiently probative of the precise issues in the particular case. 72 Furthermore, a document which is self-authenticating by virtue of its status as an official publication may, nonetheless, be excludable as hearsay. 73

◆ Comment: Although Rule 902(5) is silent concerning the level of government that must authorize the publication in question, commentators have expressed the view that officially published local ordinances should be included within the Rule. 74 Another commentator has suggested that the level should extend at least as far down as the political scale referred to in Rule 902(1) (United States, any state, district, commonwealth, territory, or insular possession thereof, the Panama Canal Zone, the Trust Territory of the Pacific Islands, and a political subdivision, department, officer, or agency thereof). 75

◆ Reminder: FR Civ P 44(a) also provides for authentication of a domestic or foreign official record by an official publication of it. 76

Footnotes

Footnote 66. FRE, Rule 902(5); Uniform Rules of Evidence, Rule 902(5).

Footnote 67. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 68. Advisory Committee Notes to Federal Rules of Evidence, Rule 201.

Footnote 69. California Asso. of Bioanalysts v Rank (CD Cal) 577 F Supp 1342.

Footnote 70. Liles v Employers Mut. Ins. (App) 126 Wis 2d 492, 377 NW2d 214 (report published by the Arizona Department of Health was self-authenticating and therefore admissible in Wisconsin state court).

Footnote 71. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 72. Uniroyal, Inc. v Jetco Auto Service, Inc. (SD NY) 461 F Supp 350, 1978-2 CCH Trade Cases ¶ 62194 (court, accepting authenticity under Rule 902(5) of certain statistical documents of New York State governmental departments, nevertheless ruled such documents inadmissible in suit involving alleged antitrust violations, since documents were not sufficiently probative of issues involved, including economic health of tire industry in particular county and, more specifically, causes of defendant tire franchise dealer's arrested growth rate during relevant period involved).

Footnote 73. Sikes v Seaboard C. L. R. Co. (Fla App D1) 429 So 2d 1216, petition den (Fla) 440 So 2d 353.

Footnote 74. Louisell and Mueller, Federal Evidence § 533.

Law Reviews: Pyle and Mockbee, Authentication and Identification, 49 Miss LJ 151, 189 (1978).

Footnote 75. LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185, 192 (1975).

Footnote 76. §§ 1388, 1393.

§ 1191 --Particular documents as self-authenticating official publications

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A report by the United States Department of Health and Human Services regarding medicaid reimbursement rates for clinical laboratories is self-authenticating under Rule 902(5) where the report bears on its cover a facsimile of the official seal of the Department, suggesting that it was printed by authority of the Department. 77 Other documents whose authenticity has been established under Rule 902(5) include:

- the "Wisconsin Motorists Handbook," offered for the purpose of showing the effect of alcohol ingestion on driving ability 78

- a report published by the Arizona Department of Health Services which suggested that there was a shortage of nurses 79
- a publication of the Federal Aviation Administration warning owners and operators of Cessna aircraft of design characteristics which permitted the accumulation of water in the aircraft's fuel line 80

Footnotes

Footnote 77. *California Asso. of Bioanalysts v Rank* (CD Cal) 577 F Supp 1342.

Footnote 78. *Lievrouw v Roth* (App) 157 Wis 2d 332, 459 NW2d 850.

Footnote 79. *Liles v Employers Mut. Ins.* (App) 126 Wis 2d 492, 377 NW2d 214.

Footnote 80. *Schneider v Cessna Aircraft Co.* (App) 150 Ariz 153, 722 P2d 321, CCH Prod Liab Rep ¶ 10743.

§ 1192 Newspapers and periodicals

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(6) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals. 81 The authenticity of newspapers or periodicals is deemed sufficiently established for purposes of admissibility since the likelihood of forgery is slight and thus no danger is apparent in receiving them. 82 Rule 902(6), together with provisions on judicial notice contained in Rule 201, 83 permits a court to take notice of statements in newspaper articles without the necessity of authentication. 84

◆ **Caution:** Although the authenticity of a publication may be established under Rule 902(6), the questions of authority to publish a particular item and responsibility for such an item may still be left open. 85 Thus, the Rule does not by its terms establish that the indicated author of a newspaper story was in fact its author, or that a person who purportedly placed an advertisement in the newspaper did in fact place it. However, several commentators have suggested that inasmuch as serious errors as to the authorship or origin of feature articles or advertising material are unlikely as a practical matter, the authority of the publisher to print such matter should be assumed and its attribution in print should be regarded as at least *prima facie* correct. 86 Responsibility for the publication of an item may in some circumstances be governed by statute. 87

The fact that an article in a newspaper or periodical is self-authenticating under Rule 902(6) does not remove an objection to its admission based on its status as hearsay. 88

Thus, Rule 902(6) does not permit the admission into evidence of a newspaper story for the purpose of showing the truth of admissions supposedly made by certain persons and printed in the story, where the reporter of the story is not available for cross-examination.
89

Footnotes

Footnote 81. FRE, Rule 902(6); Uniform Rules of Evidence, Rule 902(6).

Footnote 82. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 83. As to judicial notice under Rule 201, see §§ 27 et seq.

Footnote 84. *Shell Oil Co. v Kleppe* (DC Colo) 426 F Supp 894.

Magazine article lauding balsa-core material was self-authenticating under Rule 902(6) and therefore admissible in action against boat manufacturer. *Snyder v Whittaker Corp.* (CA5 Tex) 839 F2d 1085, CCH Prod Liab Rep ¶ 11708, 1988 AMC 2534, 24 Fed Rules Evid Serv 1217.

Footnote 85. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 86. *Louisell and Mueller*, Federal Evidence § 534 (distinguishing letters to the editor and classified advertisements on the basis of the publisher's lower financial stake in the correctness of such material).

Pyle and Mockbee, Authentication and Identification, 49 Miss LJ 151, 191 (1978).

Footnote 87. See, for example, 39 USCS § 3005(b), providing that a public advertisement, by a person engaged in activity amounting to mail fraud, to the effect that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the named person is the agent or representative of the advertiser for the receipt of remittances.

Footnote 88. *Duhon v Petroleum Helicopters, Inc.* (La App 3d Cir) 554 So 2d 1270, cert den (La) 559 So 2d 1360 and (disapproved on other grounds by *Green v Industrial Helicopters, Inc.* (La) 593 So 2d 634, 1992 AMC 1426).

As to the exclusion of newspaper articles from evidence due to their nature as hearsay, see § 1253.

Footnote 89. *New England Mut. Life Ins. Co. v Anderson* (CA10 Kan) 888 F2d 646, 28 Fed Rules Evid Serv 1516.

§ 1193 Trade inscriptions and the like

[View Entire Section](#)

Under Rule 902(7) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin. 90 There are several factors that justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like, including the minimal risk of forgery, the serious penalties for trademark infringement, and the great efforts devoted to inducing the public to buy in reliance on brand names and the substantial protection given brand names. 91

◆ Comment: One writer has said that the requirement under Rule 902(7) that a label be affixed "in the course of business" does not restrict self-authentication to commercial ventures, but extends to any ongoing enterprise or institution and includes, for example, private universities and social organizations that use symbols or products they distribute. 92 Another commentator has expressed the view that the "affixed in the course of business" requirement suggests an appearance that is at least somewhat formal and elaborate; under this view, a stenciled and painted sign on a wooden packing crate purporting to identify the manufacturer should be deemed within the scope of FRE, Rule 902(7), while an apparently handscrawled paper tag on an article of clothing purporting to identify its manufacturer should not. 93

Footnotes

Footnote 90. FRE, Rule 902(7); Uniform Rules of Evidence, Rule 902(7).

Footnote 91. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

See also 19 USCS § 1615(2), providing that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of the foreign origin of merchandise.

Footnote 92. LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185, 193 (1975); Pyle and Mockbee, Authentication and Identification, 49 Miss LJ 151, 190 (1978).

Footnote 93. Louisell and Mueller, Federal Evidence § 535.

§ 1194 Acknowledged documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 902(8) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take

acknowledgments. 94 The theory behind Rule 902(8) is that notaries, due to penalties for violation of their duties, will not certify a document unless the purported writer, presumably known to the notary, swears in the notary's presence that he executed the questioned writing, so that the notary's certificate attached to the document appears to be at least presumptive proof that the document is what its proponent claims. 95

The federal version of Rule 902(8), as originally submitted by the Supreme Court, referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments, but Congress replaced the quoted words with "executed in the manner provided by law by," such modification being made to eliminate the requirement, believed to be inconsistent with the law in some states, that a notary public must affix a seal to a document acknowledged before the notary. 96 As so modified, the Federal Rule, like its counterpart in the Uniform Rules, merely requires that the document be executed in the manner prescribed by state law, 97 the usual rule being that a certificate of acknowledgment executed and attested by the officer who took the acknowledgment furnishes formal proof of authenticity of the instrument acknowledged. 98

◆ **Observation:** Even prior to the promulgation of the Rule 902(8), virtually every state regarded acknowledged documents of title to real estate as self-authenticating. 99 Some state statutes not based on Rule 902(8) extend this rule to other acknowledged documents as well. 1

◆ **Practice guide:** An acknowledged document concerning title to real estate, aside from being self-authenticating under Rule 902(8), will also generally come within the exception to the hearsay rule concerning property records contained in Rule 803(14), 2 or the exception concerning documents affecting interests in property contained in Rule 803(15). 3

Footnotes

Footnote 94. FRE, Rule 902(8); Uniform Rules of Evidence, Rule 902(8).

Footnote 95. La Rocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185, 193 (1975).

Footnote 96. House Judiciary Committee Report No. 93-650 (1973), p 17.

Annotation: Sufficiency of certificate of acknowledgment, 25 ALR2d 1124.

Practice References 12 Am Jur Proof of Facts 281, Acknowledgments.

Forms: Acknowledgments for use in particular jurisdictions. 1 Am Jur Legal Forms 2d, Acknowledgments §§ 7:11-7:464.

Footnote 97. House Judiciary Committee Report No. 93-650 (1973), p 17.

Footnote 98. 1 Am Jur 2d, Acknowledgments § 78.

Footnote 99. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

As to an instrument which is duly acknowledged being generally admissible in evidence without further proof of its execution, see 1 Am Jur 2d, Acknowledgments § 71.

Footnote 1. *Jousan v Presidio Corp.* (Tex Civ App Houston (1st Dist)) 590 SW2d 524 (document containing an acknowledgment taken before a notary is self-proving under state statute).

For a sampling of typical state enactments in this regard, see *Louisell and Mueller*, Federal Evidence § 536.

Footnote 2. As to the provisions of Rule 803(14), see § 1350.

Footnote 3. As to the provisions of Rule 803(15), see § 1244.

§ 1195 --Authentication of particular documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An affidavit originating in the United Nations or its industrial development organization, UNIDO, which is notarized in a state of the United States by a duly authorized notary public is a self-authenticating acknowledged document under Rule 902(8).⁴ An acknowledged promissory note is also within the Rule.⁵ A document cannot, however, be regarded as self-authenticating under Federal Rules of Evidence, Rule 902(8) where its acknowledgment took place prior to the effective date of the Rule.⁶

Footnotes

Footnote 4. *United States v M'Biye*, 211 US App DC 10, 655 F2d 1240, 8 Fed Rules Evid Serv 273.

Footnote 5. *Union State Bank v Miller* (ND) 335 NW2d 807, cert den 464 US 1019, 78 L Ed 2d 727, 104 S Ct 554, later proceeding (ND) 358 NW2d 222 (ovrld on other grounds by *Olson v Job Service North Dakota* (ND) 379 NW2d 285).

Footnote 6. *Haury & Smith Realty Co. v Piccadilly Partners I* (Tenn App) 802 SW2d 612.

§ 1196 Commercial paper and related documents

[View Entire Section](#)

Under Rule 902(9), extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law. 7 This Rule rests largely on the notion that persons in the commercial world take at face value many documents which are usually what they seem to be, and that the courts may safely follow along in this respect.

◆ Comment: Issues relating to the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or a defense, and, with respect to presumptions and burden of proof, will be controlled by the rule established in *Erie R. Co. v Tompkins*. 8 However, there may be questions of authenticity involving lesser segments of a case, or the case may be one governed by federal common law, and, in these situations, resort to the authentication provisions of the Uniform Commercial Code is provided for under Rule 902(9). 9 Although the wording of Rule 902(9) is in terms of "general commercial law" in order to avoid the potential complications inherent in borrowing local statutes, it would be difficult to determine the general commercial law without referring to the Uniform Commercial Code. 10

With respect to the meaning of the phrase "general commercial law," it was the intent of the House Committee on the Judiciary that the Uniform Commercial Code, which has been adopted virtually in every state, would be followed generally, but that federal commercial law would apply where federal commercial paper is involved. 11 Further, it was the intent of the House Committee that in those instances in which the issues are governed by the *Erie* doctrine, state law would apply irrespective of whether it is the Uniform Commercial Code. 12

◆ Caution: Dispensing with a requirement of extrinsic evidence of the authenticity of promissory notes under Rule 902(9) and admitting the notes into evidence does not establish their genuineness or the existence of an indebtedness conclusively, since the opposite party is not foreclosed from disputing authenticity. 13

Footnotes

Footnote 7. FRE, Rule 902(9); Uniform Rules of Evidence, Rule 902(9).

Footnote 8. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

The *Erie* doctrine is discussed in 32 Am Jur 2d, Federal Practice and Procedure §§ 267 et seq.

Footnote 9. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 10. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 11. House Judiciary Committee Report No. 93-650 (1973), p 17.

Footnote 12. House Judiciary Committee Report No. 93-650 (1973), p 17.

Footnote 13. United States v Carriger (CA6 Mich) 592 F2d 312, 79-1 USTC ¶ 9195, 4 Fed Rules Evid Serv 124, 43 AFTR 2d 79-538.

§ 1197 --Pertinent Uniform Commercial Code provisions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Pertinent provisions of the Uniform Commercial Code, for the purposes of Rule 902(9), include—

—UCC § 1-202, which provides that a document purporting to be a bill of lading (or one of several specified other types of documents) is "prima facie evidence" of its own authenticity.

—UCC § 3-114(3), which provides that where a negotiable instrument or any signature thereon is dated, the date is presumed to be correct.

—UCC § 3-307, which provides that a signature on a negotiable instrument is presumed to be genuine or authorized except in certain circumstances.

—UCC § 3-510, which provides for the admissibility of certain documents which create a presumption of dishonor and of any notice of dishonor shown therein.

—UCC § 8-105, stating that a signature on a security is presumed to be genuine or authorized. 14

◆ Comment: The Uniform Commercial Code's provisions concerning self-authentication are not intended only to resolve the issue of authenticity for the purpose of determining admissibility, but also affect the trier of fact's ultimate assessment of the authenticity of the evidence in question. The terms "presumption" or "presumed," as used in the Code, mean that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence. 15 The Code does not define the term "prima facie evidence," which is the term used in the self-authenticating provision of UCC § 1-202, but one authority has suggested that this term, like the term "presumption," means that the trier of fact must find the proffered item authentic, at least in the absence of counterproof. 16 Under Rule 302 of the Federal Rules of Evidence, it appears that federal courts applying the Uniform Commercial Code to determine the rights of litigants must apply the Code's provisions regarding the effect of a presumption on the findings of the trier of fact. 17

Footnotes

Footnote 14. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 902.

Annotation: Construction and effect of sec. 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 ALR3d 1243.

Footnote 15. UCC § 1-201(31).

As to the general definition of presumptions under the Uniform Commercial Code, see 15A Am Jur 2d, Commercial Code § 4. As to presumptions, generally, see §§ 181et seq.

Footnote 16. Louisell and Mueller, Federal Evidence § 537.

See also Bigham, Presumptions, Burden of Proof and the Uniform Commercial Code. 21 Vanderbilt L Rev 177 (1968) (§ 1-202 is intended to establish a preliminary assumption sufficient to support a finding of authenticity in the absence of contrary evidence).

Footnote 17. Louisell and Mueller, Federal Evidence § 77.

§ 1198 --Particular documents as self-authenticating

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Authentication of notes and security agreements is sufficient under Rule 902(9) where the Uniform Commercial Code, 18 as adopted in the forum state, provides that each signature on an instrument is admitted unless specifically denied in the pleadings. 19 Notes are sufficiently identified as promissory notes by their production and no further authentication is required by reason of Rule 902(9), since under § 3-307 of the Uniform Commercial Code, mere production of a note is prima facie evidence of its validity and of the holder's right to recover on it. 20 Without reference to any provision of the Uniform Commercial Code, one court has held that checks of a corporation were admissible in evidence under Rule 902(9) as commercial paper. 21 Another court has permitted the admission of checks written by a corporation under Rule 902(9) as self-authenticating commercial paper by virtue of the section of the Uniform Commercial Code 22 regarding what creates a presumption of dishonor. 23

Footnotes

Footnote 18. UCC § 3-307.

Footnote 19. Interfirst Bank of Abilene, N.A. v Lull Mfg. (CA5 Tex) 778 F2d 228, 19 Fed Rules Evid Serv 1141, 42 UCCRS 671.

Footnote 20. United States v Carriger (CA6 Mich) 592 F2d 312, 79-1 USTC ¶ 9195, 4 Fed Rules Evid Serv 124, 43 AFTR 2d 79-538.

Footnote 21. *United States v Little* (CA8 Ark) 567 F2d 346, 2 Fed Rules Evid Serv 830, cert den 435 US 969, 56 L Ed 2d 60, 98 S Ct 1608, reh den 438 US 909, 57 L Ed 2d 1153, 98 S Ct 3131.

Footnote 22. UCC § 3-510.

Footnote 23. *United States v Hawkins* (CA11 Fla) 905 F2d 1489, 30 Fed Rules Evid Serv 762, cert den 498 US 1038, 112 L Ed 2d 696, 111 S Ct 707.

§ 1199 Presumptions under state or federal acts

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 902(10) of the Uniform Rules of Evidence and the Federal Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any signature, document, or other matter declared by an act of Congress (or, in the case of the Uniform Rule, an act of the enacting state) to be presumptively or prima facie genuine or authentic. 24 This Rule dispenses with the necessity of preliminary proof of authenticity as governed by statute. 25

◆ Observation: Rule 902(10) is one of three provisions in Article IX of the Uniform and Federal Rules of Evidence which prevent the Rules from displacing other statutory provisions relating to authentication, the other two being Rule 901(b)(10), which preserves any method of authentication or identification provided by statute, 26 and Rule 902(4), which preserves the operative effect of statutes and rules on certified copies of public records. 27

Acts of Congress which declare matters to be presumptively or prima facie genuine or authentic include—

–1 USCS § 112, relating to statutes at large as legal evidence of laws.

–1 USCS § 113, relating to Little and Brown's Edition of Laws and Treaties as competent evidence without further proof or authentication thereof.

–1 USCS § 204, relating to the United States Code and District of Columbia Code as prima facie evidence of the law.

–10 USCS § 936(d), relating to a signature without seal of certain military personnel acting as notary, together with title of the office, as prima facie evidence of authority.

–14 USCS § 636(b), relating to a signature and indication of grade of any commissioned or warrant officer of the Coast Guard performing any notarial act as prima facie evidence of authority.

- 15 USCS § 77f(a), relating to a signature on a SEC registration, which is presumed genuine.
- 15 USCS § 1057(b), relating to a certificate of registration of a trademark as prima facie evidence of validity of the registration.
- 17 USCS § 204(b), relating to a certificate of acknowledgment as prima facie evidence of the execution of transfer of copyright ownership.
- 17 USCS § 410(c), relating to a certificate of registration made before or within 5 years after first publication of work as constituting prima facie evidence of validity of copyright and of facts stated in certificate.
- 19 USCS § 1615(2), relating to marks, labels, brands, or stamps indicating foreign origin as prima facie evidence of foreign origin of merchandise.
- 22 USCS § 4221, relating to a document bearing the seal and signature of a consular officer as admissible in evidence without further proof of the seal or signature being genuine.
- 26 USCS § 6062, relating to an individual's name on a corporate return as prima facie evidence of his authority to sign the return on behalf of the corporation.
- 26 USCS § 6063, relating to a partner's signature on a tax return as prima facie evidence that the partner is authorized to sign the return on behalf of the partnership.
- 26 USCS § 6064, relating to an individual's signature on a tax return as prima facie evidence of his signature.
- 26 USCS § 6340(b), relating to a copy of record of sale of property certified by the Secretary of the Treasury as evidence of truth of facts stated therein.
- 26 USCS § 7462, relating to Tax Court reports published by the government as competent evidence without further proof or authentication.
- 28 USCS § 1745, relating to certified copies of foreign patent documents as prima facie evidence of their contents and of the dates indicated on their face.
- 40 USCS § 270c, relating to a certified copy of a contractor's bond as prima facie evidence of the contents, execution, and delivery of original.
- 42 USCS § 269(b), relating to bills of health certified by proper consular or other officer as evidence of the statement therein.
- 44 USCS § 1507, relating to publication of a document in the Federal Register as creating a rebuttable presumption that it was duly issued, prescribed, or promulgated, and that the contents thereof may be judicially noted.
- 44 USCS § 1510(e), relating to documents codified in the Code of Federal Regulations as prima facie evidence of the text of the documents and of the fact that they are in effect on and after date of publication.

—46 USCS Appx § 823, relating to authorized publication of Federal Maritime Commission reports as competent evidence without further proof or authentication.

—47 USCS § 154(m), relating to reports and decisions of the Federal Communications Commission in publications authorized by the Commission as competent evidence without further proof or authentication thereof.

—47 USCS § 412, relating to copies of documents filed with the Federal Communications Commission as prima facie evidence of what they purport to be.

—49 USCS § 10303(b), relating to a public record, or copy of extract of record, certified by the secretary of the Interstate Commerce Commission under seal of the Commission as competent evidence.

—49 USCS § 10310(a), relating to published reports of the Interstate Commerce Commission as competent evidence of their contents.

—49 USCS Appx § 1503, relating to copies of records and reports filed with Department of Transportation as prima facie evidence of what they purport to be.

—50 USCS Appx § 581(1), relating to a signed certificate of military service as prima facie evidence as to certain facts stated in the certificate.

—50 USCS Appx § 581(2), relating to a signed certificate of military service as prima facie evidence of its contents and of the authority of the signer to issue the same.

§ 1199 ----Presumptions under state or federal acts [SUPPLEMENT]

Note: All sections then remaining in 49 USCS Appendix were repealed in 1994.

Statutes:

46 USCS Appx § 823 was repealed in 1995.

The ICC Termination Act of 1995 (PL 104-88) abolished the Interstate Commerce Commission and created the Surface Transportation Board (49 USCS §§ 701 et seq.), which has authority over rail, motor, water, and pipeline carriers. 49 USCS §§ 10303, 10310 were omitted in the Act.

Footnotes

Footnote 24. FRE, Rule 902(10); Uniform Rules of Evidence, Rule 902(10).

Footnote 25. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

Footnote 26. § 1048.

Footnote 27. § 1186.

§ 1200 Certified records of regularly conducted activity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 902(11) of the Uniform Rules of Evidence (which has no counterpart in the Federal Rules of Evidence but is based on a similar federal statute applicable to criminal proceedings) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (1) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters; (2) is kept in the course of the regularly conducted activity; and (3) was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. A record so certified, however, is not self-authenticating under this Rule unless its proponent makes an intention to offer it known to the adverse party, and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it. 28

◆ Comment: This Rule is based on 18 USCS § 3505, which provides for the exception from the hearsay rule, in federal criminal proceedings, of foreign records of regularly conducted activity, and for their authentication by certification. 29

As used in Rule 902(11) of the Uniform Rules of Evidence, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position of the individual executing the certificate, or of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States. 30

Footnotes

Footnote 28. Uniform Rules of Evidence, Rule 902(11).

Footnote 29. 13A ULA, Uniform Rules of Evidence, Rule 902, Comment to the 1986 Amendment.

As to the provisions of 18 USCS § 3505, generally, see § 1320.

c. Ancient Documents [1201-1211]

(1). Authentication [1201-1209]

§ 1201 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, a document purporting to be 30 or more years old is generally admissible in evidence without the ordinary requirements as to proof of execution and authenticity, 31 as long as it is produced from proper custody and is on its face free from suspicion, 32 and circumstances exist which corroborate its authenticity. 33 Under such circumstances any subscribing witnesses are presumed to be dead. 34 Even where such witnesses are shown to be living, 35 or are in court, 36 their testimony is not required to authenticate an ancient document.

◆ Observation: The presumption of the authenticity of an ancient document is rebuttable. 37

Footnotes

Footnote 31. *McGuire v Blount*, 199 US 142, 50 L Ed 125, 26 S Ct 1; *Applegate v Lexington & Carter County Mining Co.*, 117 US 255, 29 L Ed 892, 6 S Ct 742; *Ninety Six v Southern R. Co. (CA4 SC)* 267 F2d 579; *Ford v Ford*, 27 App DC 401; *Woods v Montevallo Coal & Transp. Co.*, 84 Ala 560, 3 So 475; *Garbarino v Noce*, 181 Cal 125, 183 P 532, 6 ALR 1433; *New York, N. H. & H. R. Co. v Cella*, 88 Conn 515, 91 A 972; *Clark v Cochran*, 79 Fla 788, 85 So 250; *Bunger v Grimm*, 142 Ga 448, 83 SE 200; *Sinkora v Wlach*, 239 Iowa 1392, 35 NW2d 40; *Crane v Marshall*, 16 Me 27; *Jasper Tp. v Martin*, 161 Mich 336, 126 NW 437; *Nixon v Porter*, 34 Miss 697; *Anderson v Anderson*, 150 Neb 879, 36 NW2d 287; *Gibson v Poor*, 21 NH 440; *Fairchild v Union Ferry Co.*, 121 Misc 513, 201 NYS 295, affd 212 App Div 823, 207 NYS 835, affd 240 NY 666, 148 NE 750; *Spears v Randolph*, 241 NC 659, 86 SE2d 263; *Blake v Marshall (Tex Civ App)* 279 SW 612; *Executors of Booge v Parsons*, 2 Vt 456.

For discussion of ancient deeds as self-authenticating, see § 1251.

Practice References 50 Am Jur POF2d 321, Ancient Documents.

Footnote 32. § 1204.

Footnote 33. § 227, 299.

Footnote 34. *Smythe v New Providence Tp.* (CA3 NJ) 263 F 481; *Ninety Six v Southern R. Co.* (CA4 SC) 267 F2d 579; *Nixon v Porter*, 34 Miss 697.

Footnote 35. *Jackson v Christman* (NY) 4 Wend 277; *Magee v Paul*, 110 Tex 470, 221 SW 254.

Footnote 36. *Nixon v Porter*, 34 Miss 697.

Footnote 37. *Nicholson v Eureka Lumber Co.*, 156 NC 59, 72 SE 86 (superseded by statute on other grounds as stated in *State v Le Duc*, 306 NC 62, 291 SE2d 607).

§ 1202 Scope and limitations of rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The general rule dispensing with proof of authenticity of ancient documents is a rule of authentication and not a rule of admissibility. 38 The fact that an instrument is an ancient document does not affect its admissibility in evidence other than to dispense with the need for proof of its genuineness. 39 The issue of a document's relevancy is not affected by the fact that it is an ancient document. 40 An ancient document has no effect as evidence unless it serves to import verity to the facts represented or written therein, 41 and such a document is admitted in evidence as proof of the facts recited in it provided that the writer of the document would have been competent to testify as to such facts. 42

An instrument which is not valid upon its face because of a want of due execution cannot be admitted in evidence as an ancient document without proof of execution. 43 However, mere omissions or irregularities which do not render an instrument invalid do not affect its admissibility as an ancient document. 44

Footnotes

Footnote 38. *Ninety Six v Southern R. Co.* (CA4 SC) 267 F2d 579.

Footnote 39. *Ninety Six v Southern R. Co.* (CA4 SC) 267 F2d 579.

Footnote 40. *Robinson v Peterson*, 200 Va 186, 104 SE2d 788.

Footnote 41. *Kirkpatrick v Tapo Oil Co.* (2nd Dist) 144 Cal App 2d 404, 301 P2d 274.

Footnote 42. *Kirkpatrick v Tapo Oil Co.* (2nd Dist) 144 Cal App 2d 404, 301 P2d 274; *State Dept. of Roads v Parks*, 185 Neb 794, 178 NW2d 788.

Footnote 43. *Meegan v Boyle*, 60 US 130, 19 How 130, 15 L Ed 577; *O'Neal v Tennessee C., I. & R. Co.*, 140 Ala 378, 37 So 275; *Fell v Young*, 63 Ill 106.

Footnote 44. Ward v Cameron (Tex Civ App) 76 SW 240, affd 97 Tex 466, 80 SW 69.

§ 1203 Copies of ancient documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the original of an ancient document is no longer in existence, or has become so defaced as to be unintelligible, a copy or tracing of it, properly authenticated, may be admissible in evidence. 45 However, there must be some proof of the execution of the original. 46

Footnotes

Footnote 45. Ayers v Watson, 137 US 584, 34 L Ed 803, 11 S Ct 201; Spokane v Catholic Bishop of Spokane, 33 Wash 2d 496, 206 P2d 277.

Footnote 46. Schunior v Russell, 83 Tex 83, 18 SW 484.

§ 1204 Proper custody; absence of suspicious circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To be admissible without proof of authenticity, an ancient document must on its face be free from suspicion and must come from proper custody. 47 Where proof of proper custody is not shown, the document is not admissible without proof of its execution and authenticity. 48 Where the document shows an alteration on its face, the party offering it as evidence must explain the alteration. 49

Ancient documents are from proper custody if they come from a place from which they might reasonably be expected to be found. 50 Custody is proper if it is proved to have had a legitimate origin or if the circumstances of the particular case are such as to render such an origin probable. 51 If a document is found where it would not properly and naturally be, its absence from the proper place must be satisfactorily accounted for. 52

◆ Observation: It has been held that proof of custody may be dispensed with if the document in question bears internal evidence that manifests its age and authenticity. 53

Footnotes

Footnote 47. *McGuire v Blount*, 199 US 142, 50 L Ed 125, 26 S Ct 1; *State Dept. of Roads v Parks*, 185 Neb 794, 178 NW2d 788; *In re Estate of Kirkby*, 57 Misc 2d 982, 293 NYS2d 1008, reh den 59 Misc 2d 584, 299 NYS2d 873; *Solomon v Beck* (Tex Civ App Beaumont) 387 SW2d 911.

Rule 601 of the Model Code of Evidence of the American Law Institute provides that a writing, offered in evidence as authentic, is admissible, if the judge finds that the writing is at least 30 years old at the time it is so offered, and is in such condition as to create no suspicion concerning its authenticity, and at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found.

Footnote 48. *Gates v McCormick*, 176 NC 640, 97 SE 626; *Sage v Dayton Coal & Iron Co.*, 148 Tenn 1, 251 SW 780.

Footnote 49. *Muehrcke v Behrens*, 43 Wis 2d 1, 169 NW2d 86.

Footnote 50. *McGuire v Blount*, 199 US 142, 50 L Ed 125, 26 S Ct 1.

Footnote 51. *Nicholson v Eureka Lumber Co.*, 156 NC 59, 72 SE 86 (superseded by statute on other grounds as stated in *State v Le Duc*, 306 NC 62, 291 SE2d 607).

Practice References Proof of proper location, origin, or custody of ancient document. 50 Am Jur POF2d 321, Ancient Documents, § 6.

Footnote 52. *Gibson v Poor*, 21 NH 440.

Footnote 53. *Commonwealth ex rel. Ferguson v Ball*, 277 Pa 301, 121 A 191, 29 ALR 626 (book that is 115 years old, bearing on its face evidence of age, is admissible without proof that it comes from proper custody).

§ 1205 Corroborating circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Unless an applicable statute provides otherwise, the acceptance of an ancient document into evidence without the usually followed modes of authentication requires some corroborating evidence of authenticity beyond its production from a proper custody. 54 In the case of an ancient deed, possession of the realty to which the deed pertains, in reliance on the deed, is the most usually offered and strongest form of corroboration, but is not indispensable; other corroborative circumstances, though circumstantial, may suffice to establish the antiquity and integrity of the document. 55

Footnotes

Footnote 54. *McGuire v Blount*, 199 US 142, 50 L Ed 125, 26 S Ct 1; *Smythe v New Providence Tp.* (CA3 NJ) 263 F 481; *Ninety Six v Southern R. Co.* (CA4 SC) 267 F2d

579; *Woods v Montevallo Coal & Transp. Co.*, 84 Ala 560, 3 So 475; *Garbarino v Noce*, 181 Cal 125, 183 P 532, 6 ALR 1433; *Clark v Cochran*, 79 Fla 788, 85 So 250; *Pridgen v Green*, 80 Ga 737, 7 SE 97; *James v Davis*, 172 Ky 381, 189 SW 440; *Homer v Cilley*, 14 NH 85; *Clark v Owens*, 18 NY 434; *Wilson v Simpson*, 80 Tex 279, 16 SW 40; *Bank of Middlebury v Rutland*, 33 Vt 414.

Footnote 55. § 1251.

§ 1206 Document executed by fiduciary or officer

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where an ancient instrument purports to have been executed under a power of attorney issuing from an individual, and the elements of proper custody and freedom from suspicion are shown, the instrument is admissible in evidence without further proof either of the genuineness of the execution or the existence of the power. 56 However, where an instrument purports to have been executed by an executor, administrator, guardian, receiver, sheriff, constable, or other officer, under authority which in the ordinary course would appear from judicial or other public records, the instrument even though ancient is not admissible in evidence, nor is it to be regarded as having been effectual, as in the passing of title, unless record proof of the authority is produced if available. 57 If records which supposedly once disclosed the authority of the fiduciary or officer are shown to have been lost or destroyed, the court, under the law of secondary evidence, may give such effect to recitals in the ancient instrument, or make such presumptions from a partial record or other circumstances, as to admit the instrument in evidence, give it prima facie effect, or give it full effect according to its terms. 58 In particular, when the records of a very old proceeding purport, in portions still preserved, to have given the authority claimed, the courts may make reasonable presumptions as to the sufficiency of intermediate steps, or those inferentially indicated. 59

Footnotes

Footnote 56. *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428.

Footnote 57. *Koch v Streuter*, 232 Ill 594, 83 NE 1072; *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428.

Footnote 58. *Wilson v Snow*, 228 US 217, 57 L Ed 807, 33 S Ct 487; *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428.

Footnote 59. *Beers v Hotchkiss*, 256 NY 41, 175 NE 506.

§ 1207 Provisions of Uniform and Federal Rules of Evidence, generally

The "ancient document" rule of the common law with respect to authentication has been codified, with some changes, in Rule 901(b)(8) of the Uniform Rules of Evidence and the Federal Rules of Evidence. Rule 901(b)(8) includes data stored electronically or by other similar means. 60 Under the Rule, documents or data compilations may be authenticated or identified as a condition precedent to admissibility by evidence that the document or data compilation, in any form:

- (1) is in such condition as to create no suspicion concerning its authenticity;
- (2) was in a place where it, if authentic, would likely be; and
- (3) has been in existence 20 years or more at the time it is offered. 61

Rule 901(b)(8) is not limited to title documents, nor is it subject to any requirement that possession, in the case of a title document, has been consistent with the document. 62

◆ **Observation:** The common-law period of 30 years is reduced under Rule 901(b)(8) to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikelihood of a still viable fraud after the lapse of time. 63 Since the importance of appearance diminishes in the case of data stored electronically or by other similar means, the importance of custody or place where such data is found increases correspondingly under the Rule. 64

A document need not bear a date to be admissible under the Rule if the circumstances of its source or custody indicate that it is old enough to qualify for authentication under the Rule. 65 Furthermore, it is not necessary to show a chain of custody for ancient documents; the Rule merely requires that the document be found in the place where, if authentic, it would likely be. 66 Although reasonable custody of the document must be established, the document need not have remained in the same place for the entire custodial period. 67

Footnotes

Footnote 60. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Law Reviews: Pyle and Mockbee, Authentication and Identification, 49 Miss LJ 151, 176 (1978).

Practice References 14 Am Jur POF2d 173, Admissibility of Computerized Business Records.

Footnote 61. FRE, Rule 901(b)(8); Uniform Rules of Evidence Rule 901(b)(8).

Footnote 62. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 63. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 64. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 65. *Kath v Burlington N. R. Co.* (Minn App) 441 NW2d 569 (document which was found in file containing other documents bearing dates from the 1930's, and which appeared to be of similar age as those documents, was properly authenticated as an ancient document though it bore no date).

Footnote 66. *United States v Kairys* (CA7 Ill) 782 F2d 1374, 19 Fed Rules Evid Serv 1184, cert den 476 US 1153, 90 L Ed 2d 703, 106 S Ct 2258, later proceeding (CA7) 981 F2d 937, reh, en banc, den (CA7) 1993 US App LEXIS 2374 and cert den (US) 123 L Ed 2d 460, 113 S Ct 1832 and (among conflicting authorities on other grounds noted in *Petkiewytsch v INS* (CA6) 945 F2d 871).

Footnote 67. *LaRocca, Authentication, Identification, and the Best Evidence Rule*, 36 La L Rev 185, 203 (1978).

§ 1208 --Requirement that document be in such condition as to create no suspicion of inauthenticity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The question whether a proffered document is suspicious within the meaning of Rule 901(b)(8) 68 and therefore inadmissible is a matter for the trial court's discretion. Although the Rule requires that the document be free of suspicion, that suspicion goes not to the contents of the document, but rather to whether the document is what it purports to be. 69

◆ Comment: The language of Rule 901(b)(8) appears to indicate that even a slight suspicion that a document is not genuine is sufficient to remove it from the scope of the Rule. However, at least one court has held that allegedly forged documents were self-authenticating under the Rule even though the trial court failed to determine whether the documents were forgeries; the possibility of forgery, said the court, goes to the weight and not the admissibility of the evidence. 70

Footnotes

Footnote 68. FRE, Rule 901(b)(8); Uniform Rules of Evidence Rule 901(b)(8).

Footnote 69. *Threadgill v Armstrong World Industries, Inc.* (CA3 Del) 928 F2d 1366, CCH Prod Liab Rep ¶ 12828, 32 Fed Rules Evid Serv 699; *United States v Kairys* (CA7 Ill) 782 F2d 1374, 19 Fed Rules Evid Serv 1184, cert den 476 US 1153, 90 L Ed 2d 703, 106 S Ct 2258, later proceeding (CA7) 981 F2d 937, reh, en banc, den (CA7) 1993 US App LEXIS 2374 and cert den (US) 123 L Ed 2d 460, 113 S Ct 1832 and (among

conflicting authorities on other grounds noted in *Petkiewytsch v INS* (CA6) 945 F2d 871).

Footnote 70. *United States v Koziy* (CA11 Fla) 728 F2d 1314, 15 Fed Rules Evid Serv 250, 77 ALR Fed 363, cert den 469 US 835, 83 L Ed 2d 70, 105 S Ct 130 and (among conflicting authorities on other grounds noted in *Maikovskis v Immigration & Naturalization Service* (CA2) 773 F2d 435) and (criticized on other grounds by *United States v Kungys* (CA3 NJ) 793 F2d 516).

§ 1209 --Authentication of particular documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 901(b)(8) 71 has been held applicable to authenticate:

- (1) personal records of an officer of a corporation which manufactured products containing asbestos, which records indicated that the industry was aware of the dangers of asbestos as early as the 1930's; 72
- (2) baptismal certificates and a marriage certificate obtained from a church in Poland; 73
- (3) a card identifying a defendant in denaturalization proceedings as having been a member of the German Waffen Schutzstaffel (SS) during World War II; 74
- (4) minutes of the Asbestos Textile Institute indicating that asbestos hazards were discussed at meetings of the Asbestos Textile Institute as early as the 1940's, where the minutes were produced by an executive secretary of the Asbestos Textile Institute from that organization's files, where the opponents did not seriously suggest that the files had been tampered with, and where the plaintiffs were prepared to introduce the depositions of individuals who could identify specific minutes from personal knowledge; 75
- (5) documents concerning the defendant in a naturalization revocation action during a time when the defendant was mayor of Kaunas, Lithuania, during the Nazi occupation, including a copy of a German-language newspaper which referred to the defendant as mayor, a copy of the Kaunas daily newspaper also referring to the defendant as mayor, translations of orders from the defendant signed in his capacity as mayor, and memos from other government officials to the defendant as mayor. 76

However, corporate memoranda of the requisite age may be held inadmissible under Rule 901(b)(8) if they are not found in the corporate records. 77

Footnotes

Footnote 71. FRE, Rule 901(b)(8); Uniform Rules of Evidence Rule 901(b)(8).

Footnote 72. *In re Rhode Island Asbestos Cases* (DC RI) 11 Fed Rules Evid Serv 444;

Threadgill v Armstrong World Industries, Inc. (CA3 Del) 928 F2d 1366, CCH Prod Liab Rep ¶ 12828, 32 Fed Rules Evid Serv 699.

Footnote 73. Matuszewski v Pancoast (Cuyahoga Co) 38 Ohio App 3d 74, 526 NE2d 80, later proceeding (Cuyahoga Co) 65 Ohio App 3d 650, 584 NE2d 1312 and motion overr.

Footnote 74. United States v Kairys (CA7 Ill) 782 F2d 1374, 19 Fed Rules Evid Serv 1184, cert den 476 US 1153, 90 L Ed 2d 703, 106 S Ct 2258, later proceeding (CA7) 981 F2d 937, reh, en banc, den (CA7) 1993 US App LEXIS 2374 and cert den (US) 123 L Ed 2d 460, 113 S Ct 1832 and (among conflicting authorities on other grounds noted in Petkiewytsch v INS (CA6) 945 F2d 871).

Footnote 75. In re Related Asbestos Cases (ND Cal) 543 F Supp 1152, 11 Fed Rules Evid Serv 899, 13 ELR 20294.

Footnote 76. United States v Palciauskas (MD Fla) 559 F Supp 1294, 12 Fed Rules Evid Serv 1674, affd (CA11) 734 F2d 625, later proceeding (CA11) 939 F2d 963.

Footnote 77. Dartez v Fibreboard Corp. (CA5 Tex) 765 F2d 456, CCH Prod Liab Rep ¶ 10873, 19 Fed Rules Evid Serv 137, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301.

(2). As Excepted From Rule Against Hearsay [1210, 1211]

§ 1210 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

At common law, some courts held that the rule concerning admissibility of ancient documents related only to the admissibility of such documents and did not overcome any objection based on their character as hearsay, unless the document was a deed. 78 Other courts permitted the admission of ancient documents as proof of facts recited therein, notwithstanding that such recitations were hearsay, if the writer would have been competent to testify to such facts. 79

§ 1210 ----Generally [SUPPLEMENT]

Case authorities:

Accounting acquisition cards prepared between 1925 and 1935 which were admittedly authentic or stipulated to were admissible under ancient documents exception to hearsay rule for proof of what was contained in them, i.e., corporate histories of acquired companies, mergers, liquidations, and transfers of assets. Kraft, Inc. v United States (1994) 30 Fed Cl 739, 1994 US Claims LEXIS 16, 94-1 USTC ¶ 50080.

Footnotes

Footnote 78. *Ninety Six v Southern R. Co.* (CA4 SC) 267 F2d 579; *King v Watkins* (CC Va) 98 F 913, *revd on other grounds* (CA4 Va) 118 F 524.

Footnote 79. *Kirkpatrick v Tapo Oil Co.* (2nd Dist) 144 Cal App 2d 404, 301 P2d 274; *State Dept. of Roads v Parks*, 185 Neb 794, 178 NW2d 788.

§ 1211 Provisions of Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(16) provides that statements in a document in existence 20 years or more, the authenticity of which is established, are excepted from the rule against hearsay. 80 This exception applies to all sorts of documents, in addition to letters, records, contracts, maps, and certificates, 81 including:

- memoranda exchanged between the president of a products liability defendant and the defendant's attorney, concerning the health risks associated with the product in question 82
 - minutes of committee meetings 83
 - foreign employment documents 84
 - letters and articles in periodicals to reconstruct facts bearing on alleged copyright infringement 85
 - newspaper articles 86
 - an inscription on the back of a family photograph 87
 - an unpublished report containing a study of asbestos manufacturing plants 88
- ◆ Observation: Inasmuch as a self-authenticating document under Rule 901(b)(8) must be at least 20 years old, a document authenticated under Rule 901(b)(8) is within the exception to the hearsay rule contained in Rule 803(16). 89
- ◆ Practice guide: Documents may be admitted under FRE, Rule 803(16) even though they are less than 20 years old where they are used to show how the events of the day were being recorded. 90

Footnotes

Footnote 80. FRE, Rule 803(16); Uniform Rules of Evidence Rule 803(16).

Footnote 81. Advisory Committee Notes to Federal Rules of Evidence, Rule 803.

Annotation: Admissibility in evidence of ancient maps and the like, 46 ALR2d 1318.

Practice References 50 Am Jur POF2d 321, Ancient Documents.

Hunter, Federal Trial Handbook 2d § 69:27.

Louisell and Mueller, Federal Evidence § 464.

Footnote 82. Dartez v Fibreboard Corp. (CA5 Tex) 765 F2d 456, CCH Prod Liab Rep ¶ 10873, 19 Fed Rules Evid Serv 137, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301 (excluded because not properly authenticated).

Footnote 83. Dartez v Fibreboard Corp. (CA5 Tex) 765 F2d 456, CCH Prod Liab Rep ¶ 10873, 19 Fed Rules Evid Serv 137, appeal after remand (CA5 Tex) 910 F2d 1291, 31 Fed Rules Evid Serv 1, cert den (US) 119 L Ed 2d 224, 112 S Ct 2301 (excluded because not properly authenticated).

Footnote 84. United States v Koziy (CA11 Fla) 728 F2d 1314, 15 Fed Rules Evid Serv 250, 77 ALR Fed 363, cert den 469 US 835, 83 L Ed 2d 70, 105 S Ct 130 and (among conflicting authorities on other grounds noted in Maikovskis v Immigration & Naturalization Service (CA2) 773 F2d 435) and (criticized on other grounds by United States v Kungys (CA3 NJ) 793 F2d 516).

Footnote 85. Bell v Combined Registry Co. (CA7 Ill) 536 F2d 164, 191 USPQ 493, cert den 429 US 1001, 50 L Ed 2d 612, 97 S Ct 530, 192 USPQ 121.

Footnote 86. Bell v Combined Registry Co. (ND Ill) 397 F Supp 1241, 188 USPQ 707, affd (CA7 Ill) 536 F2d 164, 191 USPQ 493, cert den 429 US 1001, 50 L Ed 2d 612, 97 S Ct 530, 192 USPQ 121 and (superseded by statute on other grounds as stated in Canfield v Ponchatoula Times (CA5 La) 759 F2d 493, 11 Media L R 2040, 226 USPQ 112, 91 ALR Fed 319); Ammons v Dade City (MD Fla) 594 F Supp 1274, affd (CA11 Fla) 783 F2d 982, reh den, en banc (CA11 Fla) 788 F2d 1570.

Annotation: Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Footnote 87. In re Estate of Egbert, 105 Mich App 395, 306 NW2d 525.

Footnote 88. George v Celotex Corp. (CA2 NY) 914 F2d 26, CCH Prod Liab Rep ¶ 12644, 31 Fed Rules Evid Serv 30.

Footnote 89. Threadgill v Armstrong World Industries, Inc. (CA3 Del) 928 F2d 1366, CCH Prod Liab Rep ¶ 12828, 32 Fed Rules Evid Serv 699; Romohr v Frank, 20 Ohio Misc 2d 4, 20 Ohio BR 207, 485 NE2d 841.

d. Authentication of Handwriting [1212-1219]

§ 1212 Nonexpert opinion

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 901(b)(2), a nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for the purposes of the litigation, constitutes sufficient authentication or identification as a condition precedent to the admissibility of the handwriting. 91 This provision states the conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him or her write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. 92

It is not permissible under Rule 901(b)(2) to allow nonexpert testimony concerning the genuineness of handwriting where the nonexpert's familiarity with the handwriting was obtained by comparing the purported signature to another sample of that person's signature for the purposes of litigation. 93 Testimony based on familiarity with handwriting acquired for purposes of the litigation is reserved for expert witnesses under Rule 901(b)(3). 94

§ 1212 ----Nonexpert opinion [SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

27 Am Jur Proof of Facts 3d 489, Forensic Identification of Handwriting

Footnotes

Footnote 91. FRE, Rule 901(b)(2); Uniform Rules of Evidence Rule 901(b)(2).

Footnote 92. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Annotation: Construction and application of Rule 701 of Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain circumstances, 44 ALR Fed 919.

Practice References 15 Am Jur POF3d 595, Questioned Document

Examination—Identification of Handwriting on Document.

Footnote 93. *United States v Pitts* (CA5 Ga) 569 F2d 343, 3 Fed Rules Evid Serv 222, cert den 436 US 959, 57 L Ed 2d 1125, 98 S Ct 3076.

Footnote 94. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

As to the provisions of Rule 901(b)(3), see § 1215.

§ 1213 --What constitutes adequate familiarity with another's handwriting

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

While Rule 901(b)(2) 95 does not require any minimum number of observations of another person's handwriting to permit a nonexpert witness to offer authentication testimony, and the extent of the witness' familiarity with the handwriting in question generally goes to the weight to be accorded his or her testimony, rather than its admissibility, there must be a minimal factual basis from which knowledge of the handwriting might reasonably have been acquired, in the absence of which the witness' testimony may be excluded. 96 A witness may have adequate familiarity with the handwriting of a particular person if the witness has seen writings purporting to be those of the person in question under circumstances indicating the genuineness of the writings. 97

◆ Comment: One writer has suggested that proffered testimony by a nonexpert witness to authenticate handwriting may be excluded under Rule 602 (which provides that a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that such witness has personal knowledge of the matter) if the court is not satisfied that the witness has sufficient familiarity with the handwriting in question to make a reasonably reliable identification. 98

◆ Practice guide: In view of the possibility that aggressive cross-examination of a nonexpert witness' identification of handwriting could destroy the probative value of the identification, counsel attempting to authenticate handwriting in this manner should do so only if there is no practical alternative and then only after exhaustive preparation of the witness. When cross-examining a nonexpert witness who has made an identification of handwriting, counsel should inquire as to (1) the extent of the witness' familiarity with the handwriting; (2) the witness' training and experience in identifying handwriting; and (3) whether the witness would rely on the handwriting he or she has identified in an ordinary business transaction. In addition, counsel should ask the witness to select genuine specimens from a group which includes artfully drawn forgeries. 99

§ 1213 --What constitutes adequate familiarity with another's handwriting

[SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

Footnotes

Footnote 95. FRE, Rule 901(b)(2); Uniform Rules of Evidence Rule 901(b)(2).

Footnote 96. United States v Binzel (CA7 Ill) 907 F2d 746, 30 Fed Rules Evid Serv 695.

Footnote 97. United States v Standing Soldier (CA8 SD) 538 F2d 196, 1 Fed Rules Evid Serv 255, cert den 429 US 1025, 50 L Ed 2d 627, 97 S Ct 646 and (criticized on other grounds by United States v Ylida (CA5 Tex) 643 F2d 348) (witness, who prior to trial compared signature on a note with that of the defendant on a signed statement which was clearly made in circumstances indicating its genuineness, possessed adequate familiarity with defendant's signature to authenticate the note).

Footnote 98. LaRocca, Authentication, Identification, and the Best Evidence Rule. 36 La L Rev 185 (1975).

Footnote 99. Pyle and Mockbee, Authentication and Identification. 49 Miss L J 151 (1978).

§ 1214 --Sufficiency in particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Authentication of a document by means of a nonexpert's opinion as to the genuineness of handwriting under Rule 901(b)(2) 1 can be established by the testimony of:

- a witness who is familiar with the handwriting and signature of signers of promissory notes 2
- a bank employee who testifies that signatures on checks match signatures of the signer's bank signature card 3
- a witness who testifies respecting the signatures and initialings of a particular person, where the witness testifying has known the person for a number of years, was his supervisor at a bank, and has taught him his job 4
- two persons who signed a lease in different capacities identifying their signatures and the signature of one of the principals, the lease having been introduced to show that the defendants, including the identified principal, were not eligible to receive milk subsidies and had submitted a false claim for them because they had leased their dairy 5

- the wife in a divorce case identifying an envelope as bearing the handwriting of her husband's mother 6
- a witness that she has frequently observed a judge signing his name and that the signature on a search warrant is his 7

§ 1214 --Sufficiency in particular circumstances [SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

Footnotes

Footnote 1. FRE, Rule 901(b)(2); Uniform Rules of Evidence Rule 901(b)(2).

Footnote 2. United States v Carriger (CA6 Mich) 592 F2d 312, 79-1 USTC ¶ 9195, 4 Fed Rules Evid Serv 124, 43 AFTR 2d 79-538.

Footnote 3. United States v Johnson (CA7 Ill) 805 F2d 753, 22 Fed Rules Evid Serv 44.

Footnote 4. United States v Gallagher (CA3 NJ) 576 F2d 1028, 3 Fed Rules Evid Serv 218, appeal after remand (CA3 NJ) 602 F2d 1139, cert dismd 444 US 1040, 62 L Ed 2d 675, 100 S Ct 713 and cert den 444 US 1043, 62 L Ed 2d 728, 100 S Ct 729 and appeal after remand (CA3 NJ) 602 F2d 1143 and (criticized on other grounds by United States v Clark (CA2 NY) 765 F2d 297).

Footnote 5. United States v Whittington (CA5 La) 783 F2d 1210, 20 Fed Rules Evid Serv 171, adhered to, reh den (CA5 La) 786 F2d 644, cert den 479 US 882, 93 L Ed 2d 246, 107 S Ct 269.

Footnote 6. Veilleux v Veilleux (Me) 565 A2d 95.

Footnote 7. Acosta v State (Tex App Corpus Christi) 752 SW2d 706, petition for discretionary review ref (Nov 30, 1988).

§ 1215 Comparison by trier of fact or expert witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 901(b)(3), authentication or identification of a document may be by way of comparison of the document by the trier of fact or by an expert witness with specimens which have been authenticated. 8 Under the Rule, an expert's testimony concerning comparisons for the purpose of authentication may be based upon familiarity acquired

solely for the purposes of the litigation, 9 and a party may move to compel a person to provide handwriting exemplars in order to provide a basis for comparison under the Rule. 10

◆ **Comment:** Compelling an accused to provide a handwriting exemplar for the purposes of comparison with a disputed writing does not abrogate his or her privilege against self-incrimination under the Federal Constitution, 11 as long as the nature of the material to be written is not essentially testimonial (such as particulars of the alleged crime). 12 A state constitutional privilege against self-incrimination may be more protective of an accused in this respect than the Federal Constitution. 13

A jury may generally make handwriting comparisons between an exemplar and a disputed document in the absence of expert testimony, except in extreme or unusual circumstances. 14

◆ **Practice guide:** Inasmuch as a jury may usually make its own handwriting comparison independently of expert testimony, counsel eliciting direct testimony of an expert in this respect should completely develop foundation testimony as to the expert's background, training, skill, the manner in which the comparison has been made, and the expert's reasons for reaching his or her conclusion; such foundation testimony will determine the weight given by the jury to the expert's testimony. The use of enlarged photographs of the exemplar and the disputed document may be helpful.

§ 1215 ----Comparison by trier of fact or expert witness [SUPPLEMENT]

Practice Aids: 23 Am Jur Proof of Facts 3d 621, Examination and Identification of Photocopies and Photocopiers.

24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

25 Am Jur Proof of Facts 3d 637, Illegible Signatures and Handwriting in Litigation.

27 Am Jur Proof of Facts 3d 489, Forensic Identification of Handwriting

Footnotes

Footnote 8. FRE, Rule 901(b)(3); Uniform Rules of Evidence Rule 901(b)(3).

Footnote 9. Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 901.

Footnote 10. United States v Clifford (CA3 Pa) 704 F2d 86, 12 Fed Rules Evid Serv 870.

Footnote 11. United States v Jackson (CA7 Ind) 886 F2d 838, 28 Fed Rules Evid Serv 1141 (criticized on other grounds by United States v Colon (CA2 NY) 905 F2d 580).

Annotation: Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Footnote 12. United States v Green (SD Ind) 282 F Supp 373.

Footnote 13. *State v Armstead*, 152 Ga App 56, 262 SE2d 233 (compelling accused to produce handwriting exemplar violated his rights under the state constitution).

Footnote 14. *United States v Jenkins* (CA9 Nev) 785 F2d 1387, 20 Fed Rules Evid Serv 192, cert den 479 US 855, 93 L Ed 2d 125, 107 S Ct 192 and cert den 479 US 889, 93 L Ed 2d 262, 107 S Ct 288 (extreme or unusual circumstances involve situations where the authenticity of the handwriting is the primary issue in the case, as where forgery is alleged; fact that exemplar in the instant case was an incomplete signature was not an extreme or unusual circumstance).

Annotation: Propriety of jury, or court sitting as trier of facts, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness, 80 ALR2d 272.

§ 1216 Proof required to establish genuineness of exemplar offered for comparison

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The testimony of an eyewitness that he or she saw the execution of a handwriting exemplar offered for comparison with a disputed handwritten document to test its authenticity is sufficient to establish its genuineness, 15 and some authority holds that nothing short of such evidence will suffice, absent an admission of genuineness. 16 Several courts have taken the view that genuineness of an exemplar may be shown by the testimony of persons who are familiar with the handwriting of the person who allegedly gave the exemplar, 17 although contrary authority also exists. 18 It is also permissible to establish genuineness by circumstantial evidence, 19 or by the fact that the exemplar was notarized. 20 Where a party relies upon an instrument containing handwriting sought to be used as an exemplar for comparison with a disputed writing in the same case, he or she will be estopped from denying its genuineness. 21 An extrajudicial acknowledgment or admission of its genuineness can have the same effect. 22

◆ Practice guide: Whether the proof of genuineness of an exemplar is sufficient to permit its introduction into evidence is a question for the trial court, although the ultimate determination as to its genuineness is for the jury. 23

While pre-Rules statutes and the common law have sometimes set a higher standard of proof for the authenticity of a handwriting exemplar offered for comparison with a disputed handwritten document to test its authenticity, under Rule 901(b)(3) of the Federal Rules of Evidence the standard of proof is no higher than for any other document proffered as evidence. 24 Where the source of the exemplar is not stipulated, it may be authenticated by nonexpert testimony under Rule 901(b)(2). 25

§ 1216 ----Proof required to establish genuineness of exemplar offered for comparison [SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

27 Am Jur Proof of Facts 3d 489, Forensic Identification of Handwriting

Footnotes

Footnote 15. Appeal of Darcy, 114 NJ Super 454, 277 A2d 226.

Annotation: Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 ALR2d 575.

Footnote 16. Rauenzahn v Sigman, 383 Pa 439, 119 A2d 312.

Footnote 17. Goodman v State, 167 Ga App 378, 306 SE2d 417; State v Fernandez, 28 Wash App 944, 628 P2d 818, remanded without op 94 Wash 2d 1026 and on reconsideration, adhered to 29 Wash App 278, 628 P2d 827, review den 96 Wash 2d 1003 and mod on other grounds (Wash App) 640 P2d 731.

Footnote 18. Hagan v Higgins (Ky) 453 SW2d 579; McCormick v State (Miss) 456 So 2d 764.

Footnote 19. State v Clark (Mo) 592 SW2d 709, cert den 449 US 847, 66 L Ed 2d 57, 101 S Ct 132, later proceeding (Mo App) 689 SW2d 644.

Note left in jail by accused, giving reasons for his departure, was properly admitted in evidence as exemplar of his handwriting where prosecution demonstrated chain of custody of note from jail to its presentation at trial. Wilson v State, 277 Ark 43, 639 SW2d 45, habeas corpus proceeding (CA8 Ark) 892 F2d 754.

Footnote 20. State v Fernandez, 28 Wash App 944, 628 P2d 818, remanded without op 94 Wash 2d 1026 and on reconsideration, adhered to 29 Wash App 278, 628 P2d 827, review den 96 Wash 2d 1003 and mod (Wash App) 640 P2d 731.

Footnote 21. Castor v Bernstein, 2 Cal App 703, 84 P 244.

Footnote 22. Snider v Preachers Aid Soc., 111 Ind App 410, 41 NE2d 665.

Footnote 23. State v Boyington (Mo App) 544 SW2d 300; State v Woodmansee, 128 Vt 467, 266 A2d 448.

Footnote 24. Advisory Committee Notes to Federal Rules of Evidence, Rule 901 (noting that this approach is consistent with 28 USCS § 1731, which provides that the admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person).

Footnote 25. United States v Mauchlin (CA7 Ill) 670 F2d 746, 10 Fed Rules Evid Serv 256 (exemplar, which consisted of papers appearing in defendant's prison file and

purportedly written by him, was authenticated by prison official who for 16 months had daily contact with defendant and had seen him write on approximately six occasions).

§ 1217 Propriety of using exemplar made after controversy arose

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Whether a handwriting exemplar which was made after the controversy leading to suit arose may be used to establish the authenticity of a disputed writing generally depends upon the circumstances under which the exemplar was made. 26 In some jurisdictions the use of such exemplars may be precluded by statute. 27

§ 1217 ----Propriety of using exemplar made after controversy arose [SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

Footnotes

Footnote 26. *De Vas v Noble*, 13 Utah 2d 133, 369 P2d 290, cert den 371 US 821, 9 L Ed 2d 61, 83 S Ct 37 (trial court did not abuse discretion in permitting expert testimony based on exemplars given after controversy had arisen, where expert requested and received thirty-five exemplars to minimize the danger of deception).

Annotation: Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 ALR2d 1274.

Footnote 27. *Belcher v Somerville* (Ky) 413 SW2d 620 (holding, however, that statute requiring exemplar to have been made before controversy arose did not require that it be made before the disputed writing was made).

§ 1218 Sufficiency of comparison in particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A specimen written in cursive handwriting may be used to authenticate handwriting in block letters. 28 Authentication by means of comparison of writings by an expert or by

the trier of fact has also been held adequate under Rule 901(b)(3) where:

(1) a handwriting expert testified that the printing on a job application form and on a handwriting exemplar supplied by the defendant were produced by the same person, this being sufficient to establish that the defendant produced the printing on the form; 29

(2) identification of the defendant as the writer of letters sought to be admitted in evidence was made by comparing the letters with letters from the defendant's prison file, there being only one person with that name in the prison system in which the defendant had been incarcerated; 30

(3) a handwriting expert testified that the block lettering on the exemplars had been written by the same person who had written the block lettering on the documents in question, the exemplars consisted of two of the defendant's income tax forms and forms found in his personnel file which were of a type he as an employee would normally have filled out, and the defense advanced no explanation as to who else could have written the exemplars. 31

§ 1218 ----Sufficiency of comparison in particular circumstances [SUPPLEMENT]

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

Footnotes

Footnote 28. United States v Clifford (CA3 Pa) 704 F2d 86, 12 Fed Rules Evid Serv 870.

Footnote 29. United States v Stembridge (CA5 Tex) 477 F2d 874.

Footnote 30. United States v Hamann (CA7 Wis) 688 F2d 507, 11 Fed Rules Evid Serv 839, cert den 460 US 1013, 75 L Ed 2d 483, 103 S Ct 1255.

Footnote 31. United States v Mangan (CA2 NY) 575 F2d 32, 78-1 USTC ¶ 9349, 3 Fed Rules Evid Serv 315, 41 AFTR 2d 78-1174, cert den 439 US 931, 58 L Ed 2d 324, 99 S Ct 320.

§ 1219 Distinctive characteristics of spelling, usage, and the like

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Distinctive characteristics of punctuation or spelling contained in a writing of known authorship may be compared against a disputed writing for the purpose of showing that the disputed writing was or was not written by the person supplying the exemplar. 32 It is also permissible to show similarities or differences in the grammar, syntax, or style of

two such writings 33 or the use of distinctive words or terms. 34 However, the testimony of an acknowledged expert in the field of psycholinguistics, offered for the purpose of proving that an accused could not have been the author of certain antisocial communications offered into evidence by the prosecution, has been excluded on the grounds that the science of psycholinguistics has not achieved such general recognition among psychological and scientific authorities as to justify courts of law in admitting expert testimony on the subject. 35

**§ 1219 ----Distinctive characteristics of spelling, usage, and the like
[SUPPLEMENT]**

Practice Aids: 24 Am Jur Proof of Facts 3d 667, Identification of Handprinting and Numerals.

Footnotes

Footnote 32. United States v Clifford (CA3 Pa) 704 F2d 86, 12 Fed Rules Evid Serv 870; United States v Larson (CA8 Minn) 596 F2d 759.

Annotation: Admissibility of evidence as to linguistics or typing style (forensic linguistics) as basis of identification of typist or author, 36 ALR4th 598.

Practice References 44 Am Jur Trials 317, Forensic Document Examination in Medical Malpractice Trials.

Footnote 33. In re Estate of Ciaffoni, 498 Pa 267, 446 A2d 225, 36 ALR4th 595, cert den 459 US 1036, 74 L Ed 2d 602, 103 S Ct 447.

Footnote 34. Succession of Killingsworth (La) 292 So 2d 536.

Footnote 35. United States v Hearst (ND Cal) 412 F Supp 893.

Annotation: Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study based on such technique—modern cases, 105 ALR Fed 299.

e. Authentication of Typewriting [1220]

§ 1220 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

For the purposes of authenticating typewritten documents, the courts have recognized for some time that the individuality of a typewriter and its operator are as distinctive as

handwriting. 36 The machine itself may identify a particular document through some characteristic peculiar to a particular typewriter such as a damaged or misaligned letter. 37 Similarities or differences in a particular typist's typing style can also be used to prove the authenticity of a typewritten document. 38

Footnotes

Footnote 36. In re Cravens' Estate, 206 Okla 174, 242 P2d 135, 34 ALR2d 615; In re Estate of Ciaffoni, 498 Pa 267, 446 A2d 225, 36 ALR4th 595, cert den 459 US 1036, 74 L Ed 2d 602, 103 S Ct 447.

Wharton's Criminal Evidence (14th ed) § 486.

Footnote 37. Huber Mfg. Co. v Claudel, 71 Kan 441, 80 P 960; Succession of Bel (La App 4th Cir) 377 So 2d 1380.

Practice References 20 Am Jur Proof of Facts 265, Questioned Typewriting.

Footnote 38. Succession of Bel (La App 4th Cir) 377 So 2d 1380.

Annotation: Admissibility of evidence as to linguistics or typing style (forensic linguistics) as basis of identification of typist or author, 36 ALR4th 598 § 4.

f. Authentication and Use of Voice Recordings or Transcripts of Them [1221-1243]

(1). Identification of Speaker [1221-1232]

(a). In General [1221-1226]

§ 1221 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 901(b)(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence, the requirement of identification of a person's voice, whether heard firsthand or through mechanical or electronic transmission or recording, as a condition precedent to admissibility is satisfied by opinion based on hearing the voice at any time under circumstances connecting it with the alleged speaker. 39 Aural voice identification under this Rule is not a subject for expert testimony, and accordingly the requisite familiarity may be acquired before or after the particular speech which is to be identified. 40 The familiarity required for identification of a voice under the Rule is minimal; 41 a witness may identify a voice he or she has heard on only one previous occasion. 42

Issues concerning the length of time over which the witness' familiarity with the voice was acquired, or the length of time between the last hearing of the voice by the witness and the witness' identification of the voice in court, go to the weight of the evidence and not its admissibility. 43 Once the minimal showing of familiarity required by the Rule has been made, the trier of fact determines the weight to be afforded the identification testimony, 44 and uncertainty as to the identity of a speaker goes to the weight of the identification, not its admissibility. 45

A witness identifying the voices of persons engaged in a conversation need not have been a participant in the conversation, 46 nor is it necessary that the witness specifically identify the voices of all the speakers on a recording. 47

§ 1221 ----Generally [SUPPLEMENT]

Practice Aids: Audio Recordings: Evidence, Experts and Technology. 48 Am Jur Trials 1.

Authentication: Audio- and videotapes revisited, 57 Tex BJ 9:981 (1994).

23 Am Jur Proof of Facts 3d 315, Foundation for Audio Recordings as Evidence.

Case authorities:

In wrongful-death action, trial court properly admitted audiotape of decedent singing; tape contained hymn sung by decedent, evidencing his singing ability, which was aspect of decedent's life that jury could properly consider in deciding value of that intangible aspect of his life. *Jones v Livingston* (1992) 203 Ga App 99, 416 SE2d 142, 103-51 Fulton County D R 25.

Footnotes

Footnote 39. FRE, Rule 901(b)(5); Uniform Rules of Evidence Rule 901(b)(5).

Footnote 40. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Fact that witness did not speak with the defendant until after the defendant's voice had been recorded did not bar witness' identification at trial of defendant's voice on tape. *United States v Watson* (CA10 Okla) 594 F2d 1330, 4 Fed Rules Evid Serv 1440, cert den 444 US 840, 62 L Ed 2d 51, 100 S Ct 78.

As to identification of a voice by use of voiceprints, see § 1018.

Footnote 41. *United States v Cerone* (CA8 Mo) 830 F2d 938, 23 Fed Rules Evid Serv 1291, cert den 486 US 1006, 100 L Ed 2d 194, 108 S Ct 1730, appeal after remand (CA8 Mo) 859 F2d 1328, cert den 488 US 1031, 102 L Ed 2d 972, 109 S Ct 840.

Footnote 42. *Wolf v State* (Tex App Corpus Christi) 674 SW2d 831, petition for discretionary review ref (Apr 3, 1985) and (disapproved on other grounds by *Reed v State* (Tex Crim) 744 SW2d 112).

Voice identification was adequate under FRE, Rule 901(b)(5) where the proponent of taped conversations presented evidence that the identifying witness had conversed with the alleged speaker over the telephone on three separate occasions. *United States v Thomas* (CA9 Wash) 586 F2d 123, 4 Fed Rules Evid Serv 370.

Footnote 43. *United States v Vega* (CA7 Ind) 860 F2d 779, 27 Fed Rules Evid Serv 561 (criticized on other grounds by *United States v Durrive* (CA7 Wis) 902 F2d 1221).

Footnote 44. *United States v Cuesta* (CA5 Fla) 597 F2d 903, cert den 444 US 964, 62 L Ed 2d 377, 100 S Ct 451, 100 S Ct 452; *Vouras v State* (Del Sup) 452 A2d 1165.

Footnote 45. *People v Gable* (Colo App) 647 P2d 246, later proceeding (Colo) 682 P2d 20, cert den 469 US 855, 83 L Ed 2d 115, 105 S Ct 181.

Footnote 46. *United States v Verlin* (ND Tex) 466 F Supp 155, 4 Fed Rules Evid Serv 638.

Footnote 47. *Vasquez Garza v State* (Tex App Corpus Christi) 794 SW2d 530, reh overr (Aug 31, 1990) and petition for discretionary review ref (Jan 30, 1991) (identification of voices was sufficient, even though witness could not identify some background voices other than to say that they were those of law enforcement officers, where testimony established that the only other persons present when the recording was made were law enforcement officers).

§ 1222 Special considerations in criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In a criminal prosecution, the fact that opinion evidence, identifying a voice in a taped telephone call as the defendant's voice, concerns an ultimate issue of fact to be resolved by the jury does not make such evidence objectionable. 48

In a prosecution involving voice identification, Rule 901(b)(5) 49 requires no "due process" procedure comparable to a lineup identification of alleged participants in crimes. 50 However, pretrial voice identification procedures should not be so suggestive as to create a substantial likelihood of irreparable misidentification. 51 It is for the trial court to determine whether there are sufficient aspects of reliability surrounding a voice identification to permit its use as evidence. 52 A defendant challenging voice identification on the grounds that the procedure employed was unduly suggestive must allege facts in support of that contention. 53 If the identification procedure is not unduly suggestive, the reliability of a voice identification goes merely to the weight to be given such testimony and not to its admissibility. 54

◆ Practice guide: Where a lay witness's voice identification testimony is offered against the accused in a criminal prosecution, it is not error for the court to refuse to

give to the jury a cautionary instruction as to the unreliability of such testimony, at least where the testimony is not critical to the state's case and the facts of the case raise no serious question as to the reliability of the testimony. 55 It is not error for the court to decline to give an instruction stating that voice identification is inherently weaker evidence than corporeal identification. 56

§ 1222 ----Special considerations in criminal cases [SUPPLEMENT]

Case authorities:

In prosecution for theft and malicious mischief, trial court properly held that telephone conversation between defendant and detective had been properly authenticated, where detective had known defendant for several years, was familiar with defendant's voice, and had had at least two recent contacts with defendant at same telephone number. *State v Mahoney* (1995) 80 Wash App 495, 909 P2d 949.

Footnotes

Footnote 48. *United States v Bice-Bey* (CA4 NC) 701 F2d 1086, 12 Fed Rules Evid Serv 1280, cert den 464 US 837, 78 L Ed 2d 123, 104 S Ct 126 (issue of whether defendant had made telephone calls placing fraudulent credit card orders).

Footnote 49. FRE, Rule 901(b)(5); Uniform Rules of Evidence Rule 901(b)(5).

Footnote 50. *United States v Albergo* (CA2 NY) 539 F2d 860, 2 Fed Rules Evid Serv 572, cert den 429 US 1000, 50 L Ed 2d 611, 97 S Ct 529.

Annotation: Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Footnote 51. *United States v Vega* (CA7 Ind) 860 F2d 779, 27 Fed Rules Evid Serv 561 (criticized by *United States v Durrive* (CA7 Wis) 902 F2d 1221) (request that police officer ascertain if a particular person's voice is on a certain recording or recordings, some of which apparently contain that person's voice and others which do not, is not impermissibly suggestive).

Footnote 52. *Wilson v State*, 282 Ark 551, 669 SW2d 889.

Footnote 53. *United States v Gambale* (DC Mass) 610 F Supp 1515, later proceeding (DC Mass) 678 F Supp 346, affd (CA1 Mass) 847 F2d 956, 26 Fed Rules Evid Serv 515, cert den 488 US 852, 102 L Ed 2d 110, 109 S Ct 138 and cert den 488 US 928, 102 L Ed 2d 332, 109 S Ct 314, later proceeding (CA1 Mass) 897 F2d 1169, 29 Fed Rules Evid Serv 1011, cert den 498 US 845, 112 L Ed 2d 98, 111 S Ct 130.

Footnote 54. *United States v Gambale* (DC Mass) 610 F Supp 1515, later proceeding (DC Mass) 678 F Supp 346, affd (CA1 Mass) 847 F2d 956, 26 Fed Rules Evid Serv 515, cert den 488 US 852, 102 L Ed 2d 110, 109 S Ct 138 and cert den 488 US 928, 102 L Ed 2d 332, 109 S Ct 314, later proceeding (CA1 Mass) 897 F2d 1169, 29 Fed Rules Evid Serv 1011, cert den 498 US 845, 112 L Ed 2d 98, 111 S Ct 130.

Footnote 55. *State v Burnison*, 247 Kan 19, 795 P2d 32, 17 ALR5th 1084 (lay witness identified voice of one of the defendants which she heard in the background of a telephone conversation she was having with her husband before he was killed).

Requested instruction, to the effect that jury was required to acquit defendant if prosecution had not established accuracy of voice identification testimony beyond a reasonable doubt, was not a correct statement of the law where prosecution had other significant sources of identification of defendant. *State v Cook*, 65 Ohio St 3d 516, 605 NE2d 70, later proceeding 65 Ohio St 3d 1483, 604 NE2d 759 and cert den (US) 126 L Ed 2d 649, 114 S Ct 681.

Annotation: Cautionary instructions to jury as to reliability of, or factors to be considered in evaluating, voice identification testimony, 17 ALR5th 851.

Footnote 56. *People v Zocchi* (2d Dept) 133 App Div 2d 478, 519 NYS2d 690.

§ 1223 Identification by trier of fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the identification of a voice on a recording under Rule 901(b)(5) 57 is ordinarily made by a witness, such identification may be made by the trier of fact if the person whose voice is allegedly on the recording has testified. 58 Where the trier of fact is a jury, the trial court may under Rule 104(b) make a preliminary determination of authenticity sufficient to allow the recording to be considered by the jury. 59 To avoid any possible confusion as to the effect of the court's preliminary determination of authenticity, the jury should be instructed that the authenticity of the recording is an issue to be resolved by them. 60

Footnotes

Footnote 57. FRE, Rule 901(b)(5); Uniform Rules of Evidence Rule 901(b)(5).

Footnote 58. *United States v Sliker* (CA2 NY) 751 F2d 477, 16 Fed Rules Evid Serv 1089, cert den 470 US 1058, 84 L Ed 2d 832, 105 S Ct 1772 and cert den 471 US 1137, 86 L Ed 2d 697, 105 S Ct 2679.

Footnote 59. *United States v Sliker* (CA2 NY) 751 F2d 477, 16 Fed Rules Evid Serv 1089, cert den 470 US 1058, 84 L Ed 2d 832, 105 S Ct 1772 and cert den 471 US 1137, 86 L Ed 2d 697, 105 S Ct 2679 (stating that such determination should preferably be made in camera).

Practice References 45 Am Jur Trials 1, Determining Preliminary Facts Under Federal Rule 104.

Footnote 60. United States v Sliker (CA2 NY) 751 F2d 477, 16 Fed Rules Evid Serv 1089, cert den 470 US 1058, 84 L Ed 2d 832, 105 S Ct 1772 and cert den 471 US 1137, 86 L Ed 2d 697, 105 S Ct 2679 (holding, however, that where counsel failed to request such an instruction, the court's failure to give it was not error).

§ 1224 Identification by means of spectrograph and voiceprints

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The sound spectrograph produces by means of an electrical process a pictorial representation of sound called a sound spectrogram or (when the sound represented is that of a person speaking) a "voiceprint." 61 Proponents of the sound spectrograph as a forensic tool for identification of voices maintain that sound patterns produced in speech are unique or virtually so for each individual and that voiceprints accurately depict this uniqueness. Although this contention has been challenged in the scientific community, some courts have permitted the introduction into evidence of expert opinion evidence as to the identity of a voice based on voiceprint analysis. 62

§ 1224 ----Identification by means of spectrograph and voiceprints [SUPPLEMENT]

Practice Aids: Voicegram Identification Evidence 54 Am Jur Trials 1.

Footnotes

Footnote 61. For more detailed discussion of the theory and mechanism of the sound spectrograph, see 19 Am Jur Proof of Facts 423, Spectrogram Voice Identification.

Footnote 62. United States v Williams (CA2 NY) 583 F2d 1194, 3 Fed Rules Evid Serv 1063, cert den 439 US 1117, 59 L Ed 2d 77, 99 S Ct 1025 and (among conflicting authorities on other grounds noted in United States v Buck (SD NY) 1987 US Dist LEXIS 9913); State v Williams (Me) 388 A2d 500.

Annotation: Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

§ 1225 --Reliability or general acceptance within scientific community as affecting admissibility; weight of evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In some cases rulings admitting expert opinion testimony as to voiceprints have been based on a determination that the voiceprint process is generally accepted by the scientific community, 63 while other courts have deemed such evidence admissible in view of evidence as to the reliability of the voiceprint process. 64 However, some courts have held that expert opinion evidence based on voiceprint analysis is not admissible for the reason that voice spectrography has not gained general acceptance in the scientific community. 65

◆ Observation: Under the "general acceptance within the scientific community" standard, the admissibility of expert opinions as to voiceprints may depend on whether the scientific community in which voiceprints must be generally accepted consists of only those scientists who have worked or experimented with the voiceprint process, or whether it consists of the larger body of scientists who by their general training and experience are qualified to express opinions as to its reliability. Cases admitting voiceprint evidence under the "general acceptance within the scientific community" standard have tended to define the relevant scientific community narrowly in terms of scientists familiar with the voiceprint process, 66 while courts reaching a different result under the same standard have sometimes defined the relevant scientific community as that concerned generally with acoustical science. 67

◆ Caution: The "general acceptance within the scientific community" standard for admissibility of expert opinion testimony based on a scientific technique is based on the holding of *Frye v United States*, 54 App DC 46, 293 F 1013, 34 ALR 145. However, the United States Supreme Court has held that the rule of *Frye* has been superseded in the federal courts by the adoption of the Federal Rules of Evidence, 68 and its continued viability may therefore also be in doubt in states whose rules of evidence are substantially similar to the Federal Rules.

Opinion testimony based on voiceprint analysis, where admissible, is not conclusive; the trier of fact must make its own determination as to what weight is to be given such evidence. 69

§ 1225 --Reliability or general acceptance within scientific community as affecting admissibility; weight of evidence [SUPPLEMENT]

Practice Aids: Voicegram Identification Evidence 54 Am Jur Trials 1.

Footnotes

Footnote 63. *United States v Brown* (Dist Col Super) 13 Crim Law 2203; *Commonwealth v Lykus*, 367 Mass 191, 327 NE2d 671, later proceeding 406 Mass 135, 546 NE2d 159.

Annotation: Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

Reliability of scientific technique and its acceptance within scientific community as affecting admissibility, at federal trial, of expert testimony as to result of test or study

based on such technique—modern cases, 105 ALR Fed 299.

Footnote 64. *United States v Baller* (CA4 W Va) 519 F2d 463, cert den 423 US 1019, 46 L Ed 2d 391, 96 S Ct 456; *United States v Jenkins* (CA6 Tenn) 525 F2d 819; *United States v Smith* (CA7 Ill) 869 F2d 348, 27 Fed Rules Evid Serv 938.

Footnote 65. *United States v McDaniel* (CA DC) 176 US App DC 60, 538 F2d 408; *People v Drake* (Colo) 748 P2d 1237 (superseded by statute on other grounds as stated in *People v Davis* (Colo) 794 P2d 159); *Cornett v State* (Ind) 450 NE2d 498.

Footnote 66. See, for example, *Commonwealth v Lykus*, 367 Mass 191, 327 NE2d 671, later proceeding 406 Mass 135, 546 NE2d 159.

Footnote 67. *Commonwealth v Topa*, 471 Pa 223, 369 A2d 1277.

Footnote 68. § 1001.

Footnote 69. *United States v Love* (CA4 SC) 767 F2d 1052, 18 Fed Rules Evid Serv 1335, cert den 474 US 1081, 88 L Ed 2d 890, 106 S Ct 848, 106 S Ct 849, postconviction proceeding (CA4 SC) 867 F2d 206, postconviction proceeding (CA4 SC) 943 F2d 366, postconviction proceeding (CA4 SC) 1993 US App LEXIS 8417 and (criticized on other grounds by *United States v Murphy* (CA4 Va) 1993 US App LEXIS 9990); *Alea v State* (Fla App D3) 265 So 2d 96; *People v Rogers*, 86 Misc 2d 868, 385 NYS2d 228 (among conflicting authorities on other grounds noted in *People v Jeter*, 80 NY2d 818, 587 NYS2d 583, 600 NE2d 214).

§ 1226 --Checklist of matters needed to identify voice by spectrograph analysis

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The following facts and circumstances tend to establish the identity of a person by comparative analysis of voice spectrograms ("voiceprints"):

- Recording of voice to be identified
- Recording of voice exemplar of accused 70 or party to civil action;
- Submission of recordings to qualified expert
- Excerpting of "cue" words or phrases (words or phrases to be tested against same words or phrases spoken in voice exemplar) from recording of voice to be identified
- Excerpting identical cue words or phrases from voice exemplar
- Electronic conversion of sounds of cue words or phrases from both recordings into voiceprints

- Showing of circumstances surrounding the making of each recording
- Establishing chain of custody of recordings from the time they were made, including their possession by the expert and their return to the proponent of the voiceprint evidence
71
- Qualifications of expert, including—
 - basic educational background in science or acoustical engineering
 - advanced degrees in science or engineering
 - special training or experimentation in related fields
 - teaching experience, including length of time, academic rank, and subjects taught
 - professional experience, including length of time, positions of responsibility held, and specific experience related to voiceprints
 - authorship of lectures, papers, articles, or books on voiceprints
 - honors or recognition received for professional achievements; membership in professional associations, societies, or academies, including offices held
- Showing degree of accuracy of past experiments with voiceprint analysis;
- Comparison of voiceprint formed by recording of voice to be identified with voiceprint formed by recording of voice exemplar
- Showing correspondence of configurations of voiceprints
- Opinion of expert as to correspondence of voiceprints and identity of speaker

**§ 1226 --Checklist of matters needed to identify voice by spectrograph analysis
[SUPPLEMENT]**

Practice Aids: Voicegram Identification Evidence 54 Am Jur Trials 1.

Footnotes

Footnote 70. Voice exemplars given for the purpose of conducting voiceprint analysis do not involve evidence of a testimonial or communicative nature, and so an accused may be compelled to give a voice exemplar without violation of his or her right against self-incrimination under the Federal Constitution's Fifth Amendment. *United States v Franks* (CA6 Tenn) 511 F2d 25, cert den 422 US 1042, 45 L Ed 2d 693, 95 S Ct 2656, 95 S Ct 2654 and cert den 422 US 1048, 45 L Ed 2d 701, 95 S Ct 2667 and (criticized on other grounds by *United States v McDaniel*, 176 US App DC 60, 538 F2d 408) and (ovrld on other grounds by *United States v Kozminski* (CA6 Mich) 821 F2d 1186, 22 Fed

Rules Evid Serv 1444) as stated in *United States v Yee* (ND Ohio) 1990 US Dist LEXIS 15908, adopted (ND Ohio) 134 FRD 161, *affd sub nom United States v Bonds* (CA6 Ohio) 12 F3d 540, 38 Fed Rules Evid Serv 688, 1994 FED App. 85P, reh, en banc, den (CA6) 1994 US App LEXIS 3679, later proceeding (CA6 Ohio) 18 F3d 1327; *United States v Askins* (DC Md) 351 F Supp 408.

Footnote 71. Establishment of a chain of custody may be unnecessary where there is prima facie evidence of authenticity. See § 1037.

(b). Telephone Conversations [1227-1232]

§ 1227 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 901(b)(5), ⁷² familiarity with a person's voice acquired through face-to-face conversations may be the basis of an identification of his or her voice in a telephone conversation, even though the identifying witness had never before spoken with that person on the telephone. ⁷³ Alternatively, a telephone conversation may be identified by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if circumstances, including self-identification, show the person answering to be the one called. ⁷⁴ The fact that a witness cannot positively identify a person with whom he spoke on the telephone is not dispositive; the identity of a party to a telephone conversation may be established by circumstantial evidence, ⁷⁵ regardless of which party initiated or answered the call. ⁷⁶ Counterproof or doubt as to a speaker's identity may be overcome by evidence that the speaker subsequently confirmed the substance of the telephone conversation in a face-to-face meeting with the caller, ⁷⁷ or subsequently acted in accordance with a plan devised in the course of the conversation. ⁷⁸

§ 1227 ----Generally [SUPPLEMENT]

Case authorities:

District court properly admitted transcripts of intercepted telephone conversations in case involving large scale cocaine trafficking since government established identity of persons speaking through various means, including self- identification of each appellant on at least one occasion, identification through nicknames, surveillance, telephone subscriber information, and monitoring agents' use of working copies of known voice samples. *United States v Green* (1994, CA11 Fla) 40 F3d 1167, 8 FLW Fed C 897.

In drug prosecution, content of two telephone conversations made to post office and inquiring about status of express mail package found to contain cocaine were admissible against defendant, where speaker identified himself with defendant's name and knew

postal service's unique item number for package, and where defendant stated that he had been waiting for package when postal service delivered it to him. *Jernigan v State* (1993, Ind App) 612 NE2d 609, later proceeding (Ind App) 1993 Ind App LEXIS 593, transfer den (Jun 16, 1993).

In action by bicyclist who was knocked down by city streetsweeper, transcript of 911 call to report accident was not admissible where plaintiff merely presented transcript without any additional evidence since statements made by caller could not be deemed present sense impression without some corroborative evidence of statement's reliability. *Berger v City of New York* (1993, Sup) 157 Misc 2d 521, 597 NYS2d 555.

In robbery prosecution, trial court properly admitted audio recording of telephone conversation between defendant and complainant's father, where father testified that caller identified himself by his initials, asked whether complainant was going to testify against him, apologized for his crime, told father that he knew complainant was one who had to drop charges because he saw her name on some paper work in court that day, and asked whether complainant would consider dropping charges against him or not testifying against him. *Wilson v State* (1994, Tex App San Antonio) 884 SW2d 904.

In divorce case, trial court properly admitted tape recordings of wife's telephone conversations, where taped conversations contained prior inconsistent statements which were specifically used to impeach wife's credibility. *Briscoe v Briscoe* (1994, La App 2d Cir) 641 So 2d 999.

Footnotes

Footnote 72. FRE, Rule 901(b)(5); Uniform Rules of Evidence Rule 901(b)(5).

Footnote 73. *State v Sarinske*, 91 Wis 2d 14, 280 NW2d 725.

Footnote 74. FRE, Rule 901(b)(6)(A); Uniform Rules of Evidence Rule 901(b)(6)(A).

Annotation: Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Practice References 36 Am Jur POF2d 605, Foundation for Telephone Conversation.

Hunter, Federal Trial Handbook (3d ed) 25.12.

Footnote 75. *United States v Espinoza* (CA4 W Va) 641 F2d 153, 7 Fed Rules Evid Serv 1438, cert den 454 US 841, 70 L Ed 2d 125, 102 S Ct 153; *Zeigler v State* (Fla) 402 So 2d 365, cert den 455 US 1035, 72 L Ed 2d 153, 102 S Ct 1739; *State v Danielson*, 37 Wash App 469, 681 P2d 260.

Footnote 76. *United States v Espinoza* (CA4 W Va) 641 F2d 153, 7 Fed Rules Evid Serv 1438, cert den 454 US 841, 70 L Ed 2d 125, 102 S Ct 153; *United States v Guaderas* (CA9 Cal) 13 Fed Rules Evid Serv 1408 (government agent testified that he dialed number given to him by one defendant, which number admittedly was the second defendant's phone number, that he asked for the second defendant by name, and that he spoke to a man who identified himself as the second defendant).

Footnote 77. Johnson v Chilcott (DC Colo) 658 F Supp 1213.

Footnote 78. Jackson v State, 12 Ark App 378, 677 SW2d 866.

§ 1228 Call to place of business

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 901(b)(6) of the Uniform Rules of Evidence and the Federal Rules of Evidence, a telephone call to a business may be authenticated or identified if the call is made to a place of business at a number assigned at the time by the telephone company and the conversation relates to business reasonably transacted over the telephone, ⁷⁹ the theory being that maintenance of the telephone connection is an invitation to do business without further identification. ⁸⁰ A witness' testimony that he called a particular businessman's office and spoke to a woman who identified herself as the businessman's secretary constitutes authenticating testimony under Rule 901(b)(6). ⁸¹

◆ Comment: One writer has said that inasmuch as the provisions of Rule 901(b)(6) concerning calls placed to a business rest on the assumption that listing a business number in a public directory is an invitation to the public to carry on business over the phone, the proprietor of a business cannot bar the admission of the substance of a telephone call by denying the authority of the person answering the call to act on behalf of the business. ⁸²

Footnotes

Footnote 79. FRE, Rule 901(b)(6)(B); Uniform Rules of Evidence Rule 901(b)(6)(B).

Footnote 80. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 81. United States v Portsmouth Paving Corp. (CA4 Va) 694 F2d 312, 1982-83 CCH Trade Cases ¶ 65034, 11 Fed Rules Evid Serv 1733.

Footnote 82. LaRocca, Authentication, Identification, and the Best Evidence Rule. 36 La L Rev 185 (1975).

§ 1229 Identification by pen register of number dialed

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence that a particular telephone number was dialed from a particular phone may be offered by means of a "pen register," a device which can be attached to a telephone line from a central telephone office to record all numbers dialed from a particular telephone (or extension) at particular times. The installation and use of a pen register does not constitute a search within the meaning of the Federal Constitution's Fourth Amendment. 83 The use of a pen register has in several cases, however, been held to constitute a search under relevant provisions of a state constitution. 84

Although the use of pen registers is regulated by federal statute, 85 the failure of a court order authorizing installment of a pen register to comply with the requirements of the statute does not render evidence obtained through the pen register constitutionally inadmissible, inasmuch as the mere violation of the statute does not result in an unconstitutional search, and Congress did not provide either specifically or by inference for exclusion of evidence as a consequence of violation of the statute. 86 It has been held that because a pen register records only the number called and the time of the call, and not the content of the call, its use does not implicate Title III of the Omnibus Crime Control and Safe Streets Act, 87 the principal federal statute governing wiretapping. 88

Footnotes

Footnote 83. *Smith v Maryland*, 442 US 736, 61 L Ed 2d 220, 99 S Ct 2577.

Practice References 2 Am Jur POF2d 545, Reliability of Scientific Devices—Telephone Calling Line Identification.

Annotation: Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 ALR4th 536.

Footnote 84. *People v Chapman*, 36 Cal 3d 98, 201 Cal Rptr 628, 679 P2d 62; *People v Sporleder* (Colo) 666 P2d 135; *State v Thompson*, 114 Idaho 746, 760 P2d 1162; *Commonwealth v Melilli*, 521 Pa 405, 555 A2d 1254; *State v Gunwall*, 106 Wash 2d 54, 720 P2d 808, 76 ALR4th 517.

But see *Richardson v State* (Tex App Amarillo) 831 SW2d 78, petition for discretionary review gr (Sep 30, 1992) and motion for rehearing on PDR denied (Dec 8, 1993) (use of a pen register is not a search within the scope of Article I, Section 9 of the Texas constitution).

Footnote 85. 18 USCS §§ 3121-3127.

Footnote 86. *United States v Thompson* (CA11 Ga) 936 F2d 1249, cert den (1992, US) 117 L Ed 2d 139, 112 S Ct 975.

Footnote 87. 18 USCS §§ 2510 et seq.

Footnote 88. *People v Turner* (1st Dist) 35 Ill App 3d 550, 342 NE2d 158.

But see *Southern Bell Tel. & Tel. Co. v Hamm*, 306 SC 70, 409 SE2d 775, 9 ALR5th 1131 (purpose of 18 USCS § 2510 is to restrict use of pen registers and similar surveillance devices whose use is not restricted as a matter of federal constitutional law).

§ 1230 Correctness of number called

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the authenticity of a telephone conversation is in question, evidence must be offered as to the correct telephone number. 89 For this purpose it is proper under the Uniform or Federal Rules of Evidence to testify that the number called was obtained from a telephone directory or from the information operator; any objection that such testimony involves hearsay evidence may be overcome by reference to the exception to the hearsay rule covering commercial publications (FRE, Rule 803(17)), or the residual exceptions (FRE, Rule 803(24), FRE, 804(b)(5)). 90 The correctness of a telephone number may also be established on the basis of prior experience. 91

Footnotes

Footnote 89. *United States v Sawyer* (CA7 Ill) 607 F2d 1190, 79-2 USTC ¶ 9537, 4 Fed Rules Evid Serv 1142, 44 AFTR 2d 79-5471, cert den 445 US 943, 63 L Ed 2d 776, 100 S Ct 1338 and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161); *United States v Watson* (CA10 Okla) 594 F2d 1330, 4 Fed Rules Evid Serv 1440, cert den 444 US 840, 62 L Ed 2d 51, 100 S Ct 78.

Footnote 90. *Louisell and Mueller*, Federal Evidence § 517.

As to the hearsay exceptions created by Rules 803(17), 803(24), and 804(b)(5), see §§ 1429, 683-689, and , see §§ 701-703, respectively.

Footnote 91. *United States v Vitale* (CA8 Mo) 549 F2d 71, 1 Fed Rules Evid Serv 641, cert den 431 US 907, 52 L Ed 2d 393, 97 S Ct 1704.

§ 1231 Self-identification of person called

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The identity of a person called on the telephone may be established under Rule 901(b)(6) by evidence that the call was made to a number assigned by the telephone company to that person, and that the person called identified himself to the caller, 92 the assumption being that the usual conduct respecting telephone calls furnishes adequate assurance of regularity. 93 Self-identification of a person called at a place where he or she could

reasonably be expected to be reached by telephone is sufficient to identify him or her, although the number called is not assigned to him or her. 94 Identification has been held sufficient where the answering party identified himself by name, the telephone he answered was registered in the name of his parents, and the answering party was subsequently found at the parents' house by an investigator. 95 Additional corroboration of a speaker's identity can be derived from circumstantial evidence, 96 such as the content of the conversation. 97

Footnotes

Footnote 92. FRE, Rule 901(b)(6)(A); Uniform Rules of Evidence Rule 901(b)(6)(A).

Footnote 93. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 94. *O'Neal v Morgan* (CA2 NY) 637 F2d 846, 7 Fed Rules Evid Serv 1069, cert den 451 US 972, 68 L Ed 2d 351, 101 S Ct 2050 (in a civil rights suit seeking damages for false arrest and police brutality, detective witness' testimony showed that he called arresting officers at police department's street crime unit, where all defendants could be expected to be, that call was referred to one of the arresting officer's partners, and that the person to whom the call was referred identified himself as the arresting officer's partner).

Footnote 95. *United States v Hines* (CA4 NC) 717 F2d 1481, 14 Fed Rules Evid Serv 26, cert den 467 US 1214, 81 L Ed 2d 363, 104 S Ct 2656 and cert den 467 US 1219, 81 L Ed 2d 373, 104 S Ct 2668.

Footnote 96. *United States v Pruitt* (CA8 Mo) 702 F2d 152, 12 Fed Rules Evid Serv 1249 (two witnesses recalled dialing number on documents provided and signed by the appellant and that number was answered by a man who identified himself as the appellant).

Footnote 97. *United States v Guaderas* (CA9 Cal) 13 Fed Rules Evid Serv 1408 (subsequent events occurred substantially as planned during recorded phone conversation).

Evidence of a call from one who identified himself as a particular person, and related information which only that person or his family would have known, was sufficient to authenticate the call. *State v Nickles* (Utah) 728 P2d 123, 43 Utah Adv Rep 20.

§ 1232 --Necessity of additional evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 901(b)(6), 98 the mere assertion of identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation; additional evidence of the speaker's identity is required. 99 Thus, a telephone call "out of the blue" from one who identifies himself with a certain name may not in itself be sufficient

authentication of the call as coming from the person named. 1 The possibility of another person using the name in question is too great to admit an identification on this basis. 2 The additional evidence required for authentication under such circumstances need not fall in any set pattern, and could consist of the content of the party's statements, a reply technique, or identification of his or her voice. 3 A "trace" by the telephone company of the phone from which a call was placed could also suffice. 4

Footnotes

Footnote 98. FRE, Rule 901(b)(6)(A); Uniform Rules of Evidence Rule 901(b)(6)(A).

Footnote 99. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Footnote 1. *United States v Pool* (CA5 Fla) 660 F2d 547, 9 Fed Rules Evid Serv 490 (authentication not sufficient where testifying agent had never met person from whom call supposedly came, and had made no voice comparisons).

Testimony concerning telephone call to witness from a person who asked him to modify his testimony on behalf of the defendant was not admissible where the only evidence connecting the defendant to the call was that the defendant's name was Clarence and the caller had identified himself by that name. *Manuel v State* (Fla App D1) 524 So 2d 734, 13 FLW 1140.

Footnote 2. *United States v Pool* (CA5 Fla) 660 F2d 547, 9 Fed Rules Evid Serv 490

Footnote 3. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Identity of telephone caller may be established by such matters as context and timing of call, contents of statements, internal pattern and other distinctive characteristics, and disclosure of facts known peculiarly to caller. *United States v Orozco-Santillan* (CA9 Cal) 903 F2d 1262.

Law Reviews: LaRocca, Authentication, Identification, and the Best Evidence Rule. 36 La L Rev 185 (1975).

Footnote 4. *Louisell and Miller*, Federal Evidence § 519.

(2). Proof that Recording is Accurate [1233-1238]

§ 1233 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under the Federal Rules of Evidence and the Uniform Rules of Evidence, tape recordings

are generally admissible into evidence at the discretion of the court, 5 provided a proper foundation is laid. It has been said that authenticity is important with regard to tape recordings because they are peculiarly susceptible to undetectable adulteration and sometimes accidental alteration. 6 The party introducing a tape recording into evidence has the burden of going forth with sufficient evidence to show that the recording is an accurate reproduction of the conversation recorded. 7 Once the proponent presents sufficient foundation testimony, the party challenging the tape recordings bears the burden of showing that the recordings are inaccurate; this could be done, for example, by engaging an expert to examine the tapes. Tapes are not inadmissible merely because one can conjure up hypothetical possibilities that tampering has occurred. 8

Composite tape recordings containing recordings of selected intercepted telephone conversations are admissible as evidence if properly authenticated. 9 Such composite tapes can be admitted as summary evidence under Rule 1006. 10

§ 1233 ----Generally [SUPPLEMENT]

Practice Aids: Audio Recordings: Evidence, Experts and Technology. 48 Am Jur Trials 1.

23 Am Jur Proof of Facts 3d 315, Foundation for Audio Recordings as Evidence.

Footnotes

Footnote 5. United States v Gordon (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by United States v A & S Council Oil Co. (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); People v Jeffers (Colo) 690 P2d 194.

Practice References Introducing and Marking Exhibits (sound recordings and transcriptions thereof). 5 Am Jur Trials 553, § 24.

Footnote 6. United States v Sandoval, 228 US App DC 327, 709 F2d 1553, 13 Fed Rules Evid Serv 381.

Practice References 48 Am Jur Trials 1, Audio Recordings: Evidence, Experts and Technology.

Footnote 7. United States v Sarro (CA11 Fla) 742 F2d 1286, 16 Fed Rules Evid Serv 971, reh den, en banc (CA11 Fla) 751 F2d 394.

Footnote 8. United States v Rengifo (CA1 Mass) 789 F2d 975, 20 Fed Rules Evid Serv 1259.

Footnote 9. United States v Rengifo (CA1 Mass) 789 F2d 975, 20 Fed Rules Evid Serv 1259; United States v Denton (CA6 Mich) 556 F2d 811, cert den 434 US 892, 54 L Ed 2d 178, 98 S Ct 269.

Footnote 10. United States v Denton (CA6 Mich) 556 F2d 811, cert den 434 US 892, 54 L Ed 2d 178, 98 S Ct 269.

For a discussion of FRE, Rule 1006, see §§ 1060, 1061 et seq.

§ 1234 Circumstances and preservation of recording

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The accuracy of a tape recording may be authenticated by proof of the circumstances under which a tape was made and its chain of custody. 11 One formulation of the requirements for authentication under this view requires proof as to (1) the competency of the operator of the recording device; (2) the ability of the device to record properly; (3) the absence of material deletions, additions, or alterations in the relevant portions of the recording; (4) the identity of the speakers; (5) the authenticity and correctness of the recording; (6) the preservation of the recording; and (7) the voluntary nature of the conversation and the absence of any inducement or duress. 12

Other courts, while recognizing that specific factors such as those discussed above may assist a trial judge in ruling upon foundation questions, have specifically rejected the adoption of inflexible criteria to all cases, and will not upset a trial court's admission of a recording unless the foundation was clearly insufficient to insure the accuracy of the recording. 13

Footnotes

Footnote 11. *United States v Sandoval*, 228 US App DC 327, 709 F2d 1553, 13 Fed Rules Evid Serv 381.

Footnote 12. *United States v Lipowski* (DC NJ) 423 F Supp 864, 1 Fed Rules Evid Serv 1242; *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); *People v Slaton*, 135 Mich App 328, 354 NW2d 326; *Furlev Sales & Associates, Inc. v North American Automotive Warehouse, Inc.* (Minn) 325 NW2d 20; *State v Robinson*, 38 Wash App 871, 691 P2d 213, review den 103 Wash 2d 1015.

Footnote 13. *United States v Jones* (CA10 Kan) 730 F2d 593, 15 Fed Rules Evid Serv 726 (foundation sufficient where government informant testified that he consented to tape telephone call, that he called defendant, that he personally recorded conversation, that tape played in court was tape he recorded, and that voices on tape were his own and that of the defendant, and where the accuracy of the recording was further insured by the informant's familiarity with the defendant and the defendant's voice).

§ 1235 --Particular evidence as necessary or sufficient

There is no requirement that a tape recording be reviewed for accuracy contemporaneous with its completion. 14 Intercepted tape-recorded telephone conversations can be authenticated by detailed testimony of a supervising federal agent of the procedures followed to obtain the recordings, including the agent's presence at the initial testing of the equipment, his personal preparation of transcripts of the tapes, and his custody of the original logs and tape recordings. Conversations need not be authenticated by someone who either participated in or personally overheard the subject matter of the recording in evidence. 15 If a law enforcement officer authenticates a tape recording obtained by a wiretap by testifying as to his personal knowledge of the methods used to carry out the wiretap and of the degree to which the persons conducting the surveillance complied with the methods prescribed, the fact that conversations on the tape are spoken in a foreign language which the testifying agent does not know does not render the agent unqualified to authenticate the recordings. 16

A recording made on a telephone answering machine is properly authenticated notwithstanding the absence of expert testimony as to the operation of the machine or its reliability, where the owner of the machine testifies to buying the machine and installing it according to instructions, identifies the voice recorded by the machine, and states that he removed the tape containing the recording and stored it until turning it over to the police. 17

Although in a prosecution for pirating tapes the better practice is for the government to compare pirated tapes with the duplicate registered with the United States Copyright Office, it is sufficient authentication if an expert witness compares the copyright owners' duplicate tapes with the legitimate copyrighted tapes and the pirated tapes and determines that the music on all three tapes has been produced from the same original source. 18

Footnotes

Footnote 14. *United States v Johnson* (CA8 Mo) 767 F2d 1259, 18 Fed Rules Evid Serv 625.

Footnote 15. *United States v Rengifo* (CA1 Mass) 789 F2d 975, 20 Fed Rules Evid Serv 1259.

Footnote 16. *United States v Rengifo* (CA1 Mass) 789 F2d 975, 20 Fed Rules Evid Serv 1259.

Footnote 17. *State v Robinson*, 38 Wash App 871, 691 P2d 213, review den 103 Wash 2d 1015.

Footnote 18. *United States v Shabazz* (CA11 Fla) 724 F2d 1536, 15 Fed Rules Evid Serv 140.

§ 1236 --Electronically enhanced recording

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A tape recording, or a copy of it, which has been electronically enhanced or filtered to lower or delete background noise can be authenticated by presenting testimony as to the care and control of the original tapes, the techniques used in the electronic enhancement, 19 and the technicians' comparison of the enhanced copy with the originals for accuracy. 20 It is sufficient authentication if the engineer who processed the tape testifies that no part of the tape has been deleted and that only sound interference has been removed from the tape. 21

Footnotes

Footnote 19. *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

Footnote 20. *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

Footnote 21. *Williams v Butler* (CA8 Ark) 746 F2d 431, 17 Fed Rules Evid Serv 767, on reh, en banc (CA8 Ark) 762 F2d 73, vacated on other grounds, remanded 475 US 1105, 89 L Ed 2d 909, 106 S Ct 1508, on remand, en banc (CA8 Ark) 802 F2d 296 (among conflicting authorities on other grounds noted in *St. Louis v Praprotnik*, 485 US 112, 99 L Ed 2d 107, 108 S Ct 915, 3 BNA IER Cas 273, 14 FR Serv 3d 412) and vacated, remanded 485 US 931, 99 L Ed 2d 264, 108 S Ct 1102 and on reconsideration, en banc (CA8 Ark) 863 F2d 1398, cert den 492 US 906, 106 L Ed 2d 565, 109 S Ct 3215.

§ 1237 Testimony of witness with knowledge of matter recorded

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A sufficient foundation is laid for the admission of a tape recording where a witness testifies, on the basis of having heard in person the conversation recorded, that the recording fairly and accurately reproduces the conversation and identifies the participants in the conversation. 22 Thus, a witness who participated in a tape-recorded

conversation, 23 or overheard it, 24 can testify as to the accuracy of the recording and thereby authenticate it. The witness' recollection of the taped conversation can be challenged through cross-examination. 25

◆ Observation: Authentication of a recording by a witness with knowledge of the matter recorded can effectively substitute for proof of the circumstances and care of the recording. 26

Footnotes

Footnote 22. *State v Thomas* (Me) 432 A2d 757.

Footnote 23. *United States v Albert* (CA5 Tex) 595 F2d 283, 4 Fed Rules Evid Serv 750, reh den (CA5 Tex) 599 F2d 449 and cert den 444 US 963, 62 L Ed 2d 375, 100 S Ct 448; *United States v Traficant* (ND Ohio) 558 F Supp 996, 13 Fed Rules Evid Serv 580 (disapproved on other grounds by *United States v Vest* (CA1 Mass) 813 F2d 477); *United States v Panas* (CA8 Mo) 738 F2d 278, 16 Fed Rules Evid Serv 146 (criticized on other grounds by *United States v Scafe* (CA10 Kan) 822 F2d 928); *United States v Sandoval*, 228 US App DC 327, 709 F2d 1553, 13 Fed Rules Evid Serv 381.

Footnote 24. *United States v Panas* (CA8 Mo) 738 F2d 278, 16 Fed Rules Evid Serv 146 (criticized by *United States v Scafe* (CA10 Kan) 822 F2d 928); *United States v Davis* (CA10 Okla) 780 F2d 838, 19 Fed Rules Evid Serv 1224; *United States v Jones* (CA10 Kan) 730 F2d 593, 15 Fed Rules Evid Serv 726; *United States v Sarro* (CA11 Fla) 742 F2d 1286, 16 Fed Rules Evid Serv 971, reh den, en banc (CA11 Fla) 751 F2d 394; *United States v Sandoval*, 228 US App DC 327, 709 F2d 1553, 13 Fed Rules Evid Serv 381.

Footnote 25. *United States v Sandoval*, 228 US App DC 327, 709 F2d 1553, 13 Fed Rules Evid Serv 381.

Footnote 26. *United States v Sarro* (CA11 Fla) 742 F2d 1286, 16 Fed Rules Evid Serv 971, reh den, en banc (CA11 Fla) 751 F2d 394 (if a witness with knowledge of the matter recorded testifies to the accuracy of a tape recording, a reviewing court will be extremely reluctant to disturb the trial court's decision to admit the tape recording even though at the time the decision was made the government had not carried its particularized burden of going forward with evidence as to the method of obtaining the recording).

§ 1238 Audibility of recording as affecting admissibility

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

To be admitted in evidence, a tape recording of a conversation must be audible and sufficiently comprehensible for a jury to consider its content. 27 Where a tape contains

inaudible portions, a transcript should be modified by deletion of the unreliable portions. 28 However, the fact that some portions of a tape recording are inaudible or unintelligible does not invariably render the entire tape inadmissible. 29 Such a tape is admissible where the unintelligible portions are not so substantial as to render the recording as a whole untrustworthy. 30 A ruling on this issue is committed to the discretion of the trial court. 31

◆ Practice guide: Where one party seeks admission of numerous tape recordings, an opposing party will not be able to bring about wholesale exclusion of the tapes by generally alleging that they are inaudible; an objection based on inaudibility should be specific and refer to particular passages. 32

§ 1238 ----Audibility of recording as affecting admissibility [SUPPLEMENT]

Case authorities:

In prosecution for distributing cocaine, possession with intent to distribute, and conspiracy to possess and distribute cocaine, trial court did not abuse its discretion in admitting tape recordings of conversations between defendant and police informant or in allowing jury to use transcripts while listening to recordings, even though defendant claimed recordings were unintelligible, where (1) defendant disputed prosecution's interpretation of recordings by calling experienced translator, (2) defendant declined opportunity to offer his own transcripts, (3) police informant and transcriber testified about recorded conversations and was cross-examined, and (4) jury was instructed that only tapes and not transcripts were to be considered when weighing evidence. *United States v Martinez* (1991, CA8 Minn) 951 F2d 887, cert den (US) 118 L Ed 2d 407, 112 S Ct 1695.

Footnotes

Footnote 27. *United States v Terry* (CA6 Tenn) 729 F2d 1063, 15 Fed Rules Evid Serv 466.

Annotation: Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence, 57 ALR3d 746.

Footnote 28. § 1239.

Footnote 29. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv 1170, reh den (CA5 Tex) 671 F2d 1378 and cert den 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, later proceeding (CA5 Tex) 724 F2d 507, later proceeding (CA5 Tex) 725 F2d 1007 and reh den (CA5 Tex) 729 F2d 779 and (criticized on other grounds by *United States v Dilg* (CA11 Ala) 700 F2d 620) and (among conflicting authorities on other grounds noted in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920); *United States v Terry* (CA6 Tenn) 729 F2d 1063, 15 Fed Rules Evid Serv 466; *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); *United States v Davis* (CA10 Okla) 780 F2d 838, 19 Fed Rules Evid Serv 1224.

Footnote 30. *United States v Stone* (CA5 Tex) 960 F2d 426, 35 Fed Rules Evid Serv 670; *United State v Huff* (CA8 Minn) 959 F2d 731, 35 Fed Rules Evid Serv 414, cert den (US) 121 L Ed 2d 110, 113 S Ct 162 and cert den (US) 113 S Ct 162; *People v Hall* (1st Dist) 112 Cal App 3d 123, 169 Cal Rptr 149; *Food Fair, Inc. v Anderson* (Fla App D5) 382 So 2d 150; *People v Rogers* (2d Dist) 187 Ill App 3d 126, 135 Ill Dec 65, 543 NE2d 300, app den (Ill) 139 Ill Dec 520, 548 NE2d 1076; *People v Morgan* (2d Dept) 175 App Div 2d 930, 573 NYS2d 765, app den 79 NY2d 861, 580 NYS2d 733, 588 NE2d 768.

Footnote 31. *People v Quintana*, 189 Colo 330, 540 P2d 1097; *Bowens v State*, 171 Ga App 364, 320 SE2d 189; *State v Taylor* (Mo App) 831 SW2d 266.

Footnote 32. *United States v Finley* (ND Ill) 708 F Supp 906, later proceeding (ND Ill) 1989 US Dist LEXIS 5219, motion gr (ND Ill) 1989 US Dist LEXIS 6125, later proceeding (ND Ill) 1989 US Dist LEXIS 6175, motion den (ND Ill) 1989 US Dist LEXIS 7607, motion gr (ND Ill) 1990 US Dist LEXIS 5845, later proceeding (CA7 Ill) 934 F2d 837, 33 Fed Rules Evid Serv 148, companion case (CA7 Ill) 934 F2d 822, 33 Fed Rules Evid Serv 818, subsequent civil proceeding (ND Ill) 1992 US Dist LEXIS 18080, affd (CA7 Ill) 13 F3d 220 and appeal after remand (CA7 Ill) 2 F3d 205 and postconviction proceeding (ND Ill) 783 F Supp 1123.

(3). Transcripts [1239-1243]

§ 1239 Generally

<p>View Entire Section Go to Parallel Reference Table</p>

A court may under some circumstances employ transcripts to assist the jury in following a tape-recorded conversation. 33 Transcripts must be properly authenticated before they can be admitted. 34 To authenticate transcripts they must be shown to be an accurate reproduction of the matter recorded. 35 The parties may stipulate to the accuracy of a transcript. 36 In the absence of such a stipulation, it is not necessary that the person authenticating a transcript by testifying that it accurately reproduces a recording also be in a position to testify that the recording accurately reproduces the matter recorded. 37 Transcripts may be authenticated through the testimony of the transcriber or of a witness to the actual conversation. 38 The court can also make an independent determination of accuracy by reading the transcript against the tape. 39

Where a tape contains inaudible portions, the court should direct the deletion of the unreliable portion of the transcript, assuming that the unintelligible portions of the tape do not render the entire recording untrustworthy. 40

Footnotes

Footnote 33. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv

1170, reh den (CA5 Tex) 671 F2d 1378 and cert den 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, later proceeding (CA5 Tex) 724 F2d 507, later proceeding (CA5 Tex) 725 F2d 1007 and reh den (CA5 Tex) 729 F2d 779 and (criticized on other grounds by *United States v Dilg* (CA11 Ala) 700 F2d 620) and (among conflicting authorities on other grounds noted in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920); *United States v Lambinus* (CA10 NM) 747 F2d 592, 17 Fed Rules Evid Serv 161, cert den 471 US 1067, 85 L Ed 2d 500, 105 S Ct 2143; *Harvey v State*, 292 Ark 267, 729 SW2d 406, later proceeding (Ark) 1991 Ark LEXIS 165.

Footnote 34. *United States v Sutherland* (CA5 Tex) 656 F2d 1181, 9 Fed Rules Evid Serv 278, reh den (CA5 Tex) 663 F2d 101 and cert den 455 US 949, 71 L Ed 2d 663, 102 S Ct 1451 and cert den 455 US 991, 71 L Ed 2d 852, 102 S Ct 1617; *United States v Devous* (CA10 Wyo) 764 F2d 1349.

Footnote 35. *United States v Sutherland* (CA5 Tex) 656 F2d 1181, 9 Fed Rules Evid Serv 278, reh den (CA5 Tex) 663 F2d 101 and cert den 455 US 949, 71 L Ed 2d 663, 102 S Ct 1451 and cert den 455 US 991, 71 L Ed 2d 852, 102 S Ct 1617.

Footnote 36. *United States v Llinas* (CA5 Fla) 603 F2d 506, cert den 444 US 1079, 62 L Ed 2d 762, 100 S Ct 1030; *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); *United States v Devous* (CA10 Wyo) 764 F2d 1349; *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

Footnote 37. *Golden v State* (Fla App D1) 429 So 2d 45, petition den (Fla) 431 So 2d 988 and cause dismd (Fla) 438 So 2d 833.

Footnote 38. *United States v Rochan* (CA5 Tex) 563 F2d 1246; *United States v Devous* (CA10 Wyo) 764 F2d 1349.

Transcript of accused's tape-recorded confession was properly authenticated by police officers who were present at and participated in the confession. *Allen v State* (Fla App D1) 492 So 2d 802, 11 FLW 1753.

Footnote 39. *United States v Robinson* (CA6 Ky) 707 F2d 872, 13 Fed Rules Evid Serv 111, appeal after remand (CA6 Ky) 763 F2d 778, 17 Fed Rules Evid Serv 1434 and (criticized on other grounds by *United States v Mazza* (CA1 Mass) 792 F2d 1210, 20 Fed Rules Evid Serv 1225); *United States v Devous* (CA10 Wyo) 764 F2d 1349 (although not prerequisite to use of transcript, court determination is recommended practice in absence of stipulation by counsel on this point); *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

Footnote 40. *United States v Terry* (CA6 Tenn) 729 F2d 1063, 15 Fed Rules Evid Serv 466.

§ 1240 Use of more than one version of transcript

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the event of a dispute between the parties as to what is said on portions of a recording, it is permissible to present the jury with two transcripts containing both sides' versions and let the jury determine which is more accurate. 41 In addition, each side may present evidence supporting the accuracy of its version or challenging the accuracy of the other side's version. 42 If two transcripts are given to the jury, they can be given the reasons for the dispute over the portions in question and instructed that they are to determine for themselves which, if either, transcript accurately reflects particular portions of the recording. The court can explain to the jury that there is a disagreement about the accuracy of the transcripts and allow the tape, or disputed portions of the tape, to be played twice, once with each transcript. 43

◆ Observation: Submission of only the government's version of a transcript has been held not error even in the absence of a stipulation where the defendants were free to make specific objections to inaccuracies in the transcripts during the testimony in which the tape recordings and transcripts were utilized, and were free to challenge the general techniques used in preparing the transcript and federal agents' personal knowledge in the context of cross-examination. 44

Where a tape recording is significantly inaudible, submission of two different versions of the transcript is prejudicial, for it inspires wholesale speculation by the parties and engenders jury confusion. 45

Footnotes

Footnote 41. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv 1170, reh den (CA5 Tex) 671 F2d 1378 and cert den 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, later proceeding (CA5 Tex) 724 F2d 507, later proceeding (CA5 Tex) 725 F2d 1007 and reh den (CA5 Tex) 729 F2d 779 and (criticized on other grounds by *United States v Dilg* (CA11 Ala) 700 F2d 620) and (among conflicting authorities on other grounds noted in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920); *United States v Llinas* (CA5 Fla) 603 F2d 506, cert den 444 US 1079, 62 L Ed 2d 762, 100 S Ct 1030; *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

Footnote 42. *United States v Llinas* (CA5 Fla) 603 F2d 506, cert den 444 US 1079, 62 L Ed 2d 762, 100 S Ct 1030; *United States v Onori* (CA5 Fla) 535 F2d 938.

Footnote 43. *United States v Onori* (CA5 Fla) 535 F2d 938.

Footnote 44. *United States v Collazo* (CA4 Md) 732 F2d 1200, 15 Fed Rules Evid Serv

827, cert den 469 US 1105, 83 L Ed 2d 773, 105 S Ct 777 (noting that federal agents testified that one or the other of them was present during all of the recorded conversations, that they prepared the transcripts, and that the transcripts were accurate, and that the District Court repeatedly told the jury that the transcripts were not evidence but merely aids to follow voices on the tape recording and that the jury was bound by its own interpretation of the recording and not the transcript).

Footnote 45. United States v Robinson (CA6 Ky) 707 F2d 872, 13 Fed Rules Evid Serv 111, appeal after remand (CA6 Ky) 763 F2d 778, 17 Fed Rules Evid Serv 1434 and (criticized on other grounds by United States v Mazza (CA1 Mass) 792 F2d 1210, 20 Fed Rules Evid Serv 1225).

§ 1241 Transcript of foreign language recording

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where the transcript contains a translation into English of conversations spoken in a foreign language, the proponent must introduce the testimony of a qualified witness to authenticate and verify the translation. 46 The procedure for providing the jury with an English transcript of a conversation produced in a foreign language should be the same as that adopted by some courts for providing a transcript of a tape in English: an effort to produce an official or stipulated transcript which satisfies all sides and, if such a transcript cannot be produced, the production by each side of its own version of the transcript or of the disputed portions, and the submission of evidence supporting the accuracy of these versions or challenging the accuracy of the other side's version. 47

Footnotes

Footnote 46. United States v Sutherland (CA5 Tex) 656 F2d 1181, 9 Fed Rules Evid Serv 278, reh den (CA5 Tex) 663 F2d 101 and cert den 455 US 949, 71 L Ed 2d 663, 102 S Ct 1451 and cert den 455 US 991, 71 L Ed 2d 852, 102 S Ct 1617.

Footnote 47. United States v Cruz (CA11 Fla) 765 F2d 1020, 19 Fed Rules Evid Serv 610.

§ 1242 Transcripts as evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although there is authority that transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence,

48 other authority states that when proper precautions are taken, it is not error to admit tapes and transcripts into evidence or to allow the jury to retain them during the trial and their deliberations. 49 The use of a transcript as a guide is analogous to the use of expert testimony as a device for aiding a jury in understanding other types of real evidence; 50 thus, a transcript is evidence of what is recorded on an audiotape, just as the tape is evidence of what was said in the original conversation. The fact that transcripts are not submitted to the jury for their consideration during deliberations does not mean that the transcripts were not evidence. 51

Footnotes

Footnote 48. United States v Gordon (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by United States v A & S Council Oil Co. (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380).

Footnote 49. United States v Cruz (CA11 Fla) 765 F2d 1020, 19 Fed Rules Evid Serv 610.

Footnote 50. United States v Onori (CA5 Fla) 535 F2d 938.

Footnote 51. United States v Sutherland (CA5 Tex) 656 F2d 1181, 9 Fed Rules Evid Serv 278, reh den (CA5 Tex) 663 F2d 101 and cert den 455 US 949, 71 L Ed 2d 663, 102 S Ct 1451 and cert den 455 US 991, 71 L Ed 2d 852, 102 S Ct 1617.

§ 1243 Use of transcripts by jury; instructions

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Transcripts should not ordinarily be read to the jury or given independent weight. 52 The jury should be instructed that it is the recording itself which is the primary evidence of its contents, 53 that the transcript is to assist the jury in evaluating the primary evidence, and that if the jury determines that the transcript is in any respect incorrect, it should disregard it to that extent and rely on its own interpretation of the recording. 54 The jury should be instructed that it need not accept any proffered transcript as accurate. 55 The court may also instruct the jury that differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript, and that they should therefore rely on what they hear rather than on what they read when there is a difference. 56

§ 1243 ----Use of transcripts by jury; instructions [SUPPLEMENT]

Case authorities:

In prosecution for distributing cocaine, possession with intent to distribute, and

conspiracy to possess and distribute cocaine, trial court did not abuse its discretion in admitting tape recordings of conversations between defendant and police informant or in allowing jury to use transcripts while listening to recordings, even though defendant claimed recordings were unintelligible, where (1) defendant disputed prosecution's interpretation of recordings by calling experienced translator, (2) defendant declined opportunity to offer his own transcripts, (3) police informant and transcriber testified about recorded conversations and was cross-examined, and (4) jury was instructed that only tapes and not transcripts were to be considered when weighing evidence. *United States v Martinez* (1991, CA8 Minn) 951 F2d 887, cert den (US) 118 L Ed 2d 407, 112 S Ct 1695.

Footnotes

Footnote 52. *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380).

Footnote 53. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv 1170, reh den (CA5 Tex) 671 F2d 1378 and cert den 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, later proceeding (CA5 Tex) 724 F2d 507, later proceeding (CA5 Tex) 725 F2d 1007 and reh den (CA5 Tex) 729 F2d 779 and (criticized on other grounds by *United States v Dilg* (CA11 Ala) 700 F2d 620) and (among conflicting authorities on other grounds noted in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920).

Footnote 54. *United States v Ruppel* (CA5 Tex) 666 F2d 261, 9 Fed Rules Evid Serv 1170, reh den (CA5 Tex) 671 F2d 1378 and cert den 458 US 1107, 73 L Ed 2d 1369, 102 S Ct 3487, reh den 458 US 1132, 73 L Ed 2d 1402, 103 S Ct 17, later proceeding (CA5 Tex) 724 F2d 507, later proceeding (CA5 Tex) 725 F2d 1007 and reh den (CA5 Tex) 729 F2d 779 and (criticized on other grounds by *United States v Dilg* (CA11 Ala) 700 F2d 620) and (among conflicting authorities on other grounds noted in *United States v Burke* (CA7 Ill) 781 F2d 1234, 19 Fed Rules Evid Serv 920); *United States v Devous* (CA10 Wyo) 764 F2d 1349.

Footnote 55. *United States v Onori* (CA5 Fla) 535 F2d 938.

Footnote 56. *United States v Gordon* (CA8 Mo) 688 F2d 42, 11 Fed Rules Evid Serv 1026 (criticized on other grounds by *United States v A & S Council Oil Co.* (CA4 NC) 947 F2d 1128, 34 Fed Rules Evid Serv 380); *United States v Slade*, 200 US App DC 240, 627 F2d 293, 5 Fed Rules Evid Serv 1053, cert den 449 US 1034, 66 L Ed 2d 495, 101 S Ct 608 and (criticized on other grounds by *United States v Gibbs* (CA3 Pa) 739 F2d 838, 15 Fed Rules Evid Serv 929).

g. Documents or Records of Documents Purporting to Establish or Affect Interest in Property [1244-1253]

(1). Generally [1244]

§ 1244 Hearsay exception under Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(15) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that a statement contained in a document purporting to establish or affect an interest in property is not subject to exclusion under the rule against hearsay if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. 57 The rationale for this exception to the hearsay rule is that documents of the type described are reliable because the matters asserted are important to serious and carefully planned transactions. 58 The requirement that the matter stated be relevant to the purpose of the document, and the "escape clause" rendering the exception inapplicable where subsequent dealings with the property have been inconsistent with the truth of the statement or the import of the document, are believed to be adequate guarantees of trustworthiness. 59

◆ Practice guide: The requirement of no inconsistency between the matter asserted in the statement and subsequent dealings with the property, and no inconsistency between such dealings and the purport of the document amount to a condition on the admissibility of the evidence, not a factor affecting its weight, and any issue as to satisfaction of this requirement should be determined by the court under Rule 104(a). The opponent of the evidence should probably be deemed to have the burden of establishing any inconsistency. 60

◆ Observation: The common law generally recognized a somewhat similar exception to the hearsay rule with respect to deeds. 61 The exception codified in Rule 803(15) is broader, inasmuch as (1) the Rule is not limited to deeds, but apparently extends to instruments dealing with personal property as well, and (2) under the Rule the age of the document is immaterial, whereas the common-law exception apparently applied only to ancient deeds.

The application of Rule 803(15) is not limited to formally executed documents such as mortgages. 62 However, the Rule is not applicable to an affidavit of heirship. 63

Rule 803(14) also allows the admission of certain records of documents affecting an interest in property recorded in a public office. 64

Footnotes

Footnote 57. FRE 803(15); Uniform Rules of Evidence Rule 803(15).

Footnote 58. *Compton v Davis Oil Co.* (DC Wyo) 607 F Supp 1221, 20 Fed Rules Evid Serv 587.

Footnote 59. Advisory Committee Notes to Federal Rules of Evidence, Rule 803(15).

Footnote 60. Louisell & Mueller, Federal Evidence § 463.

Practice References 45 Am Jur Trials 1, Determining Preliminary Facts Under Federal Rule 104.

Footnote 61. Louisell & Mueller, Federal Evidence § 463.

Footnote 62. *Madden v State* (Tex Crim) 799 SW2d 683, reh den (Nov 28, 1990) and later proceeding 498 US 1301, 112 L Ed 2d 1026, 111 S Ct 902 and cert den 498 US 1129, 112 L Ed 2d 1200, 111 S Ct 1096 and cert den 499 US 954, 113 L Ed 2d 483, 111 S Ct 1432, habeas corpus den (CA5 Tex) 18 F3d 304, reh den (CA5 Tex) 1994 US App LEXIS 10178 and (ovrld on other grounds by *Geesa v State* (Tex Crim) 820 SW2d 154) as stated in *Turro v State* (Tex App Fort Worth) 837 SW2d 232, petition for discretionary review gr (Dec 23, 1992) and revd, cause remanded (Tex Crim) 867 SW2d 43 (handwritten list of weapons possessed by murder victim and corresponding serial numbers found, after victim's death, among his personal papers was admissible under Rule 803(15)).

Footnote 63. *Compton v WWV Enterprises* (Tex App Eastland) 679 SW2d 668.

Footnote 64. FRE 803(14); Uniform Rules of Evidence Rule 803(14), discussed in § 1350.

(2). Deeds [1245-1253]

(a). In General [1245-1250]

§ 1245 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A deed to realty which is in all respects regular and in compliance with the provisions of the law regarding such instruments is generally admissible in evidence in an action between the parties to it, or their privies, 65 or in favor of a party claiming under the deed, 66 subject to the general evidentiary requirements of relevance and competency. 67 To the extent that a deed contains admissions of facts amounting to declarations against the interest of the maker, it is admissible in evidence by a stranger, whether the plaintiff or the defendant, against all the other parties to the suit who have a joint interest with the party making the admissions. 68

Footnotes

Footnote 65. *Vance v Gilbert*, 178 Cal 574, 174 P 42; *Matthews v Hill*, 165 App Div 672, 151 NYS 101; *Keyes v Gore*, 42 Ohio St 211.

As to the legality of a deed in matters of form and content, see 23 Am Jur 2d, Deeds §§ 17-25.

Footnote 66. *People's Bank v Calhoun*, 102 US 256, 12 Otto 256, 26 L Ed 101; *Tarver v Deppen*, 132 Ga 798, 65 SE 177; *Wicker v Jones*, 159 NC 102, 74 SE 801.

In an action of ejectment, deeds and other muniments of title which convey or purport to convey the land in controversy are admissible as tending to show title or right to possession. 25 Am Jur 2d, Ejectment § 108.

Footnote 67. *Hollingsworth v Flint*, 101 US 591, 11 Otto 591, 25 L Ed 1028.

Footnote 68. *Peters v Nolan Coal Co.*, 61 W Va 392, 56 SE 735.

§ 1246 Authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, it is essential to give preliminary proof of the authenticity and execution of a deed offered in evidence, 69 unless the deed is deemed self-proving by virtue of its status as an ancient document. 70 Under modern practice, however, the common-law rule is rarely invoked in view of statutes which provide that deeds (and frequently other sorts of documents) which are acknowledged by a notary public or other designated official are admissible without further evidence of authenticity. Typical in this respect is Rule 902(8) of the Uniform Rules of Evidence and the Federal Rules of Evidence, which provides that extrinsic evidence of authenticity is not required for a document accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments. 71 This Rule was promulgated in recognition of the fact that in most states, acknowledged deeds are regarded as self-authenticating, and was intended to extend this practice to all acknowledged documents. 72

Footnotes

Footnote 69. *Beverly v Burke*, 9 Ga 440; *Garrison v Haydon*, 24 Ky 222; *Shanks v Lancaster*, 46 Va 110.

Footnote 70. § 1251.

Footnote 71. FRE 902(8); Uniform Rules of Evidence Rule 902(8).

Footnote 72. Advisory Committee Notes to Federal Rules of Evidence, Rule 902.

§ 1247 Defective or void deed

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A void deed is generally not admissible to prove title to realty. ⁷³ However, a deed cannot be excluded from evidence as void upon the ground that it does not sufficiently describe any land, if the land conveyed can be identified by extrinsic evidence. ⁷⁴ Neither is a deed rendered inadmissible merely because of a clerical or scrivener's error. ⁷⁵ Moreover, even an invalid deed may be admitted into evidence for the purpose of showing such matters as the intention of the parties, ⁷⁶ the extent of a claim of the party in possession under it, ⁷⁷ or the precise location of the property in question. ⁷⁸

Footnotes

Footnote 73. *Cox v Hart*, 145 US 376, 36 L Ed 741, 12 S Ct 962.

Footnote 74. *Cox v Hart*, 145 US 376, 36 L Ed 741, 12 S Ct 962.

Generally, as to the admissibility of parol evidence to explain ambiguities in deeds, see 23 Am Jur 2d, Deeds §§ 310 et seq.

Footnote 75. *Pardee v Lindley*, 31 Ill 174; *Matthews v Hill*, 165 App Div 672, 151 NYS 101.

Footnote 76. *Bank of Metropolis v Guttschlick*, 39 US 19, 14 Pet 19, 10 L Ed 335.

Footnote 77. *McLawrin v Salmons*, 50 Ky 96.

Footnote 78. *Ryan v United States*, 136 US 68, 34 L Ed 447, 10 S Ct 913.

§ 1248 Deeds referred to in another deed; deeds to adjacent or comparably situated land

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Deeds which are referred to in another deed as parts of the description of the land conveyed may be used in evidence in aid of that description. ⁷⁹ Where a deed containing no description of the land conveyed, except by reference to another deed, is properly admitted in evidence, the one referred to should also be received for the purpose of showing a description of the land conveyed, whether the conveyance is genuine or not. ⁸⁰

A deed of land adjacent to property to which title is disputed, in which the land therein conveyed is described as being bounded by lands of a certain person, is admissible as tending to establish the existence of a conveyance to that person by former owners. 81 The value of a particular tract of land may be shown by deeds to comparably situated tracts, but only where such deeds are supported by expert testimony. 82

Footnotes

Footnote 79. *Peyton v Heinekin*, 131 US Appx 101, 20 L Ed 679.

Footnote 80. *Hicks v Coleman*, 25 Cal 122.

Footnote 81. *Masterson v Harris County Houston Ship Channel Nav. Dist.* (Tex Com App) 15 SW2d 1011, 67 ALR 1324, reh den (Tex Com App) 18 SW2d 588, 67 ALR 1332.

Footnote 82. *Buxton v Evans* (La App 3d Cir) 478 So 2d 736, cert den (La) 479 So 2d 921.

§ 1249 Recitals as evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A deed offered as evidence of the truth of the matters recited, acknowledged, or declared in it is admissible only against parties and privies, 83 under general principles governing admissions of parties and their privies. 84 At common law, recitals in a deed other than an ancient deed 85 are generally not admissible against a stranger to the instrument to prove the facts therein recited, nor are they binding upon him. 86 Thus, a recital in a recent, as distinguished from an ancient, deed that the consideration has been paid, or stating the amount of the consideration paid, is not proof of such fact as against a stranger. 87 Nor is a recital admissible as against a stranger to prove heirship. 88

◆ Comment: Some of the decisions stating that recitals in a deed (other than an ancient deed) are not binding as against strangers have justified this rule on the grounds that such recitals are hearsay. 89 Such holdings have presumably been superseded in some jurisdictions by the adoption of the Uniform Rules of Evidence or the Federal Rules of Evidence, Rule 803(15) of which provides that statements in a document purporting to establish or affect an interest in property are not excludable on the basis of their status as hearsay if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. 90 On the other hand, decisions justifying the common-law rule on the grounds that such recitals are, as to strangers to the deed, *res inter alios acta* 91 would probably not be affected by the

adoption of Rule 803(15).

§ 1249 ----Recitals as evidence [SUPPLEMENT]

Practice Aids: Deed of realty creating trust. 17A Am Jur Legal Forms 2d, Trusts § 251:83.

Footnotes

Footnote 83. Franklin v Dorland, 28 Cal 175; Snyder v Cearfoss, 190 Md 151, 57 A2d 786; Waters v Pittman, 254 NC 191, 118 SE2d 395; Peters v Nolan Coal Co., 61 W Va 392, 56 SE 735.

Footnote 84. §§ 760 et seq.

Footnote 85. As to recitals in ancient deeds, see § 1253.

Footnote 86. Simmons Creek Coal Co. v Doran, 142 US 417, 35 L Ed 1063, 12 S Ct 239; Stewart v Peabody, 280 Ala 5, 189 So 2d 554; Carter v Thompson, 167 Ark 272, 267 SW 790, 38 ALR 1053; Soukup v Union Inv. Co., 84 Iowa 448, 51 NW 167; Dyer v Marriott, 89 Kan 515, 131 P 1185; Reams v Sinclair, 88 Neb 738, 130 NW 562; Waters v Pittman, 254 NC 191, 118 SE2d 395; Skipper v Yow, 240 NC 102, 81 SE2d 200; Potter v Washburn, 13 Vt 558; Hagan v Holderby, 62 W Va 106, 57 SE 289.

Footnote 87. Simmons Creek Coal Co. v Doran, 142 US 417, 35 L Ed 1063, 12 S Ct 239; Kruse v Conklin, 82 Kan 358, 108 P 856; Enkema v McIntyre, 136 Minn 293, 161 NW 587, 2 ALR 411; Peck v Mallams, 10 NY 509; Waters v Pittman, 254 NC 191, 118 SE2d 395; Lloyd v Lynch, 28 Pa 419.

Footnote 88. Carter v Thompson, 167 Ark 272, 267 SW 790, 38 ALR 1053; Soukup v Union Inv. Co., 84 Iowa 448, 51 NW 167; Dyer v Marriott, 89 Kan 515, 131 P 1185; Potter v Washburn, 13 Vt 558.

Footnote 89. Wanex v Hurst, 188 Md 520, 53 A2d 38; Lloyd v Lynch, 28 Pa 419.

Footnote 90. As to Rule 803(15), generally, see § 1244.

Footnote 91. Waters v Pittman, 254 NC 191, 118 SE2d 395.

As to the doctrine of res inter alios acta, generally, see § 1176.

§ 1250 --Exceptions to general rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Exceptions to the general rule that the recitals of a deed are not evidence against a stranger have been created where strict adherence to the general rule would work an injustice. 92 The most important exception is found in the case of ancient deeds. 93 Also, recitals in deeds are admissible as evidence of reputation concerning matters of general and public interest as stated in the recitals. 94

Footnotes

Footnote 92. *Deery v Cray*, 72 US 795, 5 Wall 795, 18 L Ed 653; *Crane v Lessee of Morris*, 31 US 598, 6 Pet 598, 8 L Ed 514; *Carver v Jackson*, 29 US 1, 4 Pet 1, 7 L Ed 761.

Footnote 93. § 1253.

Footnote 94. *Bow v Allenstown*, 34 NH 351.

(b). Ancient Deeds [1251-1253]

§ 1251 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the general rule admitting ancient documents in evidence without direct proof of their execution, 95 a deed which appears to have been in existence for more than 30 years, which is valid upon its face and free from suspicion, and which comes from proper custody, is admissible at common law without the usual and regular proof of its execution. 96 A deed of such age, coming from proper custody, is admissible where possession under it, or some other corroborative evidence freeing it from all just grounds of suspicion, is shown. 97 While possession of the land to which the deed pertains, in reliance on the deed, is the most commonly offered form of corroboration, 98 such possession is not indispensable; other corroborative circumstances, though circumstantial, may suffice to establish the antiquity and integrity of the document. 99

Where an ancient deed, otherwise admissible, is offered in evidence, it is immaterial that its proof or acknowledgment was insufficient to admit it to record. 1

An ancient deed purporting to have been signed by an agent is admissible without the production of the power of attorney, where the other necessary facts are present and the possession of the land has been consistent with its terms. 2

Footnotes

Footnote 95. § 1201.

Footnote 96. *Wilson v Snow*, 228 US 217, 57 L Ed 807, 33 S Ct 487; *Ford v Ford*, 27 App DC 401; *O'Neal v Tennessee C., I. & R. Co.*, 140 Ala 378, 37 So 275; *Garbarino v Noce*, 181 Cal 125, 183 P 532, 6 ALR 1433; *Reinhart v Miller*, 22 Ga 402; *Homewood Realty Corp. v Safe Deposit & Trust Co.*, 160 Md 457, 154 A 58, 78 ALR 8; *Anderson v Anderson*, 150 Neb 879, 36 NW2d 287; *Trustees of German Tp. v Farmers & Citizens Sav. Bank Co. (CP)* 51 Ohio Ops 346, 66 Ohio L Abs 332, 113 NE2d 409, affd (Ohio App, Montgomery Co) 115 NE2d 690; *Emory v Bailey*, 111 Tex 337, 234 SW 660, 18 ALR 901; *Wilson v Braden*, 56 W Va 372, 49 SE 409.

Practice References 50 Am Jur POF2d 321, Ancient Documents, §§ 15-24.

Footnote 97. *Applegate v Lexington & Carter County Mining Co.*, 117 US 255, 29 L Ed 892, 6 S Ct 742.

Footnote 98. *Crane v Marshall*, 16 Me 27; *Nixon v Porter*, 34 Miss 697; *Wilson v Braden*, 56 W Va 372, 49 SE 409.

Footnote 99. *Applegate v Lexington & Carter County Mining Co.*, 117 US 255, 29 L Ed 892, 6 S Ct 742; *Reuter v Stuckart*, 181 Ill 529, 54 NE 1014; *Harlan v Howard*, 79 Ky 373; *Cunningham v Davis*, 175 Mass 213, 56 NE 2; *Long v McDow*, 87 Mo 197; *Sanger v Merritt*, 120 NY 109, 24 NE 386; *Nicholson v Eureka Lumber Co.*, 156 NC 59, 72 SE 86 (superseded by statute on other grounds as stated in *State v Le Duc*, 306 NC 62, 291 SE2d 607); *Emory v Bailey*, 111 Tex 337, 234 SW 660, 18 ALR 901.

Footnote 1. *Frost v Wolf*, 77 Tex 455, 14 SW 440.

Footnote 2. *Wilson v Snow*, 228 US 217, 57 L Ed 807, 33 S Ct 487.

§ 1252 Copies; effect of affidavit of forgery

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It has been held that the presumption of due execution of a deed more than 30 years old applies only to originals, and not to mere copies. 3 It has been held otherwise, however, with regard to a certified copy of a recorded ancient deed where the copy had been on record for more than 30 years, 4 and it has also been held that a certified copy from a record of a deed made more than 30 years before the copy is offered in evidence shows conclusively that the instrument was in existence for the period necessary to make it an ancient instrument. 5

◆ Practice guide: Notwithstanding the self-authenticating nature of a copy of an ancient deed, the proponent of such a copy may, before securing its admission into evidence, be required to overcome an objection to its admission under the best evidence doctrine. 6

According to some authority, an ancient deed is admissible in evidence without proof of execution, notwithstanding that an affidavit has been filed attacking it as a forgery; under

this view no distinction seems to be made whether the instrument offered is an original deed or a copy. 7 Under other authority, an original ancient deed is admissible in evidence without proof of its execution, regardless of an affidavit of forgery filed against it, but where the instrument offered is a copy or record of it, it is not admissible without proof of execution if it has been attacked by an affidavit of forgery. 8 Under a statute permitting the use in evidence of a certified copy of the record of a lost deed where the original would be admissible, such copy may be admitted after the deed has been on record for more than 30 years, if it is free from anything suspicious on its face, notwithstanding the filing of an affidavit charging the original to be forged. 9

Footnotes

Footnote 3. *McCleery v Lewis*, 104 Me 33, 70 A 540; *Anderson v Anderson*, 150 Neb 879, 36 NW2d 287.

Footnote 4. *Fielder v Pemberton*, 136 Tenn 440, 189 SW 873.

Footnote 5. *Emory v Bailey*, 111 Tex 337, 234 SW 660, 18 ALR 901.

Footnote 6. As to the best evidence doctrine, generally, see §§ 1049 et seq.

Footnote 7. *Emory v Bailey*, 111 Tex 337, 234 SW 660, 18 ALR 901; *Crockett v Arkansas-Louisiana Gas Co.* (Tex Civ App) 125 SW2d 1101.

Footnote 8. *Bentley v McCall*, 119 Ga 530, 46 SE 645.

Footnote 9. *Emory v Bailey*, 111 Tex 337, 234 SW 660, 18 ALR 901.

§ 1253 Recitals as evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although recitals contained in a deed are generally not, as against strangers, evidence of the facts recited, 10 when the deed offered in evidence is an ancient deed, its recitals are at common law competent evidence of the facts recited, even as against strangers to the title, when accompanied by possession under the deed or other corroborating circumstances. 11 Under the exception, recitals of pedigree in ancient deeds are admissible on the theory that, if untrue, they would long since have been disproved, and that time and possession have raised the presumption of this truth, 12 provided there is some proof, even though slight, of the relationship of the declarant with the family. 13

◆ **Comment:** The rule permitting admission into evidence of recitals in ancient deeds has been regarded as an application to deeds of the general common-law exception to the hearsay rule pertaining to ancient documents. 14 Rule 803(16) of the Uniform Rules of Evidence and the Federal Rules of Evidence somewhat alters the common-law

exception pertaining to ancient documents. 15 Moreover, Rule 803(14) creates an exception to the hearsay rule for records of documents purporting to establish or affect an interest in property, as proof of the content of the original recorded documents; this exception does not require that a document be of any particular age. 16

An ancient deed may be introduced in evidence as proof of facts recited in it which tend to prove that a valuable consideration was or was not given, 17 or to establish the person or persons from whom title was derived where there is other proof of a long-continued and undisputed possession, in accordance with the right or title claimed. 18 When a party attempts to establish his chain of title through conveyances from a remote grantor, a deed in the chain of title which has been either lost or destroyed may be established by a subsequent deed containing a recital of the missing deed. 19 Recitals in ancient deeds are also admissible to establish the extent of the property conveyed or the location of disputed boundary lines. 20

Footnotes

Footnote 10. § 1249.

Footnote 11. *Wilson v Snow*, 228 US 217, 57 L Ed 807, 33 S Ct 487; *Garbarino v Noce*, 181 Cal 125, 183 P 532, 6 ALR 1433; *Brown v Weare*, 348 Mo 135, 152 SW2d 649, 136 ALR 286; *Young v Shulenberg*, 165 NY 385, 59 NE 135; *Skipper v Yow*, 240 NC 102, 81 SE2d 200; *Sitler v Gehr*, 105 Pa 577; *Wilson v Braden*, 56 W Va 372, 49 SE 409.

Footnote 12. *Wilson v Braden*, 56 W Va 372, 49 SE 409.

Footnote 13. *Fulkerson v Holmes*, 117 US 389, 29 L Ed 915, 6 S Ct 780; *Young v Shulenberg*, 165 NY 385, 59 NE 135; *Sitler v Gehr*, 105 Pa 577.

Footnote 14. *Skipper v Yow*, 240 NC 102, 81 SE2d 200.

Footnote 15. FRE 803(16), Uniform Rules of Evidence Rule 803(16).

As to ancient documents, generally, see §§ 1201 et seq.

Footnote 16. As to Rule 803(14), generally, see § 1350.

Footnote 17. *Strong v Whybark*, 204 Mo 341, 102 SW 968; *Chamblee v Tarbox*, 27 Tex 139.

Footnote 18. *McMahon v Stratford*, 83 Conn 386, 76 A 983; *Norris v Hall*, 124 Mich 170, 82 NW 832.

Footnote 19. *Dorff v Schmunk*, 197 Pa 298, 47 A 113.

Footnote 20. *Garbarino v Noce*, 181 Cal 125, 183 P 532, 6 ALR 1433; *Edmunds v Plianos*, 74 SD 260, 51 NW2d 701.

h. Private Memoranda [1254-1275]

(1). In General [1254]

§ 1254 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The rule against hearsay applies to written statements as well as to oral testimony, and accordingly a private memorandum which falls within the terms of the rule is at common law excludable from evidence on hearsay grounds, 21 especially where it is of a self-serving nature, 22 unless it can be brought within one of the exceptions to the hearsay rule, such as the res gestae exception 23 or the exception pertaining to admissions of a party. 24

A memorandum concerning a transaction between one of the parties to the suit and a nonparty may also be excluded under the doctrine of res inter alios acta. 25 In addition, the presence of a memorandum written on evidence tendered for some purpose other than proving the truth of the matters alleged in the memorandum may render the evidence inadmissible due to the prejudicial effect of the memorandum. 26

§ 1254 ----Generally [SUPPLEMENT]

Case authorities:

A memorandum of a meeting in which members of the architectural review committee of plaintiff homeowners association explained their reasons for disapproving defendant homeowners' application for permission to replace wood siding on their home with vinyl siding was relevant to the issue of whether the committee acted reasonably and in good faith, but the trial court's exclusion of this evidence was not prejudicial error where several of the reasons set forth in the memorandum were testified to at trial and plaintiff could have established the other reasons through the testimony of committee members. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

Footnotes

Footnote 21. *Heil v Zahn*, 187 Md 603, 51 A2d 174.

Annotation: Written recitals or statements as within rule excluding hearsay, 10 ALR2d 1035.

Footnote 22. *In re Levi's Will*, 3 Misc 2d 746, 157 NYS2d 320.

Footnote 23. *Shepard v Minneapolis Threshing Mach. Co.*, 50 Wash 242, 97 P 57.

As to the *res gestae* exception to the hearsay rule, generally, see § 861.

Footnote 24. As to the exception for admissions of a party, generally, see § 668.

As to other exceptions to the hearsay rule, see §§ 679 et seq.

Footnote 25. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

As to the doctrine of *res inter alios acta*, generally, see § 1176.

Footnote 26. *Carrier v State* (Tex Crim) 565 SW2d 57 (in prosecution for delivery of heroin, it was error to admit an envelope into evidence, where notations on the envelope amounted to a neat condensation of the government's whole case against the defendant, notwithstanding that the accused had the opportunity to cross-examine the government agent who had made the notations).

(2). Entries in Family Records and Bibles [1255-1257]

§ 1255 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Entries in a family Bible regarding such matters as births, deaths, and marriages of family members are competent evidence on these issues at common law, where a proper showing is made as to the authorship or authenticity of the entries as a part of the family record and where better evidence is not available. 27 The admissibility of such proof is not confined to actions involving pedigree, but extends to other actions where such proof is relevant. 28 An entry in a family Bible made by a person since deceased, showing his own birth date, is admissible. 29 It is not necessary that the record be made by a member of the family for it to be admitted. 30 An entry in a family Bible must have been made at the time when the event happened, or within some period of time thereafter so remote from the purposes of the suit in which they are offered as evidence as to prove that it was not made for the purposes of litigation. 31 Such entries, moreover, are generally regarded as hearsay evidence which should not be admitted where the person who made them is alive and capable of testifying. 32

Footnotes

Footnote 27. *Lewis v Marshall*, 30 US 470, 5 Pet 470, 8 L Ed 195; *Brown v State*, 247 Ala 288, 24 So 2d 223; *Estate of Monticelli*, 107 Cal App 2d 90, 236 P2d 661; *Rhoades v Bussinger*, 188 Md 638, 53 A2d 419.

As to authentication of entries in a family Bible or other family record, see § 1257.

Practice References 45 Am Jur POF2d 631, Age of Person.

Footnote 28. State v Bowman, 278 Mo 492, 213 SW 64.

Footnote 29. Ewell v Ewell, 163 NC 233, 79 SE 509.

As to admissibility of a memorandum written by a person since deceased, generally, see § 1274.

Footnote 30. Union Cent. Life Ins. Co. v Pollard, 94 Va 146, 26 SE 421.

Footnote 31. Brown v State, 247 Ala 288, 24 So 2d 223; Chapman v Chapman, 2 Conn 347; Bower v Lunney, 27 Tenn App 87, 178 SW2d 91.

Footnote 32. People v Mayne, 118 Cal 516, 50 P 654; State v Adkins, 106 W Va 658, 146 SE 732.

§ 1256 Provisions of Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(13) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like, are not excluded by the rule against hearsay. ³³ The phrase "statements of facts concerning personal or family history" is meant to include the specific types of statements enumerated in Rule 803(11): statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts. ³⁴

Rule 804(b)(4)—which provides generally that a statement of personal or family history is not excludable as hearsay if the declarant is unavailable as a witness, and the statement relates to the declarant's own family relationships, or to the family relationships of another person to whom the declarant is related or intimately associated with—has also been used to admit into evidence writings concerning family relationships. ³⁵

Footnotes

Footnote 33. FRE 803(13); Uniform Rules of Evidence Rule 803(13).

Footnote 34. House Judiciary Committee Report No. 93-650 (1973), p. 15.

Footnote 35. In re Estate of Egbert, 105 Mich App 395, 306 NW2d 525 (inscription on back of photograph).

As to the provisions of Rule 804(b)(4), generally, see § 691.

§ 1257 Authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As a preliminary to the introduction of a family record in evidence, there must be some proof of its authenticity and due execution. 36 Although, in the case of Bible entries, the common law does not require proof of handwriting to warrant the admission in evidence of an entry adopted or accepted by the family as a true record, there must be some showing of authenticity, by way of proof either that the entry was made originally by one having knowledge or that the record was accepted by the family as true. 37 The production of a Bible from proper custody, together with its recognition by the members of the family as a true family record, is generally sufficient to render admissible in evidence entries of family pedigree in it, without any evidence of the authorship or handwriting of the entries. 38 But a family Bible in which the names and birth dates of several members of the same family are recorded, without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, is not competent proof of the age of any person whose name may be recorded in it. 39

◆ Comment: A sufficiently old record or Bible entry may be authenticated under the rules of the common law or the Uniform or Federal Rules of Evidence pertaining to authentication of ancient documents. 40

Footnotes

Footnote 36. Supreme Council of Golden Star Fraternity v Conklin, 60 NJL 565, 38 A 659.

Footnote 37. Supreme Council of Golden Star Fraternity v Conklin, 60 NJL 565, 38 A 659.

Footnote 38. Prudential Ins. Co. v Pierce's Adm'x, 270 Ky 216, 109 SW2d 616; Union Cent. Life Ins. Co. v Pollard, 94 Va 146, 26 SE 421.

Footnote 39. Prudential Ins. Co. v Pierce's Adm'x, 270 Ky 216, 109 SW2d 616; Supreme Council of Golden Star Fraternity v Conklin, 60 NJL 565, 38 A 659.

Footnote 40. As to the rules pertaining to authentication of ancient documents, see §§ 1201 et seq.

(3). Writings Used to Refresh Recollection [1258-1263]

§ 1258 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In some situations, a writing or memorandum made either at the time of the occurrence or transaction recorded, or while the facts were fresh in the writer's mind, which is not otherwise admissible evidence, may be used by a witness while testifying for the purpose of refreshing his or her memory. Such a memorandum may be used where the witness' recollection of the event in question is more or less obscured, but is revived after consulting the memorandum such that the witness is able to testify to the facts to which it relates from independent recollection. 41 When a memorandum is used in this manner, it does not become evidence in the case, 42 unless introduced by opposing counsel. 43 The party whose witness has consulted the memorandum has no right to introduce it in evidence, as the writing is hearsay. 44 However, a writing may be employed for refreshment of memory even though the source from which it is derived would not be admissible in evidence. 45

◆ **Observation:** The common-law practice of using writings to refresh the memory of a witness during or before his or her testimony is recognized by Rule 612 of the Uniform Rules of Evidence and the Federal Rules of Evidence, which Rule assumes the validity of this practice and governs the use and introduction into evidence of such writings by an adverse party. 46

§ 1258 ----Generally [SUPPLEMENT]

Case authorities:

State prisoners who alleged that their placement in prison's maximum control unit (MCU) was due to their affiliation with alleged terrorist organization were not permitted to examine prison's files related to plaintiffs' placement in MCU under Rule 612, since that rule pertains to documents used to refresh witness's recollection, and witness in hearing at issue was not relying on any of documents to refresh his recollection, but only referring to documents to describe their nature and why they would be considered privileged. *Pack v Beyer* (1994, DC NJ) 157 FRD 226.

Footnotes

Footnote 41. 81 Am Jur 2d, Witnesses § 777.

Practice References 10 Am Jur Proof of Facts 251, Refreshing Recollection.

Footnote 42. *Stewart v State* (Ala App) 381 So 2d 214, cert den (Ala) 381 So 2d 220; *State v Masse*, 24 Conn Supp 45, 1 Conn Cir 381, 186 A2d 553; *People v Chrisoulas*, 367

Ill 85, 10 NE2d 382, 112 ALR 990; Commonwealth v Clark, 23 Mass App 375, 502 NE2d 564; Gardner v Metropolitan S. R. Co., 223 Mo 389, 122 SW 1068; Springer v Labow, 108 NJL 68, 155 A 476; Mathews v Chili Ave. Garage, Inc., 37 Misc 2d 609, 236 NYS2d 981, affd (4th Dept) 18 App Div 2d 882, 236 NYS2d 1022.

Contra McCarthy v Boston & M. R. R., 92 NH 149, 27 A2d 97.

Annotation: Refreshment of recollection by use of memoranda or other writings, 82 ALR2d 473 §§ 23, 24.

Footnote 43. § 1259.

Footnote 44. In re Adoption of Baby Boy B. (3d Dept) 163 App Div 2d 673, 558 NYS2d 281, app den 76 NY2d 710, 563 NYS2d 62, 564 NE2d 672, later proceeding (3d Dept) 174 App Div 2d 808, 571 NYS2d 125.

Footnote 45. People v Rowan, 76 Mich App 124, 255 NW2d 791 (although tape recordings made without warrant were inadmissible in evidence, police witness could testify after having referred to his notes which he had made after occasionally listening to tapes and then using his independent knowledge and refreshed memory).

The fact that a tape recording of a conversation was made by an attorney in violation of applicable canons of legal ethics is no bar to the use of the recording to refresh a witness' recollection. 20th Century Wear, Inc. v Sanmark-Stardust, Inc. (CA2 NY) 747 F2d 81, 224 USPQ 98, 17 Fed Rules Evid Serv 470, cert den 470 US 1052, 84 L Ed 2d 818, 105 S Ct 1755.

Footnote 46. § 1261.

§ 1259 Prerequisites for use of writing to refresh recollection

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Although some authorities hold that a memorandum, in order to be used by a witness to refresh his recollection, must be stated by the witness to be a correct statement of the matter involved, other authorities, recognizing that even a false statement may revive an accurate memory, have declined to impose such a requirement. 47 Under Rule 612 of the Uniform Rules of Evidence and the Federal Rules of Evidence, which govern the use of writings to refresh memory, it must be shown that the writing is needed to refresh the witness' memory as to the matter in question. 48

◆ **Caution:** Failure to establish that the writing is needed to refresh the witness' memory is not fatal where no objection is made. 49

After consulting the writing, the witness will not be allowed to testify over objection by an adverse party unless he or she first attests that his or her memory has indeed been

refreshed by the writing, so that his or her testimony now represents an independent recollection and not a mere reiteration of the writing just consulted. 50

◆ Practice guide: As a practical matter, it may be difficult to distinguish true refreshment of recollection from mere repetition of the contents of the writing, especially since a witness who claims refreshment of memory by a writing may nonetheless be allowed to consult the writing while testifying, especially if it is lengthy and detailed. 51 Where the writing consulted is one which would not be admissible as evidence, the court should take care to insure that the witness actually has a present recollection and that refreshment of recollection is not being used as a ruse to put inadmissible evidence before the jury. 52 However, prejudice which may arise from the possibility that a witness who consults a writing while testifying is merely reciting its contents rather than refreshing his recollection may be vitiated by a showing that the witness is able to embellish upon the writing and testify to matters not contained in it, and by affording the opposing party full opportunity to cross-examine the witness, introduce the writing into evidence under Rule 612, and attack the witness' credibility. 53

§ 1259 ----Prerequisites for use of writing to refresh recollection [SUPPLEMENT]

Case authorities:

Detective was properly permitted to read from and testify regarding parts of statements he took from armed robbery victims on night of robbery, after prosecutor was unsuccessful in refreshing victims' recollections with their written statements, where detective testified how statements given to him were translated verbatim and how he attested them, and where victims testified that they remembered giving statements and that information given in statements was correct. *State v Padilla* (1994, App) 118 NM 189, 879 P2d 1208.

In prosecution for driving while intoxicated, trial court did not err in permitting two police officers to read material before jury from written reports, where officers merely read written reports to refresh their memories and then testified from their refreshed memories. *McCoy v State* (1994, Tex App Eastland) 877 SW2d 844.

Footnotes

Footnote 47. 81 Am Jur 2d, Witnesses § 778.

Footnote 48. *United States v Jimenez* (CA5 Tex) 613 F2d 1373, 5 Fed Rules Evid Serv 1002 (criticized on other grounds by *United States v De Castris* (CA7 Ill) 798 F2d 261, 21 Fed Rules Evid Serv 504) as stated in *United States v Beasley* (CA7 Ind) 809 F2d 1273, 22 Fed Rules Evid Serv 507; *People v Larry*, 162 Mich App 142, 412 NW2d 674, app den (Mich) LEXIS slip op.

Annotation: Use of writing to refresh witness' memory, as governed by Rule 612 of Federal Rules of Evidence, 73 ALR Fed 423 § 3.

Practice References Hunter, *Federal Trial Handbook* (3d ed) §§ 31.2, 31.3.

Footnote 49. *United States v Pate* (CA5 Ala) 543 F2d 1148, reh den (CA5 Ala) 545 F2d 1298.

Footnote 50. *United States v Cheyenne* (CA8 SD) 558 F2d 902, cert den 434 US 957, 54 L Ed 2d 316, 98 S Ct 486.

Footnote 51. *State v Winemiller* (Iowa App) 411 NW2d 719.

Footnote 52. *20th Century Wear, Inc. v Sanmark-Stardust, Inc.* (CA2 NY) 747 F2d 81, 224 USPQ 98, 17 Fed Rules Evid Serv 470, cert den 470 US 1052, 84 L Ed 2d 818, 105 S Ct 1755.

Footnote 53. *United States v Rinke* (CA10 Kan) 778 F2d 581, 19 Fed Rules Evid Serv 1353 (noting that in the case at bar jury confusion was not an issue inasmuch as trial was to the court).

§ 1260 Distinction between use of writing to refresh recollection and other techniques involving use of writing at trial

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The use of a writing to refresh a witness' recollection is distinct from the admission of a writing into evidence as a past recollection recorded. 54

◆ Practice guide: Opposing counsel who suspects that a witness has no independent memory after consulting a writing, but is merely repeating the contents of the writing, should (unless the writing is defined as not hearsay by Rule 801(d) of the Uniform or Federal Rules of Evidence or a substantially similar rule) treat the situation as one in which the proponent of the witness' testimony is in fact attempting to introduce the writing into evidence as a past recollection recorded, in which case a proper foundation must be laid to secure admission of the writing notwithstanding its nature as hearsay. If the writing is admitted as a past recollection recorded, it may be considered as substantive evidence and not merely for its impeaching effect.

The use of a writing to refresh recollection of a witness is also distinguishable from its use as a prior inconsistent statement to impeach the testimony of the witness. 55

Footnotes

Footnote 54. *United States v Horton* (CA5 La) 526 F2d 884, 76-1 USTC ¶ 9219, 37 AFTR 2d 76-753, reh den (CA5 La) 529 F2d 523 and cert den 429 US 820, 50 L Ed 2d 81, 97 S Ct 67.

As to a past recollection recorded, see §§ 1264 et seq.

Footnote 55. As to the use of prior inconsistent statements to impeach the testimony of a witness, see 81 Am Jur 2d, Witnesses §§ 929-951, 986-991.

§ 1261 Inspection of writing and introduction into evidence by adverse party

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a witness has consulted a writing to refresh his or her memory while testifying, an adverse party is generally entitled to inspect such writing and cross-examine the witness as to its contents. 56 This rule is codified by Rule 612 of the Uniform Rules of Evidence and the Federal Rules of Evidence, which provide that where a witness has while testifying used a writing to refresh his or her memory, an adverse party is entitled to have the writing produced, to inspect it, to cross-examine the witness with regard to it, and to introduce in evidence those portions of the writing which relate to the testimony of the witness. 57 Rule 612 provides that any claim that the writing contains matters not related to the witness' testimony is to be resolved by judicial inspection of the writing in camera and excision of any unrelated matter. 58

◆ Observation: Rule 612 also permits inspection and use by an adverse party of a writing used to refresh recollection where the writing is consulted by the witness before testifying, if the court in its discretion determines that the interests of justice so require. 59

Footnotes

Footnote 56. 81 Am Jur 2d, Witnesses § 793.

Practice References Hunter, Federal Trial Handbook (3d ed) § 31.4.

Footnote 57. FRE 612; Uniform Rules of Evidence 612(c).

Footnote 58. FRE 612; Uniform Rules of Evidence 612(c).

Footnote 59. FRE 612(2); Uniform Rules of Evidence 612(b).

§ 1262 --In federal criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 612 of the Federal Rules of Evidence, which governs the use of writings to refresh

recollection, is expressly subject to the Jencks Act, which governs a criminal defendant's right to discovery of prior statements of prospective government witnesses. 60 Items within the purview of the Jencks Act are producible only according to the terms of the Act, 61 and where a particular statement prepared by a prospective government witness is not subject to production under the Act for the reason that it is unrelated to the witness' testimony, the trial court does not abuse its discretion under Rule 612 by declining to permit inspection of the statement by the defense. 62

A substantial overlap exists between the coverage of Rule 612 and that of the Jencks Act, but the identity of the procedures provided for disclosure and use of statements under the Act and under the Rule makes the overlap of no essential importance. 63

◆ Observation: One authority has noted that Rule 612 is rarely invoked in civil cases because of the broad availability of discovery in civil litigation. 64

Footnotes

Footnote 60. FRE 612.

As to discovery of statements under the Jencks Act, 18 USCS § 3500, see §§ 1152 et seq.

Footnote 61. Advisory Committee Notes to Federal Rules of Evidence, Rule 612.

Footnote 62. *United States v Williams* (CA11 Ala) 875 F2d 846, 89-2 USTC ¶ 9390, 28 Fed Rules Evid Serv 55, 64 AFTR 2d 89-5061, reh den, en banc (CA11 Ala) 886 F2d 1322.

Footnote 63. Advisory Committee Notes to Federal Rules of Evidence, Rule 612.

Footnote 64. *Louisell and Mueller*, Federal Evidence § 350.

§ 1263 --Where writing is asserted to be privileged

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Notes of the Advisory Committee pertaining to Rule 612 of the Federal Rules of Evidence state that the Rule is not intended to be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his or her memory. However, several federal courts have expressed the view that neither a claim of attorney-client privilege 65 nor invocation of the "work product" doctrine 66 will protect from disclosure writings used by a witness while testifying to refresh his or her recollection.

◆ Comment: Some courts have reached a different result where the document sought

is one which the witness consulted prior to giving testimony. 67 Some commentators have defended the distinction between documents used prior to testifying and those used while testifying, on the grounds that this distinction existed in pre-Rules practice and there is no indication that the enactment of the Rules was intended to change the prior law of privilege. 68 Other courts have rejected the contention that this distinction is material under the Rules. 69 With respect to the pre-Rules distinction between writings consulted before testifying and writings consulted after testifying, the Notes of the Advisory Committee regarding Rule 612 appear to approve the view that this distinction should be repudiated.

Footnotes

Footnote 65. *S & A Painting Co. v O.W.B. Corp.* (WD Pa) 103 FRD 407, 17 Fed Rules Evid Serv 645, 1 FR Serv 3d 428; *Marshall v United States Postal Service* (DC Dist Col) 88 FRD 348, 7 Fed Rules Evid Serv 1239, 30 FR Serv 2d 1263.

See also *Farm Credit Bank v Huether* (ND) 454 NW2d 710 (decided under state rule substantially similar to Rule 612 and reaching the same conclusion).

Annotation: Use of writing to refresh witness' memory, as governed by Rule 612 of Federal Rules of Evidence, 73 ALR Fed 423.

Footnote 66. *Cambridge Industrial Products Corp. v Metal Works, Ltd.* (DC Mass) 4 Fed Rules Evid Serv 835; *S & A Painting Co. v O.W.B. Corp.* (WD Pa) 103 FRD 407, 17 Fed Rules Evid Serv 645, 1 FR Serv 3d 428.

Footnote 67. *Sporck v Peil* (CA3) 759 F2d 312, 17 Fed Rules Evid Serv 1232, 1 FR Serv 3d 1431, 84 ALR Fed 763, cert den 474 US 903, 88 L Ed 2d 230, 106 S Ct 232 and (criticized on other grounds by *In re San Juan Dupont Plaza Hotel Fire Litig.* (CA1 Puerto Rico) 859 F2d 1007).

See also *Merlin v Boca Raton Community Hospital, Inc.* (Fla App D4) 479 So 2d 236, 10 FLW 2683 (decided under state rule providing for disclosure only of writings consulted while testifying and apparently supporting distinction between writing consulted during testimony and writing consulted prior to giving testimony).

Footnote 68. *Louisell & Mueller*, Federal Evidence § 351.

Footnote 69. *Wheeling-Pittsburgh Steel Corp. v Underwriters Laboratories, Inc.* (ND Ill) 81 FRD 8, 1978-2 CCH Trade Cases ¶ 62134, 26 FR Serv 2d 787 (stating that the use of documents to refresh recollection prior to giving testimony waives the attorney-client privilege and that the fact that the document was consulted prior to rather than during testimony is of little significance).

(4). Past Recollection Recorded [1264-1270]

(a). In General [1264]

§ 1264 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Another use of a memorandum commonly referred to as refreshment of recollection, but sometimes also called "past recollection recorded," occurs where a memorandum records a past recollection of the witness who, even after consulting the memorandum, cannot presently testify from independent memory as to the event in question, but is able to state that he once knew the facts and correctly recorded them in the memorandum. Under such circumstances, the memorandum is admissible in evidence once it has been verified by the witness, 70 notwithstanding its nature as hearsay and notwithstanding that the witness cannot effectively be cross-examined as to the matters stated in the memorandum. 71 The matters in the memorandum must, however, be matters of which the witness had personal knowledge, as distinguished from matters related to him or her by another. 72

◆ Caution: A past recollection recorded while the declarant was under hypnosis for the purpose of enhancing his or her memory is likely to be inadmissible not on the basis of its nature as hearsay, but, rather, on the grounds that it constitutes improper scientific evidence. 73

§ 1264 ----Generally [SUPPLEMENT]

Case authorities:

In prosecution for sale of controlled substance, trial court properly allowed confidential informant and narcotics agents to refer to their notes during testimony; under state evidence rule, witnesses were not required to satisfy foundation requirements of past-recollection-recorded exception to hearsay rule. *King v State* (1993, Miss) 615 So 2d 1202.

Footnotes

Footnote 70. *Strother v South Expressway Radio*, 132 Ga App 771, 209 SE2d 93; *Commonwealth v Canales*, 454 Pa 422, 311 A2d 572.

An automobile accident report written by the investigating police officer was admissible as a record of past recollection where the officer testified that although he had not been present when the collision occurred, and that he did not recall anything of the initial interview with defendant-driver, he did recognize his signature and handwriting on the report and that he wrote the report at the time of the investigation. *Dennis v Scarborough* (Ala) 360 So 2d 278.

Annotation: Refreshment of recollection by use of memoranda or other writings, 82 ALR2d 473.

Footnote 71. 81 Am Jur 2d, Witnesses § 782.

Footnote 72. Partridge v Miller (Ala) 553 So 2d 585; Roeske v Pryor (1st Dist) 152 Ill App 3d 771, 105 Ill Dec 642, 504 NE2d 927.

Footnote 73. Emmett v State, 232 Ga 110, 205 SE2d 231 (reliability of hypnosis has not been established); Commonwealth v Reed, 400 Pa Super 207, 583 A2d 459, app den 528 Pa 629, 598 A2d 282 (use of hypnosis to enhance memory is not generally accepted in the scientific community).

Annotation: Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442 § 6.

(b). Provisions of Uniform and Federal Rules of Evidence [1265-1270]

§ 1265 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, which memorandum or record is shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly, is not excluded by the hearsay rule. The Rule further provides that if admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. 74

◆ **Observation:** The Rule's restriction on receipt of the memorandum or record as an exhibit has been criticized as unjustified and inconsistent with the general treatment by the Uniform and Federal Rules of Evidence of other writings excepted from the hearsay rule. 75 The drafters of Rule 803(5) did not offer any rationale for this restriction, but it has been said that its purpose is to keep the jury from according undue emphasis to the written word. 76 Receiving such a memorandum as evidence, as distinguished from merely reading it into evidence, is harmless error where the case is tried to the court without a jury. 77

◆ **Practice guide:** The fact that a memorandum cannot be received as an exhibit under Rule 803(5) does not bar its receipt as an exhibit under some other Rule whose language permits such receipt. 78

Rule 803(5) has been invoked to introduce into evidence, as a past recollection recorded, such material as:

- Statements made to police or other law enforcement officers 79
- A form which an officer of the Immigration and Naturalization Service had filled out during an interview with an alien 80
- A police chemist's report 81
- The transcribed testimony of witnesses at a prior proceeding 82
- A police officer's notes regarding serial numbers of money found at a criminal defendant's residence 83

Footnotes

Footnote 74. FRE 803(5); Uniform Rules of Evidence Rule 803(5).

Footnote 75. Blakely, Past Recollection Recorded: Restrictions on Use as Exhibit and Proposals for Change. 17 Hou LR 411 (March 1980).

Footnote 76. United States v Judon (CA5 Ala) 567 F2d 1289, 2 Fed Rules Evid Serv 1003, appeal after remand (CA5 Ala) 581 F2d 553.

Footnote 77. De Forest v De Forest (App) 143 Ariz 627, 694 P2d 1241.

Footnote 78. Baker v Elcona Homes Corp. (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054 (police accident report not admissible as an exhibit under Rule 803(5) was admissible under Rule 803(8)).

Footnote 79. United States v Edwards (CA9 Ariz) 539 F2d 689, 1 Fed Rules Evid Serv 307, 35 ALR Fed 599, cert den 429 US 984, 50 L Ed 2d 594, 97 S Ct 501 and (among conflicting authorities on other grounds noted in United States v Alvarez-Sanchez (CA9 Cal) 975 F2d 1396, 92 CDOS 7844, 92 Daily Journal DAR 12730).

Annotation: Admissibility of statement under Rule 803(5) of Federal Rules of Evidence, providing for recorded-recollection exception to hearsay rule, 35 ALR Fed 605.

Footnote 80. Trias-Hernandez v Immigration & Naturalization Service (CA9) 528 F2d 366, 1 Fed Rules Evid Serv 92.

Footnote 81. United States v Marshall (CA9 Cal) 532 F2d 1279.

Footnote 82. Arrow-Hart, Inc. v Covert Hills, Inc. (ED Ky) 71 FRD 346, 1 Fed Rules Evid Serv 554, 22 FR Serv 2d 1485, affd (CA6 Ky) 552 F2d 711, 23 FR Serv 2d 636.

As to evidence from prior proceedings, generally, see §§ 890 et seq.

Footnote 83. United States v Marcantoni (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063.

§ 1266 Requirement that witness lack adequate present recollection

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although Rule 803(5) 84 may be invoked to permit admission of a memorandum even where the witness retains some present memory of the events in question, 85 it is necessary as a predicate for introduction of a memorandum under the Rule that the witness be shown to lack sufficient recollection to be able to testify fully and accurately. 86 Admission of a past recollection recorded under Rule 803(5) is proper even though the witness may be exercising "selective memory" on the witness stand. 87

◆ Practice guide: In order to satisfy the requirement of a lack of present memory, counsel seeking admission of a recorded recollection under Rule 803(5) might first use the document in an effort to refresh the recollection of the witness (at least where counsel has no reason to believe the witness will repudiate the document; otherwise, it may be tactically advisable not to give the witness advance notice of a potential source of impeachment).

Footnotes

Footnote 84. FRE 803(5); Uniform Rules of Evidence Rule 803(5).

Footnote 85. *State v Thompson* (Iowa) 397 NW2d 679; *State v Mastracchio* (RI) 546 A2d 165, supp op (RI) 605 A2d 489.

Footnote 86. *United States v Micke* (CA7 Wis) 859 F2d 473, 88-2 USTC ¶ 9553, 26 Fed Rules Evid Serv 1480, 62 AFTR 2d 88-5864; *United States v Felix-Jerez* (CA9 Ariz) 667 F2d 1297, 9 Fed Rules Evid Serv 1452 (criticized on other grounds by *United States v Nazemian* (CA9 Cal) 948 F2d 522, 91 CDOS 8383, 91 Daily Journal DAR 12903, 34 Fed Rules Evid Serv 188) and (among conflicting authorities on other grounds noted in *United States v Hitt* (CA9 Or) 981 F2d 422, 92 CDOS 9651, 92 Daily Journal DAR 16110, 36 Fed Rules Evid Serv 1269).

Footnote 87. *United States v Williams* (CA6 Mich) 571 F2d 344, 2 Fed Rules Evid Serv 1014, cert den 439 US 841, 58 L Ed 2d 139, 99 S Ct 131.

§ 1267 Requirement that memorandum correctly reflect prior knowledge of witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(5) requires for the admission into evidence of a past recollection recorded that the writing correctly reflect the prior knowledge of the witness. 88 Where the witness has a present recollection of making a memorandum, and can testify from present memory that he or she took care to insure that the memorandum correctly reflected what he or she then knew, this requirement of the Rule is satisfied. 89 A statement which the witness fails to endorse as accurate cannot be admitted under the Rule. 90

♦ Comment: It has been suggested that where the witness does not recall making the record in question, it may nonetheless be admitted under Rule 803(5) if the witness testifies that he or she routinely makes similar records in the course of his or her business or profession, and the steps or method used in the preparation of such records indicate to the court that the record in question is indeed an accurate reflection of the prior knowledge of the witness. 91 Where the record in question cannot be characterized as routinely prepared and the witness has no memory of making it, a bare statement by the witness to the effect that he would not have made the record if it were not true may be insufficient to admit the writing under the Rule. 92

Footnotes

Footnote 88. FRE 803(5); Uniform Rules of Evidence Rule 803(5).

Footnote 89. *United States v Cambindo Valencia* (CA2 NY) 609 F2d 603, 4 Fed Rules Evid Serv 1197, 5 Fed Rules Evid Serv 570, cert den 446 US 940, 64 L Ed 2d 795, 100 S Ct 2163 and (criticized on other grounds by *United States v Layton* (CA9 Cal) 855 F2d 1388, 26 Fed Rules Evid Serv 988); *Greger v International Jensen, Inc.* (CA8 Mo) 820 F2d 937, 26 Env't Rep Cas 1188, 23 Fed Rules Evid Serv 184 (among conflicting authorities on other grounds noted in *United States v Graves* (CA5 La) 5 F3d 1546); *United States v Edwards* (CA9 Ariz) 539 F2d 689, 1 Fed Rules Evid Serv 307, 35 ALR Fed 599, cert den 429 US 984, 50 L Ed 2d 594, 97 S Ct 501 and (among conflicting authorities on other grounds noted in *United States v Alvarez-Sanchez* (CA9 Cal) 975 F2d 1396, 92 CDOS 7844, 92 Daily Journal DAR 12730).

Footnote 90. *O'Malley v United States Fidelity & Guaranty Co.* (CA5 Miss) 776 F2d 494.

Footnote 91. *Louisell & Mueller*, Federal Evidence § 445.

As apparently adopting this approach, see *In re Messenger* (DC Pa) 32 F Supp 490.

Footnote 92. *Louisell & Mueller*, Federal Evidence § 445 (noting that such testimony is merely a general assertion of honesty which almost any witness would be likely to make under pressure by counsel, and arguing that under such circumstances the court should have discretion to exclude the writing).

But see *United States v Ray* (CA8 Mo) 768 F2d 991, 18 Fed Rules Evid Serv 1016, supp op (CA8 Mo) 777 F2d 423 and (disapproved on other grounds by *Henderson v United States*, 476 US 321, 90 L Ed 2d 299, 106 S Ct 1871) and (among conflicting authorities on other grounds noted in *United States v Peeples* (CA5 Tex) 811 F2d 849) (in prosecution for failure to appear, transcript of testimony given by accused's attorney at arraignment to the effect that he had notified accused of the arraignment date was

admissible under Rule 803(5); accuracy of transcript was confirmed when attorney said "if the transcript says I said that, I'm sure I did").

§ 1268 Requirement that memorandum must have been prepared when matter was fresh in witness' memory

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence requires that a writing admitted as a past recollection recorded must have been made or adopted by the witness when the matter in question was fresh in his or her memory. 93 Whether this requirement has been satisfied in a particular instance requires consideration of the circumstances of the case. 94 The fact that several months, 95 or more than a year, 96 has elapsed between the occurrence of a particular event and the witness' making or adoption of a writing concerning it does not preclude admission of the writing under Rule 803(5) as a past recollection recorded.

◆ Comment: The "freshness" requirement of Rule 803(5) is probably less restrictive than the often-stated requirement under pre-Rules practice that the writing must have been made at or near the time of the matter in question. It is probably also less demanding than the "immediacy" required of statements offered under Rule 803(1) as present sense impressions, and less restrictive than the time limit inherent in the Rule 803(2) exception for excited utterances. Thus, a writing offered under Rule 803(5) should not be excluded merely because it was not made immediately after the event in question, or because the declarant was no longer excited by the event.

§ 1268 ----Requirement that memorandum must have been prepared when matter was fresh in witness' memory [SUPPLEMENT]

Case authorities:

Assistant U.S. Attorney's memorandum of conversation with law enforcement officer concerning her observation of other law enforcement officers' mistreatment of defendant when they arrested him was not admissible as recorded recollection of AUSA since it was not dictated when matter was fresh in his memory, nor was it recorded recollection of law enforcement officer since she denied both accuracy and making of statement. *United States v Severson* (1995, CA7 Wis) 49 F3d 268, reh den (1995, CA7 Wis) 1995 US App LEXIS 5394 and reh, en banc, den (1995, CA7 Wis) 1995 US App LEXIS 10077.

Footnotes

Footnote 93. FRE 803(5); Uniform Rules of Evidence Rule 803(5).

Footnote 94. *United States v Lewis* (CA7 Wis) 954 F2d 1386, 35 Fed Rules Evid Serv 1372.

Footnote 95. *United States v Patterson* (CA9 Nev) 678 F2d 774, 10 Fed Rules Evid Serv 1095, cert den 459 US 911, 74 L Ed 2d 174, 103 S Ct 219 and (criticized on other grounds by *United States v Valles-Valencia* (CA9 Ariz) 823 F2d 381, 23 Fed Rules Evid Serv 364) as stated in *United States v Hughes Aircraft Co.* (CD Cal) 1992 US Dist LEXIS 16012 (upholding admission of transcript of witness' testimony before grand jury concerning conversation with accused which had taken place "at least" ten months previously, although stating that issue was close in view of lapse of time, witness' admission that he was angry with the accused at the time of his grand jury testimony, and witness' ambiguous answers to questions asked to lay foundation for admission of transcript).

Footnote 96. *United States v Lewis* (CA7 Wis) 954 F2d 1386, 35 Fed Rules Evid Serv 1372 (delay of 15 or 16 months between FBI agent's interview of prisoner and prisoner's adoption of agent's memorandum of interview did not render memorandum inadmissible under Rule 803(5), although better practice would have been to have prisoner review memorandum shortly after interview).

But see *United States v Campbell*, 221 US App DC 367, 684 F2d 141, 11 Fed Rules Evid Serv 939 (criticized on other grounds by *United States v Bernard* (CA4 W Va) 757 F2d 1439) (suggesting that Rule 803(5) could not justify admission of notes made in 1980 concerning events which had occurred between 1973 and 1977).

§ 1269 Requirement that witness have personal knowledge of matter recorded

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although Rule 803(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence does not require a memorandum to have been prepared by the witness for it to be admissible as a recorded recollection, 97 the events recounted in the memorandum must be matters of which the witness had firsthand knowledge. 98 A memorandum not based on the personal knowledge of the witness, but, rather, on hearsay information, is not admissible under Rule 803(5) unless the hearsay information on which the memorandum is based can be brought within an exception to the hearsay rule. 99

Footnotes

Footnote 97. *United States v Williams* (CA6 Mich) 571 F2d 344, 2 Fed Rules Evid Serv 1014, cert den 439 US 841, 58 L Ed 2d 139, 99 S Ct 131; *Black v State* (App) 116 Ariz 234, 568 P2d 1132; *Hewitt v Grand Trunk W. R. Co.*, 123 Mich App 309, 333 NW2d 264.

Footnote 98. *Rock v Huffco Gas & Oil Co.* (CA5 La) 922 F2d 272, 32 Fed Rules Evid

Serv 1041; Black v State (App) 116 Ariz 234, 568 P2d 1132; State v Veluzat (RI) 578 A2d 93.

Footnote 99. Ricciardi v Children's Hospital Medical Center (CA1 Mass) 811 F2d 18, 22 Fed Rules Evid Serv 752; Rock v Huffco Gas & Oil Co. (CA5 La) 922 F2d 272, 32 Fed Rules Evid Serv 1041.

§ 1270 Use of recorded recollection against accused in criminal case

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Statements which qualify as past recollections recorded under Rule 803(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence may generally be introduced against the accused in a criminal trial. 1 However, authority exists to the effect that where the central allegations of a criminal charge are established solely through a past recollection recorded which barely meets minimal standards of admissibility, such evidence will not support a conclusion of guilt beyond a reasonable doubt. 2

◆ Observation: One commentator has noted that the use under Rule 803(5) of a past recollection recorded against the accused in a criminal trial would appear to raise substantial issues under the Federal Constitution's Confrontation Clause, inasmuch as (1) the Rule is invoked only when the witness cannot adequately recall the matters stated in the writing and therefore cannot be effectively cross-examined concerning them, and (2) the United States Supreme Court 3 expressly left open the issue whether a witness's actual or asserted lack of memory as to matters asserted in a prior inconsistent statement might so stifle defense cross-examination as to violate the rights of the accused under the Confrontation Clause. 4 The same commentator, however, notes that the courts have consistently rejected Confrontation Clause challenges in this context, 5 and regards this line of authority as correct in view of the "long and venerable lineage" of the doctrine embodied in Rule 803(5).

§ 1270 ----Use of recorded recollection against accused in criminal case [SUPPLEMENT]

Case authorities:

Trial court erred in admitting FBI agent's report of interview with witness as past recollection recorded where it was undisputed that witness would not put his name to report when it was first shown to him and he subsequently disavowed its accuracy on witness stand. United States v Schoenborn (1993, CA7 Wis) 4 F3d 1424, 38 Fed Rules Evid Serv 68.

Footnotes

Footnote 1. *United States v Marcantoni* (CA5 Fla) 590 F2d 1324, 4 Fed Rules Evid Serv 477, cert den 441 US 937, 60 L Ed 2d 666, 99 S Ct 2063; *United States v Williams* (CA6 Mich) 571 F2d 344, 2 Fed Rules Evid Serv 1014, cert den 439 US 841, 58 L Ed 2d 139, 99 S Ct 131; *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

Footnote 2. *United States v Orrico* (CA6 Ohio) 599 F2d 113, 4 Fed Rules Evid Serv 881 (noting that a past recollection recorded might be sufficient to prove a purely technical element of a crime, such as the value of stolen property, if it featured strong indicia of reliability).

Footnote 3. *In California v Green*, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930.

Footnote 4. *Louisell and Mueller*, Federal Evidence § 445.

Footnote 5. *United States v Riley* (CA8 Iowa) 657 F2d 1377, 8 Fed Rules Evid Serv 1665, appeal after remand (CA8 Iowa) 684 F2d 542, 10 Fed Rules Evid Serv 1368, cert den 459 US 1111, 74 L Ed 2d 962, 103 S Ct 742 and (not followed on other grounds by *United States v Sutton* (AFCMR) 1993 CMR LEXIS 618); *United States v Marshall* (CA9 Cal) 532 F2d 1279.

(5). Other Memoranda [1271-1275]

§ 1271 Check stubs

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, check stubs containing notations as to the purpose of the check, or other circumstances, have been deemed excludable as hearsay where they did not come within an exception to the hearsay rule such as the exception for records made in the regular course of business, 6 or the *res gestae* rule. 7 A check stub may be admissible, however, as an admission against interest. 8 Under the common-law "shopbook" rule, which provided for admissibility of a party's books of account if such books were books of original entry or the first permanent records of the transactions in question, 9 check stubs have in some cases been held admissible in evidence, 10 but in other cases excluded. 11 They may, however, be used for the purpose of refreshing the memory of a witness. 12

◆ **Observation:** Common-law rules pertaining to hearsay and to the admission of business records, which have been invoked to keep checks stubs out of evidence, have been to a great extent superseded by statutory codes of evidence. Thus, Rule 803(6) of the Uniform Rules of Evidence (embodying the previously promulgated but withdrawn Uniform Business Records as Evidence Act) provides for broad admissibility of

records of regularly conducted business activity notwithstanding the status of such records as hearsay under the common law, 13 and might in a proper case permit admission of check stubs. Under proper circumstances, a check stub might also be excepted from the hearsay rule as a recorded recollection under Rule 803(5) of the Uniform Rules. 14

A checkbook stub not admissible as a business record or under some other exception to the hearsay rule cannot be admitted as demonstrative evidence that the party proffering the stub wrote or delivered a check, inasmuch as the only thing the stub demonstrates is that the stub was completed. 15

Footnotes

Footnote 6. Nall v Brennan, 324 Mo 565, 23 SW2d 1053, 68 ALR 684; Leask v Hoagland, 205 NY 171, 98 NE 395, reh den 205 NY 594, 98 NE 1106; Better Homes Equipment Co. v Nixon (App, Franklin Co) 72 Ohio L Abs 329, 134 NE2d 850.

As to the "business records" exception to the hearsay rule, generally, see §§ 1290 et seq.

Footnote 7. In re Laning's Estate, 241 Pa 98, 88 A 289.

Footnote 8. A. Sam & Sons Produce Co. v Campese (4th Dept) 14 App Div 2d 487, 217 NYS2d 275.

Footnote 9. § 1290.

Footnote 10. Fulkerson v Long, 63 Mo App 268.

Footnote 11. Better Homes Equipment Co. v Nixon (App, Franklin Co) 72 Ohio L Abs 329, 134 NE2d 850.

Annotation: What constitutes books of original entry within rule as to admissibility of books of account, 17 ALR2d 235, § 23.

Footnote 12. 81 Am Jur 2d, Witnesses § 789.

Footnote 13. § 1300.

Footnote 14. As to Rule 803(5), generally, see §§ 1265-1270.

Footnote 15. Franklin Invest. Co. v Smith (Dist Col App) 383 A2d 355.

§ 1272 Diaries

<p>View Entire Section Go to Parallel Reference Table</p>

Under the common law, personal diaries are generally, by virtue of the rule against hearsay, inadmissible as evidence as proof of facts stated in them. 16 Such diaries, however, may be used to refresh the memory of a witness, 17 and may, where the witness has entirely forgotten the facts but is able to swear that the diary entry was correct at the time it was made, be used as independent evidence as a past recollection recorded. 18 Diaries have also been permitted into evidence, notwithstanding their status as hearsay, where the declarant was unavailable as a witness and there was a reasonable probability of the truth of the statements contained in them. 19

◆ Observation: Some courts have held that the diary of one accused of a crime is privileged under the Federal Constitution's Fifth Amendment from admission into evidence against him or her, 20 while others have declined to recognize such a privilege. 21 One commentator has argued that not only the Fifth Amendment, but also the common-law and constitutional rights of privacy should be regarded as protecting the contents of a personal diary from unwanted disclosure. 22

Diaries and small memorandum books do not generally belong to the class of books of account which were admissible as books of original entry under the common-law "shopbook" rule, 23 although they have under certain circumstances been admitted under this rule. 24

The rules pertaining to hearsay contained in the Uniform Rules of Evidence and the Federal Rules of Evidence permit admission of a private diary, notwithstanding that it is hearsay, where the entry in question constitutes a statement of the declarant's then existing state of mind under Rule 803(3). 25

◆ Comment: A diary might also be excepted from the hearsay rule under the Uniform or Federal Rules of Evidence as a recorded recollection under Rule 803(5), or as an ancient document under Rule 803(16). 26 An individual's personal diary will not qualify for the exception to the hearsay rule contained in Rule 803(6) for records of regularly conducted business activity, unless the diary entries can be shown to have the requisite business connection. 27

Footnotes

Footnote 16. *Arnold v Hussey*, 111 Me 224, 88 A 724; *Doe v Lucy*, 83 NH 160, 139 A 750; *Leask v Hoagland*, 205 NY 171, 98 NE 395, reh den 205 NY 594, 98 NE 1106.

Footnote 17. 81 Am Jur 2d, Witnesses § 789.

Footnote 18. As to past recollections recorded, see §§ 1264 et seq.

Footnote 19. *State v Davis*, 305 NC 400, 290 SE2d 574, habeas corpus proceeding (CA4 NC) 778 F2d 168, 18 Fed Rules Evid Serv 1278 (entry in diary of murder victim, in which she stated "I got up at 8:15," was properly admitted to show that she was alive at 8:15 a.m. on the day her body was found, in view of the victim's unavailability as a witness and the absence of any reason to believe she would lie in her diary about the time at which she got out of bed).

Footnote 20. *In re Grand Jury Proceedings* (CA3 Pa) 632 F2d 1033.

Footnote 21. *United States v Levasseur* (ED NY) 619 F Supp 775.

Footnote 22. *LaVacca, Protecting the Contents of a Personal Diary from Unwanted Eyes*. 19 Rut LJ 389 (Winter 1988).

Footnote 23. *Richardson v Emery*, 23 NH 220; *O'Rourke v Cleary*, 105 Vt 85, 163 A 583.

Annotation: What constitutes books of original entry within rule as to admissibility of books of account, 17 ALR2d 235 § 27.

Footnote 24. *J. H. Leavenworth & Son, Inc. v Hunter*, 150 Miss 245, 116 So 593; *Remick v Rumery*, 69 NH 601, 45 A 574.

Footnote 25. *State v Williams*, 133 Ariz 220, 650 P2d 1202.

As to Rule 803(3), generally, see § 667.

Footnote 26. As to Rule 803(5), see §§ 1265-1270. As to Rule , see §§ 803(16), see § 1211.

Footnote 27. *McCormick v Mirrored Image, Inc. (Hamilton Co)* 7 Ohio App 3d 232, 7 Ohio BR 294, 454 NE2d 1363 (data must have been recorded pursuant to a duty in a sole proprietorship, or in the routine operations of the business).

As to Rule 803(6), generally, see § 1300.

§ 1273 Memoranda of physician

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, the records or memoranda of a physician who attended at the birth of a person, containing entries made in the regular course of business, were, upon a proper foundation, admissible upon the question of date of birth or the age of such person. 28 Such entries could also be used to show the state of a person's health at a given time. 29

The common-law rules pertaining to admission of the memoranda of physicians have to a great extent been superseded by the adoption of the Uniform and Federal Rules of Evidence, which contain various exceptions to the hearsay rule applicable under at least some circumstances to such memoranda. Thus, Rule 803(4) excepts from the rule against hearsay statements made for purposes of medical diagnosis or treatment. 30 Hospital or medical records have in many cases been held admissible, notwithstanding their nature as hearsay, under the "business records" exception to the hearsay rule contained in Rule 803(6). 31

Footnotes

Footnote 28. *Arms v Middleton* (NY) 23 Barb 571; *Smith v State* (Tex Crim) 73 SW 401 (ovrld on other grounds by *Battles v State*, 63 Tex Crim 147, 140 SW 783).

Practice References 45 Am Jur POF2d 631, Age of Person §§ 8, 22.

15 Am Jur Trials 373, Discovery and Evaluation of Medical Records.

Footnote 29. *Freedman v Mutual Life Ins. Co.*, 342 Pa 404, 21 A2d 81, 135 ALR 1249.

Footnote 30. As to Rule 803(4), generally, see § 866.

Footnote 31. §§ 1298, 1315.

§ 1274 Memoranda of person since deceased—at common law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, the hearsay nature of a private memorandum is not changed by the mere fact that the person who wrote it is deceased. 32 Such memoranda are therefore generally not admissible in evidence. 33 Exceptions have been recognized where the memorandum amounts to a declaration against proprietary interest, 34 or where it tends to show the decedent's mental condition or intent at the time of the memorandum. 35 Even where such a memorandum is admissible as having been prepared in the regular course of business, it will be excluded as self-serving where the decedent was an agent of the party proffering it. 36

Footnotes

Footnote 32. *Heil v Zahn*, 187 Md 603, 51 A2d 174.

Footnote 33. *Cummins v Pennsylvania Fire Ins. Co.*, 153 Iowa 579, 134 NW 79; *Vinal v Gilman*, 21 W Va 301; *Hay v Peterson*, 6 Wyo 419, 45 P 1073 (criticized on other grounds by *Gardner v State*, 27 Wyo 316, 196 P 750, 15 ALR 1040).

Footnote 34. *Lassone v Boston & L. R. Co.*, 66 NH 345, 24 A 902.

Footnote 35. *Gillespie v Gray* (App, Cuyahoga Co) 38 Ohio L Abs 145, 49 NE2d 108; *Borak v Bridge* (Tex Civ App Corpus Christi) 524 SW2d 773, writ ref n r e (Oct 1, 1975).

Footnote 36. *Waterous v Columbian Nat. Life Ins. Co.*, 353 Mo 1093, 186 SW2d 456.

§ 1275 --Under statutes

The common-law rule concerning the admissibility of memoranda written by persons since deceased has been widely superseded by the adoption of statutes which make statements, declarations, and memoranda of persons since deceased competent evidence of matters relevant to a controversy. 37 Under some such statutes, a memorandum of a person since deceased is admissible notwithstanding that it contains facts to which he could not, if living, testify, and without regard to the time when made, provided that it is relevant to the controversy. 38 Other statutes restrict admissibility to such matters as the deceased would have been competent to testify to if he were alive. 39 Such statutes may be restricted in their application to actions by or against representatives of the person making the memorandum. 40 Others are limited in their application to entries made by a person, since deceased, in a professional capacity or in the ordinary course of professional conduct. 41 Such statutes refer to persons engaged in an employment or vocation requiring special learning or attainment. 42

Rule 804 of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that certain statements are not excluded by the hearsay rule if the declarant is unavailable as a witness within the meaning of the Rule. 43 A deceased declarant is unavailable within the meaning of the Rule. 44 The Rule does not distinguish between oral and written statements, and, accordingly, it appears that any memorandum within the scope of the Rule as adopted in a particular jurisdiction is admissible.

Footnotes

Footnote 37. *Plisko v Morgan*, 148 Conn 510, 172 A2d 621; *Cummins v Pennsylvania Fire Ins. Co.*, 153 Iowa 579, 134 NW 79.

Footnote 38. *Walter v Sperry*, 86 Conn 474, 85 A 739.

Footnote 39. *Keough v Boston E. R. Co.*, 229 Mass 275, 118 NE 524.

Footnote 40. *Morris v United Virginia Bank*, 237 Va 331, 377 SE2d 611.

Footnote 41. *Williams v Laurence-David, Inc.*, 271 Or 712, 534 P2d 173.

Footnote 42. *Cummins v Pennsylvania Fire Ins. Co.*, 153 Iowa 579, 134 NW 79 (an insurance agent's entries in the policy register are not within the operation of a statute making admissible in evidence entries by a person since deceased when made in a professional capacity or in the ordinary course of professional conduct).

Footnote 43. § 690.

Footnote 44. § 696.

i. Letters and Telegrams [1276-1281]

§ 1276 Letters

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Both at common law ⁴⁵ and under the Uniform or Federal Rules of Evidence, ⁴⁶ a letter offered as evidence should be accompanied by proof showing its authenticity or genuineness, unless by reason of its age and the source from which it comes, it is deemed a self-authenticating ancient document, ⁴⁷ or unless the adverse party, expressly or by implication, admits its authenticity. ⁴⁸ While a letter can be authenticated by establishing that it is in the handwriting of the person whom its proponent alleges was its author, ⁴⁹ or by proving the genuineness of his or her signature, ⁵⁰ it is not essential that the signature or handwriting be proved where its genuineness can be otherwise established. ⁵¹ At common law, a letter may be authenticated by any evidence from which a jury could find that it was either written or authorized by the person who the writing indicates was responsible for its contents. ⁵²

◆ Observation: Although neither the Uniform Rules of Evidence nor the Federal Rules of Evidence contain any provision specifically dealing with the authentication of letters, the general statement of Rule 901(a), that authentication is sufficient where evidence has been presented which is sufficient to support a finding that the matter in question is what its proponent claims, applies to letters. ⁵³

§ 1276 ----Letters [SUPPLEMENT]

Case authorities:

Although letter by primary insurer's defense attorney to primary insurer's claims attorney concerning injured plaintiff's settlement demand was business record, letter was not admissible as evidence of truth of what anyone told defense attorney in settlement conference, including unnamed lawyers for plaintiff who made demand characterized by letter-writer as unreasonable. *Twin City Fire Ins. Co. v Country Mut. Ins. Co.* (1994, CA7 Ill) 23 F3d 1175, 39 Fed Rules Evid Serv 384.

The trial court properly excluded letters to defendant homeowners indicating plaintiff homeowners association's legal position in an action to enjoin defendants from replacing wood clapboard siding on their home with vinyl siding since the letters had no tendency to prove any issue in the case. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

Footnotes

Footnote 45. *McClendon v State*, 243 Ala 218, 8 So 2d 883; *Shulman v Shulman*, 150

Conn 651, 193 A2d 525; Di Giorgio Importing & S.S. Co. v Pennsylvania R. Co., 104 Md 693, 65 A 425.

Footnote 46. People v Taylor, 159 Mich App 468, 406 NW2d 859, app den 428 Mich 913; Wilkes Computer Services, Inc. v Aetna Casualty & Surety Co., 59 NC App 26, 295 SE2d 776.

Footnote 47. McCreary v Coggeshall, 74 SC 42, 53 SE 978.

As to authentication of ancient documents, generally, see §§ 1201 et seq.

Footnote 48. Liberty Chair Co. v Crawford, 193 NC 531, 137 SE 577, 51 ALR 1496.

Footnote 49. People v Esch (Colo App) 786 P2d 462, cert den (Colo) 1990 Colo LEXIS 55.

As to proof of a person's handwriting, generally, see §§ 1212 et seq.

Footnote 50. Shulman v Shulman, 150 Conn 651, 193 A2d 525; Lancaster v Ames, 103 Me 87, 68 A 533; Gambrill v Schooley, 95 Md 260, 52 A 500; Maynard v Bailey, 85 W Va 679, 102 SE 480, 9 ALR 981.

Footnote 51. In re Barber's Estate, 63 Conn 393, 27 A 973 (ovrld on other grounds by Vincent v Mutual Reserve Fund Life Ass'n, 77 Conn 281, 58 A 963); Maynard v Bailey, 85 W Va 679, 102 SE 480, 9 ALR 981.

Footnote 52. Milner Hotels, Inc. v Mecklenburg Hotel, Inc., 42 NC App 179, 256 SE2d 310.

Footnote 53. People v Taylor, 159 Mich App 468, 406 NW2d 859, app den 428 Mich 913.

§ 1277 --As self-authenticating

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Letters are generally not deemed self-authenticating under the common law. ⁵⁴ Thus, the mere fact that a letter (other than a reply letter) purports to have been written and signed by the person in question is insufficient to establish its authenticity and genuineness. ⁵⁵ The mere fact that a letter is received through the mail does not in itself establish it as the letter of the person purported to have written it. ⁵⁶

◆ Observation: Rule 902 of the Uniform Rules of Evidence and the Federal Rules of Evidence sets forth various documents which are deemed self-authenticating under the Rule, ⁵⁷ but does not specifically list any type of letter in this enumeration.

§ 1277 --As self-authenticating [SUPPLEMENT]

Case authorities:

The trial court properly excluded letters to defendant homeowners indicating plaintiff homeowners association's legal position in an action to enjoin defendants from replacing wood clapboard siding on their home with vinyl siding since the letters had no tendency to prove any issue in the case. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

Footnotes

Footnote 54. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580.

Footnote 55. *Rogers v State*, 101 Ark 45, 141 SW 491; *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580; *Gartrell v Stafford*, 12 Neb 545, 11 NW 732; *Voegle v Tschirley*, 76 SD 509, 81 NW2d 604; *In re Maxcy's Estate*, 262 Wis 89, 54 NW2d 194.

As to reply letters, see § 1278.

Footnote 56. *Richmond Dredging Co. v Atchison, T. & S. F. R. Co.*, 31 Cal App 399, 160 P 862.

Footnote 57. §§ 1180 et seq.

§ 1278 --Reply letters

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Under Rule 901(b)(4) of the Uniform Rules of Evidence and the Federal Rules of Evidence, letters are prima facie authentic if their contents are responsive to prior communications shown to be authentic. 58 This rule comports with the common-law rule under which a letter is deemed authentic if it purports to be from the addressee of a prior genuine letter and to be in reply thereto, and was received through the mail in due course. 59 The rule is applicable to typewritten letters, even where the signature is typewritten. 60 Under the common-law rule, however, it has been held that to be admissible as a reply letter, a letter must be propounded by its recipient, not its sender. 61

§ 1278 --Reply letters [SUPPLEMENT]

Case authorities:

The trial court properly excluded letters to defendant homeowners indicating plaintiff homeowners association's legal position in an action to enjoin defendants from replacing wood clapboard siding on their home with vinyl siding since the letters had no tendency to prove any issue in the case. *Raintree Homeowners Ass'n v Bleimann* (1994) 116 NC App 561, 449 SE2d 13, review gr 338 NC 669, 453 SE2d 180.

Footnotes

Footnote 58. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

United States v Weinstein (CA11 Fla) 762 F2d 1522, 18 Fed Rules Evid Serv 757, mod on other grounds, reh den, in part (CA11 Fla) 778 F2d 673, cert den 475 US 1110, 89 L Ed 2d 917, 106 S Ct 1519 and (among conflicting authorities on other grounds noted in *United Energy Owners Committee, Inc. v United States Energy Management Systems, Inc.* (CA9 Cal) 837 F2d 356, 10 FR Serv 3d 253) and (among conflicting authorities on other grounds noted in *United States v Feldman* (CA9 Cal) 853 F2d 648) and (among conflicting authorities on other grounds noted in *Fleischhauer v Feltner* (CA6 Ohio) 879 F2d 1290) and (criticized on other grounds by *McNeil v Salan* (CA6) 1992 US App LEXIS 11476); *People v Thompson*, 111 Mich App 324, 314 NW2d 606.

Footnote 59. *Barham v Bank of Delight*, 94 Ark 158, 126 SW 394; *Bradley Freight Lines, Inc. v Pope, Flynn & Co.*, 42 NC App 285, 256 SE2d 522, cert den 298 NC 295, 259 SE2d 299; *Conner v Zanuzoski*, 36 Wash 2d 458, 218 P2d 879.

Footnote 60. *Barham v Bank of Delight*, 94 Ark 158, 126 SW 394; *Lancaster v Ames*, 103 Me 87, 68 A 533.

Footnote 61. *Presnick v De Rosa*, 12 Conn App 554, 532 A2d 1309.

§ 1279 Telegrams

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A telegram is admissible in evidence only where authenticated. 62 There must be some competent proof that it was written and sent by the person whose name it bears. 63 It is not enough that the writing on its face purports to be from the sender; there must be competent proof that the alleged sender sent or authorized the sending of the telegram in question. 64 It is, however, practically impossible to state any definite or precise standard for determining the genuineness of telegrams. 65 Authenticity may be shown by indirect and circumstantial evidence. 66

Footnotes

Footnote 62. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580; *Harlow v Commonwealth*, 204 Va 385, 131 SE2d 293, 5 ALR3d 1012.

Footnote 63. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580; *State v Boswell*, 192 NC 150, 134 SE 413; *Edwards Bros. v Erwin*, 148 NC 429, 62 SE 545; *Western Twine Co. v Wright*, 11 SD 521, 78 NW 942; *Harlow v Commonwealth*, 204 Va 385, 131 SE2d 293, 5 ALR3d 1012; *Cobb v Glenn Boom & Lumber Co.*, 57 W Va 49, 49 SE 1005.

Annotation: Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 ALR3d 1018.

Practice References 21 Am Jur Proof of Facts 783, Sending and Receipt of Telegrams.

Footnote 64. *Christian v State*, 174 Ark 357, 295 SW 368; *Harlow v Commonwealth*, 204 Va 385, 131 SE2d 293, 5 ALR3d 1012.

Footnote 65. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580; *Harlow v Commonwealth*, 204 Va 385, 131 SE2d 293, 5 ALR3d 1012.

Footnote 66. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580; *Harlow v Commonwealth*, 204 Va 385, 131 SE2d 293, 5 ALR3d 1012.

§ 1280 --Sufficiency of particular evidence to authenticate telegram

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A telegram is sufficiently authenticated when, from its contents and other circumstances in evidence, the court can reasonably infer that the person sought to be charged is the author of the message or that it was written and sent by another acting for him. 67 Authenticity of telegrams may be established by the fact that the alleged sender admits or does not deny that he sent them, 68 or where it can be reasonably inferred from the evidence that the purported sender had knowledge of the contents of the telegram, or that he had acted consistently with its contents. 69 A properly addressed telegram may be admitted in evidence against the purported sender upon proof of delivery of the message by him to a telegraph office for transmission. 70

Footnotes

Footnote 67. *Lundgren v Union Indem. Co.*, 171 Minn 122, 213 NW 553, 52 ALR 580.

Footnote 68. *Dunbar v United States*, 156 US 185, 39 L Ed 390, 15 S Ct 325; *Collins v Western Union Tel. Co.*, 145 Ala 412, 41 So 160; *People v Larrabee*, 113 Cal App 745, 299 P 85; *McDonald v State*, 12 Okla Crim 144, 152 P 610.

Annotation: Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 ALR3d 1018 § 4.

Footnote 69. *Johnson v United States* (CA7 Ill) 215 F 679; *Halstead v Minnesota Tribune Co.*, 147 Minn 294, 180 NW 556; *Ridings v State*, 108 Neb 804, 189 NW 372.

In *Dierks Lumber & Coal Co. v Kull*, 176 Ark 966, 4 SW2d 926, the court held that where the alleged senders of certain telegrams did not deny the authenticity of the telegrams and it was clearly inferable from the contents of the telegrams that the alleged senders knew all about the account sued on, although the office from which the telegrams were sent was not within the jurisdiction of the court, the telegrams presented were admissible in evidence regardless of whether the telegrams were signed by typewriter or by stamp.

In *People v Rabin*, 317 Mich 654, 27 NW2d 126, cert den 322 US 759, 92 L Ed 345, 68 S Ct 60, the court held that a telegram was admissible in evidence without proof of signature of the purported sender, because there was evidence showing that the telegram was sent and received in compliance with a previous conversation between the purported sender and a witness contemplating the transmission of money by telegram.

Footnote 70. *Alderman v United States* (CA5 Fla) 279 F 259, cert den 259 US 584, 66 L Ed 1075, 42 S Ct 586; *Peterman v Vermont Sav. Bank*, 181 La 403, 159 So 598.

The court in *U. B. Blalock & Co. v W. D. Clark & Bros.*, 137 NC 140, 49 SE 88, in sustaining the admission of a telegram, held that although the authenticating witness, an operator at the sending office, was not the one who actually sent it, the fact that he brought it from the file in his office was a sufficient authentication.

§ 1281 --Reply telegrams

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Uniform Rules of Evidence, the Federal Rules of Evidence, and the common law all generally treat the authentication of reply telegrams in a manner similar to that of reply letters. 71 Common-law authority generally holds that telegrams purporting to be in reply to telegrams previously sent by the recipient are admissible without further proof of the identity of the sender, 72 especially when the reply telegrams are deposited with the telegraph operator with charges prepaid and are properly addressed. 73 Contrary authority, however, does exist, under which the rule permitting self-authentication of reply letters is not applicable to reply telegrams. 74 And where it appears that the purported sender is physically and mentally incapable of composing or causing a telegram to be sent, some corroboration other than that it was received in reply to a prior message is needed to authenticate a telegram. 75

Footnotes

Footnote 71. As to the authentication of reply letters, see § 1278.

Footnote 72. House Grain Co. v Finerman & Sons, 116 Cal App 2d 485, 253 P2d 1034 (a reply telegram authenticates itself); Lundgren v Union Indem. Co., 171 Minn 122, 213 NW 553, 52 ALR 580; State v Rothrock, 45 Nev 214, 200 P 525; Edwards Bros. v Erwin, 148 NC 429, 62 SE 545.

Annotation: Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 ALR3d 1018 § 7.

Footnote 73. Whilden & Sons v Merchants' & Planters' Nat. Bank, 64 Ala 1; Western Twine Co. v Wright, 11 SD 521, 78 NW 942.

Footnote 74. Smith v Easton, 54 Md 138.

Footnote 75. Ikenberry v New York Life Ins. Co., 134 Minn 432, 159 NW 955.

j. Church Records [1282, 1283]

§ 1282 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Notwithstanding their nature as hearsay, church records are generally admissible at common law as evidence of matters recorded before the commencement of the action in which their admission is sought, and in the course of performance of the duties of the office or position of the person making such a record. ⁷⁶ Their admission is subject to proper authentication, ⁷⁷ and according to some authority, the person making the record must authenticate it if he or she is available as a witness. ⁷⁸

The common-law rule regarding admissibility of church records has in many jurisdictions been superseded by the adoption of Rule 803(11) of the Uniform Rules of Evidence and the Federal Rules of Evidence, or similar statutory rules. Rule 803(11) provides that the rule against hearsay does not apply to statements of births, marriages, divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. ⁷⁹

◆ **Comment:** Rule 803(11) has been characterized as broader than the common-law rule, inasmuch as the common-law rule was essentially a particular application of the "business record" exception to the hearsay rule, which exception requires that the person furnishing the information be one engaged in the business or activity in question. ⁸⁰ Rule 803(11) contains no such requirement.

Rule 803(11) does not apply to a statement from a religious organization that a contribution of a stated amount has been made by a particular person, inasmuch as such information does not constitute a fact of personal or family history within the meaning of the Rule. ⁸¹

Footnotes

Footnote 76. *Dailey v Grand Lodge, B. R. T.*, 311 Ill 184, 142 NE 478; *Sinkora v Wlach*, 239 Iowa 1392, 35 NW2d 40; *Sitler v Gehr*, 105 Pa 577.

Footnote 77. *Sinkora v Wlach*, 239 Iowa 1392, 35 NW2d 40; *In re Garrett's Estate*, 371 Pa 284, 89 A2d 531, cert den 344 US 860, 97 L Ed 667, 73 S Ct 101 and appeal after remand 372 Pa 438, 94 A2d 357, cert den 345 US 996, 97 L Ed 1403, 73 S Ct 1138 and reh den 346 US 842, 98 L Ed 362, 74 S Ct 16.

Footnote 78. *Durfee v Abbott*, 61 Mich 471, 28 NW 521.

Footnote 79. FRE 803(11), Uniform Rules of Evidence Rule 803(11).

Footnote 80. Notes of Advisory Committee to Federal Rules of Evidence, Rule 803 (citing a pre-Rules case in which a church record was held admissible to prove the fact, date, and place of a baptism, but not the age of the child baptized).

Footnote 81. *Ruberto v Commissioner (CA2)* 774 F2d 61, 85-2 USTC ¶ 9720, 19 Fed Rules Evid Serv 1332, 56 AFTR 2d 85-6107, on remand TC Memo 1987-623, PH TCM P 87623, 54 CCH TCM 1388; *Hall v Commissioner (CA9)* 729 F2d 632, 84-1 USTC ¶ 9341, 15 Fed Rules Evid Serv 509, 53 AFTR 2d 84-1174, 78 ALR Fed 355.

Annotation: Exception to hearsay rule, under Rule 803(11) or Rule 803(12) of Federal Rules of Evidence, with respect to information contained in records of religious organization, 78 ALR Fed 361.

§ 1283 Marriage, baptismal, and similar certificates

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 803(12) of the Uniform Rules of Evidence and the Federal Rules of Evidence, statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter, are excepted from the rule against hearsay. 82

◆ **Observation:** As regards certificates issued by a public official, Rule 803(12) is duplicative of Rule 803(8), the "public record" exception to the hearsay rule. 83 The coverage of Rule 803(12) also overlaps that of Rule 803(9) (the "vital statistics" exception to the hearsay rule) in that some events, such as births and marriages, may lead to the creation of records admissible under both Rules. However, Rule 803(9) reaches the report or certificate prepared for the public record and the resultant public record itself, while Rule 803(12) reaches certificates prepared for and given to private

individuals for their own records or for commemorative purposes. 84

A certificate offered under Rule 803(12) and made by a public official will in many instances be self-authenticating under the provisions of Rule 902(1) or 902(2). Otherwise, proof will be required that the person was authorized to perform the act certified and did make the certificate. 85

◆ Practice guide: The language of Rule 803(12) apparently creates a presumption that a certificate offered under the Rule was executed on the date it bears. 86 One commentator has said that this presumption cannot have been intended to be conclusive, and that a certificate offered under the Rule should be excluded if an opponent can prove that it was made long after the event it certifies. 87

Footnotes

Footnote 82. FRE 803(12), Uniform Rules of Evidence Rule 803(12).

Footnote 83. Notes of Advisory Committee to Federal Rules of Evidence, Rule 803.

Footnote 84. Louisell & Mueller, Federal Evidence § 460.

Footnote 85. Notes of Advisory Committee to Federal Rules of Evidence, Rule 803.

Footnote 86. Notes of Advisory Committee to Rule 803(12), Federal Rules of Evidence.

Footnote 87. Louisell & Mueller, Federal Evidence § 460.

k. Corporate Books and Records [1284-1289]

(1). In General [1284-1287]

§ 1284 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Corporate records are generally admissible in evidence where they are relevant and not excludable under a generally applicable rule of the law of evidence. Thus, the minutes of meetings of such bodies as a board of directors are admissible to show what occurred at such meetings. 88 Financial records showing net worth are admissible for the purpose of determining a proper amount of punitive damages to be assessed against the corporation, 89 or where it is necessary to show the value of the corporation to effect a division of property in a divorce proceeding. 90 Objections that such records constitute hearsay are properly overcome by bringing them within the terms of applicable exceptions to the

hearsay rule, as, for example, the rule pertaining to records of regularly conducted business activity, 91 or the rule regarding admissions. 92

Corporate bylaws are also admissible, if properly proved, in all cases where these provisions have relevancy to the cause of the action. 93

The records of private corporations are not public records and their admission into evidence is not governed by rules pertaining to public records as evidence. 94

Footnotes

Footnote 88. *Mailhoit v Liberty Bank & Trust Co.*, 24 Mass App 525, 510 NE2d 773; *Stivers Lincoln-Mercury, Inc. v Abbott* (Mo App) 796 SW2d 923.

Footnote 89. *Hall v Montgomery Ward & Co. (Iowa)* 252 NW2d 421; *Mutual Life Ins. Co. v Estate of Wesson (Miss)* 517 So 2d 521, cert den 486 US 1043, 100 L Ed 2d 620, 108 S Ct 2035.

Footnote 90. *Huskinson v Huskinson*, 92 Idaho 920, 453 P2d 569.

Footnote 91. *Meriwether v Crown Invest. Corp.*, 289 Ala 504, 268 So 2d 780; *Sparta Sportsfabrikk v NorTur, Inc. (Minn App)* 407 NW2d 128.

As to the exception to the hearsay rule pertaining to business entries and records, see §§ 1290 et seq.

Footnote 92. *Ten Eyck v Pontiac, O. & P. A. R. Co.*, 74 Mich 226, 41 NW 905; *Wentz v Guaranteed Sand & Gravel Co.*, 205 Minn 611, 287 NW 113; *Curtis v Atchison, T. & S. F. R. Co.*, 363 Mo 779, 253 SW2d 789; *Rueb v Rehder*, 24 NM 534, 174 P 992, 1 ALR 423; *Rudd v Robinson*, 126 NY 113, 26 NE 1046; *Miller v Dilkes*, 251 Pa 44, 95 A 935; *Missouri P. R. Co. v Sherwood*, 84 Tex 125, 19 SW 455.

As to the rule regarding admissions, see §§ 760 et seq.

Footnote 93. *Knights & Ladies of America v Weber*, 101 Ill App 488.

The rules and regulations of a board of trade are competent evidence in a case involving liability on a contract which was made subject to such rules. *Hansen v Boyd*, 161 US 397, 40 L Ed 746, 16 S Ct 571.

Footnote 94. *Continental Ins. Co. v Chicago & N. W. R. Co.*, 97 Minn 467, 107 NW 548.

§ 1285 Actions between corporation and its stockholders or members

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As between a corporation and its stockholders or members, the books and records of the corporation are admissible in evidence to prove the corporate acts and proceedings and the financial status of the corporation. 95 According to some authorities, the records of a corporation are admissible against one to show that he was a stockholder, although other authority holds that in the absence of any statutory provision to the contrary, the books of a corporation are not admissible in evidence to prove the membership of a person unless accompanied by proof of authorization, assent, knowledge, or other confirmatory conduct making the person privy to the entries. 96

Where a controversy between a corporation and a stockholder or a member relates to private dealings or to contracts with the member in his individual capacity, the corporate books and records are generally held to be inadmissible. 97 A stockholder or member of a corporation is not merely by reason of his relation to the corporation chargeable with knowledge of corporate transactions, and entries in the corporate books are no more evidence against him than they are as against a stranger, in the absence of proof that he knew of the entries and assented to them. 98

Footnotes

Footnote 95. *Fish v Smith*, 73 Conn 377, 47 A 711; *Tome v Parkersburg B. R. Co.*, 39 Md 36; *Simon v Weymouth Agricultural & Industrial Soc.*, 389 Mass 146, 449 NE2d 371; *North River Meadow Co. v Christ Church at Shrewsbury*, 22 NJL 424.

Forms: Stockholders' right of inspection of corporate records. 7A Am Jur Pl & Pr Forms (Rev), Corporations, Forms 231-251.

Footnote 96. 18A Am Jur 2d, Corporations § 739.

Footnote 97. *Trainor v German-American Sav., Loan & Bldg. Ass'n*, 204 Ill 616, 68 NE 650, appeal after remand 185 Ill App (abstract) 345; *North River Meadow Co. v Christ Church at Shrewsbury*, 22 NJL 424; *Rudd v Robinson*, 126 NY 113, 26 NE 1046; *Pearsall v Western Union Tel. Co.*, 124 NY 256, 26 NE 534.

Footnote 98. *Rudd v Robinson*, 126 NY 113, 26 NE 1046; *Hughes v Wachter*, 61 ND 513, 238 NW 776, 100 ALR 255.

§ 1286 Actions between stockholders or members

[View Entire Section](#)
[Go to Parallel Reference Table](#)

As between the stockholders or members of a corporation in an action between them, the books and records of the corporation are considered as partaking of the nature of public records and so are generally admissible in evidence in such an action. 99 Thus, in litigation between stockholders over the proper division of the assets of a corporation upon dissolution, an entry in its record book purporting to set out the proceedings at a stockholders' meeting is competent evidence of such proceedings. 1 But the books and

papers of a corporation are not admissible with regard to dealings of the corporation with one of the particular stockholders involved in the litigation, since in such respect the stockholder stands as a stranger to the corporation. 2

Footnotes

Footnote 99. *Spena v Goffe*, 112 Kan 693, 212 P 1093; *Hubbell v Meigs*, 50 NY 480; *Rogers v Rosenfeld*, 158 Wis 285, 149 NW 33.

Footnote 1. *Spena v Goffe*, 112 Kan 693, 212 P 1093.

Footnote 2. *Hayden v Williams* (CA2 NY) 96 F 279.

§ 1287 Criminal proceedings against officers or stockholders

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The fact that the defendant in a criminal proceeding is a corporate officer is not sufficient to make the corporate books admissible evidence against him in the prosecution. 3 Books of a corporation are admissible against its officers in a criminal prosecution only if there is evidence tending to show that there exists some kind of actual connection between the officers and the contents of the books, predicated upon some facts other than their mere status as corporate officers. 4 Where the corporation is completely dominated by one person, or a small group of persons, who are both officers and main stockholders of the corporation, and the separate legal entity of the corporation amounts to a mere fiction, the books of the corporation are competent evidence in a criminal prosecution against such persons. 5 Corporate books have also been held to constitute competent evidence against a corporate officer who, although not exercising complete and absolute control over the corporation, occupies a position of authority and of general supervision over the business of the corporation from which it can be inferred that he authorized the entries in the corporate books or was actually acquainted with them. 6 While in some cases the admission of the books has been based on proof of actual knowledge of the entries by the corporate officer against whom they are offered in evidence, 7 other cases seem to be based on knowledge of the contents of the books inferred from the position of the officer in the corporation. 8

Footnotes

Footnote 3. *State v Carmean*, 126 Iowa 291, 102 NW 97; *State v Johnston*, 149 SC 195, 146 SE 657; *State v Bolyn*, 143 SC 63, 141 SE 165.

Footnote 4. *People v Jones*, 61 Cal App 2d 608, 143 P2d 726, cert den and app dismd 323 US 665, 89 L Ed 541, 65 S Ct 39; *Cliff v People*, 84 Colo 254, 269 P 907; *State v Franks*, 262 NC 94, 136 SE2d 623; *Appelget v State*, 33 Okla Crim 136, 243 P 255; *State v German*, 163 Or 342, 96 P2d 1085.

Footnote 5. *Cornes v United States* (CA9 Ariz) 119 F2d 127; *Shreve v United States* (CA9 Ariz) 103 F2d 796, cert den 308 US 570, 84 L Ed 479, 60 S Ct 84; *Le Master v People*, 54 Colo 416, 131 P 269.

Footnote 6. *People v Jones*, 61 Cal App 2d 608, 143 P2d 726, cert den and app dismd 323 US 665, 89 L Ed 541, 65 S Ct 39; *Cliff v People*, 84 Colo 254, 269 P 907; *Appelget v State*, 33 Okla Crim 136, 243 P 255; *State v German*, 163 Or 342, 96 P2d 1085; *State v Johnston*, 149 SC 195, 146 SE 657.

Footnote 7. *People v People v Rowland*, 12 Cal App 6, 106 P 428.

Footnote 8. *State v Cutts*, 24 Idaho 329, 133 P 115; *State v Cooke*, 130 Or 552, 278 P 936.

(2). Authentication [1288, 1289]

§ 1288 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Proof of the authenticity of corporate books and records must be given if they are to be introduced in evidence. 9 It must be shown that they are the books of the corporation, that they have been kept as its records, and that the entries made therein were made by the acting or proper officer for that purpose, or by some other duly accredited person in his absence. 10 Generally, the secretary or acting secretary is the proper corporate officer to keep the minutes and records of the corporation and the person by whom their authenticity and correctness should be proved. 11

Admissions contained in corporate books and made by officers or agents of the corporation are generally admissible evidence against the corporation, 12 and no foundation that the books are authentic is necessary. 13

Footnotes

Footnote 9. *Terry v Birmingham Nat. Bank*, 93 Ala 599, 9 So 299; *Mandel v Swan Land & Cattle Co.*, 154 Ill 177, 40 NE 462; *McConnell v Combination Min. & Mill. Co.*, 30 Mont 239, 76 P 194, mod on other grounds 31 Mont 563, 79 P 248.

Footnote 10. *Bruce v McClure* (CA5 Fla) 220 F2d 330; *Illinois Conference of Evangelical Ass'n v Plagge*, 177 Ill 431, 53 NE 76; *McConnell v Combination Min. & Mill. Co.*, 30 Mont 239, 76 P 194, mod on other grounds 31 Mont 563, 79 P 248; *North American Bldg. Asso. v Sutton*, 35 Pa 463.

Footnote 11. *Bruce v McClure* (CA5 Fla) 220 F2d 330; *Fraternal Relief Ass'n v Edwards*,

9 Ga App 43, 70 SE 265.

Footnote 12. § 822.

Footnote 13. Bruce v McClure (CA5 Fla) 220 F2d 330; Wentz v Guaranteed Sand & Gravel Co., 205 Minn 611, 287 NW 113.

§ 1289 Instruments executed on behalf of corporation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Instruments purporting to be executed in behalf of corporations must be authenticated to be admissible. 14 Even though a paper purporting to be the act of a private corporation bears a seal purporting to be the seal of such corporation, it is not admissible without suitable evidence to establish the authenticity of such seal as the corporate seal of that corporation. 15 If, however, the authenticity of the seal is shown by competent proof, proof of the further fact that such seal is affixed to a paper purporting to be the act of the corporation in question is at least prima facie evidence that it has been duly affixed, and in the absence of evidence to the contrary, dispenses with the necessity of positive proof. 16

A contract signed by a general manager on behalf of the corporation may be authenticated by him or her. 17

Footnotes

Footnote 14. Robertson v Burstein, 105 NJL 375, 146 A 355, 65 ALR 324.

Footnote 15. Robertson v Burstein, 105 NJL 375, 146 A 355, 65 ALR 324.

Footnote 16. Susquehanna Bridge & Bank Co. v General Ins. Co., 3 Md 305; Berks & Dauphin Turnpike Road Co. v Myers (Pa) 6 Serg & R 12; Emory v Bailey, 111 Tex 337, 234 SW 660, 18 ALR 901.

Footnote 17. Raftis v McCloud River Lumber Co., 35 Cal App 397, 170 P 176.

I. Business Entries and Records [1290-1320]

(1). Common-law Rules [1290-1293]

(a). In General [1290, 1291]

§ 1290 Entries made by party offering record (the "shopbook" rule)

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the English common law, the books of account of a party to a lawsuit were not admissible in evidence unless they were kept by a clerk or other disinterested person who was available to testify as to their accuracy. 18 The unavailability of the bookkeeper as a witness, by reason of death or otherwise, gave rise at an early date to an exception to this rule under which the books became admissible provided the entries were made in the regular course of the business. 19 However, where the entries were made by the party to the lawsuit himself, the books were inadmissible under the early common law, since parties to lawsuits were disqualified as witnesses and could not therefore testify as to the accuracy of their books. 20 Although this rule was deemed to apply in some American jurisdictions, 21 the difficulties engendered by the common-law rule where a shopkeeper had no clerk led in most states to the adoption of a rule, often called the "shopbook rule," under which a party to a lawsuit could give in evidence, in support of his claim against his adversary, his books of account notwithstanding that the entries in it had been made by himself. 22

◆ Comment: Although the rule against the use as evidence of a party's books on his own behalf seems to have originated under the principle that a party could not testify or otherwise make evidence on his own behalf, the abandonment of that principle had little effect on the application of the shopbook rule in the United States. 23 Rather, American courts have tended to view the rule as based on a consideration underlying the rule against hearsay (that is, the untrustworthiness of evidence originating outside a judicial proceeding), and to regard the shopbook rule as a common-law exception to the rule against hearsay. 24

The shopbook rule originally applied only where the shopkeeper had no clerk keeping his books, and although the rule was extended over the years by courts attempting to adopt it to the realities of modern business practice, 25 it nonetheless came to be an object of ridicule by businessmen and a source of dissatisfaction to the judiciary. Accordingly, the rule has generally been superseded by the adoption of statutes and codes of evidence liberalizing the admission into evidence of books of account and other business records. 26

Footnotes

Footnote 18. *George v Miami Shores Village* (Fla App D3) 154 So 2d 729; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Footnote 19. § 1291.

Footnote 20. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Footnote 21. *De Land Min. & Mill. Co. v Hanna*, 112 Md 528, 76 A 850.

Footnote 22. *Alabama Lumber Co. v Cross*, 152 Ala 562, 44 So 563; *Kipp v Miller*, 47 Colo 598, 108 P 164; *T. Barbour Brown & Co. v Canty*, 115 Conn 226, 161 A 91, 83 ALR 801; *Turner v Turner*, 123 Ga 5, 50 SE 969; *House v Beak*, 141 Ill 290, 30 NE 1065; *Culver v Marks*, 122 Ind 554, 23 NE 1086; *Kuhl v Chamberlain*, 140 Iowa 546, 118 NW 776; *Gus Dattilo Fruit Co. v Louisville & N. R. Co.*, 238 Ky 322, 37 SW2d 856; *Mathes v Robinson*, 49 Mass 269, 8 Met 269; *Cluett v Rosenthal*, 100 Mich 193, 58 NW 1009; *Borgess Inv. Co. v Vette*, 142 Mo 560, 44 SW 754; *Wightman v Campbell*, 217 NY 479, 112 NE 184; *Smith v Rentz*, 131 NY 169, 30 NE 54; *Moore v Copeley*, 165 Pa 294, 30 A 829; *Jeffords v Muldrow*, 104 SC 388, 89 SE 357, 6 ALR 755; *Ft. Worth & R. G. R. Co. v Jones* (Tex Civ App) 212 SW 552; *Osborne v Grand T. R. Co.*, 87 Vt 104, 88 A 512; *Ratliff v Jewell*, 153 Va 315, 149 SE 409, 67 ALR 1541; *State ex rel. Spokane & Eastern Trust Co. v Superior Court of Washington*, 109 Wash 634, 187 P 358, 9 ALR 157; *Parkersburg & Marietta Sand Co. v Smith*, 76 W Va 246, 85 SE 516; *Blumer Brewing Corp. v Mayer*, 223 Wis 540, 269 NW 693, 111 ALR 1087.

Footnote 23. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Footnote 24. *Murray v Donlan* (2d Dept) 77 App Div 2d 337, 433 NYS2d 184.

Footnote 25. *Shmargon v Rosenstein*, 192 App Div 143, 182 NYS 343.

Footnote 26. §§ 1294 et seq.

§ 1291 Entries made by another

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under the common law, entries in books of accounts made in the regular course of business by a person other than the party offering them in evidence were admissible provided they were authenticated by the person who made them. 27 If the entries were not verified by the person who made them, and it was not shown that such person was unavailable as a witness, the books were not admissible. 28 However, where such third person was dead or otherwise unavailable as a witness, entries or memoranda made by him in the regular course of business, and under circumstances calculated to insure accuracy and precluding any motive of misrepresentation, were admissible as evidence of the facts stated, 29 upon proof of his handwriting. 30 This was an exception to the hearsay rule, which generally renders inadmissible private memoranda of a deceased person, 31 inasmuch as entries made in the regular and usual course of business were deemed to be more trustworthy than most other writings. 32

The rule providing for the admissibility of entries or memoranda made in the regular course of business was not limited to entries or memoranda of shops or mercantile establishments, but included entries or memoranda of persons who had since died which were made in the usual course of their professional duties, 33 such as the entries or memoranda of attorneys 34 and notaries, 35 bank records, 36 a register of bills

receivable and payable, 37 and church registers. 38 However, books or records which were not made in the regular course of business 39 at, or near, or within a reasonable time after, the time of the transaction to which they related 40 were not admissible in evidence.

◆ Observation: The common-law rule relating to entries made in the regular course of business has largely been superseded by statutes and rules of evidence which preserve the essence of the rule but no longer require authentication of the entries by the persons making them or a showing of their unavailability as witnesses.

§ 1291 ----Entries made by another [SUPPLEMENT]

Case authorities:

In criminal prosecution arising from Medicaid fraud, computer print-outs were properly admitted in evidence under business record exception to hearsay rule, even though they had been specifically created for trial and were not generated in ordinary course of business, since print-outs were generated from computer tapes which had been made in regular course of business from data entered into computer at time of each fraudulent transaction; fact that print-outs were produced after commencement of criminal proceeding did not affect their admissibility. *People v Weinberg* (1992, 2d Dept) 183 AD2d 932, 586 NYS2d 132, app den 80 NY2d 977, 591 NYS2d 147, 605 NE2d 883.

Footnotes

Footnote 27. § 1293.

Footnote 28. § 1293.

Footnote 29. *Chaffee & Co. v United States*, 85 US 516, 18 Wall 516, 21 L Ed 908; *Hancock v Kelly*, 81 Ala 368, 2 So 281; *Hansen v Kaperonis*, 243 Iowa 1257, 55 NW2d 284; *Cascio v Standard Oil Co. (La App 1st Cir)* 32 So 2d 66; *Arnold v Hussey*, 111 Me 224, 88 A 724; *Dow v Sawyer*, 29 Me 117; *North Bank v Abbot*, 30 Mass 465; *Tiedt v Larson*, 174 Minn 558, 219 NW 905; *Lassone v Boston & L. R. Co.*, 66 NH 345, 24 A 902; *Jameson v First Sav. Bank & Trust Co.*, 40 NM 133, 55 P2d 743, 103 ALR 1492; *Wightman v Campbell*, 217 NY 479, 112 NE 184; *Dairy & Ice Cream Supply Co. v Gastonia Ice Cream Co.*, 232 NC 684, 61 SE2d 895; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423; *State v Davie*, 121 Utah 189, 240 P2d 265; *State v Phair*, 48 Vt 366; *State ex rel. Alderson v Holbert*, 137 W Va 883, 74 SE2d 772.

Footnote 30. § 1293.

Footnote 31. § 1274.

Footnote 32. *Smith v Bear* (CA2 NY) 237 F2d 79, 60 ALR2d 1119.

Footnote 33. *Ward v Music* (Ky) 257 SW2d 516; *Richmond v Weiss & Goldring, Inc.* (La App 3d Cir) 124 So 2d 601; *Jameson v First Sav. Bank & Trust Co.*, 40 NM 133, 55 P2d 743, 103 ALR 1492; *State ex rel. Alderson v Holbert*, 137 W Va 883, 74 SE2d 772.

Footnote 34. *Jameson v First Sav. Bank & Trust Co.*, 40 NM 133, 55 P2d 743, 103 ALR 1492.

Footnote 35. *Nicholls v Webb*, 21 US 326, 8 Wheat 326, 5 L Ed 628.

Footnote 36. *American Surety Co. v Pauly* (CA2 NY) 72 F 470, *affd* 170 US 133, 42 L Ed 977, 18 S Ct 552.

Footnote 37. *Tiedt v Larson*, 174 Minn 558, 219 NW 905.

Footnote 38. *Kennedy v Doyle*, 92 Mass 161, 10 Allen 161.

Footnote 39. *In re Estate of Martine*, 233 Ill App 94; *Cullinan v Moncrief*, 90 App Div 538, 85 NYS 745.

Footnote 40. *Burley v German-American Bank*, 111 US 216, 28 L Ed 406, 4 S Ct 341; *Nall v Brennan*, 324 Mo 565, 23 SW2d 1053, 68 ALR 684.

(b). Authentication [1292, 1293]

§ 1292 Of entries made by party offering record

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where a party offers his own books to prove his claim against another under the shopbook rule, the books must be authenticated. 41 It is necessary to show that the transactions were correctly recorded, or, as it is sometimes expressed, the books must appear to have been fairly and honestly kept. 42 One making entries in shopbooks should generally have knowledge of their verity; if they are made on reports of others, the entrant should testify that he made them correctly as reported, and his testimony should be supplemented by the one who made the reports. 43 It is not, however, essential that the entrant testifying to the correctness of book accounts have an independent or exact recollection of the transaction entered, if he is able to say that at the time when he made the entries he had personal knowledge of the transaction, and that the entries were made correctly in conformity with such knowledge. 44 The lack of such independent evidence merely affects the weight of the books as evidence. 45

Footnotes

Footnote 41. *Wentz v Guaranteed Sand & Gravel Co.*, 205 Minn 611, 287 NW 113.

Practice References 34 Am Jur POF2d 509, *Foundation for Offering Business Records in Evidence*.

Footnote 42. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Footnote 43. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

Footnote 44. *Merrill v Ithaca & O. R. Co.* (NY) 16 Wend 586; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423; *Curran v Witter*, 68 Wis 16, 31 NW 705.

Footnote 45. *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

§ 1293 Of entries made by another

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule at common law as to entries in books of account which have been made by a person other than the party who offers the books is that entries so made in the ordinary course of business, by a person whose duty it was to make them, contemporaneously with the occurrence of the transactions recorded, are competent evidence where they are proved by the person who made them, if he is alive and can be produced. 46 If the entries are not verified by the person who made them, and it is not shown that he or she is unavailable as a witness, the books are inadmissible. 47 The necessity of verifying the correctness of entries by the bookkeeper, clerk, or other person who made the entries in a book of accounts is relaxed when such person has died, is beyond the jurisdiction of the court, or is otherwise unavailable as a witness. 48 In such cases, books of account, if otherwise unobjectionable, become admissible upon proof of the fact of the unavailability or absence of the bookkeeper 49 and upon proof of his or her handwriting. 50

Footnotes

Footnote 46. *St. Louis S. R. Co. v White Sewing Mach. Co.*, 78 Ark 1, 93 SW 58; *Barnes v Simmons*, 27 Ill 512; *Hansen v Kaperonis*, 243 Iowa 1257, 55 NW2d 284; *Mansfield v Gushee*, 120 Me 333, 114 A 296; *Lassone v Boston & L. R. Co.*, 66 NH 345, 24 A 902; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423; *Commonwealth v Grotzner*, 125 Pa Super 305, 189 A 495; *Vinal v Gilman*, 21 W Va 301.

Practice References 34 Am Jur POF2d 509, *Foundation for Offering Business Records in Evidence*.

Footnote 47. *Terry v Birmingham Nat. Bank*, 93 Ala 599, 9 So 299; *Mansfield v Gushee*, 120 Me 333, 114 A 296; *Missouri, K. & T. R. Co. v Davis*, 24 Okla 677, 104 P 34; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423; *Commonwealth v Grotzner*, 125 Pa Super 305, 189 A 495.

Footnote 48. *Beaver v Taylor*, 68 US 637, 1 Wall 637, 17 L Ed 601; *Heiskell v Rollins*, 82 Md 14, 33 A 263; *President, etc., of Union Bank v Knapp*, 20 Mass 96; *Lassone v Boston & L. R. Co.*, 66 NH 345, 24 A 902; *Dairy & Ice Cream Supply Co. v Gastonia Ice Cream Co.*, 232 NC 684, 61 SE2d 895; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27

ALR 1423; *United Grocery Co. v J. M. Dannelly & Son*, 93 SC 580, 77 SE 706; *State v Davie*, 121 Utah 184, 240 P2d 263; *Vinal v Gilman*, 21 W Va 301.

Footnote 49. § 1291.

Footnote 50. *Heiskell v Rollins*, 82 Md 14, 33 A 263; *President, etc., of Union Bank v Knapp*, 20 Mass 96; *Radtke v Taylor*, 105 Or 559, 210 P 863, 27 ALR 1423.

As to authentication of handwriting, generally, see §§ 1212 et seq.

(2). Statutory Provisions [1294-1320]

(a). Model Act for Proof of Business Transactions [1294, 1295]

§ 1294 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Model Act for Proof of Business Transactions, which originated in New York in 1927, provides that any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. The Act further provides that all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility, and that the term "business" shall include every kind of business, profession, occupation, and calling.

The Act represents a broad exception to the hearsay rule. 51 It was formulated in recognition of the fact that modern business practice typically involves a large number of persons in recordkeeping, and it is intended to permit writings made in the regular course of business to be received in evidence without the necessity of calling as witnesses all the persons who had any part in making it, 52 provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information. 53 The self-serving nature of a record under the Act goes to its weight but not its admissibility. 54

◆ Practice guide: The Act's statutory prerequisites for admission of a business record must be satisfied by foundation testimony. 55 The fact that the witness by whom the foundation is laid was not, at the time of the making of the record, an employee of the business does not affect the record's admissibility. 56

◆ Observation: The Act was at one time codified as federal law and referred to as the Federal Business Records Act. 57 However, with the adoption of the Federal Rules of Evidence, Rule 803(6) of which addresses the exemption of business records from the hearsay rule, the codification of the Act was amended to delete matters covered by the new Rules. 58

Footnotes

Footnote 51. *Frush v Brooks*, 204 Md 315, 104 A2d 624.

Footnote 52. *In re Fifth Ave. Coach Lines, Inc.*, 42 Misc 2d 319, 247 NYS2d 933.

Footnote 53. *Chase Manhattan Bank (Nat. Asso.), Bank Americard Div. v Hobbs*, 94 Misc 2d 780, 405 NYS2d 967.

Records are not inadmissible under the Act merely because the recordkeeper lacks personal knowledge of the matter recorded, so long as the record is made on information imparted by one under a duty to impart it. *Cox v State*, 3 NY2d 693, 171 NYS2d 818, 148 NE2d 879.

Footnote 54. *Whitehead v Joiner*, 234 Ga 457, 216 SE2d 317.

Footnote 55. *State v Anonymous*, 33 Conn Supp 668, 366 A2d 557.

Annotation: Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Practice References 34 Am Jur POF2d 509, Foundation for Offering Business Records in Evidence.

Footnote 56. *Baumert-Moran Sales Co. v Red Bird Truck Rental Corp.*, 149 Conn 42, 175 A2d 189.

Footnote 57. *Smith v Universal Services, Inc.* (CA5 La) 454 F2d 154, 4 BNA FEP Cas 187, 4 BNA FEP Cas 541, 4 CCH EPD ¶ 7617, 4 CCH EPD ¶ 7704, on remand (DC La) 360 F Supp 446, 5 BNA FEP Cas 1375, 6 CCH EPD ¶ 8920.

Annotation: Admissibility of credit reports under Federal Business Records Act (28 USC § 1732(a)), 19 ALR Fed 988.

Accident reports by employees of litigant as admissible under Federal Business Records Act (28 USC § 1732), 10 ALR Fed 858.

Admissibility of hospital records under Federal Business Records Act (28 USC § 1732(a)), 9 ALR Fed 457.

Personal checkbook or account as business record under Federal Business Records Act (28 USC § 1732), 8 ALR Fed 919.

§ 1295 Records admissible under Model Act

[View Entire Section](#)
[Go to Parallel Reference Table](#)

For a record to be admissible under the Model Act, it must meet three qualifications: (1) it must have been made in the regular course of business; (2) it must be the regular course of business to make such record; and (3) it must have been made at or near the time of the act, transaction, or event. 59 The fact that a record is generally admissible under the Act, however, does not mean that anything and everything contained in the record is necessarily admissible in any given case. 60 A portion of a proffered exhibit which is not shown to have been made in the regular course of business may be deleted before the exhibit is admitted into evidence. 61

While the Model Act was essentially designed to meet problems encountered by commercial enterprises engaged in litigation, the writings and records made admissible under it are not limited to commercial entries, as was the case under the shopbook rule. 62 Records admissible under the Act include—

—recorded statements of firefighters as to what happened at the scene of a fire. 63

—a memorandum prepared by a police officer, but not signed by the accused, containing the accused's oral confession to a murder. 64

—physicians' records. 65

—diaries of a person engaged in illegal loansharking transactions. 66

However, as the Act was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto, 67 the Act does not make admissible an accident report filed by a police officer insofar as such report is based upon the hearsay statements of persons who happened to be present at the scene of the accident when the officer arrived. 68 Conclusions of a police officer in such a report are also subject to deletion before the report is received in evidence. 69 A recording of a telephone call to a 911 emergency number is not admissible under the Act where the person making the call was under no business duty to report the occurrence or incident giving rise to the call. 70

Footnotes

Footnote 59. *American Oil Co. v Valenti*, 179 Conn 349, 426 A2d 305, 28 UCCRS 118.

Footnote 60. *Maggi v Mendillo*, 147 Conn 663, 165 A2d 603.

Footnote 61. *Szela v Johnson Motor Lines, Inc.*, 145 Conn 714, 146 A2d 910.

Footnote 62. *Needle v New York R. Corp.*, 227 App Div 276, 237 NYS 547.

Annotation: Admissibility of school records under hearsay exceptions, 57 ALR4th 1111 §§ 3-15.

Admissibility of computerized private business records, 7 ALR4th 8.

Admissibility under Uniform Business Records as Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 ALR3d 104.

Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence, 68 ALR3d 1069.

Footnote 63. *Holloway v Eich*, 255 Md 591, 258 A2d 585.

Footnote 64. *Holcomb v State*, 307 Md 457, 515 A2d 213.

Footnote 65. *Jezowski v Beach*, 59 Misc 2d 224, 298 NYS2d 360.

Footnote 66. *People v Kennedy*, 68 NY2d 569, 510 NYS2d 853.

Footnote 67. *Johnson v Lutz*, 253 NY 124, 170 NE 517.

Footnote 68. *State v Masse*, 24 Conn Supp 45, 1 Conn Cir 381, 186 A2d 553; *Kuhl v Aetna Casualty & Surety Co.*, 51 Md App 476, 443 A2d 996, affd 296 Md 446, 463 A2d 822; *Johnson v Lutz*, 253 NY 124, 170 NE 517.

Annotation: Admissibility in state court proceedings of police reports as business records, 77 ALR3d 115.

Footnote 69. *Honick v Walden*, 10 Md App 714, 272 A2d 406.

Footnote 70. *People v Luke*, 136 Misc 2d 733, 519 NYS2d 316.

Annotation: Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784 § 11.

(b). Uniform Business Records as Evidence Act [1296-1299]

§ 1296 Generally

[View Entire Section](#)

The Uniform Business Records as Evidence Act provides that a record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. 71 The term "business," as used in the Act, is defined to include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

◆ **Observation:** While similar in many respects to the Model Act for Proof of Business Transactions, the Uniform Business Records as Evidence Act departs from the Model Act by requiring, in addition to proof as to the making of the record in the regular course of business at or near the time of the matter recorded, that the court be satisfied that the sources of information, method, and time of preparation of the record are such as to justify its admission. 72 By contrast, the Model Act states that circumstances other than those specified as a foundation for admission of the record bear on the weight, but not the admissibility, of the record.

The Uniform Act abrogates many of the antiquated and technical common-law rules regarding the admission of business records in evidence, and expands the operation of the common-law rule for the admission of such records as an exception to the hearsay rule. 73 The Act eliminates the necessity of calling, qualifying, and interrogating each person who made the individual entries. 74 The admissibility of records under the Act does not turn on whether, in the context of the case, they are self-serving or admissions against interest; such matters affect probative value or credibility and are for the factfinder. 75

◆ **Observation:** The Uniform Business Records as Evidence Act was enacted by more than half the states, but was withdrawn by the National Conference of Commissioners on Uniform State Laws upon the promulgation of the Uniform Rules of Evidence, inasmuch as Rule 803(6) of the Uniform Rules embodies the substance of the Act. 76 States adopting the Uniform Rules have generally repealed any prior enactment of the Act.

Footnotes

Footnote 71. *Richmond v Frederick*, 116 Cal App 2d 541, 253 P2d 977.

Annotation: Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Footnote 72. *Thomas v Fred Weber Contractor, Inc.* (Mo App) 498 SW2d 811 (noting that trial court has considerable discretion in determining whether sources of information, method, and time of preparation render document inadmissible in a particular case).

Footnote 73. *Bohn v James* (Mo App) 573 SW2d 448 (criticized on other grounds by *Parry v Staddon* (Mo App) 769 SW2d 811); *Fauceglia v Harry*, 409 Pa 155, 185 A2d

Footnote 74. *Webber v McCormick*, 63 NJ Super 409, 164 A2d 813.

Practice References 34 Am Jur POF2d 509, Foundation for Offering Business Records in Evidence.

Footnote 75. *Mahoney v Minsky*, 39 NJ 208, 188 A2d 161.

An ambulance company's trip ticket and the corresponding page of its logbook were admissible under the statute to show that the ambulance driver, who collided with a car, believed that he was on an emergency trip, notwithstanding that the notation of the letter "E" in both records, used by the ambulance company to designate emergency calls, was self-serving. *Gallup v Sparks-Mundo Engineering Co.*, 43 Cal 2d 1, 271 P2d 34.

Footnote 76. Historical Note to Rule 803, Uniform Rules of Evidence.

§ 1297 Records admissible under Uniform Act

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Uniform Business Records as Evidence Act does not make relevant that which is not in fact relevant, nor does it make all business records competent evidence regardless of the manner in which, and the purpose for which, they were made. 77 The statute does not make a record admissible when oral testimony to the same effect would not be admissible. 78 The Act requires that the record offered in evidence be that of an "act, condition, or event," and accordingly a record, to be admitted under the Act, must contain statements of fact rather than conclusions. 79 A record to be admissible under the Act must be based upon the entrant's own observation, or upon information transmitted to him by an observer under a business duty to so transmit it. 80

◆ Practice guide: A record which is objectionable in part will be redacted upon the making of a properly specific objection, 81 but where at least some of the record in question is admissible, a blanket objection to its admission is not well taken, and the entire record will be admitted. 82

Footnotes

Footnote 77. *Tile-Craft Products Co. v Colonial Properties, Inc.* (Mo) 498 SW2d 547; *Haas v Kasnot*, 371 Pa 580, 92 A2d 171, appeal after remand 377 Pa 440, 105 A2d 74.

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence, 68 ALR3d 1069.

Footnote 78. McGowan v Los Angeles, 100 Cal App 2d 386, 223 P2d 862, 21 ALR2d 1206; Hancock v Crouch (Mo App) 267 SW2d 36.

The Uniform Business Records as Evidence Act does not make competent matters contained in records covered by the act which are otherwise violative of evidentiary rules. Commonwealth v Green, 251 Pa Super 318, 380 A2d 798.

Footnote 79. Williams v Caples, 342 Pa 230, 20 A2d 302.

Footnote 80. State v Boyington (Mo App) 544 SW2d 300.

It is not required that the entrant have personal knowledge of the event recorded. People v Fowzer, 127 Cal App 2d 742, 274 P2d 471; Fauceglia v Harry, 409 Pa 155, 185 A2d 598.

Footnote 81. Allen v St. Louis Public Service Co., 365 Mo 677, 285 SW2d 663, 55 ALR2d 1022.

Footnote 82. Finkel v Hoel-Steffen Constr. Co. (Mo App) 631 SW2d 645.

But see Glenn v Brown, 28 Wash App 86, 622 P2d 1279, review den 95 Wash 2d 1018 (trial court did not abuse its discretion in excluding from evidence letters of consulting physician to primary treating physician where, in addition to facts observed by the consulting physician, one of the letters also contained a statement which was arguably an opinion as to the cause of the plaintiff's injury, and no attempt was made to segregate the potentially inadmissible portions of the letters from those which were admissible).

§ 1298 --Hospital records; accident records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Opinions, diagnoses, or conclusions contained in hospital records are not admissible under the Uniform Business Records as Evidence Act, as they represent an expression of expert opinion not subject to cross-examination, 83 although the results of a relatively simple medical test such as that for blood alcohol are not objectionable. 84

A record to be admissible under the Act must be based upon the entrant's own observation, or upon information transmitted to him by an observer under a business duty to so transmit it. 85 Thus, although an accident report filed by a policeman is generally not admissible in evidence under the Act where the report is based upon the hearsay statements of third persons who were at the scene of the accident when the policeman arrived, 86 such a report is admissible where it is based upon the policeman's personal observations, 87 or the observations of one who had a business duty to transmit his observations to the officer. 88

Accident reports made by employees to their employers have been deemed not

admissible in evidence under the Uniform Business Records as Evidence Act where the regular business of the employer was not the investigation of accidents. 89 However, such reports have been held admissible, notwithstanding that the employer's regular business was not the investigation of accidents, where it was the frequent and regular practice of employees to make such reports. 90

Footnotes

Footnote 83. *Morris v Moss*, 290 Pa Super 587, 435 A2d 184; *Glenn v Brown*, 28 Wash App 86, 622 P2d 1279, review den 95 Wash 2d 1018.

Footnote 84. *State v Martorelli*, 136 NJ Super 449, 346 A2d 618, certif den 69 NJ 445, 354 A2d 642; *Commonwealth v Seville*, 266 Pa Super 587, 405 A2d 1262.

Medical records librarian properly testified to finding of spermatozoa in prosecutrix' vagina after incident resulting in trial of defendant for rape; where tests to determine presence of sperm were basic and routine and left little room for error, finding of spermatozoa was thus fact, and medical records could be admitted under business records exception to hearsay rule. *Commonwealth v Campbell*, 244 Pa Super 505, 368 A2d 1299.

Annotation: Admissibility under Uniform Business Records as Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 ALR3d 104.

Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party, 19 ALR3d 1008.

Footnote 85. § 1297.

Footnote 86. *MacLean v San Francisco* (1st Dist) 151 Cal App 2d 133, 311 P2d 158; *Haas v Kasnot*, 371 Pa 580, 92 A2d 171, appeal after remand 377 Pa 440, 105 A2d 74.

Annotation: Admissibility in state court proceedings of police reports as business records, 77 ALR3d 115.

Footnote 87. *MacLean v San Francisco* (1st Dist) 151 Cal App 2d 133, 311 P2d 158.

Footnote 88. *State v Jordan* (Mo App) 664 SW2d 668.

Footnote 89. *Githens, Rexsamer & Co. v Wildstein*, 428 Pa 201, 236 A2d 792; *Owens v Seattle*, 49 Wash 2d 187, 299 P2d 560, 61 ALR2d 417.

Footnote 90. *Fagan v Newark*, 78 NJ Super 294, 188 A2d 427.

§ 1299 --Memorandum of telephone conversation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A memorandum of a telephone conversation made by one in the regular course of business is admissible in evidence under the Uniform Business Records as Evidence Act. 91 However, where the memorandum is introduced in evidence for the purpose of establishing the fact of the telephone conversation, the admissibility of the memorandum depends upon the legitimacy of an inference that the telephone conversation was had with the person in question. 92

Footnotes

Footnote 91. State v Bassano, 67 NJ Super 526, 171 A2d 108.

Annotation: Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784 § 11.

Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Footnote 92. State v Bassano, 67 NJ Super 526, 171 A2d 108.

Generally, as to the admissibility of evidence as to the fact of a telephone call and the identity of the caller, see §§ 582, 578.

(c). Rule 803(6) of Uniform and Federal Rules of Evidence [1300-1314]

§ 1300 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(6) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides that proffered evidence is not excluded by the hearsay rule if:

- The evidence is a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses
- It was kept in the course of a regularly conducted business activity, and it was the regular practice of that business activity to make such a record
- The source of the information was a person with knowledge

- The memorandum, report, or data compilation was made at or near the time of the event or occurrence in question
- All as shown by testimony of the custodian of the record or by some other qualified witness
- The source of information or the method or circumstances of preparation does not indicate lack of trustworthiness 93

The term "business" is defined by the Rule as including business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. 94

The rationale of the Rule is that the reliability of a business record is demonstrated by evidence that it was made pursuant to established and routine procedures for systematic conduct of a business. 95

- ◆ Observation: The testimony required of the custodian of the record or other qualified witness will serve to authenticate the record as well as remove a hearsay objection to its admission. 96

§ 1300 ----Generally [SUPPLEMENT]

Practice Aids: Evidence: Photocopies of business records, 141 Chi Daily L Bull 86:1 (1995).

Hearsay, the New York and Federal Rules of Evidence: What's the difference? 11 Touro LR 1:57 (1994).

Case authorities:

Time sheets identifying work age discrimination plaintiff could have performed were properly admitted under business records exception where employer's defense was that employee was terminated because there was no work he could do. *Starceski v Westinghouse Elec. Corp.* (1995, CA3 Pa) 54 F3d 1089, 67 BNA FEP Cas 1184.

Footnotes

Footnote 93. FRE 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 94. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 95. *Teac Corp. of America v Bauer* (Colo App) 678 P2d 3.

Law Reviews: Egan & Cunningham, Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques. 30 Duquesne L Rev 205 (Winter 1992).

Practice References 34 Am Jur POF2d 509, Foundation for Offering Business Records in Evidence.

§ 1301 Distinctions between Rule and other statutory provisions for receipt of business records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(6) 97 differs from both the Model Act for Proof of Business Transactions and the Uniform Business Records as Evidence Act, in that records admissible under Rule 803(6) include records of "opinions or diagnoses," as well as records of "acts," "events," and "conditions"; the Model and Uniform Acts were confined to reports of acts, events, and conditions, and records of "conclusions" were generally held outside the scope of those Acts. 98 While records containing opinions and conclusions are admissible under Rule 803(6), 99 such records are subject to other provisions of the Rules concerning expert opinion testimony. 1

The Rule also departs from the Model Act in that the exemption created by Rule 803(6) does not apply where the source of information, the method, or the circumstances of the preparation of the record in question indicates untrustworthiness. Under the Model Act, there is no general provision requiring a record to be trustworthy; circumstances other than those required for the foundation for admission of the record go to the weight of the record but not its admissibility. 2

Footnotes

Footnote 97. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 98. §§ 1295, 1297.

Footnote 99. State ex rel. Miller v Tucson Assoc. Ltd. Partnership (App) 165 Ariz 519, 799 P2d 860, 57 Ariz Adv Rep 84.

Footnote 1. McCabe v R.A. Manning Constr. Co. (Wyo) 674 P2d 699.

Footnote 2. § 1294.

§ 1302 What constitutes a record

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 803(6) the evidence must consist of a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses. 3 Although the scope of this provision is broad, it is not unlimited; for example, the exception does not embrace operating or procedural manuals, which are not records of any act, transaction, occurrence, or event as required by the Rule. 4 Even records of a particular occurrence, such as theft of property from the business, are not within the Rule where it is not the regular practice of the business to make such records. 5 It is not the name of a record that renders it within or without the business records exception, and the fact that a witness refers to records as "corporate records" does not demonstrate that they fall within Rule 803(6). 6

Personal business records are within the scope of Rule 803(6) if they are systematically checked and regularly and continually maintained. 7 For example, while desk calendars in which entries may or may not appear at the whim of the writer do not ordinarily have the sort of regularity that supports a reliable inference, they may be business records if they are maintained regularly without regard to the events subject to the trial and if there is a demonstrable pattern of inclusion or exclusion. 8

Even records of illegal enterprises have been held admissible, 9 the theory being that the records, although not used or relied on by other employees or required to be kept, were kept as part of a business activity and were unlikely to be falsified. 10

§ 1302 ----What constitutes a record [SUPPLEMENT]

Case authorities:

Right sides of Western Union "to- send-money" forms were admissible business records to support government's charge that defendant laundered money and engaged in continuing criminal enterprise; testimony established customary procedure Western Union agents followed in entering information onto that side of form and how unique ten-digit money transfer control number is assigned to each transfer. *United States v Cestnik* (1994, CA10 Wyo) 36 F3d 904.

In action by employee against employer for injuries resulting from explosion, advertising brochure describing asphalt dip vat as using vapor phase heating process, and three pieces of correspondence indicating company was ordering correct amount of heat transfer liquid were properly admitted as business records, even though documents were not discovered until three weeks into trial, where letters and brochure shed light on significant matters in controversy, and were surprises to all parties; four days adjournment for preparation following discovery of documents was adequate. *Hurlbut v Conoco, Inc.* (1993) 253 Kan 515, 856 P2d 1313, CCH Prod Liab Rep ¶ 13652.

Footnotes

Footnote 3. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 4. *Seattle-First Nat. Bank v Randall* (CA9 Or) 532 F2d 1291, 1 Fed Rules Evid Serv 1124, 19 UCCRS 228 (bank's loan manual setting out lending guidelines).

Footnote 5. *People v Bettistea*, 173 Mich App 106, 434 NW2d 138.

Footnote 6. *United States v Johnson* (CA9 Ariz) 594 F2d 1253, 4 Fed Rules Evid Serv 663, 50 ALR Fed 310, cert den 444 US 964, 62 L Ed 2d 376, 100 S Ct 451.

Footnote 7. *Keogh v Commissioner* (CA9) 713 F2d 496, 83-2 USTC ¶ 9539, 13 Fed Rules Evid Serv 1594, 52 AFTR 2d 83-5881 (among conflicting authorities on other grounds noted in *Anastasato v Commissioner* (CA3) 794 F2d 884, 86-2 USTC ¶ 9529, 58 AFTR 2d 86-5349).

Footnote 8. *United States v Ramsey* (CA7 Ill) 785 F2d 184, 20 Fed Rules Evid Serv 58, cert den 476 US 1186, 91 L Ed 2d 552, 106 S Ct 2924.

Footnote 9. *United States v Foster* (CA9 Cal) 711 F2d 871, 13 Fed Rules Evid Serv 1883, cert den 465 US 1103, 80 L Ed 2d 132, 104 S Ct 1602.

Footnote 10. *United States v Hedman* (CA7 Ill) 630 F2d 1184, 6 Fed Rules Evid Serv 1105, cert den 450 US 965, 67 L Ed 2d 614, 101 S Ct 1481.

§ 1303 --Computerized records

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

If the requirements of Rule 803(6) are met, computerized records are admissible under the Rule. 11 However, it has been said that the foundation for admissibility of computer business records includes proof that they are kept pursuant to a routine procedure designed to assure their accuracy, they are created for motives that tend to assure accuracy, and are not prepared for litigation, and they are not themselves mere accumulations of hearsay. 12 The original source of the computer program may also have to be delineated. 13 It may be necessary also to show that the computer equipment used was of a standard type. 14 It is not, however, necessary to show that the security system by which access to the computer is controlled is absolutely airtight. 15

◆ Observation: The requirement that computer records not be prepared for litigation in order to be admissible under Rule 803(6) should probably be understood as meaning that the records should not have been created for the purpose of litigation. Where records are created and stored in a computer in the ordinary course of business and not in anticipation of litigation, the fact that a printout of the records is created for the purpose of litigation does not render the records inadmissible. 16

While the foundation witness need not be the person who prepared or supervised the preparation of the record, 17 the witness should be able to describe the method and circumstances by which the computer record was prepared, to establish that the record is

◆ Practice guide: Appropriate discovery should be undertaken well in advance of trial concerning the reliability of computerized evidence that may be used later, and such discovery will usually include inquiry into the accuracy of the underlying source materials, the procedures for storage and processing, and some testing of the reliability of the results obtained. 19

§ 1303 --Computerized records [SUPPLEMENT]

Practice Aids: Admissibility of computer-generated evidence, 14 Constr Lawyer 3:1 (1994).

Admissibility of computer-produced statements, 67 Law Inst J 611 (1993).

Case authorities:

Printout of computerized driving records are admissible if properly certified. *Hodges v City of Hoover* (1994, Ala App) 647 So 2d 39.

Computer printout of defendant's rap sheet was admissible in criminal prosecution as official record over hearsay objection where printout was clearly identified as "CLETS [California Law Enforcement Telecommunications System] Data Base Response" and bore certification from county district attorney's office that it was received from CLETS. *People v Dunlap* (1993, 5th Dist) 18 Cal App 4th 1468, 23 Cal Rptr 2d 204, 93 CDOS 7174, 93 Daily Journal DAR 12165, review den *People v Dunlap* (1993, Cal) 1994 Cal LEXIS 6445.

In action by franchisor of retail pharmacies against franchisees, computer-generated monthly document, prepared by franchisor, summarizing license fees based upon sales reports submitted by licensee was properly admitted as business exception to hearsay where executive vice president testified that, although he did not have personal knowledge of exhibit, that document was prepared in ordinary course of business by person with knowledge of information recorded, and that it was stored in computer system near or at time individual license fees were due. *Medicine Shoppe Int'l v Mehra* (1994, Mo App) 882 SW2d 709.

In action by pedestrians injured when they were struck by automobile, computer printouts of insurance records were not admissible where insurer failed to lay proper foundation regarding methods used to record information, sources of information, time of preparation, and procedures for entering and retrieving information. *Tomassini v Saunders* (1994, Law Div) 274 NJ Super 203, 643 A2d 665.

In robbery prosecution, computer print-out from state motor vehicle department, showing registration of specified vehicle, was admissible under business record exception to hearsay rule, where print-out was properly authenticated by custodian. *State v Fontenot* (1993, La App 1st Cir) 618 So 2d 915, cert den (La) 623 So 2d 1332.

Footnotes

Footnote 11. *United States v Sanders* (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv 1274; *United States v Croft* (CA7 Wis) 750 F2d 1354, 16 Fed Rules Evid Serv 1141; *Phoenix v Com/Systems, Inc.* (CA9 Ariz) 706 F2d 1033, 13 Fed Rules Evid Serv 557; *Minor v State* (Miss) 379 So 2d 495; *Richards on behalf of Westside Supply Co. v Arthalloney*, 216 Neb 11, 342 NW2d 642, 38 UCCRS 234; *State v Ben-Neth*, 34 Wash App 600, 663 P2d 156.

Advisory Committee Notes to Federal Rules of Evidence, FRE, Rule 803.

Law Reviews: Peritz, Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence. 80 Northw U LR 956, (Winter 1986).

Annotation: Admissibility of computerized private business records, 7 ALR4th 8.

Practice References Admissibility of Computerized Business Records. 14 Am Jur POF2d 173.

Computer Printouts as Evidence. 16 Am Jur POF 273.

Texts Louisell and Mueller, Federal Evidence § 449.

Footnote 12. *Capital Marine Supply, Inc. v M/V Roland Thomas, II* (CA5 La) 719 F2d 104, 1984 AMC 905, 14 Fed Rules Evid Serv 731; *United States v Glasser* (CA11 Fla) 773 F2d 1553, 19 Fed Rules Evid Serv 1336 (criticized on other grounds by *United States v Penta* (CA1 Mass) 898 F2d 815, 29 Fed Rules Evid Serv 1325).

Footnote 13. *United States v Scholle* (CA8 Minn) 553 F2d 1109, 1 Fed Rules Evid Serv 1374, cert den 434 US 940, 54 L Ed 2d 300, 98 S Ct 432 and (criticized on other grounds by *United States v Bowman* (CA8 Minn) 798 F2d 333, 21 Fed Rules Evid Serv 476) and (among conflicting authorities on other grounds noted in *United States v Smith* (App DC) 296 US App DC 100, 964 F2d 1221, 35 Fed Rules Evid Serv 920) and (criticized on other grounds by *United States v Blackburn* (CA7 Ind) 992 F2d 666, 36 Fed Rules Evid Serv 1328).

But see *United States v Dababneh* (NMCMR) 28 MJ 929 (stating that it is unnecessary to burden computer-generated business records with foundational requirements other than those which exist for other classes of business records).

Manual for Complex Litigation 2d § 3.50 (1977).

Footnote 14. *Eastman v Department of Public Aid* (2d Dist) 178 Ill App 3d 993, 128 Ill Dec 276, 534 NE2d 458; *Allen v State* (Ind) 439 NE2d 615, appeal after remand (Ind) 453 NE2d 1011; *State v Jones* (La App 3d Cir) 544 So 2d 1209.

Footnote 15. *United States v Glasser* (CA11 Fla) 773 F2d 1553, 19 Fed Rules Evid Serv 1336 (criticized on other grounds by *United States v Penta* (CA1 Mass) 898 F2d 815, 29 Fed Rules Evid Serv 1325).

Footnote 16. *United States v Sanders* (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv

1274; *United States v Briscoe* (CA7 Ill) 896 F2d 1476, 30 Fed Rules Evid Serv 831, cert den 498 US 863, 112 L Ed 2d 137, 111 S Ct 173.

Footnote 17. *United States v Fendley* (CA5 Tex) 522 F2d 181, 76-1 USTC ¶ 9110, 75-2 USTC ¶ 9754, 36 AFTR 2d 75-6238; *United States v Miller* (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647.

Footnote 18. *United States v Croft* (CA7 Wis) 750 F2d 1354, 16 Fed Rules Evid Serv 1141.

Footnote 19. *Manual for Complex Litigation* 2d § 21.446.

§ 1304 Requirement that record be made in course of regularly conducted business activity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A "regularly conducted business activity" under Rule 803(6) includes the activities of businesses, institutions, associations, professions, occupations, and callings of every kind, whether or not conducted for profit. 20 A state prison is a "business" within the meaning of Rule 803(6), 21 as are condominium associations 22 government agencies, 23 and institutions and associations such as schools, churches, and hospitals. 24 The form or type of business organization does not matter; the Rule encompasses sole proprietorships 25 as well as corporations. 26

§ 1304 ----Requirement that record be made in course of regularly conducted business activity [SUPPLEMENT]

Case authorities:

Computer printouts of collection memos pertaining to defendant's accounts were properly admitted as business records in prosecution for credit card fraud since they were reports or records made either during telephone conversations between collections department and defendant or immediately following them, they were made and kept in course of regularly conducted business activity, i.e., telephonic inquiry of delinquent credit card accounts, and it was credit card company's regular practice to record such calls. *United States v Goodchild* (1994, CA1 NH) 25 F3d 55.

Accountant's notes of meeting at which redemption of his clients' shares were discussed were admissible under business records exception to hearsay rule where accountant testified that notes were prepared by him in course of his accounting and consulting business, that it was his practice to take notes at meetings, and that he initialed and dated meeting notes in upper-right-corner, that he prepared notes in his capacity as client's accountant and consultant in transaction, and that notes were located in appropriate file in his office. *Hoselton v Metz Baking Co.* (1995, CA8 Iowa) 48 F3d 1056, reh den (1995,

CA8 Iowa) 1995 US App LEXIS 6326.

Automobile dealers' documents, including certificates of title, purchase orders, and odometer statements, were properly admitted as business records in defendant's trial on charge of possessing stolen automobiles since they were kept in regular course of dealers' business; even though dealers did not create documents, dealers relied on documents' identification of individual cars in keeping track of their cars, and although witnesses who testified concerning them were not employees of dealers at time of testifying, they were employees when cars were stolen. *United States v Childs* (1993, CA9 Ariz) 5 F3d 1328, 93 CDOS 7242, 93 Daily Journal DAR 12315, 37 Fed Rules Evid Serv 1344.

Police property receipt for weapon was properly admitted into evidence under business records exception where government established that its regular and customary practice was to fill out property receipt for any type of evidence. *United States v Brown* (1993, CA11 Fla) 9 F3d 907, 7 FLW Fed C 1081.

Admission of routinely and mechanically kept INS records, such as I-194 form and warrants of deportations, does not violate rule; such records, prepared long before alleged offense and relied on in daily INS operations, do not raise hearsay concerns. *United States v Agustino- Hernandez* (1994, CA11 Fla) 14 F3d 42, 38 Fed Rules Evid Serv 1365, 7 FLW Fed C 1207.

In action by manufacturer against steel supplier alleging breach of contract and negligence, trial court did not commit reversible error in admitting test report of chemical analysis of steel prepared by independent lab for customer under business record exception to hearsay rule, where report was record acquired and maintained by customer in regular course of business. *Precision Steel Warehouse, Inc. v Anderson-Martin Mach. Co.* (1993) 313 Ark 258, 854 SW2d 321, reh den 313 Ark 272A, 856 SW2d 306.

Letter containing proposal to company for installation of clinical system software program was properly admitted as means of assisting assessment of damages where proposal had been received in ordinary course of business, and was type of proposal defendant often received in business dealings. *Hauser v Rose Health Care Sys.* (1993, Colo App) 857 P2d 524, cert den (Colo) 1993 Colo LEXIS 729.

Footnotes

Footnote 20. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 21. *Stone v Morris* (CA7 Ill) 546 F2d 730, 2 Fed Rules Evid Serv 246.

Footnote 22. *Chateau Chaumont Condominium Asso. v Aspen Title Co.* (Colo App) 676 P2d 1246.

Footnote 23. *Thirsk v Ethicon, Inc.* (Colo App) 687 P2d 1315, CCH Prod Liab Rep ¶ 10225 (Food and Drug Administration); *State v Nowakowski*, 67 Wis 2d 545, 227 NW2d 697 (ovrld on other grounds by *State v Petrone*, 161 Wis 2d 530, 468 NW2d 676) (county highway committee).

But see *United States v American Cyanamid Co.* (SD NY) 427 F Supp 859, 1977-1 CCH

Trade Cases ¶ 61408, 1 Fed Rules Evid Serv 672 (Rule 803(8), rather than Rule 803(6), determines whether government records are inadmissible as hearsay).

Footnote 24. Conference Committee Report No. 93-1597 (1974) p 11.

Louisell and Mueller, Federal Evidence § 446.

Footnote 25. United States v McPartlin (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65; United States v Goins (CA8 Mo) 593 F2d 88, 3 Fed Rules Evid Serv 1164, cert den 444 US 827, 62 L Ed 2d 35, 100 S Ct 52.

Footnote 26. Sparta Sportsfabrikk v NorTur, Inc. (Minn App) 407 NW2d 128.

§ 1305 Requirement that keeping of record be regular practice of business

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(6) requires for the admissibility of a business record that it be the regular practice of the business to keep the record in question. 27 The Rule is not satisfied if any of the participants in the making of the record is outside the pattern of regularity of activity. 28 If the supplier of the information does not act in the regular course, an essential link is broken, 29 and the gap can be bridged only if his or her statement is admissible under some other hearsay exception. 30

The Rule includes records pertaining to matters in which the business is a direct participant, 31 but not records outside the usual practice of the business, 32 or records made solely for purposes of the pending litigation. 33

◆ Comment: Records prepared for the purpose of litigation are also subject to exclusion on the grounds that this circumstance renders them untrustworthy. 34 However, a compilation of data previously recorded in the ordinary course of business and not in anticipation of litigation, and not otherwise excludable, will be admitted even though the compilation has been prepared for the purposes of litigation. 35

§ 1305 ----Requirement that keeping of record be regular practice of business [SUPPLEMENT]

Case authorities:

Pretrial services agency's reports containing two telephone numbers given to agency by narcotics conspirators as their own at time of their arrest were properly admitted as business records since government showed that it was standard practice for agency to record phone numbers given by defendants, and government did not seek to prove that phone numbers were actually those of defendant's accomplices, only that they matched

those on back of business card in defendant's possession at time of his arrest. *United States v Cicero* (1994, App DC) 22 F3d 1156, cert den (1994, US) 1994 US LEXIS 6810.

Footnotes

Footnote 27. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 28. *United States v Snyder* (CA10 Kan) 787 F2d 1429, 20 Fed Rules Evid Serv 687, cert den 479 US 836, 93 L Ed 2d 78, 107 S Ct 134; *Farmers Union Oil Co. v Wood* (ND) 301 NW2d 129.

Footnote 29. Advisory Committee Notes to Federal Rules of Evidence, Rule 803(6).

Footnote 30. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

As to the admissibility of a business record where the source of information in the report is under no duty to report such information, see § 1306.

Footnote 31. *United States v Holladay* (CA5 Miss) 566 F2d 1018, 78-1 USTC ¶ 9218, 2 Fed Rules Evid Serv 948, reh den (CA5 Miss) 573 F2d 1309 and cert den 439 US 831, 58 L Ed 2d 125, 99 S Ct 108 (notebooks of gasoline sales kept at gas station); *United States v Smith* (CA9 Ariz) 609 F2d 1294, 5 Fed Rules Evid Serv 477, 61 ALR Fed 346 (hotel registration and billing records); *Gibbs v State Farm Mut. Ins. Co.* (CA9 Cal) 544 F2d 423, 1 Fed Rules Evid Serv 566 (memoranda prepared by insurer relating to insurance claim).

Footnote 32. *United States v Simmons* (CA4 Md) 773 F2d 1455, 19 Fed Rules Evid Serv 526 (government forms filled out by gunmaker disclosing place of manufacture of weapons were not admissible because forms were not made for regular business purpose nor completed at time weapons were manufactured).

Corporate memoranda setting forth history of certain transactions were inadmissible because it was not regular business practice to make memoranda dealing with history of contracts. *United States v Lemire*, 232 US App DC 100, 720 F2d 1327, 14 Fed Rules Evid Serv 833, cert den 467 US 1226, 81 L Ed 2d 874, 104 S Ct 2678.

Footnote 33. *Johnson & Johnson v W. L. Gore & Associates, Inc.* (DC Del) 436 F Supp 704, 195 USPQ 487; *United States v Kim*, 193 US App DC 370, 595 F2d 755 (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Hines* (AFCMR) 18 MJ 729; *Atty. Gen. v John A. Biewer Co.*, 140 Mich App 1, 363 NW2d 712; *Hunter v Bozeman*, 216 Mont 251, 700 P2d 184, 27 BNA WH Cas 819, 102 CCH LC ¶ 55508.

Where, in an action on an account, exhibit consisting of an invoice was prepared shortly before trial and was not prepared in the ordinary course of business, exhibit was not within the business records exception to the hearsay rule and was inadmissible.

American Secur. Service, Inc. v Baumann (Franklin Co) 32 Ohio App 2d 237, 61 Ohio Ops 2d 256, 289 NE2d 373.

Footnote 34. § 1313.

Footnote 35. United States v Sanders (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv 1274.

§ 1306 --Business duty of persons providing or transmitting information

[View Entire Section](#)
[Go to Parallel Reference Table](#)

For a business record to be admissible under Rule 803(6), 36 all persons transmitting the information contained in the record, including the person furnishing the information to be recorded, must have been acting under a business duty to the business activity in question. If any such person is not acting under a business duty, his or her contribution to the record must be brought within some other exception to the rule against hearsay if the record is to be admitted. 37

◆ Observation: An employee or agent of the business activity will ordinarily be considered as acting under a business duty to transmit information, while a mere volunteer or bystander lacking any ongoing business relationship with the business activity will not be. The required business duty may also arise between two independent business entities, at least where there is a binding, continuing contractual agreement for the transmittal of information between the entities and the more general circumstances surrounding the entities' relationship do not suggest a lack of trustworthiness. 38

◆ Comment: While a record based on information supplied by one who is under no business duty can be excluded from evidence as not complying with the requirement of Rule 803(6) that the record be kept in the course of a regularly conducted business activity, such a record may also be challenged on the grounds that this circumstance renders it untrustworthy. 39

Footnotes

Footnote 36. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 37. White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

As to the admissibility of a record based on information supplied by one with no business duty to supply it, see § 1308.

Footnote 38. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

Footnote 39. § 1313.

§ 1307 Personal knowledge requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 803(6) the source of the information recorded in the record in question must be a person with personal knowledge. 40 The "with knowledge" language of Rule 803(6) must be read as incorporating the first-hand knowledge requirement of Rule 602, that is, the information recorded must have originated with someone who had first-hand knowledge of it. 41 The others involved in the chain of transmission of the information to the ultimate record, including the person who physically causes the record to be made, need not have such knowledge. 42

It is not required for admission of a business record under Rule 803(6) that the party seeking to introduce the record produce or identify the person upon whose firsthand knowledge the record was based. 43 It is not invariably necessary that the identity of the original informant be established, 44 as long as the court can determine from some appropriate source—from the document itself or from external evidence, either direct or circumstantial or both, or from some combination of these things—that this foundation element has been met. 45

§ 1307 ----Personal knowledge requirement [SUPPLEMENT]

Case authorities:

County Attorney could authenticate arrest records admitted under Rule 803(6) even though he was not county attorney at time where records were made; he was qualified witness since he could explain system of recordkeeping and vouch that requirements of Rule 803(6) were met, and he was not required to have personal knowledge of recordkeeping practice or circumstances under which records objected to were kept. *United States v Box* (1995, CA5 Tex) 50 F3d 345.

Footnotes

Footnote 40. *United States v Vacca* (ED Pa) 431 F Supp 807, 77-2 USTC ¶ 9675, 1 Fed Rules Evid Serv 1006, 40 AFTR 2d 77-5047, affd without op (CA3 Pa) 571 F2d 573; *United States v Reese* (CA6 Mich) 568 F2d 1246, 2 Fed Rules Evid Serv 871; *Schmutz v*

Bolles (Colo) 800 P2d 1307, CCH Prod Liab Rep ¶ 12650; Hardesty v Corrova (Franklin Co) 27 Ohio App 3d 332, 27 Ohio BR 389, 501 NE2d 81, motion overr.

Louisell and Mueller, Federal Evidence § 446.

Footnote 41. White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146 (Dun and Bradstreet Reports not admissible as business records because information contained therein not shown to have originated with source which had both first hand knowledge and business duty to report information to Dun and Bradstreet).

Footnote 42. Lewis v Baker (CA2 NY) 526 F2d 470; United States v Lemmons (CA6 Mich) 527 F2d 662, cert den 429 US 817, 50 L Ed 2d 77, 97 S Ct 60; United States v Ahrens (CA8 Ark) 530 F2d 781, 76-1 USTC ¶ 9241, 2 Fed Rules Evid Serv 535, 37 AFTR 2d 76-854; Stern v Gad (Fla App D3) 575 So 2d 258.

Footnote 43. Capital Marine Supply, Inc. v M/V Roland Thomas, II (CA5 La) 719 F2d 104, 1984 AMC 905, 14 Fed Rules Evid Serv 731; United States v Keplinger (CA7 Ill) 776 F2d 678, 19 Fed Rules Evid Serv 796, cert den 476 US 1183, 91 L Ed 2d 548, 106 S Ct 2919; United States v Flenoid (CA8 Mo) 718 F2d 867, 14 Fed Rules Evid Serv 614 (criticized by United States v Blue (CA4 NC) 957 F2d 106).

Footnote 44. Teac Corp. of America v Bauer (Colo App) 678 P2d 3.

Footnote 45. White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146.

§ 1308 Admission of record containing hearsay outside the scope of Rule 803(6)

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Whenever a business record is prepared by one person in reliance on information supplied by another, double hearsay is involved, and if more than one person transmits the information before it is ultimately recorded, it is more accurate to speak of multiple hearsay. As long as every person in the chain of transmission is acting under a business duty in the regular course of a regularly conducted business, such multiple hearsay is excused by Rule 803(6) without resort to any other exception to the rule against hearsay. 46 But where the information in the record is originally supplied by an outsider to the business under no duty to supply such information, the record is not admissible under Rule 803(6) to prove the truth of the matters stated in it unless the outsider's statement fits within some other hearsay exception under the Rules. 47 Statements by an outsider upon which a business record is based may overcome a hearsay objection on a number of grounds, such as the admissions doctrine and the exceptions for present sense

impressions, dying declarations, and declarations against interest, 48 state-of-mind statements, 49 the exception for statements aimed at medical diagnosis or treatment, 50 or the residual hearsay exception contained in Rule 803(24). 51 If the record prepared by one business contains records prepared by another business, the outsider's statement may itself be within the business records exception; 52 in such a situation, it must be shown that the records of both businesses satisfy the requirements of the exception. 53

◆ **Reminder:** As is generally true of statements or documents containing hearsay, the fact that a business record contains hearsay will not render it inadmissible if it is introduced not for the truth of the hearsay it contains but for some other purpose. 54

Footnotes

Footnote 46. *Wilson v Zapata Off-Shore Co.* (CA5 Tex) 939 F2d 260, 56 BNA FEP Cas 1051, 57 CCH EPD ¶ 40942, 33 Fed Rules Evid Serv 1034; *United States v Baker*, 224 US App DC 68, 693 F2d 183, 11 Fed Rules Evid Serv 1550.

Footnote 47. *United States v Beasley* (CA5 Ala) 513 F2d 309, reh den (CA5 Ala) 521 F2d 815 and appeal after remand (CA5 Ala) 545 F2d 403, 2 Fed Rules Evid Serv 263, on reh (CA5 Ala) 563 F2d 1225; *United States v Yates* (CA6 Ohio) 553 F2d 518, 1 Fed Rules Evid Serv 948; *United States v Pazsint* (CA9 Alaska) 703 F2d 420, 12 Fed Rules Evid Serv 1576; *United States v Plum* (CA10 Utah) 558 F2d 568, 2 Fed Rules Evid Serv 129; *State v McGann*, 132 Ariz 296, 645 P2d 811.

Louisell and Mueller, *Federal Evidence* § 448.

Footnote 48. *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437.

Footnote 49. *United States v Keane* (CA7 Ill) 522 F2d 534, cert den 424 US 976, 47 L Ed 2d 746, 96 S Ct 1481, (disapproved on other grounds by *McNally v United States*, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875) as stated in *United States v Runnels* (CA6 Mich) 833 F2d 1183, 126 BNA LRRM 2789.

Footnote 50. *United States v Sackett* (CA2 NY) 598 F2d 739, 4 Fed Rules Evid Serv 872.

Footnote 51. *United States v Pfeiffer* (CA8 Mo) 539 F2d 668, 1 Fed Rules Evid Serv 561.

Law Reviews: Egan & Cunningham, *Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques*. 30 *Duquesne L Rev* 205 (Winter 1992).

Annotation: *Uniform Evidence Rule 803(24): the residual hearsay exception*, 51 ALR4th 999.

Admissibility of statement under Rule 803(24) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness, 36 ALR Fed 742 § 6.

Footnote 52. *United States v Flom* (CA5 Fla) 558 F2d 1179, 1977-2 CCH Trade Cases ¶ 61618, 2 Fed Rules Evid Serv 451; *Grogg v Missouri P. R. Co.* (CA8 Ark) 841 F2d 210, 24 Fed Rules Evid Serv 928; *United States v Carranco* (CA10 Colo) 551 F2d 1197, 1 Fed Rules Evid Serv 1341.

Footnote 53. *United States v Davis* (CA5 Ga) 571 F2d 1354, 3 Fed Rules Evid Serv 761; *United States v Carranco* (CA10 Colo) 551 F2d 1197, 1 Fed Rules Evid Serv 1341.

Footnote 54. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, rev'd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675); *State v McGann*, 132 Ariz 296, 645 P2d 811.

§ 1309 Contemporaneity requirement

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To be admissible under Rule 803(6), a business record must be made at or near the time of the event or occurrence recorded. 55 An audit report, to satisfy this requirement, must be made at or near the time of the examination of the records upon which it is based, but not at or near the time when the transactions shown in such records occurred. 56 The fact that a computer printout of a record is made much later than the transaction recorded does not disqualify the record from admission, as such a printout is not the record itself, but rather the means by which the record is made available for perusal. 57 The presence of nonsequential entries in a business record does not prevent the proponent of the record from showing that it was made at or near the time of the transactions recorded. 58

◆ Practice guide: If the record itself shows that it was made at or near the time of the event recorded, the authenticating witness need not testify from personal knowledge to that fact. 59

Footnotes

Footnote 55. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 56. *Wildwood Contractors v Thompson-Holloway Real Estate Agency*, 17 Ark App 169, 705 SW2d 897.

Footnote 57. *Brown v J.C. Penney Co.*, 297 Or 695, 688 P2d 811.

Footnote 58. *United States v McPartlin* (CA7 Ill) 595 F2d 1321, 4 Fed Rules Evid Serv 416, cert den 444 US 833, 62 L Ed 2d 43, 100 S Ct 65.

§ 1310 Necessity of foundation; who may testify as to foundation

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The mere presence of a document in the files of a business entity does not qualify that document as a record of regularly conducted activity; there must be proof which satisfies the foundational elements of Rule 803(6). 60 The foundation may be established by the testimony of the regular custodian of the business record, 61 the person who supervised its preparation, 62 or anyone who is familiar with the manner in which the record was prepared. 63 While the foundation may be laid by one who has firsthand knowledge of the matter recorded, 64 it is not necessary that the witness have such firsthand knowledge, 65 or that the witness either prepared 66 or even observed the preparation 67 of the record. A witness can lay a proper foundation for receipt of a business record even if it was made before his or her employment began. 68 A proper foundation can be laid by a person outside the organization as long as the witness is familiar with the recordkeeping system. 69 The essential point is that the witness explain the recordkeeping system of his or her organization, thereby establishing the regular practices and procedures surrounding the creation of records. 70

A "wholesale" approach may be taken to authenticating large amounts of business records. The witness or witnesses can provide foundation testimony about all documents at the same time or about large groups of documents by type, as long as the opposing party is allowed to explore particular, relevant documents where he or she finds it necessary to do so. 71

Footnotes

Footnote 60. White Industries, Inc. v Cessna Aircraft Co. (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d 118, 109 S Ct 146; Marshall Trucking Co. v State, 23 Ark App 110, 743 SW2d 16; Crosby v Paxson Electric Co. (Fla App D1) 534 So 2d 787, 13 FLW 2532.

Law Reviews: Arnold, Presenting Business Records as Evidence in Federal Court. 32 Prac Law 19, (June 1986).

Footnote 61. United States v Colyer (CA5 Tex) 571 F2d 941, reh den (CA5 Tex) 576 F2d 1249, cert den 439 US 933, 58 L Ed 2d 328, 99 S Ct 325; Federal Deposit Ins. Corp. v Staudinger (CA10 Okla) 797 F2d 908, 21 Fed Rules Evid Serv 384.

Footnote 62. Wallace Motor Sales, Inc. v American Motor Sales Corp. (CA1 Mass) 780 F2d 1049, 19 Fed Rules Evid Serv 1210; United States v Henneberry (CA8 Mo) 719 F2d 941, 14 Fed Rules Evid Serv 820, cert den 465 US 1107, 80 L Ed 2d 141, 104 S Ct 1612; State v Ben-Neth, 34 Wash App 600, 663 P2d 156.

Footnote 63. *United States v Hathaway* (CA6 Mich) 798 F2d 902, 21 Fed Rules Evid Serv 436; *United States v Peters* (CA7 Wis) 791 F2d 1270, 20 Fed Rules Evid Serv 1112, cert den 479 US 847, 93 L Ed 2d 106, 107 S Ct 168; *United States v Kail* (CA8 Minn) 804 F2d 441, 21 Fed Rules Evid Serv 1219.

Footnote 64. *Breezy Bay, Inc. v Industria Maquiladora Mexicana, S. A.* (Fla App D3) 361 So 2d 440.

Louisell and Mueller, *Federal Evidence* § 446.

Footnote 65. *Wallace Motor Sales, Inc. v American Motor Sales Corp.* (CA1 Mass) 780 F2d 1049, 19 Fed Rules Evid Serv 1210; *United States v Lawson* (CA6 Ohio) 780 F2d 535; *United States v Keplinger* (CA7 Ill) 776 F2d 678, 19 Fed Rules Evid Serv 796, cert den 476 US 1183, 91 L Ed 2d 548, 106 S Ct 2919; *United States v Miller* (CA9 Idaho) 771 F2d 1219, 1985-2 CCH Trade Cases ¶ 66775, 19 Fed Rules Evid Serv 647; *AMF, Inc. v Mravec* (Cuyahoga Co) 2 Ohio App 3d 29, 2 Ohio BR 32, 440 NE2d 600.

Footnote 66. *Peter Eckrich & Sons, Inc. v Selected Meat Co.* (CA7 Ill) 512 F2d 1158; *Cole Oil & Tire Co. v Davis* (La App 2d Cir) 567 So 2d 122; *State v Ben-Neth*, 34 Wash App 600, 663 P2d 156.

Footnote 67. *United States v Flom* (CA5 Fla) 558 F2d 1179, 1977-2 CCH Trade Cases ¶ 61618, 2 Fed Rules Evid Serv 451; *United States v Page* (CA8 Iowa) 544 F2d 982, 1 Fed Rules Evid Serv 466.

Footnote 68. *United States v Rose* (CA7 Ind) 562 F2d 409; *Farmers Union Oil Co. v Wood* (ND) 301 NW2d 129.

Footnote 69. *United States v Hathaway* (CA6 Mich) 798 F2d 902, 21 Fed Rules Evid Serv 436.

Footnote 70. *United States v Wables* (CA7 Ill) 731 F2d 440, 15 Fed Rules Evid Serv 394; *Farmers Union Oil Co. v Wood* (ND) 301 NW2d 129.

Footnote 71. *United States v Keplinger* (CA7 Ill) 776 F2d 678, 19 Fed Rules Evid Serv 796, cert den 476 US 1183, 91 L Ed 2d 548, 106 S Ct 2919.

§ 1311 --Foundation in absence of testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Despite the reference in Rule 803(6) to the testimony of the custodian or other qualified witness, 72 such testimony is not required in the occasional case where the requirements for qualification as a business record can be satisfied by documentary evidence, 73 affidavits, 74 or admissions of the parties. 75 Witness testimony is also not required where, from the materials open for the court's consideration, it can make the required

finding to its own satisfaction. In the absence of witness testimony as to regularity of the activity and its recordation, the proponent must show regularity of practice in some precise and explicit manner either by external evidence or from the documents themselves plus surrounding circumstances. 76

Satisfaction of the foundation requirements may also be resolved by stipulation. 77

Footnotes

Footnote 72. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 73. *United States v Mendel* (CA2 NY) 746 F2d 155, 16 Fed Rules Evid Serv 771, cert den 469 US 1213, 84 L Ed 2d 331, 105 S Ct 1184.

Footnote 74. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 75. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675); *Philip Werlein, Ltd. v Daniels* (La App 4th Cir) 538 So 2d 722, cert den (La) 543 So 2d 21.

Footnote 76. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 77. *United States v Renfro* (CA6 Mich) 600 F2d 55, 79-2 USTC ¶ 9438, 44 AFTR 2d 79-5279, cert den 444 US 941, 62 L Ed 2d 307, 100 S Ct 294; *Ponderosa System, Inc. v Brandt* (CA10 Wyo) 767 F2d 668, 18 Fed Rules Evid Serv 1193.

§ 1312 Trustworthiness requirement; circumstances supporting finding that record is trustworthy

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

Rule 803(6) of the Uniform Rules of Evidence and the Federal Rules of Evidence expressly authorizes courts to exclude business records where the source of information in the record or the means of preparation of the record indicate lack of trustworthiness. 78

Thus, under the Rule an otherwise qualified business record may be excluded from evidence merely because the court deems it untrustworthy. 79 The party objecting to the admission of a proffered record bears the burden of establishing its untrustworthiness. 80 The court's determination of this issue is an exercise of discretion which will not be disturbed on appeal unless abused. 81

Trustworthiness of a business record is supported by a finding that—

—the data recorded are important to the business in question outside the litigation context. 82

—the information in the record is corroborated by independent evidence. 83

—the person making the record would not himself be subject to censure or personal liability in connection with the matters reported. 84

—the record contains relatively simple factual information, rather than evaluations or conclusions. 85

—the record was checked for accuracy. 86

—the record was a personal memorandum made by one who had no reason to lie to himself. 87

—the record was actually received during the ordinary course of business. 88

§ 1312 ----Trustworthiness requirement; circumstances supporting finding that record is trustworthy [SUPPLEMENT]

Case authorities:

Audit report prepared by independent contractor was properly admitted under business records exception, even though it was prepared after Department of Labor suspected defendant of misappropriation of federal funds, since report had business significance apart from its use in prosecuting defendant because contractor was bound to prepare report and was interested in assuring that it was accurate, he had ten years' experience in preparing regulatory compliance reports for DOL, and he was neutral third party with nothing to gain from any possible litigation against defendant. *United States v Frazier* (1995, CA10 Utah) 53 F3d 1105.

Once a proper predicate is laid for the introduction of medical records under the business record exception to the hearsay rule, the burden is on the opposing party to prove the untrustworthiness of the records, and if the opposing party is unable to carry this burden, the record will be allowed into evidence as a business record, subject to withstanding the test for relevancy, where the defendant in a personal injury case sought introduction of plaintiff's blood alcohol tests as business records. *Love v Garcia* (1994, Fla) 634 So 2d 158, 19 FLW S 80.

Footnotes

Footnote 78. FRE, Rule 803(6); Uniform Rules of Evidence Rule 803(6).

Footnote 79. *State v Therriault* (Me) 485 A2d 986.

Footnote 80. *United States v Tafoya* (CA5 Tex) 757 F2d 1522, 85-1 USTC ¶ 9341, 17 Fed Rules Evid Serv 1142, 55 AFTR 2d 85-1501, reh den, en banc (CA5 Tex) 762 F2d 1004 and cert den 474 US 921, 88 L Ed 2d 259, 106 S Ct 252; *Anaya v New Mexico State Personnel Bd.* (App) 107 NM 622, 762 P2d 909.

Footnote 81. *United States v Bonallo* (CA9 Or) 858 F2d 1427, 26 Fed Rules Evid Serv 1085, 99 ALR Fed 869; *Chalupa v Hartford Fire Ins. Co.*, 217 Neb 662, 350 NW2d 541; *Milwaukee v Allied Smelting Corp.* (App) 117 Wis 2d 377, 344 NW2d 523 (disapproved on other grounds by *Just v Land Reclamation, Ltd.*, 155 Wis 2d 737, 456 NW2d 570, 20 ELR 21407).

Footnote 82. *United States v Ullrich* (CA5 Fla) 580 F2d 765, 4 Fed Rules Evid Serv 304, reh den (CA5 Fla) 589 F2d 1114; *Selig v United States* (CA7 Wis) 740 F2d 572, 84-2 USTC ¶ 9696, 16 Fed Rules Evid Serv 196, 54 AFTR 2d 84-5784.

Footnote 83. *United States v Wigerman* (CA8 Mo) 549 F2d 1192, 1 Fed Rules Evid Serv 654.

Footnote 84. *Lewis v Baker* (CA2 NY) 526 F2d 470.

Footnote 85. *United States v Peden* (CA5 Tex) 556 F2d 278, 2 Fed Rules Evid Serv 375, cert den 434 US 871, 54 L Ed 2d 150, 98 S Ct 216.

Footnote 86. *United States v Davis* (CA8 Ark) 542 F2d 743, 1 Fed Rules Evid Serv 360, cert den 429 US 1004, 50 L Ed 2d 616, 97 S Ct 537.

Texts Louisell and Mueller, Federal Evidence § 447.

Footnote 87. *Keogh v Commissioner* (CA9) 713 F2d 496, 83-2 USTC ¶ 9539, 13 Fed Rules Evid Serv 1594, 52 AFTR 2d 83-5881 (among conflicting authorities on other grounds noted in *Anastasato v Commissioner* (CA3) 794 F2d 884, 86-2 USTC ¶ 9529, 58 AFTR 2d 86-5349).

Footnote 88. *Black Sea & Baltic General Ins. Co. v S.S. Hellenic Destiny* (SD NY) 575 F Supp 685, 1984 AMC 1055.

§ 1313 --Circumstances supporting finding that record is not trustworthy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Motive and opportunity to make an inaccurate report supports a finding that a particular business record is not trustworthy and therefore inadmissible under Rule 803(6). 89 A

motivation to misrepresent on the part of the person preparing the record or the person who is the source of the information contained in the record can render the record untrustworthy. 90 Lack of trustworthiness is also indicated where—

—a draft of board meeting minutes is marked, edited, and substantially different from a final copy also offered in evidence. 91

—a foreign document appears to have been tampered with. 92

—the source of the information on which the record was based was under no business duty to report the information. 93

—the record is prepared for the purpose of litigation. 94

◆ Comment: A distinction should be drawn between records created solely for the purpose of litigation and compilations of records previously prepared in the regular course of business and not in anticipation of litigation. Such a compilation is admissible notwithstanding that it has been prepared for the purpose of litigation. 95

Footnotes

Footnote 89. *State ex rel. Maeschen v Wittstruck* (SD) 377 NW2d 137; *Kuhlman, Inc. v G. Heileman Brewing Co.*, 83 Wis 2d 749, 266 NW2d 382.

Footnote 90. *Solomon v Shuell*, 435 Mich 104, 457 NW2d 669.

Footnote 91. *Lloyd v Professional Realty Services, Inc.* (CA11 Ala) 734 F2d 1428, 15 Fed Rules Evid Serv 1340, cert den 469 US 1159, 83 L Ed 2d 922, 105 S Ct 908.

Footnote 92. *United States v Castaneda-Reyes* (CA11 Fla) 703 F2d 522, 12 Fed Rules Evid Serv 1536, cert den 464 US 856, 78 L Ed 2d 157, 104 S Ct 174.

Footnote 93. *United States v Pazzint* (CA9 Alaska) 703 F2d 420, 12 Fed Rules Evid Serv 1576, appeal after remand (CA9 Alaska) 728 F2d 411 (calls to automatically-recorded police emergency phone number).

Footnote 94. *E. F. Hutton & Co. v Penham* (SD NY) 547 F Supp 1286, CCH Fed Secur L Rep ¶ 98811, 11 Fed Rules Evid Serv 1345; *Paddack v Dave Christensen, Inc.* (CA9 Or) 745 F2d 1254, 5 EBC 2542, 117 BNA LRRM 2963, 102 CCH LC ¶ 11228, 16 Fed Rules Evid Serv 1280.

Footnote 95. *United States v Sanders* (CA5 Tex) 749 F2d 195, 16 Fed Rules Evid Serv 1274.

§ 1314 --Effect of incompleteness or inaccuracy of record

[View Entire Section](#)

An attack on the accuracy 96 or the completeness 97 of a business record goes to the weight of the evidence, not its admissibility. 98 The fact that some records are missing does not prevent admission of other records. 99

Footnotes

Footnote 96. *Crompton-Richmond Co. v Briggs* (CA5 Ga) 560 F2d 1195, 2 Fed Rules Evid Serv 493; *State v Ben-Neth*, 34 Wash App 600, 663 P2d 156.

A payroll record of the defendant, a migrant farm worker, was not untrustworthy by virtue of the fact that the defendant's alias was misspelled. *Garcia v State* (Fla) 564 So 2d 124, 15 FLW S 344.

Proof of one error in an account record did not render the record inadmissible under Rule 803(6). *Hardesty v Corrova* (Franklin Co) 27 Ohio App 3d 332, 27 Ohio BR 389, 501 NE2d 81, motion overr.

Footnote 97. *Crompton-Richmond Co. v Briggs* (CA5 Ga) 560 F2d 1195, 2 Fed Rules Evid Serv 493; *Wallace v Target Stores, Inc.* (Colo App) 701 P2d 1272, CCH Prod Liab Rep ¶ 10583.

Footnote 98. *United States v Panza* (CA2 NY) 750 F2d 1141, 17 Fed Rules Evid Serv 339; *Crompton-Richmond Co. v Briggs* (CA5 Ga) 560 F2d 1195, 2 Fed Rules Evid Serv 493.

Footnote 99. *United States v Panza* (CA2 NY) 750 F2d 1141, 17 Fed Rules Evid Serv 339.

(d). Admissibility of Particular Records as Business Records [1315-1318]

§ 1315 Hospital and medical records

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Medical records are admissible under Rule 803(6) of the Uniform Rules of Evidence and Federal Rules of Evidence where a proper foundation for their admission is laid and the records are not deemed untrustworthy. 1 A patient's medical history is provable by admission under Rule 803(6) of hospital or medical records. 2 Such records may also be received under the Rule to show what procedures were followed in a particular case. 3

In this context it is particularly relevant that Rule 803(6), unlike some prior codifications

of the business records exception to the hearsay rule, specifically permits admission of "opinions" and "diagnoses." 4 However, hospital or medical records which contain expressions of expert opinion must comply with applicable law governing expert opinions. 5 Moreover, the general rule excluding reports based on information supplied from outside sources not under a duty to report such information and not within any exception to the hearsay rule 6 applies to medical records, and requires exclusion of expressions of opinion contained in such records which are based on information supplied by an outside source as to the cause of an accident. 7

Even where the jurisdiction adopting Rule 803(6) has deleted the provision pertaining to "opinions and diagnoses," a medical chart, or a general description of a person's physical condition, is within the rule. 8

◆ Observation: Rule 803(4) of the Uniform and Federal Rules of Evidence excepts from the hearsay rule statements made by a declarant for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptom, pain, or sensation, or the general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment. 9 Although it appears that most of the cases decided under Rule 803(4) have concerned oral testimony as to a declarant's statements, the Rule also applies to a statement by a declarant reported in a medical record. 10

§ 1315 ----Hospital and medical records [SUPPLEMENT]

Case authorities:

In case by investor who alleged violations of securities laws and various state laws arising out of broker's partial liquidation of his account at clearing broker's direction in order to satisfy margin call, district court did not err in making available to defense counsel and receiving into evidence portions of records of plaintiff's admission to hospital for alcohol abuse at end of period when broker claimed investor sustained his losses by reason of inability to manage his financial affairs. *Conway v Icahn & Co.* (1994, CA2 NY) 16 F3d 504, motion gr (SD NY) 1994 US Dist LEXIS 5933.

Patient of internist, whose psychiatric records were sought by internist's husband in divorce proceeding, was entitled to statutory psychiatrist-patient privilege, where statutory privilege did not define psychiatrist and where internist was physician to whom county medical health department referred patients for psychiatric treatment; internist testified that she treated one-third of her patients for mental problems and had treated patient in question for mental condition for 2 years. "Psychiatrist" in statutory privilege would be interpreted to mean "a person licensed to practice medicine, or reasonably believed by patient so to be, who devotes a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including alcohol or drug addiction." *Wiles v Wiles* (1994, Ga) 448 SE2d 681, 94 Fulton County D R 3335.

Footnotes

Footnote 1. *Pieters v B-Right Trucking, Inc.* (ND Ind) 669 F Supp 1463, 24 Fed Rules Evid Serv 17; *Jaime v Vilberg* (Fla App D3) 363 So 2d 386, cert den (Fla) 373 So 2d

462; In re Martin (Minn App) 458 NW2d 700; State v Sellers, 39 Wash App 799, 695 P2d 1014, review den 103 Wash 2d 1036.

As to the admissibility of hospital records under the Uniform Business Records as Evidence Act, see § 1298.

Law Reviews: Shore & Coviello, Medico-Legal Documents: Admissibility & Validity. 7 West St U LR 25, (Fall 1979).

Annotation: Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Admissibility of records other than police reports, under Rule 803(6), Federal Rules of Evidence, providing for business records exception to hearsay rule, 61 ALR Fed 359 §§ 11, 26.

Practice References 15 Am Jur Trials 373, Discovery and Evaluation of Medical Records.

Introducing and Marking Exhibits (hospital and medical records). 5 Am Jur Trials 553 § 21.

Louisell and Mueller, Federal Evidence § 451.

Footnote 2. United States v Sackett (CA2 NY) 598 F2d 739, 4 Fed Rules Evid Serv 872; Higgins v Martin Marietta Corp. (CA10 Kan) 752 F2d 492, 17 Fed Rules Evid Serv 588 (letter written by plaintiff's treating physician).

Footnote 3. Ascher v Gutierrez, 175 US App DC 100, 533 F2d 1235 (record of birth as showing anesthesiologist was not in attendance).

Footnote 4. § 1301.

Footnote 5. McDougall v Thomas (DC Dist Col) 17 Fed Rules Evid Serv 353.

As to the law of expert opinion, see 31A Am Jur 2d, Expert and Opinion Evidence.

Footnote 6. § 1308.

Footnote 7. General Motors Corp. v Bryant (Tex Civ App Houston (1st Dist)) 582 SW2d 521, writ ref n r e (Oct 10, 1979).

Annotation: Admissibility of hospital record relating to cause or circumstances of accident or incident in which patient sustained injury, 44 ALR2d 553.

Footnote 8. Van Every v Southeastern Michigan Transp. Authority, 142 Mich App 256, 369 NW2d 875 (among conflicting authorities on other grounds noted in Galli v Reutter, 148 Mich App 313, 384 NW2d 43).

Footnote 9. FRE, Rule 803(4), Uniform Rules of Evidence Rule 803(4), generally discussed in § 867.

Footnote 10. *United States v Pollard* (CA7 Ill) 790 F2d 1309, 20 Fed Rules Evid Serv 1003 (ovrld on other grounds by *United States v Sblendorio* (CA7 Ill) 830 F2d 1382, 23 Fed Rules Evid Serv 1212).

Annotation: Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Federal Rules of Evidence, 55 ALR Fed 689.

§ 1316 Police records and reports

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Police reports are admissible under Rule 803(6) of the Uniform Rules of Evidence and Federal Rules of Evidence as business records if they meet the requirements of the Rule. However, it has been noted that the nature of police business and the circumstances under which such reports are usually prepared make it unlikely that a particular report will meet those requirements. 11 The stricture of the Rule most likely to disqualify a police report or record from admissibility is the requirement that the person who is the source of the information recorded be acting in the regular course of a business 12 and under a duty to transmit the information recorded. 13 The application of this requirement means that entries in a police report which result from the officer's own observations and knowledge may be admitted under the Rule, but entries based on statements made by persons under no business duty to report may not. 14 The officer making the report generally qualifies as acting in the regular course of his or her business, but the informant does not, and the report cannot come under the Rule unless all participants in the making of the record, including the person furnishing the information to be recorded, act in the regular course of business. 15 This rationale for exclusion of police records applies also to calls to automatically-recorded police emergency phone numbers. 16

It appears that a record of an informant's statements which is offered for a purpose other than proving the truth of those statements (as, for example, merely to show that a statement had been made to the police) is not subject to exclusion on the grounds that the informant was under no duty to make such statements. 17

◆ Observation: Even a report based on an officer's firsthand observations may be objectionable where the report does not qualify for admission as a public record under Rule 803(8)(B). 18

§ 1316 ----Police records and reports [SUPPLEMENT]

Case authorities:

Police incident reports by son complaining of his mother's intoxication and attempt to get his "bank statement because she needed money" were admissible under business records

exception to hearsay rule since police officers who observed scene of which son complained were law enforcement personnel included in Rule 803(8) and reports made by officers were not of adversarial confrontation nature which might cloud their perception. *Riff v Clawges* (1994, ED Pa) 158 FRD 357.

Court properly refused to admit evidence of voided police arrest report where defendant had not elicited identity of person who made statements in report; statements could not possibly have met requirements of either business record or prior inconsistent statement exceptions to hearsay rule. *People v Dananel* (1992, 2d Dept) 183 AD2d 778, 584 NYS2d 485, app den 80 NY2d 902, 588 NYS2d 828, 602 NE2d 236.

In a murder prosecution in which a witness testified to the defendant's attempt to rape her several hours after the murder and his statement that she would get the same thing the murder victim got if she opened her mouth, the defendant was properly precluded from introducing into evidence a police report regarding the rape of the witness, notwithstanding his contention that the report contained information that conflicted with the witness's later police report and her trial testimony, since the report was not given under oath and was not signed or adopted by the witness. *Commonwealth v Simmons* (1995, Pa) 662 A2d 621, application gr (Pa) 1995 Pa LEXIS 1336 and petition for certiorari filed (Dec 14, 1995).

Footnotes

Footnote 11. *Moncrief v Detroit*, 398 Mich 181, 247 NW2d 783.

Annotation: Admissibility in state court proceedings of police reports as business records, 77 ALR3d 115.

Admissibility of police reports under Federal Business Records Act (Federal Rules of Evidence, Rule 803, and predecessor amendments), 31 ALR Fed 457.

Footnote 12. §§ 1304, 1305.

Footnote 13. § 1306.

Footnote 14. *United States v Pazsint* (CA9 Alaska) 703 F2d 420, 12 Fed Rules Evid Serv 1576, appeal after remand (CA9 Alaska) 728 F2d 411; *Hewitt v Grand Trunk W. R. Co.*, 123 Mich App 309, 333 NW2d 264.

Footnote 15. *Cleveland v Cleveland Electric Illuminating Co.* (ND Ohio) 538 F Supp 1257.

Footnote 16. *United States v Pazsint* (CA9 Alaska) 703 F2d 420, 12 Fed Rules Evid Serv 1576.

Annotation: Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784 § 11.

Footnote 17. *State v Ristau* (SD) 290 NW2d 487 (where there was no dispute that the accused had killed his parents, tape recording of his telephone call to police, which was

made shortly after the killings and which showed the tone and quality of his voice, was properly admitted as a business record for the limited purpose of focusing on the issue of the accused's sanity at time of the killings).

Footnote 18. § 1362.

§ 1317 School records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

School records may be admissible in evidence, notwithstanding their nature as hearsay, under the "business records" exception to the hearsay rule. 19 Records admissible upon satisfaction of the requirements of the exception include—

- attendance records. 20
- report cards. 21
- health records. 22
- enrollment records kept by a school board. 23
- school personnel files. 24
- a record of a student's account receivable at a university. 25
- a report of a faculty committee dealing with racial discrimination at a university. 26

However, the presence of opinions and conclusions within a school record can render it inadmissible under the business records exception. 27

◆ Observation: If the proceeding in which school records are offered in evidence is an administrative proceeding (such as a disciplinary proceeding against a student or teacher), the rule against hearsay may be inapplicable and present no bar to the admission of such records. 28

◆ Practice guide: A school record may also qualify for the "public records" exception to the hearsay rule, 29 or for the residual hearsay exceptions contained in Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence, or substantially identical rules. 30

Footnotes

Footnote 19. *Schwarcz v Schwarcz*, 378 Pa Super 170, 548 A2d 556, app den 522 Pa 578, 559 A2d 39 and app den 522 Pa 578, 559 A2d 39 and cert den 498 US 815, 112 L

Ed 2d 31, 111 S Ct 56.

As to the admissibility of school records under the "public record" exception to the hearsay rule, see § 1347.

Annotation: Admissibility of school records under hearsay exceptions, 57 ALR4th 1111.

Footnote 20. *Simmons v State*, 175 Ind App 333, 371 NE2d 1316, 5 ALR4th 1201; *In re Welfare of L.Z. (Minn)* 396 NW2d 214.

Footnote 21. *In re R.*, 180 Mont 340, 590 P2d 1117.

Footnote 22. *Snyder v Beers*, 1 Ariz App 497, 405 P2d 288.

Footnote 23. *Phillippi v School Dist.*, 28 Pa Cmwlt 185, 367 A2d 1133.

Footnote 24. *United States v Ream* (CA5 Tex) 491 F2d 1243; *Tschetter v Doland Board of Educ. (SD)* 302 NW2d 43 (criticized on other grounds by *Dale v Board of Educ. (SD)* 316 NW2d 108).

Footnote 25. *Administration of Tulane Educational Fund v Waters* (La App 5th Cir) 497 So 2d 27, cert den (La) 498 So 2d 16.

Footnote 26. *Uzzell v Friday* (MD NC) 592 F Supp 1502, later proceeding (MD NC) 618 F Supp 1222.

Footnote 27. *Re Welfare of L.Z. (Minn)* 396 NW2d 214; *Kershaw County Dept. of Social Services v McCaskill*, 276 SC 360, 278 SE2d 771.

Footnote 28. *Boykins v Fairfield Bd. of Education* (CA5 Ala) 492 F2d 697, cert den 420 US 962, 43 L Ed 2d 438, 95 S Ct 1350 (apparently applying Alabama law).

As to the admissibility of hearsay at an administrative hearing, generally, see 2 Am Jur 2d, Administrative Law § 348.

Annotation: Comment Note.—Hearsay evidence in proceedings before state administrative agencies, 36 ALR3d 12.

Comment Note.—Hearsay evidence in proceedings before federal administrative agencies, 6 ALR Fed 76.

Footnote 29. § 1347.

Footnote 30. *United States v Hitsman* (CA5 Fla) 604 F2d 443, 4 Fed Rules Evid Serv 1533.

As to the residual hearsay exceptions, generally, see §§ 683-689, 701-703.

§ 1318 Operating or procedural manuals; safety codes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(6) of the Uniform Rules of Evidence and the Federal Rules of Evidence generally does not embrace such things as operating or procedural manuals, or codes setting safety, procedural, or product standards, even though such documents are produced by businesses or business associations, for the reasons that such documents do not assess particular matters (the "acts, events, conditions, opinions, or diagnoses" mentioned in the Rule), and they generally are not prepared "at or near" the time of the event which is the subject of the litigation. 31

◆ Observation: A privately printed safety code or standard may under proper circumstances qualify for the "learned treatise" exception to the hearsay rule contained in Rule 803(18). 32

Footnotes

Footnote 31. *Seattle-First Nat. Bank v Randall* (CA9 Or) 532 F2d 1291, 1 Fed Rules Evid Serv 1124, 19 UCCRS 228 (bank's manual setting forth lending guidelines was properly excluded as not within Rule 803(6)).

See also Louisell and Mueller, *Federal Evidence* § 446 (noting that such documents are not written on a regular or recurring basis).

As to the admissibility of privately issued safety codes or standards, generally, see § 1415.

As to the admissibility of safety codes issued by government bodies, see § 1346.

Footnote 32. As to Rule 803(18), generally, see § 1416.

(e). Evidentiary Effect of Absence of Business Record [1319]

§ 1319 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 803(7) of the Uniform Rules of Evidence and the Federal Rules of Evidence, a litigant may prove the nonoccurrence or nonexistence of a matter by evidence that the matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Rule 803(6), if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and

preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. 33 The Rule may be invoked to show the nonoccurrence of unusual as well as routine events. 34

◆ Comment: The absence of an entry in a record system probably is not hearsay as defined by Rule 801 of the Uniform and Federal Rules, although pre-Rules decisions can be found which characterize such evidence as hearsay and hold it not within any exception to the hearsay rule. 35

For the application of Rule 803(7) to prove that a particular event or transaction never took place, it is necessary to show that records of the sort of transaction involved are ordinarily kept in written form. 36 The "trustworthiness" requirement of the Rule relates to the thoroughness or diligence with which the records were searched before concluding that the particular record sought does not exist. 37 Although the Rule does not specifically require the testimony of a custodian of the records or other qualified witness to lay a foundation for receipt of evidence under the Rule, it has been assumed that such a foundation is a necessary predicate for admission of such evidence. 38 However, it is not necessary to call to the stand all persons with access to the records who could have supplied the "missing" item. 39 Moreover, the failure to lay any foundation is not plain error requiring reversal absent some evidence suggesting that the records are unreliable. 40

◆ Practice guide: If a foundation is deemed necessary, it may be laid by a custodian of the records, or some other person who has personally checked the records. 41

Footnotes

Footnote 33. FRE, Rule 803(7); Uniform Rules of Evidence Rule 803(7).

Footnote 34. *United States v Gentry* (CA7 Ill) 925 F2d 186, reh den (CA7) 1991 US App LEXIS 4035 (in prosecution for making false report of food tampering, admission of testimony from employee of candy manufacturer that there were no reports of pins in candy other than that made by accused was proper under Rule 803(7) to show nonoccurrence of tampering).

Footnote 35. Advisory Committee Notes to Federal Rules of Evidence, Rule 803.

Footnote 36. *Fury Imports, Inc. v Shakespeare Co.* (CA5 Fla) 554 F2d 1376, 2 Fed Rules Evid Serv 92, appeal after remand (CA5 Fla) 625 F2d 585, 6 Fed Rules Evid Serv 1125, reh den (CA5 Fla) 631 F2d 1189 and cert den 450 US 921, 67 L Ed 2d 349, 101 S Ct 1369.

Footnote 37. *United States v Robinson* (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901.

Footnote 38. *United States v Rich* (CA9 Wash) 580 F2d 929, cert den 439 US 935, 58 L Ed 2d 331, 99 S Ct 330.

Footnote 39. *United States v Zeidman* (CA7 Ill) 540 F2d 314, 2 Fed Rules Evid Serv 609.

Footnote 40. United States v Rich (CA9 Wash) 580 F2d 929, cert den 439 US 935, 58 L Ed 2d 331, 99 S Ct 330.

Footnote 41. United States v Rich (CA9 Wash) 580 F2d 929, cert den 439 US 935, 58 L Ed 2d 331, 99 S Ct 330.

(f). Federal Criminal Code Provisions Relating to Foreign Business Records [1320]

§ 1320 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under 18 USCS § 3505, a foreign record of regularly conducted business activity, or a copy of such a record, is not excludable from evidence under the hearsay rule in federal criminal proceedings if a foreign certification attests that:

- Such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters
- Such record was kept in the course of a regularly conducted business activity
- The business activity made such a record as a regular practice
- If such record is not the original, such record is a duplicate of the original; unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness. 42 A foreign certification under the statute authenticates such a record or duplicate. 43 The fact that foreign records may be admitted in a criminal trial without affording the accused an opportunity to confront the recordkeeper does not constitute a violation of the accused's rights under the Confrontation Clause of the Federal Constitution's Sixth Amendment. 44

At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under the statute a foreign record of regularly conducted activity must provide written notice of that intention to each other party. A motion opposing admission in evidence must be made and ruled upon before trial. 45

◆ Caution: Failure to file such a motion prior to trial is a waiver of the objection to the admission of the record or duplicate, although the court may for cause shown grant relief from the waiver. 46

◆ Definitions: As used in the statute, "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country. "Foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record or regularly conducted activity or another qualified

person that, if falsely made, would subject the maker to criminal penalty under the laws of that country. "Business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. 47

A foreign certification under the statute need not recite that a falsely made statement would subject the maker to criminal penalties, nor need it state what such penalties would be. 48 Where the requirements of the statute have been met, a trial court may properly deny a request by an accused for the government to direct letters rogatory to the source of the foreign records for the purpose of deposing the source as to the accuracy of the records. 49

Footnotes

Footnote 42. 18 USCS § 3505(a)(1).

Footnote 43. 18 USCS § 3505(a)(2).

Footnote 44. *United States v Miller* (CA9 Cal) 830 F2d 1073, 24 Fed Rules Evid Serv 179, cert den 485 US 1033, 99 L Ed 2d 907, 108 S Ct 1592.

Law Reviews: Brenner, *The Revival of "Trial by Affidavit"*; 18 USC § 3505 and the Requirements of the Confrontation Clause, 41 Ark L Rev 323.

Footnote 45. 18 USCS § 3505(a)(2).

Footnote 46. 18 USCS § 3505(a)(2).

Footnote 47. 18 USCS § 3505(c).

Footnote 48. *United States v Gleave* (WD NY) 786 F Supp 258.

Footnote 49. *United States v Gleave* (WD NY) 786 F Supp 258.

m. Public Records, Reports, or Other Public Documents [1321-1411]

(1). In General [1321, 1322]

§ 1321 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The admission of public or official records and reports is governed by principles not substantially different from those applicable to other forms of documentary evidence,

including general rules of materiality and competency. 50 Where only part of a proffered public record is sufficiently material to be admitted, the entire record may be excluded if the proponent does not make a separate offer of the admissible portion. 51

§ 1321 ----Generally [SUPPLEMENT]

Practice Aids: Hearsay exceptions for business and public records, 9 Criminal Justice 3:40 (1994).

Distinctions between the public records exception to the hearsay rule in federal and New York practice, 11 Touro LR 1:195 (1994).

Case authorities:

In action arising out of boundary- line dispute, trial court correctly sustained defendant's objections to admission of aerial photographs, where trial court found that measurement information written on back of photographs was not type of measurement information regularly kept in office of record but was computed and written by certifier for purposes of litigation, and plaintiff failed to offer evidence regarding regularity of information written on back of photographs and regarding existence of measurement information on back of original slides or photographs. *Tewes v Pine Lane Farms* (1994, Iowa) 522 NW2d 801.

Footnotes

Footnote 50. As to general rules of competency and materiality with regard to documentary evidence, see § 1023.

Practice References 2 Am Jur Trials 409, Locating Public Records.

Introducing and Marking Exhibits (public records). 5 Am Jur Trials 553 § 19.

Footnote 51. *Ferlise v Raznick*, 202 Neb 745, 277 NW2d 94.

§ 1322 Effect of alteration or mutilation

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

According to some courts, the "aura of trustworthiness" often said to attend public records and reports 52 is dissipated where a particular public document has been altered, mutilated, or subjected to the deletion of some of its contents. Such circumstances give rise to suspicion that the document has been fraudulently altered, and the document will not be admitted into evidence unless the alteration is satisfactorily explained. 53 A somewhat different view provides that under some circumstances a mutilation, alteration,

or deletion does not give rise to a suspicion of fraudulent alteration, and that in such cases the record may be admitted without explanation. 54

The "public records" exception to the hearsay rule, as codified by Rule 803(8) of the Uniform Rules of Evidence and the Federal Rules of Evidence, permits exclusion of a public record or report otherwise admissible under the Rule if "the sources of information or other circumstances indicate lack of trustworthiness." 55 This language has been employed to exclude public records which have been subjected to unexplained deletions. 56

§ 1322 ----Effect of alteration or mutilation [SUPPLEMENT]

Practice Aids: 29 Am Jur Proof of Facts 3d 549, The Effects of Alterations to Documents

Footnotes

Footnote 52. § 1382.

Footnote 53. Evans v Holsinger, 242 Iowa 990 48 NW2d 250, 28 ALR2d 1434.

Annotation: Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 ALR2d 1443 § 2.

Practice References Hunter, Federal Trial Handbook (3d ed) § 44.28.

1 Am Jur Proof of Facts 500, Alteration of Instruments.

16 Am Jur Proof of Facts 665, Charred Documents.

44 Am Jur Trials 317, Forensic Document Examination in Medical Malpractice Cases.

Footnote 54. Gage v Chicago, 225 Ill 218, 80 NE 127.

Footnote 55. §§ 1369, 1370.

Footnote 56. Crispin v Volkswagenwerk AG, 248 NJ Super 540, 591 A2d 966, certif den 126 NJ 385, 599 A2d 162.

(2). Statutes, Regulations, and Ordinances [1323]

§ 1323 Generally

[View Entire Section](#)

Where properly authenticated, 57 statutes, administrative rules and regulations, 58 and municipal ordinances 59 are generally admissible in evidence where they are relevant and not subject to exclusion under any generally applicable rule of evidence. Documentary evidence of such matters is not necessary and may be excluded where the court takes judicial notice of them. 60

Footnotes

Footnote 57. As to authentication of legislative acts and like matters, see §§ 1405 et seq.

Footnote 58. *Dura Corp. v Harned* (Alaska) 703 P2d 396, CCH Prod Liab Rep ¶ 10842.

Footnote 59. *Crosby v Canino*, 89 Colo 434, 3 P2d 792, 78 ALR 1202.

Footnote 60. *State ex rel. Blankenship v Freeman* (Okla) 440 P2d 744.

As to the taking of judicial notice of statutes, administrative rules and regulations, and municipal ordinances, see §§ 24 et seq.

(3). Judicial Records [1324-1345]

(a). Admissibility and Use in General [1324-1340]

§ 1324 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Upon proper authentication, 61 a judicial record is generally admissible in evidence in a subsequent action if it is relevant to some issue in it. 62 This rule extends to all parts of the record of the prior case. 63 Records which have been held admissible under this rule include: examinations; 64 affidavits; 65 depositions; 66 condemnations in admiralty forfeiture cases; 67 deeds; 68 exhibits; 69 reports of masters; 70 and official returns of officers made in the discharge of their duty. 71 A transcript of the argument of counsel in another case has also been held admissible in evidence where relevant to the issues in the case at bar. 72 However, personal notes made by the court in the course of a hearing have been held not a part of the record of the case and therefore inadmissible. 73

A writing which does not purport to be a record, but a mere transcript of minutes extracted from the docket of the court, is generally not admissible in evidence. 74 However, in some cases certified copies of the minutes of courts have been held

admissible in evidence as a part of the record of a cause. 75 Except where the principle of res judicata is involved, 76 the previous finding of a court cannot be used as evidence of the fact found. 77

Footnotes

Footnote 61. As to authentication of judicial records, see §§ 1398 et seq.

Footnote 62. *Roberts v United States*, 176 US 221, 44 L Ed 443, 20 S Ct 376; *Brown v Green* (CA7 Ill) 738 F2d 202, 15 Fed Rules Evid Serv 1629 (applying Illinois law); *Mullen v Mullen* (Fla App D2) 184 So 2d 917; *Miller v Stacy* (App, Greene Co) 76 Ohio L Abs 61, 145 NE2d 312; *Morris v Fidelity & Deposit Co.* (Tex Civ App) 217 SW2d 678, 10 ALR2d 432, writ ref.

As to the admissibility of testimony given at a former trial, see §§ 890 et seq.

As to the admissibility of judicial admissions made in a former action generally, see § 773.

As to the admissibility of an agreed statement of facts made in a former action, see 3 Am Jur 2d, Agreed Case § 27.

Footnote 63. *Hanson v Buckner's Exr.*, 34 Ky 251.

Footnote 64. *Hammatt v Emerson*, 27 Me 308 (criticized on other grounds by *Kuperman v Eiras* (Me) 586 A2d 1260).

Footnote 65. *Cantrell v Prudential Ins. Co.*, 252 Ark 70, 477 SW2d 484; *Thompson v Owen*, 174 Ill 229, 51 NE 1046; *Hammatt v Emerson*, 27 Me 308 (criticized on other grounds by *Kuperman v Eiras* (Me) 586 A2d 1260).

But in *Staley v South Jersey Realty Co.*, 83 NJ Eq 300, 90 A 1042, it was held that ex parte affidavits to which the rules of evidence are not applied are not evidence and are incapable of supporting a judicial decision in an action at law.

Footnote 66. As to the admissibility of depositions in evidence in actions or proceedings other than those in which the depositions are taken, see 23 Am Jur 2d, Depositions and Discovery § 190.

Footnote 67. *Dorr v Pacific Ins. Co.*, 20 US 581, 7 Wheat 581, 5 L Ed 528.

Footnote 68. *Applegate v Lexington & Carter County Mining Co.*, 117 US 255, 29 L Ed 892, 6 S Ct 742.

Footnote 69. *Hanson v Buckner's Exr.*, 34 Ky 251.

Footnote 70. *Hopkins v Lee*, 19 US 109, 6 Wheat 109, 5 L Ed 218.

Footnote 71. *Slaughter v Barnes*, 10 Ky 412; *Cousin v Alworth*, 44 Minn 505, 47 NW 169; *Huntington v Crouter*, 33 Or 408, 54 P 208; *Barrett v Copeland*, 18 Vt 67.

As to the return of a writ of attachment as evidence, see 6 Am Jur 2d, Attachment and Garnishment § 325.

As to the return of a writ of execution as evidence, see 30 Am Jur 2d, Executions §§ 581 et seq.

Footnote 72. Ocean Acci. & Guarantee Corp. v Lucas (CA6 Ohio) 74 F2d 115, 98 ALR 1461.

Footnote 73. Peery v Peery (Tex App Fort Worth) 709 SW2d 392.

Footnote 74. Ferguson v Harwood, 11 US 408, 7 Cranch 408, 3 L Ed 386; State v De Witt, 20 SCL 282; Gibson v Holmes, 78 Vt 110, 62 A 11.

Footnote 75. Bynum v Knighton, 137 Ga 250, 73 SE 400.

Footnote 76. As to the doctrine of res judicata, see generally 46 Am Jur 2d, Judgments.

Footnote 77. Masters v Dunstan, 256 NC 520, 124 SE2d 574.

§ 1325 Pleadings—as admissible in case in which they have been filed

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Pleadings generally do not constitute evidence in the case in which they have been filed, 78 except to the extent they contain admissions or declarations by a party regarding a relevant matter. 79 There is also authority to the effect that an original pleading may be admitted to show that the allegations in an amended pleading are an afterthought. 80

Footnotes

Footnote 78. Razorback Cab of Ft. Smith, Inc. v Lingo, 304 Ark 323, 802 SW2d 444; Jimenez v Broadway Motors, Inc. (Mo) 445 SW2d 315.

But see Hayes v Henault (3d Dept) 131 App Div 2d 930, 516 NYS2d 798 (bill of particulars filed by motorcyclist against car driver in personal injury action was admissible not only for purposes of impeaching motorcyclist's testimony, but also as direct evidence).

Allegations in a motion for judgment are allegations only, and not evidence. Gilliland v Singleton, 204 Va 115, 129 SE2d 641, 10 ALR3d 1078.

Footnote 79. §§ 774 et seq.

Footnote 80. Andrews v Metro N. C. R. Co. (CA2 Conn) 882 F2d 705, 28 Fed Rules

§ 1326 --As admissible in subsequent separate action

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although pleadings in a prior action generally are not evidence of the facts stated in them, 81 pleadings filed in one action may be admitted in evidence in a subsequent action where they are relevant to some issue in the subsequent action. 82 While some courts restrict the use of such pleadings to impeachment, 83 other courts have admitted them for the purpose of showing or explaining—

—the capacity in which a person was a party to the previous action. 84

—the matter involved in the earlier action. 85

—the basis of the prior judgment or order of court. 86

—the making of an alleged claim. 87

—an offer of payment. 88

—the date of the commencement of an action. 89

—malice in the pleader. 90

—representations of a person inducing another to act. 91

—the existence of a physical condition. 92

Footnotes

Footnote 81. Wood v Paulus (Tex Civ App Corpus Christi) 524 SW2d 749, writ ref n r e (Sep 24, 1975).

Footnote 82. Anvil Invest. Ltd. Partnership v Thornhill Condominiums, Ltd. (1st Dist) 85 Ill App 3d 1108, 41 Ill Dec 147, 407 NE2d 645, CCH Fed Secur L Rep ¶ 97609 (in securities fraud action, complaints which had been previously filed against the defendants were properly admitted where the plaintiffs' allegation that the defendants had failed to disclose that such complaints had been filed against them was material to the instant action).

Footnote 83. Tomczik v State Tenure Com., 175 Mich App 495, 438 NW2d 642, app den 436 Mich 866.

Footnote 84. *Adams v ReQua*, 22 Fla 250.

Footnote 85. *Crane v Pacific Bank*, 106 Cal 64, 39 P 215; *Owens v Dawson* (Pa) 1 Watts 149; *Reese v Qualtrough*, 48 Utah 23, 156 P 955, 14 ALR 94.

Footnote 86. *Hornbuckle v Stafford*, 111 US 389, 28 L Ed 468, 4 S Ct 515.

Footnote 87. *Miles v Strong*, 68 Conn 273, 36 A 55; *Miller v Chrisman*, 25 Ill 269.

Footnote 88. *Pfister v Wade*, 69 Cal 133, 10 P 369; *Gallimore v Grubb*, 156 NC 575, 72 SE 628.

Footnote 89. *Shelley v Smith*, 249 Md 619, 241 A2d 682; *Oppermann v McGown* (Tex Civ App) 50 SW 1078.

Footnote 90. *Meriwether v Publishers: Geo. Knapp & Co.*, 224 Mo 617, 123 SW 1100; *Leavitt v Cutler*, 37 Wis 46.

Footnote 91. *Scott v Times-Mirror Co.*, 181 Cal 345, 184 P 672, 12 ALR 1007.

Footnote 92. *Craig v United R. Co. (Mo)* 185 SW 205, 14 ALR 17.

§ 1327 Coroner's verdict as admissible judicial record

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, the verdict of a coroner's jury is held admissible in evidence on the ground that the proceedings of a coroner's inquest are judicial in their nature. This common-law rule has found support in some cases in which evidence of a coroner's verdict is held admissible in evidence in a subsequent trial, 93 particularly on the issue of suicide. 94 Other decisions, however, have refused to admit a coroner's verdict in evidence, 95 especially when offered to prove the cause of death, 96 for the reason that the coroner's proceedings do not amount to a judicial determination, 97 and that the coroner's report or verdict constitutes nothing more than opinion evidence 98 and is hearsay. 99 This rule against admission has been applied even though the verdict of the coroner's jury is required to be returned to, and filed with, the clerk of a court of record, 1 but is particularly applicable where the inquest, or a particular fact found, is unauthorized by law. 2

Footnotes

Footnote 93. *Home Ben. Asso. v Sargent*, 142 US 691, 35 L Ed 1160, 12 S Ct 332.

Footnote 94. *Fleetwood v Pacific Mut. Life Ins. Co.*, 246 Ala 571, 21 So 2d 696, 159 ALR 171.

As to the admissibility of a coroner's verdict or findings in actions on insurance policies, see 43 Am Jur 2d, Insurance §§ 1988, 1989.

As to the admissibility of an official death certificate for the purpose of proving cause of death, see § 1373.

Annotation: Insurance: coroner's verdict or report as evidence on issue of suicide, 28 ALR2d 352 § 9.

Footnote 95. District of Columbia v Washington, 44 App DC 120; Germania Life Ins. Co. v Ross-Lewin, 24 Colo 43, 51 P 488; World Ins. Co. v Kincaid (Fla App D1) 145 So 2d 268, cert dismd (Fla) 157 So 2d 517; Liberty Nat. Life Ins. Co. v Power, 111 Ga App 458, 142 SE2d 103, revd on other grounds 221 Ga 305, 144 SE2d 389; Spiegel's House Furnishing Co. v Industrial Com., 288 Ill 422, 123 NE 606, 6 ALR 540.

Footnote 96. Nehi Bottling Co. v Jefferson, 226 Miss 586, 84 So 2d 684; Carson v Metropolitan Life Ins. Co., 156 Ohio St 104, 45 Ohio Ops 103, 100 NE2d 197, 28 ALR2d 344; Jamison v Ardes, 408 Pa 188, 182 A2d 497.

Footnote 97. Swofford v Life Ins. Co., 159 SC 337, 157 SE 7.

Footnote 98. World Ins. Co. v Kincaid (Fla App D1) 145 So 2d 268, cert dismd (Fla) 157 So 2d 517; Carson v Metropolitan Life Ins. Co., 156 Ohio St 104, 45 Ohio Ops 103, 100 NE2d 197, 28 ALR2d 344.

Footnote 99. Shiovitz v New York Life Ins. Co., 281 Mich 382, 275 NW 181; Nehi Bottling Co. v Jefferson, 226 Miss 586, 84 So 2d 684.

Footnote 1. Cox v Royal Tribe of Joseph, 42 Or 365, 71 P 73.

Footnote 2. Peoria Cordage Co. v Industrial Board of Illinois, 284 Ill 90, 119 NE 996.

§ 1328 Opinions of courts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Several courts have stated that an opinion delivered by a court in announcing its decision is not competent evidence for the purpose of proving any matter of fact, 3 at least as against a person who was not in any way concerned with the proceeding in which the opinion was rendered, as a party or otherwise. 4 In other cases, however, judicial decisions or opinions have been held admissible in evidence, 5 particularly where offered—

—to prove the unwritten law of a foreign state or nation. 6

—for the purpose of determining issues passed on by the court in a trial without a jury. 7

–to show that certain documents existed and were among the papers in the case. 8

–to establish a defendant's knowledge of prior accidents or claims similar to the one which was the basis of the instant action. 9

Footnotes

Footnote 3. Carr v Fidelity & Casualty Co. (La App 3d Cir) 248 So 2d 917; Kasperek v May, 182 Neb 582, 156 NW2d 144; Tupper v Amort, 222 Or 33, 350 P2d 904, clarified 222 Or 38, 352 P2d 563; State ex rel. Huff v Reeves, 5 Wash 2d 637, 106 P2d 729, 130 ALR 1465; Wunderlich v Palatine Ins. Co., 115 Wis 509, 92 NW 264.

Footnote 4. State v Butler, 151 NC 672, 65 SE 993.

Footnote 5. Stanford v Pruet, 27 Ga 243; Franklin v Twogood, 25 Iowa 520; Dimpfel v Wilson, 107 Md 329, 68 A 561.

Footnote 6. § 1329.

Footnote 7. Reliance Marine Ins. Co. v Herbert, 87 Hun 285, 33 NYS 819.

Footnote 8. Taylor v Commonwealth, 70 Va 780.

Footnote 9. Johnson v Colt Industries Operating Corp. (DC Kan) 609 F Supp 776, CCH Prod Liab Rep ¶ 10839, 19 Fed Rules Evid Serv 1258, affd (CA10 Kan) 797 F2d 1530, CCH Prod Liab Rep ¶ 11066, 21 Fed Rules Evid Serv 123.

§ 1329 --Courts of other states or nations

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Judicial opinions offered as proof of the unwritten law of a sister state or foreign nation are generally admissible in evidence, even in the absence of a statutory provision specifically authorizing such admission. 10 Where the opinions are admissible, they may be shown by the production of reports containing the cases adjudged by the court of the foreign state or nation. 11 In some states, statutes have been enacted declaring that the unwritten law of other states may be proved by the reports of adjudged cases in the courts of such states. 12 However, the fact that a purported decision does not appear in the original reports has been held sufficient ground for disregarding it, although it does appear in an unofficial publication. 13

§ 1329 --Courts of other states or nations [SUPPLEMENT]

Practice Aids: Strategies for Effective Management of Crossborder Recognition and

Footnotes

Footnote 10. *The Paquete Habana*, 175 US 677, 44 L Ed 320, 20 S Ct 290; *Equitable Life Assur. Soc. v Brandt*, 240 Ala 260, 198 So 595, 134 ALR 555; *Dimpfel v Wilson*, 107 Md 329, 68 A 561; *Ferneau v Armour & Co.* (Mo App) 303 SW2d 161.

Practice References 21 Am Jur POF2d 1, Law of Foreign Jurisdiction.

Footnote 11. *In re Duncan*, 83 Idaho 254, 360 P2d 987; *Franklin v Twogood*, 25 Iowa 520; *Dimpfel v Wilson*, 107 Md 329, 68 A 561; *Meuer v Chicago, M. & S. P. Ry.*, 11 SD 94, 75 NW 823.

Footnote 12. *Varner v Interstate Exchange*, 138 Iowa 201, 115 NW 1111; *Penobscot & K. R. Co. v Bartlett*, 78 Mass 244, 11 Gray 244; *Rice v Rankans*, 101 Mich 378, 59 NW 660.

Footnote 13. *Franklin v Trickey*, 9 Ariz 282, 80 P 352.

§ 1330 Judgments—generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judgment is generally admissible in evidence in a subsequent action if it is relevant to an issue in it. 14 A duly certified abstract of a judgment may also be admitted. 15 However, a judgment is admissible only to prove the fact that a judgment was rendered, the time of its rendition, and the terms and effect of the judgment. 16 The record of the case may not be introduced for the purpose of proving the facts on which the judgment was based. 17

Proper purposes for the introduction into evidence of a judgment entered in a prior case include—

—proof of a fact collateral to the issues involved in the instant case, 18 as, for example, the introduction of a judgment of conviction to impeach a witness. 19

—showing a course of conduct previously taken by a party to the instant case. 20

—showing the divestiture or acquisition of certain legal rights through the rendition of the judgment or through proceedings held thereunder, 21 as, for example, in actions on judgments 22 and actions involving property sold under a writ of execution. 23

—showing, for the purposes of the doctrine of res judicata, that an issue involved in the instant case, or the cause of action involved in the instant case, was previously adjudicated. 24

Footnotes

Footnote 14. *Lazarus v Phelps*, 156 US 202, 39 L Ed 397, 15 S Ct 271; *Fairfield County Bar v Taylor*, 60 Conn 11, 22 A 441; *Jacksonville, T. & K. W. R. Co. v Peninsular Land, Transp. & Mfg. Co.*, 27 Fla 1, 9 So 661, reh den 27 Fla 157, 9 So 689; *Peter v Peter*, 343 Ill 493, 175 NE 846, 75 ALR 890; *Wells v Wells*, 209 Mass 282, 95 NE 845; *Smith v Ayrault*, 71 Mich 475, 39 NW 724; *McCullough v Sullivan*, 102 NJL 381, 132 A 102, 43 ALR 928; *Terry v Munger*, 121 NY 161, 24 NE 272; *Patterson v Anderson*, 40 Pa 359; *Permian Oil Co. v Smith*, 129 Tex 446, 107 SW2d 564, 111 ALR 1175.

Footnote 15. *Tomlinson v Texas Dept. of Public Safety* (Tex Civ App Corpus Christi) 429 SW2d 590.

Footnote 16. *Diamond v New York Life Ins. Co.* (CA7 Ill) 50 F2d 884, cert den 284 US 647, 76 L Ed 549, 52 S Ct 25; *Scott v Scott* (Tex Civ App Houston (1st Dist)) 554 SW2d 274.

Footnote 17. *Scott v Scott* (Tex Civ App Houston (1st Dist)) 554 SW2d 274.

Footnote 18. *Lehnen v Dickson*, 148 US 71, 37 L Ed 373, 13 S Ct 481; *Omaha & Grant Smelting & Refining Co. v Tabor*, 13 Colo 41, 21 P 925; *Lamb v Stubblefield* (Mo App) 200 SW 695; *Eudaly v Superior Oil Co.* (Okla) 270 P2d 335; *Kerr v Lunsford*, 31 W Va 659, 8 SE 493.

Footnote 19. 81 Am Jur 2d, Witnesses §§ 910, 970, 971.

Footnote 20. *Terry v Munger*, 121 NY 161, 24 NE 272; *Jones v Watkins* (Tex Civ App) 97 SW2d 1027, writ dism w o j.

Footnote 21. *Chirac v Reinicker*, 24 US 280, 11 Wheat 280, 6 L Ed 474; *Illinois Steel Co. v Industrial Com.*, 290 Ill 594, 125 NE 252; *Eudaly v Superior Oil Co.* (Okla) 270 P2d 335.

Footnote 22. 47 Am Jur 2d, Judgments §§ 972, 973.

Footnote 23. 30 Am Jur 2d, Executions.

Footnote 24. 46 Am Jur 2d, Judgments § 608.

§ 1331 --Particular matters as affecting admissibility

<p>View Entire Section Go to Parallel Reference Table</p>

As a general rule, a judgment is not admissible in evidence where offered to show rights

declared in the judgment, until it becomes final by affirmance upon appeal or by the lapse of time within which an appeal may be taken. 25 A judgment is also inadmissible if it is void due to absence of jurisdiction. 26 However, mere irregularities in connection with a judgment, or the proceedings in which it was rendered, do not affect the admissibility of the judgment. A judgment or judgment roll is not rendered inadmissible by the fact that the complaint was not properly verified, 27 or that the judgment was rendered upon a verdict under erroneous instructions. 28

Although it has been held that a statute directing that a judicial record be signed is merely directory, and that other evidence may be given to establish the record, 29 on the other hand, there is authority for the rule that the record of a judgment, to be admissible in evidence, must have been signed by an officer authorized by law. 30

It has been held that the record of a judgment, to be admissible in evidence, must have been filed in the proper office 31 and recorded. 32 However, it is not necessary to the admissibility of a judgment that it be contained in the formal judgment roll of the common law. The record may be contained in the judgment book or docket, as provided by the local law or custom, or where a formal record is not required by law to be made up, those entries which are permitted to stand in its place are admissible. 33

Footnotes

Footnote 25. *Sewell v Johnson*, 165 Cal 762, 134 P 704; *Pendleton v Norfolk & W. R. Co.*, 82 W Va 270, 95 SE 941, 16 ALR 761.

Footnote 26. *Sabariego v Maverick*, 124 US 261, 31 L Ed 430, 8 S Ct 461; *Williams v Williams*, 130 NY 193, 29 NE 98.

Footnote 27. *Commercial Bank & Trust Co. v Jordan*, 85 Mont 375, 278 P 832, 65 ALR 968.

Footnote 28. *Richardson v Boston*, 65 US 188, 24 How 188, 16 L Ed 625.

Footnote 29. 46 Am Jur 2d, Judgments § 68.

Footnote 30. *Morris v Patchin*, 24 NY 394.

Footnote 31. *Morris v Patchin*, 24 NY 394.

Footnote 32. *Turley v Tobin* (Tex Civ App) 7 SW2d 949, writ ref.

Footnote 33. *Philadelphia, W. & B. R. Co. v Howard*, 54 US 307, 13 How 307, 14 L Ed 157; *Kenyon v Baker*, 16 Mich 373; *Jones v Henry*, 84 NC 320.

§ 1332 --For and against whom admissible

[View Entire Section](#)

Judgments may be admitted in evidence in subsequent actions for or against parties to the actions in which the judgments were rendered, 34 or for or against persons in privity with them. 35 Furthermore, a judgment may be offered in evidence, even as against a stranger to the prior litigation, to prove the fact of its own rendition 36 and the acquisition of certain rights thereunder. 37 A judgment has also been held admissible where it is offered to prove a fact collateral to the issues in the principal action, 38 or where the judgment is offered to prove that a party to the later action had previously prosecuted an inconsistent action, 39 or where the judgment is rendered upon a subject of a public nature. 40

However, a judgment is not admissible in favor of, or against, a stranger to the action in which the judgment was rendered where the judgment is offered to establish an issue or the cause of action involved in the instant case, since the principle of res judicata does not operate to affect strangers to a judgment. 41 But this rule may not be applicable if the judgment was one in rem. 42

Footnotes

Footnote 34. *Fairfield County Bar v Taylor*, 60 Conn 11, 22 A 441; *McCoy v Oldham*, 1 Ind App 372, 27 NE 647; *Lowell v Parker*, 51 Mass 309, 10 Met 309; *Littleton v Richardson*, 34 NH 179; *Union Nat. Bank v Western Bldg. Co.*, 44 ND 336, 175 NW 628; *Hoey v Furman*, 1 Pa 295; *In re Kirby*, 10 SD 322, 73 NW 92; *Mills v Howeth*, 19 Tex 257; *State Bank of Sevier v American Cement & Plaster Co.*, 80 Utah 250, 10 P2d 1065; *Johnson's Ex'x v Jennings' Adm'r*, 51 Va 1.

Footnote 35. *Wilson v Campbell*, 33 Ala 249; *Moon v Rollins*, 36 Cal 333; *Belden v Seymour*, 8 Conn 304; *Huddleston v Graham*, 73 Fla 350, 74 So 414; *Newson v Lucan*, 26 Ky 440; *Lowell v Parker*, 51 Mass 309, 10 Met 309; *Shanks v Lancaster*, 46 Va 110; *Kerr v Lunsford*, 31 W Va 659, 8 SE 493.

Footnote 36. *Drummond v Prestman*, 25 US 515, 12 Wheat 515, 6 L Ed 712; *Pico v Webster*, 14 Cal 202; *Illinois Steel Co. v Industrial Com.*, 290 Ill 594, 125 NE 252; *Smith v Ayrault*, 71 Mich 475, 39 NW 724; *Lonkey v Keyes Silver Mining Co.*, 21 Nev 312, 31 P 57; *Falcon v Johnston*, 102 NC 264, 9 SE 394; *Union Nat. Bank v Western Bldg. Co.*, 44 ND 336, 175 NW 628; *Fitchette v Sumter Hardwood Co.*, 145 SC 53, 142 SE 828.

Footnote 37. *Southern R. Co. v Bouknight* (CA4 SC) 70 F 442; *Snodgrass v Branch Bank at Decatur*, 25 Ala 161; *Pico v Webster*, 14 Cal 202; *Fairfield County Bar v Taylor*, 60 Conn 11, 22 A 441; *Illinois Steel Co. v Industrial Com.*, 290 Ill 594, 125 NE 252; *Peden v Chicago, R. I. & P. R. Co.*, 78 Iowa 131, 42 NW 625; *Morgan v Yarborough*, 13 La 74; *Emery v Fowler*, 39 Me 326; *Commonwealth v Tolman*, 149 Mass 229, 21 NE 377; *Childress v Carley*, 92 Miss 571, 46 So 164; *Lee's Admr. v Lee*, 21 Mo 531; *Littleton v Richardson*, 34 NH 179; *Terry v Munger*, 121 NY 161, 24 NE 272; *Hodges v Wilkinson*, 111 NC 56, 15 SE 941; *Tierney v Phoenix Ins. Co.*, 4 ND 565, 62 NW 642; *Eudaly v Superior Oil Co. (Okla)* 270 P2d 335; *Patterson v Anderson*, 40 Pa 359; *Fitchette v Sumter Hardwood Co.*, 145 SC 53, 142 SE 828; *Plymouth County Bank v Gilman*, 3 SD 170, 52 NW 869, adhered to, on reh 4 SD 265, 56 NW 892; *Stephens v Jack*, 11 Tenn

402, 3 Yer 402.

Footnote 38. Omaha & Grant Smelting & Refining Co. v Tabor, 13 Colo 41, 21 P 925; Corbley v Wilson, 71 Ill 209; Fitchette v Sumter Hardwood Co., 145 SC 53, 142 SE 828; Kerr v Lunsford, 31 W Va 659, 8 SE 493.

Footnote 39. Terry v Munger, 121 NY 161, 24 NE 272.

Footnote 40. Illinois Steel Co. v Industrial Com., 290 Ill 594, 125 NE 252; Bow v Allenstown, 34 NH 351; Fitchette v Sumter Hardwood Co., 145 SC 53, 142 SE 828; Kerr v Lunsford, 31 W Va 659, 8 SE 493.

Footnote 41. 46 Am Jur 2d, Judgments § 518.

Footnote 42. Illinois Steel Co. v Industrial Com., 290 Ill 594, 125 NE 252; Fitchette v Sumter Hardwood Co., 145 SC 53, 142 SE 828.

§ 1333 --Admissibility in criminal prosecution of judgment in civil action

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judgment rendered in a civil action is generally not admissible in a subsequent criminal prosecution, where such judgment is offered for the purpose of proving facts adjudicated thereby. 43 This rule applies even where the defendant and the state are the parties in the civil action. 44 However, a judgment rendered in a civil action has been held admissible in a subsequent criminal prosecution where the judgment in the civil action was offered in the criminal action as proof merely of its own existence 45 or of the time of the rendition of the judgment, 46 or where the judgment was introduced to prove some collateral fact in the criminal case not bearing upon the question of guilt or innocence, 47 or where the judgment in the civil action established a status which was a material fact in the criminal action. 48

Footnotes

Footnote 43. 46 Am Jur 2d, Judgments § 620.

Footnote 44. State v Dubose, 152 Fla 304, 11 So 2d 477; State v Rogers, 198 SC 273, 17 SE2d 563.

Footnote 45. State v Weil, 83 SC 478, 65 SE 634.

Footnote 46. State v Weil, 83 SC 478, 65 SE 634.

Footnote 47. State v Dixon, 80 Mont 181, 260 P 138.

Footnote 48. Halbrook v State, 34 Ark 511.

§ 1334 --Courts of other states and nations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where it is relevant and not otherwise excludable, the judgment of a court of a sister state is admissible in evidence. 49 In such case, an authenticated copy of the record is sufficient without producing the original. 50 There is nothing in the full faith and credit clause of the Federal Constitution, or in the federal statute enacted thereunder, 51 which requires that proof of a judgment shall include all the pleadings and proceedings in the suit, or which attempts to specify what parts of the proceedings in a state court shall be included in making up the record in an adjudicated cause. 52 However, a judgment obtained in another state is not admissible against a party as to whom it is void for lack of jurisdiction. 53

A judicial record of a court of a foreign nation is, as a general rule, admissible in an action in a court in the United States if it is relevant to an issue or issues involved therein. 54

Footnotes

Footnote 49. *Selig v Hamilton*, 234 US 652, 58 L Ed 1518, 34 S Ct 926; *North Carolina Land & Lumber Co. v Boyer* (CA6 Tenn) 191 F 552; *Slaughter v Cunningham*, 24 Ala 260; *Belden v Seymour*, 8 Conn 304; *Mayer v Brensinger*, 180 Ill 110, 54 NE 159; *Friend v Miller*, 52 Kan 139, 34 P 397; *Patton v Kennedy*, 8 Ky 389; *Ellis v Ellis*, 55 Minn 401, 56 NW 1056; *Tittman v Thornton*, 107 Mo 500, 17 SW 979; *Clark v Depew*, 25 Pa 509.

Footnote 50. *Mills v Duryee*, 11 US 481, 7 Cranch 481, 3 L Ed 411.

As to authentication of judicial records, see §§ 1398 et seq.

Footnote 51. 28 USCS § 1738.

Footnote 52. *Parker v McLain*, 237 US 469, 59 L Ed 1051, 35 S Ct 632.

Footnote 53. *Williams v Williams*, 130 NY 193, 29 NE 98.

Footnote 54. *Ennis v Smith*, 55 US 400, 14 How 400, 14 L Ed 472.

§ 1335 --Courts of special, inferior, and limited jurisdiction

[View Entire Section](#)

In some cases, proceedings before courts of inferior and limited jurisdiction are considered matters in pais, provable by parol or other testimony. 55 A judgment recovered before an inferior court may be proved by memoranda of the judge upon his docket and by the production of the original papers in the case, verified by the testimony of the magistrate, if these, when taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. 56 Under the general rule that the jurisdiction of a court of special and limited jurisdiction must be affirmatively shown, or must affirmatively appear of record, 57 it has been held that a summons must be affirmatively shown to have been served upon the defendant within the territorial jurisdiction of such court before a judgment by default founded thereon may be introduced in evidence to establish rights claimed to be acquired under it. 58

Footnotes

Footnote 55. *Turner v Fendall*, 5 US 117, 1 Cranch 117, 2 L Ed 53.

Footnote 56. *McGrath v Seagrave*, 84 Mass 443.

Footnote 57. 47 Am Jur 2d, Judgments § 965.

Footnote 58. *Mallett v Uncle Sam Gold & Silver Mining Co.*, 1 Nev 188.

§ 1336 Records of prior criminal proceedings

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under the common law, proof which shows or tends to show that an accused in a criminal prosecution has committed crimes other than the one charged is generally inadmissible. 59 While this rule will generally operate to exclude records of past criminal proceedings from admission into evidence in a subsequent criminal proceeding, the record of a prior indictment of a similar offense has been admitted as tending to show the accused's knowledge that the conduct forming the basis of the later prosecution was illegal. 60 Furthermore, once an adjudication of guilt has been made, the court may in sentencing the accused consider prior convictions and other offenses committed by the accused, 61 and in this respect the judge may receive and consider court or public records showing previous convictions of the accused. 62 Where records of a prior conviction are admissible to show the status of the accused as a convicted felon, such records are not made inadmissible by the accused's offer to stipulate to his status as a convicted felon, at least where the prior conviction records are not unduly or unfairly prejudicial. 63 But where the records admitted contain extraneous matter, such as warrants issued and violations of probation, their admission has been held to be reversible error even absent objection by the accused. 64

Where the record of a prior conviction is admissible, and the record does not identify the offense of which the accused was convicted, the common law permits such offense to be established by parol testimony. 65

Footnotes

Footnote 59. As to this rule and the exceptions thereto, see §§ 405 et seq.

Footnote 60. *Brackenridge v State*, 27 Tex App 513, 11 SW 630 (ovrld on other grounds by *Leeper v State*, 29 Tex App 63, 14 SW 398).

Footnote 61. 21 Am Jur 2d, Criminal Law § 599.

Footnote 62. *Wright v State* (Okla Crim) 617 P2d 1354; *Commonwealth ex rel. Hendrickson v Myers*, 393 Pa 224, 144 A2d 367.

As to proof of prior convictions under statutes enhancing the punishment for second or subsequent offenders, see 39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 26, 27.

Annotation: Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 ALR2d 768 § 10[b].

Footnote 63. *Parker v State* (Fla App D4) 389 So 2d 336, approved (Fla) 408 So 2d 1037.

Footnote 64. *Commonwealth v Clark*, 23 Mass App 375, 502 NE2d 564.

Footnote 65. *Hodgson v Vermont*, 168 US 262, 42 L Ed 461, 18 S Ct 80.

§ 1337 --Prosecution of person other than accused

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In a criminal case the record of conviction or acquittal in another case to which the accused was not a party is not ordinarily admissible to establish the truth of any fact involved in such conviction or acquittal. 66 A judgment of acquittal in a case in which the accused was not the defendant is not admissible even though the prior case involved persons arrested with the accused and separately tried for the same offense. 67

Although there is some old authority that in the trial of one charged as being an accessory, the record of the conviction of the alleged principal is admissible as prima facie evidence that he or she committed the crime as charged, 68 in other jurisdictions, however, this rule has been rejected. 69 In any event, evidence that the principal entered a plea of nolo contendere is incompetent to establish the guilt of the principal at the trial of an accessory, where no judgment has been entered upon the plea, since it is at most a qualified admission of guilt by the principal which cannot affect the accessory and

might be withdrawn. 70 Moreover, at the trial of an accessory, a record showing merely a verdict against the principal without a judgment or sentence thereon is inadmissible upon the question of the principal's guilt. 71 It has also been held that proof of the trial and acquittal of the principal for a misdemeanor is not admissible at the trial of an aider or abettor for a felony. 72

◆ Caution: The use of the evidence of the conviction of another may raise problems under the Confrontation Clause, and thus is not allowed under the Federal Rules of Evidence. 73

Footnotes

Footnote 66. *Commonwealth v Tilley*, 327 Mass 540, 99 NE2d 749.

Footnote 67. *State v McCullough*, 50 NC App 184, 272 SE2d 613.

Footnote 68. *Drummond v Prestman*, 25 US 515, 12 Wheat 515, 6 L Ed 712; *Mulligan v People*, 68 Colo 17, 189 P 5; *Howard v State*, 109 Ga 137, 34 SE 330; *State v Gleim*, 17 Mont 17, 41 P 998.

Footnote 69. *Commonwealth v Tilley*, 327 Mass 540, 99 NE2d 749; *State v Rand*, 33 NH 216; *Ogden v State*, 12 Wis 532.

Footnote 70. *Pharr v United States (CA6 Tenn)* 48 F2d 767; *Buck v Commonwealth*, 107 Pa 486.

Footnote 71. *Commonwealth v Minnich*, 250 Pa 363, 95 A 565.

Footnote 72. *Christie v Commonwealth*, 193 Ky 799, 237 SW 660, 24 ALR 599.

As to the effect of the acquittal of a principal in the first degree on the prosecution of an aider or abettor, see 21 Am Jur 2d, Criminal Law §§ 175, 176.

Footnote 73. § 1345.

§ 1338 --Admissibility in civil action

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a general rule, although subject to exceptions, that in the absence of a statutory provision to the contrary, a judgment of conviction or acquittal rendered in a criminal prosecution may not be admitted as evidence in a subsequent civil action, where the judgment is offered to bar the civil action or to establish the truth of facts upon which it was rendered. 74

◆ Caution: Even where the record of a judgment of conviction is improperly admitted, such admission is harmless error where the fact of the conviction is otherwise admitted into evidence without objection. 75

The judgment in a criminal action is available as evidence in a subsequent civil action where the judgment is offered for the single purpose of proving its own existence, where such existence is a material fact, 76 in which case the judgment is conclusive as to the fact of its rendition. 77

◆ Observation: The existence of one or more criminal convictions is deemed material, and evidence of such convictions is admissible, in custody or adoption proceedings. 78

A judgment in a criminal action is admissible in a subsequent civil action where such judgment is the foundation of the civil action. 79

Footnotes

Footnote 74. 46 Am Jur 2d, Judgments §§ 614-619.

As to the use of a prior criminal conviction to impeach a witness, see 81 Am Jur 2d, Witnesses §§ 910-928.

Footnote 75. *Harper v Samples*, 164 Ga App 511, 298 SE2d 29.

Footnote 76. *Montgomery v Collins* (Ala) 355 So 2d 1111; *Washington Nat. Ins. Co. v Clement*, 192 Ark 371, 91 SW2d 265; *Campbell v Cochran* (Del Super) 416 A2d 211; *Smith v Andrews* (2d Dist) 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210.

Footnote 77. *Burt v Union Cent. L. Ins. Co.* (CA5 Tex) 105 F 419, affd 187 US 362, 47 L Ed 216, 23 S Ct 139; *Washington Nat. Ins. Co. v Clement*, 192 Ark 371, 91 SW2d 265; *Hampton v Westover*, 137 Neb 695, 291 NW 93.

Footnote 78. *Williams v State Dept. of Pensions & Secur.* (Ala App) 460 So 2d 1348; *In re Appeal in Pima County Juvenile Action etc.* (App) 134 Ariz 442, 657 P2d 430; *In re G.* (5th Dist) 98 Cal App 3d 412, 159 Cal Rptr 460; *Smith v Andrews* (2d Dist) 54 Ill App 2d 51, 203 NE2d 160, cert den 382 US 1029, 15 L Ed 2d 543, 86 S Ct 655, reh den 383 US 954, 16 L Ed 2d 216, 86 S Ct 1210; *G.E.Y. v Cabinet for Human Resources* (Ky App) 701 SW2d 713; *Adoption of Irwin*, 28 Mass App 41, 545 NE2d 1193, review den 406 Mass 1103, 548 NE2d 887; *In re Emmons*, 165 Mich App 701, 419 NW2d 449, app den 430 Mich 873 and (criticized on other grounds by *In re Waite*, 188 Mich App 189, 468 NW2d 912); *In re Welfare of Scott*, 309 Minn 458, 244 NW2d 669; *In Interest of B---- M---- P----* (Mo App) 704 SW2d 237; *In re Bradley*, 57 NC App 475, 291 SE2d 800; *Thompson v King* (ND) 393 NW2d 733, cert den 479 US 1098, 94 L Ed 2d 173, 107 S Ct 1320; *In re B.A.M.* (SD) 290 NW2d 498; *In re Sego*, 82 Wash 2d 736, 513 P2d 831.

Footnote 79. *Brown v Bradlee*, 156 Mass 28, 30 NE 85.

§ 1339 Completeness of records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A copy of a part of a judicial record is generally inadmissible in evidence; a copy of a judicial record offered in evidence must contain the whole record. 80 A judgment entry alone, unaccompanied by any other part of the record of such judgment or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact of its rendition, is inadmissible if an objection is properly made, 81 even though the judgment offered is from a court of general jurisdiction or contains general recitals of jurisdiction. 82

Although the usual method of proving the proceedings of a court is by the record as completed and extended, it has been held that the minutes or memoranda upon the docket of the clerk of the court or the magistrate are competent evidence of an order or proceeding in court, in case the extended record has not been made. 83 The fact that certain papers filed in the case are not contained in a certified copy of a judgment record does not prevent its admission in evidence if the certificate states that the writings annexed together constitute the record, since the missing papers may not have been a proper part of the record. 84 Where a judgment is part of the muniments of an estate, it may be given in evidence without the proceedings on which it is founded. 85 A similar result has been reached in the case of a judgment offered to prove course of conduct previously taken by a party to the principal case. 86

Footnotes

Footnote 80. *Smith v Anderson*, 259 Ark 310, 532 SW2d 745; *Kenyon v Baker*, 16 Mich 373; *Hoover v Jones*, 84 Neb 662, 121 NW 975; *Slocinski v Radwan*, 83 NH 501, 144 A 787, 63 ALR 643; *Clark v Depew*, 25 Pa 509; *Short v Blair & Hughes Co.* (Tex Civ App) 230 SW 427, appeal after remand (Tex Civ App) 271 SW 199.

Footnote 81. *Clem v Meserole*, 44 Fla 234, 32 So 815; *Kenyon v Baker*, 16 Mich 373; *Short v Blair & Hughes Co.* (Tex Civ App) 230 SW 427, appeal after remand (Tex Civ App) 271 SW 199.

Footnote 82. *Short v Blair & Hughes Co.* (Tex Civ App) 230 SW 427, appeal after remand (Tex Civ App) 271 SW 199.

Footnote 83. *McGrath v Seagrave*, 84 Mass 443.

Footnote 84. *Wells v Wells*, 209 Mass 282, 95 NE 845.

Footnote 85. *Richardson v Hobart* (Ala) 1 Stew 500; *Baudin v Roliff* (La) 1 Mart NS 165; *Masters v Varner's Ex'ors*, 46 Va 168.

Footnote 86. *Jones v Watkins* (Tex Civ App) 97 SW2d 1027, writ diss w o j.

§ 1340 Mode of proof of judicial records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A judgment and the proceedings in the cause in which it is rendered are generally proved by the record itself or by a copy of it. 87 At common law they may not be proved in any other manner, at least in the absence of the loss or destruction of the record. 88 A judgment may not be proved at common law by parol or extrinsic evidence. 89 It may not be proved by the testimony of a judge of the court which rendered it, 90 or by the testimony of a witness that while he was clerk of the court, certain papers shown to him were issued and filed by him and that he believes that they are the records of the court, 91 or by the testimony of another witness that he received the records from the present clerk of the court as the records of the actions to which they relate. 92 However, where the record is indefinite or ambiguous, parol evidence is admissible to explain it. 93

Footnotes

Footnote 87. *Turnbull v Payson*, 95 US 418, 5 Otto 418, 24 L Ed 437; *Gunn v Howell*, 35 Ala 144; *Snider v Greathouse*, 16 Ark 72; *Florida Land Inv. Co. v Williams*, 84 Fla 157, 92 So 876, 26 ALR 171, appeal after remand 98 Fla 1258, 116 So 642; *Peter v Peter*, 343 Ill 493, 175 NE 846, 75 ALR 890; *State ex rel. Kelly v Wolfer*, 119 Minn 368, 138 NW 315; *Childress v Carley*, 92 Miss 571, 46 So 164; *Remick v Butterfield*, 31 NH 70; *Pelton v Platner*, 13 Ohio 209; *Gamel v Hynds*, 69 Okla 204, 171 P 920; *Turley v Tobin* (Tex Civ App) 7 SW2d 949, writ ref.

As to judicial notice of judicial records, see §§ 129 et seq.

Footnote 88. *Lyon v Bolling*, 14 Ala 753; *Hammatt v Emerson*, 27 Me 308 (criticized on other grounds by *Kuperman v Eiras* (Me) 586 A2d 1260); *Slocinski v Radwan*, 83 NH 501, 144 A 787, 63 ALR 643; *Gauldin v Madison*, 179 NC 461, 102 SE 851, 10 ALR 1497; *Gamel v Hynds*, 69 Okla 204, 171 P 920; *Haines v West*, 101 Tex 226, 105 SW 1118.

Footnote 89. *Gambrill v Schooley*, 95 Md 260, 52 A 500; *Reynolds v Stansbury*, 20 Ohio 344; *Turley v Tobin* (Tex Civ App) 7 SW2d 949, writ ref; *Tung-Sol Lamp Works, Inc. v Monroe*, 113 Vt 228, 32 A2d 120.

Footnote 90. *Heirs of Ludlow v Johnston*, 3 Ohio 553 (holding such testimony insufficient even if the docket containing the judgment has been lost or mislaid); *Tung-Sol Lamp Works, Inc. v Monroe*, 113 Vt 228, 32 A2d 120.

Footnote 91. *Lyon v Bolling*, 14 Ala 753; *Gamel v Hynds*, 69 Okla 204, 171 P 920.

Footnote 92. *Lyon v Bolling*, 14 Ala 753.

Footnote 93. *Burns v Marsh*, 144 Mo App 412, 128 SW 834.

As to the use of parol evidence to determine the issues in a former case, see § 1137.

(b). Judicial Records as Hearsay [1341-1345]

§ 1341 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To the extent that any part of a judicial record is hearsay, it must be brought within an exception to the hearsay rule before it can be admitted. 94 The "business record" exception to the hearsay rule can be invoked to justify admission of a record of unsworn statements of counsel if the statutory or common-law requirements of the exception are met. 95

Footnotes

Footnote 94. *Jacobs v Hertz Corp.*, 358 Mass 541, 265 NE2d 588 (ovrld on other grounds by *Smith v Ariens Co.*, 375 Mass 620, 377 NE2d 954); *Johnson v American Family Mut. Ins. Co.*, 93 Wis 2d 633, 287 NW2d 729.

Footnote 95. *Kearney v New York*, 144 Misc 2d 201, 543 NYS2d 879 (transcript of prosecutor's statements made in open court was admissible under "business record" exception).

As to the admission of business records notwithstanding their nature as hearsay, generally, see §§ 1290-1314.

As to the hearsay rule, and exceptions thereto, with regard to evidence from a prior proceeding, see §§ 890 et seq.

§ 1342 Judgments, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The common law recognized an exception to the hearsay rule with respect to judgments regarding personal, family, or general history, or boundaries, based on the rationale that such judgments were evidence of reputation, to which the hearsay rule generally did not apply. This rule has been codified as Rule 803(23) of the Uniform Rules of Evidence and the Federal Rules of Evidence, which states that the hearsay rule does not apply to

judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. 96

◆ Comment: Although one writer has noted that the considerations of trustworthiness and reliability which characterize judgments and which justify excepting them from the rule against hearsay would apparently justify a rule covering all matters essential to judgments, 97 Rule 803(23) is nonetheless limited to matters provable by reputation under the common-law rule. In particular, the Rule does not permit the admission of judgments to prove matters of character, 98 although matters of character may be shown by reputation evidence under Rule 803(21). 99

Footnotes

Footnote 96. FRE Rule 803(23); Uniform Rules of Evidence Rule 803(23).

As to the exception to the hearsay rule covering reputation of personal or family history, see § 680.

As to the exception to the hearsay rule covering reputation as to boundaries or general history, see § 681.

Footnote 97. Louisell and Mueller, Federal Evidence § 471.

Footnote 98. Notes of Advisory Committee to Federal Rules of Evidence, Rule 803.

Footnote 99. As to Rule 803(21), see § 682.

§ 1343 Judgments of conviction

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(22) of the Uniform Rules of Evidence and the Federal Rules of Evidence provide generally that the hearsay rule does not bar admission of evidence of a final judgment entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to the judgment (but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused). 1 The Federal Rule specifically excludes judgments entered upon a plea of nolo contendere, 2 but the provision of the Uniform Rule requiring that the judgment be entered after a trial or upon a plea of guilty is optional. 3 The pendency of an appeal may be shown, but does not affect admissibility. 4 A judgment of conviction admitted under Rule 803(22) is substantive, but not conclusive, evidence of matters stated therein. 5

Rule 803(22) includes only judgments of conviction, and not judgments of acquittal. 6

Judgments of conviction embraced by the Rule include judgments rendered in state courts ⁷ and in the courts of foreign nations, at least where there exist procedural safeguards adequate to provide reasonable assurance of reliability of the judgment. ⁸ The fact that the sentence entered upon the judgment of conviction was suspended, or for a term of less than one year, does not place the judgment beyond the scope of Rule 803(22) as long as the offense in question was punishable by a term of imprisonment longer than a year. ⁹ It appears likely that a "deferred sentence," as imposed by some state courts, is also within the scope of Rule 803(22) as long as the underlying offense is punishable by the requisite term of imprisonment. ¹⁰

In most jurisdictions, the requirement of the Rule that the offense be punishable by imprisonment for longer than one year has the practical effect of restricting the Rule's scope to convictions for felonies. ¹¹

Footnotes

Footnote 1. FRE Rule 803(22); Uniform Rules of Evidence Rule 803(22).

Footnote 2. FRE Rule 803(22).

Footnote 3. Uniform Rules of Evidence Rule 803(22).

Footnote 4. FRE Rule 803(22); Uniform Rules of Evidence Rule 803(22).

Footnote 5. *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461; *Lichon v American Universal Ins. Co.*, 435 Mich 408, 459 NW2d 288, reh den 435 Mich 1243.

Footnote 6. *United States v Viserto* (CA2 NY) 596 F2d 531, cert den 444 US 841, 62 L Ed 2d 52, 100 S Ct 80.

Footnote 7. *Eastern Renovating Corp. v Roman Catholic Bishop* (CA1 Mass) 554 F2d 4, 1 Fed Rules Evid Serv 974.

Footnote 8. *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461 (judgment issued by Japanese court convicting seaman of "inflicting injury" upon another seaman was improperly excluded in convicted seaman's action under the Jones Act for injuries sustained in a shipboard altercation; admission under FRE Rule 803(22) was called for where the record indicated that the incident had been meticulously investigated by Japanese authorities, that the convicted seaman had been represented by counsel in the Japanese proceedings, and that the Japanese proceedings had generally accorded with "civilized jurisprudence").

Footnote 9. *Lloyd v American Export Lines, Inc.* (CA3 Pa) 580 F2d 1179, 3 Fed Rules Evid Serv 193, 47 ALR Fed 874, cert den 439 US 969, 58 L Ed 2d 428, 99 S Ct 461.

Footnote 10. *United States v Turner* (CA10 Okla) 497 F2d 406, cert den 423 US 848, 46 L Ed 2d 71, 96 S Ct 90 and (superseded by statute on other grounds as stated in *United*

States v Miller (CA10 Colo) 907 F2d 994, 91-1 USTC ¶ 50002, 66 AFTR 2d 90-5337) (pre-Rules case stating that guilty plea in state court leading to imposition of deferred judgment was properly admitted for impeachment purposes despite defense contention that deferred judgment was not a conviction; federal standards control the issue, and federal cases have viewed a plea of guilty as equivalent to a conviction in this context).

Footnote 11. See, for example, 18 USCS § 1, stating that any federal offense punishable by death or imprisonment for a term exceeding one year is a felony.

A prior judgment of conviction for resisting arrest was not admissible under Rule 803(22) in a subsequent action by police officers for injuries arising from arrest, because resisting arrest is a misdemeanor. Banek v Thomas (Colo) 733 P2d 1171.

§ 1344 --Admissibility as limited to facts essential to judgment

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(22) of the Uniform Rules of Evidence and the Federal Rules of Evidence permits receipt of a judgment of conviction only for the purposes of establishing a fact essential to sustain the judgment. ¹² Thus, a conviction for filing a false tax return may not subsequently be used to show the amount of tax due in a subsequent civil suit, as the amount of tax due is probably not a fact essential to the judgment of conviction. ¹³ Admission of a judgment of conviction may also be denied under Rule 803(22) where a general verdict of guilty rendered on an indictment charging multiple criminal acts makes it impossible to determine for exactly what reasons or upon what acts the jury convicted the defendants. ¹⁴

Footnotes

Footnote 12. FRE Rule 803(22); Uniform Rules of Evidence Rule 803(22).

Footnote 13. United States v First Nat. State Bank (DC NJ) 469 F Supp 612, 80-1 USTC ¶ 9412, 4 Fed Rules Evid Serv 646, 44 AFTR 2d 79-5192, affd in part and revd in part on other grounds (CA3 NJ) 616 F2d 668, 80-1 USTC ¶ 9217, 45 AFTR 2d 80-840, cert den 447 US 905, 64 L Ed 2d 854, 100 S Ct 2987.

Footnote 14. Columbia Plaza Corp. v Security Nat. Bank, 219 US App DC 182, 676 F2d 780, 10 Fed Rules Evid Serv 407.

§ 1345 --Restriction on use of convictions of person other than accused

[View Entire Section](#)

Rule 803(22) of the Uniform Rules of Evidence and the Federal Rules of Evidence expressly excludes from its reach convictions of "persons other than the accused" when offered by the government in criminal prosecutions and for purposes other than impeachment. 15 This exclusion generally embraces prosecutions in which the government seeks to prove an element of the charged offense by showing that someone other than the accused has been convicted of a separate but related crime. 16

◆ Observation: This proviso is intended to incorporate the holding of *Kirby v United States*. 17 In that case (a prosecution for receipt of stolen property), the government introduced into evidence the convictions of three persons other than the accused for stealing the property, in order to prove that the property had in fact been stolen. The United States Supreme Court held that this use of the three convictions violated the Confrontation Clause (and distinguished a hypothetical situation in which the proof of the prior convictions of the others would be required as an element of the offense with which the accused had been charged). 18 Other authority states that the use of others' convictions in this manner also trenches upon an accused's due process right to have the prosecution prove every element of the offense with which he is charged, inasmuch as the jury, presented with the prior judgment of conviction, may defer to the findings of the trier of fact in that case, substituting those findings for the required evidence. 19

Footnotes

Footnote 15. FRE Rule 803(22); Uniform Rules of Evidence Rule 803(22).

Footnote 16. *United States v Diaz* (CA5 Tex) 936 F2d 786 (in prosecution for transporting illegal aliens, government could not prove illegal status of one of the aliens transported by evidence of her conviction on a charge of being in the United States without required documentation).

In prosecution for conducting illegal gambling business, where government was required to prove that at least four persons in addition to the accused were engaged in illegal gambling, the receipt of testimony by co-offenders to the effect that they had been convicted at their previous and separate trial of conducting an illegal gambling business was contrary to Rule 803(22) and reversible error. *United States v Vandetti* (CA6 Ky) 623 F2d 1144, 6 Fed Rules Evid Serv 311.

Footnote 17. *Kirby v United States*, 174 US 47, 43 L Ed 890, 19 S Ct 574.

Footnote 18. See, for example, 15 USCS § 902(d), creating the offense of interstate shipment of firearms to a known convicted felon.

Footnote 19. *United States v Crispin* (CA5 Tex) 757 F2d 611, 17 Fed Rules Evid Serv 1490.

(4). Other Records [1346-1350]

§ 1346 Safety codes issued or approved by government bodies

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A safety code or standard which has been given compulsory force by a legislative body is generally admissible in evidence where relevant. 20 Where the codes or standards at issue had not been given the force of law, some courts have nonetheless permitted their admission into evidence as probative of whether a party to a suit was negligent in particular circumstances. 21 In other cases, however, such codes have been excluded from evidence on the grounds that they were not intended to prevent injuries of the type suffered in the case at bar, 22 or because they established a standard of care above an ordinary standard of care. 23

◆ Practice guide: An objection on hearsay grounds to the introduction of a safety code is likely to be answered by attempting to bring the code within either the "learned treatise" exception to the hearsay rule 24 or the "public record" exception to the hearsay rule. 25 If the "learned treatise" exception is invoked, admission will be denied if the witness testifying about the code is not an expert on the subject. 26 The "public record" exception will not apply where the preparation of the code was not required by law. 27

Footnotes

Footnote 20. *Swaney v Peden Steel Co.*, 259 NC 531, 131 SE2d 601.

Annotation: Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Footnote 21. *Arkansas Valley Electric Coop. Corp. v Davis*, 304 Ark 70, 800 SW2d 420 (violation of National Electric Safety Code, promulgated by United States Department of Commerce, is evidence of negligence).

Charts from the Idaho Driver's Handbook which showed average automobile stopping distances at various speeds should have been admitted as evidence on the issue of whether the plaintiff could have avoided the accident in which he had been involved if he had been driving at a lawful speed. *Dawson v Olson*, 97 Idaho 274, 543 P2d 499.

A report on water heaters, issued by the United States Consumer Product Safety Commission and recommending that a warning be placed on water heaters against storing gasoline or gasoline-powered equipment in the same room as a water heater, should have been allowed in evidence as an official publication, because it was highly relevant to the question of a water heater manufacturer's duty to warn consumers on this point. *Toups v Sears, Roebuck & Co.* (La) 507 So 2d 809, CCH Prod Liab Rep ¶ 11405, on remand (La App 4th Cir) 519 So 2d 842.

Footnote 22. *Thies v St. Paul's Evangelical Lutheran Church* (Minn App) 489 NW2d 277.

Footnote 23. *Cole v Multnomah County*, 39 Or App 211, 592 P2d 221, review den 286 Or 449.

Footnote 24. §§ 1413-1417.

Footnote 25. §§ 1351 et seq.

Footnote 26. *Meadows v Coca-Cola Bottling, Inc.* (Ala) 392 So 2d 825, CCH Prod Liab Rep ¶ 8880.

Footnote 27. *Sikes v Seaboard C. L. R. Co.* (Fla App D1) 429 So 2d 1216, petition den (Fla) 440 So 2d 353.

§ 1347 School records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Records kept by public schools can be admitted into evidence where they are relevant and are brought within the requirements of the public records exception to the hearsay rule. 28 Under this rule, transcripts of students' attendance records 29 and school census cards listing several students' dates of birth and identifying a particular man as their father 30 have been admitted. Where there is no official duty to keep the record in question, however, such records are inadmissible. 31

Report cards issued to students by a private school have been held not within the "official records" exception to the hearsay rule, where the applicable statute defined official records as records of government action or inaction. 32 Opinions rendered by a faculty hearing panel at a private university with regard to claims of sex discrimination in the university's employment practices have been held not within the public records exception on the grounds that the panel was not a public agency and its members were not public officials. 33

◆ Observation: School records may also be admissible under the "business records" exception to the hearsay rule. 34

Footnotes

Footnote 28. As to the requirements of the public records exception, see §§ 1351 et seq.

Footnote 29. *In re R.*, 79 Misc 2d 339, 357 NYS2d 1001.

Footnote 30. *State v Barlow*, 8 Utah 2d 396, 335 P2d 629.

Footnote 31. *Reisman v Los Angeles City School Dist.*, 123 Cal App 2d 493, 267 P2d 36.

Footnote 32. *Schwarcz v Schwarcz*, 378 Pa Super 170, 548 A2d 556, app den 522 Pa 578, 559 A2d 39 and app den 522 Pa 578, 559 A2d 39 and cert den 498 US 815, 112 L Ed 2d 31, 111 S Ct 56.

Footnote 33. *Lamphere v Brown University* (CA1 RI) 685 F2d 743, 29 BNA FEP Cas 701, 29 CCH EPD ¶ 32928, 11 Fed Rules Evid Serv 388.

Footnote 34. § 1317.

§ 1348 Tax records

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Certificates of tax assessments and payments prepared by the Internal Revenue Service are within the public record exception to the hearsay rule as codified by Rule 803(8) of the Federal Rules of Evidence, 35 and are not rendered inadmissible merely because they are generated by a computer. 36 Records of tax assessments based on appraised value of property, however, are admissible under Rule 803(8) only for the purpose of showing an assessment based on the appraised value, and are not admissible for the purpose of showing that the property actually had the value stated in them. 37

§ 1348 ----Tax records [SUPPLEMENT]

Case authorities:

In action by patient for invasion of privacy against her plastic surgeon for using her before-and- after pictures on brochures without her consent, trial court erred in ordering surgeon to disclose that portion of his tax returns showing profits and losses from his medical practice in support of patient's claim for punitive damages; while Nevada did not recognize privilege for tax returns or necessarily require that liability for punitive damages be established before discovery of financial condition, before tax returns or financial records were discoverable on issue of punitive damages, plaintiff was required to demonstrate some factual basis for punitive damage claim. *Hetter v Eighth Judicial Dist. Court* (1994, Nev) 874 P2d 762.

Footnotes

Footnote 35. FRE Rule 803(8), generally discussed in §§ 1352 et seq.

Footnote 36. *Hughes v United States* (CA9 Cal) 953 F2d 531, 92 CDOS 300, 92 Daily Journal DAR 396, 92-1 USTC ¶ 50086, 34 Fed Rules Evid Serv 1318, 69 AFTR 2d

Footnote 37. In re Digby (BC ND Ala) 47 BR 614, 12 CBC2d 440.

See also *Smith v Woodlawn Constr. Co.*, 235 Va 424, 368 SE2d 699 ("official documents" exception to hearsay rule does not extend to statements not within the personal knowledge of the recording official, nor does it permit introduction of opinion evidence contained in official records, and therefore a county revenue commissioner's assessment of certain parcels of land was inadmissible, as there was no showing that the commissioner had personal knowledge of the value of the property, and in any event such knowledge would have been merely an opinion).

§ 1349 Weather records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Properly authenticated and officially kept weather records are generally held to be within the "public records" exception to the hearsay rule, 38 and accordingly to be admissible as evidence of weather conditions at a certain time and place. 39 Similarly, information extracted from an official weather report and included within a privately compiled document is not subject to exclusion under the hearsay rule. 40 The fact that a weather report was made at a place remote from the place where the weather conditions are in controversy has been held by some courts to affect the weight to be given the report, but not its admissibility. 41 In other cases, however, the distance between the place where the records were taken and the place at issue has led the courts to exclude such records from evidence. 42

Where a weather report is admissible in evidence, it is deemed *prima facie* evidence of the data it contains and not conclusive evidence of such data. 43

♦ **Caution:** The "public records" exception to the hearsay rule which permits admission of an official weather reports will not be stretched to permit admission of an official report based on hearsay from unofficial sources, such as reports of nonexpert witnesses and newspaper clippings. 44

A weather report may in the discretion of the court be excluded from evidence if it is confusing with respect to the conditions it describes. 45

Footnotes

Footnote 38. §§ 1351 et seq.

Footnote 39. *People v Orchard* (1st Dist) 17 Cal App 3d 568, 95 Cal Rptr 66 (disapproved on other grounds by *People v Williams*, 29 Cal 3d 392, 174 Cal Rptr 317, 628 P2d 869) as stated in *People v Balderas*, 41 Cal 3d 144, 222 Cal Rptr 184, 711 P2d

480; Loughnane v Chicago (1st Dist) 188 Ill App 3d 1078, 136 Ill Dec 626, 545 NE2d 150, app den 129 Ill 2d 564, 140 Ill Dec 672, 550 NE2d 557; Jones v Wilbanks (Mo App) 735 SW2d 409.

Annotation: Weather reports and records as evidence, 57 ALR3d 713 § 3.

Practice References 10 Am Jur Proof of Facts 49, Rain and Other Weather Phenomena.

5 Am Jur POF3d 191, Meteorological Conditions at a Particular Time or Place.

Obtaining weather reports. 2 Am Jur Trials 409, Locating Public Records.

Hunter, Federal Trial Handbook 2d § 69:18.

Footnote 40. Uniprop Manufactured Housing, Inc. v Lakeville (Minn App) 474 NW2d 375.

Footnote 41. Loughnane v Chicago (1st Dist) 188 Ill App 3d 1078, 136 Ill Dec 626, 545 NE2d 150, app den 129 Ill 2d 564, 140 Ill Dec 672, 550 NE2d 557.

Footnote 42. Pulvari v Greyhound Corp., 126 US App DC 146, 375 F2d 322 (exclusion of weather report of conditions at airport 2 miles away from accident scene was not error).

Footnote 43. Gillespie Land & Irrig. Co. v Gonzalez, 93 Ariz 152, 379 P2d 135; Harris v H. G. Smithy Co., 139 US App DC 65, 429 F2d 744.

But see Wadlund v Hartford, 139 Conn 169, 91 A2d 10 (official weather records are indisputable evidence of weather conditions at a particular place).

Footnote 44. Enid v Reeser (Okla) 330 P2d 198.

Footnote 45. Fedors v O'Brien (1st Dist) 39 Ill App 2d 407, 188 NE2d 739 (weather report was properly excluded where only part of it covered the area where the accident in question took place, the time covered in the report began after the time of the accident, the amount of precipitation which fell was not definitely stated, and the report could have supported either party's contentions).

§ 1350 Records of documents purporting to establish or affect interest in property

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 803(14) of the Uniform Rules of Evidence and the Federal Rules of Evidence, the record of a document purporting to establish or affect an interest in property is admissible in evidence notwithstanding the rule against hearsay as proof of the content of the original recorded document and its execution and delivery by each

person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office. 46

◆ Caution: The mere fact that a copy of a deed has been placed in the working file of a public agency does not make such document a public record for the purpose of Rule 803(14). 47

◆ Comment: As noted by the Advisory Committee in its notes pertaining to Rule 803(14) of the Federal Rules of Evidence, under any theory of the admissibility of public records, the provision of Rule 803(14) for admission of recorded documents respecting an interest in property for the purpose of showing their contents is unobjectionable, since otherwise the recording process would be reduced to a nullity. Admission of such documents to show their execution and delivery, however, is problematic in view of the fact that the recorder is unlikely to have first-hand knowledge of such matters. The Committee noted that the problem is solved by the fact that apparently all jurisdictions qualify for recording only those documents which are shown by a specified procedure to have been executed and delivered.

Information contained in recorded deeds as to the sale prices of various land parcels, proffered to show the value of a parcel in the same vicinity, is generally hearsay and inadmissible unless a proper foundation for such evidence is laid under Rule 803(14) or another potentially applicable hearsay exception (such as Rule 803(15), applicable to the deeds themselves, or Rule 703, permitting the use of hearsay evidence as the basis of an expert opinion). 48 Although Rule 803(14) is commonly invoked to determine matters such as a chain of title or metes and bounds of a parcel of land, its scope extends to other matters as well, such as the suitability of land for a particular use. 49

An assertion by one who signed a quitclaim deed that she did not know what she was signing does not affect the admissibility of the record of the deed under Rule 803(14). 50

◆ Comment: Rule 803(14) is not by its language limited to matters concerning real property. However, as a practical matter the "applicable statute" authorizing the recording of documents covered by Rule 803(14) is generally a state statute pertaining to the recording of interests in real property. Although the Uniform Commercial Code provides for the filing of financing statements indicating security interests in personal property, 51 such financing statements do not affect or establish property interests in the same sense as do mortgages, deeds, or easements; they are in effect notice to the world of a previously created interest. For this reason, one commentator has said that although no judicial authority exists on the issue, Rule 803(14) should probably be read as covering only records of documents establishing or affecting real property interests. 52

Footnotes

Footnote 46. FRE Rule 803(14); Uniform Rules of Evidence Rule 803(14).

As to rules dealing with documents or records of documents purporting to establish or affect interests in property, see also §§ 1244 et seq.

Footnote 47. *Amoco Production Co. v United States* (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

Footnote 48. *United States v 478.34 Acres of Land* (CA6 Ky) 578 F2d 156, 3 Fed Rules Evid Serv 187.

Annotation: Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay—state cases, 89 ALR4th 456 §§ 18-21, 24.

Practice References Hunter, *Federal Trial Handbook* (3d ed) § 49.9.

Footnote 49. *Connecticut Light & Power Co. v Federal Power Com.* (CA2) 557 F2d 349, 2 Fed Rules Evid Serv 340 (recorded deed made in 1716 granting the right to float rafts, trees, and logs upon the Housatonic River was admissible under Rule 803(14) on the question of the navigability of the river between certain points).

Footnote 50. *Pimentel v Alamo* (Fla App D3) 555 So 2d 895, 15 FLW D 164.

Footnote 51. 68A Am Jur 2d, Secured Transactions §§ 304 et seq.

Footnote 52. *Louisell & Mueller*, *Federal Evidence* § 462.

(5). "Public Record" Exception to Hearsay Rule [1351-1371]

(a). In General [1351]

§ 1351 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When a document is offered to prove the truth of matters asserted in it, it is hearsay, even if the document is a public record. 53 Both the common law and the statutory law of evidence, however, provide for broad exceptions to the hearsay rule for a range of documents having the character of public records. The common law recognizes (although it does not always sharply define) an exception to the hearsay rule which applies to official records and public reports which public officials are required by statute or by the nature of their duties to make or keep. 54 In many jurisdictions the common-law exception has been codified or superseded by statutes defining the extent to which public records and reports are exempt from the hearsay rule. Such statutes may provide for the admission of public records, notwithstanding their character as hearsay, to the extent that such records contain statements of facts as distinguished from conclusions involving the exercise of judgment or discretion, or the expression of opinion. 55 The admission of public records may be confined to matters within the scope of the maker's

duty as defined by statute. 56 Admission of such a record may require satisfaction of a statutorily mandated showing of trustworthiness by showing that the record was based on the observations of one having a duty to make and record such observations. 57

◆ Observation: A public record or report may qualify for the "business records" exception to the hearsay rule. 58 Furthermore, a public record of a document purporting to establish or affect an interest in property will qualify for admission into evidence under Rule 803(14) notwithstanding its nature as hearsay if an applicable statute authorizes the recording of documents of that kind in the office in which the document was recorded. 59

Footnotes

Footnote 53. *People v Graney* (2d Dist) 234 Ill App 3d 497, 174 Ill Dec 790, 599 NE2d 574.

Footnote 54. *Knox Lime Co. v Maine State Highway Com.* (Me) 230 A2d 814.

Footnote 55. *Kaye v State Dept. of Licensing*, 34 Wash App 132, 659 P2d 548.

Footnote 56. *Westinghouse Electric Corp. v Dolly Madison Leasing & Furniture Corp.*, 42 Ohio St 2d 122, 71 Ohio Ops 2d 85, 326 NE2d 651.

Footnote 57. *Fisk v Department of Motor Vehicles* (2nd Dist) 127 Cal App 3d 72, 179 Cal Rptr 379, 31 ALR4th 905.

Footnote 58. *People v Lopez*, 60 Cal 2d 223, 32 Cal Rptr 424, 384 P2d 16, cert den 375 US 994, 11 L Ed 2d 480, 84 S Ct 634, reh den 376 US 939, 11 L Ed 2d 660, 84 S Ct 794 and reh den 376 US 946, 11 L Ed 2d 770, 84 S Ct 800 and (ovrld on other grounds by *De Lancie v Superior Court*, 31 Cal 3d 865, 183 Cal Rptr 866, 647 P2d 142) as stated in *Donaldson v Superior Court*, 35 Cal 3d 24, 196 Cal Rptr 704, 672 P2d 110.

As to the admission of business records notwithstanding their nature as hearsay, see §§ 1290 et seq.

Footnote 59. § 1350.

(b). Provisions of Federal Rules of Evidence [1352-1369]

(i). In General [1352-1355]

§ 1352 Generally

[View Entire Section](#)

Rule 803(8) of the Federal Rules of Evidence provides for the admission of a wide range of public records and reports notwithstanding their nature as hearsay.

◆ **Observation:** Rule 803(8) sets out the exception for public records and reports formerly governed by a federal statute known as the Official Records Act. 60

Under the Rule, the hearsay bar is removed from records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report (excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel); or

(C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. 61

◆ **Comment:** It is unclear whether the proviso of Rule 803(8) permitting exclusion of otherwise admissible evidence if the source of information or other circumstances indicate lack of trustworthiness is intended to apply only to records offered under clause (C), or to records offered under clauses (A) and (B) as well. Most of the reported cases interpreting and applying the "trustworthiness" proviso have done so in the context of evidence offered under clause (C). 62 Some commentators and cases, however, have suggested that the proviso should be regarded as applicable to all the clauses of Rule 803(8). 63 By contrast, the "public records" exception to the hearsay rule contained in Rule 803(6) of the Uniform Rules of Evidence is worded so as to make clear that the trustworthiness provision applies to all reports proffered under the Rule. 64

Footnotes

Footnote 60. The Official Records Act no longer applies to cases, actions, and proceedings to which the Federal Rules of Evidence apply. 28 USCS § 1733(c).

Annotation: What are official records within purview of 28 USCS § 1733, making such records or books admissible in evidence, 50 ALR2d 1197.

Admissibility, under Rule 803(8)(C) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law", 47 ALR Fed 321.

Practice References Hunter, Federal Trial Handbook (3d ed) § 55.14.

Footnote 61. FRE Rule 803(8).

Practice References Hunter, Federal Trial Handbook (3d ed) § 55.13.

Louisell and Mueller, Federal Evidence §§ 454-456.

Footnote 62. § 1368.

Footnote 63. United States v Orozco (CA9 Cal) 590 F2d 789, 4 Fed Rules Evid Serv 308, cert den 439 US 1049, 58 L Ed 2d 709, 99 S Ct 728 and cert den 442 US 920, 61 L Ed 2d 288, 99 S Ct 2845 (applying trustworthiness proviso to records proffered under clause (B)).

Louisell & Mueller, Federal Evidence § 456 (noting that the trustworthiness proviso in the "business records" exception to the hearsay rule contained in FRE Rule 803(6) clearly applies to all records offered thereunder).

Footnote 64. § 1370.

§ 1353 Scope of exception

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The public records exception in FR Evid, Rule 803(8) is quite broad, embracing records in almost any form, 65 including computer printouts. 66 It reaches records of any public office or agency, whether state or local, 67 federal, or foreign. 68

The record to be admitted must be made from matters within the personal knowledge of the public official making the record or his agent or someone with a duty to report the matter to a public official. However, the Rule does not require a public official to make the record. 69 Records prepared by private agencies, or by persons who are not public officers, are excluded from the ambit of Rule 803(8), despite their otherwise public nature. 70

Footnotes

Footnote 65. Chandler v Roudebush, 425 US 840, 48 L Ed 2d 416, 96 S Ct 1949, 12 BNA FEP Cas 1368, 11 CCH EPD ¶ 10957 (administrative findings made in connection with claim of discrimination in public employment); Melville v American Home Assur. Co. (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756 (airworthiness directives issued by Federal Aviation Administration); Higgenbottom v Noreen (CA9 Or) 586 F2d 719, 4 Fed Rules Evid Serv 202 (inspection reports prepared by Veterans' Administration in aid of purchase-money mortgage).

Footnote 66. United States v Farris (CA7 Ill) 517 F2d 226, 75-1 USTC ¶ 9497, 20 FR Serv 2d 1117, 36 AFTR 2d 75-5064, cert den 423 US 892, 46 L Ed 2d 123, 96 S Ct 189 (citing proposed Rule); United States v Orozco (CA9 Cal) 590 F2d 789, 4 Fed Rules

Evid Serv 308, cert den 439 US 1049, 58 L Ed 2d 709, 99 S Ct 728 and cert den 442 US 920, 61 L Ed 2d 288, 99 S Ct 2845 (Custom Service's compilation of license numbers of cars crossing the border).

Annotation: Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Practice Aids: Computer Printouts as Evidence. 16 Am Jur Proof of Facts 273.

Footnote 67. United States v King (CA8 Mo) 590 F2d 253, cert den 440 US 973, 59 L Ed 2d 790, 99 S Ct 1538 (state tax records).

Advisory Committee Notes to Federal Rules of Evidence, FRE Rule 803.

Footnote 68. United States v Grady (CA2 NY) 544 F2d 598, 1 Fed Rules Evid Serv 408, 37 ALR Fed 819 (police records from Northern Ireland); United States v Friedman (CA9 Wash) 593 F2d 109, 4 Fed Rules Evid Serv 646 (not followed on other grounds by United States v Hines (AFCMR) 18 MJ 729) (Chilean immigration records).

Footnote 69. United States v Central Gulf Lines, Inc. (CA5 La) 747 F2d 315, 1985 AMC 1982, 17 Fed Rules Evid Serv 568.

Footnote 70. Lamphere v Brown University (CA1 RI) 685 F2d 743, 29 BNA FEP Cas 701, 29 CCH EPD ¶ 32928, 11 Fed Rules Evid Serv 388, later proceeding (DC RI) 613 F Supp 971, 38 BNA FEP Cas 871, 39 CCH EPD ¶ 36062, vacated on other grounds (CA1 RI) 798 F2d 532, 41 BNA FEP Cas 828, 41 CCH EPD ¶ 36434, on remand (DC RI) 690 F Supp 125, 47 BNA FEP Cas 300, 49 CCH EPD ¶ 38819, later proceeding (DC RI) 706 F Supp 131, 49 BNA FEP Cas 106, on reconsideration (DC RI) 712 F Supp 1053, affd (CA1 RI) 875 F2d 916, 49 BNA FEP Cas 1464, 50 CCH EPD ¶ 39025 and dismd without op (CA1 RI) 900 F2d 247 and app den (CA1 RI) 843 F2d 1383 (excluding opinions of sex discrimination hearing panel composed of faculty of private university).

In products liability action against manufacturer of snuff tobacco, trial court did not err in excluding report of International Agency for Research on Cancer and report of Consensus Development Conference of National Institute of Health, offered on issue of causation, since neither report was prepared by public office or agency as required by Rule 803(8); rather, IARC report was a review and critique of literature on causation of cancer conducted at Conference attended by scientists, and NIH report was prepared by panel of scientists and non-scientists after conference. Marsee v United States Tobacco Co. (CA10 Okla) 866 F2d 319, CCH Prod Liab Rep ¶ 12023, 27 Fed Rules Evid Serv 694.

§ 1354 Rationale; relationship to Confrontation Clause

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rationale underlying the admissibility of documents under Rule 803(8) is the

presumed trustworthiness of public documents prepared in the discharge of official functions, and the necessity of using such documents, due to the likelihood that a public official would have no independent memory of a particular action or entry where the official's duties require the constant repetition of routine tasks. 71 The "public records" exception to the hearsay rule embodied in FR Evid, Rule 803(8) is firmly enough rooted in American jurisprudence that admission of a public record under the Rule, without affording an accused any further opportunity to inquire into the reliability of the record, does not violate the requirements of the Confrontation Clause. 72

Footnotes

Footnote 71. *Williams v Tri-County Growers, Inc.* (CA3 Pa) 747 F2d 121, 26 BNA WH Cas 1519, 102 CCH LC ¶ 34600, 17 Fed Rules Evid Serv 60 (criticized on other grounds by *Martin v Cooper Elec. Supply Co.* (CA3 NJ) 940 F2d 896, 30 BNA WH Cas 793, 119 CCH LC ¶ 35526); *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659, reh den, en banc (CA5 Tex) 758 F2d 651.

Footnote 72. *United States v De Water* (CA9 Hawaii) 846 F2d 528, 25 Fed Rules Evid Serv 748.

§ 1355 Authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The custodian of a public record is an appropriate authenticating witness for the purposes of Rule 803(8) of the Federal Rules of Evidence. 73 Such a witness must be able to identify the documents as authentic and as made pursuant to a duty required by law. Where the witness testifies that he or she was the custodian of the documents, properly identifies the documents, and testifies that they were prepared pursuant to federal regulations, Rule 803(8) is satisfied. 74 However, the authenticating witness need not be the custodian of the record in question as long as he or she can attest to familiarity with the record system. 75

◆ **Observation:** The self-authentication provisions of Rule 902 make it unnecessary in most cases to obtain live testimony that a public document is in fact what it appears to be. 76 Moreover, Rule 1005 permits public records to be proved by copy. 77

Footnotes

Footnote 73. *United States v Central Gulf Lines, Inc.* (CA5 La) 747 F2d 315, 1985 AMC 1982, 17 Fed Rules Evid Serv 568.

Practice Aids: Introducing and marking exhibits (public records). 5 Am Jur Trials 553 § 19.

Footnote 74. *United States v Central Gulf Lines, Inc.* (CA5 La) 747 F2d 315, 1985 AMC 1982, 17 Fed Rules Evid Serv 568.

Footnote 75. *United States v Ray* (CA9 Cal) 930 F2d 1368, 91 CDOS 2868 (criticized on other grounds by *United States v Wogan* (CA1 Me) 938 F2d 1446).

Footnote 76. As to Rule 902, see §§ 1180 et seq.

Footnote 77. § 1090.

(ii). Records Setting Forth Activities of Office or Agency [1356, 1357]

§ 1356 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(8)(A) of the Federal Rules of Evidence allows for the receipt of public records setting forth the activities of a public office or agency. 78 Thus admitted are such public records as—

—the report to Congress of a federal agency. 79

—reports from examiners from the Office of the Comptroller of Currency. 80

—the official transcript of a judicial proceeding, offered to prove that an officer of the court administered an oath to a witness. 81

—the return of a marshal used to prove that he served papers on a particular person at a particular place and time. 82

—a certificate of insurance issued by the Federal Deposit Insurance Corporation indicating that a bank was federally insured; 83

—an internal police report describing a shooting which occurred in the course of an arrest. 84

—a report by the Department of Labor on reconciliation efforts with the Equal Opportunity Coordinator concerning job discrimination at a major corporation. 85

—documents prepared by the Commissioner of Customs entitled "Antidumping Proceeding Notice" and "Withholding of Appraisement Notice." 86

—a graph from a Drug Enforcement Administration statistical report indicating the average retail price and purity of illicit cocaine. 87

—a federal marshal's receipt for a defendant. 88

—Senate Committee Reports, even though in the form of factual evaluations rather than compilations of data. 89

—case control studies regarding toxic shock syndrome conducted by the Center for Disease Control and state health departments. 90

§ 1356 ----Generally [SUPPLEMENT]

Case authorities:

In products liability action involving silicone gel breast implants, court erred in admitting FDA report containing proposed findings about implants generally since document by its own terms was not final but invited public comment, did not contain any findings about specific implants at issue, and proposed findings related to implants after date in issue. *Toole v McClintock* (1993, CA11 Ala) 999 F2d 1430, CCH Prod Liab Rep ¶ 13606, 37 Fed Rules Evid Serv 997, 7 FLW Fed C 735.

Footnotes

Footnote 78. FRE Rule 803(8)(A).

Footnote 79. *Eastern Air Lines, Inc. v McDonnell Douglas Corp.* (CA5 Fla) 532 F2d 957, 19 UCCRS 353 (criticized on other grounds by *Opera Co. of Boston, Inc. v Wolf Trap Foundation for Performing Arts* (CA4 Va) 817 F2d 1094).

Footnote 80. *Farmers & Merchants Nat. Bank v Bryan* (CA10 Okla) 902 F2d 1520 (criticized on other grounds by *FDIC v Dawson* (CA5 Tex) 4 F3d 1303).

Footnote 81. *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

As to 28 USCS § 753(b), providing that a reporter's transcript of criminal proceedings is prima facie correct statement of the testimony taken and proceedings had, see 32 Am Jur 2d, Federal Practice and Procedure § 210.

Footnote 82. *United States v Union Nacional de Trabajadores* (CA1 Puerto Rico) 576 F2d 388, 98 BNA LRRM 2554, 83 CCH LC ¶ 10617.

Footnote 83. *United States v Albert* (CA1 Me) 773 F2d 386, 18 Fed Rules Evid Serv 831.

Footnote 84. *Wilson v Beebe* (CA6 Mich) 770 F2d 578 (among conflicting authorities on other grounds noted in *Fundiller v Cooper City* (CA11 Fla) 777 F2d 1436) and (among conflicting authorities on other grounds noted in *Kuhar v Hanton* (CA6 Ohio) 836 F2d 1348, reported in full 1988 US App LEXIS 140).

Footnote 85. *Blim v Western Elec. Co.* (CA10 Okla) 731 F2d 1473, 34 BNA FEP Cas

757, 34 CCH EPD ¶ 34300, 15 Fed Rules Evid Serv 1289, cert den 469 US 874, 83 L Ed 2d 161, 105 S Ct 233, 36 BNA FEP Cas 816, 35 CCH EPD ¶ 34663 and (criticized on other grounds by *Lindsey v American Cast Iron Pipe Co.* (CA11 Ala) 810 F2d 1094, 43 BNA FEP Cas 143, 42 CCH EPD ¶ 36945) and (among conflicting authorities on other grounds noted in *Hansard v Pepsi-Cola Metro. Bottling Co.* (CA5 Tex) 865 F2d 1461, 49 BNA FEP Cas 197, 49 CCH EPD ¶ 38764, 27 Fed Rules Evid Serv 644).

Footnote 86. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 87. *United States v Hardin* (CA7 Ill) 710 F2d 1231, 13 Fed Rules Evid Serv 890, cert den 464 US 918, 78 L Ed 2d 263, 104 S Ct 286.

Footnote 88. *United States v Wilson* (CA9 Nev) 690 F2d 1267, cert den 464 US 867, 78 L Ed 2d 178, 104 S Ct 205, reh den 467 US 1211, 81 L Ed 2d 358, 104 S Ct 2402 and (disapproved on other grounds by *United States v Young*, 470 US 1, 84 L Ed 2d 1, 105 S Ct 1038) as stated in *United States v Hoac* (CA9 Cal) 990 F2d 1099, 93 CDOS 2196, 93 Daily Journal DAR 3855, 37 Fed Rules Evid Serv 558, cert den (US) 127 L Ed 2d 392, 114 S Ct 1075.

Footnote 89. *Hobson v Wilson* (DC Dist Col) 556 F Supp 1157, affd in part and revd in part on other grounds 237 US App DC 219, 737 F2d 1, cert den 470 US 1084, 85 L Ed 2d 142, 105 S Ct 1843.

Footnote 90. *Wolf v Procter & Gamble Co.* (DC NJ) 555 F Supp 613, 12 Fed Rules Evid Serv 294, 37 FR Serv 2d 1053.

§ 1357 Records of foreign nations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(8)(A) of the Federal Rules of Evidence also permits the receipt into evidence of public records of foreign countries, such as a recommended decision and supporting documents prepared by the Japanese Fair Trade Commission, 91 a telex sent by the German government through the State Department to the Federal Aviation Administration regarding an ongoing case, 92 and a document written on official stationary, signed and sealed by Commander General of Honduran Navy, identifying a certain vessel as Honduran and consenting to the exercise of jurisdiction by the United States over the vessel. 93

Footnotes

Footnote 91. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368, on remand (CA3 Pa) 807 F2d 44, 1986-2 CCH Trade Cases ¶ 67374, cert den 481 US 1029, 95 L Ed 2d 527, 107 S Ct 1955 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 92. *Federal Aviation Admin. v Landy* (CA2 NY) 705 F2d 624, 13 Fed Rules Evid Serv 100, 36 FR Serv 2d 494, cert den 464 US 895, 78 L Ed 2d 232, 104 S Ct 243.

Footnote 93. *United States v Mena* (CA11 Fla) 863 F2d 1522, cert den 493 US 834, 107 L Ed 2d 72, 110 S Ct 109, 110 S Ct 110.

(iii). Report of Matters Observed Pursuant to Legal Duty [1358-1362]

§ 1358 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(8)(B) of the Federal Rules of Evidence allows the receipt of public records setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, except in criminal cases observed by police officers and other law enforcement personnel. 94 The source of the information recorded must have personal knowledge of the matters observed, 95 and the record must be of a sort which is routinely prepared, even if not required by statute. 96

◆ Observation: A state statute which requires a record to be kept but provides that such record shall not be admissible as evidence is not controlling in federal litigation where the Federal Rules of Evidence apply, but may nonetheless influence a federal District Court to exclude the record in question, particularly where there are factors present which make the record less trustworthy. 97

Rule 803(8)(B) does not require that a public official personally make the record, as long as the record is made pursuant to a duty imposed by law, which law may issue from a governmental agency. 98 But it does not include records based upon statements by persons outside the public agency, that is, private citizens, 99 unless a report can be used merely to prove that an outsider made a statement where this is itself significant. 1 Nor does the exception authorize admission of nonadversarial public hearing reports. 2

Footnotes

Footnote 94. FRE Rule 803(8)(B).

Footnote 95. *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437.

Footnote 96. *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

Annotation: Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 ALR3d 414.

Footnote 97. *Johnson v United States* (CA11 Fla) 780 F2d 902, 19 Fed Rules Evid Serv 1434 (criticized on other grounds by *Gutierrez-Rodriguez v Cartagena* (CA1 Puerto Rico) 882 F2d 553, 28 Fed Rules Evid Serv 1317) (court also considered circumstances under which report was prepared and inclusion of noncontemporaneous unofficial statements).

Footnote 98. *United States v Central Gulf Lines, Inc.* (ED La) 575 F Supp 1430, 1985 AMC 595, 15 Fed Rules Evid Serv 900, affd (CA5 La) 747 F2d 315, 1985 AMC 1982, 17 Fed Rules Evid Serv 568 (cargo survey reports and short landing certificates prepared by an independent surveyor who was hired by a private sponsor cooperating under agreement with the Agency for International Development were admissible as public records).

Footnote 99. *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054 (eyewitness account of accident included in policeman's accident report).

Footnote 1. *Hackley v Roudebush*, 171 US App DC 376, 520 F2d 108, 11 BNA FEP Cas 487, 10 CCH EPD ¶ 10403, 1 Fed Rules Evid Serv 170 (criticized on other grounds by *Haire v Calloway* (CA8 Mo) 526 F2d 246, 11 BNA FEP Cas 769, 10 CCH EPD ¶ 10505) (referring to provisions for prior consistent statements, prior inconsistent statements, and former testimony; citing proposed Rule).

Footnote 2. *Escrow Disbursement Ins. Agency, Inc. v American Title & Ins. Co.* (SD Fla) 551 F Supp 302.

§ 1359 Particular reports as admissible under Rule 803(8)(B)

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(8)(B) is designed to reach records which are relatively concrete and factual in nature, as opposed to interpretative or evaluative. It includes such records as—

—an accident report, insofar as it describes the scene of the accident and the extent of damages, 3 but not to the extent that the report draws conclusions. 4

- weather bureau records. 5
- a report of water temperatures in a river. 6
- reports from building code inspectors; 7
- a copyright certificate offered to prove the date when a sound recording first became copyrightable. 8
- an Immigration and Naturalization Service warrant of deportation. 9
- an Indian tribal roll. 10
- notices prepared by the Commissioner of Customs. 11
- a foreign notarial document. 12
- a report prepared by the Bureau of Alcohol, Tobacco, and Firearms establishing that a particular firearm traveled in interstate commerce. 13
- a trial transcript introduced to show that testimony was given and that an oath was taken. 14

§ 1359 ----Particular reports as admissible under Rule 803(8)(B) [SUPPLEMENT]

Practice Aids: Admissibility of government factfinding in products liability actions
29 ALR5th 534.

Case authorities:

Immigration form, which contained routine pedigree information and details of arrest, contained factual findings resulting from investigation made pursuant to authority granted by law, and driver's license application, which required DMV official to fill in certain routine information, could be considered statements setting forth matters observed pursuant to duty imposed by law, and thus were properly admitted. *Felzcerek v INS* (1996, CA2) 75 F3d 112.

Letters written by officials of Labor Department regarding validity of local union's trusteeship should not have been admitted in action by former business manager who was terminated following imposition and lifting of trusteeship since they were not records, reports, statements, or data compilations setting forth factual findings resulting from investigation made pursuant to authority granted by law. *Thompson v Office & Professional Employees Int'l Union* (1996, CA6 Tenn) 74 F3d 1492, 151 BNA LRRM 2425, 131 CCH LC ¶ 11506, reh, en banc, den (1996, CA6) 1996 US App LEXIS 8864.

Documents offered by insurer in support of motion for summary judgment are admissible, where it obtained them through Freedom of Information requests directed to public governmental agencies, because documents are subject to FRE 803(8) public records exception to hearsay rule, absent challenge to their trustworthiness. *Upjohn Co. v Aetna Casualty & Sur. Co.* (1993, WD Mich) 850 F Supp 1342.

Footnotes

Footnote 3. *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054.

Annotation: Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, 23 ALR2d 1360.

Admissibility of police reports under Federal Business Records Act (Federal Rules of Evidence, Rule 803, and predecessor amendments), 31 ALR Fed 457.

Footnote 4. *Lerner v Seaboard C. L. R. Co.* (SD NY) 594 F Supp 963 (notation in report that intersection is especially hazardous).

Footnote 5. *Evanston v Gunn*, 99 US 660, 9 Otto 660, 25 L Ed 306.

As to the admissibility of weather records generally, see § 1349.

Footnote 6. *Elwood v New York* (SD NY) 450 F Supp 846, revd on other grounds (CA2 NY) 606 F2d 358, 13 Env't Rep Cas 1833, cert den 447 US 906, 64 L Ed 2d 855, 100 S Ct 2989, 14 Env't Rep Cas 1575 (United States Geological Survey).

Footnote 7. *United States v Hansen* (CA7 Wis) 583 F2d 325, 4 Fed Rules Evid Serv 381, cert den 439 US 912, 58 L Ed 2d 259, 99 S Ct 283.

Footnote 8. *United States v Taxe* (CA9 Cal) 540 F2d 961, 192 USPQ 204, cert den 429 US 1040, 50 L Ed 2d 751, 97 S Ct 737, reh den 429 US 1124, 51 L Ed 2d 575, 97 S Ct 1163 and appeal after remand (CA9 Cal) 572 F2d 216, 200 USPQ 18, cert den 436 US 918, 56 L Ed 2d 759, 98 S Ct 2265, 200 USPQ 558 and (criticized on other grounds by *United States v Gering* (CA9 Wash) 716 F2d 615, 14 Fed Rules Evid Serv 348).

Footnote 9. *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659, reh den, en banc (CA5 Tex) 758 F2d 651.

Footnote 10. *United States v Torres* (CA7 Wis) 733 F2d 449, 15 Fed Rules Evid Serv 495, cert den 469 US 864, 83 L Ed 2d 135, 105 S Ct 204, post-conviction proceeding (CA7) 1991 US App LEXIS 6914.

Footnote 11. *In re Japanese Elec. Prods. Antitrust Litig.* (CA3 Pa) 723 F2d 238, 1983-2 CCH Trade Cases ¶ 65757, 14 Fed Rules Evid Serv 401, revd on other grounds, remanded 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, 1986-1 CCH Trade Cases ¶ 67004, 4 FR Serv 3d 368 and (criticized on other grounds by *Pfeiffer v Marion Ctr. Area Sch. Dist.* (CA3 Pa) 917 F2d 779, 31 Fed Rules Evid Serv 675).

Footnote 12. *Morgan Guaranty Trust Co. v Hellenic Lines, Ltd.* (SD NY) 621 F Supp 198, 1986 AMC 626.

Footnote 13. *United States v Johnson* (CA8 Mo) 722 F2d 407, 14 Fed Rules Evid Serv 1086.

Footnote 14. *United States v Arias* (CA9 Ariz) 575 F2d 253, 3 Fed Rules Evid Serv 184, cert den 439 US 868, 58 L Ed 2d 179, 99 S Ct 196.

§ 1360 Exclusion of observations of law enforcement personnel

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The exception to the hearsay rule for matters observed pursuant to duty imposed by law as to which matters there was a duty to report is not applicable in criminal cases with respect to matters observed by police officers and other law enforcement personnel. 15 This provision reflects Congress' reluctance to credit the accuracy of documents prepared by law enforcement personnel which purport to recount observations made in furtherance of criminal investigations. 16 Since the legislative history makes it clear that Congress was concerned with protecting the rights of the accused, 17 the language of the exception does not prevent the accused in criminal cases from introducing reports by law enforcement personnel under clause (B). 18 However, out-of-court statements of interviewees contained in such a report must come within separate hearsay exceptions before they can be admitted. 19

The phrase "other law enforcement personnel," as used in Rule 803(8)(B), includes any officer or employee of a governmental agency which has law enforcement responsibilities, 20 but does not apply to those officials whose reports would not lead to a criminal conviction. 21

Footnotes

Footnote 15. FRE Rule 803(8)(B).

Annotation: Admissibility, over hearsay objection, of police observations and investigative findings offered by government in criminal prosecution, excluded from public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence, 56 ALR Fed 168.

Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exception to hearsay rule in criminal cases matters observed by law enforcement officers, 37 ALR Fed 831.

Practice Aids: Hunter, Federal Trial Handbook (3d ed) § 55:19.

Footnote 16. *United States v Shoupe* (CA6 Ohio) 548 F2d 636, 2 Fed Rules Evid Serv 636.

Footnote 17. Excerpts from Congressional Record for Feb. 6, 1974, H563-H565.

Footnote 18. *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid

Serv 22, 31 ALR Fed 437; *United States v Oates* (CA2 NY) 560 F2d 45, 1 Fed Rules Evid Serv 718, on remand (ED NY) 445 F Supp 351, affd without op (CA2 NY) 591 F2d 1332 and (criticized on other grounds by *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256) and (criticized on other grounds by *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187) and (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Hines* (AFCMR) 18 MJ 729 and (criticized on other grounds by *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659) and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695) and (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and (criticized on other grounds by *United States v Picciandra* (CA1 Mass) 788 F2d 39, 86-1 USTC ¶ 9322, 20 Fed Rules Evid Serv 20) and (not followed on other grounds by *United States v Yeoman* (NMCMR) 22 MJ 762) and (criticized on other grounds by *United States v Hernandez-Rojas* (CA9 Or) 617 F2d 533, 6 Fed Rules Evid Serv 207) and (criticized on other grounds by *United States v Bland* (CA9 Cal) 961 F2d 123, 92 CDOS 2405, 92 Daily Journal DAR 3795, 35 Fed Rules Evid Serv 296) and (criticized on other grounds by *United States v Blackburn* (CA7 Ind) 992 F2d 666, 36 Fed Rules Evid Serv 1328).

Footnote 19. *United States v De Peri* (CA3 Pa) 778 F2d 963, 19 Fed Rules Evid Serv 256 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and cert den 475 US 1110, 89 L Ed 2d 916, 106 S Ct 1518 and cert den 476 US 1159, 90 L Ed 2d 720, 106 S Ct 2277 (FBI agent's report detailing his interviews during course of criminal investigation).

Footnote 20. *United States v Oates* (CA2 NY) 560 F2d 45, 1 Fed Rules Evid Serv 718, on remand (ED NY) 445 F Supp 351, affd without op (CA2 NY) 591 F2d 1332 and (criticized on other grounds by *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256) and (criticized on other grounds by *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187) and (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Hines* (AFCMR) 18 MJ 729 and (criticized on other grounds by *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659) and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695) and (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and (criticized on other grounds by *United States v Picciandra* (CA1 Mass) 788 F2d 39, 86-1 USTC ¶ 9322, 20 Fed Rules Evid Serv 20) and (not followed on other grounds by *United States v Yeoman* (NMCMR) 22 MJ 762) and (criticized on other grounds by *United States v Hernandez-Rojas* (CA9 Or) 617 F2d 533, 6 Fed Rules Evid Serv 207) and (criticized on other grounds by *United States v Bland* (CA9 Cal) 961 F2d 123, 92 CDOS 2405, 92 Daily Journal DAR 3795, 35 Fed Rules Evid Serv 296) and (criticized on other grounds by *United States v Blackburn* (CA7 Ind) 992 F2d 666, 36 Fed Rules Evid Serv 1328) (Customs Inspector at border).

Footnote 21. *United States v Hansen* (CA7 Wis) 583 F2d 325, 4 Fed Rules Evid Serv 381, cert den 439 US 912, 58 L Ed 2d 259, 99 S Ct 283 (city building inspector).

§ 1361 --Routine reports of nonadversarial nature

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the exclusion pertaining to matters observed by law enforcement personnel embraces many kinds of investigative reports, 22 it does not apply to routine reports of a nonadversarial nature. 23 The factors to be considered in determining whether a document is "routine" and "nonadversarial" include whether it is the product of a ministerial, objective, and nonevaluative act, and whether the report was made with knowledge that the act was requested as part of a criminal investigation. 24

Footnotes

Footnote 22. *United States v Ruffin* (CA2 NY) 575 F2d 346, 78-1 USTC ¶ 9269, 2 Fed Rules Evid Serv 1307, 41 AFTR 2d 78-1021 (criticized on other grounds by *United States v De Bright* (CA9 Ariz) 710 F2d 1404) and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Panzardi-Lespier* (CA1 Puerto Rico) 918 F2d 313, 31 Fed Rules Evid Serv 846) (IRS record as to statement by defendant relating to tax liability of his corporation); *United States v Oates* (CA2 NY) 560 F2d 45, 1 Fed Rules Evid Serv 718, on remand (ED NY) 445 F Supp 351, affd without op (CA2 NY) 591 F2d 1332 and (criticized on other grounds by *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256) and (criticized on other grounds by *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187) and (disapproved on other grounds by *Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240, 7 Fed Rules Evid Serv 1) as stated in *United States v Hines* (AFCMR) 18 MJ 729 and (criticized on other grounds by *United States v Quezada* (CA5 Tex) 754 F2d 1190, 17 Fed Rules Evid Serv 659) and (among conflicting authorities on other grounds noted in *United States v Nixon* (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194) and (criticized on other grounds by *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695) and (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) and (criticized on other grounds by *United States v Picciandra* (CA1 Mass) 788 F2d 39, 86-1 USTC ¶ 9322, 20 Fed Rules Evid Serv 20) and (not followed on other grounds by *United States v Yeoman* (NMCMR) 22 MJ 762) and (criticized on other grounds by *United States v Hernandez-Rojas* (CA9 Or) 617 F2d 533, 6 Fed Rules Evid Serv 207) and (criticized on other grounds by *United States v Bland* (CA9 Cal) 961 F2d 123, 92 CDOS 2405, 92 Daily Journal DAR 3795, 35 Fed Rules Evid Serv 296) and (criticized on other grounds by *United States v Blackburn* (CA7 Ind) 992 F2d 666, 36 Fed Rules Evid Serv 1328) (laboratory analysis of heroin prepared by government chemist); *United States v Campagnuolo* (CA5 Fla) 592 F2d 852 (criticized on other grounds by *Government of Virgin Islands v Martinez* (CA3 VI) 780 F2d 302) (FBI agent's written report of substance of telephone calls received on defendant's telephone).

Footnote 23. *United States v Union Nacional de Trabajadores* (CA1 Puerto Rico) 576 F2d 388, 98 BNA LRRM 2554, 83 CCH LC ¶ 10617 (marshal's return of service); *United States v Grady* (CA2 NY) 544 F2d 598, 1 Fed Rules Evid Serv 408, 37 ALR Fed 819 (routine function of recording serial numbers and receipts of weapons found in Northern Ireland); *United States v Dancy* (CA5 Tex) 861 F2d 77, 26 Fed Rules Evid Serv 1109 (fingerprint card, which contained defendant's fingerprints, physical description, sentence, and California Department of Corrections reporting date); *United States v Wilmer* (CA9 Wash) 799 F2d 495, 21 Fed Rules Evid Serv 761, cert den 481 US 1004, 95 L Ed 2d 200, 107 S Ct 1626 (breathalyzer calibration report); *United States v Gilbert* (CA9 Or) 774 F2d 962, 19 Fed Rules Evid Serv 602 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) (card with attached latent fingerprint and Department of Public Safety employee's notation that fingerprint had been lifted from seized item); *United States v Orozco* (CA9 Cal) 590 F2d 789, 4 Fed Rules Evid Serv 308, cert den 439 US 1049, 58 L Ed 2d 709, 99 S Ct 728 and cert den 442 US 920, 61 L Ed 2d 288, 99 S Ct 2845 (computer data cards indicating that car owned by defendant had crossed border on certain night).

Footnote 24. *United States v Gilbert* (CA9 Or) 774 F2d 962, 19 Fed Rules Evid Serv 602 (among conflicting authorities on other grounds noted in *United States v Wright-Barker* (CA3 NJ) 784 F2d 161) (routine report of latent fingerprint).

§ 1362 --Excludable material as admissible under another exception to hearsay rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The question has arisen whether law enforcement records which are inadmissible under the exclusion in Rule 803(8)(B) are admissible under other exceptions to the hearsay rule. It has been held that the exclusion in Rule 803(8)(B) bars resort to other hearsay exceptions, ²⁵ but it has also been held that the exclusion does not apply to the past recorded recollections of a testifying police officer which would otherwise be admissible under the exception in Rule 803(5). ²⁶ The view has also been expressed that a law enforcement report may be admitted under the "business records" exception if the author is available to testify at trial. ²⁷ And where the existence or nonexistence of a particular public record is relevant to an accused's criminal liability, a statement of law enforcement personnel that no such record has been found after diligent search is admissible under Rule 803(10). ²⁸

◆ Observation: Several courts have noted the disagreement over whether a report that is inadmissible under Rule 803(8)(B) is nonetheless admissible under one of the other hearsay exceptions, but have found it unnecessary to resolve the question in the cases presented. ²⁹

Footnotes

Footnote 25. *United States v Cain* (CA5 La) 615 F2d 380, 5 Fed Rules Evid Serv 1103;

United States v Smith, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437.

Footnote 26. United States v Sawyer (CA7 Ill) 607 F2d 1190, 79-2 USTC ¶ 9537, 4 Fed Rules Evid Serv 1142, 44 AFTR 2d 79-5471, cert den 445 US 943, 63 L Ed 2d 776, 100 S Ct 1338.

As to past recorded recollections, generally, see §§ 1264 et seq.

Footnote 27. United States v Sawyer (CA7 Ill) 607 F2d 1190, 79-2 USTC ¶ 9537, 4 Fed Rules Evid Serv 1142, 44 AFTR 2d 79-5471, cert den 445 US 943, 63 L Ed 2d 776, 100 S Ct 1338; Chaney v Brown (CA10 Okla) 730 F2d 1334, motion gr, cert den 469 US 1090, 83 L Ed 2d 710, 105 S Ct 601.

As to the admission of business records notwithstanding their nature as hearsay, see §§ 1290 et seq.

Footnote 28. § 1377.

Footnote 29. United States v Nixon (CA2 NY) 779 F2d 126, 19 Fed Rules Evid Serv 194; United States v Wright-Barker (CA3 NJ) 784 F2d 161 (among conflicting authorities on other grounds noted in United States v Martinez-Hidalgo (CA3 VI) 993 F2d 1052, 28 VI 365).

(iv). Records of Factual Findings from Authorized Investigations [1363-1369]

§ 1363 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Rule 803(8)(C) of the Federal Rules of Evidence allows for the receipt in civil actions and proceedings, and against the government in criminal cases, of public records setting forth factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. 30 These records must relate to matters which the agency is authorized to investigate, 31 and the factual findings must be based upon the full administrative process required by law. 32 The requirement of the Rule that a report contain factual findings bars admission of statements not based on factual investigation. 33 The language of the Rule is "pursuant to authority" and this means "authorized" rather than "required." 34 All that is required is that the grant of authority issue from a properly constituted body. 35 The investigation from which the records are derived must be conducted by a public agency. 36 The information gathered by the agency need not be the result of a routine, ongoing, or periodic investigation, but need only be the type of information the agency routinely gathers in the regular course of its business pursuant to authority granted by law. 37 The fact that an investigatory proceeding could also be

labeled a "quasi-judicial hearing" is of no consequence. 38

The exception is not available to the government in making its case in a criminal prosecution. 39 Moreover, even a record which satisfies the requirements set forth in the Rule is subject to exclusion by the trial court under Rule 403 on grounds of prejudice, confusion, or waste of time. 40 "Factual findings" within the meaning of the Rule necessarily entail a delineation of past, or at least ongoing, events; thus, a memorandum that outlines future inquiries and expected results is inadmissible under the Rule. 41

§ 1363 ----Generally [SUPPLEMENT]

Case authorities:

Findings of ALJ of state Labor Department that plaintiff had not misrepresented her husband's insurance coverage to her employer would be admissible evidence under Rule 803(8)(c) as factual findings resulting from investigation pursuant to authority granted by law, unless sources of information or other circumstances indicate lack of trustworthiness; sweep of rule encompasses administrative proceedings. *Henry v Daytop Village* (1994, CA2 NY) 42 F3d 89, 66 BNA FEP Cas 882.

Footnotes

Footnote 30. FRE Rule 803(8)(C).

Footnote 31. *United States v School Dist.* (CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid Serv 225, 47 ALR Fed 294.

Annotation: Admissibility, under Rule 803(8)(C) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law", 47 ALR Fed 321.

Footnote 32. *SEC v General Refractories Co.* (DC Dist Col) 400 F Supp 1248, CCH Fed Secur L Rep ¶ 95291, 1 Fed Rules Evid Serv 105.

A SEC release designed to notify the public that the trading suspension of certain securities was lifted and that their price might be subject to erratic price movements because of control by one individual of 60 percent of the float was inadmissible hearsay since the release was not a determination of facts obtained after administrative proceedings. *United States v Corr* (CA2 NY) 543 F2d 1042, 1 Fed Rules Evid Serv 376.

Footnote 33. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

Footnote 34. *Jenkins v Whittaker Corp.* (CA9 Hawaii) 785 F2d 720, 20 Fed Rules Evid Serv 654, 5 FR Serv 3d 232, cert den 479 US 918, 93 L Ed 2d 296, 107 S Ct 324 (accident report prepared by Army personnel was within Rule 803(8)(C) despite fact that they were not mandated by law).

Footnote 35. *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564 (shooting review board, report of which was properly admitted, was properly constituted body of state's department of public safety under state statute).

Footnote 36. *Lamphere v Brown University* (CA1 RI) 685 F2d 743, 29 BNA FEP Cas 701, 29 CCH EPD ¶ 32928, 11 Fed Rules Evid Serv 388, later proceeding (DC RI) 613 F Supp 971, 38 BNA FEP Cas 871, 39 CCH EPD ¶ 36062, vacated on other grounds (CA1 RI) 798 F2d 532, 41 BNA FEP Cas 828, 41 CCH EPD ¶ 36434, on remand (DC RI) 690 F Supp 125, 47 BNA FEP Cas 300, 49 CCH EPD ¶ 38819, later proceeding (DC RI) 706 F Supp 131, 49 BNA FEP Cas 106, on reconsideration (DC RI) 712 F Supp 1053, affd (CA1 RI) 875 F2d 916, 49 BNA FEP Cas 1464, 50 CCH EPD ¶ 39025 and dismd without op (CA1 RI) 900 F2d 247 and app den (CA1 RI) 843 F2d 1383 (investigation of sex discrimination at a private university conducted by a hearing panel composed of faculty members was not admissible under Rule 803(8)).

Footnote 37. *Keith v Volpe* (CD Cal) 618 F Supp 1132 (information gathered pursuant to court order).

Footnote 38. *Revlon, Inc. v Carson Products Co.* (SD NY) 602 F Supp 1071, revd on other grounds (CA FC) 803 F2d 676, 231 USPQ 472, later proceeding (SD NY) 647 F Supp 905 and cert den 479 US 1018, 93 L Ed 2d 722, 107 S Ct 671 (affidavit of FDA official giving findings in accordance with investigation conducted in determining trade secret status of product.)

Footnote 39. *United States v Davis* (CA5 Ga) 571 F2d 1354, 3 Fed Rules Evid Serv 761.

Footnote 40. *Wilson v Attaway* (CA11 Ga) 757 F2d 1227, 17 Fed Rules Evid Serv 1380, reh den (CA11 Ga) 764 F2d 1411.

As to Rule 403, generally, see §§ 324 et seq.

Footnote 41. *Koonce v Quaker Safety Products & Mfg. Co.* (CA5 Tex) 798 F2d 700, CCH Prod Liab Rep ¶ 11207, 21 Fed Rules Evid Serv 631, reh overr (CA5 Tex) 814 F2d 209.

§ 1364 Particular reports as admissible

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(8)(C) permits receipt of reports by public officials which are evaluations and interpretations of outside data, such as—

—the annual reports of federal agencies. 42

—inspection reports issued by federal agencies. 43

—administrative findings made in connection with complaints of discrimination in

employment, education, or housing, whether cast in the form of the findings of a hearing examiner, 44 investigative field reports, 45 or affidavits supporting findings of field reports. 46

—a police accident report stating conclusions based upon interviews with the persons involved. 47

—safety standards based upon study by a public agency. 48

—federal studies of diseases. 49

—reports of the Consumer Products Safety Commission. 50

—decisions of the Federal Communications Commission regarding tariffs of the American Telephone and Telegraph Company. 51

—segments of Senate Committee Reports, even though they are factual evaluations rather than compilations of data, where the reports reflect adherence to scholarly responsibility and investigative integrity. 52

—a graph from a Drug Enforcement Administration statistical report showing the average retail price and purity of illicit drugs. 53

—aircraft accident investigation reports prepared by the Armed Forces. 54

—a report of the Commission on Wartime Relocation and Internment of Civilians. 55

—correspondence between defendant corporations in a products liability action and the National Highway Safety Administration urging manufacturers to initiate voluntary recall of products. 56

Footnotes

Footnote 42. *Givens v Lederle* (CA5 Fla) 556 F2d 1341, 2 Fed Rules Evid Serv 387 (annual polio summary of Center for Disease Control offered to show that medical profession recognized occurrence of vaccine-induced polio).

Footnote 43. *Higgenbottom v Noreen* (CA9 Or) 586 F2d 719, 4 Fed Rules Evid Serv 202 (inspections made by Veterans' Administration of house purchased by veteran).

Footnote 44. *Chandler v Roudebush*, 425 US 840, 48 L Ed 2d 416, 96 S Ct 1949, 12 BNA FEP Cas 1368, 11 CCH EPD ¶ 10957 (Veterans' Administration employee alleging denial of promotion on basis of sex and race); *United States v School Dist.* (CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid Serv 225, 47 ALR Fed 294 (school desegregation suit); *Hall v United States* (DC Minn) 436 F Supp 505, 18 BNA FEP Cas 335, 15 CCH EPD ¶ 8084 (age discrimination); *Buffington v Defense Mapping Agency* (ED Mo) 435 F Supp 816, 23 BNA FEP Cas 201 (racial discrimination in employment).

Footnote 45. *Hodge v Seiler* (CA5 La) 558 F2d 284, 2 Fed Rules Evid Serv 721 (investigation by Department of Housing and Urban Development of racial

discrimination in housing); *Cohen v Illinois Institute of Technology* (CA7 Ill) 524 F2d 818, 11 BNA FEP Cas 659, 11 BNA FEP Cas 1448, 10 CCH EPD ¶ 10465, cert den 425 US 943, 48 L Ed 2d 187, 96 S Ct 1683, 12 BNA FEP Cas 1090, 12 CCH EPD ¶ 11172 and (among conflicting authorities on other grounds noted in *Traggis v St. Barbara's Greek Orthodox Church* (CA2 Conn) 851 F2d 584) (investigation by Department of Health, Education and Welfare of sex discrimination in employment).

Footnote 46. *Fowler v Blue Bell, Inc.* (CA11 Ala) 737 F2d 1007, 35 BNA FEP Cas 752, 34 CCH EPD ¶ 34542, 16 Fed Rules Evid Serv 126.

Footnote 47. *Wilson v Beebe* (CA6 Mich) 770 F2d 578 (among conflicting authorities on other grounds noted in *Fundiller v Cooper City* (CA11 Fla) 777 F2d 1436) and (among conflicting authorities on other grounds noted in *Kuhar v Hanton* (CA6 Ohio) 836 F2d 1348, reported in full 1988 US App LEXIS 140); *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Annotation: Admissibility of police reports under Federal Business Records Act (Federal Rules of Evidence, Rule 803, and predecessor amendments), 31 ALR Fed 457.

Footnote 48. *Melville v American Home Assur. Co.* (CA3 Pa) 584 F2d 1306, 3 Fed Rules Evid Serv 756 (airworthiness directive prepared by Federal Aviation Administration); *Muncie Aviation Corp. v Party Doll Fleet, Inc.* (CA5 Ga) 519 F2d 1178, 1 Fed Rules Evid Serv 133.

Annotation: Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Footnote 49. *Ellis v International Playtex, Inc.* (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561 (studies of toxic shock syndrome containing tentative conclusions and statistical findings); *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314 (epidemiological studies prepared by the Center for Disease Control).

Footnote 50. *Roth v Black & Decker, Inc.* (CA8 Mo) 737 F2d 779, CCH Prod Liab Rep ¶ 10138, 15 Fed Rules Evid Serv 1827.

Footnote 51. *Litton Systems, Inc. v American Tel. & Tel. Co.* (CA2 NY) 700 F2d 785, 1982-83 CCH Trade Cases ¶ 65194, 12 Fed Rules Evid Serv 1426 (among conflicting authorities on other grounds noted in *Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.* (US) 123 L Ed 2d 611, 113 S Ct 1920, 93 CDOS 3198, 93 Daily Journal DAR 5465, 26 USPQ2d 1641, 1993-1 CCH Trade Cases ¶ 70207, 7 FLW Fed S 223).

Footnote 52. *Hobson v Wilson* (DC Dist Col) 556 F Supp 1157, affd in part and revd in part on other grounds 237 US App DC 219, 737 F2d 1, cert den 470 US 1084, 85 L Ed 2d 142, 105 S Ct 1843.

Footnote 53. *United States v Hardin* (CA7 Ill) 710 F2d 1231, 13 Fed Rules Evid Serv 890, cert den 464 US 918, 78 L Ed 2d 263, 104 S Ct 286.

Footnote 54. *In re Air Crash Disaster at Mannheim* (ED Pa) 586 F Supp 711, CCH Prod Liab Rep ¶ 10414, 16 Fed Rules Evid Serv 101, revd on other grounds, remanded (CA3 Pa) 769 F2d 115, CCH Prod Liab Rep ¶ 10598, cert den 474 US 1082, 88 L Ed 2d 891, 106 S Ct 851, reh den 480 US 941, 94 L Ed 2d 784, 107 S Ct 1596 and reh den 481 US 1008, 95 L Ed 2d 208, 107 S Ct 1636.

Footnote 55. *Korematsu v United States* (ND Cal) 584 F Supp 1406, 16 Fed Rules Evid Serv 1231.

Footnote 56. *In re Multi-Piece Rims Products Liability Litigation* (WD Mo) 545 F Supp 149, 11 Fed Rules Evid Serv 572.

§ 1365 Records containing statements of third parties

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(8)(C) embraces records based upon statements or testimony by persons other than the preparer of the record, 57 if the preparer has firsthand knowledge of the statements made by declarants with firsthand knowledge of the facts mentioned in the public record. 58 The Rule does not authorize the receipt in evidence of hearsay statements of third parties on which the factual findings in question are based. 59

Footnotes

Footnote 57. *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054 (accident report prepared by police officer received in personal injury suit).

Footnote 58. *Fraley v Rockwell International Corp.* (SD Ohio) 470 F Supp 1264, 4 Fed Rules Evid Serv 1172.

Footnote 59. *John McShain, Inc. v Cessna Aircraft Co.* (CA3) 563 F2d 632, 2 Fed Rules Evid Serv 479 (airline accident reports including statements filed by pilots as well as reports of government investigators); *Florida Canal Industries, Inc. v Rambo* (CA5 Fla) 537 F2d 200 (Coast Guard accident report including statement by surviving yacht owner); *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054; *Brown v Sierra Nevada Memorial Miners Hospital* (CA9 Cal) 849 F2d 1186, 46 CCH EPD ¶ 38047, 25 Fed Rules Evid Serv 1435; *Baker v Firestone Tire & Rubber Co.* (CA11 Fla) 793 F2d 1196, 21 Fed Rules Evid Serv 79 (congressional report containing testimony and statements made to subcommittee as part of its investigation).

§ 1366 Reports containing conclusions or opinions

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Investigatory reports which are otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. 60 The term "factual findings" encompasses inferences drawn from facts, and conclusory statements do not render an item of evidence inadmissible. 61 Factual findings admissible under Rule 803(8)(C) include those which are made by the preparer of the report from disputed evidence. 62 Once a report is shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry is not whether the report contains opinions and conclusions but rather whether it is trustworthy. 63

Footnotes

Footnote 60. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531; *Litton Systems, Inc. v American Tel. & Tel. Co.* (CA2 NY) 700 F2d 785, 1982-83 CCH Trade Cases ¶ 65194, 12 Fed Rules Evid Serv 1426 (among conflicting authorities on other grounds noted in *Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.* (US) 123 L Ed 2d 611, 113 S Ct 1920, 93 CDOS 3198, 93 Daily Journal DAR 5465, 26 USPQ2d 1641, 1993-1 CCH Trade Cases ¶ 70207, 7 FLW Fed S 223) (admitting findings of FCC that tariffs were "unreasonable" and "discriminatory"); *Zenith Radio Corp. v Matsushita Electric Industrial Co.* (ED Pa) 505 F Supp 1125, 6 Fed Rules Evid Serv 801; *McClure v Mexia Independent School Dist.* (CA5 Tex) 750 F2d 396, 36 BNA FEP Cas 1402, 35 CCH EPD ¶ 34910, 17 Fed Rules Evid Serv 109, reh den, en banc (CA5 Tex) 755 F2d 173 and (among conflicting authorities on other grounds noted in *Gilchrist v Jim Slemmons Imports, Inc.* (CA9 Cal) 803 F2d 1488, 42 BNA FEP Cas 314, 1 BNA IER Cas 1053, 41 CCH EPD ¶ 36656) (EEOC determination of reasonable cause to believe discrimination had occurred); *United States v School Dist.* (CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid Serv 225, 47 ALR Fed 294 (findings of HEW hearing examiner that school had been established and maintained as black school for segregation purposes); *Jenkins v Whittaker Corp.* (CA9 Hawaii) 785 F2d 720, 20 Fed Rules Evid Serv 654, 5 FR Serv 3d 232, cert den 479 US 918, 93 L Ed 2d 296, 107 S Ct 324; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564 (report containing conclusion that there was no doubt that defendant acted within guidelines established by state highway patrol policies and procedures manual).

Reports resting on medical opinions and diagnoses representing the findings of a public agency made pursuant to an investigation are admissible if found to be trustworthy. *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314.

Law Reviews: Turner, Admissibility of Accident Reports into Evidence Under Federal Rule of Evidence 803(8)(C). 35 Trial Law G 137 (Summer 1991).

Footnote 61. *Revlon, Inc. v Carson Products Co.* (SD NY) 602 F Supp 1071, later proceeding (SD NY) 226 USPQ 51, application gr, motion gr, in part, motion den, in part (SD NY) 622 F Supp 362, 227 USPQ 411, 4 FR Serv 3d 89, and affd in part and revd in part on other grounds (CA FC) 803 F2d 676, 231 USPQ 472, cert den 479 US 1018, 93 L Ed 2d 722, 107 S Ct 671 (affidavit of Director of Division of Cosmetic Technology, Bureau of Foods, FDA).

Footnote 62. *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054 (police accident report observing that one vehicle apparently entered intersection against red light and concluding that cause of accident was vehicle's failure to yield right of way).

Footnote 63. *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314.

As to the trustworthiness of a report proffered under Rule 803(8)(C), see § 1368.

§ 1367 Scientific reports

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A scientific report the admission of which is sought under Rule 803(8)(C) is not unreliable by reason of the fact that no experts testify at trial about the methodology used to obtain the data. Because the evidence in such a report has been gathered and presented by a public agency, it may be presumed to reflect methodologies accepted by the scientific community. The burden rests with the opponent and not the proponent of the report to demonstrate that the methodology was flawed. The hearsay exception assumes regularity of procedure absent a showing to the contrary. Whether the declarant or the investigator was available to testify about the methodology or whether the report stated its methodology are not by themselves reason to exclude the report. An opponent's concern about the methodology of scientific studies should be addressed to the relative weight accorded the evidence and not its admissibility. 64

Footnotes

Footnote 64. *Ellis v International Playtex, Inc.* (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561.

§ 1368 Trustworthiness

[View Entire Section](#)

Under Rule 803(8)(C) of the Federal Rules of Evidence, the trial court has the discretion and obligation to exclude an entire report or portions of it, whether narrow factual statements or broader conclusions, that it determines to be untrustworthy. 65 The burden of proof on this issue is on the opponent of the evidence. 66 The focus in a determination of trustworthiness is not whether the court agrees with the report or its conclusions, but rather whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon. 67 Discrepancies and ambiguities contained in a report do not render it untrustworthy within the meaning of the Rule, but go only to the weight to be given to it by the trier of fact. 68

◆ Observation: Rule 803(6), the "business records" exception, also contains a proviso permitting exclusion of evidence otherwise qualifying for admission if such evidence is deemed untrustworthy. 69 The presence of this proviso in both Rules has led one court to say that it would be incongruous to hold that, although a given compilation of data lacks sufficient trustworthiness for admission as business records under FR Evid, Rule 803(6), it may nonetheless be introduced as a public report pursuant to FR Evid, Rule 803(8). 70

Footnotes

Footnote 65. *Beech Aircraft Corp. v Rainey*, 488 US 153, 102 L Ed 2d 445, 109 S Ct 439, 1989 AMC 441, 26 Fed Rules Evid Serv 257, on remand, en banc (CA11 Fla) 868 F2d 1531.

Footnote 66. *Gentile v County of Suffolk* (CA2 NY) 926 F2d 142, 32 Fed Rules Evid Serv 315; *Ellis v International Playtex, Inc.* (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561 (studies of toxic shock syndrome by Center for Disease Control); *Baker v Elcona Homes Corp.* (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054; *Kehm v Procter & Gamble Mfg. Co.* (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314; *Perrin v Anderson* (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564; *Fayson v Schmadl* (DC Dist Col) 126 FRD 419.

Footnote 67. *Moss v Ole South Real Estate, Inc.* (CA5 Miss) 933 F2d 1300, 33 Fed Rules Evid Serv 609 (criticized on other grounds by *In re Oil Spill by The Amoco Cadiz* (CA7 Ill) 954 F2d 1279, 1992 AMC 913, 35 Fed Rules Evid Serv 1204, 22 ELR 20835).

Footnote 68. *Fayson v Schmadl* (DC Dist Col) 126 FRD 419.

Footnote 69. § 1312.

Footnote 70. *Cleveland v Cleveland Electric Illuminating Co.* (ND Ohio) 538 F Supp 1257.

§ 1369 --Circumstances bearing on trustworthiness of report

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Reports of a conclusory nature can be excluded in the court's discretion under Rule 803(8)(C) where the nature of the opinions is such as to suggest a lack of trustworthiness.

71 The determination of trustworthiness should not be made on the basis of mere reliance on the title of the official or the body making the report. 72 Facts relevant to a determination of trustworthiness include—

—the adequacy of an official's investigation. 73

—the official's level of skill and expertise in the area in question. 74

—the timeliness of the investigation. 75

—whether a formal hearing was held and the level at which it was conducted. 76

—the presence or absence of factors indicating bias. 77

—any other fact or circumstance relevant to the reliability of the report. 78

◆ Observation: The ability of the proponent of a report to produce as witnesses the persons who prepared the report may indicate that the admission of the report under Rule 803(8)(C) is not in order, at least where other factors suggest that it may be untrustworthy. 79

Footnotes

Footnote 71. *Koonce v Quaker Safety Products & Mfg. Co.* (CA5 Tex) 798 F2d 700, CCH Prod Liab Rep ¶ 11207, 21 Fed Rules Evid Serv 631, reh overr (CA5 Tex) 814 F2d 209 (memo outlined future inquiries into safety measures and offered opinions on expected results, and did not involve hearing or comprehensive investigation); *Bright v Firestone Tire & Rubber Co.* (CA6 Tenn) 756 F2d 19, CCH Prod Liab Rep ¶ 10404 (report of House subcommittee consisted of subjective conclusions regarding defendant tire company's culpability rather than factual findings and was based on hearsay regarding lawsuits and customer complaints without any investigation into the ground for those complaints); *Jenkins v Whittaker Corp.* (CA9 Hawaii) 785 F2d 720, 20 Fed Rules Evid Serv 654, 5 FR Serv 3d 232, cert den 479 US 918, 93 L Ed 2d 296, 107 S Ct 324 (author of report had no competence or experience in field, arrived at accident scene over a week after accident, and did not talk to personnel involved).

Footnote 72. *Matthews v Ashland Chemical, Inc.* (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248.

Footnote 73. *Koonce v Quaker Safety Products & Mfg. Co.* (CA5 Tex) 798 F2d 700,

CCH Prod Liab Rep ¶ 11207, 21 Fed Rules Evid Serv 631, reh overr (CA5 Tex) 814 F2d 209 (memorandum regarding explosion written by operator of plant was untrustworthy where it did not involve hearing or comprehensive investigation); Matthews v Ashland Chemical, Inc. (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248 (report prepared by chief fire investigator of town fire department where investigator spent only 2 hours at premises, conducted no additional investigation, and did not disassemble allegedly offending machinery); Miller v Caterpillar Tractor Co. (CA6 Mich) 697 F2d 141, CCH Prod Liab Rep ¶ 9486, 12 Fed Rules Evid Serv 819 (accident reports prepared by mining engineer with United States Bureau of Mines and by police officer were untrustworthy where investigation commenced 3 days after accident occurred, authors of report possessed no firsthand knowledge of accident, and reports were derived from information received from other persons); Jenkins v Whittaker Corp. (CA9 Hawaii) 785 F2d 720, 20 Fed Rules Evid Serv 654, 5 FR Serv 3d 232, cert den 479 US 918, 93 L Ed 2d 296, 107 S Ct 324 (report describing accident involving atomic simulator was untrustworthy where author had no experience with atomic simulators, arrived at accident scene weeks after accident, and never talked to any personnel involved).

Footnote 74. Ellis v International Playtex, Inc. (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561; Matthews v Ashland Chemical, Inc. (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248; Miller v Caterpillar Tractor Co. (CA6 Mich) 697 F2d 141, CCH Prod Liab Rep ¶ 9486, 12 Fed Rules Evid Serv 819; Kehm v Procter & Gamble Mfg. Co. (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314; Jenkins v Whittaker Corp. (CA9 Hawaii) 785 F2d 720, 20 Fed Rules Evid Serv 654, 5 FR Serv 3d 232, cert den 479 US 918, 93 L Ed 2d 296, 107 S Ct 324.

Footnote 75. Ellis v International Playtex, Inc. (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561; Matthews v Ashland Chemical, Inc. (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248; Baker v Elcona Homes Corp. (CA6 Ohio) 588 F2d 551, 3 Fed Rules Evid Serv 1592, cert den 441 US 933, 60 L Ed 2d 661, 99 S Ct 2054; Abdel v United States (CA7 Ill) 670 F2d 73, 9 Fed Rules Evid Serv 1697; Kehm v Procter & Gamble Mfg. Co. (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041, later proceeding (CA8 Iowa) 724 F2d 630, 38 FR Serv 2d 314; Perrin v Anderson (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 76. United States v Corr (CA2 NY) 543 F2d 1042, 1 Fed Rules Evid Serv 376; Drummond v Alia-The Royal Jordanian Airline Corp. (WD Pa) 11 Fed Rules Evid Serv 1904; Matthews v Ashland Chemical, Inc. (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248; Perrin v Anderson (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564.

Footnote 77. Ellis v International Playtex, Inc. (CA4 Va) 745 F2d 292, CCH Prod Liab Rep ¶ 10196, 16 Fed Rules Evid Serv 561; Matthews v Ashland Chemical, Inc. (CA5 La) 770 F2d 1303, 19 Fed Rules Evid Serv 248; Wilson v Beebe (CA6 Mich) 743 F2d 342, 16 Fed Rules Evid Serv 335, different result reached on other grounds on reh, en banc (CA6 Mich) 770 F2d 578 and (among conflicting authorities on other grounds noted in Haygood v Younger (CA9 Cal) 769 F2d 1350); United States v Hardin (CA7 Ill) 710 F2d 1231, 13 Fed Rules Evid Serv 890, cert den 464 US 918, 78 L Ed 2d 263, 104 S Ct 286; Kehm v Procter & Gamble Mfg. Co. (CA8 Iowa) 724 F2d 613, CCH Prod Liab Rep ¶ 9873, 14 Fed Rules Evid Serv 1041; Perrin v Anderson (CA10 Okla) 784 F2d 1040, 19 Fed Rules Evid Serv 1564 (internal police investigation is not necessarily biased, absent specific evidence).

Footnote 78. *Bright v Firestone Tire & Rubber Co.* (CA6 Tenn) 756 F2d 19, CCH Prod Liab Rep ¶ 10404 (report of House of Representatives subcommittee consisted of subjective conclusions regarding defendant tire company's culpability rather than factual findings and was based on hearsay regarding lawsuits and customer complaints without any investigation into the ground for those complaints); *Baker v Firestone Tire & Rubber Co.* (CA11 Fla) 793 F2d 1196, 21 Fed Rules Evid Serv 79 (congressional report was politically motivated and devoid of factual findings).

A lack of trustworthiness was shown in a report on an aircraft accident prepared at the direction of a foreign government where the report did not show the extent of input by qualified persons, no hearing was conducted, resulting in very few procedural safeguards to protect against inclusion of hearsay and irrelevant evidence, the foreign government may have required that the report be prepared in such a way as to protect itself from liability, the investigating committees' meetings were lacking in procedural safeguards, and the final report was based on findings and reports of subcommittees about which the court knew nothing. *Drummond v Alia-The Royal Jordanian Airline Corp.* (WD Pa) 11 Fed Rules Evid Serv 1904.

Footnote 79. *United States v Lanese* (CA2 Conn) 890 F2d 1284, 29 Fed Rules Evid Serv 446, cert den 495 US 947, 109 L Ed 2d 533, 110 S Ct 2207 and (criticized on other grounds by *United States v Fells* (CA4 Va) 920 F2d 1179, 31 Fed Rules Evid Serv 1104) (court properly excluded police investigatory report of alleged arson since it and underlying incident occurred 6 weeks after events alleged in indictment, contents suggested defendant was biased against person he accused, and there was no indication that defendant could not produce testimony of investigating officers).

(c). Provisions of Uniform Rules of Evidence [1370, 1371]

§ 1370 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(8) of the Uniform Rules of Evidence excepts from the hearsay rule records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. However, the Rule specifically states that it does not apply to—

—investigative reports by police and other law enforcement personnel.

—investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case to which it is a party.

—factual findings offered by the government in criminal cases.

—factual findings resulting from special investigation of a particular complaint, case, or incident.

—any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. 80

An amended version of Rule 803(8) allows the introduction of investigative reports and factual findings resulting from an investigation when offered by an accused in a criminal case. It is also prefaced with the statement that unless the sources of information or other circumstances indicate a lack of trustworthiness, the specified materials are admissible. 81

◆ Practice guide: The exclusion of investigative reports by police and other law enforcement personnel from the scope of Rule 803(8) apparently does not preclude admission of statements from police reports under the residual hearsay exception contained in Rule 803(24). 82

As with Rule 803(8) of the Federal Rules of Evidence, 83 the burden of showing untrustworthiness of a proffered record under Uniform Rule 803(8) rests with the party seeking to exclude it. 84 Another point of similarity between the Uniform Rule and its Federal counterpart is that a public office or agency need not be required by law to make a particular record in order for such record to be admissible under the Uniform Rule. 85

Footnotes

Footnote 80. Uniform Rules of Evidence Rule 803(8).

Footnote 81. Uniform Rules of Evidence Rule 803(8), as amended in 1986. This amendment brings the Uniform Rule into closer harmony with the Federal Rule, although it remains somewhat more restrictive than the Federal Rule (Comment to 1986 Amendment).

Footnote 82. *State v Ortlepp* (Minn) 363 NW2d 39, 51 ALR4th 985; *State v Echeverria*, 51 Or App 513, 626 P2d 897.

Annotation: Uniform Evidence Rule 803(24): the residual hearsay exception, 51 ALR4th 999 § 5.

Footnote 83. § 1368.

Footnote 84. *Ehredt v De Havilland Aircraft Co.* (Alaska) 705 P2d 446, later proceeding (Alaska) 705 P2d 913 (where employer of deceased employee, in negligence suit by employee's widow, sought to put into evidence a certified copy of a "coverage card" indicating that the decedent had been covered under a workers' compensation insurance policy at the time of his death, exclusion of the card as untrustworthy was not an abuse of discretion in view of (1) conflicting testimony by employees of the state Worker's Compensation Board as to whether the uncertain source of the card and its lack of signature rendered it untrustworthy; and (2) the discrepancy between the card and the insurance policy as to dates of coverage).

Footnote 85. Department of Human Services v Hulit (Me) 524 A2d 1212.

As to this point under Rule 803(8) of the Federal Rules of Evidence, see § 1364.

§ 1371 Distinctions between Uniform Rule 803(8) and Federal Rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Notwithstanding some similarities in the application of the two Rules, 86 Rule 803(8) of the Uniform Rules of Evidence has been characterized as "strikingly different" from its counterpart in the Federal Rules of Evidence. 87 With respect to investigative reports by police and other law enforcement personnel, the Uniform Rule makes explicit the public policy that the prosecution ought not to be allowed to introduce investigative reports tending to prove commission of the charged offense without calling as witnesses, subject to cross-examination, the persons who have conducted the investigation and written the reports. 88 Furthermore, the Uniform Rule, unlike the Federal Rule, excludes from its scope factual findings resulting from special investigation of a particular complaint, case, or incident. 89 However, it has been said that before a public record or report can be excluded under this or any of the specific exceptions to Rule 803(8), it must have been made under circumstances in which the person making the record or report could foresee its use in litigation and use such knowledge to manipulate the ultimate decision in the litigation. 90 A compilation of regularly recorded data, even though made in response to an opposing party's discovery request, is not excludable as resulting from special investigation of a particular case, complaint, or incident. 91

Footnotes

Footnote 86. § 1370.

Footnote 87. State v Reitenbaugh (Iowa) 392 NW2d 486; Tiemann v Santarelli Enterprises, Inc. (Me) 486 A2d 126 (Uniform Rule "differs markedly" from corresponding Federal Rule).

With respect to the "public records" exception to the hearsay rule, Montana adopted Uniform Rule 803(8) rather than the text of Federal Rule 803(8) because the Uniform Rule is more clear and expresses better policy with certain reports in requiring an official to testify rather than admitting his or her report as an exception to the hearsay rule. Mahan v Farmers Union Cent. Exchange, Inc., 235 Mont 410, 768 P2d 850, 51 CCH EPD ¶ 39211 (criticized on other grounds by Walden v State, 250 Mont 132, 818 P2d 1190).

Footnote 88. State v Reitenbaugh (Iowa) 392 NW2d 486 (in prosecution of accused for motor vehicle offenses, arrest warrant, issued after accused failed to report according to the conditions of his pre-trial release and containing probation officer's statement that accused's whereabouts were unknown, was not admissible as public document under

Rule 803(8) as evidence of flight tending to show accused's guilt; warrant was within three different exceptions to the Rule, because probation officer's statement constituted (1) an investigative report by law enforcement personnel; (2) an investigative report prepared by the government and offered by it in a case to which it was a party; and (3) factual findings offered by the state in a criminal case).

Annotation: Admissibility in state court proceedings of police reports under official record exception to hearsay rule, 31 ALR4th 913.

Footnote 89. *Swart v Town & Country Home Center, Inc.*, 2 Ark App 211, 619 SW2d 680 (report of investigation of employer by compliance officer of the Wage and Hour Division of the United States Department of Labor was not admissible under Rule 803(8) where it appeared that the investigation resulted from an anonymous complaint); *Tiemann v Santarelli Enterprises, Inc.* (Me) 486 A2d 126 (report made by state Human Rights Commission of investigation conducted in response to complaint of job discrimination was not admissible under Rule 803(8)); *Mahan v Farmers Union Cent. Exchange, Inc.*, 235 Mont 410, 768 P2d 850, 51 CCH EPD ¶ 39211 (criticized on other grounds by *Walden v State*, 250 Mont 132, 818 P2d 1190) (factual findings of officer of state Human Rights Commission regarding age discrimination complaint were inadmissible).

Footnote 90. *Byrne v State* (Alaska App) 654 P2d 795.

Footnote 91. *Department of Human Services v Hulit* (Me) 524 A2d 1212.

(6). "Vital Statistics" Exception to Hearsay Rule [1372-1374]

§ 1372 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Records of births, deaths, and marriages are generally excepted from the hearsay rule by statutory codes or common-law rules of evidence. Rule 803(9) of the Uniform Rules of Evidence and the Federal Rules of Evidence excludes from the hearsay rule records or data compilations, in any form, of birth, fetal death, death, or marriages, if the report was made to a public office pursuant to requirements of law. 92

◆ **Comment:** Although the plain language of the Rule seems to contemplate the receipt of "records" as distinguished from the "reports" upon which such records are based, one commentator has expressed the view that the Rule should be regarded as making admissible both the original report and any compilation made from it. 93

A document, such as a death certificate, which is within the scope of the Rule may be admitted into evidence without producing any witness for cross-examination about it. 94 However, the admission of a death certificate under Rule 803(9) to prove the fact of a person's death does not require the admission of the entire death certificate where

statements contained in the death certificate, but not necessary to prove the fact of death, are shown to be hearsay. 95

◆ Observation: Rule 803(9) builds on state statutory schemes requiring physicians, clergymen, judges, and other persons to report births, deaths, and marriages. The admission of evidence under the Rule may be affected by statutes governing the permissibility of including certain information in such reports. Thus, it has been held that even where a vital statistics record is admissible under the Rule, information contained in the record in violation of a legislative policy against identifying a putative father of a child born out of wedlock, in the absence of his written consent or a judicial determination of his paternity, is entitled to no evidentiary weight. 96

◆ Reminder: Under the Uniform and Federal Rules, reports made to a public office pursuant to requirements of law may be authenticated by a copy certified as correct by the custodian or other person authorized to make the certification. 97

Footnotes

Footnote 92. FRE Rule 803(9); Uniform Rules of Evidence Rule 803(9).

Practice References 2 Am Jur Trials 409, Locating Public Records.

Hunter, Federal Trial Handbook (3d ed) § 55.20.

Footnote 93. Louisell and Mueller, Federal Evidence § 457.

Footnote 94. *Shell v State (Miss)* 554 So 2d 887, reh den (Miss) 1989 Miss LEXIS 651 and revd, in part, remanded on other grounds 498 US 1, 112 L Ed 2d 1, 111 S Ct 313.

Forms: Certificate of death. 7 Am Jur Legal Forms 2d, Death § 85:3.

Certificate of death–Short form. 7 Am Jur Legal Forms 2d, Death § 85:4.

Footnote 95. *State v Gould*, 216 Mont 455, 704 P2d 20 (where accused, in prosecution for negligent homicide arising from the death of his companion in a motor vehicle accident, maintained that his companion and not himself had been driving his truck at the time of the fatal accident, statement in companion's death certificate that she had been a passenger in the vehicle was shown at trial to have been based upon hearsay and should have been excised, although admission of statement was harmless error in view of other evidence that the decedent had been a passenger).

Footnote 96. *Moore v Goode*, 180 W Va 78, 375 SE2d 549.

Footnote 97. FRE Rule 902(4), Uniform Rules of Evidence Rule 902(4), discussed in § 1186.

§ 1373 Admissibility of statement in death certificate as to cause of death

An entry in a death certificate attributing the decedent's death to a specific illness, disease, or other physical condition, is generally admissible where relevant as prima facie evidence of the cause of death, subject to rebuttal by other evidence. 98 However, a statement that a disease or other physical condition was the immediate cause of death may be excluded where it does not purport to be the opinion of a doctor or any other person who presumably knew the cause. 99 The admission of such evidence may also be subject to statutes rendering inadmissible evidence which would tend to disgrace the memory of a decedent. 1 And a statute generally permitting the receipt into evidence of a death certificate as prima facie evidence of the facts stated in it has been construed as barring receipt into evidence of any statement of the cause of death on the grounds that the statute does not permit a death certificate to contain such a statement. 2

According to some authorities, a statement in a death certificate as to the cause of death is admissible only to the extent that it identifies the immediate agency of the death; a recitation of events leading up to the death, or a conclusion as to whether the death was intentional or accidental, is not admissible. 3 Under this view, a statement that the death was the result of a criminal act must be deleted if the death certificate is to be admitted. 4 Other authorities, however, permit the introduction of a statement in a death certificate to the effect that the death was accidental. 5

Footnotes

Footnote 98. *Miles v Edward O. Tabor, M.D., Inc.*, 387 Mass 783, 443 NE2d 1302.

Annotation: Official death certificate as evidence of cause of death in civil or criminal action, 21 ALR3d 418 § 3[a].

Practice References 39 Am Jur POF2d 1, Cause of Death as Determined from Autopsy.

Footnote 99. *National Life & Acci. Ins. Co. v Salas* (Tex Civ App Eastland) 426 SW2d 327, writ ref n r e (Jun 19, 1968) (holding, however, that admission of such statement was not reversible error where it apparently did not influence the jury on the relevant question, which was the state of the decedent's health at a prior time).

Footnote 1. *Tinney v Neilson's Flowers, Inc.*, 61 Misc 2d 717, 305 NYS2d 713, affd (2d Dept) 35 App Div 2d 532, 314 NYS2d 161.

Footnote 2. *People v Fiddler*, 45 Ill 2d 181, 258 NE2d 359.

Footnote 3. *Hodges v Effingham County Hospital Authority*, 182 Ga App 173, 355 SE2d 104.

Footnote 4. *Brown v State* (Ind) 448 NE2d 10, habeas corpus proceeding (ND Ind) 612 F Supp 1576 and habeas corpus proceeding (CA7 Ind) 791 F2d 598, 20 Fed Rules Evid Serv 863 (statement that death was caused by "house fire started by arsonist" should not

have been admitted, although its admission was harmless error in view of other evidence that the fire in question was indeed the result of arson).

But see *Dunn v State*, 251 Ga 731, 309 SE2d 370, habeas corpus proceeding 257 Ga 66, 355 SE2d 61 (in murder prosecution where fact of homicide was not disputed and issue was the accused's intent, a death certificate indicating "homicide" as the cause of death was properly admitted as proof of the immediate agency of death).

Footnote 5. *Romero v Volunteer State Life Ins. Co.* (2nd Dist) 10 Cal App 3d 571, 88 Cal Rptr 820.

§ 1374 --Under Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(9) 6 has been construed as permitting the admission into evidence of statements in a death certificate as to the immediate physical cause of death. 7 Some jurisdictions enacting the Rule have specifically indicated that it is not to be construed as permitting admission of such statements under all circumstances. 8 Moreover, in at least one case decided under the Rule the court has indicated that a distinction may be drawn under the Rule between a statement of the immediate cause of death and a conclusion as to the manner of death, that is, whether the death was, for example, accidental or due to suicide. 9

◆ Comment: Although statements relating to the manner of death (for example, that the decedent fell into a ditch or was shot by his spouse) amount to investigative findings and are not the sort of conclusions which medical training qualifies a physician or coroner to reach, such assessments are sometimes required as part of the official duty of a coroner or physician in reporting on a death. One commentator has argued that in such situations conclusions as to the manner of death seem to fall within Rule 803(8)(C), dealing with factual findings resulting from an investigation, and that their admissibility should be determined according to the provisions of that Rule. 10

Footnotes

Footnote 6. FRE Rule 803(9); Uniform Rules of Evidence Rule 803(9).

Footnote 7. *Weiner v Metropolitan Life Ins. Co.* (ED Pa) 416 F Supp 551; *Greek v Bassett*, 112 Mich App 556, 316 NW2d 489; *Corlett v Smith* (App) 107 NM 707, 763 P2d 1172.

Footnote 8. Legislative Comment to Rule 803 of North Carolina Rules of Evidence (stating that Rule 803(9) is not intended to allow the use of statements of the cause of death against an accused in a criminal case).

Footnote 9. *Corlett v Smith* (App) 107 NM 707, 763 P2d 1172.

See also *State v Jurgens* (Minn App) 424 NW2d 546, a case decided several years after Minnesota adopted Uniform Rule 803(9) in which the court—responding to a contention by an accused that her indictment for murder should have been dismissed because the grand jury had before it a death certificate indicating that the mode of her alleged victim's death was homicide—stated that a death certificate's statement regarding mode of death is generally inadmissible because it is a conclusion and is hearsay, and cited as authority a pre-Rule case holding that a death certificate is admissible for the purpose of showing the immediate cause of death but not the manner (for example, accident or suicide) in which the death occurred; in the case at bar, however, the court concluded that the testimony before the grand jury of the physician who had made the entry as to the mode of death provided the missing foundation and made the written hearsay statement merely cumulative.

Footnote 10. *Louisell & Mueller*, Federal Evidence § 457.

(7). Evidentiary Effect of Absence of Public Record or Entry [1375-1380]

§ 1375 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, records and reports of public officers made in the course of the discharge of their official duties are admissible not only as proof of the facts stated in them, but also to show the absence of entries that in the usual course should appear therein, 11 and to prove, by reason of the absence of any entry, that an event did not take place or that something was not done. 12 The common-law rule has been codified in various rules and statutes. 13 Thus, it is provided in Rule 44(b) of the Federal Rules of Civil Procedure that a written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in the rules in the case of a domestic record, 14 or complying with the requirements of the rules for a summary in the case of a foreign record, 15 is admissible in evidence that the records contain no such record or entry. 16 This provision of the Rule, as made applicable by Rule 27 of the Federal Rules of Criminal Procedure, has been held not to violate the right of an accused under the Sixth Amendment of the Federal Constitution to be confronted with the witnesses against him. 17 Similar provision is made in the Model Code of Evidence of the American Law Institute. 18

◆ Practice guide: To establish under Rule 44(b) that there is no record as to a particular matter, it is not necessary under the Rule to produce testimony by an official custodian of the records; evidence may be given by any qualified person who has examined the record. 19 By contrast, a statement as to the absence of a public record proffered under Rule 803(10) of the Uniform Rules of Evidence and the Federal Rules of Evidence may be deemed inadmissible where the search for the record was

conducted by one other than the custodian of the records searched. 20

Footnotes

Footnote 11. *Chesapeake & Delaware Canal Co. v United States* (CA3 Del) 240 F 903, affd 250 US 123, 63 L Ed 889, 39 S Ct 407.

Footnote 12. *Commonwealth by Funk v Clark*, 311 Ky 710, 225 SW2d 118; *Winnett v Detroit U. Ry.*, 171 Mich 629, 137 NW 539; *Lummus Cotton Gin Co. v Arnold*, 151 Tenn 540, 269 SW 706.

Footnote 13. Some federal statutes providing that the absence of an official record of an event constitutes evidence that the event has not occurred include 8 USCS § 1284(b) (providing that the absence of an alien crewman's name from the outgoing manifest of the vessel or aircraft on which he arrived in the United States is prima facie evidence of failure to detain or deport such crewman as required by law) and 42 USCS §§ 405(c)(3), 405(c)(4)(B), 405(c)(4)(C) (providing that the absence of records in the Department of Health and Human Services as to an individual's wages or self-employment income for a particular period is evidence that he or she earned no wages or self-employment income for that period).

Footnote 14. That is, authenticated as provided in Rule 44(a)(1), Federal Rules of Civil Procedure, discussed in § 1388.

Footnote 15. As to such requirements, see § 1393.

Footnote 16. Rule 44(b), Federal Rules of Civil Procedure.

Annotation: Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 ALR2d 1227 § 6.

Forms: Certificate—Proof of lack of record. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:2804.

Footnote 17. *T'Kach v United States* (CA5 Fla) 242 F2d 937.

Footnote 18. Rule 517 of the Model Code of Evidence of the American Law Institute provides that a writing stating that the writer is an officer, or a deputy of an officer, having the official custody of specified official records, and that he has made a diligent search of the records of the office and has found therein no record or entry of a specified tenor, is admissible as tending to prove that the records of the office contain no such record or entry, if the writing is accompanied by a certificate that the officer has the custody of the specified records, made and authenticated as provided in this rule.

Footnote 19. *Jackson v United States* (CA5 Ala) 250 F2d 897.

Footnote 20. § 1378.

§ 1376 Provisions of Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(10) of the Uniform Rules of Evidence and the Federal Rules of Evidence codifies the common-law rule permitting proof of the nonoccurrence of an event by showing absence of a record which would regularly be made of its occurrence. Under the Rule, evidence in the form of a certification in accordance with Rule 902, or testimony that diligent search failed to disclose the record, report, statement, data compilation, or entry is admissible to prove the absence of such a document, or the nonoccurrence or nonexistence of a matter of which such a document is normally made and preserved by a public office or agency. 21 The absence of a record of an event which would ordinarily be recorded gives rise to a legitimate negative inference that the event did not occur. 22 A record may be found to be "a regularly made and preserved record" of one fact and not of another, so that a certificate that it does not exist is admissible under Rule 803(10) for a limited purpose only. 23

◆ **Comment:** Some courts have pointed out that evidence as to the absence of an entry in public records is arguably not hearsay and need not be dealt with as an exception to the hearsay rule. 24 A similar observation was made by the Advisory Committee in its notes with respect to the provision in Rule 803(7) of the Federal Rules of Evidence excepting from the hearsay rule evidence as to the absence of a business entry or record. 25

Footnotes

Footnote 21. FRE Rule 803(10); Uniform Rules of Evidence Rule 803(10).

As to self-authenticating public records under Rule 902, see §§ 1180 et seq.

Annotation: Admissibility, under Rule 803(10) of Federal Rules of Evidence, of evidence of absence of public record or entry, 70 ALR Fed 198.

Footnote 22. *United States v Robinson* (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901.

Annotation: Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Practice References Hunter, *Federal Trial Handbook* (3d ed) § 55:21.

Louisell and Mueller, *Federal Evidence* § 458.

Footnote 23. *United States v Stout* (CA11 Fla) 667 F2d 1347, 9 Fed Rules Evid Serv 1466 (National Firearms Registration and Transfer Record did not constitute regularly made and preserved record of payment of transfer taxes pending applications for firearms

transactions or assignment of serial numbers for firearms, and thus certification that record had been searched and that no evidence had been found that defendants had registered their firearms, made application to make or transfer firearms, paid the tax on firearms, or identified firearms with serial numbers was inadmissible except to show that defendants had not registered their firearms).

Footnote 24. *United States v M'Biye*, 211 US App DC 10, 655 F2d 1240, 8 Fed Rules Evid Serv 273; *State v Wheel*, 155 Vt 587, 587 A2d 933, later proceeding 157 Vt 648, 596 A2d 372.

Footnote 25. § 1319.

§ 1377 --Requirement of diligent search

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The requirement of the Rule that a diligent search be conducted²⁶ is one of substance, not form.²⁷ Although a casual or partial search will not satisfy the requirement,²⁸ the absence from a certificate of a recitation that a diligent search has been performed does not cause admission of the certificate to be reversible error where indications are that the certificate is reliable.²⁹ It is sufficient that the affidavit makes a showing that an adequate search has been made,³⁰ and this is particularly true when considering translated documents.³¹ Conversely, the requirement is not satisfied merely by a ritual incantation that a certificate results from a "diligent search"; rather, if in a particular instance the circumstances indicate a lack of trustworthiness, the evidence should be excluded, and the result of a search that has been less than diligent is inadmissible to prove the absence of a record.³² Thus, a search of records using misspelled versions of an accused's first and last names has been held insufficiently diligent to permit admission of the certificate of search.³³ However, where a search of records is conducted under a name believed to be that of the accused, but the accused later asserts that the name under which the search was conducted is not his real name, admission of the certificate of search is not error where the accused fails to object to its introduction.³⁴

Footnotes

Footnote 26. FRE Rule 803(10); Uniform Rules of Evidence Rule 803(10).

Footnote 27. *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187.

Footnote 28. *United States v Robinson* (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901.

Footnote 29. *United States v Wilson* (CA5 Tex) 732 F2d 404, 15 Fed Rules Evid Serv 978, cert den 469 US 1099, 83 L Ed 2d 718, 105 S Ct 609; *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256.

Annotation: Admissibility, under Rule 803(10) of Federal Rules of Evidence, of evidence of absence of public record or entry, 70 ALR Fed 198 § 6[b].

Footnote 30. *United States v Wilson* (CA5 Tex) 732 F2d 404, 15 Fed Rules Evid Serv 978, cert den 469 US 1099, 83 L Ed 2d 718, 105 S Ct 609.

Footnote 31. *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256.

Footnote 32. *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187.

A certificate of search was insufficient where it was a potpourri of descriptions of existing records. *United States v Pinto-Mejia* (CA2 NY) 720 F2d 248, 14 Fed Rules Evid Serv 705, reh den, mod on other grounds (CA2) 728 F2d 142 and (criticized on other grounds by *United States v Humphrey* (CA9 Alaska) 759 F2d 743) and (criticized on other grounds by *United States v Mena* (CA11 Fla) 863 F2d 1522).

Footnote 33. *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187.

Footnote 34. *United States v Evans*, 281 US App DC 194, 888 F2d 891, cert den 494 US 1019, 108 L Ed 2d 500, 110 S Ct 1325.

§ 1378 --Competency of person certifying absence of record

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A certification of absence of a public record is not admissible under Rule 803(10) where the person making the certification is incompetent under the circumstances to make it. 35 A person certifying the absence of a record may be deemed incompetent to make such certification if he or she is not the custodian of the records in question. 36

Footnotes

Footnote 35. *United States v Beason* (CA5 Tex) 690 F2d 439, 11 Fed Rules Evid Serv 1421, cert den 459 US 1177, 74 L Ed 2d 1023, 103 S Ct 828; *United States v Stout* (CA11 Fla) 667 F2d 1347, 9 Fed Rules Evid Serv 1466.

Annotation: Admissibility, under Rule 803(10) of Federal Rules of Evidence, of evidence of absence of public record or entry, 70 ALR Fed 198 § 6[c].

Footnote 36. *United States v Beason* (CA5 Tex) 690 F2d 439, 11 Fed Rules Evid Serv 1421, cert den 459 US 1177, 74 L Ed 2d 1023, 103 S Ct 828 (certificate intended to show nonpayment of tax on firearms was inadmissible where executed by custodian of

weapons registration records who did not have custody of tax-stamp records that would have reflected whether tax had been paid).

§ 1379 --Applicability of Rule to criminal cases

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of the absence of a public record or entry may be admitted under Rule 803(10) against a defendant in a criminal case; the provisions of Rule 803(8)(B) and (C) barring admission of investigative records or reports against an accused in a criminal case 37 are not extended to Rule 803(10). 38 Furthermore, the use of documents to show the absence of a public record or entry under the Rule is not violative of the Confrontation Clause of the Federal Constitution's Sixth Amendment. 39

Footnotes

Footnote 37. § 1360.

Footnote 38. *United States v Cepeda Penes* (CA1 Puerto Rico) 577 F2d 754 (permitting evidence to make a showing that defendant had filed no tax returns from 1972 to 1975); *United States v Yakobov* (CA2 NY) 712 F2d 20, 13 Fed Rules Evid Serv 906, 70 ALR Fed 187 (noting that a statement under FRE Rule 803(10) is normally a step removed from any element of the offense charged, and has no evaluative aspects); *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695, cert den 477 US 906, 91 L Ed 2d 568, 106 S Ct 3279.

Annotation: Admissibility, under Rule 803(10) of Federal Rules of Evidence, of evidence of absence of public record or entry, 70 ALR Fed 198 § 5.

Footnote 39. *United States v Wilson* (CA5 Tex) 732 F2d 404, 15 Fed Rules Evid Serv 978, cert den 469 US 1099, 83 L Ed 2d 718, 105 S Ct 609; *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695, cert den 477 US 906, 91 L Ed 2d 568, 106 S Ct 3279; *United States v Lee* (CA9 Cal) 589 F2d 980, 4 Fed Rules Evid Serv 326, cert den 444 US 969, 62 L Ed 2d 382, 100 S Ct 460; *United States v Herrera-Britto* (CA11 Fla) 739 F2d 551, 16 Fed Rules Evid Serv 264.

§ 1380 --Particular records searched as establishing nonoccurrence of event

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Public records searchable to establish the nonoccurrence of an event under Rule 803(10)

include—

—tax return records. 40

—records of statements necessary for a special dispensation under the federal tax laws. 41

—court documents indicating whether a particular judge had attended court proceedings.
42

—federal license or registration records. 43

—personnel records. 44

—foreign vessel registration records. 45

Footnotes

Footnote 40. *United States v Cepeda Penes* (CA1 Puerto Rico) 577 F2d 754; *United States v Bowers* (CA4 Va) 920 F2d 220, 90-2 USTC ¶ 50588, 31 Fed Rules Evid Serv 1089, 71A AFTR 2d 93-3332, post-conviction proceeding (CA4) 1992 US App LEXIS 7664; *United States v Johnson* (CA5 Tex) 577 F2d 1304, 78-2 USTC ¶ 9642, 42 AFTR 2d 78-5624, reh den (CA5 Tex) 584 F2d 389.

Footnote 41. *Brutsche v Commissioner* (CA10) 585 F2d 436, 78-2 USTC ¶ 9745, 42 AFTR 2d 78-6018.

Footnote 42. *State v Wheel*, 155 Vt 587, 587 A2d 933, later proceeding 157 Vt 648, 596 A2d 372.

Footnote 43. *United States v Harris* (CA5 La) 551 F2d 621, 1 Fed Rules Evid Serv 978, cert den 434 US 836, 54 L Ed 2d 98, 98 S Ct 125 (license to engage in business as firearms dealer); *United States v Metzger* (CA6 Ky) 778 F2d 1195, 19 Fed Rules Evid Serv 695, cert den 477 US 906, 91 L Ed 2d 568, 106 S Ct 3279 (license to manufacture explosives, registration of destructive device, or payment of taxes for destructive device); *United States v Combs* (CA9 Cal) 762 F2d 1343, 17 Fed Rules Evid Serv 1101 (among conflicting authorities on other grounds noted in *United States v Disla* (CA9 Cal) 805 F2d 1340) (registration of firearm); *United States v Herrera-Britto* (CA11 Fla) 739 F2d 551, 16 Fed Rules Evid Serv 264 (foreign registration of vessel).

Footnote 44. *United States v Wilson* (CA5 Tex) 732 F2d 404, 15 Fed Rules Evid Serv 978, cert den 469 US 1099, 83 L Ed 2d 718, 105 S Ct 609 (offered to refute defendant's claim that he had "special relationship" with CIA); *United States v Lee* (CA9 Cal) 589 F2d 980, 4 Fed Rules Evid Serv 326, cert den 444 US 969, 62 L Ed 2d 382, 100 S Ct 460 (offered to refute claim that defendant was employed by CIA).

Footnote 45. *United States v Martinez* (CA11 Fla) 700 F2d 1358, 12 Fed Rules Evid Serv 1256 (Honduran certificate stating that vessel was not matriculated in Honduras was admissible where certificate was not law enforcement or evaluative report and recited that extensive search of public records had been carried out).

(8). Authentication [1381-1411]

(a). In General [1381-1390]

§ 1381 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

It has been said that a general aura of trustworthiness is often accorded official or public records or documents, due to a presumption that official duties such as recordkeeping are regularly performed. 46 Authentication is generally not entirely dispensed with, however. At common law, the contents of official records may be authenticated by the production of the documents themselves, accompanied by testimony showing that they come from the proper custody. 47 They may be identified by their custodian, 48 or, if it is shown that the custodian is not available for the purpose of identification, the identity of the record in question may be established by any witness having knowledge of the facts. 49 Books and records kept by public officers are also generally admissible in evidence when there is attached to them a certificate by the officer or legal custodian as to their correctness and authenticity. 50 It is not a prerequisite to the admissibility in evidence of books and records of public officers that the entries therein be identified and verified by the persons who actually made them. 51

◆ Observation: The doctrine of custodial authentication of public documents applies not only to reports made by public officials, but also to writings prepared by private persons who are required to file such information in public places. 52

§ 1381 ----Generally [SUPPLEMENT]

Case authorities:

Evidence was sufficient to prove that defendant was convicted felon, even though fingerprint card in name of alias he used was improperly authenticated and admitted, since defendant's own admissions as to prior felony conviction in Colorado and use of alias were sufficiently corroborative to render error harmless. *United States v Rackley* (1993, CA10 Okla) 986 F2d 1357.

Exhibit containing fingerprint card in name of alias which defendant used was improperly authenticated and admitted as evidence of his Colorado conviction, since government offered no circumstantial evidence to support finding that exhibit in question came from Denver police department. *United States v Rackley* (1993, CA10 Okla) 986 F2d 1357.

The trial court did not err in a first- degree murder prosecution by admitting into

evidence a letter purportedly written by the victim where the victim's mother testified that she was familiar with her daughter's handwriting, that the letter was written in her daughter's handwriting, and that she recognized the signature as that of her daughter. There was sufficient evidence of authenticity. GS § 8C-1, Rule 901(a). *State v Alston* (1995) 341 NC 198, 461 SE2d 687.

Footnotes

Footnote 46. *United States v New York* (ED NY) 132 F Supp 779, 55-2 USTC ¶ 9566, 47 AFTR 1730, *affd* (CA2 NY) 233 F2d 307, 56-1 USTC ¶ 9504, 49 AFTR 1211; *Preis v American Indemnity Co.* (2nd Dist) 220 Cal App 3d 752, 269 Cal Rptr 617, *review den.*

Footnote 47. *Chesapeake & Delaware Canal Co. v United States*, 250 US 123, 63 L Ed 889, 39 S Ct 407; *Pierce v Doolittle*, 130 Iowa 333, 106 NW 751; *Dikeman v Parrish*, 6 Pa 210.

Footnote 48. *State v Sonderleiter*, 251 Iowa 106, 99 NW2d 393; *Sherrick v State*, 157 Neb 623, 61 NW2d 358.

Footnote 49. *Junior v State*, 76 Ark 483, 89 SW 467.

Footnote 50. *Belford v Scribner*, 144 US 488, 36 L Ed 514, 12 S Ct 734; *State v Tarwater*, 293 Mo 273, 239 SW 480; *State v Kilmer*, 31 ND 442, 153 NW 1089.

Footnote 51. *Chesapeake & Delaware Canal Co. v United States* (CA3 Del) 240 F 903, *affd* 250 US 123, 63 L Ed 889, 39 S Ct 407; *Gurney v Howe*, 75 Mass 404, 9 Gray 404; *Cheatham v Young*, 113 NC 161, 18 SE 92; *State v Pearson*, 223 SC 377, 76 SE2d 151; *In re Escalante Valley Drainage Area*, 11 Utah 2d 77, 355 P2d 64; *Kellerher v Porter*, 29 Wash 2d 650, 189 P2d 223.

Footnote 52. *Pyle & Mockbee, Authentication and Identification*, 49 Miss LJ 151 (1978).

§ 1382 Self-authenticating public documents; authentication as ancient documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, journals of a branch of the legislature⁵³ and state papers, published under the authority of the Senate of the United States,⁵⁴ are receivable in evidence without further proof of their authenticity. The great seal of the state or government proves itself.⁵⁵ The common law pertaining to self-authenticating public documents has in many jurisdictions been superseded by the adoption of Rule 902 of the Uniform Rules of Evidence and the Federal Rules of Evidence, which provides that a wide range of public records, public documents, and official publications are deemed self-authenticating where the conditions of the Rule are met.⁵⁶

For the admission of public and proprietary records in evidence as ancient documents, it

is only necessary to show that they are of the age of 30 years or more and come from a natural and reasonable custody. 57

Footnotes

Footnote 53. *Amos v Moseley*, 74 Fla 555, 77 So 619.

Footnote 54. *Thiesen v Gulf, F. & A. R. Co.*, 75 Fla 28, 78 So 491.

Footnote 55. *Thompson v Stewart*, 3 Conn 171; *Gunn v Peakes*, 36 Minn 177, 30 NW 466.

Footnote 56. As to these provisions of Rule 902, see §§ 1180 et seq.

Footnote 57. *McGuire v Blount*, 199 US 142, 50 L Ed 125, 26 S Ct 1; *Sinkora v Wlach*, 239 Iowa 1392, 35 NW2d 40.

As to ancient documents, generally, see §§ 1201 et seq.

§ 1383 Copies of records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, where a document purports to be a certified copy, it must be shown to have come from proper custody and to have been properly certified. 58 This requirement may be satisfied by proof of the authority and incumbency of the custodian performing the purported certification and by proof of the genuineness of his signature or seal. 59

Footnotes

Footnote 58. *People v Sheridan*, 136 Cal App 675, 29 P2d 464; *State v Hendrix*, 331 Mo 658, 56 SW2d 76.

As to self-authentication, under the Uniform Rules of Evidence and the Federal Rules of Evidence, of documents purporting to be certified copies of public records, see § 1186.

Footnote 59. *Jones v Scarborough*, 194 Ga App 468, 390 SE2d 674.

§ 1384 --Form and content of certification

[View Entire Section](#)

Statutes requiring the certification of copies of public records or documents as a condition of their admission into evidence generally do not require any particular form of certification beyond the statement that the copy is a correct or true copy of the original.

60 To "certify," as that term is ordinarily used with reference to copies of public documents or records, is to affirm or assert in writing the correctness of the instrument as copied. 61 It is not necessary that the certification employ the word "certificate" or "certify," but it is sufficient if the writing is a certificate in substance. 62 A proper form of certification of a copy of a public record or document requires the signature of the official making it, 63 but where the proper custodian subscribes his official attestation to a purported copy of a record in his keeping, he, for all intents and purposes, affirms or certifies its correctness. 64

In the absence of a statutory requirement, the certificate need not state that the copy has been compared with the original; it is sufficient to state merely that it is a true and correct copy. 65 The seal of the officer is not essential to the certificate, 66 in the absence of a statute requiring the certificate to bear such seal. 67

Footnotes

Footnote 60. State ex rel. Scotten v Brill, 58 Minn 152, 59 NW 989; State v Gee, 28 Or 100, 42 P 7.

As to the authentication of documents purporting to be copies of records of public officials under the Federal Rules of Civil and Criminal Procedure, see § 1388.

Footnote 61. Sawyer v Lorenzen & Weise, 149 Iowa 87, 127 NW 1091.

Footnote 62. Sawyer v Lorenzen & Weise, 149 Iowa 87, 127 NW 1091.

Footnote 63. Watson v Finch, 150 Ind 183, 48 NE 245.

Footnote 64. Sawyer v Lorenzen & Weise, 149 Iowa 87, 127 NW 1091.

Footnote 65. Kellogg v Finn, 22 SD 578, 119 NW 545.

Footnote 66. Belford v Scribner, 144 US 488, 36 L Ed 514, 12 S Ct 734; St. Paul, M. & M. R. Co. v Burton, 111 US 788, 28 L Ed 604, 4 S Ct 699; Strasser v Ress, 165 Neb 858, 87 NW2d 619.

Footnote 67. Conkey v Conder, 137 Ind 441, 37 NE 132; Matthews v State, 243 Miss 568, 139 So 2d 386.

§ 1385 --Sufficiency of statement as to content of proffered document

Only copies of official documents, properly certified by their custodian, are admissible as proof of their contents. 68 A mere certificate of the clerk or other custodian of a paper as to the substance, contents, or legal effect of a proffered document or as to the fact that it is an abstract or summary of the original is not admissible, being hearsay. 69 The power of the officer is limited to a certification that the paper is a true copy of another writing, and he is not authorized to determine to what the record or document relates or pertains, or to pass judgment upon it in any way. 70 A certifying officer has no authority to state facts explanatory of, or collateral to, the record certified by him as a true or correct copy, or to state mere conclusions not required to be certified. 71 But the custodian of a record, having authority to certify a transcript of it, has authority to specify in his certificate the particular record from which the transcript is taken, and such certificate is at least prima facie evidence of the fact recited. 72

Footnotes

Footnote 68. Carr v Youse, 39 Mo 346; Bartlett v Patton, 33 W Va 71, 10 SE 21.

Footnote 69. J. R. Watkins Medical Co. v Martin, 132 Ark 108, 200 SW 283, 2 ALR 1230; Carr v Youse, 39 Mo 346; State v Kilmer, 31 ND 442, 153 NW 1089; Ayre v Hixson, 53 Or 19, 98 P 515; Bartlett v Patton, 33 W Va 71, 10 SE 21.

Footnote 70. Cox v Cox, 26 Pa 375; Ward v Sutor, 70 Tex 343, 8 SW 51; Hagan v Holderby, 62 W Va 106, 57 SE 289; Phares v State, 3 W Va 567.

Footnote 71. Mansfield v Johnson, 51 Fla 239, 40 So 196; Mandel v Swan Land & Cattle Co., 154 Ill 177, 40 NE 462; Harkins v Cole, 200 Miss 698, 28 So 2d 839; Hudkins v Bush, 69 W Va 194, 71 SE 106.

Footnote 72. Mansfield v Johnson, 51 Fla 239, 40 So 196.

§ 1386 Nonjudicial records of state, possession or territory of United States

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In accordance with the requirement of the Constitution that full faith and credit be given in each state to the public acts of every other state, and pursuant to the power bestowed upon Congress to provide for the proof of such matters, 73 Congress has enacted a series of statutes providing for the authentication of nonjudicial records or books kept in any public office of any state, possession, or territory of the United States so as to permit their receipt in evidence in other states. 74 The latest such statute provides that all nonjudicial records or books kept in any public office of any state, territory, or possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other state, territory, or possession by the attestation of the custodian of such

records or books, and the seal of his office annexed, if there is a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the state, territory, or possession, that the said attestation is in due form and by the proper officers. If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory, or possession in which it is made. 75

This statute is within the terms of the Constitution, 76 although, in the absence of the Constitution's full faith and credit clause authorizing such legislation, Congress would have had no power to prescribe rules of evidence for state courts. 77

The statute is not intended to preclude other modes of authentication recognized as proper in the state where authentication is sought. 78 Thus, a state may establish its own rules for authentication of nonjudicial records of a sister state, as long as such rules are not more stringent than those set by the federal statute 79 and do not exclude documents authenticated as prescribed by that statute. 80 The methods provided by acts of Congress are not exclusive of any other methods that the states may adopt in their own courts, 81 provided such methods are not inconsistent with the acts of Congress. The state may waive some of the requirements of the federal acts, but it may not add to those requirements. 82

Footnotes

Footnote 73. USCS Constitution Art 4 § 1.

Footnote 74. For a historical survey of these statutes, see *Wilcox v Bergman*, 96 Minn 219, 104 NW 955.

As to the proof and authentication of the judicial records of states, possessions, or territories of the United States, see § 1399.

Footnote 75. 28 USCS § 1739.

Footnote 76. *Wilcox v Bergman*, 96 Minn 219, 104 NW 955.

Footnote 77. *Edmonds v State*, 201 Ga 108, 39 SE2d 24.

Footnote 78. *Kearney v Thomas*, 225 NC 156, 33 SE2d 871.

Footnote 79. 28 USCS § 1739.

Footnote 80. *State v Yuriar*, 22 Ariz App 9, 522 P2d 770; *State v Young (Mo)* 366 SW2d 386.

Footnote 81. *Pressley v State*, 207 Ga 274, 61 SE2d 113; *Tomlin v Woods*, 125 Iowa 367, 101 NW 135; *Lattourett v Cook*, 1 Iowa 1; *Ellis v Ellis*, 55 Minn 401, 56 NW 1056; *Donaldson v Phillips*, 18 Pa 170; *Thrasher v Ballard*, 33 W Va 285, 10 SE 411.

Footnote 82. *Parke v Williams*, 7 Cal 247; *Pressley v State*, 207 Ga 274, 61 SE2d 113; *Garden City Sand Co. v Miller*, 157 Ill 225, 41 NE 753.

§ 1387 Authentication by proof of custody under Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Authentication or identification of a document may be accomplished under Rule 901(b)(7) of the Uniform Rules of Evidence and the Federal Rules of Evidence by showing that a writing authorized by law to be recorded or filed and which is in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. 83

◆ **Comment:** Public records may thus be regularly authenticated by proof of custody, without more; this principle is extended to include computer data and data stored by similar methods. 84 According to commentators, the term "public records or reports," as used in Rule 901(b)(7), includes such items as tax returns, Selective Service files, weather bureau reports, patent office records, military records, immigration records, any other official records of a state, federal, local, or other public office, acts of legislatures, judicial records, and reports of administrative offices. 85

To properly authenticate a document as a public record or report under Rule 901(b)(7), testimony may be elicited to demonstrate, for example, that the documents were authorized by law to be recorded or filed in a public office or that they were from the public office where items of this nature are kept. 86 Authentication under the Rule has been accomplished by the uncontroverted testimony of the Chief of Claims and Collections for the Department of Agriculture identifying a short-landing certificate and cargo surveys prepared in compliance with government regulations relating to ocean carrier loss and damage. 87

◆ **Caution:** The mere fact that a document is kept in a working file of a governmental agency does not automatically qualify it as a public record under Rule 901(b)(7) for purposes of authentication. For example, although the recorded version of a deed is a public record, a copy of a deed deposited in a working file of an agency is not by that fact alone a public record. 88

Footnotes

Footnote 83. FRE 901(b)(7); Uniform Rules of Evidence Rule 901(b)(7).

Law Reviews: LaRocca, Authentication, Identification, and the Best Evidence Rule, 36 La L Rev 185 (1975).

Footnote 84. Advisory Committee Notes to Federal Rules of Evidence, Rule 901.

Practice References Hunter, Federal Trial Handbook 2d § 58.16.

Louisell and Mueller, Federal Evidence § 520.

Forms: Attestation—Of copy of official domestic record by officer having legal custody thereof. 1A Federal Procedural Forms, L Ed, Actions in District Court § 1:2793.

Footnote 85. Pyle & Mockbee, Authentication and Identification, 49 Miss LJ 151, 175 (1978).

Footnote 86. United States v Davis (CA5 Ga) 571 F2d 1354, 3 Fed Rules Evid Serv 761.

Footnote 87. United States v Central Gulf Lines, Inc. (ED La) 575 F Supp 1430, 1985 AMC 595, 15 Fed Rules Evid Serv 900, affd (CA5 La) 747 F2d 315, 1985 AMC 1982, 17 Fed Rules Evid Serv 568 and affd in part and revd in part (CA5 La) 974 F2d 621, 1993 AMC 2622, 36 Fed Rules Evid Serv 1371, cert den (US) 122 L Ed 2d 669, 113 S Ct 1274.

Footnote 88. Amoco Production Co. v United States (CA10 Utah) 619 F2d 1383, 67 OGR 136, later proceeding (DC Utah) 663 F Supp 998, 95 OGR 406, affd (CA10 Utah) 852 F2d 1581, 101 OGR 173, later proceeding (CA10 Utah) 852 F2d 1574, 101 OGR 160.

§ 1388 Provisions of Federal Rules of Civil and Criminal Procedure

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Under Rule 44(a)(1) of the Federal Rules of Civil Procedure, an official record kept within the United States, or any state, district, commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. 89 Under this Rule, material contained in an official file may be authenticated as part of that file simply by the officer having legal custody of the record, or the officer's deputy, attesting to the fact that it came from that source. 90 Also, a document that on its face appears to be an official publication comes under FR Civ P 44(a)(1) unless the party opposing its admission into evidence shows that it is not in fact an official publication. 91 Where authentication under Rule 44(a)(1) is required and not accomplished, a court cannot take judicial notice of the record in question. 92

◆ Observation: These provisions of the Federal Rules of Civil Procedure are made applicable to criminal prosecutions by Rule 27 of the Federal Rules of Criminal Procedure, which provides that an official record or an entry therein, or the lack of such a record or entry, may be proved in the same manner as in civil actions. 93 FR Civ P 44(a)(1) has also been applied in admiralty cases, 94 and in administrative proceedings. 95

Under these provisions, proof of an official document otherwise admissible is not subject to an objection on the ground that it is hearsay evidence. 96

Footnotes

Footnote 89. FR Civ P, Rule 44(a)(1).

Footnote 90. *Vlisidis v Holland* (DC Pa) 150 F Supp 678, *affd* (CA3 Pa) 245 F2d 812.

Annotation: Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 ALR2d 1227 (§ 5 superseded by Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784).

Footnote 91. *California Asso. of Bioanalysts v Rank* (CD Cal) 577 F Supp 1342.

Footnote 92. *Powers v Dole* (CA7 Ill) 782 F2d 689, 39 BNA FEP Cas 1774, 39 CCH EPD ¶ 35912.

Footnote 93. FR Crim P, Rule 27.

Footnote 94. *McWilliams Dredging Co. v United States* (DC La) 105 F Supp 582.

Footnote 95. *Maroon v Immigration & Naturalization Service* (CA8) 364 F2d 982, 2 ALR Fed 292; *Chung Young Chew v Boyd* (CA9) 309 F2d 857 (among conflicting authorities on other grounds noted in *Roldan v Racette* (CA2 NY) 984 F2d 85, 24 FR Serv 3d 841).

Footnote 96. *Kariakin v United States* (CA9 Cal) 261 F2d 263 (Selective Service file held admissible in prosecution for knowingly refusing and failing to report for induction into Armed Forces of United States).

§ 1389 --Nonexclusive nature of authentication provided by Rules

<p>View Entire Section Go to Parallel Reference Table</p>

The provisions of Rule 44 of the Federal Rules of Civil Procedure are intended to provide

a simple and uniform method of proving public records in all cases, including those specifically provided for in the federal statutes. Such statutes are not, however, superseded, and proof may be made also according to their provisions, whenever they differ from the Federal Procedural Rules. 97 Rule 44(c) specifically provides that the rule concerning the proof of an official record does not prevent the proof of official records, or of entry or lack of entry therein, by any other method authorized by law. 98 Thus, official records may be proved in any manner permitted by the common law 99 or by pertinent federal or state statutes. 1

A document can be admitted into evidence, even though it has not been certified in accordance with Rule 44(a)(1), if it may be regarded as self-authenticating under Rule 902 of the Uniform Rules of Evidence or the Federal Rules of Evidence. 2

Footnotes

Footnote 97. See notes of Advisory Committee to Rule 44, Federal Rules of Civil Procedure.

Footnote 98. FR Civ P 44(c).

Footnote 99. Reed v Stevens, 120 Me 290, 113 A 712; Hutchins v Gerrish, 52 NH 205; Donaldson v Phillips, 18 Pa 170.

Footnote 1. Van Cedarfield v Laroche (CA1 NH) 252 F2d 817; Jackson v United States (CA5 Ala) 250 F2d 897.

Footnote 2. United States v Pent-R-Books, Inc. (CA2 NY) 538 F2d 519, 1 Fed Rules Evid Serv 259, cert den 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175.

As to self-authenticating records under Rule 902, see §§ 1180 et seq.

§ 1390 --Sufficiency of authentication of copy under particular circumstances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 44(a)(1) of the Federal Rules of Civil Procedure contemplates that the officer having immediate custody of the records, or his deputy, and not his superior, must make the attestation. 3 A copy of an official record is not properly authenticated under Rule 44(a)(1) where the certificate of authentication is signed by a person on behalf of a government department which does not have custody of the original document, or where the certificate does not certify the existence of such custody. 4 A copy made of a copy of an official record is not sufficient proof of the record where it is not shown by the certificate that the copy from which the copy sought to be introduced in evidence was made was itself an official document or a true copy of the original. 5 Copies of a complaint and cross claim in a state court action are not admissible evidence under Rule 44(a)(1) for the purpose of ruling on a summary judgment motion, where the copies

neither bear the imprint of a state court seal nor are supported by any affidavit of the officer having legal custody of the originals attesting to their authenticity. 6

However, Rule 44(a)(1) is satisfied where copies of tax returns are authenticated by a district director of the Internal Revenue Service who certifies that such copies are true copies of returns on file in a particular office. 7

Footnotes

Footnote 3. *United States v Ansani* (DC Ill) 138 F Supp 454, *affd* (CA7 Ill) 240 F2d 216, *cert den* 353 US 936, 1 L Ed 2d 759, 77 S Ct 813, *reh den* 353 US 978, 1 L Ed 2d 1139, 77 S Ct 1055.

Annotation: Sufficiency, under Federal Civil Procedure Rule 44(a)(1), of authentication of copy of domestic official record, 2 ALR Fed 306.

Footnote 4. *Mullican v United States* (CA5 Tex) 252 F2d 398, 70 ALR2d 1217.

Footnote 5. *Mullican v United States* (CA5 Tex) 252 F2d 398, 70 ALR2d 1217.

Footnote 6. *First Nat. Life Ins. Co. v California Pacific Life Ins. Co.* (CA11 Ala) 876 F2d 877, 13 FR Serv 3d 1345, *reh den*, *en banc* (CA11 Ala) 887 F2d 1093.

Footnote 7. *United States v Merrick* (CA10 Colo) 464 F2d 1087, 72-2 USTC ¶ 9572, 30 AFTR 2d 72-5270, *cert den* 409 US 1023, 34 L Ed 2d 314, 93 S Ct 462.

(b). Records of Foreign Country [1391-1397]

§ 1391 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Public records and documents of foreign countries are, under some circumstances, deemed by statute to be self-authenticating. 8 In the absence of statute or procedural rule, whether there has been a proper authentication of foreign documents must be determined by the courts as occasion may require, under the guidance furnished by the rules of the common law or the usages of nations. 9 The object of any such authentication is to afford satisfactory evidence that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, such official having due authority to make such certification. Any evidence which is calculated to give reasonable assurance of the facts in question is sufficient for this purpose. Such evidence is whatever legitimately tends to prove that the document was obtained from the office where the original is kept, that the signature of the certificate was made by the individual whose name is thus subscribed, that he held, at the time, the official position indicated by his subscription, and that it is one of the functions of those

holding that position to certify to such copies. 10 By the usages of civilized nations, proof is allowed of all or some of these points in the shape of certificates from public officers under their official seals, when these seals are such that the courts take judicial notice of them. 11 At common law, the essentials of proper authentication apply to ancient foreign records as well as to recent ones. 12

Footnotes

Footnote 8. As to self-authenticating foreign public documents under the Uniform Rules of Evidence and the Federal Rules of Evidence, see § 1184.

Footnote 9. *Barber v International Co. of Mexico*, 73 Conn 587, 48 A 758.

Footnote 10. *Barber v International Co. of Mexico*, 73 Conn 587, 48 A 758.

Footnote 11. *Barber v International Co. of Mexico*, 73 Conn 587, 48 A 758.

Footnote 12. *Sinkora v Wlach*, 239 Iowa 1392, 35 NW2d 40.

§ 1392 Effect on state law of Hague Convention regarding authentication of foreign documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, adopted by the United States effective October 15, 1981, provides for the authentication of foreign public documents from the signatory nations by means of a standard certification (termed an "apostille") certifying the signature, official position, and seal of the attesting officer. 13 The Federal government's exclusive jurisdiction over the foreign policy of the United States means that the provisions of the Convention must prevail over any inconsistent provisions of state law; accordingly, a document within the scope of the Convention which has been authenticated according to the provisions of the Convention is sufficiently authenticated for the purposes of admission into evidence in a state court, notwithstanding that the document has not been authenticated under state law. 14

Footnotes

Footnote 13. § 1397.

Footnote 14. *In re Estate of McDermott*, 112 Misc 2d 308, 447 NYS2d 107.

§ 1393 Under Federal Rules of Civil and Criminal Procedure

Under the Federal Rules of Civil Procedure, a foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication of it; or a copy of it, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position of the attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. 15 A final certification under the Rules may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (1) admit an attested copy without final certification, or (2) permit the foreign official record to be evidenced by an attested summary with or without final certification. 16

Under the Rules, a document that on its face appears to be an official publication is admissible in evidence unless a party opposing its admission shows that it lacks that character. 17 The Rules also permit the use of copies of official foreign documents, provided they are attested as required by the rule. 18 Furthermore, because in some situations it may be difficult to satisfy the requirement of final certification, the Rules allow the court, for good cause shown, to admit attested copies of official documents of foreign countries without final certification. 19

The Rules do not prevent the proof of foreign official records, or of entry or lack of entry therein, by any other method authorized by law. 20 The provisions of Rule 44 are made applicable to criminal prosecutions by the provision in the Federal Rules of Criminal Procedure that an official record or an entry therein, or the lack of such a record or entry, may be proved in the same manner as in civil actions. 21

A statute provides that an official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure. 22

Footnotes

Footnote 15. FR Civ P, Rule 44(a)(2).

Annotation: Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784.

Footnote 16. FR Civ P, Rule 44(a)(2).

Footnote 17. Notes of Advisory Committee on 1966 Amendment to Rule 44.

Footnote 18. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR

Serv 2d 141, 41 ALR Fed 777.

Footnote 19. United States v Rodriguez Serrate (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

As to what constitutes good cause to admit an attested copy without final certification, see § 1396.

As to abolition, by treaty or convention, of the requirement of final certification, see § 1397.

Footnote 20. FR Civ P, Rule 44(c).

Footnote 21. FR Crim P, Rule 27.

Footnote 22. 28 USCS § 1741.

§ 1394 --Records to which Rules apply

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Military service records of foreign governments are foreign records which may be authenticated according to the provisions of Rule 44(a)(2) of the Federal Rules of Civil Procedure. 23 The provisions of Rule 44(a)(2) of the Federal Rules of Civil Procedure apply also to the authentication of originals or copies of foreign records relating to:

- A property interest in a dramatic composition 24
- An appointment of a personal representative for a decedent's estate 25
- Bankruptcy proceedings in a foreign country 26
- Birth certificates or citizenship papers 27
- Border crossings or other officially monitored movements 28
- The census or population of a foreign country 29
- A death certificate 30
- The expropriation of private property by a foreign government 31
- The guardianship of minor children 32
- The importation or smuggling of goods into the United States 33
- A marriage 34

- Military uniform regulations of a foreign country 35
- Radio communications between an airport and an airliner which subsequently crashed 36

The authentication of hotel registration records by means of the procedures provided by Rule 44(a)(2) has been approved where the records in question were deemed to be a species of official records in that they were required by law to be kept. 37 However, genealogical records and family trees do not constitute official records within the contemplation of Rule 44(a)(2), notwithstanding their attestation by a foreign official, where such records do not purport to be based on officially recognized records, but, rather, are based on birth, marriage, and death records of the family. 38 A church baptismal certificate has also been characterized as a nonofficial record outside the scope of the Rule. 39

◆ Observation: The application of Rule 44(a)(2) is not limited to public documents; it speaks not of "public" records, but only of "official" ones, and accordingly it is not required for the application of the Rule to a document that the document be one that is available for examination by the public. 40

Footnotes

Footnote 23. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

Annotation: Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784 § 3.

Footnote 24. *Hospital for Sick Children v Melody Fare Dinner Theatre* (ED Va) 516 F Supp 67, 209 USPQ 749.

Footnote 25. *Nielson v Avco Corp.* (DC NY) 54 FRD 76.

Footnote 26. *Siata International U.S.A., Inc. v Insurance Co. of North America* (ED Pa) 362 F Supp 1355, revd on other grounds (CA3 Pa) 498 F2d 817.

Footnote 27. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777; *New York Life Ins. Co. v Aronson* (DC Pa) 38 F Supp 687; *United States v Klissas* (DC Md) 218 F Supp 880; *Fakouri v Cadais* (CA5 La) 147 F2d 667, reh den (CA5 La) 149 F2d 321 and cert den 326 US 742, 90 L Ed 443, 66 S Ct 54; *United States v Pacheco-Lovio* (CA9 Cal) 463 F2d 232.

Footnote 28. *United States v Leal* (CA9 Guam) 509 F2d 122 (criticized on other grounds by *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437); *United States v Wing* (CA9 Cal) 450 F2d 806, cert den 405 US 994, 31 L Ed 2d 462, 92 S Ct 1267.

Footnote 29. *United States v Ghaloub* (CA2 Vt) 385 F2d 567 (used to establish citizenship of an individual claiming United States citizenship).

Footnote 30. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

Footnote 31. *Gulden v United States* (ND NY) 278 F Supp 1019, 68-1 USTC ¶ 9181, 21 AFTR 2d 380.

Footnote 32. *Fakouri v Cadais* (CA5 La) 147 F2d 667, reh den (CA5 La) 149 F2d 321 and cert den 326 US 742, 90 L Ed 443, 66 S Ct 54.

Footnote 33. *United States v Blum* (CA2 NY) 329 F2d 49, cert den 377 US 993, 12 L Ed 2d 1045, 84 S Ct 1920; *United States v Leal* (CA9 Guam) 509 F2d 122 (criticized on other grounds by *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437); *United States v Wing* (CA9 Cal) 450 F2d 806, cert den 405 US 994, 31 L Ed 2d 462, 92 S Ct 1267.

Footnote 34. *United States v D'Agostino* (CA2 NY) 338 F2d 490.

Footnote 35. *Mole v United States* (CA5 Ga) 315 F2d 156.

Footnote 36. *Le Roy v Sabena Belgian World Airlines* (CA2 NY) 344 F2d 266, cert den 382 US 878, 15 L Ed 2d 119, 86 S Ct 161.

Footnote 37. *United States v Leal* (CA9 Guam) 509 F2d 122 (criticized on other grounds by *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437).

Footnote 38. *In re Estate of Shega*, 38 Wis 2d 269, 156 NW2d 392.

Footnote 39. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

Footnote 40. *Banco De Espana v Federal Reserve Bank* (CA2 NY) 114 F2d 438 (permitting authentication of secret instructions from the government of Spain to its ambassador by means of an affidavit of the ambassador).

§ 1395 --Sufficiency of initial attestation or final certification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The requirement of Rule 44(a)(2) that a document offered as a copy of a foreign official record be attested by an official authorized to make such an attestation 41 has been held satisfied where documents purporting to establish Dominican Republic citizenship (including an identification card, a copy of a birth certificate, and records of a relative's military service) were each offered with an attestation of the Dominican official in charge of the records from which it was obtained. 42 Where authentication of hotel registration records was permitted by means of a procedure essentially identical to that

set forth in Rule 44(a)(2)—the court noting that such records were a sort of official record inasmuch as they were required by law to be kept—attestation of the records by the assistant manager of the hotel was held sufficient. 43 However, in a suit for a tax refund based on alleged losses stemming from loss of property in the course of the Communist takeover of Hungary, a document purporting to be from a deputy district chairman of a Hungarian court and detailing certain matters concerning property alleged to have been lost or sold to the state was held inadmissible for lack of authentication under Rule 44(a)(2), where it appeared not to have been attested by any Hungarian public official. 44

Final certification of copies of official foreign records has been deemed sufficient for the purposes of authentication under Rule 44(a) of the Federal Rules of Civil Procedure where the copies were certified by the United States consul in the foreign nation where the records originated. 45

Footnotes

Footnote 41. § 1393.

Footnote 42. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

Annotation: Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784 § 4.

Footnote 43. *United States v Leal* (CA9 Guam) 509 F2d 122 (criticized on other grounds by *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437).

Footnote 44. *Gulden v United States* (ND NY) 278 F Supp 1019, 68-1 USTC ¶ 9181, 21 AFTR 2d 380.

Footnote 45. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

See also *In re Estate of Nikiporez*, 19 Wash App 231, 574 P2d 1204, review den 90 Wash 2d 1013, decided under a state evidentiary rule substantially identical to Rule 44(a)(2), in which certification by a United States vice consul of a Soviet official's authentication of a Russian marriage certificate was held sufficient to admit the document.

§ 1396 --Good cause for admission notwithstanding lack of certification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Because in some situations it may be difficult to satisfy the requirement of final certification under Rule 44(a)(2), the Rule allows a court, for good cause shown, to admit an attested copy of official documents of foreign countries without final certification. 46

Thus, although final certification is normally required for the authentication of foreign records, they may be admitted absent final certification where their proponent has made diligent efforts to obtain such certification and the opposing party has had a reasonable opportunity to investigate the authenticity and accuracy of the documents. 47 Lack of final certification has not precluded the admission into evidence of foreign documents where the opposing party was shown the documents, was furnished with copies of them, and the documents dealt only with the date and location of the opposing party's birth and family origins, such matters being within his intimate personal knowledge. 48 And admission of official records of a foreign immigration service was approved, notwithstanding that they had not been finally certified, where the reason for the absence of certification was the refusal of the foreign official in charge of the records to go to the American embassy to certify them because he preferred his own government's procedure for authenticating them, and where the opposing party could not claim that he had been prevented from investigating the authenticity and accuracy of the records. 49

◆ Practice guide: Lack of certification of a copy of a foreign official record will not bar its admission into evidence where the party against which it is offered concedes that the document is an accurate copy of the original. 50 Moreover, the failure of an opposing party to raise an objection to an absence of facts constituting good cause for admission of a foreign record notwithstanding its lack of final certification can estop him or her from raising such an issue on appeal. 51

Footnotes

Footnote 46. § 1393.

Footnote 47. *Insurance Co. of North America v S/S "Italica"* (SD NY) 567 F Supp 59, 1984 AMC 136, 36 FR Serv 2d 1473 (Italian weather records made available to opposing party over a year before trial).

Annotation: Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed 784 § 8.

Footnote 48. *United States v Rodriguez Serrate* (CA1 Puerto Rico) 534 F2d 7, 22 FR Serv 2d 141, 41 ALR Fed 777.

Footnote 49. *United States v Leal* (CA9 Guam) 509 F2d 122 (criticized on other grounds by *United States v Smith*, 172 US App DC 297, 521 F2d 957, 1 Fed Rules Evid Serv 22, 31 ALR Fed 437).

Footnote 50. *Le Roy v Sabena Belgian World Airlines* (CA2 NY) 344 F2d 266, cert den 382 US 878, 15 L Ed 2d 119, 86 S Ct 161.

Footnote 51. *United States v Pacheco-Lovio* (CA9 Cal) 463 F2d 232.

§ 1397 --Abolition by treaty or convention of requirement of final certification

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The requirement of final certification for authentication of a foreign official record is dispensed with if the record and its attestation are certified as provided in a treaty or convention to which the United States and the nation in which the record is located are parties. 52 The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, to which the United States is a party, is a convention of the sort referred to by the Rule, and provides that the requirement of final certification is abolished in favor of a model "apostille" certifying the signature, official position, and seal of the attesting officer. 53

Footnotes

Footnote 52. FR Civ P, Rule 44(a)(2).

Footnote 53. Notes of Advisory Committee on December 1991 Amendment of Rule.

As to the effect of the Hague Convention on state law, see § 1392.

Law Reviews: The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. 11 Harv Int LJ 476 (1970).

(c). Judicial Records [1398-1404]

§ 1398 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, a judgment produced for the inspection of the court, when such judgment becomes relevant in another action in the same court, requires no authentication where it is produced by the clerk. 54 But where either an original record or a purported copy of it is offered in another court, the general common-law rule is that proof of identity and authenticity must be made, 55 or the document is not admissible in evidence. 56 If the original record itself is offered, proof of its existence in appropriate official custody is sufficient evidence of its genuineness. 57 It is not sufficient for a witness to identify certain papers as those which were filed with him at a time when he was clerk of the court, or for a witness to testify that he received certain papers from the present clerk of court. 58 An attorney's production of records without other authentication is likewise insufficient. 59 Copies of the original record may be authenticated by certification by the clerk having custody of the record. 60

◆ Observation: The common law regarding authentication of judicial records has in many jurisdictions been superseded by the adoption of Rule 902 of the Uniform Rules of Evidence and the Federal Rules of Evidence. Although Rule 902 does not specifically address authentication of judicial records, its provisions make self-authenticating numerous classes of documents (such as domestic public documents, 61 certified copies of public records, 62 and officially published documents 63 to which judicial records generally or in many particular instances belong.

Footnotes

Footnote 54. *Divide Creek Irr. Dist. v Hollingsworth* (CA10 Colo) 72 F2d 859, 96 ALR 937; *Frank v State*, 142 Ga 741, 83 SE 645, error den 235 US 694, 59 L Ed 429, 35 S Ct 208; *Sutcliffe v State*, 18 Ohio 469; *Plymouth County Bank v Gilman*, 3 SD 170, 52 NW 869, adhered to, on reh 4 SD 265, 56 NW 892, later proceeding 9 SD 278, 68 NW 735; *Short v Blair & Hughes Co.* (Tex Civ App) 230 SW 427, appeal after remand (Tex Civ App) 271 SW 199.

Footnote 55. *Owings v Hull*, 34 US 607, 9 Pet 607, 9 L Ed 246; *Thomason v Odum*, 31 Ala 108; *Wickersham v Johnston*, 104 Cal 407, 38 P 89; *Commonwealth v Eastman*, 55 Mass 189, 1 Cush 189.

Footnote 56. *Slocinski v Radwan*, 83 NH 501, 144 A 787, 63 ALR 643; *Ehrlich v Mulligan*, 104 NJL 375, 140 A 463, 57 ALR 596.

Footnote 57. *Divide Creek Irr. Dist. v Hollingsworth* (CA10 Colo) 72 F2d 859, 96 ALR 937.

Footnote 58. *Lyon v Bolling*, 14 Ala 753; *Darden v Neuse & T. R. S. B. Co.*, 107 NC 437, 12 SE 46.

Footnote 59. *Bigham v Coleman*, 71 Ga 176.

Footnote 60. *State ex rel. Devening v Bartholomew*, 176 Ind 182, 95 NE 417; *Letcher's Trustee v German Nat. Bank*, 134 Ky 24, 119 SW 236; *State ex rel. Kelly v Wolfer*, 119 Minn 368, 138 NW 315.

Footnote 61. §§ 1181-1183.

Footnote 62. §§ 1186-1189.

Footnote 63. §§ 1190, 1191.

§ 1399 Records of states, territories, or possessions of United States

[View Entire Section](#)

The records and judicial proceedings of any court of a state, territory, or possession of the United States shall be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and the seal of the court annexed, if a seal exists, together with a certificate of the judge of the court that said attestation is in proper form. 64 A record of a judgment so authenticated proves itself without further evidence. 65 A transcript of a record from another state properly authenticated by certificates of the judge and clerk of court as required by the statute, which shows that the record is among those of the court of which they are officers, is prima facie admissible in evidence, although the record itself purports to belong to another court. 66 The absence of a certificate of the judge that the attestation is in proper form as required by statute renders the record inadmissible. 67 Where a certificate appears, however, extrinsic evidence that the certifying judge is in fact a judge of the court is not required in the absence of proof to the contrary. 68

The fact that the judge who has certified the clerk's attestation of a copy is not the same judge who signed the original judgment is not a bar to authentication of a copy of a judicial record under the statute. 69

Footnotes

Footnote 64. 28 USCS § 1738.

Footnote 65. *Hanley v Donoghue*, 116 US 1, 29 L Ed 535, 6 S Ct 242.

Footnote 66. *Tittman v Thornton*, 107 Mo 500, 17 SW 979.

Footnote 67. *Drummond's Admrs. v Magruder & Co.*, 13 US 122, 9 Cranch 122, 3 L Ed 677.

Footnote 68. *Paschall v Geib* (Tex Civ App Dallas) 405 SW2d 385, writ ref n r e (Oct 19, 1966) and reh'g of writ of error overr (Nov 16, 1966).

Footnote 69. *Paschall v Geib* (Tex Civ App Dallas) 405 SW2d 385, writ ref n r e (Oct 19, 1966) and reh'g of writ of error overr (Nov 16, 1966).

§ 1400 --Courts within scope of federal statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The language of 28 USCS § 1738 does not include judicial records of federal courts. 70

The federal statute does not apply to records of courts of inferior and limited jurisdiction, as distinguished from records of courts of general jurisdiction. 71 This rule has been

held applicable to a judgment rendered by a court of special or limited jurisdiction and filed pursuant to statutory provisions in a court of general jurisdiction. 72 Authentication of the records of such inferior courts must conform to the requirements of the common law, 73 or to the statutes of the state in which they are to be introduced in evidence. 74

◆ Observation: Records of an inferior court (such as a justice court) have been deemed within the scope of the statute, however, where the court is under the law of the state a court of record. 75

Footnotes

Footnote 70. *National Acci. Soc. v Spiro* (CA2 NY) 94 F 750; *Adams v Way*, 33 Conn 419.

As to authentication of records of federal courts, see § 1402.

Footnote 71. *Draggou v Graham*, 9 Ind 212; *Strecker v Railson*, 16 ND 68, 111 NW 612.

Footnote 72. *Strecker v Railson*, 16 ND 68, 111 NW 612.

Footnote 73. *Strecker v Railson*, 16 ND 68, 111 NW 612.

Footnote 74. *Collier v Collier*, 150 Ind 276, 49 NE 1063; *Missouri, K. & T. R. Co. v Hindman*, 83 Kan 35, 110 P 102; *Smith v Petrie*, 70 Minn 433, 73 NW 155; *Robinson v Prescott*, 4 NH 450; *Silver Lake Bank v Harding*, 5 Ohio 545.

Footnote 75. *Koury v Claymont Development Co.*, 32 Del 115, 119 A 858; *Belton v Fisher*, 44 Ill 32; *Draggou v Graham*, 9 Ind 212; *Case v McGee*, 8 Md 9; *Melvin v Lyons*, 18 Miss 78; *Mahurin v Bickford*, 6 NH 567; *Pelton v Platner*, 13 Ohio 209; *Brown v Edson*, 23 Vt 435.

§ 1401 --Under state statutes

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A state may enact a statute authorizing the introduction of a judicial record of a sister state in evidence without compliance with all the requisites established by the federal statute, 76 although such a statute may not impose requirements in excess of those imposed by the federal statute, or inconsistent with them. 77 Accordingly, a copy of the proceedings of a court of one state is admissible in evidence in a court of another state, if authenticated according to the statute of the latter, even though not according to the acts of Congress. 78 A document which has not been authenticated in the manner of either the federal statute or an applicable state statute cannot be admitted without the consent of the opposing party. 79

Footnotes

Footnote 76. 28 USCS § 1738.

Footnote 77. *Garden City Sand Co. v Miller*, 157 Ill 225, 41 NE 753; *Willock v Wilson*, 178 Mass 68, 59 NE 757; *Ellis v Ellis*, 55 Minn 401, 56 NW 1056.

Footnote 78. *Gradler v Johnson*, 372 Ill 137, 22 NE2d 946, 159 ALR 1123; *Ellis v Ellis*, 55 Minn 401, 56 NW 1056.

A copy of a foreign judgment, certified by the clerk having custody and control of the original records as a true and attested copy, has been held admissible in evidence, without further identification, in an action on the judgment. *Sampson v Conlon*, 100 NH 358, 126 A2d 250, 60 ALR2d 1021.

Footnote 79. *Ehrlich v Mulligan*, 104 NJL 375, 140 A 463, 57 ALR 596.

§ 1402 Records of federal courts

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The record of a judgment in a federal district court need not be authenticated in the manner provided by 28 USCS § 1738 to make it admissible in another federal court. 80 It is, however, no objection to the admissibility of federal judicial records that they are authenticated in the mode provided by the statute for the authentication of judicial records of states. 81 However, the authentication in federal court of judicial records kept within the United States, or any state, district, commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, is now governed by Federal Rule of Civil Procedure 44, as judicial records are "official records" within the scope of the Rule. 82

Footnotes

Footnote 80. *Turnbull v Payson*, 95 US 418, 5 Otto 418, 24 L Ed 437 (stating that authentication may be had by the certificate of the clerk under the seal of the court, without the judge's certificate that the same is in due form).

Footnote 81. *Williams v Wilkes*, 14 Pa 228.

Footnote 82. *Maroon v Immigration & Naturalization Service* (CA8) 364 F2d 982, 2 ALR Fed 292 (applying Rule 44 to records of conviction for income tax evasion).

As to the provisions of FR Civ P Rule 44, generally, see §§ 1388-1390.

§ 1403 Judicial records of foreign nations—at common law

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, judgments of foreign countries, to be admissible in evidence, must be clothed with all the forms required to prove their authenticity in the country in which they are pronounced. 83 Such judgments are usually authenticated by an exemplification under the great seal, by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. 84 However, in attesting the record of a foreign court, offered in evidence, it is only necessary that the seal of the court be attached to the certificate of the clerk; it need not be attached to the record. 85

◆ Observation: Copies of records of foreign courts, however, are not proved by the mere fact that they purport to be under the hands and seals of the officers of such courts; there must be some extrinsic proof of the genuineness of the signatures and seals. 86

The clerk of a court is presumed to possess authority to make and certify copies of the records of a court in a certificate over his official signature, together with the seal of the court. The clerk's official signature and the seal are duly authenticated by the affixing of the great seal of the state or government in which the court is found to the certificate of the keeper thereof; the great seal proves itself. 87

Footnotes

Footnote 83. Succession of Lorenz, 41 La Ann 1091, 6 So 886.

In *Yeaton v Fry*, 9 US 335, 5 Cranch 335, 3 L Ed 117, it was held that copies of the proceedings of the vice-admiralty court of Jamaica were admissible in evidence when certified under the seal of the court by the deputy registrar, who was certified by the judge of the court, who was certified by a notary public.

Footnote 84. *Church v Hubbart*, 6 US 187, 2 Cranch 187, 2 L Ed 249, holding that a translation of a foreign judgment, certified by a consul of the United States, but not under oath, and a foreign judgment certified under the private seal of his arms by one styling himself to be the Secretary of State for foreign affairs, are not evidence.

The record of a court of vice-admiralty in Bermuda, purporting to be certified by the deputy registrar, under the seal of the court, is admissible in evidence in a state court without other proofs of authenticity. *Thompson v Stewart*, 3 Conn 171.

Footnote 85. *Carpenter v Ritchie*, 2 Wash 512, 28 P 380.

It has been held that the record of a judgment of a court of a province of Canada is duly authenticated by attestation of the clerk of the court, with the seal of the court annexed, to

which is attached the proper certificates of the chief justice of the court, of the assistant secretary of state of the province, and of the governor in chief of said province, to which is affixed the great seal of the province. *Lazier v Westcott*, 26 NY 146.

Footnote 86. *Thompson v Stewart*, 3 Conn 171; *Gage, Dater & Sloan v Dubuque & P. R. Co.*, 11 Iowa 310; *Word v McKinney*, 25 Tex 258.

Footnote 87. *Gunn v Peakes*, 36 Minn 177, 30 NW 466; *Lazier v Westcott*, 26 NY 146.

§ 1404 --Pursuant to statute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The authentication of foreign judicial records is in some jurisdictions governed by statute. 88 Thus, the procedures prescribed in Rule 44(a)(2) of the Federal Rules of Civil Procedure, which provides generally for the authentication of foreign official documents, apply to the authentication of a judgment of a foreign court. 89 Section 5.02 of the Uniform Interstate and International Procedure Act provides for authentication of foreign official records in a manner substantially similar to that set forth in Rule 44(a)(2). 90 Moreover, a foreign judicial record may be self-authenticating under the provisions of Rule 902(3) of the Uniform Rules of Evidence or the Federal Rules of Evidence. 91

◆ Reminder: Where a foreign judicial record is a public document and originates from a signatory to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, its authentication is governed by the Convention rather than by state law. 92

Footnotes

Footnote 88. *Cooley v Cooley* (Tex Civ App Eastland) 503 SW2d 604 (statute providing for authentication by officer or clerk of "foreign records which are permitted or required by law to be made").

Footnote 89. § 1394.

Footnote 90. As to the provisions of Rule 44(a)(2) relating to the authentication of foreign official records, see § 1393.

Footnote 91. As to the provisions of Rule 902(3), see §§ 1184, 1185.

Footnote 92. § 1392.

(d). Legislative Acts [1405-1411]

§ 1405 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, a court is required to take judicial notice of the existence and tenor of the public laws of the state. 93 This rule extends to the taking of judicial notice by a federal court of the laws of the state in which it sits. 94 On the other hand, strictly private acts are not, as a general rule, judicially noticed at common law. 95 It has been said that they must be proved the same as any other matter of fact. 96 The common law requires that they be proved by sworn or exemplified copies authenticated by the great seal. 97 In some states, however, all laws, both public and private, are required by statute to be judicially noticed, and in most other states the distinction between public and private acts of the legislature has become relatively unimportant in view of constitutional prohibitions against special legislation. 98 Also, many states have enacted statutes providing that volumes containing the statutes of the state, published by state authority, are sufficient evidence of such statutes. 99

It has been held, in the absence of statute, that an edition of the laws of the state published under the authority of the legislature is evidence both of public and private laws. 1 Thus, laws printed by the public printer, by order of the legislature, in accordance with a general act of assembly for that purpose, whether public or private, are to be considered as sufficiently authenticated. 2 A statute may also be proved, like other records, by a sworn copy. 3

Footnotes

Footnote 93. § 120.

Footnote 94. § 105.

Footnote 95. § 121.

Footnote 96. *Leland v Wilkinson*, 31 US 317, 6 Pet 317, 8 L Ed 412; *Spangler v Jacoby*, 14 Ill 297; *Elmondorff v Carmichael*, 13 Ky 472; *Bow v Allenstown*, 34 NH 351; *Smith v Potter*, 27 Vt 304.

Footnote 97. *Smith v Potter*, 27 Vt 304.

Footnote 98. § 121.

Footnote 99. *Falls v United States Sav. Loan & Bldg. Co.*, 97 Ala 417, 13 So 25.

As to self-authentication of official publications under Rule 902(5) of the Uniform Rules of Evidence or the Federal Rules of Evidence, see §§ 1190, 1191.

Footnote 1. *Junction R. Co. v Bank of Ashland*, 79 US 226, 12 Wall 226, 20 L Ed 385.

Footnote 2. *Bow v Allenstown*, 34 NH 351; *Emery v Berry*, 28 NH 473; *State v Abbey*, 29 Vt 60.

Footnote 3. *Ennis v Smith*, 55 US 400, 14 How 400, 14 L Ed 472.

§ 1406 Federal statutes, treaties, and rules; laws of the District of Columbia

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The United States Statutes at Large are legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several states, and the territories and insular possessions of the United States. 4 A compilation entitled "United States Treaties and Other International Agreements" is legal evidence of the treaties, international agreements other than treaties, and the President's proclamations of such treaties and agreements, therein contained, in all the courts of the United States, the several states, and the territories and insular possessions of the United States. 5

It is also provided by statute that the edition of the laws and treaties of the United States, published by Little and Brown, and the publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist of the United States, and the Treaties and Other International Acts Series issued under the authority of the Secretary of State, shall be competent evidence of the several public and private acts of Congress, and of the treaties, international agreements other than treaties, and the President's proclamations of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof. 6

Provision is also made as to the evidentiary effect of the United States Code, the Code of the District of Columbia, and current supplements thereto. 7 Rule 902(5) of the Federal Rules of Evidence makes self-authenticating officially published books, pamphlets, or other publications containing statutes. 8

§ 1406 ----Federal statutes, treaties, and rules; laws of the District of Columbia [SUPPLEMENT]

Statutes:

In 1994, the then-existing text of 1 USCS § :112a was codified as 1 USCS § :112a(a). 1 USCS § :112a(b) was added, providing that the Secretary of State may determine that publication of certain categories of agreements is not required if certain criteria are met.

Footnotes

Footnote 4. 1 USCS § 112.

The statutes at large are accepted as proof of those laws in any court of the United States. *Bear v United States* (DC Neb) 611 F Supp 589, *affd* (CA8 Neb) 810 F2d 153.

Footnote 5. 1 USCS § 112a.

Footnote 6. 1 USCS § 113.

Footnote 7. 1 USCS §§ 204, 209.

Footnote 8. As to Rule 902(5), generally, see § 1190.

As to authentication by proof of custody under Rule 901(b)(7), see § 1387.

§ 1407 Journals of legislature

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The printed journals of either house of a legislature, published in obedience to law, and the copies of such journals certified by the secretary of state, are competent evidence at common law of the proceedings in the legislature. 9 The clerks of the senate and house of representatives are the keepers of their respective records, and an extract from the journals of either house may be authenticated by the clerk. 10

A federal statute provides that extracts from the Journals of the Senate and the House of Representatives, and from the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or the Clerk of the House of Representatives, shall be received in evidence with the same effect as the originals would have. 11

◆ Observation: Rule 902(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence makes officially published journals of a legislature self-authenticating. 12

Footnotes

Footnote 9. *Post v Supervisors*, 105 US 667, 15 Otto 667, 26 L Ed 1204; *South Ottawa v Perkins*, 94 US 260, 4 Otto 260, 24 L Ed 154; *Watkins v Lessee of Holman*, 41 US 25, 16 Pet 25, 10 L Ed 873; *Taylor v Beckham*, 108 Ky 278, 56 SW 177, *error dismd* 178 US 548, 44 L Ed 1187, 20 S Ct 890; *Ex parte Wren*, 63 Miss 512; *State ex rel. George v Swift*, 10 Nev 176.

Footnote 10. Thomson v Gaillard, 37 SCL 418.

Footnote 11. 28 USCS § 1736.

Footnote 12. As to Rule 902(5), generally, see § 1191.

§ 1408 Acts of another state—generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Courts generally do not take judicial notice of the laws of a sister state, except to the extent that they may be required to do so in order to effectuate the provisions of the full faith and credit clause of the Federal Constitution; 13 such laws must be proved the same as other facts. The Constitution of the United States requires full faith and credit to be given in each state to the public acts of every other state, and empowers Congress to prescribe by general law the manner in which such acts shall be proved. 14 Pursuant to this provision, an act of Congress, originally enacted as the Act of May 26, 1790, declares that the acts of the legislature of any state, territory, or possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such state, territory, or possession thereto. 15 Under this statute, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts in the courts of other states and of the Union. No formality is required other than the annexation of the seal, which will be presumed to have been done by an officer having custody of it and competent authority to affix it. 16

The federal statutes do not prevent a party from proving acts of another state by the more laborious method of the common law. 17 Authentication in the manner provided in the federal statutes is not generally deemed the best evidence in such a sense as to exclude other modes of proof. 18

The problem of proving the law of other states has, in many states, been obviated to a large extent by the adoption of the Uniform Judicial Notice of Foreign Law Act, which requires the courts of the adopting state to take judicial notice of the statutes of every state, territory, and other jurisdiction of the United States. 19

Footnotes

Footnote 13. § 110.

Footnote 14. USCS Constitution Art 4 § 1.

Footnote 15. 28 USCS § 1738.

Footnote 16. United States v Amedy, 24 US 392, 11 Wheat 392, 6 L Ed 502; United States v Johns (CCD Pa) 4 US 412, 4 Dall 412, 1 L Ed 888, 1 Wash CC 363, 26 F Cas

616, No 15481; *Hunter v Fulcher*, 26 Va 126.

Footnote 17. *People ex rel. Johnson v Miller*, 195 Ill 621, 63 NE 504; *Petty v Hayden*, 115 Iowa 212, 88 NW 339; *Kingman v Cowles*, 103 Mass 283.

Footnote 18. *Anthony Doll & Co. v Hogan*, 40 NM 55, 53 P2d 649.

Footnote 19. § 109.

§ 1409 --Books or copies of statutes purporting to be officially published

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The mode provided by the act of Congress for the authentication of statutes of other states does not exclude other modes of proof. 20 At common law, the statutory law of another state may generally be proved by statute books or printed copies of the statute in question purporting to be published under the authority of such other state, without other authentication, 21 although in some instances it has been held that such volumes are not admissible without extrinsic evidence of their authenticity. 22 The issue is controlled in some states by statutes providing generally that printed statutes of other states are admissible where they purport to be printed by public authority. 23 Rule 902(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence, which generally makes self-authenticating any book, pamphlet, or other publication issued by public authority, will have a similar effect with respect to a printed volume of another state's statutes. 24

Volumes or copies of the statutes of another state, printed by private individuals and not purporting to be published by authority of the state, and mere unofficial volumes purporting to contain the statutes or digests of the statutes of other states, which are not shown to be commonly admitted as evidence of the laws in that state, are not admissible to prove such laws. 25

Footnotes

Footnote 20. § 1408.

Footnote 21. *Ennis v Smith*, 55 US 400, 14 How 400, 14 L Ed 472; *Falls v United States Sav. Loan & Bldg. Co.*, 97 Ala 417, 13 So 25; *Clarke v Bank of Mississippi*, 10 Ark 516; *Cochran v Ward*, 5 Ind App 89, 29 NE 795, reh overr 5 Ind App 97, 31 NE 581; *Goodwin v Provident Sav. Life Assur. Soc.*, 97 Iowa 226, 66 NW 157; *Handley v Harris*, 48 Kan 606, 29 P 1145; *Biesenthall v Williams*, 62 Ky 329; *Lapice v Smith*, 13 La 91; *Reed v Stevens*, 120 Me 290, 113 A 712; *Commonwealth v Stevens*, 196 Mass 280, 82 NE 33; *Emery v Berry*, 28 NH 473; *Anthony Doll & Co. v Hogan*, 40 NM 55, 53 P2d 649; *In re Gehrig's Estate*, 126 NY 537, 27 NE 784; *Cole v District Board of School Dist.*, 32 Okla 692, 123 P 426; *State v Abbey*, 29 Vt 60; *Union Cent. Life Ins. Co. v Pollard*, 94 Va 146, 26 SE 421.

Footnote 22. *Stanford v Pruet*, 27 Ga 243.

Footnote 23. *Falls v United States Sav. Loan & Bldg. Co.*, 97 Ala 417, 13 So 25; *Cochran v Ward*, 5 Ind App 89, 29 NE 795, reh overr 5 Ind App 97, 31 NE 581; *Rudolph Hardware Co. v Price*, 164 Iowa 353, 145 NW 910.

Footnote 24. As to Rule 902(5), generally, see § 1190.

Footnote 25. *Yarbrough v Arnold*, 20 Ark 592; *Dixon v Thatcher*, 14 Ark 141; *Canfield v Squire* (Conn) 2 Root 300; *Rudolph Hardware Co. v Price*, 164 Iowa 353, 145 NW 910.

§ 1410 Acts of foreign country

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of statute, courts do not take judicial notice of the laws of another country. 26 At common law, a printed copy of a statute of a foreign country requires authentication to be admissible in evidence. 27 Statutes of foreign countries may be proved at common law by printed volumes of foreign statutes, where authenticated by the oath of a competent person, or by some other method equivalent to the sanction of an oath. 28

Some jurisdictions have adopted statutes to the effect that a printed copy of the law at issue is prima facie evidence of the foreign country's law if the copy appears in an official publication or, in the case of an unofficial publication, if the volume is shown to be commonly recognized and used as evidence of the law in the courts of that country. Some such statutes are based on the Uniform Proof of Statutes Act, which was promulgated in 1920. The Uniform Proof of Statutes Act was superseded by the Uniform Interstate and International Procedure Act, promulgated in 1962, which sets forth as the standard for admissibility of foreign law that such law appear in any publication proved to be commonly accepted as proof thereof in the tribunals having jurisdiction in the foreign governmental unit. 29

Footnotes

Footnote 26. § 112.

Footnote 27. *Pierce v Indseth*, 106 US 546, 16 Otto 546, 27 L Ed 254, 1 S Ct 418; *Ennis v Smith*, 55 US 400, 14 How 400, 14 L Ed 472; *Church v Hubbard*, 6 US 187, 2 Cranch 187, 2 L Ed 249; *Owen v Boyle*, 15 Me 147; *Baltimore & O. R. R. Co. v Glenn*, 28 Md 287; *Anglo-American Land Mortg. & Agency Co. v Dyer*, 181 Mass 593, 64 NE 416; *Barrows v Joseph F. Downs & Co.*, 9 RI 446.

Annotation: Comment Note.—Pleading and proof of law of foreign country, 75 ALR3d 177.

Footnote 28. *Nashua Sav. Bank v Anglo-American Land, Mortg. & Agency Co.*, 189 US 221, 47 L Ed 782, 23 S Ct 517 (copies of acts of Parliament were sufficiently authenticated to be admissible in evidence in a federal court sitting in New Hampshire when produced by an attorney and solicitor of the Supreme Court of Judicature in England of 30 years' experience, in connection with his testimony that he was intimately acquainted with such acts, and that the copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof").

Footnote 29. Uniform Interstate and International Procedure Act § 5.03.

§ 1411 Municipal ordinances

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of statute, courts of general jurisdiction do not take judicial notice of municipal ordinances, but require that they be proved as other facts. 30 A municipal ordinance may be proved as to its contents, as well as to its passage, by the introduction in evidence of the original record, properly identified as such. 31 An ordinance may also be proved by a copy certified or attested to be correct by the official custodian of the records of the municipality. 32

The statutes in some states specifically provide for the proof of bylaws and ordinances of municipal corporations, and usually provide for their proof by authorized printed copies, certified transcripts of the books, and minutes or journals kept under the direction of the corporation, as well as by original books, ordinances, and minutes or journals. Under such a statute, an ordinance having the seal of the municipality attached has been held to be properly admitted in evidence without further proof of its passage. 33 Several commentators have expressed the view that Rule 902(5) of the Uniform and Federal Rules of Evidence—which provides generally that books, pamphlets, or other publications purporting to be issued by public authority are self-authenticating—should be regarded as extending to official publications of municipal ordinances. 34

Municipal courts may take, or may be required by statute to take, judicial notice of the ordinances or other local laws of the municipalities in which their jurisdictions lie. 35 But even though a court may be bound by statute to take judicial notice of a municipal ordinance, it is not required to receive in evidence an unofficial and unauthorized publication purporting to contain such ordinance. 36

Footnotes

Footnote 30. § 126.

Footnote 31. *Porter v State*, 124 Ga 297, 52 SE 283; *Grafton v S. Paul, M. & M. R. Co.*,

16 ND 313, 113 NW 598.

A book identified by the mayor as the ordinance book in which all ordinances of the municipality are kept and recorded, where there is nothing in the evidence to impeach the document as a public record, is competent testimony to prove the existence of the ordinance in question. *Bugg v Houlka*, 122 Miss 400, 84 So 387, 9 ALR 480.

Footnote 32. *Sawyer v Lorenzen & Weise*, 149 Iowa 87, 127 NW 1091.

Footnote 33. *Eichenlaub v St. Joseph*, 113 Mo 395, 21 SW 8; *Devon v Oroville*, 120 Wash 317, 207 P 231.

Footnote 34. § 1190.

Footnote 35. § 126.

Footnote 36. *Moore v Dresden Inv. Co.*, 162 Wash 289, 298 P 465, 77 ALR 1258.

n. Privately Printed Matter [1412-1429]

(1). In General [1412]

§ 1412 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Generally speaking, privately printed books or other publications, when offered for the purpose of proving the truth of the matters stated therein, are excludable from evidence on hearsay grounds. 37 The fact that such material may be self-authenticating under an applicable rule or statute does not remove a hearsay objection to its admission into evidence. 38 However, in keeping with the general rule that a statement is not hearsay if it is not offered for the purpose of proving its truth, 39 printed publications are not subject to exclusion as hearsay where they are offered merely to show the fact of their publication, or some fact other than the truth of their content. 40 Moreover, the hearsay rule is subject to various exceptions specifically concerning certain types of privately printed matter, such as learned treatises, 41 or market reports and commercial publications, 42 as well as more generally stated exceptions which may be applied in particular circumstances to privately printed matter. 43

Privately printed books or publications must be authenticated to be admitted into evidence, 44 unless they are deemed self-authenticating as ancient documents, 45 or by virtue of some other exception to the requirement of authentication. Particularly relevant in the context of privately printed documents are the provisions of the Uniform Rules of Evidence and the Federal Rules of Evidence making newspapers and periodicals, 46 as well as commercial paper and related documents, 47 self-authenticating.

Footnotes

Footnote 37. *Estate of Dickens v Avanti Research & Dev., Inc.* (1st Dist) 161 Ill App 3d 565, 113 Ill Dec 399, 515 NE2d 208, CCH Prod Liab Rep ¶ 11596, app den (Ill) 117 Ill Dec 224, 520 NE2d 385; *Milner Enterprises, Inc. v Jacobs* (Miss) 207 So 2d 85; *Superior Ice & Coal Co. v Belger Cartage Service, Inc.* (Mo) 337 SW2d 897.

Footnote 38. *Duhon v Petroleum Helicopters, Inc.* (La App 3d Cir) 554 So 2d 1270, cert den (La) 559 So 2d 1360 and (disapproved on other grounds by *Green v Industrial Helicopters, Inc.* (La) 593 So 2d 634, 1992 AMC 1426).

As to self-authenticating documents, generally, see §§ 1180 et seq.

Footnote 39. § 661.

Footnote 40. *Woods v State*, 101 Nev 128, 696 P2d 464.

Admission of a newspaper article, along with numerous other items found in defendant's truck, did not violate rule against hearsay where article was admitted only to show that it had been found in the truck. *Richardson v State* (Tex App Beaumont) 690 SW2d 22, petition for discretionary review ref (Nov 6, 1985).

Footnote 41. As to the exception to the hearsay rule for learned treatises under the Uniform Rules of Evidence and the Federal Rules of Evidence, see §§ 1413 et seq.

Footnote 42. As to the exception to the hearsay rule for market reports and commercial publications under the Uniform Rules of Evidence and the Federal Rules of Evidence, see § 1429.

Footnote 43. As to the possible application of Rule 803(20), an exception for reputation as to events of general history, to a privately printed newspaper article, see § 1425.

Footnote 44. *Aguayo v Crompton & Knowles Corp.* (2nd Dist) 183 Cal App 3d 1032, 228 Cal Rptr 768, CCH Prod Liab Rep ¶ 11111.

Footnote 45. *Commonwealth ex rel. Ferguson v Ball*, 277 Pa 301, 121 A 191, 29 ALR 626.

As to the self-authentication of ancient documents generally, see §§ 1201 et seq.

Footnote 46. § 1192.

Footnote 47. §§ 1196 et seq.

(2). Learned Treatises [1413-1417]

§ 1413 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is generally held, in the absence of contrary statutory provision, that scientific books and treatises are hearsay and as such not admissible as independent evidence of the truth of the facts therein stated. 48 This is so even though opinions may be given by expert witnesses whose knowledge is based at least in part upon such treatises. 49 Another reason advanced for the exclusion of learned treatises from evidence is that a lay jury may be misled or confused by them. 50

The common-law rule against admission in evidence of learned treatises has in many jurisdictions been superseded by statutes providing for their admission under certain circumstances. 51

◆ Practice guide: Notwithstanding the general rule against admission of learned treatises in evidence, in some cases counsel has been permitted to read from such treatises by way of illustration in arguing to the jury. 52 Furthermore, witnesses giving expert testimony may refer to treatises to corroborate their own opinions; such reference is not considered an introduction of the treatises in evidence. 53 And the cross examination of expert witnesses may be based on information contained in a treatise, under certain circumstances. 54

§ 1413 ----Generally [SUPPLEMENT]

Practice Aids: Limits on admitting learned treatises, 82 Ill BJ 186 (1994).

Case authorities:

Referee in attorney discipline hearing properly found that book entitled "Feeling Good: The New Mood Therapy" could not be introduced as substantive evidence to help referee assess attorney's medical condition, under statutory exception to hearsay rule for "learned treatises," where referee determined that book had not been written primarily for professionals but for general public and, consequently, referee could not find that it had influence on medical opinions. Furthermore, referee was unable to take judicial notice that author was recognized in his profession as expert in subject of depression and anxiety. In re Disciplinary Proceedings Against Thompson (1993) 180 Wis 2d 48, 508 NW2d 384.

Footnotes

Footnote 48. Estate of Dickens v Avanti Research & Dev., Inc. (1st Dist) 161 Ill App 3d 565, 113 Ill Dec 399, 515 NE2d 208, CCH Prod Liab Rep ¶ 11596, app den (Ill) 117 Ill Dec 224, 520 NE2d 385; Kelly v St. Luke's Hosp. (Mo App) 826 SW2d 391; Johnson v

Mountainside Hosp., 239 NJ Super 312, 571 A2d 318, cert den 122 NJ 188, 584 A2d 248; Morfesis v Sobol (3d Dept) 172 App Div 2d 897, 567 NYS2d 954, app den 78 NY2d 856, 574 NYS2d 937, 580 NE2d 409; Gulf Oil Corp. v Miller, 198 Okla 54, 175 P2d 335.

Contra Thornton v Mahan (Ala) 423 So 2d 181 (recognizing "learned treatise" exception to hearsay rule applicable where an expert testifies that a particular work is standard or trustworthy).

Annotation: Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

Medical books or treatises as independent evidence, 84 ALR2d 1338.

Footnote 49. Western Assur. Co. v J. H. Mohlman Co. (CA2 NY) 83 F 811, cert den 168 US 710, 42 L Ed 1213, 18 S Ct 949; Fidelity & Casualty Co. v Meyer, 106 Ark 91, 152 SW 995; Coastal Coaches, Inc. v Ball (Tex Civ App) 234 SW2d 474, 22 ALR2d 955, writ ref n r e.

Footnote 50. Cross v Huttenlocher, 185 Conn 390, 440 A2d 952; Bixby v Omaha & C. B. R. & B. Co., 105 Iowa 293, 75 NW 182; Ashworth v Kittridge, 66 Mass 193, 12 Cush 193; People v Hall, 48 Mich 482, 12 NW 665; Boyle v State, 57 Wis 472, 15 NW 827.

Footnote 51. State v McDonald, 222 Kan 494, 565 P2d 267 (statute providing that statements in published treatises may be received in evidence if court takes judicial notice or expert testifies that treatise is a reliable authority); Ramsland v Shaw, 341 Mass 56, 166 NE2d 894 (statute permitting the introduction of medical books and treatises, in the discretion of the court, in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitarium, as evidence when the statement is relevant, when its author is recognized in his profession as an expert on the subject, and where notice has been given to the adverse party within a specified time period).

As to the provisions of the Uniform Rules of Evidence and the Federal Rules of Evidence concerning the admission of learned treatises into evidence, see §§ 1413 et seq.

Footnote 52. 75A Am Jur 2d, Trial § 512.

Footnote 53. 31A Am Jur 2d, Expert and Opinion Evidence § 124.

Footnote 54. 31A Am Jur 2d, Expert and Opinion Evidence §§ 125 et seq.

§ 1414 Books of exact science; almanacs, tables, and computations

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A general exception to the common-law rule excluding scientific books as independent

evidence exists with reference to books or publications on topics of exact science which contain statements of ascertained facts rather than opinions, or which, by long use in the practical affairs of life, have come to be accepted as standard and unvarying authority in determining the action of those who use them; publications of this kind, when duly authenticated, are generally admissible as evidence. 55 The most frequently used publications of this class are standard tables of mortality and life expectancy. 56 To this class belong also almanacs, 57 tables of logarithms, weights and measures, interest, and similar compilations, 58 and, according to some authorities, remarriage tables. 59

Encyclopedias and dictionaries also fall within this class, the latter being admitted to show the ordinary meaning of words, not as evidence, but only as aids to the memory and understanding of the court. 60

The authenticity of a publication of this type, produced at the trial, should be established by proof satisfactory to the court, as by the testimony of a witness familiar with its nature and use. 61

Footnotes

Footnote 55. *Nix v Hedden*, 149 US 304, 37 L Ed 745, 13 S Ct 881; *Kansas C. S. R. Co. v Morris*, 80 Ark 528, 98 SW 363; *Bixby v Omaha & C. B. R. & B. Co.*, 105 Iowa 293, 75 NW 182; *Illinois C. R. Co. v Houchins*, 121 Ky 526, 89 SW 530; *Tucker v Donald*, 60 Miss 460.

Practice References Hunter, *Federal Trial Handbook* (3d ed) § 44.27.

Footnote 56. §§ 1418-1423.

Footnote 57. *Munshower v State*, 55 Md 11.

Practice References 1 Am Jur Proof of Facts 475, Authentication of Almanac.

Footnote 58. *Munshower v State*, 55 Md 11; *Tucker v Donald*, 60 Miss 460.

Footnote 59. *In re Keenan's Estate*, 302 NY 417, 99 NE2d 219, 25 ALR2d 1459.

However, in *Osborn v Osborn* (Mo App) 252 SW2d 837, the court said that the variety of factors involved makes it impossible to forecast the probability of a widow's remarriage with a view to fixing the value of her homestead right.

Annotation: Remarriage tables, 25 ALR2d 1464.

Practice References Foundation for Introduction in Evidence of Remarriage Tables. 10 Am Jur Proof of Facts 281, Remarriage, Proof 1.

Footnote 60. *Nix v Hedden*, 149 US 304, 37 L Ed 745, 13 S Ct 881.

Footnote 61. *Notto v Atlantic City R. Co.*, 75 NJL 826, 69 A 968.

§ 1415 Nongovernmental safety codes or standards

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Safety codes or standards issued by voluntary organizations have been held admissible in evidence by some courts as bearing on the issue of negligence in particular cases. 62 Such evidence may be excluded if it is not sufficiently accredited by an expert witness as to its acceptance in the field for which it has been promulgated, 63 or not sufficiently pertinent to the circumstances of the case. 64

Other cases have held that such codes or standards of safety are not admissible. 65

◆ Caution: Published safety standards have been held admissible in evidence under Rule 803(18) of the Uniform Rules of Evidence and the Federal Rules of Evidence (the "learned treatise" exception to the hearsay rule), 66 and the adoption of the Rule or a substantially similar rule by a particular jurisdiction arguably represents a statutory supersession of prior contrary case law concerning safety standards and the hearsay rule.

§ 1415 ----Nongovernmental safety codes or standards [SUPPLEMENT]

Case authorities:

In an appeal of a take-nothing judgment in a slip and fall case, the trial court properly excluded evidence: (1) where the victim attempted to use a statement made to her by a store employee to impeach another store employee by showing bias, because bias of a witness can be shown only by introducing evidence of prior statements made by that witness; (2) where the victim attempted to introduce the store's safety manual, because the victim did not lay a proper predicate for the admission of the manual by asking the witness if she had ever seen or read the manual; and (3) where the victim attempted to introduce the store's post-accident instruction for the employees to be more careful, because it was not a subsequent remedial measure that could be used as evidence of the feasibility of a precautionary measure since the store did not alter the manner in which the plants were sprayed. *Keetch v Kroger Co.* (1992, Tex) 845 SW2d 262.

Footnotes

Footnote 62. *Torre v Harris-Seybold Co.*, 9 Mass App 660, 404 NE2d 96, CCH Prod Liab Rep ¶ 8722; *Bailey v Baker's Air Force Gas Corp.* (4th Dept) 50 App Div 2d 129, 376 NYS2d 212.

As to safety codes or standards promulgated by governmental bodies, see § 1346.

Annotation: Admissibility in evidence, on issue of negligence, of codes or standards

of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Footnote 63. *Standridge v Alabama Power Co.* (Ala) 418 So 2d 84.

Footnote 64. *Aller v Rodgers Machinery Mfg. Co.* (Iowa) 268 NW2d 830, 4 ALR4th 634 (in products liability action by injured user of woodworking saw against manufacturer of saw, safety standards of various associations and government agencies were properly excluded from evidence where they dealt generally with standards for the metalworking industry rather than the woodworking industry).

Footnote 65. *Catholic Diocese of Natchez-Jackson v Jaquith* (Miss) 224 So 2d 216 (assuming that the introduction of the material was probably erroneous, because safety codes are admissible only when they have been given compulsory force by state legislatures, but that the admission of the evidence was harmless error).

Footnote 66. § 1417.

§ 1416 Provisions of Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Under Rule 803(18) of the Uniform Rules of Evidence and the Federal Rules of Evidence, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by a witness or by other expert testimony or by judicial notice, are not subject to exclusion as hearsay to the extent called to the attention of an expert witness on cross-examination or relied upon by him or her on direct examination. The Rule further provides that if admitted, such statements may be read into evidence but may not be received as exhibits. 67

◆ Observation: A reason advanced at common law for the exclusion of learned treatises from evidence, aside from their nature as hearsay, was the danger that a lay jury might be misled or confused by them. 68 Rule 803(18) addresses this concern by limiting the admission of material in learned treatises to situations in which an expert witness is on the stand and available to explain such material, and by providing that such material may not physically be received in evidence. 69

A learned treatise is not admissible as independent evidence under Rule 803(18); a foundation as to its authoritativeness must generally be laid by an expert witness. 70 If a cross-examiner establishes the reputability of a treatise by proof or judicial notice, the work may be used to impeach an expert witness regardless of whether the witness relies on or acknowledges the work as authoritative. 71 The fact that the statements in the treatise are disputed does not preclude their admission into evidence if the requirements of the Rule have been met. 72 But if the reliability of the treatise is not established by the testimony of some expert witness, or by judicial notice, the material therein may not

be introduced into evidence. 73 The Rule extends only to published works that have been subjected to widespread collegial scrutiny, and does not extend to the prior inconsistent testimony of an expert in order to impeach his or her current testimony. 74 An article cannot be established as authoritative merely by testimony that the periodical in which it appeared is highly regarded; it is necessary that the foundation testimony go to the authoritative stature of the writer of the article, or the acceptance of article itself by the profession. 75

The requirement that a treatise be established as a reliable authority by the testimony of an expert witness applies even where the treatise has been written by a party to the action. For example, in a medical malpractice case, a treatise written by the defendant cannot be admitted under the Rule until a foundation for the book has been laid by an expert witness. 76 Furthermore, even where a treatise authored by a party has been qualified as authoritative under the Rule, it is nonetheless subject to exclusion on the grounds that it is inherently prejudicial to recognize as authoritative a work authored by a party. 77

§ 1416 ----Provisions of Uniform and Federal Rules of Evidence [SUPPLEMENT]

Practice Aids: Increasing the useful information provided by experts in the courtroom: A comparison of Federal Rules of Evidence 703 and 803(18) with the evidence rules in Illinois, Ohio, and New York, 26 Seton Hall LR 1:183 (1996).

Footnotes

Footnote 67. FRE 803(18); Uniform Rules of Evidence Rule 803(18).

Footnote 68. § 1413.

Footnote 69. Advisory Committee Notes to Federal Rules of Evidence, Rule 803.

Footnote 70. *Schneider v Revici* (CA2 NY) 817 F2d 987, 22 Fed Rules Evid Serv 1493; *Generella v Weinberger* (ED Pa) 388 F Supp 1086

Under Rule 803(18), learned treatises are to be used only in conjunction with testimony by an expert witness, either on direct or cross-examination, even though the authority of the publication is otherwise established. *Wirtz v Orr* (Tex Civ App Texarkana) 575 SW2d 66, writ dismissed (Feb 28, 1979).

Practice References Treatises, Articles and Other Sources Regarded as Authoritative. Danner and Varn, Expert Witness Checklists § 1:152.

Footnote 71. *Dawsey v Olin Corp.* (CA5 La) 782 F2d 1254.

Annotation: Treatises, periodicals, or pamphlets as exception to hearsay rule under Rule 803 (18) of the Federal Rules of Evidence, 64 ALR Fed 971.

Footnote 72. *Tart v McGann* (CA2 NY) 697 F2d 75, 12 Fed Rules Evid Serv 363.

Footnote 73. *Hemingway v Ochsner Clinic* (CA5 La) 608 F2d 1040, 5 Fed Rules Evid Serv 484, appeal after remand (CA5 La) 722 F2d 1220, cert den 469 US 829, 83 L Ed 2d 58, 105 S Ct 114, reh den 469 US 1067, 83 L Ed 2d 437, 105 S Ct 550; *State v McDonald*, 222 Kan 494, 565 P2d 267.

Footnote 74. *United States v Jones* (CA5 La) 712 F2d 115, 13 Fed Rules Evid Serv 1540.

The medical report of the defendant's expert was not a learned treatise for the purpose of the Rule where there was no showing that it had ever been published. *Sharman v Skaggs Cos.* (App) 124 Ariz 165, 602 P2d 833.

Footnote 75. *Meschino v North Am. Drager* (CA1 Mass) 841 F2d 429.

Footnote 76. *Schneider v Revici* (CA2 NY) 817 F2d 987, 22 Fed Rules Evid Serv 1493.

Footnote 77. *Schneider v Revici* (CA2 NY) 817 F2d 987, 22 Fed Rules Evid Serv 1493.

§ 1417 Admissibility of particular works under Uniform and Federal Rules

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(18) 78 has been applied to admit medical treatises, 79 statistical studies, 80 published safety standards, 81 a treatise on identification by handwriting, 82 and other publications. 83

Publications held inadmissible under the exception have included excerpts from the Physicians' Desk Reference containing pregnancy warnings issued with respect to drugs chemically related to defendant manufacturer's drug, 84 and a document prepared by the National Institute for Occupational Safety and Health, and a publication of the National Safety Council. 85 An editorial published in a medical journal is excludable where the editorial is not a "learned treatise" but is primarily an expression of opinion by a physician concerning a controversial subject which poses a risk of litigation for his colleagues in the medical profession. 86

Footnotes

Footnote 78. FRE 803(18); Uniform Rules of Evidence Rule 803(18).

Footnote 79. *Apicella v McNeil Laboratories, Inc.* (ED NY) 66 FRD 78, 19 FR Serv 2d 1360; *Thomas v American Cystoscope Makers, Inc.* (ED Pa) 414 F Supp 255; *Walker v North Dakota Eye Clinic, Ltd.* (DC ND) 415 F Supp 891.

Footnote 80. *Bair v American Motors Corp.* (CA3 Pa) 473 F2d 740 (construing proposed rule).

Footnote 81. *Alexander v Conveyors & Dumpers, Inc.* (CA5 Miss) 731 F2d 1221, CCH

Prod Liab Rep ¶ 10089, 15 Fed Rules Evid Serv 1237; *Francisco v Manson, Jackson & Kane, Inc.*, 145 Mich App 255, 377 NW2d 313.

Annotation: Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Footnote 82. *United States v Mangan* (CA2 NY) 575 F2d 32, 78-1 USTC ¶ 9349, 3 Fed Rules Evid Serv 315, 41 AFTR 2d 78-1174, cert den 439 US 931, 58 L Ed 2d 324, 99 S Ct 320.

Footnote 83. *Burgess v Premier Corp.* (CA9 Wash) 727 F2d 826, CCH Fed Secur L Rep ¶ 99699, 15 Fed Rules Evid Serv 241 (criticized on other grounds by William Z. Salcer, Panfeld, *Edelman v Envicon Equities Corp.* (CA2 NY) 744 F2d 935, CCH Fed Secur L Rep ¶ 91673) (books on cattle investments written by preeminent expert in industry).

Footnote 84. *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation* (SD Ohio) 624 F Supp 1212, later proceeding (DC Mass) 646 F Supp 856, CCH Prod Liab Rep ¶ 11177, affd (CA1 Mass) 830 F2d 1190, CCH Prod Liab Rep ¶ 11553, 24 Fed Rules Evid Serv 152 and affd (CA6 Ohio) 857 F2d 290, 11 FR Serv 3d 1267, cert den 488 US 1006, 102 L Ed 2d 779, 109 S Ct 788.

Footnote 85. *Terry v Norfolk & W. R. Co.* (CA4 Va) 10 Fed Rules Evid Serv 61.

Footnote 86. *O'Brien v Angley*, 63 Ohio St 2d 159, 17 Ohio Ops 3d 98, 407 NE2d 490.

(3). Mortality or Life Expectancy Tables [1418-1423]

§ 1418 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Mortality tables (also called life expectancy tables) are generally prepared by or for life insurance companies, and in their usual form show for persons at different ages the number of deaths to be expected per 1,000 persons at that age and the life expectancy of a person who has reached that age. 87 Standard mortality and life expectancy tables are regarded as impartial and disinterested, and therefore are admissible in evidence to show the probable expectancy of life where this fact is relevant. 88 Mortality or life expectancy tables are not, however, admissible to prove the length of time that one may be totally disabled, 89 nor are such tables essential in proving the issue of life expectancy. 90 Even where admitted, they are not binding on the jury, but serve only as a guide to aid the jury in its determination. 91

Mortality or life expectancy tables are most commonly used to show the life expectancy of one who has been negligently injured or killed. In actions for personal injury, as distinguished from death, it is necessary for the admission of such tables to present

evidence that the injury which is the basis of the action is permanent. 92 Such tables are also admissible in an action where the present value of a life insurance policy is at issue, 93 in an action involving the value of a wife's right of dower, 94 and according to most courts, in an action in which the question as to the value of the interest of a life tenant is involved. 95

◆ Practice guide: There is authority for the view that a witness may be allowed to testify from standard mortality tables as to the life expectancy of a person provided the table itself would be admissible on the question of expectancy of life. 96 There is other authority, however, holding that mortality tables must speak for themselves, and not through the mouth of a witness testifying as to their contents. 97

To render mortality tables admissible on an issue of expectancy of life, the exact age of the person whose expectancy is involved need not be shown; the approximate age will suffice. 98

Footnotes

Footnote 87. *National Life & Acci. Ins. Co. v United States* (MD Tenn) 381 F Supp 1034, 74-2 USTC ¶ 9683, 34 AFTR 2d 74-5814, affd (CA6 Tenn) 524 F2d 559, 75-2 USTC ¶ 9786, 36 AFTR 2d 75-6147; *Illinois C. R. Co. v Houchins*, 121 Ky 526, 89 SW 530; *Butler v Butler*, 180 Minn 134, 230 NW 575.

For a standard mortality table, see the Am Jur 2d Desk Book, Item 92.

Footnote 88. *Pierce v Tennessee C., I. & R. Co.*, 173 US 1, 43 L Ed 591, 19 S Ct 335; *Allen v Toledo* (4th Dist) 109 Cal App 3d 415, 167 Cal Rptr 270; *Sainz v Bucelo* (Fla App D3) 527 So 2d 911, 13 FLW 1526; *Great Atlantic & Pacific Tea Co. v Turner*, 180 Ga App 533, 349 SE2d 537; *Fultz v Peart* (5th Dist) 144 Ill App 3d 364, 98 Ill Dec 285, 494 NE2d 212; *McCue v Low*, 179 Ind App 372, 385 NE2d 1162; *Byrum v Maryott*, 26 Md App 130, 337 A2d 142; *Leh v Dyer* (Mo App) 643 SW2d 65.

Practice References 7 Am Jur Proof of Facts 215, Life Expectancy.

5 Am Jur Trials 921, Showing Pain and Suffering § 62 (use of mortality tables to show duration of future pain and suffering).

Footnote 89. *Universal Life & Acci. Ins. Co. v Sanders*, 129 Tex 344, 102 SW2d 405.

Footnote 90. § 1458.

Footnote 91. *Allen v Toledo* (4th Dist) 109 Cal App 3d 415, 167 Cal Rptr 270; *Oberhelman v Blount*, 196 Neb 42, 241 NW2d 355.

Footnote 92. *Swan v Wisdom* (Fla App D5) 386 So 2d 574; *Cox v Cantrell*, 181 Ga App 722, 353 SE2d 582; *Porter v Bi-State Dev. Agency* (Mo App) 710 SW2d 435.

Annotation: Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 ALR2d 419.

Footnote 93. *People v Security Life Ins. & Annuity Co.*, 78 NY 114.

Footnote 94. 25 Am Jur 2d, *Dower and Curtesy* §§ 182, 190.

Footnote 95. 51 Am Jur 2d, *Life Tenants and Remaindermen* § 31.

Footnote 96. *Steinbrunner v Pittsburg & W. R. Co.*, 146 Pa 504, 23 A 239.

As to expert opinion testimony on life expectancy, see Am Jur 2d, *Expert and Opinion Evidence*.

Footnote 97. *Erb v Popritz*, 59 Kan 264, 52 P 871.

Footnote 98. *Murray v Omaha Transfer Co.*, 95 Neb 175, 145 NW 360, 7 ALR 1343, adhered to 98 Neb 482, 153 NW 488, 7 ALR 1349; *Teegarden v Dahl* (ND) 138 NW2d 668, 46 ALR3d 708.

§ 1419 Particular tables

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Where admission of mortality or life expectancy tables is proper, courts, in order to get the best evidence obtainable, are inclined to favor the latest standard tables, because the facts upon which they are calculated are more complete. 99 Although some early American cases approved the use of tables based on mortality rates observed in England, 1 later cases have approved a table based on the combined experience of life insurance companies of America, based insurable lives and known as the American Experience Table of Mortality. 2 Numerous other tables have also been recognized as standard and admissible. 3 It has been held permissible to admit in evidence mortality tables published by the United States Department of Health and Human Services and based on a census of population and deaths for the entire continental United States. 4 The use of a mortality table contained in the World Almanac was not reversible error, even though the state's insurance commissioner had published a mortality table for the use of courts and appraisers. 5 That other tables are also recognized does not detract from the value of a table of expectancy properly admitted in evidence. 6

In some jurisdictions, mortality tables have been placed in the statutes. 7 But even where a table published by legislative authority for the use of the courts is disregarded in favor of another table, no error is committed if the discrepancy between the tables is minor. 8

§ 1419 ----Particular tables [SUPPLEMENT]

Case authorities:

"Future Damage Calculator," slide rule-type device which has life expectancy and work life expectancy tables on one side and "present value" table on other, was not admissible under hearsay exception for market reports and commercial publication where party offering exhibit made no showing and offered no foundation that exhibit is generally used or relied upon by public or persons in legal or other professions. *Crane v Crest Tankers* (1995, CA8 Mo) 47 F3d 292, 41 Fed Rules Evid Serv 351.

Footnotes

Footnote 99. *Illinois C. R. Co. v Houchins*, 121 Ky 526, 89 SW 530; *Horton v State*, 50 Misc 2d 1017, 272 NYS2d 312.

Footnote 1. *Gordon, Rankin & Co. v Tweedy*, 74 Ala 232 (criticized on other grounds by *Smith v Persons*, 285 Ala 48, 228 So 2d 806) as stated in *McCloud v AmSouth Bank* (Ala App) 540 So 2d 75; *Sauter v New York C. & H. R. R. Co.*, 66 NY 50.

Footnote 2. *Tucker v Gurley*, 179 Miss 412, 176 So 279; *Nolop v Skemp*, 7 Wis 2d 462, 96 NW2d 826.

Footnote 3. *Rea v Simowitz*, 225 NC 575, 35 SE2d 871, 162 ALR 999.

Footnote 4. *Rosche v McCoy*, 397 Pa 615, 156 A2d 307, 81 ALR2d 377.

Footnote 5. *Bradshaw v Seattle*, 43 Wash 2d 766, 264 P2d 265, 42 ALR2d 800.

Footnote 6. *Sellers v Foster*, 27 Neb 118, 42 NW 907.

Footnote 7. *Hunn v Michigan C. R. Co.*, 78 Mich 513, 44 NW 502; *Smith v Odd Fellows Bldg. Ass'n*, 46 Nev 48, 205 P 796, 23 ALR 38; *Starnes v Tyson*, 226 NC 395, 38 SE2d 211.

Footnote 8. *Bradshaw v Seattle*, 43 Wash 2d 766, 264 P2d 265, 42 ALR2d 800.

§ 1420 Authentication; table as self-authenticating

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Where relevant, a standard mortality or life expectancy table is generally admissible in evidence without preliminary proof of its authenticity. 9 It is a generally recognized rule that mortality tables published in standard encyclopedias, 10 such as those found in the *Encyclopedia Britannica*, 11 and in standard law books, 12 are admissible without further proof of authenticity, although a table printed in a law book is not admissible when it is shown not to have been in actual use for the purpose for which such tables were intended, nor to have acquired a reputation for accuracy. 13 The courts also admit without preliminary proof tables which have been made a part of the statutory law of the state, 14 or which were printed pursuant to legislative authority. 15 If, however, the

table offered as evidence does not appear to be in actual use for the purpose for which such tables are intended, or to have acquired a reputation for accuracy, its authenticity must be established by competent evidence. 16

◆ Observation: A mortality table which was incorporated into statutory law or was otherwise officially printed would presumably be self-authenticating under Rule 902(5) of the Uniform Rules of Evidence and the Federal Rules of Evidence. 17

Footnotes

Footnote 9. *Froeming v Stockton E. R. Co.*, 171 Cal 401, 153 P 712 (ovrld on other grounds by *Lane v Pacific Greyhound Lines*, 26 Cal 2d 575, 160 P2d 21); *Steinbrunner v Pittsburg & W. R. Co.*, 146 Pa 504, 23 A 239; *Bennett v Denver & R. G. W. R. Co.*, 117 Utah 57, 213 P2d 325.

Footnote 10. *Steinbrunner v Pittsburg & W. R. Co.*, 146 Pa 504, 23 A 239; *Bennett v Denver & R. G. W. R. Co.*, 117 Utah 57, 213 P2d 325.

Footnote 11. *Scagel v Chicago, M. & S. P. R. Co.*, 83 Iowa 380, 49 NW 990.

Footnote 12. *Worden v Humeston & S. R. Co.*, 76 Iowa 310, 41 NW 26.

Footnote 13. *Notto v Atlantic City R. Co.*, 75 NJL 826, 69 A 968; *Bennett v Denver & R. G. W. R. Co.*, 117 Utah 57, 213 P2d 325.

Footnote 14. *Hunn v Michigan C. R. Co.*, 78 Mich 513, 44 NW 502.

Footnote 15. *Smith v Odd Fellows Bldg. Ass'n*, 46 Nev 48, 205 P 796, 23 ALR 38.

Footnote 16. *Notto v Atlantic City R. Co.*, 75 NJL 826, 69 A 968; *Rea v Simowitz*, 225 NC 575, 35 SE2d 871, 162 ALR 999; *Bennett v Denver & R. G. W. R. Co.*, 117 Utah 57, 213 P2d 325.

Footnote 17. As to Rule 902(5), see §§ 1190, 1191.

§ 1421 --Nature of proof where required

[View Entire Section](#)
[Go to Parallel Reference Table](#)

When preliminary proof of authenticity is required for the admission into evidence of a mortality table, it should be of such a character that it will satisfy the court as to the authenticity of the table, 18 such as testimony of a witness familiar with it and with its use. 19 The testimony of a lawyer who is not familiar with the table in question is not sufficient authentication. 20 It is not, however, essential that the witness have knowledge of the way the table was made up, of the class of persons included in the

estimate, or of the accuracy of the table, if he is able to state that they are commonly used and relied upon. 21 Proof that a life table is in common use by life insurance companies is sufficient authentication of it. 22

Footnotes

Footnote 18. Notto v Atlantic City R. Co., 75 NJL 826, 69 A 968; Jones v Eppler (Okla) 266 P2d 451, 48 ALR2d 333.

Practice References Authentication of mortality table by actuary. 7 Am Jur Proof of Facts 215, Life Expectancy.

Footnote 19. Notto v Atlantic City R. Co., 75 NJL 826, 69 A 968.

Footnote 20. Notto v Atlantic City R. Co., 75 NJL 826, 69 A 968.

Footnote 21. Pearl v Omaha & S. L. R. Co., 115 Iowa 535, 88 NW 1078.

It is not necessary that a witness be an actuary before being qualified to testify as to the mathematical accuracy of a mortality table. Bennett v Denver & R. G. W. R. Co., 117 Utah 57, 213 P2d 325.

Footnote 22. Galveston, H. & S. A. R. Co. v Arispe, 81 Tex 517, 17 SW 47.

§ 1422 Admissibility in case of young children

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Mortality tables are generally not admissible in evidence as an aid in determining the life expectancy of a young child whose age is not tabulated in them. 23 However, mortality tables which contain a tabulation of the lives of infants are admissible as an aid in determining the life expectancy of a young child. 24

Footnotes

Footnote 23. Rea v Simowitz, 225 NC 575, 35 SE2d 871, 162 ALR 999; Decker v McSorley, 111 Wis 91, 86 NW 554.

Footnote 24. Ruehl v Lidgerwood Rural Tel. Co., 23 ND 6, 135 NW 793, decided under a statute making life expectancy tables admissible in evidence without limiting them to any class of persons.

§ 1423 Effect of poor health, injury, or hazardous occupation

Although some courts have taken the position that mortality or life expectancy tables are inadmissible upon the life expectancy of a person who is not in average good health, 25 other authority states that is not essential for the admission of such tables to show that the person whose life expectancy is at issue is in any particular state of health, and that the fact that such person is not in good health, 26 or is engaged in a particularly dangerous occupation, 27 goes to the weight to be afforded such tables and not their admissibility. The tables are admitted only for the guidance of the trier of fact, who is free to take into account also such matters as the plaintiff's or decedent's health, habits, and activities. 28

Footnotes

Footnote 25. *Fortner v Koch*, 272 Mich 273, 261 NW 762; *Colbert v Rhode Island Co. (RI)* 67 A 446.

Footnote 26. *Kanelos v Kettler*, 132 US App DC 133, 406 F2d 951; *Levar v Elkins (Alaska)* 604 P2d 602; *Guthrie v Missouri Methodist Hospital (Mo App)* 706 SW2d 938; *Budd v Erie L. R. Co.*, 98 NJ Super 47, 236 A2d 143, cert den 51 NJ 186, 238 A2d 472; *Harwell & Harwell, Inc. v Rodriguez (Tex Civ App San Antonio)* 487 SW2d 388, writ ref n r e (May 9, 1973) and reh'g of writ of error overr (Jun 27, 1973).

Standard mortality tables were admissible in wrongful death action notwithstanding assertion that decedent had not had a normal life expectancy due to his exposure to human immunodeficiency virus (HIV) and the probability that he would develop acquired immune deficiency syndrome (AIDS). *Kilmer v Browning (Mo App)* 806 SW2d 75, later proceeding (Mo App) 1991 Mo App LEXIS 357.

Footnote 27. *Central Railroad v Crosby*, 74 Ga 737; *Greer v Louisville & N. R. Co.*, 94 Ky 169, 21 SW 649; *Broz v Omaha Maternity & General Hospital Ass'n.*, 96 Neb 648, 148 NW 575; *Smith v Odd Fellows Bldg. Ass'n*, 46 Nev 48, 205 P 796, 23 ALR 38; *Bell Aerospace Corp. v Anderson (Tex Civ App El Paso)* 478 SW2d 191, writ ref n r e (Jul 19, 1972).

Footnote 28. *Charles H. Tompkins Co. v Girolami (Dist Col App)* 566 A2d 1074; *Oberhelman v Blount*, 196 Neb 42, 241 NW2d 355.

As to the determination of damages on the basis of life expectancy, and the admissibility of mortality tables on this issue, see 22 Am Jur 2d, *Damages* § 163.

(4). Other Publications [1424-1429]

§ 1424 Newspapers and newspaper articles—generally

In accordance with the general rule that privately printed books or publications are not admissible as evidence of the truth of the facts stated therein, 29 newspapers or newspaper articles are generally regarded as hearsay and therefore not admissible as evidence of the facts stated in them. 30 But when proof is made that a particular person usually reads a newspaper and that it has probably been brought to his attention, the newspaper may be offered in evidence for the purpose of showing that such person had notice of its contents, especially when better proof cannot be produced. 31 A newspaper article may also be admitted for the purpose of showing general public knowledge of the statements it contains, 32 or to show how events of the day were being recorded at the time of the article's publication. 33 Also, when it is shown that a person is the author of, or otherwise responsible for, statements or articles in newspapers, they may be used against him. 34 In actions for defamation of character, newspaper articles and reports may be admitted in evidence to show the nature of the defamatory matter. 35

§ 1424 ----Newspapers and newspaper articles--generally [SUPPLEMENT]

Case authorities:

Magazine and newspaper articles in which defendants' denials that they were in merger negotiations with Columbia were reported were admissible under residual hearsay exception in former Columbia stockholders' action alleging securities fraud based on materially false and misleading statements; defendants' internal memoranda concerning statements constituted corporate admissions and established trustworthiness of newspaper article, and magazine article's trustworthiness was complementarily supported by reporter's notes. *In re Columbia Sec. Litig.* (1994, SD NY) 155 FRD 466, CCH Fed Secur L Rep ¶ 98238.

Footnotes

Footnote 29. § 1412.

Footnote 30. *Baker v Beech Aircraft Corp.* (4th Dist) 96 Cal App 3d 321, 157 Cal Rptr 779; *Clay v State*, 264 Ind 495, 346 NE2d 574, later proceeding (Ind) 508 NE2d 800; *Rotman v Hirsch* (Iowa) 199 NW2d 53, 55 ALR3d 658; *People v Burt*, 89 Mich App 293, 279 NW2d 299; *Cantrell v Superior Loan Corp.* (Mo App) 603 SW2d 627; *Samuel Sheitelman, Inc. v Hoffman*, 106 NJ Super 353, 255 A2d 807.

As to the admissibility of newspaper advertisements, see § 1426.

As to the admissibility of trade journals, market reports, and the like appearing in newspapers, see §§ 1427, 1428.

Annotation: Admissibility of newspaper article as evidence of the truth of the facts

stated therein, 55 ALR3d 663.

Footnote 31. *Miller v Keaton*, 260 Mo 708, 168 SW 1140.

Footnote 32. *Hudson v Shawnee*, 246 Kan 395, 790 P2d 933.

Footnote 33. *Ammons v Dade City* (MD Fla) 594 F Supp 1274, affd (CA11 Fla) 783 F2d 982, reh den, en banc (CA11 Fla) 788 F2d 1570.

Footnote 34. *Dunlop v United States*, 165 US 486, 41 L Ed 799, 17 S Ct 375; *Owens v Hagenbeck-Wallace Shows Co.*, 58 RI 162, 192 A 158, 112 ALR 113, reh den 58 RI 268, 192 A 464, 112 ALR 124.

Footnote 35. 50 Am Jur 2d, Libel and Slander § 445.

§ 1425 --As within exceptions to hearsay rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Newspaper articles which satisfy the exception to the hearsay rule for ancient documents contained in Rule 803(16) of the Uniform and Federal Rules of Evidence are admissible notwithstanding their character as hearsay. 36 A newspaper article containing statements about a party may be adopted by him or her and thereby become admissible notwithstanding its nature as hearsay. 37

It has been held at common law that in matters of local interest, when the fact in question is of such a public nature that it would be generally known throughout the community, and when the questioned fact occurred so long ago that the testimony of an eyewitness would probably be less trustworthy than a contemporary newspaper account, a court may relax the exclusionary rules to the extent of admitting the newspaper article in evidence. 38

◆ Comment: Rule 803(20) of the Uniform Rules of Evidence and the Federal Rules of Evidence, dealing with reputation as to events of general history, appears to codify this rule to some extent. 39

Footnotes

Footnote 36. *Ammons v Dade City* (MD Fla) 594 F Supp 1274, affd (CA11 Fla) 783 F2d 982, reh den, en banc (CA11 Fla) 788 F2d 1570.

As to Rule 803(16), generally, see § 1211.

Footnote 37. *State v Damiano* (RI) 587 A2d 396 (holding, however, that where the defendant had pointed to a photograph contained in a newspaper article describing a

robbery and the taking of a police officer as a hostage and said "That's me," such conduct was an adoption of the photograph and perhaps also the headline of the article, but not the entire article, and that the article was therefore inadmissible hearsay).

Footnote 38. *Dallas County v Commercial Union Assur. Co.* (CA5 Ala) 286 F2d 388, 4 FR Serv 2d 786 (declining to regard the article in question—which described a fire in the tower of a local courthouse in 1901—as a business record, an ancient document, or as coming within any other readily identifiable hearsay exception, but nonetheless holding it admissible because it was necessary, trustworthy, relevant and material).

Footnote 39. As to the provisions of Rule 803(20), see § 681.

§ 1426 Advertisements, brochures, catalogs, and the like

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Printed materials such as pamphlets, brochures, or instruction sheets published by a manufacturer are hearsay and as such generally not admissible as independent evidence of the truth of the facts stated in them. 40 However, under the general rules governing admissions of a party, 41 the admissibility of evidence of advertisements, brochures, catalogs, and the like has been recognized or upheld in many instances when it was shown that the party against whom they were sought to be introduced was the author of or otherwise responsible for them. 42 Evidence of this kind has been successfully offered in criminal cases to show that an accused was engaged in an illegal business, 43 or was practicing a profession without being properly licensed. 44 Such evidence may also be admitted in civil cases to resolve such matters as the liability of one alleged to be a partner but who denies his status as such, 45 a controverted issue of agency, 46 or a controverted issue of employment. 47

To be admissible, such a writing must be authenticated 48 and must be shown to have emanated from the one against whom it is sought to be used, 49 or to have been produced with his knowledge and acquiescence. 50

◆ Observation: A merchandise catalog has been held to be within Rule 803(17) of the Uniform Rules of Evidence and the Federal Rules of Evidence, which provides for the admission of market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations, notwithstanding their character as hearsay. 51

Footnotes

Footnote 40. *Julien v Barker*, 75 Idaho 413, 272 P2d 718; *Reed v Church*, 175 Va 284, 8 SE2d 285.

Footnote 41. §§ 760 et seq.

Footnote 42. Keppelman v Heikes, 111 Cal App 2d 475, 245 P2d 54 (advertisement); Koser v Hornback, 75 Idaho 24, 265 P2d 988, 44 ALR2d 1015 (pamphlet); Oxley v Linnton Plywood Asso., 205 Or 78, 284 P2d 766 (prospectus and registration statement); Sportatorium, Inc. v State (Tex Civ App) 104 SW2d 912, writ dismissed; State v Low, 192 Wash 631, 74 P2d 458.

In a suit by a workman, injured in a fall of a temporary elevator, against the general contractor's liability insurer on the theory that the insurer had been negligent in undertaking gratuitous safety inspections of the general contractor's practices and equipment, the insurer's advertisements in various national and trade publications stating that its safety engineers "worked hand in hand with insureds to build safety into every job" and made "thorough inspection and hazard analysis" were admissible in light of the insurer's denial that it had undertaken to make surveys and inspections, and its allegations that its engineers' visits were solely for its own purpose of keeping informed about risks. Nelson v Union Wire Rope Corp., 31 Ill 2d 69, 199 NE2d 769.

Annotation: Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 ALR2d 1027 § 2.

Footnote 43. St. Louis v Hellscher, 295 Mo 293, 242 SW 652 (cards distributed by the defendant admitted in evidence in a prosecution for fortunetelling).

Footnote 44. Mayer v State, 64 NJL 323, 45 A 624 (medicine); State v Covington, 34 NC App 457, 238 SE2d 794, cert den 294 NC 184, 241 SE2d 519 (engineering).

Footnote 45. Paterson v Mobile Steel Co., 202 Ala 471, 80 So 855.

Footnote 46. F. H. Groves Piano Co. v Dalton Adding Machine Co., 64 Pa Super 189.

Footnote 47. Fryer v New York Brokerage Co., 152 Iowa 688, 133 NW 110.

Footnote 48. Lochner v Silver Sales Service, Inc., 232 NC 70, 59 SE2d 218.

Footnote 49. Koser v Hornback, 75 Idaho 24, 265 P2d 988, 44 ALR2d 1015; Fryer v New York Brokerage Co., 152 Iowa 688, 133 NW 110; State ex rel. Flambeau Paper Co. v Windus, 208 Wis 583, 243 NW 216.

Footnote 50. Paterson v Mobile Steel Co., 202 Ala 471, 80 So 855; English v Moore, 28 Ga App 265, 110 SE 737, appeal after remand 29 Ga App 307, 114 SE 921; Fletcher v Pullen, 70 Md 205, 16 A 887; Waltham Piano Co. v Pierson, 104 Neb 199, 176 NW 364.

Footnote 51. § 1429.

§ 1427 Trade journals, market reports and business and professional directories and lists; generally

[View Entire Section](#)

In almost every organized trade or occupation there are handbooks and other publications, containing information of everyday professional and business needs, which are intended to be circulated publicly and to be consulted by persons interested, which are tested by their use, and which are found by their experience to be trustworthy and to be actually relied upon by the persons engaged in the particular trade or occupation concerned. Under a common-law exception to the hearsay rule which has never been precisely formulated, such publications have been held or assumed to be admissible. 52 The admissibility of such publications is in some jurisdictions provided for by statute. 53 Publications admitted at common law include trade journals reporting current prices, certain commercial and professional lists, registers, and reports, business directories, and the like. 54 Under this rule, market reports or quotations as printed and contained in newspapers, trade journals, trade circulars, and similar publications, which are well known, reliable, and of good repute, have been held admissible as evidence of the state of the market. 55 In some instances, the courts have adhered strictly to the "best evidence" rule by refusing to sanction the introduction of newspapers or trade journals as evidence of market quotations, where it has been possible to obtain other evidence to show the market value of the commodity. 56

§ 1427 ----Trade journals, market reports and business and professional directories and lists; generally [SUPPLEMENT]

Case authorities:

In medical malpractice action based on improper insertion of central venous catheter, trial court did not abuse wide discretion given to it in evidentiary matters by admitting package insert from brand of catheter other than that used on patient and bulletin from Food and Drug Administration, where documents were used to bolster expert physician's statements that catheter had been inserted incorrectly. Trial court's pretrial order specifically stated that FDA bulletin would be admitted only if it was shown to qualify as learned treatise. In trial court's opinion, it did qualify. *Ozment v Wilkerson* (1994, Ala) 646 So 2d 4.

Footnotes

Footnote 52. *Atlantic Nat. Bank v Korrick*, 29 Ariz 468, 242 P 1009, 43 ALR 1184; *St. Louis & S. F. R. Co. v Pearce*, 82 Ark 353, 101 SW 760; *Columbian Peanut Co. v Pope*, 69 Ga App 26, 24 SE2d 711; *Garvis v K Mart Discount Store* (Mo App) 461 SW2d 317; *California Sugar & White Pine Co. v Whitmer Jackson & Co.*, 33 NM 117, 263 P 504.

Annotation: Admissibility in evidence of professional directories, 7 ALR4th 638.

Footnote 53. *Miller v Modern Business Center* (2nd Dist) 147 Cal App 3d 632, 195 Cal Rptr 279; *Mazzaro v Paull*, 372 Mass 645, 363 NE2d 509, 7 ALR4th 630 (holding, however, that in medical malpractice action, trial court did not err in excluding from evidence copy of directory of medical specialists where proponent did not rely on statute

for admissibility of directory).

Footnote 54. *Mohr v Shultz*, 86 Idaho 531, 388 P2d 1002; *Housden v Berns*, 241 Mo App 1163, 273 SW2d 794; *Baker v Atkins* (Mo App) 258 SW2d 16.

Footnote 55. *Virginia v West Virginia*, 238 US 202, 59 L Ed 1272, 35 S Ct 795, writ den 241 US 531, 60 L Ed 1147, 36 S Ct 719, later proceeding 246 US 565, 62 L Ed 883, 38 S Ct 400; *Columbian Peanut Co. v Pope*, 69 Ga App 26, 24 SE2d 711; *Sterling-Midland Coal Co. v Great Lakes Coal & Coke Co.*, 266 Ill App 46; *Whelan v Lynch*, 60 NY 469.

Footnote 56. *National Bank of Commerce v New Bedford*, 175 Mass 257, 56 NE 288; *Norfolk & W. R. Co. v Reeves*, 97 Va 284, 33 SE 606.

§ 1428 --Authentication

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is generally necessary for the introduction in evidence of a newspaper, trade journal, trade circular, or price list, giving the quotations of the market value of a commodity, that a preliminary foundation be laid for such evidence by showing that such publications have been regularly prepared by a person in touch with the market and that they are generally regarded as trustworthy and relied upon. 57 According to some decisions, such reports are not admissible as original evidence without extrinsic proof that they are accurate and that they are based upon reliable sources of information, 58 although there are cases which take the view that newspapers containing market reports or quotations which are relied upon by the commercial world generally are admissible without proof of their accuracy and without requiring evidence as to how the information published is obtained. 59

The cases also indicate, although generally without stressing the point, that the quotations should represent actual sales of a class of commodity substantially similar to that involved in the particular case, at a time and place sufficiently close to be controlling upon the issue involved. 60 A newspaper summary of the prices of a certain commodity prevailing during a preceding year is not admissible in evidence to establish the price of the article on a specified date. 61 It has been held that in order to qualify a newspaper as evidence of the price of commodities on a particular date, it should be published for the enlightenment of persons dealing in the articles, to prove the value of which the paper is offered, and persons generally must have been in the habit of dealing in such commodities in reliance upon its market quotations. 62

Generally speaking, it is the province of the trial court to determine whether or not the preliminary foundation laid is sufficient to bring this kind of evidence within the exception to the hearsay rule. 63

Footnotes

Footnote 57. *Miller v Modern Business Center* (2nd Dist) 147 Cal App 3d 632, 195 Cal Rptr 279; *Columbian Peanut Co. v Pope*, 69 Ga App 26, 24 SE2d 711; *Mohr v Shultz*, 86 Idaho 531, 388 P2d 1002; *Housden v Berns*, 241 Mo App 1163, 273 SW2d 794; *Baker v Atkins* (Mo App) 258 SW2d 16; *Gulf, C. & S. F. R. Co. v Hillis* (Tex Civ App Waco) 320 SW2d 687.

Footnote 58. *Whelan v Lynch*, 60 NY 469; *Fairley v B. R. Smith & Co.*, 87 NC 367.

Footnote 59. *Mt. Vernon Brewing Co. v Teschner*, 108 Md 158, 69 A 702.

Footnote 60. *State ex rel. Wann v Dickson*, 213 Mo 66, 111 SW 817.

In *Atlantic Nat. Bank v Korrick*, 29 Ariz 468, 242 P 1009, 43 ALR 1184, the court held that upon the issue of fraud and negligence upon the part of the pledgee in making the sale of the pledged cotton, the pledgor could not rely solely upon a newspaper article which purported to be a summary of the weekly average market value of several varieties of such cotton, including the variety pledged, at the time of its sale, where the article was not published until several months after the sale and in fact represented merely asking prices.

Footnote 61. *Atlantic Nat. Bank v Korrick*, 29 Ariz 468, 242 P 1009, 43 ALR 1184.

Footnote 62. *Atlantic Nat. Bank v Korrick*, 29 Ariz 468, 242 P 1009, 43 ALR 1184; *Pierce v Miller*, 107 Neb 851, 187 NW 105.

Footnote 63. *Housden v Berns*, 241 Mo App 1163, 273 SW2d 794.

§ 1429 --Provisions of Uniform and Federal Rules of Evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Rule 803(17) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides for the admission of market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations, notwithstanding their character as hearsay. ⁶⁴ The trustworthiness of such publications is based upon general reliance by the public or by a particular segment of the public, and upon the motivation of the compiler to foster reliance by being accurate. ⁶⁵ The Rule has been cited to approve the admission of specialized market publications bearing on:

- Stock prices ⁶⁶
- Industry performance ⁶⁷
- Used-car prices ⁶⁸

- A merchandise catalog 69

However, newspaper articles of general interest are not admissible under Rule 803(17).
70 Other documents ruled inadmissible under the Rule exception have included excerpts from the Physicians' Desk Reference containing pregnancy warnings issued with respect to drugs chemically related to defendant manufacturer's drug, 71 and a prospectus and 10-K form filed by a corporation with the SEC in connection with debentures issued by corporation. 72

Footnotes

Footnote 64. FRE 803(17); Uniform Rules of Evidence Rule 803(17).

Footnote 65. Advisory Committee Notes to Federal Rules of Evidence, Rule 803.

Hunter, Federal Trial Handbook 2d § 69:28.

Louisell and Mueller, Federal Evidence § 465.

Footnote 66. *United States v Anderson* (CA9 Cal) 532 F2d 1218, cert den 429 US 839, 50 L Ed 2d 107, 97 S Ct 111 (Wall Street Journal).

Footnote 67. *McDonald v Johnson & Johnson* (DC Minn) 537 F Supp 1282, 1982-1 CCH Trade Cases ¶ 64694, 11 Fed Rules Evid Serv 256, affd in part and vacated in part on other grounds (CA8 Minn) 722 F2d 1370, 1983-2 CCH Trade Cases ¶ 65717, mod (CA8) 722 F2d 1390 and cert den 469 US 870, 83 L Ed 2d 149, 105 S Ct 219, later proceeding (CA8 Minn) 776 F2d 767 (report used by corporation to project sales for purpose of calculating damages); *Aero Spacelines, Inc. v United States*, 208 Ct Cl 704, 530 F2d 324, 21 CCF ¶ 84143 ("Aerospace Facts and Figures" offered in suit for renegotiation of government contract).

Footnote 68. *United States v Johnson* (CA7 Ill) 515 F2d 730 (criticized on other grounds by *United States v Levine* (CA1 Mass) 569 F2d 1175) ("Red Book" offered to prove value of stolen cars).

Footnote 69. *United States v Grossman* (CA1 Mass) 614 F2d 295, 5 Fed Rules Evid Serv 1121.

Footnote 70. *United States v Baskes* (ND Ill) 433 F Supp 799, 77-1 USTC ¶ 9393, 39 AFTR 2d 77-1455.

Footnote 71. *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation* (SD Ohio) 624 F Supp 1212, later proceeding (DC Mass) 646 F Supp 856, CCH Prod Liab Rep ¶ 11177, affd (CA1 Mass) 830 F2d 1190, CCH Prod Liab Rep ¶ 11553, 24 Fed Rules Evid Serv 152 and affd (CA6 Ohio) 857 F2d 290, 11 FR Serv 3d 1267, cert den 488 US 1006, 102 L Ed 2d 779, 109 S Ct 788.

Footnote 72. *White Industries, Inc. v Cessna Aircraft Co.* (WD Mo) 611 F Supp 1049, 19 Fed Rules Evid Serv 321, later proceeding (WD Mo) 657 F Supp 687, affd (CA8 Mo) 845 F2d 1497, 1988-1 CCH Trade Cases ¶ 67992, cert den 488 US 856, 102 L Ed 2d

VII. WEIGHT AND SUFFICIENCY [1430-1499]

A. General Principles [1430-1433]

Research References

ALR Digest: Evidence §§ 1414, 1452-1487

ALR Index: Evidence

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 353; 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 56, 76, 95, 96, 127; 18A Am Jur Pl & Pr Forms (Rev), Negligence, Forms 223-226, 303, 304, 307, 311, 327; 23A Am Jur Pl & Pr Forms (Rev), Trial § 219

1. In General [1430, 1431]

§ 1430 Assessing weight and sufficiency, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy, and sufficient evidence is such evidence in character, weight, or amount that will legally justify the judicial or official action demanded. ⁷³ Determining whether the evidence is sufficient requires both a quantitative and a qualitative analysis. If opposite conclusions can be drawn reasonably, then the evidence cannot be said to be insufficient. Quantitatively, evidence may fail only if it is absent, that is, where there is none at all. Qualitatively, however, it fails when it cannot be said reasonably that the intended inference may logically be drawn from it. ⁷⁴ Thus, to hold that there is insufficient evidence to support a verdict is to find that there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial. ⁷⁵

The weight of the evidence, at least in theory, is a somewhat more subjective concept than that of sufficiency. ⁷⁶ The weight given to any evidence depends upon the particular circumstances ⁷⁷ and is generally not relevant to the question of sufficiency. ⁷⁸ It is defined as the balance or preponderance of evidence, and is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. ⁷⁹ The weight of the evidence is its weight in probative value, not the quantity or amount of evidence. It is not determined by mathematics, but depends on its effect in inducing belief. ⁸⁰ The probative force of evidence is to be estimated, not only by its own intrinsic weight, but also in view of the evidence which it is in the

◆ Observation: The pleadings of lawyers and the opinions of judges often do not maintain the distinction between weight and sufficiency with clarity, and often employ the terms interchangeably and synonymously. Cases, for example, purporting to deal with the sufficiency of evidence might state that a verdict or conviction should not be set aside unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence is so clearly against the verdict as to convince the reviewing court that the verdict is wrong and unjust. That statement confuses the standard of review on the question of the sufficiency of the evidence with the standard of review on the question of the weight of the evidence: If the evidence is insufficient to support a conviction, a judgment of acquittal should be entered; if the evidence is sufficient to support a conviction, but the verdict is against the clear preponderance of the evidence, a new trial should be ordered. 82

Questions arising before verdict, regarding the weight and sufficiency of the evidence introduced in the trial of a case, arise principally in connection with a demurrer to the evidence, 83 a motion for a nonsuit, 84 or a motion for a directed verdict. 85 After verdict such questions may arise on a motion for judgment notwithstanding the verdict, 86 upon a motion for a new trial, 87 or in the appellate courts in reviewing rulings on motions for nonsuits, directed verdicts, or demurrers to the evidence. 88

§ 1430 ----Assessing weight and sufficiency, generally [SUPPLEMENT]

Case authorities:

Evidence was sufficient to support jury's finding of future medical expenses, where licensed physician testified that plaintiff would need additional back surgery at cost of approximately \$20,000, physician testified that plaintiff would need rehabilitation and medication for up to 1 year, and plaintiff's medical records and bills showed past medical expenses of over \$80,000. *Williams Distrib. Co. v Franklin* (1994, Tex App Dallas) 884 SW2d 503, reh den (Sep 6, 1994) and writ of error filed (Oct 18, 1994).

Evidence of corroboration was insufficient to support claim that testatrix had agreed orally to transfer real estate to claimant in exchange for her services to testatrix's business, where (1) testimony of witnesses as to testatrix's intention was equally consistent with unenforceable promise to give home to claimant, and (2) surrounding circumstances, including testatrix's subsequent execution of will contemplating another distribution of her property, and lack of any evidence that testatrix planned or attempted to have will drawn, did not corroborate existence of contract. *Vaughn v Shank* (1994) 248 Va 224, 445 SE2d 127.

In slip-and-fall action by customer against department store, trial court did not err in finding store liable, where: customer demonstrated that prior to fall she was in reasonably good health; as result of fall, she sustained sprain to right shoulder, tendonitis in knee, contusions to hip, and carpal tunnel syndrome and tenosynovitis in right hand and wrist; 2 years after accident, shoulder, knee, and wrist injuries continued to require wrist brace and prescription medication for pain management. Trial court found plaintiff's demeanor very credible, and treating physician testified that plaintiff's injuries were caused by fall and not by previous employment or any other accident. *Johnson v Wal-Mart Stores, Inc.*

(1993, La App 2d Cir) 616 So 2d 817.

There was reasonable basis for jury to have found that accident did not cause plaintiff's physical problems, where treating physician had no notes of any arm, neck or shoulder pain with regard to plaintiff, examination by orthopedist showed normal reflexes and range of motion in allegedly injured shoulder, and with respect to carpal tunnel syndrome, treating physician and orthopedic surgeon were in agreement that carpal tunnel syndrome could result from various causes, not just trauma. Additionally, treating physician was of opinion that if trauma caused condition, symptoms would have appeared within few days after accident, which was not case here with left hand. Thus, jury did not err in finding that plaintiff was not injured in alleged accident. *Trammel v State Farm Mut. Auto Ins. Co.* (1993, La App 1st Cir) 637 So 2d 517.

Footnotes

Footnote 73. *Tibbs v State* (Fla) 397 So 2d 1120, *affd* 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211.

The test of the sufficiency of the evidence in a civil case is whether the evidence, taken as a whole, shows the fact sought to be proved is more probable than not. *Billa v Billa* (La App 5th Cir) 423 So 2d 1231, *cert gr*, *set aside* (La) 428 So 2d 806, *on remand* (La App 5th Cir) 434 So 2d 168, *cert den* (La) 435 So 2d 444.

Evidence is sufficient or satisfactory if it is such as to satisfy an unprejudiced mind of the truth. *Houle v Tondreau Bros. Co.*, 148 Me 189, 91 A2d 481.

As to burden of proof, see §§ 155 *et seq.*

Footnote 74. *Carbo, Inc. v Lowe* (Ind App) 521 NE2d 977.

Evidence is sufficient or satisfactory if it is such as to satisfy an unprejudiced mind of the truth. *Houle v Tondreau Bros. Co.*, 148 Me 189, 91 A2d 481.

Footnote 75. *Dominguez v Manhattan & Bronx Surface Transit Operating Authority*, 46 NY2d 528, 415 NYS2d 634, 388 NE2d 1221, *on remand* (1st Dept) 71 App Div 2d 555, 418 NYS2d 411.

Footnote 76. *Tibbs v State* (Fla) 397 So 2d 1120, *affd* 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211.

Footnote 77. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243 (criticized on other grounds by *Cornwall v U.S. Constr. Mfg., Inc.* (CA FC) 800 F2d 250, 231 USPQ 64) and (disapproved on other grounds by *Crawford Fitting Co. v J. T. Gibbons, Inc.*, 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494, 43 BNA FEP Cas 1775, 43 CCH EPD ¶ 37102, 1987-1 CCH Trade Cases ¶ 67596, 7 FR Serv 3d 1161).

Footnote 78. *Dominguez v Manhattan & Bronx Surface Transit Operating Authority*, 46 NY2d 528, 415 NYS2d 634, 388 NE2d 1221, *on remand* (1st Dept) 71 App Div 2d 555, 418 NYS2d 411.

Footnote 79. *Tibbs v State* (Fla) 397 So 2d 1120, affd 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211.

As to the assessment of the weight of the evidence as a function of the trier of fact, see § 1431.

Footnote 80. *Johnson v Gregg* (1991, Mo App) 807 SW3d 680.

Footnote 81. *Shapiro v Equitable Life Assur. Soc.*, 76 Cal App 2d 75, 172 P2d 725, holding that the fact that a party fails to produce available witnesses and documents under his control may be considered in weighing his testimony.

All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted. *Travelers' Ins. Co. v Pomerantz*, 246 NY 63, 158 NE 21; *Conk v Metropolitan Life Ins. Co.*, 251 App Div 442, 296 NYS 902.

Footnote 82. *Pearson v State* (Ala App) 601 So 2d 1119, reh den, without op (Ala App) 1992 Ala Crim App LEXIS 316, cert den, without op (Ala) 1992 Ala LEXIS 1104.

Footnote 83. 75A Am Jur 2d, Trial §§ 1074-1076.

Footnote 84. 75A Am Jur 2d, Trial §§ 883-890.

Footnote 85. 75A Am Jur 2d, Trial §§ 857-865.

Footnote 86. 46 Am Jur 2d, Judgments §§ 106 et seq.

Footnote 87. 58 Am Jur 2d, New Trial §§ 202-209.

Footnote 88. 5 Am Jur 2d, Appeal and Error §§ 818, 819.

§ 1431 Weight of evidence as determination of trier of fact

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The trier of fact determines the weight to be given the evidence. 89 Where testimony is incredible, unbelievable, or inherently improbable, the trier is to disregard it as without probative value, 90 even though uncontradicted. 91

When weighing the evidence, the trier of fact is not required to accept entirely either the state's or the defendant's account of the facts. 92 The judge or jury may reject that which it finds implausible, but accept other parts which it finds to be believable, 93 and is free to choose among reasonable constructions of the evidence. 94

The finding of the trier of fact should not be disturbed unless the trier of fact clearly failed to give the evidence the proper weight. 95

§ 1431 ----Weight of evidence as determination of trier of fact [SUPPLEMENT]

Case authorities:

In a personal injury suit by a seaman alleging negligence and unseaworthiness under the Jones Act and general maritime law, the Court of Appeals affirmed the trial court's take-nothing judgment and rejected the seaman's claim of insufficient evidence, where the owner of the ship testified that it was seaworthy despite being equipped with inoperable navigational equipment, because only the trier of fact can determine credibility of the witnesses, resolve conflicts in the evidence, and determine weight to be given to the evidence. *Downen v Texas Gulf Shrimp Co.* (1993, Tex App Corpus Christi) 846 SW2d 506, writ den (Jul 30, 1993).

Footnotes

Footnote 89. *United States v Vaccaro* (CA9 Nev) 816 F2d 443, 22 Fed Rules Evid Serv 1570, disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 and disapproved on other grounds by *Powers v Ohio*, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364, 91 CDOS 2259, 91 Daily Journal DAR 3732 as stated in *Holland v McGinnis* (CA7 Ill) 963 F2d 1044; *State v Lee* (Me) 583 A2d 212; *Dominguez v Manhattan & Bronx Surface Transit Operating Authority*, 46 NY2d 528, 415 NYS2d 634, 388 NE2d 1221, on remand (1st Dept) 71 App Div 2d 555, 418 NYS2d 411; *State v Williams* (Logan Co) 82 Ohio App 3d 39, 610 NE2d 1188; *State v Williams* (Tenn Crim) 784 SW2d 660.

Unless evidence is clearly incompetent and inadmissible for a specific reason, it should go to the jury for a determination of its weight. *Department of Transp. v White*, 173 Ga App 68, 325 SE2d 397.

Law Reviews: Cohen, The Role of Evidential Weight in Criminal Proof. 66 Bos U LR 635 (May/July 1986).

Forms: Instruction–Duty of jury to determine facts. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 353.

Instruction to jury–Duty where evidence equally balanced. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 76.

Instruction to jury–Weighing of evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 95.

Instruction to jury–General considerations affecting weight to be given testimony of witnesses. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 96.

Footnote 90. *Hollis v Scott* (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386, later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813.

As to incredible evidence, see § 1447.

Footnote 91. *King v Brindley*, 255 Ala 425, 51 So 2d 870.

Footnote 92. *Pugliese v Commonwealth* (Va App) 428 SE2d 16.

Footnote 93. *Pugliese v Commonwealth* (Va App) 428 SE2d 16.

The jury may accept that part of the defendant's proof they feel is consistent with truth and reject that portion they believe originated in falsity. *State v Williams* (Tenn Crim) 784 SW2d 660.

Footnote 94. *United States v Rothrock* (CA1 Me) 806 F2d 318, 87-1 USTC ¶ 9111, 58 AFTR 2d 86-6294; *United States v Pruneda-Gonzalez* (CA5 Tex) 953 F2d 190, cert den (US) 119 L Ed 2d 575, 112 S Ct 2952; *Crutchfield v State*, 25 Ark App 227, 763 SW2d 94, post-conviction proceeding (Ark) 1989 Ark LEXIS 436; *State v Thornton* (Iowa) 498 NW2d 670; *Mitzelfelt v Kamrin*, 526 Pa 54, 584 A2d 888; *Commonwealth v Bricker*, 397 Pa Super 457, 580 A2d 388, app den 527 Pa 596, 589 A2d 687.

A jury may reject, in whole or in part, the testimony of any witness. *State v Turner* (La App 1st Cir) 577 So 2d 200.

As to inconsistent testimony, see § 1443.

Footnote 95. *United States v Vaccaro* (CA9 Nev) 816 F2d 443, 22 Fed Rules Evid Serv 1570 disapproved on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 and disapproved on other grounds by *Powers v Ohio*, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364, 91 CDOS 2259, 91 Daily Journal DAR 3732 as stated in *Holland v McGinnis* (CA7 Ill) 963 F2d 1044; *Novey v Kishwaukee Community Health Services Center* (2d Dist) 176 Ill App 3d 674, 126 Ill Dec 132, 531 NE2d 427; *State v Thornton* (Iowa) 498 NW2d 670; *State v Lee* (Me) 583 A2d 212; *Commonwealth v Ruci*, 409 Mass 94, 564 NE2d 1000; *State v Bliss* (Minn) 457 NW2d 385; *People v Widdi* (2d Dept) 148 App Div 2d 648, 539 NYS2d 106, app den 74 NY2d 670, 543 NYS2d 413, 541 NE2d 442; *State v Williams* (Tenn Crim) 784 SW2d 660.

The finding of the trial court will not be set aside when there is nothing in the record to show that the court manifestly disregarded the weight of the evidence. *State v Williams* (Logan Co) 82 Ohio App 3d 39, 610 NE2d 1188.

2. Negligence Actions, In General [1432, 1433]

§ 1432 Proof by direct or circumstantial evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although negligence may be established by direct evidence, 96 it is not necessary that every fact and circumstance that make up a case of negligence be proved by direct and positive evidence 97 or by the testimony of eyewitnesses. 98 Affirmative proof of negligence may be established as well by circumstantial evidence, 99 and circumstantial evidence alone may authorize a finding of negligence. 1

The burden of proving negligence 2 is not sustained by evidence from which a finder of fact can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities. 3 There must be something more which would lead a reasoning mind to one conclusion rather than to another. 4 Further, when circumstantial evidence is as consistent with the theory that the defendant was not negligent as it is with the theory that defendant was, the trier of fact may not guess, 5 a mere equipoise of evidence being insufficient to entitle the plaintiff to a verdict. 6

Negligence may, however, be inferred from all the facts and attendant circumstances in the case, 7 and where the circumstances are such as to take the case out of the realm of conjecture and put it within the field of legitimate inference from established facts, a prima facie case is made. 8

While the ultimate fact of negligence is an inference to be drawn from all the circumstances of the case, evidentiary facts must be established which would warrant a reasonable person to infer negligence. 9 It is not always essential, where proof of negligence rests on circumstantial evidence, that the jury's finding relate itself to negligence in a particular respect, if it may reasonably be referable to several acts or omissions with respect to each of which the defendant is charged with a duty toward the plaintiff. 10 It is recognized, too, that in proving negligence circumstantially, absolute certainty cannot be achieved. 11

§ 1432 ----Proof by direct or circumstantial evidence [SUPPLEMENT]

Case authorities:

In negligence action by plaintiff landowner against defendant secured creditor exercising dominion over underground gas tank which leaked and contaminated plaintiff's land, there was insufficient evidence in record to support finding that secured creditor's (bank's) employees made statements to effect that bank would be responsible in cleaning up spill. *Nischke v Farmers & Merchants Bank & Trust* (1994, App) 187 Wis 2d 96, 522 NW2d 542.

Footnotes

Footnote 96. *Faulkinbury v Shaw*, 183 Ark 1019, 39 SW2d 708; *Scheurer v Banner Rubber Co.*, 227 Mo 347, 126 SW 1037; *Rodgers v Saxton*, 305 Pa 479, 158 A 166, 80 ALR 280.

As to proximate cause of negligence, see 57 Am Jur 2d, Negligence §§ 457 et seq.

As to custom and usage as the standard of care in a negligence case, see 57A Am Jur 2d, Negligence §§ 173 et seq.

Footnote 97. Arizona Binghampton Copper Co. v Dickson, 22 Ariz 163, 195 P 538, 44 ALR 881; Cobb v Twitchell, 91 Fla 539, 108 So 186, 45 ALR 865; Louisville Trust Co. v Morgan, 180 Ky 609, 203 SW 555, 7 ALR 396; Sollberger v Walcott (La App 1st Cir) 101 So 2d 483; Brown-Miller Co. v Howell, 224 Miss 136, 79 So 2d 818; Palmer v Clarksdale Hospital, 206 Miss 680, 40 So 2d 582; Burt v Lake Region Flying Service, 78 ND 928, 54 NW2d 339; Towery v Guffey (Okla) 358 P2d 812; Hopkins v Derst Baking Co., 221 SC 497, 71 SE2d 407; Walton & Co. v Burchel, 121 Tenn 715, 121 SW 391; Pfeifer v Standard Gateway Theater, Inc., 259 Wis 333, 48 NW2d 505.

Footnote 98. Arizona Binghampton Copper Co. v Dickson, 22 Ariz 163, 195 P 538, 44 ALR 881; Schier v Wehner, 116 Md 553, 82 A 976; Palmer v Clarksdale Hospital, 206 Miss 680, 40 So 2d 582; Burt v Lake Region Flying Service, 78 ND 928, 54 NW2d 339; Towery v Guffey (Okla) 358 P2d 812; Pfeifer v Standard Gateway Theater, Inc., 259 Wis 333, 48 NW2d 505.

As to the elements of actionable negligence, generally, see 57A Am Jur 2d, Negligence §§ 78 et seq.

Footnote 99. Kieffer v Linton (1990) 396 SE2d 13.

Negligence may be proved by either direct or circumstantial evidence or by a combination of them. Morrow v Madisonville (Tenn App) 737 SW2d 547.

Footnote 1. National Biscuit Co. v Litzky (CA6 Mich) 22 F2d 939, 56 ALR 853; 1st Bank Southeast v M/V Kalidas (ED Wis) 670 F Supp 1421; Bell v Colony Apartments Co. (Ala) 568 So 2d 805; Arizona Binghampton Copper Co. v Dickson, 22 Ariz 163, 195 P 538, 44 ALR 881; McGloin v Southington, 15 Conn App 668, 546 A2d 906, app den 209 Conn 813, 550 A2d 1083; Cangelosi v Our Lady of Lake Regional Medical Center (La) 564 So 2d 654; Burghardt v Detroit U. Ry., 206 Mich 545, 173 NW 360, 5 ALR 1333; Lindgren v Voge, 260 Minn 262, 109 NW2d 754, 88 ALR2d 1080; Fowler Butane Gas Co. v Varner, 244 Miss 130, 141 So 2d 226; Hardwick v Kansas City Gas Co., 355 Mo 100, 195 SW2d 504, 166 ALR 556; Scheurer v Banner Rubber Co., 227 Mo 347, 126 SW 1037; McAlexander v Estate of Lewis, 167 Neb 524, 93 NW2d 632, 77 ALR2d 575; Kahalili v Rosecliff Realty, Inc., 26 NJ 595, 141 A2d 301, 66 ALR2d 680; Hepp v Quickel Auto & Supply Co., 37 NM 525, 25 P2d 197; Burt v Lake Region Flying Service, 78 ND 928, 54 NW2d 339; Towery v Guffey (Okla) 358 P2d 812; Schweiger v Solbeck, 191 Or 454, 230 P2d 195, 29 ALR2d 435; Rodgers v Saxton, 305 Pa 479, 158 A 166, 80 ALR 280; Bloom v Bailey, 292 Pa 348, 141 A 150, 57 ALR 585; Hopkins v Derst Baking Co., 221 SC 497, 71 SE2d 407; Neel v Henne, 30 Wash 2d 24, 190 P2d 775; Pfeifer v Standard Gateway Theater, Inc., 259 Wis 333, 48 NW2d 505; O'Malley v Eagan, 43 Wyo 233, 2 P2d 1063, 77 ALR 582, reh den 43 Wyo 350, 5 P2d 276, 77 ALR 597.

Footnote 2. As to burden of proof, generally, see §§ 155 et seq.

Footnote 3. Owl Drug Co. v Crandall, 52 Ariz 322, 80 P2d 952, 120 ALR 1521; Gordon v Clotworthy, 127 Colo 377, 257 P2d 410, 49 ALR2d 314; In re Hayden's Estate, 174 Kan 140, 254 P2d 813, 36 ALR2d 1278; Shephard v Great Atlantic & Pacific Tea Co.,

305 Ky 799, 205 SW2d 687; American Airlines, Inc. v Shell Oil Co., 355 Mich 151, 94 NW2d 214; McVaney v Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, 237 Neb 451, 466 NW2d 499; Omaha v Bowman, 52 Neb 293, 72 NW 316; Batchelor v Atlantic C. L. R. Co., 196 NC 84, 144 SE 542, 60 ALR 1091; Gypsy Oil Co. v Ginn, 152 Okla 30, 3 P2d 714; Schweiger v Solbeck, 191 Or 454, 230 P2d 195, 29 ALR2d 435; Bloom v Bailey, 292 Pa 348, 141 A 150, 57 ALR 585; Erickson v Webber, 58 SD 446, 237 NW 558, 80 ALR 914; Nelson v West Coast Dairy Co., 5 Wash 2d 284, 105 P2d 76, 130 ALR 606; Klein v Beeten, 169 Wis 385, 172 NW 736, 5 ALR 1237.

Footnote 4. McVaney v Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, 237 Neb 451, 466 NW2d 499.

Footnote 5. 1st Bank Southeast v M/V Kalidas (ED Wis) 670 F Supp 1421.

Footnote 6. McDonough v Newmans Cloak & Suit Co., 247 Minn 250, 77 NW2d 59, 61 ALR2d 100; Watts v Richmond, F. & P. R. Co., 189 Va 258, 52 SE2d 129, 7 ALR2d 1418; Neel v Henne, 30 Wash 2d 24, 190 P2d 775; Ruff v Fruit Delivery Co., 22 Wash 2d 708, 157 P2d 730.

Footnote 7. National Biscuit Co. v Litzky (CA6 Mich) 22 F2d 939, 56 ALR 853; Cobb v Twitchell, 91 Fla 539, 108 So 186, 45 ALR 865; Kelly v Walgreen Drug Stores, 293 Ky 691, 170 SW2d 34; Comstock v General Motors Corp., 358 Mich 163, 99 NW2d 627, 78 ALR2d 449.

Negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence. Cobb v Twitchell, 91 Fla 539, 108 So 186, 45 ALR 865.

Footnote 8. National Biscuit Co. v Litzky (CA6 Mich) 22 F2d 939, 56 ALR 853; Kelly v Walgreen Drug Stores, 293 Ky 691, 170 SW2d 34; Burghardt v Detroit U. Ry., 206 Mich 545, 173 NW 360, 5 ALR 1333; Palmer v Clarksdale Hospital, 206 Miss 680, 40 So 2d 582; McAlexander v Estate of Lewis, 167 Neb 524, 93 NW2d 632, 77 ALR2d 575; Burt v Lake Region Flying Service, 78 ND 928, 54 NW2d 339; Towery v Guffey (Okla) 358 P2d 812; Hopkins v Derst Baking Co., 221 SC 497, 71 SE2d 407; Pfeifer v Standard Gateway Theater, Inc., 259 Wis 333, 48 NW2d 505.

Footnote 9. Union P. R. Co. v Huxoll, 245 US 535, 62 L Ed 455, 38 S Ct 187; Kelly v Walgreen Drug Stores, 293 Ky 691, 170 SW2d 34; Schier v Wehner, 116 Md 553, 82 A 976; Omaha & R. V. R. Co. v Clarke, 35 Neb 867, 53 NW 970, different results reached on reh 39 Neb 65, 57 NW 545; Ridge v Norfolk S. R. Co., 167 NC 510, 83 SE 762; Cleveland, T. & V. R. Co. v Marsh, 63 Ohio St 236, 58 NE 821; Schweiger v Solbeck, 191 Or 454, 230 P2d 195, 29 ALR2d 435.

The inference of negligence must be based upon something other than mere conjecture, speculation, or probability, and it is not sufficient to introduce evidence of a state of facts which is simply consistent with, or indicates a mere possibility or probability as to the existence of, negligence, or which suggests with equal force, and leaves fully as reasonable, an inference of the nonexistence of negligence; the facts must be of such a nature and so related to each other that the inference contended for is the more probable or reasonable to be drawn therefrom. Gypsy Oil Co. v Ginn, 152 Okla 30, 3 P2d 714.

While facts making up a case of negligence may be inferred from circumstances, the circumstantial proof must be such as will produce conviction to a reasonable certainty or on an unprejudiced mind. *Steckman v Silver Moon, Inc.*, 77 SD 206, 90 NW2d 170, 64 ALR2d 1171.

Forms: Instruction to jury—Negligence not to be presumed or inferred (simply by reason of the fact than an accident occurred). 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 56.

Occurrence of accident no proof of negligence. 23A Am Jur Pl & Pr Forms (Rev), Trial § 219.

Footnote 10. *Hepp v Quickel Auto & Supply Co.*, 37 NM 525, 25 P2d 197.

Footnote 11. *Sollberger v Walcott* (La App 1st Cir) 101 So 2d 483; *Davis v Dennert*, 162 Neb 65, 75 NW2d 112; *Hepp v Quickel Auto & Supply Co.*, 37 NM 525, 25 P2d 197; *Lear v Shirk's Motor Express Corp.*, 397 Pa 144, 152 A2d 883.

§ 1433 Contributory negligence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Although the defense of contributory negligence has been largely abrogated or modified by comparative negligence, 12 in jurisdictions where the defense is recognized and where the defendant has the burden of proving contributory negligence, 13 the defendant must prove, by a preponderance of the evidence, that the plaintiff was negligent and that the plaintiff's negligence contributed in some degree as the proximate cause of the plaintiff's injury. 14 This rule does not mean that the burden must be discharged by the defendant's own evidence; contributory negligence may be established by the defendant's or the plaintiff's evidence. 15

Footnotes

Footnote 12. 57A Am Jur 2d, Negligence § 842.

Footnote 13. As to pleading contributory negligence as an affirmative defense, see 61A Am Jur 2d, Pleading § 158.

Footnote 14. *District of Columbia v Sterling* (1990) 578 A2d 1163.

As to standard of proof by a preponderance of the evidence, in general, see § 157.

For a discussion of comparative negligence and its effect on contributory negligence, including a state-by-state analysis of comparative fault, see 57B Am Jur 2d, Negligence §§ 1128 et seq.

Forms: Answer–Defense–Plaintiff's contributory negligence. 18A Am Jur Pl & Pr Forms (Rev), Negligence, Forms 303, 304, 307, 311.

Defendant's burden of proof (contributory negligence as an affirmative defense). 18A Am Jur Pl & Pr Forms (Rev), Negligence, Form 327.

Footnote 15. Kelly v Virginia Electric & Power Co., 238 Va 32, 381 SE2d 219.

B. Particular Types of Evidence [1434-1463]

Research References

FRE, Rules 103(a)(1); 802

ALR Digest: Evidence §§ 1416-1420, 1423, 1427-1428.5, 1539-1552.5

ALR Index: Circumstantial Evidence; Evidence; Experiments and Tests; Real and Demonstrative Evidence

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 353, 364; 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 53, 55, 96, 104, 105, 107, 109, 121-126, 134; 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 53, 55, 96, 104, 105, 107, 109, 121-126, 134; 23A Am Jur Pl & Pr Forms (Rev), Trial §§ 191-196, 202, 204, 206, 207, 221; 25 Am Jur Pl & Pr Forms (Rev), Witnesses, Forms 181-187

5 Am Jur POF3d 191, Meteorological Conditions at a Particular Time and Place

1 Am Jur Trials 555, Locating and Preserving Evidence in Criminal Cases; 2 Am Jur Trials 409, Locating Public Records; 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence

1. In General [1434, 1435]

§ 1434 Circumstantial evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is not ordinarily necessary that there be any direct testimony in order to sustain the burden of proving a particular fact or issue, 16 and, under appropriate circumstances, circumstantial evidence may be given the same weight as direct evidence. 17 In criminal 18 and civil cases, 19 issues may be established by, and verdicts founded on, circumstantial evidence—that is, by inferences from established facts—when no direct evidence is available, so long as there exists a logical and convincing connection between the facts established and the conclusion concurred. 20

The sufficiency of circumstantial evidence should be assessed with the same standard as any other kind of evidence. 21 The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of the fact and circumstances from which it can be inferred, 22 nor does it alter the rule that it is

solely within the province of the trier of fact to evaluate or weigh the evidence. 23 Thus, circumstantial evidence and reasonable inferences derived from it may be adequate for a conviction or verdict. 24 This obtains not only in instances where facts can be proved only by circumstantial evidence, 25 but also in instances where, even though there is direct testimony, the circumstantial evidence outweighs 26 or is more satisfactory or convincing 27 than direct or positive testimony. Circumstances may so contradict the positive testimony of a witness as to warrant the jury in disregarding it. 28 Further, circumstances which are inconclusive when separately considered, may, when considered together, be sufficient to constitute conclusive proof. 29

Circumstantial evidence used to prove facts is limited by the rule that inferences drawn must be reasonable. A conclusion must be rationally and logically drawn from the facts established by the evidence when viewed in the light of common experience. To support a conclusion, the circumstantial evidence must be capable of convincing a rational trier of fact that the conclusion is more probable than any other alternative. 30 The conclusions based on inferences from circumstantial evidence must not be the result of speculation and conjecture. 31

◆ Caution: It is sometimes said that when the prosecution's case is based on circumstantial evidence, the judge should grant a directed verdict unless the evidence excludes every other hypothesis but that of guilt. 32 The United States Supreme Court has twice explicitly rejected this proposition. 33 The "excludes every hypothesis but guilt" rule serves no useful purpose: it is not needed to prevent a trier of fact from convicting on insufficient evidence, and is not needed to authorize a reviewing court to reverse such a conviction. 34

Issues that may be proved by circumstantial evidence include:

- Whether there is a causal connection between a wrongful act and the injury complained of 35
- Notice 36
- Knowledge 37
- Intent 38
- Existence of contracts to pay for services 39
- Existence of agency 40
- Employment 41
- Relationship or kinship 42
- Any other given fact in question in a civil case, 43 except as limited by statute 44 or by valid contractual provisions 45

§ 1434 ----Circumstantial evidence [SUPPLEMENT]

Case authorities:

A .44-caliber handgun, two boxes of .44-caliber ammunition, and three shells and a spent cartridge in the gun, which were found in a dumpster four days after a murder, were relevant because they tended to link defendant to the crime where two different shooters were involved in the killing; the evidence was contradictory as to who was carrying what kind of weapon the night of the shooting; defendant's fingerprints were found on one of the boxes of ammunition; the bullets found in the dumpster were consistent with the type of bullets recovered from the victim's body; and defendant admitted that he owned a .44-caliber handgun and that he had bought the ammunition for himself and another person. From the fact that a .44-caliber handgun was found in the dumpster with a box of .44-caliber bullets linked to defendant through his fingerprints and his own testimony, the jury could infer that it was defendant who fired the .44-caliber handgun the night of the murder. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

Footnotes

Footnote 16. *Commonwealth v Di Stasio*, 297 Mass 347, 8 NE2d 923, 113 ALR 1133, cert den 302 US 683, 82 L Ed 527, 58 S Ct 50 and cert den 302 US 759, 82 L Ed 587, 58 S Ct 370; *Crayne v Crayne*, 54 Nev 205, 13 P2d 222, 84 ALR 716.

The fact that evidence on which the verdict is based is in whole or in part circumstantial rather than direct does not diminish its probative force. *State v Tinsley*, 24 Conn App 685, 591 A2d 448, app den 220 Conn 902, 593 A2d 968.

Evidence is never to be disregarded or swept aside merely because it is circumstantial. *Miller v Northern P. R. Co.*, 24 Idaho 567, 135 P 845.

Footnote 17. *United States v Russell* (CA1 Mass) 919 F2d 795.

Footnote 18. §§ 1467 et seq.

Footnote 19. *Bowden v Johnson*, 107 US 251, 17 Otto 251, 27 L Ed 386, 2 S Ct 246; *Rea v Missouri*, 84 US 532, 17 Wall 532, 21 L Ed 707; *Kempner v Churchill*, 75 US 362, 8 Wall 362, 19 L Ed 461; *Castle v Bullard*, 64 US 172, 23 How 172, 16 L Ed 424; *Christensen v Slawter* (1st Dist) 173 Cal App 2d 325, 343 P2d 341, 74 ALR2d 567; *Burgess v Small*, 151 Me 271, 117 A2d 344, 51 ALR2d 1149; *Prior Lake State Bank v National Surety Corp.*, 248 Minn 383, 80 NW2d 612, 57 ALR2d 1306; *State ex rel. Union Electric Light & Power Co. v Public Service Com.*, 333 Mo 426, 62 SW2d 742; *State v Mihoy*, 98 NH 38, 93 A2d 661, 35 ALR2d 852; *Helman v Sacred Heart Hospital*, 62 Wash 2d 136, 381 P2d 605, 96 ALR2d 1193.

A party may satisfy its burden of producing evidence by offering circumstantial evidence. *District of Columbia v Savoy Constr. Co.* (Dist Col App) 515 A2d 698 (superseded by statute on other grounds as stated in *Dano Resource Recovery, Inc. v District of Columbia* (Dist Col App) 566 A2d 483).

Footnote 20. *United States v McNeill* (CA3 Pa) 887 F2d 448, 28 Fed Rules Evid Serv 1263, cert den 493 US 1087, 107 L Ed 2d 1055, 110 S Ct 1152.

Annotation: Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases, 36 ALR4th 1046.

Forms: Instruction to jury—Character of evidence—Direct or circumstantial. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 104, 105.

Burden of proof may be met by circumstantial evidence. 23A Am Jur Pl & Pr Forms (Rev), Trial § 221.

Footnote 21. *Jackson v Virginia*, 348 US 307, 61 L Ed 2d 560, 99 S Ct 2781; *United States v Christian* (CA6 Tenn) 942 F2d 363, cert den (US) 116 L Ed 2d 806, 112 S Ct 905 and (among conflicting authorities on other grounds noted in *United States v Smiley* (CA8 Mo) 997 F2d 475); *Wilson v State*, 319 Md 530, 573 A2d 831; *State v Badami*, 235 Neb 118, 453 NW2d 746; *State v Carson* (ND) 453 NW2d 485.

Inasmuch as the probative value of direct and circumstantial evidence is intrinsically similar, there is no logically sound reason for drawing a distinction as to the weight to be assigned to each. *State v Harvill*, 106 Ariz 386, 476 P2d 841.

Footnote 22. *Thomas v Allstate Ins. Co.*, 27 Ark App 27, 766 SW2d 31.

Footnote 23. *Reed v Bowen* (Fla App D2) 503 So 2d 1265, 11 FLW 2254, approved (Fla) 512 So 2d 198, 12 FLW 477.

As to determining the weight of the evidence, see § 1431.

Footnote 24. *Torrez v Standard Brand Paint* (Tex App El Paso) 795 SW2d 13, writ den (Nov 21, 1990) and reh'g of writ of error overr (Jan 9, 1991).

Footnote 25. *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455, 153 ALR 1122.

Footnote 26. *Bowden v Johnson*, 107 US 251, 17 Otto 251, 27 L Ed 386, 2 S Ct 246; *Toomay v Graham* (Mo App) 151 SW2d 119.

Direct testimony may be contradicted by circumstantial evidence, and the contradiction may be so strong as to justify disbelief of the direct testimony. *Gray v Southern Pacific Co.*, 23 Cal 2d 632, 145 P2d 561.

Footnote 27. *Kempner v Churchill*, 75 US 362, 8 Wall 362, 19 L Ed 461; *People v Martina* (1st Dist) 140 Cal App 2d 17, 294 P2d 1015.

Footnote 28. *Gray v Southern Pacific Co.*, 23 Cal 2d 632, 145 P2d 561; *Lantz v Stribling* (1st Dist) 130 Cal App 2d 476, 279 P2d 112; *Commonwealth Life Ins. Co. v Pendleton*, 231 Ky 591, 21 SW2d 985, 66 ALR 1526.

Footnote 29. *Wager v Hall*, 83 US 584, 16 Wall 584, 21 L Ed 504; *Kempner v Churchill*, 75 US 362, 8 Wall 362, 19 L Ed 461; *Castle v Bullard*, 64 US 172, 23 How 172, 16 L Ed 424.

It is not necessary that any single fact, proved by circumstantial evidence standing alone,

established the issue; it is sufficient if all the facts and circumstances considered together lead to a rational inference that the ultimate fact is as alleged. *Mast v State Board of Optometry* (2nd Dist) 139 Cal App 2d 78, 293 P2d 148; *In re Estate of Gallo*, 61 Cal App 163, 214 P 496.

Practice References Law of Probabilities: Cumulative Value of Evidence. 1 Am Jur Trials 555, Locating and Preserving Evidence in Criminal Cases § 52.

Footnote 30. *Andrus v Gas Co. of New Mexico, Div. of Public Service Co.* (App) 110 NM 593, 798 P2d 194.

Footnote 31. *Boehm v Kish*, 201 Conn 385, 517 A2d 624, further stating that when an element necessary to a cause of action cannot be established without conjecture, the evidence presented cannot withstand a motion for a directed verdict.

Before a plaintiff in a civil case can have a favorable verdict supported solely by circumstantial evidence, the evidence must be such as to reasonably establish the theory relied upon, and to preponderate to that theory rather than to any other reasonable hypothesis. *Southern R. Co. v Georgia Kraft Co.*, 258 Ga 232, 367 SE2d 539, on remand 188 Ga App 623, 373 SE2d 774.

Footnote 32. *Cook v State*, 185 Ga App 585, 364 SE2d 912; *Daniel v State*, 59 Ga App 454, 1 SE2d 229; *Wilson v State*, 319 Md 530, 573 A2d 831 (the rule applies only when the case is based upon circumstantial evidence alone); *State v Graven*, 54 Ohio St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370.

Footnote 33. *Jackson v Virginia*, 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781, reh den 444 US 890, 62 L Ed 2d 126, 100 S Ct 195 and (not followed by *State v Williams* (La) 383 So 2d 369) as stated in *State v Gatson* (La App 3d Cir) 434 So 2d 1315; *Holland v United States*, 348 US 121, 99 L Ed 150, 75 S Ct 127, 54-2 USTC ¶ 9714, 46 AFTR 943, reh den 348 US 932, 99 L Ed 731, 75 S Ct 334, 46 AFTR 1361 and (not followed by *People v Crow*, 108 Ill 2d 520, 92 Ill Dec 570, 485 NE2d 381); *United States v Artuso* (CA2 NY) 618 F2d 192, cert den 449 US 861, 66 L Ed 2d 77, 101 S Ct 164 and cert den 449 US 879, 66 L Ed 2d 102, 101 S Ct 226; *United States v Stirling* (CA2 NY) 571 F2d 708, CCH Fed Secur L Rep ¶ 96308, 2 Fed Rules Evid Serv 1257, cert den 439 US 824, 58 L Ed 2d 116, 99 S Ct 93; *United States v White* (CA10 Okla) 673 F2d 299; *United States v Coombs*, 150 US App DC 333, 464 F2d 842.

Footnote 34. *Wilson v State*, 319 Md 530, 573 A2d 831, in which defendant house cleaner was tried before a judge and convicted of stealing three rings from a house, based solely on the testimony of the 81-year-old resident that defendant had cleaned the upstairs on the day the rings disappeared and had access to the master bedroom closet in which the rings were last seen; the state's case was inadequate because five members or friends of the resident's family had had access to the upstairs that day, none of whom testified that they did not take the rings, and other cleaners may also have been in the house; the evidence was insufficient to sustain the conviction, not, as the court said, because it failed to exclude all other hypotheses, but simply because it was inadequate to carry the inference of guilt in the first instance.

Circumstantial evidence is sufficient to establish a proposition if it makes the claimant's theory reasonably probable and not merely possible, and more probable than any other

theory based on the evidence, but the evidence need not exclude every other possible theory. *Jennings v Farmers Mut. Ins. Asso.*, 260 Iowa 279, 149 NW2d 298.

Footnote 35. *Hersum v Kennebec Water Dist.*, 151 Me 256, 117 A2d 334, 53 ALR2d 1072; *Willi v Lucas*, 110 Mo 219, 19 SW 726.

Footnote 36. *Citizens Trust & Sav. Bank v Stackhouse*, 91 SC 455, 74 SE 977; *Dulin v Ohio R. R. Co.*, 73 W Va 166, 80 SE 145.

Footnote 37. *Liberty Nat. Life Ins. Co. v Weldon*, 267 Ala 171, 100 So 2d 696, 61 ALR2d 1346.

Footnote 38. *Hagerty v Union Guardian Trust Co.*, 258 Mich 133, 242 NW 211, 85 ALR 417.

As to circumstantial evidence of intent in criminal cases, see § 1469.

Footnote 39. *In re Oldfield's Estate*, 175 Iowa 118, 156 NW 977.

Footnote 40. 3 Am Jur 2d, Agency § 362.

Footnote 41. *Roth v Headlee*, 238 Iowa 1340, 29 NW2d 923.

Footnote 42. *In re Estate of Hartman*, 157 Cal 206, 107 P 105, holding that the facts that two men called each other brother and that their conduct and conversation indicate and are consistent with such relationship are sufficient to establish the fact of its existence.

Footnote 43. *Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp.* (CA2 NY) 216 F2d 920, 52 ALR2d 1231; *Thomas v Allstate Ins. Co.*, 27 Ark App 27, 766 SW2d 31.

Footnote 44. *Wittemann v Sands*, 238 NY 434, 144 NE 671, 37 ALR 1216.

Footnote 45. *Consolidated Theatres, Inc. v Warner Bros. Circuit Management Corp.* (CA2 NY) 216 F2d 920, 52 ALR2d 1231.

§ 1435 Incompetent evidence admitted without objection

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

According to most courts, the fact that evidence which is introduced in a case may be, if objected to, incompetent evidence under one or more exclusionary rules of evidence does not destroy its probative effect, if it is admitted without objection. It is the generally prevailing rule that relevant evidence received without objection may properly be considered, although it would have been excluded if objection had been made. 46 It follows that such evidence, where admitted without objection, has the force and effect of

proper evidence 47 and is to be accorded its natural probative effect as though it were admissible under the established rules of practice. 48 Incompetent evidence admitted without objection may establish a fact, 49 support a finding, 50 or sustain a judgment. 51

These general principles have been applied to hearsay evidence admitted without objection, which may be regarded as sufficient to establish a fact in controversy. But such evidence, even though admitted without objection, is minimized by the same inherent weaknesses which are grounds for its exclusion. 52

Secondary evidence, if received without objection, is competent proof to be considered in determining whether a fact is established. 53 Such evidence, where it is the uncontradicted testimony of a witness likely to be informed on the subject, cannot be disregarded. 54

§ 1435 ----Incompetent evidence admitted without objection [SUPPLEMENT]

Case authorities:

It was noted that all evidence admitted, whether competent or incompetent, may be considered in ruling on a motion to dismiss for insufficiency of the evidence. *State v Pleasant* (1995) 342 NC 366, 464 SE2d 284.

Footnotes

Footnote 46. *Smith v State*, 40 Ala App 600, 119 So 2d 202, cert den 270 Ala 741, 119 So 2d 203; *Abbott v Limited Mut. Compensation Ins. Co.*, 30 Cal App 2d 157, 85 P2d 961; *Burke v Tackett*, 313 Ky 583, 233 SW2d 115; *Mississippi State Highway Com. v Robertson (Miss)* 350 So 2d 1348; *Cannady's Used Cars v Dowling*, 221 Miss 293, 72 So 2d 696, 44 ALR2d 1053; *Crampton v Osborn*, 356 Mo 125, 201 SW2d 336, 172 ALR 344; *Rosberg v Montgomery Ward & Co.*, 110 Mont 154, 99 P2d 979; *Schell v State (Okla)* 418 P2d 690; *Hanns v Friedly*, 181 Or 631, 184 P2d 855; *State v Paris*, 43 Wash 2d 498, 261 P2d 974.

Incompetent evidence if admitted without objection has probative value and may be considered with the same force and effect as proper evidence. *Hannahs v Noah*, 83 SD 296, 158 NW2d 678.

As to objections to incompetent evidence, in general, see 75 Am Jur 2d, Trial § 428.

Footnote 47. *State v Paris*, 43 Wash 2d 498, 261 P2d 974.

Footnote 48. *Citizens Bank of Hattiesburg v Miller*, 194 Miss 557, 11 So 2d 457; *Wine v Beach*, 194 Va 601, 74 SE2d 149; *State v Paris*, 43 Wash 2d 498, 261 P2d 974.

Upon waiver of the statute as to testimony of a transaction with a decedent, or upon admission of such testimony without objection, the evidence is entitled to the same credence and weight as any other evidence received. *Boettcher v Busse*, 45 Wash 2d 579, 277 P2d 368, 49 ALR2d 191.

Footnote 49. *Ewald v Poates*, 107 App Div 242, 94 NYS 1106.

Footnote 50. *People v Willis*, 30 Cal App 2d 419, 86 P2d 670.

Footnote 51. *Martin v Town & Country Development, Inc.* (4th Dist) 230 Cal App 2d 422, 41 Cal Rptr 47, 10 ALR3d 1347.

Footnote 52. § 1441.

Footnote 53. *Kansas City S. R. Co. v C. H. Albers Com. Co.*, 223 US 573, 56 L Ed 556, 32 S Ct 316.

As to best and secondary evidence, see §§ 1053 et seq.

Footnote 54. *Kansas City S. R. Co. v C. H. Albers Com. Co.*, 223 US 573, 56 L Ed 556, 32 S Ct 316.

2. Testimony, In General [1436-1449]

§ 1436 Number of witnesses as affecting weight and sufficiency

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Frequently, the testimony of several witnesses is offered in proof of a contested fact. An issue is not, however, to be determined merely by the number of witnesses testifying in support or in contradiction of it in comparison with the number of those giving opposing testimony, 55 but by the greater weight and sufficiency of the evidence, of which the trier of fact is the sole judge. 56 Or, as sometimes stated, witnesses are not counted, but weighed, and the weight to be given evidence is not determined by the number of the witnesses on either side. 57 Therefore, in civil cases, preponderance of the evidence has no reference to the relative number of witnesses testifying for the opposing parties. 58 The jury is free to believe the minority of the witnesses, and a verdict based upon the testimony of the minority will not be disturbed merely because it is opposed to the testimony of the majority. 59 The preponderance of the evidence can be established by a single witness as against a greater number of witnesses who testify to the contrary 60 even if the witness in question is the victim 61 or a party to the proceeding. 62

The issue, in a criminal prosecution, of the guilt or innocence of the accused is also not to be determined solely by counting the witnesses on one side or the other, inasmuch as numerical superiority of witnesses is not the criterion or key to such determination. 63 However, the trier of fact does not completely discount the numerical preponderance of witnesses on one side or the other of a case or an issue. 64 Rather, numerical preponderance is one circumstance to be considered along with all other facts and circumstances in the testimony of the witnesses on either side. 65 In other words, the number of witnesses testifying on each side is a fact that may be considered and given

due weight. 66 Although a mere numerical preponderance of witnesses is not in itself controlling, it is entitled to consideration and may control if there is no special reason to credit, or to give equal or greater credit to, the evidence of the smaller number. 67

As with civil cases, the uncorroborated testimony of one witness is sufficient to convict a defendant, 68 if believed by a jury beyond a reasonable doubt. 69 This rule that the testimony of a single witness is sufficient to support a conviction applies as well to inconsistent testimony. 70

Footnotes

Footnote 55. Putman v Cameron, 129 Cal App 2d 89, 276 P2d 102; State v Hodge, 153 Conn 564, 219 A2d 367; Houle v Tondreau Bros. Co., 148 Me 189, 91 A2d 481; State v Linder (Hamilton Co) 111 Ohio App 146, 12 Ohio Ops 2d 107, 165 NE2d 460; Harrison v Chesshir (Tex Civ App Amarillo) 322 SW2d 317; State v Coburn, 122 Vt 102, 165 A2d 349.

Footnote 56. Snowden v Webb, 217 Miss 664, 64 So 2d 745, 39 ALR2d 93, sugg of error overr 217 Miss 680, 65 So 2d 839 and sugg of error sustained, in part 217 Miss 682, 67 So 2d 251; New Hampshire Milk Dealers' Asso. v New Hampshire Milk Control Board, 107 NH 335, 222 A2d 194.

The weight of evidence is not to be determined by the number of witnesses. New Deal Cab Co. v Meyer (Fla App D1) 139 So 2d 189.

As to expert testimony, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 1 et seq.

Forms: Evaluation of testimony of witnesses as to number of witnesses on each side. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 125.

Instruction to jury—Effect of number of witnesses on weight of evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 125.1.

Instruction to jury—Preponderance of evidence—As not necessarily referring to greater number of witnesses or quantity of evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 134.

Jury not required to find in conformity with greater number of witnesses—Testimony of one witness sufficient to prove fact. 23A Am Jur Pl & Pr Forms (Rev), Trial § 220.

Footnote 57. Bienvenu v State Farm Mut. Auto. Ins. Co. (La App 5th Cir) 545 So 2d 581; In re Estate of Brackett (Fla App D2) 109 So 2d 375, cert den (Fla) 113 So 2d 231.

The number of witnesses is not critical, so long as the evidence presented is sufficient to support the factual findings of the jury. State v Milligan (Utah) 727 P2d 213, 44 Utah Adv Rep 9.

Footnote 58. Weiler v United States, 323 US 606, 89 L Ed 495, 65 S Ct 548, 156 ALR 496; Ruwaldt v W. C. McBride, Inc., 388 Ill 285, 57 NE2d 863, 155 ALR 1209; Lautenbach v Meredith, 240 Iowa 166, 35 NW2d 870; Houle v Tondreau Bros. Co., 148

Me 189, 91 A2d 481; *Geelen v Pennsylvania R. Co.*, 400 Pa 240, 161 A2d 595, 91 ALR2d 1; *Lubbock v Thiel* (Tex Civ App Amarillo) 352 SW2d 799, writ ref n r e (Mar 14, 1962), error ref n r e.

As to preponderance of the evidence, in general, see § 157.

Footnote 59. *Wilson v Haughton* (Ky) 266 SW2d 115, 41 ALR2d 950; *Snowden v Webb*, 217 Miss 664, 64 So 2d 745, 39 ALR2d 93, sugg of error overr 217 Miss 680, 65 So 2d 839 and sugg of error sustained, in part 217 Miss 682, 67 So 2d 251; *Robinson v Gallagher Transfer & Storage Co.*, 58 Wyo 69, 125 P2d 157.

Footnote 60. *Houle v Tondreau Bros. Co.*, 148 Me 189, 91 A2d 481; *State v Bliss* (Minn) 457 NW2d 385; *Aide v Taylor*, 214 Minn 212, 7 NW2d 757, 145 ALR 530; *Robinson v Gallagher Transfer & Storage Co.*, 58 Wyo 69, 125 P2d 157.

A verdict can be based on the testimony of a single witness, no matter what the issue. *State v Perez* (Minn App) 404 NW2d 834.

If accepted as true by the trier of fact, the testimony of a single witness is sufficient to establish any fact, including the amount of damages. *Garren v Smith* (Mo App) 803 SW2d 184.

Footnote 61. *Becker v State* (Ind App) 585 NE2d 279.

Footnote 62. *In re Marriage of Jones* (2nd Dist) 195 Cal App 3d 1097, 241 Cal Rptr 231.

Footnote 63. *State v Hodge*, 153 Conn 564, 219 A2d 367.

Footnote 64. *Rice v Cleveland*, 144 Ohio St 299, 29 Ohio Ops 447, 58 NE2d 768; *McDaniel v Orr* (Tex Com App) 33 SW2d 427.

Footnote 65. *Lautenbach v Meredith*, 240 Iowa 166, 35 NW2d 870; *Rice v Cleveland*, 144 Ohio St 299, 29 Ohio Ops 447, 58 NE2d 768; *State v Linder* (Hamilton Co) 111 Ohio App 146, 12 Ohio Ops 2d 107, 165 NE2d 460; *State v Coburn*, 122 Vt 102, 165 A2d 349.

Footnote 66. *Maddox v Texas Indem. Ins. Co.* (Tex Civ App) 224 SW2d 495, writ ref n r e, error ref n r e.

Footnote 67. *State v Coburn*, 122 Vt 102, 165 A2d 349.

In case of conflict of evidence, and especially where all the witnesses are equally intelligent and free from bias, and have had equal opportunity to know the facts to which they testify, numerical preponderance on one side is entitled to consideration, unless there is special reason to credit the evidence of the smaller number. *Rice v Cleveland*, 144 Ohio St 299, 29 Ohio Ops 447, 58 NE2d 768.

Footnote 68. *McKinney v State* (Ind) 558 NE2d 829.

Footnote 69. *State v Rodney* (Mo App) 760 SW2d 500.

As to proof beyond a reasonable doubt, in general, see §§ 168 et seq.

Footnote 70. State v Rodney (Mo App) 760 SW2d 500.

As to inconsistent testimony, in general, see § 1443.

§ 1437 Effect of witnesses' credibility, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The issue of witness credibility is primarily a question for the trier of fact. 71 It has sometimes been stated that a jury is not permitted to disbelieve testimony unless there is good reason for questioning the credibility of the witnesses. 72

Provided that the trier of fact does not act arbitrarily, 73 it is under no obligation to credit the evidence proffered by any witness, including experts, 74 and is not compelled to accept even uncontroverted testimony when it doubts the credibility of a witness. 75 Witnesses may be contradicted by the facts they state as well as by direct adverse testimony, and there may be so many omissions in an account of particular transactions or of their own conduct as to discredit the entire testimony. 76

Attacks on witness credibility are simple challenges to the quality and not to the sufficiency of the evidence. 77 When determining the credibility of the testimony of witnesses, the trial court may consider whether the testimony is reasonable and consistent with other evidence; whether the witness has made inconsistent statements; the witness's appearance, conduct, memory and knowledge of the facts; the witness's interest in the trial; 78 and the witness's emotional or mental state. 79 The trier of fact may also consider the relationship of the witnesses to the party involved and their feelings towards the party. 80 A family relationship between a witness and a party, for example, may bear upon the witness's bias. The fact of the relationship does not establish bias, but is simply a circumstance considered by the fact-finder in appraising credibility. 81

Footnotes

Footnote 71. 81 Am Jur 2d, Witnesses § 1029.

As to credibility of witnesses, in general, see 81 Am Jur 2d, Witnesses §§ 1027-1037.

Footnote 72. Page v Crisp (App) 303 SC 117, 399 SE2d 161.

Annotation: Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case, 7 ALR Fed 377.

Forms: Instruction—Duty of jury to determine facts. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 353.

Instruction to jury—General considerations affecting weight to be given testimony of

witnesses. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 96.

Instruction to jury—Credibility of witnesses. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 121.

Instruction to jury—Inferences of believability of witnesses from statements of court. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 126.

Footnote 73. *Lubetsky v Friedman* (2nd Dist) 228 Cal App 3d 35, 278 Cal Rptr 706, 91 CDOS 1658, 91 Daily Journal DAR 2635.

Footnote 74. *Lubetsky v Friedman* (2nd Dist) 228 Cal App 3d 35, 278 Cal Rptr 706, 91 CDOS 1658, 91 Daily Journal DAR 2635; *Mather v Griffin Hospital*, 207 Conn 125, 540 A2d 666.

As to weight and sufficiency of expert testimony, in general, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 129-135.

Footnote 75. § 1445.

Footnote 76. *Bassett Unified School Dist. v Commission on Professional Competence* (2nd Dist) 201 Cal App 3d 1444, 247 Cal Rptr 865; *Gray v Floyd* (Tex App Houston (1st Dist)) 783 SW2d 214 (the jury is not required to believe even witnesses who are unimpeached and uncontradicted).

Footnote 77. *United States v Lee* (CA6 Mich) 991 F2d 343.

Footnote 78. *State v Frake* (Iowa) 450 NW2d 817.

Footnote 79. *United States v Martinez* (CA10 Colo) 877 F2d 1480, cert den 493 US 981, 107 L Ed 2d 515, 110 S Ct 513, 110 S Ct 514, stating that the fact that a witness was a teenager with a history of emotional problems and that another was a drug addict were impeaching facts which posed a credibility issue to be resolved by the factfinder and were properly left for the jury to consider.

A witness's paranoia and psychiatric treatment does not necessarily make his testimony unbelievable. *United States v Gatto* (DC NJ) 727 F Supp 903, later proceeding (DC NJ) 746 F Supp 432, later proceeding (DC NJ) 750 F Supp 664 and revd (CA3 NJ) 924 F2d 491, 32 Fed Rules Evid Serv 262, reh, en banc, den (CA3) 1991 US App LEXIS 16755, later proceeding (CA3 NJ) 995 F2d 449, 37 Fed Rules Evid Serv 194, reh, en banc, den (CA3) 1993 US App LEXIS 15153 and cert den (US) 126 L Ed 2d 339, 114 S Ct 391.

Although the testimony of a narcotics addict must be viewed with caution, the testimony may be enough to sustain a conviction if credible in view of the surrounding circumstances. *People v Steidl*, 142 Ill 2d 204, 154 Ill Dec 616, 568 NE2d 837, cert den (US) 116 L Ed 2d 125, 112 S Ct 161.

Annotation: Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases, 23 ALR4th 1089.

Use of drugs as affecting competency or credibility of witness, 65 ALR3d 705.

Forms: Instruction to jury—Factors to be considered in ascertaining credibility of witnesses. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 122, 123.

Jury to determine credibility of witnesses—Factors in determining credibility and weight to be given testimony. 23A Am Jur Pl & Pr Forms (Rev), Trial §§ 191-196.

Impeachment of witness—Bad reputation for truth. 23A Am Jur Pl & Pr Forms (Rev), Trial § 206.

Impeachment of witness—Conviction of crime or felony. 23A Am Jur Pl & Pr Forms (Rev), Trial § 207.

Instructions to jury—Determination of credibility of witnesses—Factors affecting determination. 25 Am Jur Pl & Pr Forms (Rev), Witnesses, Forms 181-187.

Footnote 80. Patterson v State, 181 Ga App 68, 351 SE2d 503.

Footnote 81. Crewe v Blackmon (App) 289 SC 229, 345 SE2d 754.

The trial court has the discretion to reject testimony of biased witnesses. State v Russell, 92 NC App 639, 376 SE2d 458.

§ 1438 Positive or negative testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Negative testimony—that is, testimony that a fact did not exist, that a thing was not done or did not take place, or that one did not hear or observe—is admissible, 82 and, the mere fact that evidence is of a negative nature does not mean that it is not probative or that it will not support a finding. 83

It is, however, a long-recognized general rule of evidence that all other things being equal, positive evidence is stronger than negative evidence. The rule is that where witnesses are of equal credibility and there are no extraneous circumstances affecting the weight of their testimony, testimony that a certain event happened or that the witness saw or heard something at a particular time or place is of more weight and value as evidence than testimony of other witnesses with the same opportunities who state that they did not see or hear anything at that time or place. 84 Often, the rule is even more broadly stated, in the form of a rule of thumb, that where there are two witnesses of equal credibility in direct contradiction on a fact question, the positive or affirmative testimony will be given preponderance over the negative. 85 Moreover, positive testimony of a single witness, whose credibility is unimpeached, that the witness saw or heard a particular thing at a specified time and place, ordinarily outweighs, as a matter of law, the testimony of any number of equally credible witnesses who, with the same opportunities, state that they did not see or hear it. 86 Purely negative testimony acquires no weight

by reason of the number of witnesses who give it, if there is positive testimony of other credible witnesses. 87

Negative evidence is generally regarded as of less weight than positive evidence because the memory of a witness is more reliable when testifying to the occurrence of an event than when testifying to its nonoccurrence. 88 However, extreme results are sometimes reached in applying the theory that the memory of a witness is less reliable when testifying to a negative. 89 For example, as to whether or not goods or papers were delivered to a witness, the witness's testimony that the event never occurred would seem equally as reliable as testimony that it did occur. And, positive testimony that a promise was made is not overcome by testimony of witnesses who say that they did not hear it made. 90

In the determination of the probative value of negative testimony and its relative weight in comparison with positive testimony, the trier of fact considers a variety of factors including the position of the witness as to the place of the occurrence and to the witness's opportunity for hearing or observing. 91

Footnotes

Footnote 82. § 318.

Footnote 83. *Fairway Builders, Inc. v Malouf Towers Rental Co.* (App) 124 Ariz 242, 603 P2d 513.

Law Reviews: Romano. Negative evidence is Pollyanna positive. 16 Trial Diplomacy Journal 88 (May-June 1993).

Forms: Instruction to jury—Character of evidence—Negative testimony. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 107.

Footnote 84. *Aetna Life Ins. Co. v Ward*, 140 US 76, 35 L Ed 371, 11 S Ct 720; *Stitt v Huidekoper*, 84 US 384, 17 Wall 384, 21 L Ed 644; *Patterson v Gaines*, 47 US 550, 6 How 550, 12 L Ed 553; *Palmquist v De Ban* (Fla) 69 So 2d 769; *Pollard v Todd*, 62 Ga App 251, 8 SE2d 566; *Snow v Cannelton Sewer Pipe Co.*, 138 Ind App 119, 210 NE2d 118; *Leblanc v Cordaro* (La App 2d Cir) 378 So 2d 1027; *Jefferson Davis Electric Cooperative, Inc. v Mike Hooks, Inc.* (La App 3d Cir) 134 So 2d 326; *Pongruber v Patrick*, 157 Neb 799, 61 NW2d 578; *Gulf, C. & S. F. R. Co. v Nail*, 156 Okla 294, 10 P2d 668; *Markusfeld v Zahn* (Tex Civ App) 99 SW2d 438, writ diss; *Southern R. Co. v Barden*, 200 Va 98, 104 SE2d 13; *Parsons v New York C. R. Co.*, 127 W Va 619, 34 SE2d 334.

Law Reviews: Saunders, The Mythic Difficulty in Proving a Negative. 15 Set H LR 276 (1985).

Footnote 85. *Smith v Formica Corp.* (La App 1st Cir) 439 So 2d 1194, CCH Prod Liab Rep ¶ 9935; *Pongruber v Patrick*, 157 Neb 799, 61 NW2d 578.

Where the court must review positive evidence as contrasted to negative evidence, the positive evidence is given greater weight. *In re Mullins* (BC WD Va) 64 BR 287, affd

without op (CA4 Va) 848 F2d 184.

Positive or affirmative evidence is recognized as preponderant over negative. *State v Bentley* (La App 2d Cir) 499 So 2d 581, review den (La) 503 So 2d 477.

Footnote 86. *Norfolk & W. R. Co. v Greenfield*, 219 Va 122, 244 SE2d 781.

As to the negative testimony as affected by the witness's opportunity to hear and observe, see § 1439.

Footnote 87. *Gaines v New Orleans*, 73 US 642, 6 Wall 642, 18 L Ed 950; *In re Edmundson's Estate*, 259 Pa 429, 103 A 277, 2 ALR 1150; *Southern R. Co. v Barden*, 200 Va 98, 104 SE2d 13; *Johnson v Richmond F. & P. R. Co.*, 160 Va 766, 169 SE 603.

Footnote 88. *Stitt v Huidekoper*, 84 US 384, 17 Wall 384, 21 L Ed 644.

As a general rule, evidence essentially negative in character is not adequate to overcome contrary positive testimony. *Bleakley v Bowlby* (Okla) 557 P2d 894.

Footnote 89. *Stitt v Huidekoper*, 84 US 384, 17 Wall 384, 21 L Ed 644.

Footnote 90. *In re Edmundson's Estate*, 259 Pa 429, 103 A 277, 2 ALR 1150.

Forms: Instruction to jury—Sufficiency of evidence to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 53.

Instruction to jury—Presumption where evidence is sufficient to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 55.

Footnote 91. § 1439.

§ 1439 --As affected by opportunity to hear and observe

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the determination of the probative value of negative testimony and its relative weight in comparison with positive testimony, the trier of fact considers, among a variety of factors, ⁹² the witness's opportunity for hearing and observing. ⁹³ Negative testimony rises or declines in the scale of probative weight according to that opportunity. ⁹⁴ It rises to the level of probative value when coupled with a sufficient predicate, consisting of additional testimony or circumstances to show that the witness's position and attitude of attention were such that the witness probably would have heard or seen the occurrence of the event had it happened. ⁹⁵ It is generally recognized that notwithstanding one witness testifies that a fact occurred, weight must be accorded to the unequivocal testimony of another witness having the same or better means of knowledge, that it did not occur. ⁹⁶

When, however, a credible witness with apparently adequate opportunity for observation testifies to an occurrence, the mere testimony of other witnesses that they were not cognizant of the occurrence is entitled to no weight and is not sufficient to create a conflict in the testimony where the opportunities of the latter for observation are not stated, or where it affirmatively appears that their situation was such or their attention was so engrossed that they probably would not have observed the event if it had occurred, or where their opportunities were not coextensive with those of the witness who testifies positively to the occurrence. 97 Thus, the testimony of witnesses that they did not hear a warning signal, whistle, or bell, without further proof that they listened for the signal, that their attention was in some way directed to it, or that they probably would have heard it if it did sound, cannot prevail against positive testimony of other creditable witnesses that such warning signal, whistle, or bell was sounded at the time in question. 98 Negative testimony of witnesses shown to have been some distance from the scene of an occurrence, that they did not hear signals given or bells rung cannot create a conflict with positive testimony of other witnesses in this regard. 99

◆ Comment: Some courts classify this type of evidence as positive, rather than negative. That is, where there is evidence that the one who denies that fact had good opportunity to see or hear, and the evidence demonstrates that the witness probably would have seen or heard that event had it occurred, or it is shown that the witness's attention was drawn to the matter controverted, then the testimony constitutes positive testimony, and produces a conflict of evidence to be decided by the trier of fact. 1 Where a witness affirms that a fact occurred, and another who had apparently sufficient opportunity to know and who declares he was paying attention denies that it occurred, it is generally held not to be a case of positive and negative testimony, but of positive testimony on both sides. 2

Footnotes

Footnote 92. *Cotton v Willmar & S. F. R. Co.*, 99 Minn 366, 109 NW 835; *Napier v Southern Pacific Co.*, 218 Or 371, 345 P2d 400, stating that the probative value to be given to the testimony of a witness that he did not hear the sound depends upon the condition of his senses, his proximity to the place, the degree of attention, and other such circumstances which render it more or less probable that if the sound had been made, he would have heard it.

Footnote 93. *Esmailka v State* (Alaska App) 740 P2d 466, stating that where a party relies on negative evidence, that is, testimony that a witness did not see an event in order to support an inference that the event did not occur, the rule is that the person allegedly witnessing the event must have been in a position to see it.

In order for negative evidence to qualify as sufficient it must be shown the witness was so situated that in the ordinary course of events he would have heard or seen the fact had it occurred. *Koll v Manatt's Transp. Co.* (Iowa) 253 NW2d 265.

Negative evidence must be preceded by a showing that the witness had been in a position to hear the sound if it occurred. *Beasley v Grand T. W. R. Co.*, 90 Mich App 576, 282 NW2d 401.

Footnote 94. *Forde v Northern P. R. Co.*, 241 Minn 246, 63 NW2d 11; *Fish v Southern*

Pac. Co., 173 Or 294, 143 P2d 917, reh den 173 Or 325, 145 P2d 991; Southern R. Co. v Barden, 200 Va 98, 104 SE2d 13.

Footnote 95. Mast v Standard Oil Co., 140 Ariz 1, 680 P2d 137 (among conflicting authorities on other grounds noted in United Bank of Arizona v Allyn (App) 167 Ariz 191, 805 P2d 1012, 58 Ariz Adv Rep 63).

Footnote 96. Southern R. Co. v Barden, 200 Va 98, 104 SE2d 13.

Footnote 97. Graham v Leek, 65 Idaho 279, 144 P2d 475; Enterprise Garnetting Co. v Forcier, 67 RI 336, 23 A2d 761; Southern R. Co. v Barden, 200 Va 98, 104 SE2d 13.

Testimony of a man's business associates in town that they had never seen him intoxicated has no weight to disprove the affirmative testimony of witnesses who had seen him intoxicated at other places. Aetna Life Ins. Co. v Ward, 140 US 76, 35 L Ed 371, 11 S Ct 720.

Footnote 98. Stephenson v Grand T. W. R. Co. (CA7 Ill) 110 F2d 401, 132 ALR 455, cert dismd 311 US 720, 85 L Ed 469, 60 S Ct 1107 and (criticized on other grounds by Trust Co. of Chicago v Pennsylvania R. Co. (CA7 Ill) 183 F2d 640, 21 ALR2d 238); Pollard v Todd, 62 Ga App 251, 8 SE2d 566.

Footnote 99. Hughes v Atchison, T. & S. F. R. Co., 121 Cal App 271, 8 P2d 853.

Footnote 1. Norfolk & W. R. Co. v Greenfield, 219 Va 122, 244 SE2d 781.

Footnote 2. Shell Oil Co. v Collar, 99 Ariz 154, 407 P2d 380; Thornburgh v Hunkler (Mo) 255 SW2d 975; Fish v Southern Pac. Co., 173 Or 294, 143 P2d 917, reh den 173 Or 325, 145 P2d 991; Davis v Sargent, 138 W Va 861, 78 SE2d 217.

Though negatively phrased, testimony of a witness who was so placed that if the event in question had occurred he would probably have noticed it that he "did not see" or "did not observe" the occurrence is sufficiently probative to controvert affirmatively phrased testimony by other witnesses that they did observe the event's occurrence and adequately supports a finding that the event did not occur. Lindhartsen v Myler, 91 Idaho 269, 420 P2d 259.

§ 1440 --Absence of records or documents as proof that event did not occur

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Proof of the absence of records that would ordinarily exist if a particular event had occurred gives rise to a legitimate negative inference that the event did not occur. 3 For example, where an alibi witness testified that he remembered being with the defendant on the date of the crime because the witness picked up an unemployment check that day, it was proper for the government to prove non-receipt of the check by proving that there was an absence of any record indicating receipt. 4 However, the

absence of records or documents is not conclusive evidence that they were never filed. Files in a county clerk's office, for example, particularly files a third or half century old, may be misplaced, lost, or destroyed. 5

Footnotes

Footnote 3. *United States v Robinson* (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901; *Berkeley v Berkeley Shore Water Co.*, 213 NJ Super 524, 517 A2d 1199.

As to weight and sufficiency of documentary evidence, in general, see §§ 1453 et seq.

Footnote 4. *United States v Robinson* (CA2 Conn) 544 F2d 110, 1 Fed Rules Evid Serv 399, cert den 434 US 1050, 54 L Ed 2d 803, 98 S Ct 901.

Footnote 5. *Barrett v Ninnescah Bow Hunters Assn.*, 15 Kan App 2d 241, 806 P2d 485.

As to degree of proof required to establish a lost instrument, see 52 Am Jur 2d, *Lost and Destroyed Instruments* § 60.

Forms: Instruction to jury—Sufficiency of evidence to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 53.

Instruction to jury—Presumption where evidence is sufficient to sustain finding of nonexistence of presumed fact. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 55.

§ 1441 Hearsay admitted without objection

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In general, hearsay evidence is incompetent and inadmissible to establish a fact. 6 However, incompetency and inadmissibility may be waived by failure to object to hearsay, so that it may be considered, if relevant, and may be given probative effect as if it were competent evidence. 7 Thus, the question presented becomes that of the weight, and not the admissibility, of the hearsay. 8 Courts differ, however, as to the amount of weight to accord hearsay admitted without objection. One view, which appears to be the majority, holds that it is as strong as any other legally competent evidence. 9 Under this view, hearsay admitted without objection—

—has the same weight to prove the fact to which it relates as properly admissible evidence. 10

—has the value of direct evidence. 11

—may be sufficient to establish a fact, 12 or support a finding. 13

—may serve as the basis for an instruction. 14

—may sustain a verdict or judgment. 15

—is in the case for what it is worth. 16

—may properly be considered even though it constitutes the sole evidence on a particular issue. 17

Another view holds that hearsay admitted without objection retains an inherent weakness requiring that it be weighed with caution. 18 Under this view, it has been said that a court may accord little or no weight to such evidence. 19 Another statement of this position is that hearsay evidence which could have been excluded if objected to, but was admitted without objection, is "consent evidence." In this regard, the trier of fact may properly consider hearsay evidence admitted by consent and give the evidence its natural and logical probative effect although the trier of fact must always weigh the evidence with caution, mindful of its inherent weakness, the same weakness which leads to its exclusion upon objection. 20 And finally, in at least one jurisdiction, the rule is that hearsay is without any probative value at all and may not be considered even where admitted without objection. 21

A variety of factors influence the weight to be given, or probative value of, hearsay admitted without objection. For example, the courts consider written hearsay, admitted in evidence with consent of the parties, to be more trustworthy than oral hearsay, since the writing itself eliminates the necessity for dependence upon the possibly faulty memory of the relating witness. 22 They may also regard hearsay admitted by stipulation as fully competent, although this may depend upon the wording and inclusiveness of the stipulation. 23 Another factor is whether the hearsay is uncontradicted. One view is that inadmissible hearsay evidence introduced without objection, if uncontradicted, may constitute substantial evidence of the fact asserted, but if contradicted by other legal evidence it will not support a finding. 24 The opposing view recognizes that the mere fact that the hearsay is subsequently disputed by the declarant, 25 or that the party against whom the hearsay is offered made no appearance or was not represented by counsel, 26 does not change the general rule that such evidence is entitled to probative effect.

◆ Comment: Under the hearsay provisions of the Federal Rules of Evidence, 27 the trier of fact, to the extent of their probative value, may consider statements which are inadmissible, but to which no objection has been made. 28

§ 1441 ----Hearsay admitted without objection [SUPPLEMENT]

Case authorities:

Bank fraud defendant's contemporaneous hearsay objection at trial was insufficient to constitute objection based on witness' personal knowledge of bank's insured status where personal knowledge ground was not stated at time and no comment was made after judge overruled objection. *United States v Nnanyererugo* (1994, App DC) 39 F3d 1205.

Footnotes

Footnote 6. § 659.

Footnote 7. 75 Am Jur 2d, Trial § 408.

Footnote 8. *Spiller v Atchison, T. & S. F. R. Co.*, 253 US 117, 64 L Ed 810, 40 S Ct 466; *Hayden v Chalfant Press, Inc.* (CA9 Cal) 281 F2d 543, 126 USPQ 483, 3 FR Serv 2d 498; *American Workmen v Ledden*, 196 Ark 902, 120 SW2d 346, 120 ALR 201; *Merchant Shippers Asso. v Kellogg Express & Draying Co.*, 28 Cal 2d 594, 170 P2d 923; *Cicero v Industrial Com.*, 404 Ill 487, 89 NE2d 354; *Sallee v Routson*, 247 Iowa 1220, 78 NW2d 516; *Townsend v Jones*, 183 Kan 543, 331 P2d 890; *Gray v Great American Indem. Co.* (La App 1st Cir) 121 So 2d 381; *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881; *Old v Cooney Detective Agency*, 215 Md 517, 138 A2d 889; *O'Kane v Travelers Ins. Co.*, 337 Mass 182, 148 NE2d 397; *Quick v Benedictine Sisters Hospital Asso.*, 257 Minn 470, 102 NW2d 36; *In re Estate of Petersen* (Mo) 295 SW2d 144; *State v Petro*, 148 Ohio St 473, 36 Ohio Ops 152, 76 NE2d 355, 5 ALR2d 425; *Gardner v Dollina*, 206 Or 1, 288 P2d 796; *Commonwealth v Boden*, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US 846, 5 L Ed 2d 70, 81 S Ct 89; *Yates v State*, 206 Tenn 118, 332 SW2d 186; *White v Newman*, 10 Utah 2d 62, 348 P2d 343; *Bethel Mills, Inc. v Whitcomb*, 116 Vt 357, 76 A2d 548; *Meredith GMC v Garner*, 78 Wyo 396, 328 P2d 371.

Footnote 9. *Yule v Miller*, 80 Cal App 609, 252 P 733; *Old v Cooney Detective Agency*, 215 Md 517, 138 A2d 889; *White v Newman*, 10 Utah 2d 62, 348 P2d 343.

In prosecution for second degree burglary, in which no objection was made to hearsay testimony of supermarket employee that customer told him "she had seen somebody trying to get in that store," evidence was admitted for all purposes and was properly given its natural and logical probative effect by trier of facts. *State v Anderson* (Mo App) 555 SW2d 362.

Hearsay evidence admitted without objection is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question. *Jones v Spidle*, 446 Pa 103, 286 A2d 366.

Under Texas rules of evidence, unobjected hearsay has probative value. *Martin v Martin* (Tex App Texarkana) 797 SW2d 347.

In an action for negligent bailment arising from the theft of plaintiff's car, unobjected-to hearsay that the assistant manager in defendant's shop had told plaintiff the keys had been left in the car was admissible and had some probative value on the issue of negligence, such that the trial court did not err in finding that defendant negligently left the keys in plaintiff's car. *Aatco Transmission Co. v Hollins* (Tex App Houston (1st Dist)) 682 SW2d 682.

Footnote 10. *Washington v United States* (CA8 Mo) 326 F2d 585; *Jefferson v Anchorage* (Alaska) 374 P2d 241; *Baley v J. F. Hink & Son* (1st Dist) 133 Cal App 2d 102, 283 P2d 349; *Alston v United States* (Dist Col App) 509 A2d 1129; *People v Williams*, 139 Ill 2d 1, 150 Ill Dec 544, 563 NE2d 431, cert den 499 US 979, 113 L Ed 2d 726, 111 S Ct

1630, habeas corpus den (ND Ill) 843 F Supp 427; *State v Liberty* (Me) 498 A2d 257.

Hearsay evidence admitted without objection may be considered for its probative value. In re Guardianship of Marshall, 46 Wash App 339, 731 P2d 5.

Footnote 11. *Commonwealth v Boden*, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US 846, 5 L Ed 2d 70, 81 S Ct 89.

Footnote 12. *Hayden v Chalfant Press, Inc.* (CA9 Cal) 281 F2d 543, 126 USPQ 483, 3 FR Serv 2d 498; *Jones v Jones* (1st Dist) 135 Cal App 2d 52, 286 P2d 908; *Mack v State*, 236 Ind 468, 139 NE2d 434; *Quick v Benedictine Sisters Hospital Asso.*, 257 Minn 470, 102 NW2d 36; *Meridian Hatcherries, Inc. v Troutman*, 230 Miss 493, 93 So 2d 472; *Schade v Milk Control Com.*, 196 Pa Super 14, 173 A2d 647; *Child v Child*, 8 Utah 2d 261, 332 P2d 981.

It is a general rule that a material fact in issue may be established by hearsay evidence where the same is admitted without objection. *Sallee v Routson*, 247 Iowa 1220, 78 NW2d 516.

Footnote 13. *Sizer v Lenney*, 146 Conn 457, 151 A2d 889; *Kern v State*, 237 Ind 144, 144 NE2d 705; *Old v Cooney Detective Agency*, 215 Md 517, 138 A2d 889; *Vielehr v Malone*, 158 Neb 436, 63 NW2d 497; *Kitts v Shop Rite Foods, Inc.*, 64 NM 24, 323 P2d 282.

Incompetent, irrelevant, and hearsay evidence was sufficient to support the findings of the court in an action by an executor to recover for an alleged breach of trust because the evidence was admitted without objection of the defendant. *Lail v Lail* (2nd Dist) 133 Cal App 2d 610, 284 P2d 907.

The milk control commission investigator's hearsay testimony, admitted without objection, as to the licensee's identity was sufficient to sustain a finding of a violation of the law for selling milk below the established price. *Schade v Milk Control Com.*, 196 Pa Super 14, 173 A2d 647.

Footnote 14. *Roberts v Schaper Stores Co.*, 318 Mo 1190, 3 SW2d 241.

Footnote 15. *People v Grayson* (3rd Dist) 172 Cal App 2d 372, 341 P2d 820; *Kitts v Shop Rite Foods, Inc.*, 64 NM 24, 323 P2d 282; *W. W. Conner Co. v McCollister & Campbell, Inc.*, 9 Wash 2d 407, 115 P2d 370.

But see, *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881, holding that hearsay evidence admitted by consent may properly be given weight as corroborative of other competent legal evidence, but will not alone support a verdict or finding.

Footnote 16. *Stroud v Masek* (Mo) 262 SW2d 47; *Barlow v Verrill*, 88 NH 25, 183 A 857, 104 ALR 1126; *Yates v State*, 206 Tenn 118, 332 SW2d 186.

Hearsay evidence, admitted without objection, is to be considered for what it is worth, however little. *Bates v Dennis*, 30 Tenn App 94, 203 SW2d 928.

Hearsay evidence received without objection may be used as proof to whatever extent it

may have rational persuasive power. *Schlichting v Schlichting*, 15 Wis 2d 147, 112 NW2d 149.

Footnote 17. *In re Holmes*, 379 Pa 599, 109 A2d 523, cert den 348 US 973, 99 L Ed 757, 75 S Ct 535, holding that hearsay evidence, if it is admitted without objection and is relevant and material to the issue, may be given its natural probative effect and may be received as direct evidence.

Footnote 18. *Consolidated Indem. & Ins. Co. v Dean*, 188 Ark 835, 68 SW2d 460; *Carpenter Steel Co. v Pellegrin* (2nd Dist) 237 Cal App 2d 35, 46 Cal Rptr 502; *In re Estate of Fagin*, 246 Iowa 496, 66 NW2d 920; *Dixon v Dixon*, 123 Md 44, 90 A 846; *In re Estate of Kasendorf*, 222 Or 463, 353 P2d 531; *Shepard v Purvine*, 196 Or 348, 248 P2d 352.

Footnote 19. *A. H. Angerstein, Inc. v Jankowski* (Super) 55 Del 304, 187 A2d 81; *Looby v Buck* (2d Dist) 20 Ill App 2d 156, 155 NE2d 641; *Shepard v Gerholdt*, 244 Iowa 1343, 60 NW2d 547.

Footnote 20. *Michaud v Vahlsing, Inc.* (Me) 264 A2d 539.

Footnote 21. *Martin v Alford*, 214 Ga 4, 102 SE2d 598; *Anton Int'l Corp. v Williams-Russell & Johnson, Inc.*, 190 Ga App 150, 377 SE2d 688 (stating that hearsay information has no probative value and cannot support a verdict).

Footnote 22. *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881.

Footnote 23. *People v Zavaleta* (2nd Dist) 182 Cal App 2d 422, 6 Cal Rptr 166 (stipulation that prior convictions could be determined from probation officer's report); *Goldthwaite v Sheraton Restaurant*, 154 Me 214, 145 A2d 362, 79 ALR2d 881 (whether such evidence still retains its hearsay characteristics as far as its weight is concerned depends upon the wording and effect of the stipulation).

The court was not required to give full weight to inadmissible entries in hospital records admitted in evidence as a whole by means of an agreement not to object to their authenticity, the court having had no opportunity to rule on the questioned evidence which pertained to circumstances surrounding the decedent's fall in the hospital unobserved by the makers of the particular entries. *Liberty Nat. Life Ins. Co. v Reid*, 276 Ala 25, 158 So 2d 667.

Footnote 24. *American Rubber Products Corp. v NLRB* (CA7) 214 F2d 47, 34 BNA LRRM 2368, 26 CCH LC ¶ 68497.

Hearsay evidence is incompetent and even if admitted without objection should not be permitted to outweigh positive and uncontradicted evidence to the contrary. *General Service Garage v Lexington Oil Co.*, 274 Ky 330, 118 SW2d 690.

As to uncontroverted testimony, in general, see § 1445.

Footnote 25. *Montpelier v Calais*, 114 Vt 5, 39 A2d 350.

Footnote 26. *Archawski v Hanioti* (CA2 NY) 239 F2d 806, cert den 353 US 984, 1 L Ed

2d 1142, 77 S Ct 1283; *Griswold v Department of Alcoholic Beverage Control* (1st Dist) 141 Cal App 2d 807, 297 P2d 762; *In re Holmes*, 379 Pa 599, 109 A2d 523, cert den 348 US 973, 99 L Ed 757, 75 S Ct 535.

Footnote 27. FRE Rule 802.

Footnote 28. FRE Rule 103(a)(1).

§ 1442 Uncertain testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

A witness is not required to speak with such confidence as to show that there are no doubts in the witness's mind. Any qualification of the testimony affects only its probative force, 29 especially where there is other testimony which tends to corroborate the fact. 30 Thus, the fact that a witness is uncertain as to the observation or the recollection of a fact and gives testimony qualified by phrases expressive of something less than a positive degree of assurance, such as "I think" or "I believe," does not affect the admissibility of the evidence, although the probative force of the evidence may be affected by the qualification expressed by the witness, and it is for the trier of fact to weigh the evidence as given. 31

Footnotes

Footnote 29. *Leathers v Sikeston Coca-Cola Bottling Co.* (Mo App) 286 SW2d 393.

Footnote 30. *Wood v St. Louis Public Service Co.* (Mo) 228 SW2d 665, 17 ALR2d 868.

Footnote 31. *Bragan v Birmingham R. L. & P. Co.*, 163 Ala 93, 51 So 30; *Leonard v Mixon*, 96 Ga 239, 23 SE 80; *State v Brinkley*, 354 Mo 337, 189 SW2d 314.

§ 1443 Inconsistent or conflicting testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

A party may prevail even though the evidence produced to establish its case or defense is not harmonious and consistent throughout. Indeed, if that were the rule, there could seldom be success in an attempt to prove an ultimate fact or establish a defense. 32 The fact that a witness makes inconsistent statements with regard to the subject matter under investigation does not render the testimony nugatory or unworthy of belief. It is the

province of the trier of fact to pass upon inconsistent statements and give or withhold assent to the truthfulness of the particular statement. 33 Although there is some authority to the contrary, 34 it has been said that inconsistencies in a witness's testimony go to credibility and do not affect the sufficiency of the evidence 35 or destroy the probative force of the testimony as a matter of law. 36

Similarly, the trier of fact is free to select from conflicting evidence and inferences which it considers most reasonable, 37 and to resolve conflicts in the testimony of different witnesses. 38 In other words, conflicting testimony goes to the weight of the evidence and not to its admissibility, 39 and, when faced with such evidence, the trier of fact is responsible for determining its weight and the credibility of the witnesses. 40 The fact that a party's testimony is contradicted by other witnesses does not render it vague, uncertain, and unconvincing so as to render a judgment for that party against the weight of the evidence. 41

The existence of a second plausible explanation for the defendants' actions, entirely consistent with innocence, does not necessarily diminish the sufficiency of the government's case. Presented with two narratives, one tending to establish the defendant's guilt and the other tending to establish innocence, the trier of fact is entitled to choose the account offered by the government. 42 A juridical basis for the determination of cause exists where there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, notwithstanding the existence of other plausible theories with or without support in the evidence. 43 Choosing which version to believe is not merely a question of witness credibility but also a question of what version logically makes better sense. 44 A trier of fact is therefore not required to reject a testimony of an eye witness and accept the exculpatory version offered by an accused at trial, nor does conflicting testimony and corroboration of the defendant's testimony themselves require reversal where the prosecution presents sufficient evidence to convict. 45

§ 1443 ----Inconsistent or conflicting testimony [SUPPLEMENT]

Case authorities:

A .44-caliber handgun, two boxes of .44-caliber ammunition, and three shells and a spent cartridge in the gun, which were found in a dumpster four days after a murder, were relevant because they tended to link defendant to the crime where two different shooters were involved in the killing; the evidence was contradictory as to who was carrying what kind of weapon the night of the shooting; defendant's fingerprints were found on one of the boxes of ammunition; the bullets found in the dumpster were consistent with the type of bullets recovered from the victim's body; and defendant admitted that he owned a .44-caliber handgun and that he had bought the ammunition for himself and another person. From the fact that a .44-caliber handgun was found in the dumpster with a box of .44-caliber bullets linked to defendant through his fingerprints and his own testimony, the jury could infer that it was defendant who fired the .44-caliber handgun the night of the murder. *State v Burke* (1995) 342 NC 113, 463 SE2d 212.

Footnotes

Footnote 32. *Primm v Market S. R. Co.*, 56 Cal App 2d 480, 132 P2d 842.

Footnote 33. *Sharpe v Brotzman* (1st Dist) 145 Cal App 2d 354, 302 P2d 668; *State v Little* (Mo App) 795 SW2d 95 (it is for the fact-finder to determine the weight to be given inconsistent testimony); *State v Rodney* (Mo App) 760 SW2d 500; *Flores v State* (Tex Crim) 372 SW2d 687; *Western Union Tel. Co. v Coker*, 146 Tex 190, 204 SW2d 977; *Swanson v Commonwealth*, 8 Va App 376, 382 SE2d 258.

The fact that there are minor discrepancies in the testimony of a party does not require that all the party's testimony be disregarded. *Patton v Minneapolis S. R. Co.*, 247 Minn 368, 77 NW2d 433, 58 ALR2d 921.

Footnote 34. *Swanson v Commonwealth*, 8 Va App 376, 382 SE2d 258, stating that contradictory statements by a witness go not to competency but to the weight and sufficiency of the testimony.

Footnote 35. *Commonwealth v Ruci*, 409 Mass 94, 564 NE2d 1000, further stating that once sufficient evidence is presented to warrant submission of the charges to the jury, it is for the jury alone to determine what weight will be accorded to the evidence.

While the witness's testimony was to some extent confused and self-contradicting, the credibility of the testimony, with all its contradictions and confusion, was properly a question for the jury. *Wilcox v Ford* (CA11 Ga) 813 F2d 1140, cert den 484 US 925, 98 L Ed 2d 247, 108 S Ct 287.

Footnote 36. *Hatley v Hatcher* (Tex Civ App Dallas) 376 SW2d 943.

Forms: Instructions to jury—Determination of credibility of witnesses—Witness impeached by inconsistent out-of-court statements or by contradictory statements. 25 Am Jur Pl & Pr Forms (Rev), Witnesses, Forms 184, 185.

Footnote 37. *Suniland Furniture Co. v Pruitt* (Tex Civ App Waco) 347 SW2d 835, writ ref n r e (Oct 3, 1961).

Footnote 38. *Peck v Century Concrete Products, Inc.* (Tex Civ App Fort Worth) 375 SW2d 459, writ ref n r e (May 6, 1964); *Maddox v State* (Tex Civ App Amarillo) 373 SW2d 322, writ ref n r e (Apr 8, 1964) and reh'g of writ of error overr (May 6, 1964).

When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, resolve inconsistencies in the testimony of any witness, and accept lay testimony or that of experts. *McGalliard v Kuhlmann* (Tex) 722 SW2d 694, reh'g of cause overr (Feb 11, 1987) and on remand (Tex App Beaumont) 735 SW2d 262.

Forms: Evaluation of conflicting testimony. 23A Am Jur Pl & Pr Forms (Rev), Trial § 198.

Footnote 39. *Loughan v Firestone Tire & Rubber Co.* (CA11 Fla) 749 F2d 1519, CCH Prod Liab Rep ¶ 10311, 17 Fed Rules Evid Serv 141, 40 FR Serv 2d 1243 (criticized on other grounds by *Cornwall v U.S. Constr. Mfg., Inc.* (CA FC) 800 F2d 250, 231 USPQ 64) and (disapproved on other grounds by *Crawford Fitting Co. v J. T. Gibbons, Inc.*, 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494, 43 BNA FEP Cas 1775, 43 CCH EPD ¶

37102, 1987-1 CCH Trade Cases ¶ 67596, 7 FR Serv 3d 1161); *State v Turner* (La App 1st Cir) 577 So 2d 200.

Footnote 40. *Whiting v State*, 248 Mont 207, 810 P2d 1177; *Grievance of Brileya*, 147 Vt 280, 515 A2d 129.

As to the effect of witnesses' credibility on weight and sufficiency of testimony, see § 1437.

Footnote 41. *Wilson v Haughton* (Ky) 266 SW2d 115, 41 ALR2d 950.

Footnote 42. *United States v Goggin* (CA11 Fla) 853 F2d 843 (the jury is free to disbelieve defendant and reject his explanation as complete fabrication); *State v Adams*, 225 Conn 270, 623 A2d 42 (also stating that in viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence); *Commonwealth v Long*, 425 Pa Super 170, 624 A2d 200, app den (Pa) 633 A2d 150 (the factfinder was free to believe all, part, or none of the evidence).

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v Bourg* (La App 1st Cir) 615 So 2d 957.

Footnote 43. *Sheptur v Procter & Gamble Distributing Co.* (CA6 Mich) 261 F2d 221, 79 ALR2d 476, cert den 359 US 1003, 3 L Ed 2d 1031, 79 S Ct 1136.

As to proximate cause and damages, see 22 Am Jur 2d, Damages §§ 451 et seq.

As to proximate cause for comparative negligence, see 57A Am Jur 2d, Negligence §§ 1191 et seq.

As to proximate cause for contributory negligence, see 57A Am Jur 2d, Negligence §§ 991 et seq.

As to proximate cause for loss in determining recovery under a policy of insurance, see 43 Am Jur 2d, Insurance §§ 463, 464.

As to proximate cause and premises liability, see 62 Am Jur 2d, Premises Liability §§ 31, 32.

As to proximate cause and products liability, see 63 Am Jur 2d, Products Liability §§ 260 et seq.

As to proximate cause for negligence, in general, see 57A Am Jur 2d, Negligence §§ 424 et seq.

As to proximate cause in tort actions, see 74 Am Jur 2d, Torts §§ 26-29.

Footnote 44. *Benton v Kroger Co.* (SD Tex) 640 F Supp 1317, 46 BNA FEP Cas 1356.

Footnote 45. *People v Reynolds* (1st Dist) 178 Ill App 3d 756, 127 Ill Dec 850, 533

§ 1444 --Previous testimony

<p style="text-align: center;">View Entire Section Go to Parallel Reference Table</p>

Generally, conflicts and discrepancies between earlier statements and in-court testimony go to a party's credibility 46 and to the weight, if any, the trier of fact should give the testimony. 47 However, where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, that evidence is discredited as a matter of law and should be disregarded. 48 It is a question of credibility for the trier of fact where a party's testimony was not changed to meet the exigencies of the case, the change is satisfactorily explained, and the changed version at trial is corroborated by other evidence in the record providing an adequate basis for the jury's findings. 49

Where a person, other than a party, 50 who was a witness at both trials testifies at the later trial to a state of facts in conflict with the former testimony, proof of the prior testimony does not constitute evidence of what the true facts are, but operates only by way of impeachment. 51

Footnotes

Footnote 46. As to the effect of the witness' credibility, generally, on the weight and sufficiency of the evidence, see § 1437.

Footnote 47. *State v Harrington*, 95 NC App 187, 381 SE2d 808.

As to prior testimony, in general, see §§ 890 et seq.

Law Reviews: Schlueter. Prior Inconsistent Statements: Were You Lying Then or are you Lying Now? 34 Texas BJ 26 (January 1991).

Footnote 48. *Insurance Co. of North America v Omaha Paper Stock, Inc.*, 189 Neb 232, 202 NW2d 188, 58 ALR3d 231.

Footnote 49. *Converse v Morse*, 232 Neb 925, 442 NW2d 872.

Footnote 50. *Kyne v Kyne*, 38 Cal App 2d 122, 100 P2d 806, in a minor's action by a guardian ad litem to obtain support where the court had under consideration the testimony that one of the witnesses had given at the two former trials, the court stated that by the settled law, such prior testimony was admissible only for impeachment purposes.

Footnote 51. *Brooks v United States* (CA10 Okla) 309 F2d 580; *Chesapeake & O. R. Co. v McCullough*, 236 Ky 647, 33 SW2d 655; *Foble v Knefely*, 176 Md 474, 6 A2d 48, 122

The issue is the truth of the testimony in the case being tried rather than the truth of any former testimony; where a witness is confronted by contradictory former testimony, it is nevertheless the final statement which constitutes the witness's testimony.

Commonwealth v Bartell, 184 Pa Super 528, 136 A2d 166.

The former testimony, where the witnesses giving it remain available, may be used only to discredit their inconsistent testimony at the later trial and the testimony of a witness which is contradicted by his own previous statements under oath is entitled to no weight. Washakie Livestock Loan Co. v Meigh, 50 Wyo 480, 62 P2d 523, 107 ALR 1063.

§ 1445 Uncontroverted testimony

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The trier of fact is not compelled to accept even uncontroverted testimony when it doubts the credibility of a witness, 52 and may consider reasonable inferences from circumstances tending to weaken the evidence. 53 Thus, the trier of fact will generally disregard as being without evidentiary value uncontroverted testimony of a witness that—

—is incredible. 54

—is inherently impossible and unbelievable. 55

—is so opposed to all reasonable probabilities as to be manifestly false. 56

—does not amount to substantial evidence of facts testified to or accepted as a basis of liability. 57

—runs counter to human experience. 58

The testimony of a witness, even though uncontradicted, is for the trier of fact so long as the matter testified to remains in dispute and does not relate to some fact of which the court will take judicial notice. 59 However, inherently probable, reasonable, credible and trustworthy testimony uncontradicted by the evidence must be accepted as true 60 in that it cannot be arbitrarily disregarded 61 or disregarded as against a mere suspicion of untruth or falsity, 62 and is to be regarded as conclusive. 63 Even so, it does not necessarily follow that a verdict or finding must be made in favor of the party introducing uncontradicted and unimpeached testimony, 64 especially if such testimony discloses a variety of circumstances from which different minds may reasonably disagree as to the ultimate facts, or if the uncontradicted evidence is that of interested witnesses. 65

There are many factors which the trier of fact may properly consider in determining the weight to give the direct testimony of a witness even though no adverse verbal testimony is adduced, 66 including whether the testimony is—

—evasive, equivocal, confused, or otherwise uncertain. 67

—incredible. 68

—contrary to physical facts and common knowledge. 69

—is inconsistent with other circumstances established in evidence, or contradictory within itself. 70

Footnotes

Footnote 52. *Smith v Commissioner* (CA9) 800 F2d 930, 86-2 USTC ¶ 9706, 58 AFTR 2d 86-5856; *Wilkins v State* (Mo) 802 SW2d 491, cert den (US) 116 L Ed 2d 98, 112 S Ct 131, later proceeding (Ky) 854 SW2d 742, cert den (US) 126 L Ed 2d 669, 114 S Ct 703; *Gray v Floyd* (Tex App Houston (1st Dist)) 783 SW2d 214.

Annotation: Comment Note: Credibility of witness giving uncontradicted testimony as matter for court or jury, 62 ALR2d 1191.

As to the effect of the witness' credibility on the weight given to and the sufficiency of the evidence, generally, see § 1437.

Forms: Right of jury to disregard inherently improbable testimony. 23A Am Jur Pl & Pr Forms (Rev) § 203.

Footnote 53. *Burns v Radoicich*, 77 Cal App 2d 697, 176 P2d 77; *Odenbaugh v County of Weld* (Colo App) 809 P2d 1059, cert den (Colo) 1991 Colo LEXIS 319; *Corsino v Grover*, 148 Conn 299, 170 A2d 267, 95 ALR2d 751.

The jury is not required to believe uncontroverted testimony where other circumstances in evidence discredit it. *Stuttgen v Gipe* (Minn App) 404 NW2d 10.

Footnote 54. *Mayer v Zim Israel Navigation Co.* (CA2 NY) 289 F2d 562, cert den 368 US 889, 7 L Ed 2d 88, 82 S Ct 140; *Hollis v Scott* (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386, later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813; *King v Brindley*, 255 Ala 425, 51 So 2d 870; *Chapman v Redwine*, 149 Colo 515, 370 P2d 147; *Kelly v Terminal R. Asso.* (Mo) 315 SW2d 699; *Blind v Saks Fifth Ave., Inc.* (Mo App) 349 SW2d 425.

As to incredible testimony, in general, see § 1447.

Footnote 55. *Hollis v Scott* (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386, later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813.

Footnote 56. *Hollis v Scott* (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386, later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813; *Ashraf v Ashraf* (App) 134 Wis 2d 336, 397 NW2d 128.

Footnote 57. *Hollis v Scott* (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386,

later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813.

Footnote 58. *United States v Batista-Polanco* (CA1 RI) 927 F2d 14, 32 Fed Rules Evid Serv 661 (criticized on other grounds by *United States v Dunnigan* (CA4 W Va) 944 F2d 178), stating that the factfinder may fairly infer that it runs counter to human experience to suppose that criminal conspirators would welcome innocent non-participants as witnesses to their crime.

Footnote 59. *Ligon v Redding*, 300 Ky 326, 188 SW2d 483; *Morris v E. I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Bender v Roundup Mining Co.*, 138 Mont 306, 356 P2d 469; *Ironside v Ironside*, 188 Okla 267, 108 P2d 157, 134 ALR 621.

Justice does not require a court or jury to accept as true any statement of a witness merely because it is not directly or specifically contradicted by other testimony. *Ackerman v Ackerman*, 35 Misc 2d 890, 231 NYS2d 493; *Sprague v Board of Review* (App, Montgomery Co) 70 Ohio L Abs 387, 128 NE2d 520.

The jurors may disbelieve a witness even though he is neither impeached nor contradicted. *Martin v Johnson* (Tex Civ App Eastland) 365 SW2d 429.

As to judicial notice, see §§ 24 et seq.

Footnote 60. *James v Mabus* (Miss) 574 So 2d 596.

Even though uncontradicted and unimpeached evidence generally must be taken as true *O'Sullivan v Simpson*, 123 Mont 314, 212 P2d 435.

The court must except as true the positive, uncontradicted testimony of the credible witness, unless his or her testimony is inherently improbable, or is rendered so by facts and circumstances disclosed at the trial. *Smith v Idaho State University Federal Credit Union*, 114 Idaho 680, 760 P2d 19.

The court cannot disregard uncontradicted testimony as to the existence that some fact or the happening of some event in the absence of something in the case which discredits the testimony or renders it against reasonable probabilities. *Ashraf v Ashraf* (App) 134 Wis 2d 336, 397 NW2d 128.

Footnote 61. *Chesapeake & O. R. Co. v Martin*, 283 US 209, 75 L Ed 983, 51 S Ct 453; *Spaulding v Jones*, 117 Cal App 2d 541, 256 P2d 637; *La Jolla Casa De Manana v Hopkins*, 98 Cal App 2d 339, 219 P2d 871; *Burns v Radoicich*, 77 Cal App 2d 697, 176 P2d 77; *Berry v Wondra*, 173 Kan 273, 246 P2d 282, 1 OGR 1099; *Commonwealth Life Ins. Co. v Pendleton*, 231 Ky 591, 21 SW2d 985, 66 ALR 1526; *Caballero v Litchfield Wood-Working Co.*, 246 Minn 124, 74 NW2d 404; *Bender v Roundup Mining Co.*, 138 Mont 306, 356 P2d 469; *Burns v Fisher*, 132 Mont 26, 313 P2d 1044, 67 ALR2d 1; *Jensen v Casale* (3d Dept) 22 App Div 2d 994, 254 NYS2d 880; *Lemons v Holland*, 205 Or 195, 286 P2d 656; *Gilliam v State*, 113 Tex Crim 108, 18 SW2d 637; *Fireman's Fund Ins. Co. v Honnoll* (Tex Civ App) 128 SW2d 96; *Esso Standard Oil Co. v Stewart*, 190 Va 949, 59 SE2d 67, 18 ALR2d 1319; *Beck v Givens*, 77 Wyo 176, 309 P2d 715, reh den 77 Wyo 191, 313 P2d 977.

When uncontradicted testimony consists of facts, as distinguished from opinions, and is

not illegal, improbable, unreasonable, or contradictory within itself, it should not be wholly disregarded, but should be accepted as proof of the issue. *Bergh v Bergh* (Fla App D1) 160 So 2d 145.

The jury cannot arbitrarily reject, but must accept as true, the uncontradicted testimony of disinterested witnesses. *Neill v Baltazar* (Tex Civ App Austin) 345 SW2d 454, writ ref n r e (Jun 21, 1961) and reh'g of writ of error overr (Oct 3, 1961).

Although it is the province of the jury to decide issues raised by conflicting evidence, where there is evidence on an issue and there is no evidence to the contrary, the jury may not disregard the undisputed evidence and decide the issue as it wishes. *Teal v Powell Lumber Co.* (Tex Civ App) 262 SW2d 223.

Forms: Jury may not arbitrarily disregard testimony. 23A Am Jur Pl & Pr Forms (Rev), Trial § 202.

Footnote 62. *Bullock v Gay*, 296 Ky 489, 177 SW2d 883; *O'Sullivan v Simpson*, 123 Mont 314, 212 P2d 435; *Bartsch v Ruby* (Tex Civ App) 229 SW2d 105, mand overr.

Footnote 63. *D.M. Ward Constr. Co. v Electric Corp. of Kansas City*, 15 Kan App 2d 114, 803 P2d 593.

Footnote 64. *Ligon v Redding*, 300 Ky 326, 188 SW2d 483; *O'Sullivan v Simpson*, 123 Mont 314, 212 P2d 435.

Footnote 65. *Ligon v Redding*, 300 Ky 326, 188 SW2d 483; *Morris v E. I. Du Pont de Nemours & Co.*, 346 Mo 126, 139 SW2d 984, 129 ALR 352; *Bender v Roundup Mining Co.*, 138 Mont 306, 356 P2d 469; *Teresi v Filley*, 146 Neb 797, 21 NW2d 699; *Burt v Lake Region Flying Service*, 78 ND 928, 54 NW2d 339; *Ironside v Ironside*, 188 Okla 267, 108 P2d 157, 134 ALR 621; *Riblet v Spokane-Portland Cement Co.*, 45 Wash 2d 346, 274 P2d 574.

Footnote 66. *Quock Ting v United States*, 140 US 417, 35 L Ed 501, 11 S Ct 733.

Footnote 67. *Commonwealth Life Ins. Co. v Pendleton*, 231 Ky 591, 21 SW2d 985, 66 ALR 1526; *In re Estate of Sandstrom*, 252 Minn 46, 89 NW2d 19; *Knuth v Murphy*, 237 Minn 225, 54 NW2d 771.

As to uncertain testimony, in general, see § 1442.

Footnote 68. § 1447.

Footnote 69. § 1448.

Footnote 70. *Quock Ting v United States*, 140 US 417, 35 L Ed 501, 11 S Ct 733; *Knuth v Murphy*, 237 Minn 225, 54 NW2d 771.

As to the uncontradicted testimony of a party, favorable to the adverse party, see § 1449.

Forms: Right of jury to disregard entire testimony of witness willfully false in part of testimony. 23A Am Jur Pl & Pr Forms (Rev), Trial § 204.

§ 1446 --Of party, victim, or interested witness

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The general rules regarding the weight and sufficiency of uncontroverted testimony ⁷¹ appear to apply to the uncontroverted testimony of a party, victim, or interested witness. The trier of fact, for example, need not accept the version of the facts advanced by the defendant, but may weigh the evidence and draw its own conclusions and inferences as to defendant's conduct and intent. ⁷² Similarly, where the only evidence presented is presented by plaintiffs themselves, this should go to the weight of the evidence. ⁷³

In evaluating evidence, the trier should accept as true the uncontradicted testimony of the witness even though the witness is a party, ⁷⁴ where the physical facts or facts of common knowledge are not unreasonable ⁷⁵ or where the record indicates no sound reason for rejection. ⁷⁶ However, the trier may ignore testimony of a party that is contradictory, impeached, inconsistent or improbable. ⁷⁷

The testimony of an interested witness can also have probative force when the testimony pertains to matters reasonably capable of exact statement, the testimony is clear, direct and positive, the testimony is internally devoid of inconsistencies and contradictions, and is uncontradicted either by testimony of other witnesses or by circumstances. ⁷⁸

Footnotes

Footnote 71. § 1445.

Footnote 72. State v Frame (Utah) 723 P2d 401, 39 Utah Adv Rep 12.

Forms: Instruction—Consideration of testimony of defendant. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 364.

Determination of weight to which testimony of party is entitled. 23A Am Jur Pl & Pr Forms (Rev), Trial § 194.

Footnote 73. Perry v Manocherian (SD NY) 675 F Supp 1417, 45 BNA FEP Cas 997, 45 CCH EPD ¶ 37569.

The testimony of an interested party is competent evidence; interest merely goes to its credibility. Imperial Litho/Graphics v M.J. Enterprises (App) 152 Ariz 68, 730 P2d 245.

Footnote 74. McCray v Abraham (La App 4th Cir) 550 So 2d 244.

Footnote 75. Evans v State (Miss) 562 So 2d 91.

In Missouri, the Weathersby Rule (Weathersby v State, 165 Miss 207, 147 So 481) states

that where the only eye witness to the slaying is the accused, if the defendant's version of the killing is reasonable, it must, as a matter of law, be accepted as true, unless substantially contradicted in material particulars by a credible witness, or by the physical facts or by facts of common knowledge; a defendant who met the Weathersby Rule would be entitled to a directed verdict of acquittal. *Fujita v Jeffries* (Mo App) 714 SW2d 202.

Footnote 76. *McCray v Abraham* (La App 4th Cir) 550 So 2d 244.

Footnote 77. *Cox v B.F. Goodrich Co.* (Okla App) 788 P2d 967, supp op, reh den (Okla App) 1989 Okla Civ App LEXIS 81.

But see, *Perry v Manocherian* (SD NY) 675 F Supp 1417, 45 BNA FEP Cas 997, 45 CCH EPD ¶ 37569, stating that in a case where, for the most part, the only evidence presented is presented by plaintiffs themselves, this should go to the weight of the evidence rather than to its ability to establish a prima facie case.

Footnote 78. *Estate of Meniffee v Barrett* (Tex App Texarkana) 795 SW2d 810.

Testimony by an interested witness may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and its clear, direct, and positive, and there are no circumstances tending to discredit or impeach it. *Lofton v Texas Brine Corp.* (Tex) 777 SW2d 384, reh'g of cause overr (Nov 1, 1989).

Forms: Instruction to jury—Interested witness. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 124.

Right of jury to consider interest of witness in assessing credibility. 23A Am Jur Pl & Pr Forms (Rev), Trial § 193.

§ 1447 Implausible, improbable, and incredible evidence, generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, incredible testimony and testimony that is so clearly and manifestly improbable should be disregarded. 79 To be incredible, evidence must be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ. 80 However, the testimony of witnesses is not incredible merely because the witnesses participated in the alleged crimes. 81 And, the mere fact that testimony given by a witness in support of an issue is not plausible does not destroy all probative value of the testimony. 82

Footnotes

Footnote 79. *Rucker v Hopkins* (Miss) 499 So 2d 766.

Footnote 80. *Burke v Scott*, 192 Va 16, 63 SE2d 740.

Petitioner's denial of knowledge of business partner's involvement in a continuing criminal enterprise was incredible where petitioner dealt with defendant exclusively in large amounts of cash delivered in brown paper bags, incurred expenses with business and tax consequences, and yet maintained no records of any kind. *United States v Rockwell* (WD Pa) 677 F Supp 836, *affd* without op (CA3 Pa) 856 F2d 185.

Footnote 81. *United States v Vaccaro* (CA9 Nev) 816 F2d 443, 22 Fed Rules Evid Serv 1570, *cert den* 484 US 914, 98 L Ed 2d 220, 108 S Ct 262, *disapproved* on other grounds by *Huddleston v United States*, 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, 25 Fed Rules Evid Serv 1 and *disapproved* on other grounds by *Powers v Ohio*, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364, 91 CDOS 2259, 91 Daily Journal DAR 3732 as stated in *Holland v McGinnis* (CA7 Ill) 963 F2d 1044, *cert den* (US) 122 L Ed 2d 360, 113 S Ct 1053.

The fact that a government witness admitted that during his involvement with selling cocaine he was seriously addicted to cocaine and quaaludes did not make his testimony as to one of the defendant's involvement with cocaine inherently incredible. *United States v Pritchett* (CA11 Ala) 908 F2d 816, 90-2 USTC ¶ 50444, 66 AFTR 2d 90-5609.

Footnote 82. *Hollis v Scott* (Ala) 516 So 2d 576, *later proceeding* (Ala) 516 So 2d 1386, *later proceeding* (Ala) 554 So 2d 387, *reh den* (Ala) 1989 Ala LEXIS 813; *Chapman v Redwine*, 149 Colo 515, 370 P2d 147; *Rayner v Lindsey*, 243 Miss 824, 138 So 2d 902; *Blind v Saks Fifth Ave., Inc.* (Mo App) 349 SW2d 425.

§ 1448 --Physical facts rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The "physical facts rule" allows a trier of fact to disregard all testimony which is inherently improbable in light of established facts and conditions, 83 opposed to the laws of nature, or clearly in conflict with principles established by the laws of science. 84 Physical facts cannot be overcome by oral testimony, 85 and when physical situations or matters of common knowledge point so certainly to the truth as to leave no room for a contrary determination, based on reason and common sense, those physical situations and reasonable probabilities are not affected by conflicting testimony. 86 The untruthfulness of testimony requiring a trial court to take a case from the jury under the physical facts rule must be (1) inherent in the rejected testimony, so that it contradicts itself, or (2) irreconcilable with facts which, under recognized rules, the court takes judicial notice, or (3) obviously inconsistent with or contradicted by undisputed physical facts. 87

Ordinarily, however, the probative value of the testimony of witnesses is not destroyed by physical facts unless the facts are such as to permit only one interpretation. 88 And, where a court cannot say as a matter of law that the testimony of a witness is contrary to scientific principles or the law of nature, the question whether the testimony does so

conflict should be regarded as one of fact for the trier of fact to determine. 89 So frequently do unlooked-for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law and fact except where they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other. 90 If the facts testified to reasonably conform to human knowledge, observation, and experience, testimony is not to be ignored merely because it portrays facts which are unusual, strange, or even startling. 91

Footnotes

Footnote 83. Trujillo ex rel. Osofsky v Galio (NM App) 745 P2d 711.

Footnote 84. Hollis v Scott (Ala) 516 So 2d 576, later proceeding (Ala) 516 So 2d 1386, later proceeding (Ala) 554 So 2d 387, reh den (Ala) 1989 Ala LEXIS 813; Peretore v Pennsylvania R. Co., 284 App Div 472, 131 NYS2d 696; McDonald v Ford Motor Co., 42 Ohio St 2d 8, 71 Ohio Ops 2d 4, 326 NE2d 252.

Footnote 85. Hart v Kline, 61 Nev 96, 116 P2d 672.

Footnote 86. Garcia v Jarvis Corp. (Fla App D3) 368 So 2d 945.

Where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff, the physical facts must control. Born v Osendorf (CA8 ND) 329 F2d 669.

Footnote 87. McDonald v Ford Motor Co., 42 Ohio St 2d 8, 71 Ohio Ops 2d 4, 326 NE2d 252.

Footnote 88. Hayward v Richardson Constr. Co., 136 Mont 241, 347 P2d 475, 77 ALR2d 1144.

Footnote 89. Connor v Jones, 115 Ind App 660, 59 NE2d 577, reh den 115 Ind App 682, 60 NE2d 534; Swift & Co. v Howard, 186 Tenn 584, 212 SW2d 388.

Footnote 90. Pepsi-Cola Distributors, Inc. v Barker (CA4 SC) 274 F2d 372; E. N. Bisso & Son v Miller (CA5 La) 233 F2d 855; Baltimore & O. R. Co. v Postom, 85 US App DC 207, 177 F2d 53; Alden v Watson, 106 Colo 103, 102 P2d 479; Denver Tramway Corp. v Perisho, 105 Colo 280, 97 P2d 422; Lowry v Mohn (Mo) 195 SW2d 652; Van Houten v Kansas City Public Service Co., 233 Mo App 423, 122 SW2d 868; Scurry v International Paper Co., 227 SC 392, 88 SE2d 256; Dixon Stave & Heading Co. v Archer, 40 Tenn App 327, 291 SW2d 603; Milwaukee Auto. Mut. Ins. Co. v Farmers Mut. Auto. Ins. Co., 2 Wis 2d 205, 85 NW2d 799.

Footnote 91. Peterson v Peterson, 74 Cal App 2d 312, 168 P2d 474.

§ 1449 Testimony of party favorable to adverse party

[View Entire Section](#)

In general, a party is bound by its own testimony which is favorable to the adverse party, 92 unless the testimony is later withdrawn, explained, or modified. 93 In particular, if a party makes a material statement of fact negating the party's right of action or defense, and no testimony more favorable appears to contradict or modify it, the party is bound by the statement, regardless of its credibility. 94

If a party testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, the opposing party is entitled to hold him to it as an informal judicial admission, 95 at least insofar as the fact is peculiarly within his own knowledge. 96 However, where the testimony of a party is in the nature of an estimate or opinion as to which he may honestly be mistaken, he does not unequivocally concede that the fact is in accord with the opinion expressed, and the court may consider the other evidence in the case and determine the facts from all the evidence. 97 Moreover, where a party, when testifying in his own behalf, makes an inadvertent and mistaken statement against his interest because of the questions asked, the trier of fact should disregard the statement. 98

Some courts have expressed a very liberal rule to the effect that the testimony of a party to a fact, unless it amounts to such a stipulation or waiver as to have the force of a judicial admission, is ordinarily no more conclusive than the evidence given by any other witness, and in some circumstances the party may claim the benefit of other competent testimony which overcomes the adverse effect. 99

The question has arisen in some cases as to the effect of a party's own conflicting testimony where it is, in part, favorable to his adversary. In other words, the question is whether a party's unfavorable testimony can be counteracted by his favorable testimony. In this respect, the rule followed by most courts is that a party may rely on more favorable evidence in his own testimony to overcome the effect of the injurious statement in his own testimony, no distinction being made in this respect from situations where such curative evidence is from other witnesses. According to this rule, it is for the trier of fact to decide the issue upon all the evidence. 1 But, where the inconsistency is drawn to the attention of the party, and he expressly adopts the self-injurious statement as the truth he is bound by the latter, in the absence of other evidence, as though it had been his only statement. 2 Conversely, if the party adopts the more favorable statement as the truth it becomes his testimony and he is then bound only by the statement adhered to. 3 However, the rule has sometimes been followed that where a party gives contradictory or inconsistent testimony, the case is to be disposed of according to the least favorable version, unless other evidence is introduced which supports the more favorable version. 4

In some cases, the courts have refused to follow the broad rule committing the entire issue of fact, on all the evidence, to the jury as one of the necessary incidents of a jury trial. They have, instead, followed the stricter rule that a party is bound by a definite statement of fact within his knowledge, whether objective or subjective, and as against not only his own conflicting testimony, but that of his own witnesses, that of the other party's witnesses, and that of the other party himself. 5 In other words, where a litigant testifies unequivocally to facts within his knowledge and upon which his case turns, he is bound by that testimony and cannot rely upon other evidence in conflict with his own testimony to strengthen his case. 6 But this stricter rule does not apply to statements of opinion or to mere estimates. 7 And even under this stricter rule, the party may give a

Footnotes

Footnote 92. *Gramar Invest. Co. v Cumberworth*, 120 Ind App 379, 92 NE2d 736; *Brooks v Stewart (Mo)* 335 SW2d 104, 81 ALR2d 508; *Standard Acci. Ins. Co. v Cloutier*, 92 NH 449, 32 A2d 684, 147 ALR 626.

Each party in the trial court is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. *Williams v Barnett (4th Dist)* 135 Cal App 2d 607, 287 P2d 789.

The plaintiff in an action for a skin infection allegedly caused by a hair dye, who admits that she read and understood the instructions and did not comply with them, is bound by that testimony. *Taylor v Jacobson*, 336 Mass 709, 147 NE2d 770, 76 ALR2d 1.

Footnote 93. *Gramar Invest. Co. v Cumberworth*, 120 Ind App 379, 92 NE2d 736.

A litigant who admits positive and definite facts which if true will defeat his right to recover, and who does not thereafter modify or explain the statements or admissions so as to show that he was mistaken, although testifying in good faith, is conclusively bound thereby and is in no position to complain of directed verdict. *Bell v Kuykendall Invest. Co. (Tex Civ App Waco)* 379 SW2d 381.

Footnote 94. *Tedder v Home Ins. Co.*, 212 Ala 624, 103 So 674; *Pepple v Headrick*, 64 Idaho 132, 128 P2d 757; *Bell v Johnson*, 142 Kan 360, 46 P2d 886; *Perry v Hanover*, 314 Mass 167, 50 NE2d 41; *Noble v Greenbaum*, 311 Mass 722, 42 NE2d 823; *Skirvin v McKamey (Mo App)* 237 SW 858; *Roddy Mfg. Co. v Dixon*, 21 Tenn App 81, 105 SW2d 513; *Westbrook v Landa (Tex Civ App)* 160 SW2d 232.

Footnote 95. *Huber v Black & White Cab Co. (4th Dist)* 18 Ill App 2d 186, 151 NE2d 641; *Bell v Harmon (Ky)* 284 SW2d 812; *Southwestern Truck Sales & Rental Co. v Johnson*, 165 Neb 407, 85 NW2d 705; *Harlow v Leclair*, 82 NH 506, 136 A 128, 50 ALR 973; *Security Nat. Bank v Johnson*, 195 Okla 107, 155 P2d 249, 169 ALR 790; *United States Fidelity & Guaranty Co. v Carr (Tex Civ App)* 242 SW2d 224, writ ref, error ref; *Kimmell v Tipton (Tex Civ App)* 142 SW2d 421; *Hargrow v Watson*, 200 Va 30, 104 SE2d 37.

Footnote 96. *Huber v Black & White Cab Co. (4th Dist)* 18 Ill App 2d 186, 151 NE2d 641; *People ex rel. Mullin v Williams (1st Dist)* 13 Ill App 2d 164, 141 NE2d 645; *Southwestern Truck Sales & Rental Co. v Johnson*, 165 Neb 407, 85 NW2d 705; *Garza v Garza (Tex Civ App)* 191 SW2d 767.

Footnote 97. *Anderson-Prichard Oil Corp. v Parker (CA10 NM)* 245 F2d 831, 7 OGR 1419; *Bell v Harmon (Ky)* 284 SW2d 812; *Reynolds v Sullivan*, 330 Mass 549, 116 NE2d 128; *Harlow v Leclair*, 82 NH 506, 136 A 128, 50 ALR 973; *Jerominski v Fowler, Dick & Walker*, 372 Pa 291, 93 A2d 433; *Western Union Tel. Co. v Coker*, 146 Tex 190, 204 SW2d 977; *McMath Co. v Staten (Tex Civ App)* 42 SW2d 649, writ dism w o j, appeal after remand (Tex Civ App) 60 SW2d 290.

Footnote 98. *Angelina Casualty Co. v Bluit* (CA5 Tex) 235 F2d 764; *Bowlin v Black & White Cab Co. (Lucas Co)* 7 Ohio App 2d 133, 36 Ohio Ops 2d 288, 219 NE2d 221; *Security Nat. Bank v Johnson*, 195 Okla 107, 155 P2d 249, 169 ALR 790; *Williams v Williams (Tex Civ App Eastland)* 336 SW2d 757, writ dismissed (Oct 5, 1960) and reh'g of writ of error overruled (Nov 23, 1960), error dismissed.

Footnote 99. *Kanopka v Kanopka*, 113 Conn 30, 154 A 144, 80 ALR 619; *Southwestern Truck Sales & Rental Co. v Johnson*, 165 Neb 407, 85 NW2d 705; *Bowlin v Black & White Cab Co. (Lucas Co)* 7 Ohio App 2d 133, 36 Ohio Ops 2d 288, 219 NE2d 221.

Mere testimony of a party on cross-examination, unfavorable to his own cause and in contradiction of other evidence in his favor, is not ordinarily conclusive, and, unless it be of such a nature or under such circumstances as to permit the court to classify it as a judicial admission, it merely creates a conflict in the evidence to be resolved as a question of fact. *Snittjer Grain Co. v Koch*, 246 Iowa 1118, 71 NW2d 29.

Footnote 1. *Mathis v Tutweiler (CA6 Tenn)* 295 F 661; *Connelly v Connecticut Co.*, 107 Conn 236, 140 A 121; *Larson v Boston E. R. Co.*, 212 Mass 262, 98 NE 1048.

Conclusive effect cannot be given to a testimonial statement of a party which merely contradicts some other portion of his testimony; rather, a fact issue is presented to be determined by the jury as with an ordinary witness. *Le Compte v Sanders (Tex Civ App Houston (1st Dist))* 378 SW2d 861, writ refused (Dec 2, 1964) and reh'g of writ of error overruled (Jan 6, 1965).

For a testimonial declaration to be binding on a party it must be deliberate, clear, and unequivocal, and where it merely contradicts some other portion of the party's testimony, conclusive and binding effect cannot be given thereto, and an issue of fact is presented for the trier of facts. *Rosales v Rosales (Tex Civ App Corpus Christi)* 377 SW2d 661.

As to conflicting testimony, in general, see § 1443.

Footnote 2. *Martin v Boston E. R. Co.*, 262 Mass 542, 160 NE 300.

Footnote 3. *Osborne v Boston Consol. Gas Co.*, 296 Mass 441, 6 NE2d 347.

Footnote 4. *Liberty Nat. Life Ins. Co. v Mitchell*, 73 Ga App 673, 37 SE2d 723.

Footnote 5. *Jacobs v Cedar Rapids*, 181 Iowa 407, 164 NW 891; *Mollman v St. Louis Public Service Co. (Mo App)* 192 SW2d 618; *Miller v Stevens*, 63 SD 10, 256 NW 152; *Crew v Nelson*, 188 Va 108, 49 SE2d 326.

The rule applies to cases where a plaintiff testifies to facts within his knowledge and on which his case turns, and does not apply to written statements made out of court. *Worrell v Worrell*, 174 Va 11, 4 SE2d 343.

Footnote 6. *Crew v Nelson*, 188 Va 108, 49 SE2d 326; *South Hill Motor Co. v Gordon*, 172 Va 193, 200 SE 637.

Footnote 7. *Mollman v St. Louis Public Service Co. (Mo App)* 192 SW2d 618; *Rowe v United R. Co.*, 211 Mo App 526, 247 SW 443; *Stephenson v Barrow (Tex Com App)* 15 SW2d 575.

Footnote 8. State ex rel. Weddle v Trimble, 331 Mo 1, 52 SW2d 864; Mollman v St. Louis Public Service Co. (Mo App) 192 SW2d 618.

3. Real or Demonstrative Evidence [1450-1452]

§ 1450 Experiments and tests

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is the responsibility of the trier of fact to determine the weight to be attached to experiments. That weight varies according to the circumstances of similarity or dissimilarity that exist between the experiments made and the occurrence under investigation. 9 The similarities between experimental and actual conditions affect the weight of the evidence, not its admissibility. 10 For example, in a prosecution for criminally negligent homicide and driving while intoxicated, any improper assumptions used by an accident reconstruction expert in establishing an impact point for the accident and the rate of speed of the motorcycle the accused was driving affected the weight of the expert's testimony and not its admissibility. 11 It has likewise been held that proof of the alcoholic content of a sample of blood taken from one whose intoxication at the time of taking the sample is in question, 12 and medical testimony that a person whose blood has such an alcoholic content is intoxicated, 13 are not entitled to the controlling effect given to undisputed physical facts. The efficacy and probative value of a blood test of one charged with intoxication depends on its being made as soon as possible after the time of the offense. 14

Footnotes

Footnote 9. People v Pfanschmidt, 262 Ill 411, 104 NE 804.

Practice Refereces 3 Am Jur Trials 427, Preparing and Using Experimental Evidence.

Footnote 10. Szeliga v General Motors Corp. (CA1 Mass) 728 F2d 566, CCH Prod Liab Rep ¶ 9975, 15 Fed Rules Evid Serv 541.

Footnote 11. People v Boice (3d Dept) 89 App Div 2d 33, 455 NYS2d 859.

Footnote 12. § 1021.

Footnote 13. 31A Am Jur 2d, Expert and Opinion Evidence § 272.

Footnote 14. In re Newbern (2nd Dist) 175 Cal App 2d 862, 1 Cal Rptr 80, 78 ALR2d 901.

§ 1451 Photographs

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Photographs, when introduced in evidence, 15 do not conclusively establish the existence of the objects which they represent or the condition or location of the objects. 16 With regard to their credibility as evidence, their probative value depends upon the accuracy with which they portray the persons and objects represented, 17 which in turn is largely dependent upon the skill of the person taking the pictures, and the manner in which, and the circumstances under which, they are taken. 18 Changes in conditions between the time of the event in questions and the photograph may effect the weight given to the photograph. The fact that a photograph was taken several months after a fire, for example, should not detract from its weight, providing that the premises were in the same condition as they were at the time of the fire, or if not in the same condition, that the changes were duly explained. 19 But, where the conditions of light were not the same when photographs of the scene of an accident were taken as when the accident occurred, the photographs are not conclusive as to the extent of the view of the person injured. 20 The weight of photographs as truthful and accurate representations is ultimately a question for the trier of fact, to be determined by the same tests as those by which all other evidence is weighed. 21

§ 1451 ----Photographs [SUPPLEMENT]

Case authorities:

In personal injury action resulting from plaintiff motorcyclist's having apparently hit earth mound just beyond end of private road, trial court should not have admitted photographs showing reflectors and warning signs at dead end, where neither defendant landowner's control of road nor feasibility of precautionary measures was at issue. However, error was harmless since defendant had also testified about his having posted reflectors and signs along road since the accident. *Wilson v Kaufmann* (1992, Mo App) 847 SW2d 840.

Footnotes

Footnote 15. § 1070.

Footnote 16. *Gulf, M. & O. R. Co. v Williamson* (CA8 Mo) 191 F2d 887.

Photographs taken after the occurrence of an event which show an object to be in a particular position do not establish, as a matter of law, that the object was in that position at the time of the occurrence. *Andersen v Bee Line, Inc.*, 1 NY2d 169, 151 NYS2d 633, 134 NE2d 457.

Footnote 17. *Colonial Refining Co. v Lathrop*, 64 Okla 47, 166 P 747.

Footnote 18. *Louisville & N. R. Co. v Hall*, 91 Ala 112, 8 So 371; *Baustian v Young*, 152 Mo 317, 53 SW 921.

As to expert testimony to interpret, explain or draw conclusions from photographs, see 31A Am Jur 2d, Expert and Opinion Evidence § 357.

Footnote 19. *Higgs v Minneapolis, S. P. & S. S. M. R. Co.*, 16 ND 446, 114 NW 722.

Footnote 20. *Baxter v Philadelphia & R. R. Co.*, 264 Pa 467, 107 A 881, 9 ALR 504.

Practice References 3 Am Jur Trials 1, Preparing and Using Photographs in Civil Cases §§ 1 et seq.

Footnote 21. *Higgs v Minneapolis, S. P. & S. S. M. R. Co.*, 16 ND 446, 114 NW 722; *Baxter v Philadelphia & R. R. Co.*, 264 Pa 467, 107 A 881, 9 ALR 504; *Hughes v State*, 126 Tenn 40, 148 SW 543; *Venable v Stockner*, 200 Va 900, 108 SE2d 380.

Forms: Instruction to jury—Weight and consideration to be given to exhibits. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 109.

§ 1452 Motion pictures

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The weight and credibility to be given motion pictures, insofar as they are admissible, 22 is within the province of the trier of fact. 23 Motion pictures are ordinarily not deemed to be conclusive on a given point portrayed. 24 Films, for example, that depict an experiment illustrating the expert's theory of the cause of the action, are an aid to the jury's understanding of the expert's testimony. 25

Footnotes

Footnote 22. As to the admissibility of motion pictures, generally, see § 1071.

Footnote 23. *Harmon v San Joaquin Light & Power Corp.*, 37 Cal App 2d 169, 98 P2d 1064.

Footnote 24. *De Battiste v Anthony Laudadio & Son*, 167 Pa Super 38, 74 A2d 784.

Motion pictures showing a workmen's compensation claimant digging a trench for the foundation of a residence, spreading gravel, rolling a wheelbarrow, and performing other types of ordinary manual labor, were not in themselves conclusive of the claimant's ability to work free of pain. *Jones v Employers Mut. Liability Ins. Co.* (La App 1st Cir) 114 So 2d 602.

Law Reviews: Bailey, Videotape Evidence: Show Me Don't Tell Me. 27 Trial 52 (March 1991).

Note, Beyond Words: The Evidentiary Status of "Day in the Life" Films. 66 Bos U LR 133 (January 1986).

Footnote 25. Szeliga v General Motors Corp. (CA1 Mass) 728 F2d 566, CCH Prod Liab Rep ¶ 9975, 15 Fed Rules Evid Serv 541.

4. Documentary Evidence [1453-1459]

§ 1453 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Documentary proof is usually regarded as prima facie, and not conclusive, evidence of the facts stated therein, 26 especially where the instrument is wholly collateral to the subject of the action. 27 For example, the weight properly accorded entries in a family Bible depends upon the character of the entries, the circumstances surrounding their making, the persons making them, the time of their making, and their purpose. 28 However, formal writings, which are solemn and deliberate in their preparation and execution, are standing evidence against the parties entering into them. 29

The general rule is that where secondary evidence is admitted, it must be clear and satisfactory as to the contents of the documents involved. 30 Ordinarily however, and except where specific performance is sought, 31 it is not necessary that witnesses should be able to tell the contents of the instrument with absolute verbal accuracy, it being sufficient if they are able to state it in substance. 32

Footnotes

Footnote 26. Finegan v Prudential Ins. Co., 300 Mass 147, 14 NE2d 172, 116 ALR 535; Swanson v Gnose, 106 Mont 262, 76 P2d 643, 115 ALR 244; Hood v Webster, 271 NY 57, 2 NE2d 43, 107 ALR 497.

Although entries in a notary's book were admissible to establish the presentment of a promissory note and demand for its payment, any weight they might have had was destroyed by the testimony of the notary on cross-examination that he had no personal knowledge of the actual presentment. Littmann v Goldstein, 255 App Div 540, 8 NYS2d 490.

As to documentary evidence, in general, see §§ 1023 et seq.

Footnote 27. Bank of America v Banks, 101 US 240, 11 Otto 240, 25 L Ed 850.

Footnote 28. *People v Mayne*, 118 Cal 516, 50 P 654; *Campbell v State*, 21 Okla Crim 242, 206 P 622, 29 ALR 369.

Footnote 29. *Pierce v Cobb*, 161 NC 300, 77 SE 350.

Footnote 30. *Walker v Drogmund*, 101 Colo 521, 74 P2d 1235.

As to circumstances when secondary evidence is admissible, generally, see §§ 1053 et seq.

Footnote 31. *Walker v Drogmund*, 101 Colo 521, 74 P2d 1235, stating that where specific performance is sought, proof of the precise terms of the agreement is indispensable.

Footnote 32. *Walker v Drogmund*, 101 Colo 521, 74 P2d 1235.

§ 1454 Books of account

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The trier of fact determines the weight and credibility of books of account 33 admitted in evidence by the trial court. 34 Books of account are prima facie evidence of the pertinent entries which they contain, including the delivery and value of the articles specified. 35 The fact that books of account have been admitted in evidence is, however, not conclusive as to their contents or as to the truth of their contents. The determination of what credit they are entitled to depends upon their appearance, the manner in which they have been kept, and the character of the party or person who offers them in evidence. 36 The courts have expressed the opinion that evidence of this character is quite unsatisfactory and that it should be subjected to close scrutiny. 37 The admission of books of account is a violation of one of the first principles of the law of evidence, which is that a party shall not himself make evidence in his own favor, and books of account should be received and used as evidence with caution. 38

Footnotes

Footnote 33. *Berg v Kucharo Const. Co.*, 237 Iowa 478, 21 NW2d 561; *Pratt v White*, 132 Mass 477.

The possibility of forgery goes to the weight, but not to the competency, of an account book. *Crawford v United States*, 212 US 183, 53 L Ed 465, 29 S Ct 260.

Footnote 34. As to admissibility into evidence of books of account, see § 1290.

Footnote 35. *General Tire & Rubber Co. v Hamm*, 69 SD 72, 6 NW2d 442.

In an action by a wholesale mercantile business company against a retailer to recover the

balance due on an open account for merchandise allegedly sold and delivered to the defendant, the plaintiff's records of account introduced in evidence were sufficient evidence to sustain a jury finding as to the sale and delivery of the merchandise for the price listed, and as to payments made and balance due on the account. *John Scowcroft & Sons Co. v Roselle*, 77 Idaho 142, 289 P2d 621, 55 ALR2d 1.

Footnote 36. *Smith v Smith*, 163 NY 168, 57 NE 300.

Footnote 37. *In re Fulton's Estate*, 178 Pa 78, 35 A 880; *Weamer v Juart*, 29 Pa 257.

Footnote 38. *Smith v Smith*, 163 NY 168, 57 NE 300.

§ 1455 Public and official books, records, and documents

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Books, records, and reports of administrative officers and other public documents, when admissible in evidence, 39 are not, as a general rule, conclusive as to the facts which they are offered to prove, but constitute prima facie evidence, except where a statute specifically makes provision as to the weight and conclusiveness of such evidence. 40 Similarly, a certificate of an officer, when admissible, affords merely prima facie evidence of the facts recited. 41 The rule that public records are not conclusive of the facts they are offered to prove is particularly applicable when the records are shown to be incorrect in some respects, 42 and the facts recited in such records may be rebutted by competent proof. 43 In the absence of countervailing proof, however, public records and certificates of officers are sufficient proof of the facts recited. 44

§ 1455 ----Public and official books, records, and documents [SUPPLEMENT]

Case authorities:

Incident reports from sister state were not admissible under official records exception to hearsay rule in proceedings to suspend driver's licenses for use of altered license, where reports bore no seal, certification, or other indicia of reliability as official records. *Peterson v North Dakota Dep't of Transp.* (1994, ND) 518 NW2d 690.

Footnotes

Footnote 39. As to the admissibility of public and official records, generally, see §§ 1321 et seq.

Footnote 40. *Chesapeake & Delaware Canal Co. v United States*, 250 US 123, 63 L Ed 889, 39 S Ct 407; *United States v Hunt*, 105 US 183, 15 Otto 183, 26 L Ed 1037; *Bruce v United States*, 58 US 437, 17 How 437, 15 L Ed 129; *Marriott v Brune*, 50 US 619, 9

How 619, 13 L Ed 282; State v Pearson, 223 SC 377, 76 SE2d 151; In re Maher's Estate, 195 Wash 126, 79 P2d 984, 117 ALR 91.

The prima facie evidence made by a copy from the records required by state law, in which a seal in due form appears, is not overcome by another copy from the records of the General Land Office in Washington which does not show any seal; it would naturally be supposed that all that is found in either copy was in the original. Campbell v Laclede Gas Co., 119 US 445, 30 L Ed 459, 7 S Ct 278.

Practice References 2 Am Jur Trials 409, Locating Public Records §§ 1 et seq.

Footnote 41. Swift & Co. v Morgan & Sturdivant (CA5 Ga) 214 F2d 115, 49 ALR2d 924.

Footnote 42. In re Maher's Estate, 195 Wash 126, 79 P2d 984, 117 ALR 91 (date of birth as shown by the public records).

Footnote 43. State ex rel. Childs v Board of Comrs., 66 Minn 519, 68 NW 767, later proceeding 66 Minn 526, 69 NW 925, later proceeding 66 Minn 532, 73 NW 631; State v Pearson, 223 SC 377, 76 SE2d 151.

Footnote 44. Bowden v Johnson, 107 US 251, 17 Otto 251, 27 L Ed 386, 2 S Ct 246; Stockton v Powell, 29 Fla 1, 10 So 688.

§ 1456 --Death certificate

[View Entire Section](#)
[Go to Parallel Reference Table](#)

There is a difference of opinion among the courts as to the evidentiary value of death certificates. One view maintains that an official death certificate constitutes competent evidence of the facts and matters contained in it. 45 Another is that a physician's statement in a death certificate is an expression of opinion and not competent to show cause of death. 46 And, in some jurisdictions, a death certificate filed as a public record by a physician is prima facie, but not conclusive, evidence of the cause of death. 47 The death certificate is often used in conjunction with other evidence to establish a cause of death. For example, in a homicide proceeding, the death certificate was admissible but could not be used as sole evidence to prove the cause of death where witnesses were available. 48 If the party against whom it is offered is not satisfied with the statement contained in the certificate of death, that party may contradict the record by any proper evidence, 49 such as testimony by the attending physician 50 or other witnesses. 51

Footnotes

Footnote 45. Hobbs v Provident Life & Acci. Ins. Co. (Tenn App) 535 SW2d 864.

Footnote 46. Ward v Commonwealth, 216 Va 177, 217 SE2d 810 (physician's statement

that gunshot wound was probable cause of death was opinion).

Footnote 47. *Krug v Mutual Ben. Health & Acci. Asso.* (CA8 Mo) 120 F2d 296 (superseded by statute on other grounds as stated in *United States v Iron Shell* (CA8 SD) 633 F2d 77, 7 Fed Rules Evid Serv 269, 55 ALR Fed 664); *Sorrow v Industrial Life & Health Ins. Co.*, 259 Ala 544, 68 So 2d 43 (a statement in death certificate by the attending physician showing suicide was evidence of the cause of death); *Allstate Ins. Co. v Holcombe*, 132 Ga App 111, 207 SE2d 537 (in suit seeking recovery from insurance company for accidental death, death certificate stating cause of death was rebuttable prima facie evidence); *Swigerd v Ortonville*, 246 Minn 339, 75 NW2d 217, 72 ALR2d 398; *Griffin v Prudential Ins. Co.*, 102 Utah 563, 133 P2d 333, 144 ALR 1402.

As to admissibility of statement in death certificate as to cause of death, see §§ 1373, 1374.

Annotation: Official death certificate as evidence of cause of death in civil or criminal action, 21 ALR3d 418.

Practice References Death Records. 2 Am Jur Trials 409, Locating Public Records § 9.

Footnote 48. *Lowery v State*, 55 Ala App 514, 317 So 2d 365, cert den 294 Ala 763, 317 So 2d 372.

Footnote 49. *Estate of Scott*, 55 Cal App 2d 780, 131 P2d 613; *Bozicevich v Kenilworth Mercantile Co.*, 58 Utah 458, 199 P 406, 17 ALR 346.

The death certificate alone did not establish by a preponderance of the evidence that decedent did not have pneumoconiosis, where the only evidence that the cause of deceased former coal miner's death was not pneumoconiosis was a death certificate completed by a physician who had never seen decedent alive and who did not have the benefit of any autopsy; the death certificate reported that the cause of death was acute indigestion which was contradicted by all of the other responsible evidence in the case about the deceased's habits, his physical condition, and his condition immediately prior to death. *Cosand v Secretary of Health, Education & Welfare* (ED Mich) 408 F Supp 263.

Footnote 50. *Estate of Scott*, 55 Cal App 2d 780, 131 P2d 613.

As to expert or opinion evidence regarding the cause of death, see 31A Am Jur 2d, Expert and Opinion Evidence §§ 245-277.

Footnote 51. *Vulcan Life Ins. Co. v McDuffie*, 57 Ala App 634, 331 So 2d 280, cert den (Ala) 331 So 2d 284, holding that coroner's certificate attributing death of insured to homicide was presumptive evidence of accidental death, where word "homicide" appearing on certificate did not equate with intentional infliction of fatal injury on which insurance policy exclusions were based, notwithstanding that insurance company rebutted presumptive evidence with testimony of eyewitness of homicide.

§ 1457 Coroner's verdict

In jurisdictions in which a coroner's verdict is admissible in evidence, 52 some courts agree that the verdict is not conclusive evidence of the facts found. 53

In several jurisdictions where the coroner's verdict or finding is deemed admissible on the issue of suicide, it is regarded as prima facie evidence of the facts found, 54 subject to rebuttal by a showing that the verdict or finding of the coroner was mistaken or erroneous. 55 Other courts have specifically rejected the proposition that the verdict or finding of a coroner should be considered prima facie evidence bearing upon the issue of suicide. 56

Footnotes

Footnote 52. § 1327.

Footnote 53. *Fleetwood v Pacific Mut. Life Ins. Co.*, 246 Ala 571, 21 So 2d 696, 159 ALR 171; *Walther v Mutual Life Ins. Co.*, 65 Cal 417, 4 P 413; *Mittelstadt v Modern Woodmen of America*, 143 Iowa 186, 121 NW 803.

The evidence was insufficient to show accidental death even though the coroner's certificate stated that death was due to carbon monoxide poisoning and was an accident, where the doctor who performed the autopsy for the coroner testified that the body was so decomposed that he could give no medical opinion as to the cause of death. *Lynde v Western & Southern Life Ins. Co.* (Mo App) 293 SW2d 147.

Practice References Autopsy Reports. 2 Am Jur Trials 409, Locating Public Records § 10.

Footnote 54. *Insurance Co. v Newton*, 89 US 32, 22 Wall 32, 22 L Ed 793; *Jensen v Continental Life Ins. Co.* (CA3 Pa) 28 F2d 545, app dismd 279 US 818, 73 L Ed 974, 49 S Ct 342 and cert den 279 US 842, 73 L Ed 988, 49 S Ct 263; *Fleetwood v Pacific Mut. Life Ins. Co.*, 246 Ala 571, 21 So 2d 696, 159 ALR 171; *Tomlinson v Sovereign Camp of Woodmen of World*, 160 Iowa 472, 141 NW 950; *Bromberg v North American Life Ins. Co.*, 192 Mich 143, 158 NW 141; *Krogh v Modern Brotherhood of America*, 153 Wis 397, 141 NW 276.

The verdict of the coroner's jury to the effect that the deceased committed suicide, having been introduced in evidence by the beneficiary, constituted prima facie proof that the deceased committed suicide, and, standing alone, would defeat any recovery on the beneficiary's part. *Supreme Lodge, K. P. v Beck* (CA9 Mont) 94 F 751, affd 181 US 49, 45 L Ed 741, 21 S Ct 532.

Footnote 55. *Hassencamp v Mutual Ben. L. Ins. Co.* (CA4 Md) 120 F 475.

A certified copy of the coroner's certificate of death, reciting that the cause of death was a gunshot wound in the head, self-inflicted while temporarily insane, was in compliance with the statutes of the state requiring the coroner to insert the cause of death, and

providing that the certificate, when made out and filed, should be prima facie evidence in all courts for all purposes of the facts recorded in it, and held that as the certificate, being prima facie evidence of its contents, was subject to explanation or contradiction if not in accord with the facts, there was no error in its admission. *Supreme Lodge, K. P. v Beck* (CA9 Mont) 94 F 751, affd 181 US 49, 45 L Ed 741, 21 S Ct 532.

Footnote 56. *Equitable Life Assur. Soc. v Stinnett* (CA6 Ky) 13 F2d 820; *New York Life Ins. Co. v Anderson* (CA8 Minn) 66 F2d 705; *New York Life Ins. Co. v Miller*, 65 App DC 129, 81 F2d 263; *New York Life Ins. Co. v Ittner*, 64 Ga App 806, 14 SE2d 203.

Annotation: Insurance: coroner's verdict or report as evidence on issue of suicide, 28 ALR2d 352.

§ 1458 Mortality or life expectancy tables

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In proving life expectancy, standard mortality or life expectancy tables are universally accepted as competent proof. 57 The law does not, however, require the production of the tables whenever there is an issue of life expectancy, and does not regard them as essential to the establishment of that issue or to the recovery of damages based on life expectancy. 58

When introduced, the tables furnish satisfactory proof of probable expectancy of life. They are not, however, conclusive and do not have absolute probative force. 59 Thus, their relative weight and effect is dependent upon the question whether the analogy they present is weak or strong, in the light of the facts in the particular case. 60 Such factors as the health of the person whose life expectancy is involved, personal habits, occupation, social environment, and general physical state, are pertinent in weighing the probative effect of mortality or life expectancy tables. 61 But in the absence of evidence tending to show that the person in question had a probability of life greater or less than that shown by the tables, they may be accepted as controlling. 62

Footnotes

Footnote 57. § 1418.

Footnote 58. *Gardner v Hobbs*, 69 Idaho 288, 206 P2d 539, 14 ALR2d 478; *Husak v Omaha Nat. Bank*, 165 Neb 537, 86 NW2d 604; *Heath v Stephens*, 144 Wash 440, 258 P 321.

Footnote 59. *Vicksburg & M. R. Co. v Putnam*, 118 US 545, 30 L Ed 257, 7 S Ct 1; *Renaldi v New York, N. H. & H. R. Co.* (CA2 NY) 230 F2d 841, 59 ALR2d 1371; *Hertz v McDowell*, 358 Mo 383, 214 SW2d 546; *Husak v Omaha Nat. Bank*, 165 Neb 537, 86 NW2d 604; *Universal Life & Acci. Ins. Co. v Sanders*, 129 Tex 344, 102 SW2d 405.

Footnote 60. *Paine v Gamble Stores*, 202 Minn 462, 279 NW 257, 116 ALR 407.

Footnote 61. *Ritter v Mutual Life Ins. Co.*, 169 US 139, 42 L Ed 693, 18 S Ct 300; *Vicksburg & M. R. Co. v Putnam*, 118 US 545, 30 L Ed 257, 7 S Ct 1; *National Life & Acci. Ins. Co. v Sims*, 187 Ark 969, 63 SW2d 524.

The probative value of the tables may be weakened and even destroyed by evidence of ill health or disease of the person whose life expectancy is in issue. *Barone v Forgette*, 286 App Div 588, 146 NYS2d 63, reh and app den (3d Dept) 1 App Div 2d 792, 149 NYS2d 235.

Footnote 62. *Davis v Michigan C. R. Co.*, 147 Mich 479, 111 NW 76.

§ 1459 Weather reports and records

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Some courts passing on the question have supported the view that official weather reports and records are prima facie evidence on the question of the weather conditions at a particular place and time, but are not conclusive of the facts stated in them. 63 Other courts maintain that such records furnish indisputable evidence of the weather conditions at a particular place. 64 However, on the question of the condition of the weather at a particular place and time, official weather records and reports are entitled to a greater weight than is the testimony of witnesses who must depend merely upon their memories. 65

As a general rule, the evidentiary weight of official weather records and reports varies in more or less direct proportion to the distance between the place in controversy and the place where the observations were made from which the weather reports were prepared. 66 It is for the trier of fact to determine the weight to be given to reports vis-a-vis the distance from the accident. 67

The rules stated above as to the evidentiary weight of weather reports and records presuppose that there has been no showing that such records contain irregularities. Where it appears that they have been carelessly kept, or tampered with as respects entries concerning weather at a particular time and place, they are entitled to no weight. 68

Footnotes

Footnote 63. *The Perseverance* (DC NY) 49 F2d 785 (stating that official weather bureau records were, beyond doubt, the best source of information as to direction or velocity of the wind and as to rainfall insofar as such facts were set down in those records); *McCollum v O'Neil*, 128 Mont 584, 281 P2d 493.

In an action for the flooding of property, the exclusion from evidence of an exhibit purporting to be a certified copy of weather bureau records of stages of high water in a

river on six occasions was not required because of testimony that the figures as to one of such occasions were not substantiated by the records, but were taken from an official bulletin; wherein the court further said that such testimony was to be considered in determining the weight of the exhibit as evidence. *Eaves v Ottumwa*, 240 Iowa 956, 38 NW2d 761, 11 ALR2d 1164.

Law Reviews: Grossman and Muldavin, Benefits of Hiring a Weather Expert. 5 Nat Trial Law 74 (July, 1993).

Falconer, Weather or Not: How Forensic Meteorologists Can Help Trial Lawyers. 24 Trial 80 (October, 1988).

Annotation: Weather reports and records as evidence, 57 ALR3d 713.

Practice References Meteorological conditions at a particular time and place. 5 Am Jur POF3d 191.

Footnote 64. *Wadlund v Hartford*, 139 Conn 169, 91 A2d 10.

Footnote 65. *Aben v District of Columbia*, 95 US App DC 237, 221 F2d 110; *Southwest Bitulithic Co. v Dickey* (Tex Civ App) 28 SW2d 264.

The testimony of a witness that he thought that there had been freezing weather at a certain place during a certain period was of no probative force when official weather records had been introduced in evidence, as a result of which the question whether there was or was not freezing weather was susceptible of definite proof. *Armstrong v Monett* (Mo) 228 SW 771.

Footnote 66. *Wadlund v Hartford*, 139 Conn 169, 91 A2d 10; *Tenney v Pleasant Realty Corp.*, 136 Conn 325, 70 A2d 138; *Silver Falls Timber Co. v Eastern & Western Lumber Co.*, 149 Or 126, 40 P2d 703.

Because the United States Weather Bureau was at some distance from the place in controversy, although within the same city, the weather bureau records were not, of themselves, sufficient to show conclusively that there was no ice present at the place in controversy. *Ward v Pittsburgh*, 353 Pa 156, 44 A2d 553.

The fact that a weather bureau was 60 miles from the place in controversy went to the evidentiary weight of the record as to wind velocity, but did not bar admission of the record. *Aerial Sprayers, Inc. v King* (Tex Civ App Amarillo) 317 SW2d 602.

Footnote 67. *Schucker v Missouri Dept. of Natural Resources* (Mo App) 703 SW2d 1, stating that the trial court did not err in admitting U. S. weather reports, even though they were taken 60 to 75 miles from scene of accident which formed basis of suit, since government weather reports are generally admissible, and there was no dispute as to heavy rainfall in area shortly before accident.

Footnote 68. *The Frederick E. Ives* (DC NY) 25 F 447.

5. Evidence of Mailing of Letter [1460-1463]

§ 1460 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a well-settled general rule that proof of the mailing of a letter, correctly addressed, upon which the proper postage is prepaid, raises a presumption of the receipt of the letter by the person to whom it is sent. 69 It is not, however, easy to state the precise quantum of proof necessary to establish the mailing of the letter. A conflict of authority exists in particular with reference to the cases in which the proof is merely the assertion that a letter was mailed or sent, without further explanation. One position is that such an assertion, without evidence of the place and circumstances under which it was mailed, is insufficient. 70 The opposing position is that it is not necessary to show in express terms that the letter was deposited in the post office or branch but that the testimony of the witness that he or she mailed the letter implies that it was deposited, 71 at least in the absence of any proof to the contrary or any inquiry as to the mode of mailing. 72

Footnotes

Footnote 69. § 261.

Footnote 70. *Watrous Varnish Co. v Nemirovsky*, 71 Pa Super 264.

As to the deposit of a letter in a mailbox or letter chute, see § 1461.

As to letters mailed in the course of business, see § 1463.

Footnote 71. *Barnet v Norton*, 90 Vt 544, 99 A 238.

Although plaintiff failed to directly testify that the postage on a letter had been prepaid, his testimony as to mailing of the letter was sufficient to raise a presumption that the letter had been received. *Moore v Drexel Homes, Inc.* (La App 4th Cir) 293 So 2d 500, cert den (La) 295 So 2d 812.

A tenant's testimony that he personally mailed a letter, properly addressed to his landlord, that the letter contained his return address, and that the letter was not returned to him was sufficient to raise the presumption that the landlord received the letter, even though the tenant did not testify that he placed the stamp on the letter. *Moore v Drexel Homes, Inc.* (La App 4th Cir) 293 So 2d 500, cert den (La) 295 So 2d 812.

Footnote 72. *Oregon S.S. Co. v Otis*, 100 NY 446, 3 NE 485, error dismd 116 US 548, 29 L Ed 719, 6 S Ct 523.

§ 1461 Deposit of letter in mailbox or letter chute

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The act of depositing a letter or other mail matter in a street letterbox established by the postal authorities is as much a mailing of the letter or other mailing matter as though it were deposited in the proper place in a general post office, and proof of so depositing it is sufficient to establish the fact that it was mailed. 73 A similar rule applies where proof is made that a letter was deposited in a rural letterbox, although in these cases the presumption of the receipt of the letter is more easily rebutted than where deposit is made at the post office. 74 Proof of depositing of a letter in a letter chute in a private building is also a sufficient evidence of mailing, where the chute is under the control of the Post Office Department. 75

Footnotes

Footnote 73. *Corry v Sylvia y Cia*, 192 Ala 550, 68 So 891; *Casco Nat. Bank v Shaw*, 79 Me 376, 10 A 67; *Wood v Callaghan*, 61 Mich 402, 28 NW 162.

Footnote 74. *Bank of Ipswich v Harding County Farmers Mut. Fire & Lightning Ins. Co.*, 55 SD 261, 225 NW 721, 63 ALR 925.

Footnote 75. *Hummelshime v State*, 125 Md 563, 93 A 990.

§ 1462 Delivery of letter to carrier or mail clerk

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence that a letter was delivered to a mail carrier 76 or to a United States railway mail clerk 77 is sufficient proof of mailing to raise the presumption of its receipt. 78 But giving a letter to one who had the contract of carrying the mail sacks to and from the railway station with the request that he mail it on the mail car is not such a deposit in the mail as to raise a presumption of the receipt of the letter. 79

Footnotes

Footnote 76. *Rosenthal v Walker*, 111 US 185, 28 L Ed 395, 4 S Ct 382; *Pearce v Langfit*, 101 Pa 507.

Footnote 77. *Watson v Richardson*, 110 Iowa 673, 80 NW 407.

Footnote 78. As to presumption of receipt, see § 262.

§ 1463 Business or office custom or usage of sender

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The authorities disagree as to what evidence of a private business custom or usage is sufficient to prove the mailing of a letter. In an office handling a great deal of correspondence, one can very seldom remember the fact of mailing any particular letter, so some jurisdictions have adopted the rule that proof of mailing may be made by showing an office custom with respect to mailing and compliance with the custom in the specific instance. 80 Under this view, proof of a custom in the sender's office whereby letters deposited in a particular place are taken and mailed by an employee is not sufficient of itself to establish the fact that a letter so deposited was mailed, in the absence of proof showing compliance with the custom. 81

Other jurisdictions have adopted the view that evidence of business custom or usage is sufficient to establish the fact of mailing without further testimony by an employee of compliance with the custom. 82 This is particularly applicable to matters such as the mailing of routine letters in an office where a very large number of such letters is customarily mailed in the due course of its business. 83

In weighing the validity of the presumption of receipt, the trier of fact considers a variety of factors. For example, the fact that copies are found without the original in the place where they would have been found had the original been mailed, is sufficient, in the absence of evidence to the contrary, to support a finding that the original had been properly mailed. Moreover, the fact that a letter was mailed with a return address but was not returned lends strength to the presumption that the letter was received. 84 Further, an addressee's positive denial of receipt does not nullify the presumption, but leaves the question for the determination of the trier of fact, with such weight given to the presumption as it finds appropriate. 85

The presumption of the receipt of a letter arising from evidence of compliance with the usual custom in mailing such letters is strengthened when the envelope bears a notice requesting that it be returned to the sender if not delivered within a specified time and it appears that the letter was never returned. 86

Footnotes

Footnote 80. *Knickerbocker Life Ins. Co. v Pendleton*, 115 US 339, 29 L Ed 432, 6 S Ct 74; *Allied American Mut. Fire Ins. Co. v Paige* (Mun Ct App Dist Col) 143 A2d 508; *Borgia v Board of Review*, 21 NJ Super 462, 91 A2d 441; *Oregon S.S. Co. v Otis*, 100 NY 446, 3 NE 485, error dismd 116 US 548, 29 L Ed 719, 6 S Ct 523; *Commercial Bank of Albany v Strong*, 28 Vt 316; *Lieb v Webster*, 30 Wash 2d 43, 190 P2d 701.

Evidence that notices sent by a bank pertaining to a note were put in an envelope,

addressed to the defendant, and put in the bank's mail, which in the ordinary course, was posted daily, is sufficient to create a presumption that the notices were duly mailed and in the ordinary course reached the addressee. *Citizens' Bank & Trust Co. v Allen* (CA4 Va) 43 F2d 549.

Proof of business custom is insufficient to establish mailing in the absence of proof showing compliance with the custom. *Good v Detroit Auto. Inter-Insurance Exchange*, 67 Mich App 270, 241 NW2d 71.

In an action by insureds seeking reformation of automobile insurance policy to provide uninsured and underinsured motorist coverage, in order to prove that information regarding coverage was mailed to insureds as part of mass mailing of information to all insureds, insurer was required to show evidence of custom along with testimony of person whose duty it was to carry out custom of mailing. *Bruce v James P. MacLean Firm*, 238 NJ Super 408, 570 A2d 1.

Footnote 81. *Freeman v United States* (CA3 NJ) 20 F2d 748; *Brotherhood of R. Trainmen v Jennings*, 232 Ala 438, 168 So 173; *Cook v Phillips*, 109 NJL 371, 162 A 732, 86 ALR 539; *Borgia v Board of Review*, 21 NJ Super 462, 91 A2d 441; *Howard v Daly*, 61 NY 362; *Lieb v Webster*, 30 Wash 2d 43, 190 P2d 701.

No presumption of receipt will be founded upon evidence that letters were addressed, stamped, and placed in a tray from which letters were taken and mailed in the regular course of business, in the absence of further evidence of the clerk whose duty it was to mail letters left in the tray. *William Gardam & Son v Batterson*, 198 NY 175, 91 NE 371.

Automobile insurer's proof that a cancellation notice was mailed to insured was insufficient where that proof consisted of testimony by the bank officer in charge of financing of insurance premiums that the cancellation notices were produced by computer and placed in envelopes by a clerk who later delivered groups of envelopes to the post office and returned with mailing sheets stamped by the post office, but officer did not provide testimony that an employee normally checked the names and addresses on the envelopes with those on the mailing sheet. *Anzalone v State Farm Mut. Ins. Co.* (2d Dept) 92 App Div 2d 238, 459 NYS2d 850.

Footnote 82. *Jenkins v Tuneup Masters* (3rd Dist) 190 Cal App 3d 1, 235 Cal Rptr 214 (testimony from all of the employees in the chain of custody coupled with proof of compliance with that custom on the occasion in question is not required); *Good v Detroit Auto. Inter-Insurance Exchange*, 67 Mich App 270, 241 NW2d 71; *General Mills, Inc. v Zerbe Bros., Inc.*, 207 Mont 19, 672 P2d 1109, 45 ALR4th 469 (it is enough there is an office practice or custom and that this practice or custom was carried out).

Annotation: Proof of mailing by evidence of business or office custom, 45 ALR4th 476.

Footnote 83. *Consolidated Motors, Inc. v Skousen*, 56 Ariz 481, 109 P2d 41, 132 ALR 1040, cert den 314 US 631, 86 L Ed 507, 62 S Ct 64, further stating that proof of the custom and the fact that a carbon copy was found without the original in the place and under the circumstances where it would have been found, if the original had been mailed, is sufficient, in the absence of evidence to the contrary, to support a finding that the

original had been properly mailed.

Where office manager testified that confirmation of sale notices were generated daily off company's computer and were processed by employees who ran notices through a machine that sealed and stamped them and then were hand-delivered to post office for mailing, evidence was sufficient to establish proof of mailing and to present jury question on delivery and receipt of confirmation. *Swink & Co. v Carroll McEntee & McGinley, Inc.*, 266 Ark 279, 584 SW2d 393, 27 UCCRS 239.

Footnote 84. *Good v Detroit Auto. Inter-Insurance Exchange*, 67 Mich App 270, 241 NW2d 71; *General Mills, Inc. v Zerbe Bros., Inc.*, 207 Mont 19, 672 P2d 1109, 45 ALR4th 469.

Footnote 85. *General Mills, Inc. v Zerbe Bros., Inc.*, 207 Mont 19, 672 P2d 1109, 45 ALR4th 469.

Upon proper evidence of business custom and habit of a commercial house as to addressing a mailing, the mere execution of a letter in the usual course of business rebuttably presumes subsequent receipt of the addressee. *Good v Detroit Auto. Inter-Insurance Exchange*, 67 Mich App 270, 241 NW2d 71.

Footnote 86. *Lieb v Webster*, 30 Wash 2d 43, 190 P2d 701.

C. Criminal Prosecutions [1464-1499]

Research References

ALR Digests: Evidence §§ 1613-1653

ALR Index: Alibi; Circumstantial Evidence; Entrapment; Evidence; Fingerprints; Footprints; Insanity; Voice

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 367-370, 375; 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 103, 104, 108

27 Am Jur POF2d 431, Alibi Defense; 5 Am Jur POF3d 191, Meteorological Conditions at a Particular Time and Place

1 Am Jur Trials 555, Locating and Preserving Evidence in a Criminal Case; 3 Am Jur Trials 427, Preparing and Using Experimental Evidence

1. In General [1464-1466]

§ 1464 Generally

<p>View Entire Section Go to Parallel Reference Table Go to Supplement</p>
--

The test for determining sufficiency of the evidence in a criminal case is whether there is substantial evidence to support the verdict 87—that is, evidence to sustain a finding to

meet the applicable standard of proof 88 of guilt beyond a reasonable doubt. 89

In making these determinations, the trier of fact is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on speculation, 90 conjecture, 91 suspicion, the weakness of the status of the accused, the embarrassing position of the accused, or the fact that some unfavorable circumstances are not satisfactorily explained. 92 If the evidence must be buttressed with surmise or conjecture rather than logical inferences, the conviction cannot stand. 93

§ 1464 ----Generally [SUPPLEMENT]

Case authorities:

If the government fails to meet its burden of proof at a federal criminal trial, then the judicial system necessarily assumes that a juror will vote to acquit, rather than convict, even if the juror is convinced that the defendant is highly dangerous and should be incarcerated. *Shannon v United States (US)* 129 L Ed 2d 459, 114 S Ct 2419.

FDA's motion to compel release of consultant's audit of company's operations to grand jury is granted, despite company's assertion of "self- evaluative" or "self- critical analysis" privilege under FRE 501, because (1) no case has applied self-evaluative privilege against government; (2) courts sparingly should expand application of privileges to new contexts and circumstances; and (3) grand jury investigating possible criminal activities had enjoyed traditionally wide latitude. *In re Grand Jury Proceedings* (1994, DC Md) 861 F Supp 386.

Given state supreme court's conclusion that evidence was insufficient to permit jury to convict petitioners for manslaughter in death of 2-year-old daughter of one, remaining evidence—circumstantial, medical, and direct—was insufficient to convict them of willful neglect or delay in seeking medical care, and they were entitled to habeas relief; state's evidence viewed in light most favorable to it did not show that petitioners knew or should have known that something was wrong with child before they called 911. *Martineau v Angelone* (1994, CA9 Nev) 25 F3d 734, 94 CDOS 3504, 94 Daily Journal DAR 6624.

Evidence was insufficient to establish that petitioner knew that checks which he presented to grocery store were forged; checks were given to him by person who represented himself to be named owner of account and petitioner had seen his identification, and state presented no evidence on essential element of petitioner's knowledge that checks were forged. *Stallings v Tansy* (1994, CA10 NM) 28 F3d 1018.

Defendant's own testimony that he attempted to have sexual intercourse with underaged victim, but did not believe there was any penetration, was sufficient corroboration of child's testimony that sexual conduct was committed; quantum of corroboration needed is amount of independent evidence which tends to prove incident occurred as alleged. *Dye v State* (1992) 205 Ga App 781, 423 SE2d 713, 92 Fulton County D R 2428.

In prosecution for sodomy by having deviate sexual intercourse with boys, video of interview of five-year- old victim by juvenile officer was properly admitted into evidence, officer did not reinforce responses or suggest responses and, although officer should have allowed victim to independently explain answer to particular question, matter concerned only time of year when conduct occurred, not specifics of conduct.

State v McClintock (1996, Mo App) 913 SW2d 124.

In capital murder trial, prosecutor's brief reference to fact that victims had families was not improper, since reference was not victim impact evidence and was relevant to degree of punishment to be imposed. Libby v State (1993, Nev) 859 P2d 1050.

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. State v Rick (1995) 342 NC 91, 463 SE2d 182.

There was sufficient evidence to convict defendant of burglary, even though he did not personally enter burglarized premises, where shoe of passenger in defendant's car matched footprints inside premises and only items stolen from store were found in defendant's car. Wilkerson v State (1994, Tex App Houston (14th Dist)) 874 SW2d 127.

Because inference established by statute making blood alcohol level of 0.10 percent or higher within three hours of driving "competent evidence" of intoxication is permissive rather than mandatory, statute did not unconstitutionally shift burden of proof to defendant. State v Wetzel (1989) 7 Hawaii App 532, 782 P2d 891.

Footnotes

Footnote 87. Gillie v State, 305 Ark 296, 808 SW2d 320.

Footnote 88. Tibbs v State (Fla) 397 So 2d 1120, aff'd 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211; State v Miller (SD) 429 NW2d 26, habeas corpus den (SD) 472 NW2d 517, habeas corpus granted, in part, habeas corpus den, in part (DC SD) 1993 US Dist LEXIS 6654.

Footnote 89. For discussion of the guilt beyond a reasonable doubt as the burden of proof in criminal cases, generally, see §§ 168 et seq.

Footnote 90. United States v Maholias (CA7 Wis) 985 F2d 869, 37 Fed Rules Evid Serv 1265, later proceeding (CA7 Wis) 1994 US App LEXIS 4470; United States v Stauffer (CA9 Cal) 922 F2d 508, 90 CDOS 9222, 90 Daily Journal DAR 14531; United States v Teffera (App DC) 300 US App DC 23, 985 F2d 1082.

Footnote 91. Brown v State, 309 Ark 503, 832 SW2d 477.

Footnote 92. State v Jansen, 241 Neb 201, 486 NW2d 501 (not followed on other grounds by State v Mowry (Neb Ct App) 3 NCA 811, 1993 Neb App LEXIS 269).

A conviction for a criminal offense may not be based solely upon conjecture, guess, speculation, or a mere possibility. State v Cooper (Tenn Crim) 736 SW2d 125.

Suspicious circumstances, including mere proximity, are insufficient to support a conviction. Wynn v Commonwealth, 5 Va App 283, 362 SE2d 193.

Footnote 93. State v Padilla (App) 104 NM 446, 722 P2d 697.

§ 1465 Presence at scene of crime

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Mere presence at the scene of crime does not constitute sufficient evidence of guilt. However, presence, companionship, and conduct before and after the offense are circumstances from which the trier of fact may infer participation in the criminal intent. Moreover, the trier of fact may find such intent upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. 94 Similarly, guilt by association is unacceptable. The mere presence of one person, among a group at a scene of contraband, is not a strong factor indicative of guilt. 95

§ 1465 ----Presence at scene of crime [SUPPLEMENT]

Case authorities:

In prosecution for falsely misrepresenting his social security account number in opening bank and other accounts, evidence that someone with different name had opened three bank accounts in another city with three different SSNs was properly admitted since preponderance of evidence linked defendant to other city, including deposit there of checks issued to defendant by bank in first city, and similarity in schemes, signatures, and appearance. *United States v Adediran* (1994, CA8 Mo) 26 F3d 61.

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

Footnotes

Footnote 94. *In re R. K. J.*, 179 Ga App 112, 345 SE2d 658.

The mere presence of defendant at the scene of the crime is not in itself sufficient to sustain a conviction. *People v Jakes* (1st Dist) 207 Ill App 3d 762, 152 Ill Dec 735, 566 NE2d 422.

Footnote 95. *Commonwealth v Spencer*, 423 Pa Super 353, 621 A2d 153.

§ 1466 Time of offense; limitations

[View Entire Section](#)

When it is charged that an offense was committed on or about a named date, the prosecution need not prove the exact date unless the time is a material ingredient in the offense, 96 and the evidence is not insufficient merely because it shows that the offense was committed on another date. 97 Evidence that a crime occurred at a time other than that charged, if it is within the period of limitations and before the indictment, is sufficient to sustain the conviction. 98 Thus, to sustain a conviction, the evidence must show that the offense was committed prior to the return of the indictment and at such time that the prosecution would not be barred by limitations. 99

§ 1466 ----Time of offense; limitations [SUPPLEMENT]

Case authorities:

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

Footnotes

Footnote 96. As to the burden of proof in criminal cases, generally, see §§ 168 et seq.

Footnote 97. *People v McDade* (2nd Dist) 230 Cal App 3d 118, 280 Cal Rptr 912, 91 CDOS 3597, 91 Daily Journal DAR 5709, review den (Cal) 1991 Cal LEXIS 4083.

Footnote 98. *Barton v State*, 199 Ga App 363, 405 SE2d 92, 102-67 Fulton County D R 18; *People v Tomasello* (2d Dist) 166 Ill App 3d 684, 117 Ill Dec 783, 520 NE2d 1134 (stating that where a special time is not an element of the offense, the jury could properly have convicted defendant on that offense on proof that it occurred on Sunday prior to the filing of the indictment and within the statute of limitations); *State v Brakensiek* (Mo App) 734 SW2d 578; *State v Fowler* (Cuyahoga Co) 27 Ohio App 3d 149, 27 Ohio BR 182, 500 NE2d 390, motion overr; *Commonwealth v Powers*, 395 Pa Super 231, 577 A2d 194; *Gottlich v State* (Tex App Fort Worth) 822 SW2d 734, reh overr (Feb 11, 1992) and petition for discretionary review ref (Apr 22, 1992) and (criticized on other grounds by *Richardson v State* (Tex App Waco) 832 SW2d 168) and (criticized on other grounds by *Curry v State* (Tex App Fort Worth) 861 SW2d 479) (in which the state's evidence was sufficient to prove that the offense was prior to the filing of the indictment but still within the five-year statute of limitations where complainant testified that defendant had assaulted her during the summer of 1987 while she stayed at his house, the outcry witness and the complainant's mother both testified that the complainant first told them about defendant's actions on August 11, 1987, and defendant was indicted on September 30, 1987).

Footnote 99. *United States v Thomas* (CA9 Cal) 893 F2d 1066, 29 Fed Rules Evid Serv 697, cert den 498 US 826, 112 L Ed 2d 53, 111 S Ct 80 and (criticized on other grounds by *United States v Cochran* (CA3 Pa) 17 F3d 56) and (criticized on other grounds by

United States v Gendron (CA1 Mass) 18 F3d 955); Steeley v State (Ala App) 533 So 2d 665, cert den 490 US 1026, 104 L Ed 2d 195, 109 S Ct 1759; Johnson v State, 298 Ark 617, 770 SW2d 128, later proceeding (Ark) 1991 Ark LEXIS 304; Wilson v State (Tex App Fort Worth) 730 SW2d 438, petition for discretionary review ref (Nov 18, 1987) and (criticized on other grounds by Curry v State (Tex App Fort Worth) 861 SW2d 479) (stating that because it is not incumbent upon the state to prove the exact date alleged in the indictment, the state sufficiently established that the sexual assault was committed within the 5-year statute of limitations, notwithstanding that the victim could not testify with certainty as to the exact date on which the offense was committed).

2. Circumstantial Evidence [1467-1470]

§ 1467 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is a well-established general principle that evidence sufficient to convict may be entirely circumstantial, 1 and circumstantial evidence may sustain a conviction of even the gravest offense. 2

Circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt in the standard of proof required for criminal cases 3 —that is, guilt beyond a reasonable doubt. 4 Single facts may each count for little weight, but when considered together and with the circumstances of the case may be sufficient proof of guilt. 5 The circumstantial evidence must form a complete chain which, in light of the evidence as a whole, leads directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt. 6 The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of the circumstances relied upon. Rather, it considers the circumstances collectively with the final analysis affording the basis of an inference of guilt beyond a reasonable doubt. 7 The facts proved must be so connected and related to each other that the conclusion may be fairly inferred and not the result of guess work, speculation, or surmise. 8

Although there are a variety of tests by which courts assess the sufficiency of circumstantial evidence, there appear to be factors in common among the tests, such as the trier of fact's ability to decide among reasonable interpretations of the evidence 9 and the fact that the evidence need not be absolutely conclusive of guilt 10 or demonstrate the impossibility of innocence. 11 One such test for the sufficiency of circumstantial evidence is whether, viewing the evidence in the light most favorable to the people, and giving it the benefit of every reasonable inference, the facts from which the inference of defendant's guilt are drawn are inconsistent with innocence and exclude, to a moral certainty, every other reasonable hypothesis. 12 Another test, frequently stated in conjunction with the first, is whether the evidence is strong enough to exclude every reasonable hypothesis of innocence. 13 Stated differently, circumstantial evidence can provide the basis to support a conviction, but it must be consistent with the

defendant's guilt and inconsistent with any other reasonable conclusion, 14 or so strong and convincing as to exclude every reasonable hypothesis except the defendant's guilt and must exclude any reasonable hypothesis of defendant's innocence. 15

◆ Comment: A few courts have adopted the proof beyond a reasonable doubt standard as the test for sufficiency of circumstantial evidence, rejecting the reasonable hypothesis theory, stating that it is no longer necessary that the evidence not only be consistent with guilt but also be inconsistent with every reasonable hypothesis of innocence. 16 Under this theory, the reasonable doubt standard applies to all criminal cases whether the evidence is direct or circumstantial. 17

§ 1467 ----Generally [SUPPLEMENT]

Case authorities:

In prosecution for aggravated assault and cruelty to children based on evidence that defendant had inflicted burn on his girl friend's eight- year-old son, although there was evidence that victim had made contradictory statements as to whether burn was inflicted by defendant or whether he tripped and fell against barrel in which trash was burning, trial court properly refused to give defendant's requested instruction that "where all the facts and circumstances of the case, and all reasonable deductions therefrom, present two equal theories, one of guilt and the other of innocence, then the jury must acquit the accused," where there was direct evidence and case was not wholly dependent on circumstantial evidence, where court defined and described circumstantial evidence, and jury was also fully instructed regarding reasonable doubt and presumption of innocence, and where defendant did not request any other charge regarding circumstantial evidence. Moss v State (1993) 209 Ga App 293, 433 SE2d 397, 93 Fulton County D R 2695.

In prosecution for armed robbery, trial court's refusal to give requested charge as to standard of proof in cases of circumstantial evidence, although error, was not reversible error where evidence of defendants' guilt was overwhelming and completely inconsistent with reasonable hypothesis of innocence, and where there was direct evidence of defendant's knowing participation in armed robbery: defendants separately "cased scene" immediately prior to robbery; they did not come in store together, though they were traveling in same car; when store owner followed one defendant outside, he saw both of them in same car and heard one of them yell, "That's him. Get him"; two armed robbers "instantly" appeared from nowhere while car was backing up to leave; while robbery was taking place, defendants, in car, were still in middle of road; and, after witnesses heard shots, they saw robbers run toward car, which was sitting at ready in road, occupied by defendants. Johnson v State (1993) 210 Ga App 99, 435 SE2d 458, 93 Fulton County D R 3134.

On appeal to Court of Appeals, proper standard of review in case where evidence against accused is wholly circumstantial is whether evidence before jury was legally sufficient to support finding of guilt beyond reasonable doubt, even though People are obliged to prove accused's guilt "to a moral certainty" and defendant is entitled to jury instruction, in words or substance, to that effect; phrase "proof to a moral certainty" is simply description of standard to be applied by fact finder in cases of purely circumstantial evidence. People v Wong (1993) 81 NY2d 600, 601 NYS2d 440, 619 NE2d 377.

Unexplained sexually transmitted disease in child is evidence of sexual abuse. In re Philip M. (1993) 82 NY2d 238, 604 NYS2d 40, 624 NE2d 168.

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. State v Rick (1995) 342 NC 91, 463 SE2d 182.

Footnotes

Footnote 1. United States v Wight (CA1 NH) 968 F2d 1393; United States v Batista-Polanco (CA1 RI) 927 F2d 14, 32 Fed Rules Evid Serv 661; United States v White (CA6 Ky) 932 F2d 588; United States v Maholias (CA7 Wis) 985 F2d 869, 37 Fed Rules Evid Serv 1265, later proceeding (CA7 Wis) 1994 US App LEXIS 4470; United States v Rodriguez (CA8 Ark) 812 F2d 414; United States v Kurt (CA9 Wash) 986 F2d 309, 93 CDOS 1094; People v Migliore (2d Dist) 170 Ill App 3d 581, 121 Ill Dec 376, 525 NE2d 182, app den 122 Ill 2d 587, 125 Ill Dec 229, 530 NE2d 257; Bustamante v State (Ind) 557 NE2d 1313; Rowan v State (Ind) 431 NE2d 805, habeas corpus proceeding (CA7 Ind) 752 F2d 1186, cert den 476 US 1140, 90 L Ed 2d 691, 106 S Ct 2245; Dority v Commonwealth, 269 Ky 201, 106 SW2d 645; Commonwealth v Nardone, 406 Mass 123, 546 NE2d 359; People v Reddick, 187 Mich App 547, 468 NW2d 278, app den 439 Mich 855; State v Webb (Minn) 440 NW2d 426; State v Livingston (Mo) 801 SW2d 344; State v Lynn, 243 Mont 430, 795 P2d 429; State v Saltzman, 235 Neb 964, 458 NW2d 239; State v Baca (App) 111 NM 270, 804 P2d 1089; Commonwealth v Fromal, 392 Pa Super 100, 572 A2d 711, app den 527 Pa 629, 592 A2d 1297; State v Corder (SD) 460 NW2d 733; Flores v Flores (Tex App Waco) 847 SW2d 648, writ den (Nov 24, 1993); State v Warner, 151 Vt 469, 560 A2d 385; Johnson v Commonwealth, 2 Va App 598, 347 SE2d 163; State v Carrico, 189 W Va 40, 427 SE2d 474; State v Pankow (App) 144 Wis 2d 23, 422 NW2d 913.

Each element of the crime may be proven by circumstantial as well as direct evidence. United States v Hankins (CA8 Mo) 931 F2d 1256, 32 Fed Rules Evid Serv 1158, cert den (US) 116 L Ed 2d 198, 112 S Ct 243.

Circumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred, and is not to be distinguished from testimonial evidence insofar as the jury's fact-finding function is concerned. United States v Stauffer (CA9 Cal) 922 F2d 508, 90 CDOS 9222, 90 Daily Journal DAR 14531.

Forms: Instruction to jury—Character of evidence—Direct or circumstantial. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Forms 103, 104.

Footnote 2. State v Hupp, 248 Kan 644, 809 P2d 1207; Commonwealth v Gorby, 527 Pa 98, 588 A2d 902 (circumstantial evidence can be sufficient to convict one of first degree murder).

Footnote 3. State v Russell, 243 Neb 106, 497 NW2d 393; State v Warner, 151 Vt 469, 560 A2d 385 (the sufficiency of circumstantial evidence to support a conviction is measured against the same standard as all other evidence).

The evidence must only reasonably support the jury's finding of guilt beyond a

reasonable doubt. *United States v Hager* (CA10 Okla) 969 F2d 883, cert den (US) 121 L Ed 2d 357, 113 S Ct 437.

Footnote 4. As to the guilt beyond a reasonable doubt standard of proof, generally, see §§ 168 et seq.

Footnote 5. *State v Lawson* (Tenn Crim) 794 SW2d 363, app den (Tenn) 1990 Tenn LEXIS 259.

There was sufficient evidence for a reasonable jury to infer that the defendant transported a Rolex watch from Oklahoma to Texas where defendant purchased a Rolex watch in Oklahoma City and left with it the same day; a check for the amount of the purchase was deposited in defendant's bank account; a witness testified that defendant wanted a Rolex watch; and the watch was recovered at defendant's house during an execution of a search warrant. *United States v Russell* (CA10 Okla) 905 F2d 1450, cert den 498 US 904, 112 L Ed 2d 224, 111 S Ct 267, habeas corpus den (CA10 Okla) 1993 US App LEXIS 16835 and (criticized on other grounds by *United States v Streit* (CA9 Ariz) 92 CDOS 4265, 92 Daily Journal DAR 6758).

Any fact in a criminal case may be proven by circumstantial evidence. *People v Gutierrez* (1st Dist) 205 Ill App 3d 231, 151 Ill Dec 395, 564 NE2d 850, app den 136 Ill 2d 548, 153 Ill Dec 378, 567 NE2d 336, habeas corpus den (ND Ill) 1992 US Dist LEXIS 8525, affd (CA7 Ill) 4 F3d 531.

The rational trier of fact is entitled to infer guilt from circumstantial evidence that excludes all other rational conclusions. *State v Murray*, 129 NH 645, 531 A2d 323.

Footnote 6. *State v Webb* (Minn) 440 NW2d 426.

Footnote 7. *Wilson v State*, 319 Md 530, 573 A2d 831.

Footnote 8. *Landis v Sumner Mfg. Co.* (Mo App) 750 SW2d 466, CCH Prod Liab Rep ¶ 11731.

Circumstantial evidence is not sufficient to sustain a verdict depending solely on it for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom; the evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible. *Ditloff v State Farm Fire & Casualty Co.*, 225 Neb 375, 406 NW2d 101.

Footnote 9. *United States v Wight* (CA1 NH) 968 F2d 1393; *United States v Batista-Polanco* (CA1 RI) 927 F2d 14, 32 Fed Rules Evid Serv 661; *United States v Hager* (CA10 Okla) 969 F2d 883, cert den (US) 121 L Ed 2d 357, 113 S Ct 437.

Footnote 10. *United States v White* (CA6 Ky) 932 F2d 588.

The reviewing court need not determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but whether inferences may be reasonably drawn from that evidence which support the verdict beyond a reasonable doubt. *Bustamante v State* (Ind) 557 NE2d 1313.

When a case involves only circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis fails, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v Hosford* (La App 1st Cir) 572 So 2d 242, cert den (La) 576 So 2d 27.

Footnote 11. *State v Livingston* (Mo) 801 SW2d 344.

Circumstantial evidence must exclude only reasonable hypotheses; it need not exclude every inference or hypothesis except that of defendant's guilt. *Brown v State*, 260 Ga 153, 391 SE2d 108.

Footnote 12. *People v Link* (3d Dept) 161 App Div 2d 839, 556 NYS2d 407, app den 76 NY2d 941, 563 NYS2d 70, 564 NE2d 680, further stating that circumstantial evidence that is consistent with either innocence or guilt is of no value.

Circumstantial evidence is sufficient when it is so strong and cogent as to indicate the guilt of the defendant to a moral certainty. *Ex parte Davis* (Ala) 548 So 2d 1041.

The circumstantial evidence need only produce a moral certainty beyond a reasonable doubt in order to sustain a conviction; it need not be absolutely incompatible with innocence. *Commonwealth v Fromal*, 392 Pa Super 100, 572 A2d 711, app den 527 Pa 629, 592 A2d 1297.

Footnote 13. *Ex parte Davis* (Ala) 548 So 2d 1041; *Bunderick v State* (Fla App D1) 528 So 2d 1247, 13 FLW 1680; *State v Harris* (La App 1st Cir) 577 So 2d 220; *Murphy v State* (Miss) 566 So 2d 1201; *State v Livingston* (Mo) 801 SW2d 344; *State v Vigil*, 110 NM 254, 794 P2d 728; *State v Graven*, 54 Ohio St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370; *State v Graven*, 54 Ohio St 2d 114, 8 Ohio Ops 3d 113, 374 NE2d 1370; *State v Bridge* (Lucas Co) 60 Ohio App 3d 76, 573 NE2d 762, motion overr 49 Ohio St 3d 708, 551 NE2d 1304; *State v Ruggles*, 183 W Va 58, 394 SE2d 42; *State v Pankow* (App) 144 Wis 2d 23, 422 NW2d 913.

But see, *State v Warner*, 151 Vt 469, 560 A2d 385, stating that the state is not required to exclude every reasonable hypothesis of innocence in proving a case with circumstantial evidence.

Where all the evidence is entirely circumstantial, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and must exclude every reasonable hypothesis of innocence. *Boothe v Commonwealth*, 4 Va App 484, 358 SE2d 740.

Footnote 14. *Gillie v State*, 305 Ark 296, 808 SW2d 320; *State v Webb* (Minn) 440 NW2d 426; *Murphy v State* (Miss) 566 So 2d 1201; *State v Saltzman*, 235 Neb 964, 458 NW2d 239; *State v McCue*, 134 NH 94, 589 A2d 580; *Boulden v State* (Tex Crim) 810 SW2d 204; *Townes v Commonwealth*, 234 Va 307, 362 SE2d 650, cert den 485 US 971, 99 L Ed 2d 447, 108 S Ct 1249.

Before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances must be so strong and cogent as to exclude every other reasonable hypothesis except the guilt of the defendant. *State v Cooper* (Tenn Crim) 736 SW2d 125.

Footnote 15. *Sanders v State* (Fla App D4) 344 So 2d 876.

Footnote 16. *State v Turrubiates*, 25 Ariz App 234, 542 P2d 427 (the test, whether the evidence is circumstantial or direct, is whether the evidence is sufficient for the jury to find the defendant guilty beyond a reasonable doubt).

The use of the reasonable hypothesis theory as an analytical construct is rejected as a method of appellate review for evidentiary sufficiency in appellate courts. *Geesa v State* (Tex Crim) 820 SW2d 154.

Footnote 17. *People v Bell* (1st Dist) 209 Ill App 3d 438, 154 Ill Dec 238, 568 NE2d 238, app den 139 Ill 2d 598, 159 Ill Dec 110, 575 NE2d 917.

§ 1468 Relative weight between direct and circumstantial evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Circumstantial evidence is not intrinsically inferior ¹⁸ or inherently less reliable than direct evidence. ¹⁹ It is as persuasive as direct evidence ²⁰ and is entitled to as much weight as other kinds of evidence. ²¹ Thus, circumstantial evidence is as competent and entitled to the same weight as direct testimony, provided that it is of such convincing character as to exclude every reasonable hypothesis other than that the accused is guilty. ²² Circumstantial evidence may be indispensable, for example, to prove the existence of a deliberate intent formed in the defendant's mind and to prove secretive crimes such as arson. ²³

§ 1468 ----Relative weight between direct and circumstantial evidence [SUPPLEMENT]

Case authorities:

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

Circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence. *Peplinski v Fobe's Roofing* (1994, App) 186 Wis 2d 308, 519 NW2d 346, review gr (Wis) 524 NW2d 138 and affd 193 Wis 2d 6, 531 NW2d 597.

Footnotes

Footnote 18. *Bernard v United States* (Dist Col App) 575 A2d 1191 (further stating that in assessing the sufficiency of the government's proof, the court makes no distinction

between direct and circumstantial evidence); *State v Bridge* (Lucas Co) 60 Ohio App 3d 76, 573 NE2d 762, motion overr 49 Ohio St 3d 708, 551 NE2d 1304.

Footnote 19. *State v Freeman* (La App 2d Cir) 506 So 2d 1279.

Footnote 20. *Payne v Jones* (ED NY) 638 F Supp 669, affd without op (CA2 NY) 812 F2d 712; *United States v Gates*, 257 US App DC 160, 807 F2d 1075, cert den 481 US 1006, 95 L Ed 2d 204, 107 S Ct 1631; *State v Mazzetta*, 21 Conn App 431, 574 A2d 806, app den 216 Conn 807, 580 A2d 64; *Amato v Commonwealth*, 3 Va App 544, 352 SE2d 4.

Circumstantial evidence possesses the same standing and statute as direct evidence. *Jozen v State* (Wyo) 746 P2d 1279.

Footnote 21. *United States v De Corte* (CA7 Ill) 851 F2d 948; *Stephens v State* (Ala App) 580 So 2d 11, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 1635 and affd (Ala) 580 So 2d 26, reh den (Ala) 1991 Ala LEXIS 575 and cert den (US) 116 L Ed 2d 138, 112 S Ct 176, reh den (US) 116 L Ed 2d 647, 112 S Ct 625; *State v Anaya* (App) 165 Ariz 535, 799 P2d 876, 64 Ariz Adv Rep 47; *McKinney v State*, 303 Ark 257, 797 SW2d 415; *Bowie v State*, 185 Ark 834, 49 SW2d 1049, 83 ALR 426; *People v Martina* (1st Dist) 140 Cal App 2d 17, 294 P2d 1015; *Dority v Commonwealth*, 269 Ky 201, 106 SW2d 645; *State v Webb* (Minn) 440 NW2d 426; *State v Johnson*, 11 Wis 2d 130, 104 NW2d 379.

Jurors are entitled to consider both direct and circumstantial evidence and permitted to give equal weight to both forms of evidence. *Smithwick v Walker* (SD NY) 758 F Supp 178, affd without op (CA2 NY) 948 F2d 1278.

For the purposes of proving guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative. *Semento v State* (Tex App Dallas) 747 SW2d 415, petition for discretionary review ref (Mar 22, 1989).

The notion that all circumstantial evidence should be viewed with distrust because it can establish, at most, only a possibility of guilt, is unwarranted. *State v Johnson*, 11 Wis 2d 130, 104 NW2d 379.

Footnote 22. *United States v LBS Bank-New York, Inc.* (ED Pa) 757 F Supp 496; *State v Anaya* (App) 165 Ariz 535, 799 P2d 876, 64 Ariz Adv Rep 47; *State v Rainer* (Minn) 411 NW2d 490, habeas corpus proceeding (CA8 Minn) 914 F2d 1067, cert den 498 US 1099, 112 L Ed 2d 1077, 111 S Ct 993, post-conviction proceeding (Minn) 502 NW2d 784; *Commonwealth v Hardcastle*, 519 Pa 236, 546 A2d 1101, cert den 493 US 1093, 107 L Ed 2d 1072, 110 S Ct 1169; *Johnson v Commonwealth*, 2 Va App 598, 347 SE2d 163.

Whether the evidence is circumstantial or direct, no greater degree of certainty is required because in either case the trier of fact must be convinced beyond a reasonable doubt of the guilt of the accused. *Wilson v State*, 319 Md 530, 573 A2d 831.

Forms: Instruction to jury—Circumstantial evidence to be considered in connection with other evidence. 9A Am Jur Pl & Pr Forms (Rev), Evidence, Form 108.

Footnote 23. *Payne v Jones* (ED NY) 638 F Supp 669, affd without op (CA2 NY) 812 F2d 712.

As to proof of intent by circumstantial evidence, see § 1469.

§ 1469 Intent

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Circumstantial evidence alone is often sufficient to show criminal intent ²⁴ because the element of intent, being a state of mind or mental purpose, is usually incapable of direct proof. ²⁵ It may be inferred from the conduct of the defendant, the facts and circumstances that demonstrate mental attitude, and the reasonable inferences from that evidence. ²⁶ For example, an intent to cause death may be inferred from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. ²⁷

§ 1469 ----Intent [SUPPLEMENT]

Case authorities:

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. *State v Rick* (1995) 342 NC 91, 463 SE2d 182.

Intent is rarely proved by direct evidence, instead trier of fact is often asked to rely on circumstantial evidence which may be stronger and more satisfactory than direct evidence. *State v Gomez* (1993, App) 179 Wis 2d 400, 507 NW2d 378.

Footnotes

Footnote 24. *United States v Perlmutter* (SD NY) 656 F Supp 782, affd without op (CA2 NY) 835 F2d 1430, cert den 485 US 935, 99 L Ed 2d 271, 108 S Ct 1110; *United States v Schmidt* (CA8 Minn) 922 F2d 1365, habeas corpus proceeding (CA8 Minn) 987 F2d 536; *People v Stell* (3d Dist) 223 Ill App 3d 531, 165 Ill Dec 907, 585 NE2d 638; *State v Thompson* (La App 1st Cir) 578 So 2d 1151; *State v Duea* (Minn App) 414 NW2d 513; *Jackson v State* (Miss) 580 So 2d 1217; *State v Welford* (Mo App) 754 SW2d 875, post-conviction proceeding (Mo App) 785 SW2d 580; *State v Saltzman*, 235 Neb 964, 458 NW2d 239; *Midland Steel Products Co. v International Union, United Auto., etc., Local 486*, 61 Ohio St 3d 121, 573 NE2d 98, reh den 61 Ohio St 3d 1432, 575 NE2d 219.

As to criminal intent, generally, see 21 Am Jur 2d, Criminal Law §§ 129, 130.

Footnote 25. *Benton v State* (Ala App) 536 So 2d 162; *People v Wehrwein* (1st Dist) 209

Ill App 3d 71, 154 Ill Dec 1, 568 NE2d 1; State v Garner (Mo App) 800 SW2d 785 (superseded by statute on other grounds as stated in State v Dunn (Mo App) 852 SW2d 157); State v Isiah, 109 NM 21, 781 P2d 293 (ovrld on other grounds by State v Lucero, 116 NM 450, 863 P2d 1071); State v West, 103 NC App 1, 404 SE2d 191.

Because direct proof of the defendant's state of mind is rarely available, resort must necessarily be had to circumstantial evidence. People v Vazquez (Colo App) 768 P2d 721.

Intent is a state of mind that will be proven, if at all, by circumstantial evidence. Scott v State (Okla Crim) 808 P2d 73.

Footnote 26. United States v Buehler (ED Wash) 793 F Supp 971, affd without op (CA9 Wash) 8 F3d 31, reported in full (CA9) 1993 US App LEXIS 27278; Gillie v State, 305 Ark 296, 808 SW2d 320; People v Scott, 154 Mich App 615, 397 NW2d 852; State v Albrecht, 242 Mont 403, 791 P2d 760; State v Morrow, 237 Neb 653, 467 NW2d 63; Commonwealth v Parker, 387 Pa Super 415, 564 A2d 246, app den 526 Pa 632, 584 A2d 315; Tharrington v Commonwealth, 2 Va App 491, 346 SE2d 337; State v Giffing, 45 Wash App 369, 725 P2d 445, review den 107 Wash 2d 1015.

A jury can conclude that defendant had the requisite intent from the circumstances surrounding the incident in question. People v Pitts (5th Dist) 223 Cal App 3d 606, 273 Cal Rptr 757, review den (Cal) 1990 Cal LEXIS 5479 and (criticized on other grounds by People v Wallace (5th Dist) 11 Cal App 4th 568, 14 Cal Rptr 2d 67, 92 CDOS 9781, 92 Daily Journal DAR 16279).

The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experience and observation. State v Hilpipe (Iowa App) 395 NW2d 899.

One's acts are generally reliable circumstantial evidence of intent. Semento v State (Tex App Dallas) 747 SW2d 415, petition for discretionary review ref (Mar 22, 1989).

Footnote 27. State v Patterson, 213 Conn 708, 570 A2d 174.

The defendant's conduct both before and after the offense may be considered as circumstantial evidence of the requisite criminal intent. State v Lovejoy (ND) 464 NW2d 386.

§ 1470 Venue

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In a criminal case venue is generally proven by direct evidence identifying the county in which the offense occurred. In the absence of specific evidence of the name of the county, however, a conviction may be sustained if the verdict is based on testimony from which the trier of fact may reasonably infer proper venue 28 from the facts and

circumstances of the cases. 29 Venue may be proven by circumstantial as well as direct evidence. 30 Reference to streets, buildings, and other landmarks familiar to the trier of fact is sufficient. 31 For example, the state proved venue in Orleans parish even though Orleans parish was never specifically mentioned where the street locations mentioned by the victim were clearly within the boundaries of that parish and the robbery was investigated by the New Orleans police department. 32 Evidence as to venue is insufficient, however, if there is nothing to show the place of the offense without resorting to surmise or conjecture. 33

Footnotes

Footnote 28. *State v Larsen* (Minn App) 442 NW2d 840; *State v Litteral*, 110 NM 138, 793 P2d 268; *State v Owens*, 293 SC 161, 359 SE2d 275, cert den 484 US 982, 98 L Ed 2d 495, 108 S Ct 496, later proceeding (SC) 424 SE2d 473, cert den (US) 123 L Ed 2d 482, 113 S Ct 1861.

It is sufficient if, from the facts appearing in evidence, the only rational conclusion which can be drawn is that the offense was committed in the county alleged. *State v Gorman*, 232 Neb 738, 441 NW2d 896.

Footnote 29. *Toledo v Taberner* (Lucas Co) 61 Ohio App 3d 791, 573 NE2d 1173.

As to venue, in general, see 21 Am Jur 2d, Criminal Law §§ 361 et seq.

Footnote 30. *United States v Griley* (CA4 Md) 814 F2d 967; *United States v McLean-Davis* (CA11 Fla) 795 F2d 957, cert den 479 US 1060, 93 L Ed 2d 991, 107 S Ct 941; *State v Mohr* (App) 150 Ariz 564, 724 P2d 1233; *Salley v State*, 199 Ga App 358, 405 SE2d 260, cert gr (Ga) 1991 Ga LEXIS 672, cert vacated 262 Ga 1, 1412 SE2d 836; *State v Wimer* (App) 118 Idaho 732, 800 P2d 128, subsequent civil proceeding (App) 122 Idaho 923, 841 P2d 453; *Evans v State* (Ind) 571 NE2d 1231; *James v State*, 105 Nev 873, 784 P2d 965; *State v Miranda*, 309 Or 121, 786 P2d 155, cert den 498 US 879, 112 L Ed 2d 171, 111 S Ct 212, post-conviction proceeding (CA9) 1991 US App LEXIS 22012, later proceeding (CA9) 1991 US App LEXIS 24716; *State v Cervantes*, 118 Or App 429, 848 P2d 118, review gr 317 Or 485, 858 P2d 875; *State v Bloodsaw* (Tenn Crim) 746 SW2d 722; *Reese v State* (Tex App Beaumont) 725 SW2d 795; *Cheng v Commonwealth*, 240 Va 26, 393 SE2d 599.

Venue may be established by proof of facts and circumstances introduced in evidence from which the place or places of commission of the crime or crimes may be fairly and reasonably inferred. *State v Damewood*, 245 Kan 676, 783 P2d 1249.

Footnote 31. *State v Johnson*, 45 Wash App 794, 727 P2d 693, review den 107 Wash 2d 1035.

Annotation: Propriety of taking judicial notice of geographic facts for purposes of proof of venue in federal criminal prosecution, 15 ALR Fed 715.

Footnote 32. *State v James* (La App 4th Cir) 545 So 2d 560, writ den (La) 551 So 2d 618.

Footnote 33. *Bowman v State*, 119 Tex Crim 602, 45 SW2d 971; *Wright v State* (Tex

As to the prohibition against basing a conviction on surmise or conjecture, in general, see § 1464.

3. Confessions [1471-1475]

§ 1471 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts differ in their evaluation of the quality of confessions as evidence of guilt. Some regard confessions as the highest and most satisfactory proof of guilt 34 and give great weight to free, voluntary, and deliberate confessions of guilt. 35 Other courts allow confessions considerable probative value, 36 and still others describe confessions as being the weakest and most suspicious of all testimony. 37 The general rule, however, is that confessions are not conclusive upon the accused, but can be disproved by other evidence. 38

The weight of a confession is always for the trier of fact to determine. 39 And where the confession is admitted, 40 the jury must consider it in the light of all the surrounding circumstances and in connection with all the other evidence in the case. 41 The jury, when weighing the confession, should act with great caution, 42 but cannot reject or disregard a confession which has been admitted by the court merely because they may deem it incompetent. 43

It is well settled that if a confession is made under such circumstances as to authorize its admission in evidence, the accused is entitled to have the entire statement or conversation, including any exculpatory or self-serving declarations connected therewith, also admitted. 44 Parts of a confession which are in the accused's favor are entitled to as much consideration as those which are against the accused, if they are not disproved and are not untrue or improbable when considered in connection with all the other testimony in the case. 45 It is for the jury to determine the weight to be given the several parts of the statement. For instance, it may believe that part which charges the defendant and reject that which tends to be exculpatory. 46

The mere fact that a witness did not hear or understand all the conversation entailing a confession does not render the witness incompetent to testify to what was heard and understood. Such testimony is entitled to much less weight than if the witness had heard and understood the whole conversation. 47 The jury is entitled to receive and consider the testimony for what it is worth, 48 and to say how greatly it is impaired by the fact that the witness heard or understood only a part of what was said in the conversation. 49

A confession otherwise voluntary is not to be excluded because the accused was intoxicated at the time of making it. 50 And where the confession is admitted in

evidence, the fact of the voluntary intoxication of the accused at the time of confession goes only to the weight and credibility of the confession. 51

§ 1471 ----Generally [SUPPLEMENT]

Case authorities:

On certiorari to review a United States Court of Appeals decision which affirmed without opinion the conviction for narcotics offenses of an accused at whose trial a Federal District Court ruled that under Rule 804(b)(3) of the Federal Rules of Evidence, an agent of the Drug Enforcement Administration could testify as to statements made to him by an arrestee who confessed to receiving and transporting cocaine and stated that he was transporting the cocaine for the accused, the United States Supreme Court will vacate the judgment of the Court of Appeals and remand the case for further proceedings, where (1) two of the Justices are of the opinion that—given that Rule 804(b)(3) does not permit the admission into evidence of non-self-inculpatory statements, even if contained in a broader narrative that is generally self- inculpatory—the case should be remanded so that the Court of Appeals may conduct an inquiry as to whether each of the statements admitted at trial under the Rule was truly self- inculpatory; (2) four of the Justices are of the opinion that—given that Rule 804(b)(3) does not permit the admission into evidence of non-self-inculpatory statements, even if contained in a broader narrative that is generally self- inculpatory—(a) the statements admitted under the Rule did not fit, even in part, within the Rule, and (b) the prosecution should be granted the opportunity to argue that the admission of the statements constituted harmless error; and (3) the remaining three Justices are of the opinion that (a) Rule 804(b)(3) permits admission of statements related to self-inculpatory statements, provided that the related statements are not so self-serving as to render them unreliable and they were not made under circumstances where it was likely that the declarant had a significant motivation to obtain favorable treatment, and (b) the case should be remanded to permit application of this analysis to the statements admitted under the Rule. [Per all members of the court.] *Williamson v United States* (US) 129 L Ed 2d 476, 114 S Ct 2431.

Rights of accused in narcotics prosecution were not violated by trial court's allowing admission of tape recording consisting of most, but not all, of defendant's inculpatory statement to police where only reason entire statement was not taped was that defendant had started to make his statement before officer could get to his tape recorder, and both officers present at time statement was made testified as to what defendant said prior to start of taping. *State v Peterson* (1993, La App 4th Cir) 619 So 2d 786.

Footnotes

Footnote 34. *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *People v Popescue*, 345 Ill 142, 177 NE 739, 77 ALR 1199.

As to confessions, generally, see §§ 708 et seq.

Footnote 35. *Wilson v United States*, 162 US 613, 40 L Ed 1090, 16 S Ct 895.

Verbal confessions or admissions made in the presence of a single witness constitute

unsatisfactory evidence and are to be received with great caution, but where they are deliberately made and precisely identified, they often afford very satisfactory evidence. *Beckwith v Bean*, 98 US 266, 8 Otto 266, 25 L Ed 124.

Footnote 36. *State v Roland*, 336 Mo 563, 79 SW2d 1050, 102 ALR 601.

Footnote 37. *Commonwealth v Turner*, 389 Pa 239, 133 A2d 187; *Collins v Commonwealth*, 123 Va 815, 96 SE 826.

Footnote 38. *Jaynes v People*, 44 Colo 535, 99 P 325; *Thomas v State*, 186 Md 446, 47 A2d 43, 167 ALR 390.

Footnote 39. *People v Gukouski*, 250 Ill 231, 95 NE 153; *State v Logner*, 266 NC 238, 145 SE2d 867, cert den 384 US 1013, 16 L Ed 2d 1032, 86 S Ct 1983; *Berry v State*, 4 Okla Crim 202, 111 P 676; *State v Rogoway*, 45 Or 601, 78 P 987, mod on other grounds 45 Or 611, 81 P 234; *Espitia v State*, 199 Tenn 696, 288 SW2d 731.

Footnote 40. As to admissibility of confessions, generally, see § 754.

Footnote 41. *United States v Anthony* (DC Pa) 145 F Supp 323; *Thomas v State*, 186 Md 446, 47 A2d 43, 167 ALR 390; *Thomas v State*, 186 Md 446, 47 A2d 43, 167 ALR 390; *Berry v State*, 4 Okla Crim 202, 111 P 676; *State v Rogoway*, 45 Or 601, 78 P 987, mod 45 Or 611, 81 P 234; *Espitia v State*, 199 Tenn 696, 288 SW2d 731; *State v Ashdown*, 5 Utah 2d 59, 296 P2d 726, affd 357 US 426, 2 L Ed 2d 1443, 78 S Ct 1354.

The circumstances surrounding the making of the confession are admissible as bearing on the weight to which the confession is entitled. *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820.

The unreliability of a confession, in view of the fact that the accused has an intelligence quotient of 47, placing him in the classification of a 6- or 7-year-old child, is properly addressed to the weight to be given his statements by the jury. *State v Bailey*, 233 La 40, 96 So 2d 34, 69 ALR2d 340.

Forms: Instruction—Jury's consideration of confession or admission of defendant. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 367-370.

Footnote 42. *Wilson v United States*, 162 US 613, 40 L Ed 1090, 16 S Ct 895; *Sparf v United States*, 156 US 51, 39 L Ed 343, 15 S Ct 273; *Beckwith v Bean*, 98 US 266, 8 Otto 266, 25 L Ed 124; *Brown v State*, 135 Fla 30, 184 So 518.

Footnote 43. *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820; *Ellis v State*, 65 Miss 44, 3 So 188.

A confession admitted in evidence by the court may not be rejected as incompetent by the jury, but each party has the right to present to the jury the same facts and circumstances previously presented to the court for their decision on the question of competency and all other circumstances having legal bearing on the confession's credibility or effect, and if, in view of all the facts and circumstances proved, the jury entertains a reasonable doubt as to the truth of the confession, they may disregard it as being incredible. *Schaffer v United States* (CA5 Fla) 221 F2d 17, 54 ALR2d 820.

Footnote 44. § 714.

Footnote 45. *Burnett v People*, 204 Ill 208, 68 NE 505; *State v Edwards*, 211 NC 555, 191 SE 1.

The truth of exculpatory matter in an admission of one accused of crime, which is introduced in evidence by the state, must be presumed unless its falsity is shown. *Forrester v State*, 93 Tex Crim 415, 248 SW 40, 26 ALR 537, appeal after remand 109 Tex Crim 361, 4 SW2d 966.

Footnote 46. *Commonwealth v Trefethen*, 157 Mass 180, 31 NE 961; *Ellis v State*, 65 Miss 44, 3 So 188; *State v Strain (Franklin Co)* 84 Ohio App 229, 39 Ohio Ops 289, 52 Ohio L Abs 533, 82 NE2d 109; *Jones v State*, 29 Tex App 20, 13 SW 990.

Forms: Instruction—Jury's consideration of confession or admission of defendant—Right of jury to accept part and reject part of pretrial statement. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 370.

Footnote 47. *People v Luis*, 158 Cal 185, 110 P 580.

Footnote 48. *State v Lu Sing*, 34 Mont 31, 85 P 521.

Footnote 49. *Descrippo v State*, 8 Ala App 85, 62 So 1004.

Footnote 50. § 746.

Footnote 51. *People v Dorman*, 28 Cal 2d 846, 172 P2d 686; *Lindsey v State*, 66 Fla 341, 63 So 832; *Burns v State*, 188 Ga 22, 2 SE2d 627; *People v Cox*, 383 Ill 617, 50 NE2d 758; *State v Alexander*, 215 La 245, 40 So 2d 232; *State v Anderson*, 247 Minn 469, 78 NW2d 320; *State v Gear*, 28 Minn 426, 10 NW 472; *State v Isom*, 243 NC 164, 90 SE2d 237, 69 ALR2d 358; *Ritchie v State*, 164 Tex Crim 38, 296 SW2d 551.

Where the trial court had made its finding that a defendant, who had given a statement to police while under sedation at a hospital, had made the statement voluntarily, the fact of the drug induced intoxication was to be left with the jury as a factor in their determination of whether the defendant's statement was entitled to weight and credibility. *Willis v State (Ala App)* 342 So 2d 802, cert den (Ala) 342 So 2d 806.

Defendant's admissions while under the influence of alcohol or drugs that he killed the victim amounted to a confession that required corroboration to support defendant's murder conviction. *State v Origer (Iowa App)* 418 NW2d 368, appeal after remand (Iowa App) 495 NW2d 132.

§ 1472 Corroboration of confessions; corpus delicti rule

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Most jurisdictions apply the corpus delicti rule regarding corroboration of extrajudicial confessions: a naked extrajudicial confession of guilt by one accused of crime, uncorroborated by any other evidence, is not sufficient to warrant or sustain a conviction. 52 Thus, by requiring independent evidence of the corpus delicti—or the body or substance, of the crime charged 53—the rule operates to establish the foundation for admission of the defendant's extrajudicial confession. 54 Once proof of the corpus delicti has been offered and the defendant's confession admitted, the confession may be considered in determining all elements of the charged offense that have been established. 55 The corroborative evidence rule addresses itself to whether a crime charged was committed and not to whether the particular defendant committed it. 56

Some jurisdictions have codified this common law confession-corroboration rule. 57 A typical example proscribes conviction of any offense solely upon evidence of a confession or admission made by the defendant without additional proof that the offense charged has been committed. There must be some evidence apart from defendant's confession or admission to establish that the offense charged has been committed, and it is not enough that the additional proof partially corroborates the truthfulness of the confession. The confession may, however, be used as a key or clue to the explanation of circumstances, which, when so explained, establish the criminal act. Under this statute, no additional proof need connect to defendant with the crime, and evidence in addition to the confession is sufficient even though it fails to exclude every reasonable hypothesis except guilt. 58

◆ Caution: The corpus delicti rule no longer exists in the federal system. 59 The rule in the federal courts is that the corroborative evidence need not be sufficient, independent of the accused's extrajudicial confession statements, to establish the corpus delicti. Rather, the prosecution must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement, the independent evidence serving a dual function, namely, tending to make the admission reliable, thus corroborating it, while also establishing independently the other necessary elements of the offense. 60

§ 1472 ----Corroboration of confessions; corpus delicti rule [SUPPLEMENT]

Practice Aids: Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact. 33 ALR5th 571.

Case authorities:

The corpus delicti rule for confessions did not apply in a capital sentencing proceeding to render inadmissible defendant's uncorroborated statement to a witness that the victim had died a slow and painful death where defendant's plea of guilty to first-degree murder established that a crime had been committed. *State v Lee* (1994) 335 NC 244, 439 SE2d 547.

Footnotes

Footnote 52. *Pate v State*, 36 Ala App 688, 63 So 2d 223; *McKenzie v State* (Alaska App) 776 P2d 351; *State v Villalobos Alvarez* (App) 155 Ariz 244, 745 P2d 991; *Thomas v State*, 295 Ark 29, 746 SW2d 49, post-conviction proceeding (Ark) 1989 Ark LEXIS 192; *People v Corrales*, 34 Cal 2d 426, 210 P2d 843; *People v Cox* (4th Dist) 221 Cal App 3d 980, 270 Cal Rptr 730; *Martinez v People*, 129 Colo 94, 267 P2d 654; *State v Harris*, 215 Conn 189, 575 A2d 223; *Nelson v State* (Sup) 50 Del 96, 123 A2d 859; *Solar v United States* (Mun Ct App Dist Col) 94 A2d 34, 35 ALR2d 1039; *Farinas v State* (Fla) 569 So 2d 425, 15 FLW S 555; *Frazier v State* (Fla) 107 So 2d 16; *Jefferies v State*, 92 Ga App 483, 88 SE2d 713; *State v Hale*, 45 Hawaii 269, 367 P2d 81; *People v Stevens* (4th Dist) 188 Ill App 3d 865, 136 Ill Dec 433, 544 NE2d 1208; *Willoughby v State* (Ind) 552 NE2d 462; *Bynum v State* (Ind App) 498 NE2d 108; *State v Saltzman*, 241 Iowa 1373, 44 NW2d 24; *State v Jones*, 150 Me 242, 108 A2d 261; *Woods v State*, 315 Md 591, 556 A2d 236; *Wood v State*, 192 Md 643, 65 A2d 316; *People v Mumford*, 171 Mich App 514, 430 NW2d 770; *Steward v State* (Miss) 32 So 2d 791; *State v Frentzel* (Mo App) 730 SW2d 554; *Vanderheiden v State*, 156 Neb 735, 57 NW2d 761; *Gallegos v State*, 152 Neb 831, 43 NW2d 1, affd 342 US 55, 96 L Ed 86, 72 S Ct 141; *Sefton v State*, 72 Nev 106, 295 P2d 385, cert den 352 US 954, 1 L Ed 2d 244, 77 S Ct 329; *State v Pickard*, 104 NH 11, 177 A2d 401; *State v Lucas*, 30 NJ 37, 152 A2d 50; *State v Carter*, 58 NM 713, 275 P2d 847; *People v Lipsky*, 57 NY2d 560, 457 NYS2d 451, 443 NE2d 925, reconsideration den 58 NY2d 824 and appeal after remand (4th Dept) 103 App Div 2d 1033, 478 NYS2d 441; *State v Van Hook*, 39 Ohio St 3d 256, 530 NE2d 883, reh den 40 Ohio St 3d 711, 534 NE2d 851 and stay gr 41 Ohio St 3d 708, 534 NE2d 1207 and cert den 489 US 1100, 103 L Ed 2d 944, 109 S Ct 1578, reh den 490 US 1077, 104 L Ed 2d 657, 109 S Ct 2094 and stay vac 42 Ohio St 3d 713, 538 NE2d 1066; *Lankister v State* (Okla Crim) 298 P2d 1088; *State v Schleigh*, 210 Or 155, 310 P2d 341; *Commonwealth v DiSabatino*, 399 Pa Super 1, 581 A2d 645, app den 527 Pa 629, 592 A2d 1297; *State v Boswell*, 73 RI 358, 56 A2d 196; *State v Blocker*, 205 SC 303, 31 SE2d 908; *State v Albright* (SD) 418 NW2d 292; *Witham v State*, 191 Tenn 115, 232 SW2d 3; *Carr v State*, 158 Tex Crim 337, 255 SW2d 870; *State v Goyet*, 120 Vt 12, 132 A2d 623; *Pepoon v Commonwealth*, 192 Va 804, 66 SE2d 854; *State v Cobelli*, 56 Wash App 921, 788 P2d 1081.

As to weight and sufficiency of evidence of corpus delicti, see § 1477.

Law Reviews: Choo, Confessions and Corroborations: A Comparative Perspective. 1991 Crim LR 867 (1991).

Footnote 53. *Government of Virgin Islands v Harris* (CA3 VI) 938 F2d 401, 33 Fed Rules Evid Serv 598.

Footnote 54. *People v Mattson*, 50 Cal 3d 826, 268 Cal Rptr 802, 789 P2d 983, reh den, stay gr (Cal) 1990 Cal LEXIS 4943 and cert den 498 US 1017, 112 L Ed 2d 595, 111 S Ct 591, reh den 498 US 1116, 112 L Ed 2d 1110, 111 S Ct 1028.

Footnote 55. *People v Mattson*, 50 Cal 3d 826, 268 Cal Rptr 802, 789 P2d 983, reh den, stay gr (Cal) 1990 Cal LEXIS 4943 and cert den 498 US 1017, 112 L Ed 2d 595, 111 S Ct 591, reh den 498 US 1116, 112 L Ed 2d 1110, 111 S Ct 1028.

As to the sufficiency of corroborating evidence, see § 1473.

Footnote 56. *Slaughter v Commonwealth* (Ky) 744 SW2d 407, cert den 490 US 1113, 104 L Ed 2d 1036, 109 S Ct 3174, reh den 492 US 932, 106 L Ed 2d 626, 110 S Ct 11.

Footnote 57. *Hickerson v State*, 196 Ark 497, 118 SW2d 671; *Grimes v State*, 204 Ga 854, 51 SE2d 797; *State v Webb*, 239 Iowa 693, 31 NW2d 337 (holding that the statute requiring corroboration is a substantial restatement of the common-law rule); *Commonwealth v Hicks*, 118 Ky 637, 82 SW 265; *State v McClain*, 208 Minn 91, 292 NW 753; *People v Lipsky*, 57 NY2d 560, 457 NYS2d 451, 443 NE2d 925, reconsideration den 58 NY2d 824 and appeal after remand (4th Dept) 103 App Div 2d 1033, 478 NYS2d 441; *People v Teeter*, 308 NY 852, 126 NE2d 182; *People v Cuzzo*, 292 NY 85, 54 NE2d 20; *State v Jordan*, 146 Or 504, 26 P2d 558, adhered to 146 Or 524, 30 P2d 751.

Footnote 58. *People v Lipsky*, 57 NY2d 560, 457 NYS2d 451, 443 NE2d 925, reconsideration den 58 NY2d 824 and appeal after remand (4th Dept) 103 App Div 2d 1033, 478 NYS2d 441.

Footnote 59. *United States v Kerley* (CA7 Wis) 838 F2d 932, mod on other grounds, reh gr, in part (CA7) 1988 US App LEXIS 4813.

Footnote 60. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308.

For further discussion of the corpus delicti doctrine and the trustworthiness doctrine, see § 753.

§ 1473 --Sufficiency of corroboration

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In those instances in which corroboration of a confession is required, 61 the corroborative evidence must consist of facts or circumstances appearing in evidence which are independent of and consistent with the confession and which tend to confirm and strengthen it. 62 While it is undisputed that there must be some evidence of probative value aside from the admission that the crime charged was committed, the courts do not agree as to the quantum of evidence necessary to corroborate a confession. Some courts require slight 63 or prima facie corroborating evidence. 64 Thus, the evidence independent of the confession need not be full and complete, 65 but is sufficient if it merely fortifies the truth of the confession without independently establishing the crime charged. 66 One statutory formulation of the corpus delicti rule is satisfied by the production of some proof, of whatever weight, that a crime was committed by someone, and conduct of defendant indicating a consciousness of guilt, such as presence at the scene, proof of motive or flight. 67

Other courts maintain that the corroborating evidence must be substantial 68 or clear and convincing. 69

Where evidence corroborating a confession is required, the corroborating evidence must relate to, and tend to establish, the corpus delicti. 70 In some jurisdictions the rule is that corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti. 71 In other jurisdictions, independent proof of all elements of the corpus delicti is not required before resort to a confession. But rather, a confession may be relied on to meet and remedy a deficiency otherwise existing in the proof of the corpus delicti if the trustworthiness of the confession appears to be assured by circumstances shown by substantial independent evidence. 72 Furthermore, a complete confession need not be corroborated by independent evidence of all or any of the elements of the crime, but may be sufficiently substantiated by independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession. 73

In general, corroboration of an accused's extrajudicial confession need not, to justify a conviction, consist of evidence sufficient to prove the offense beyond a reasonable doubt, 74 or even by a preponderance of the evidence, 75 as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that the defendant is guilty. In other words, the corroborating evidence need not be such as, independently of the confession, would warrant a conviction, 76 nor need it be conclusive in character. 77 In fact, direct and positive proof of the corpus delicti, independently of the confession, is not essential, 78 and circumstantial evidence may constitute a sufficient corroboration of a confession. 79 The jury should first pass upon the sufficiency of the evidence of the corpus delicti, and if it satisfies them beyond a reasonable doubt that a crime has been committed, then they are at liberty to give the confession such weight as it is entitled to, taking into view the circumstances surrounding it and the extent to which it has been corroborated. 80

The courts agree that evidence in corroboration of a confession need not connect the defendant with the crime charged, and that such connection can be shown by the confession without corroboration on that point. 81 A confession may sustain a conviction where there is other evidence sufficient to show the commission of the crime by someone. 82

§ 1473 --Sufficiency of corroboration [SUPPLEMENT]

Practice Aids: Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact. 33 ALR5th 571.

Case authorities:

Evidence in addition to confession need not exclude every reasonable hypothesis other than guilt and is sufficient if it demonstrates conduct indicating consciousness of guilt, such as presence at crime scene, motive or flight. *People v Washington* (1992, 1st Dept) 184 AD2d 451, 585 NYS2d 407, app den 80 NY2d 911, 588 NYS2d 836, 602 NE2d 244.

Footnotes

Footnote 61. § 1472.

Footnote 62. *People v Lueder*, 3 Ill 2d 487, 121 NE2d 743; *Bergen v People*, 17 Ill 426; *People v Lytton*, 257 NY 310, 178 NE 290, 79 ALR 503.

Footnote 63. *People v Corrales*, 34 Cal 2d 426, 210 P2d 843; *State v McQuinn*, 361 Mo 631, 235 SW2d 396; *Vanderheiden v State*, 156 Neb 735, 57 NW2d 761; *State v Bushey*, 148 Vt 197, 531 A2d 902; *State v Blay*, 77 Vt 56, 58 A 794; *Watkins v Commonwealth*, 238 Va 341, 385 SE2d 50, cert den 494 US 1074, 108 L Ed 2d 798, 110 S Ct 1797; *Campbell v Commonwealth*, 194 Va 825, 75 SE2d 468.

Footnote 64. *People v Cox* (4th Dist) 221 Cal App 3d 980, 270 Cal Rptr 730; *People v Smith*, 72 Cal App 2d Supp 875, 164 P2d 857; *Woods v State*, 315 Md 591, 556 A2d 236; *State v Lutes*, 38 Wash 2d 475, 230 P2d 786.

Footnote 65. *Woods v State*, 315 Md 591, 556 A2d 236.

Footnote 66. *Fallada v Dugger* (CA11 Fla) 819 F2d 1564.

Footnote 67. *People v Lipsky*, 57 NY2d 560, 457 NYS2d 451, 443 NE2d 925, reconsideration den 58 NY2d 824 and appeal after remand (4th Dept) 103 App Div 2d 1033, 478 NYS2d 441.

Footnote 68. *Solar v United States* (Mun Ct App Dist Col) 94 A2d 34, 35 ALR2d 1039 (stating that if there is substantial evidence of the corpus delicti, independent of the confession, and the two together are convincing beyond a reasonable doubt of the defendant's guilt, that is sufficient); *State v Webb*, 239 Iowa 693, 31 NW2d 337 (under statute); *State v Dixon*, 80 Mont 181, 260 P 138.

Footnote 69. *State v Ferry*, 2 Utah 2d 371, 275 P2d 173.

Comment After *State v Ferry*, *State v Weldon* suggested, in dicta, a trustworthiness standard; *State v Johnson* discussed that proposition but ultimately agreed with *Ferry* that the clear and convincing standard was applicable.

Footnote 70. *Wong Sun v United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407; *Evans v United States* (CA10) 122 F2d 461, cert den 314 US 698, 86 L Ed 558, 62 S Ct 478; *Bradford v State*, 104 Ala 68, 16 So 107; *Frazier v State* (Fla) 107 So 2d 16; *Poythress v State*, 95 Ga App 124, 97 SE2d 165; *Brown v State*, 239 Ind 184, 154 NE2d 720, cert den 361 US 936, 4 L Ed 2d 360, 80 S Ct 375; *State v Saltzman*, 241 Iowa 1373, 44 NW2d 24; *Bollinger v State*, 208 Md 298, 117 A2d 913; *State v Robinson* (App, Scioto Co) 83 Ohio L Abs 259, 168 NE2d 328; *State v Schleigh*, 210 Or 155, 310 P2d 341; *Gray v Commonwealth*, 101 Pa 380; *State v Bates*, 76 SD 23, 71 NW2d 641; *Nichols v State*, 200 Tenn 65, 289 SW2d 849; *Harkey v State*, 90 Tex Crim 212, 234 SW 221, 17 ALR 1276.

Where a confession has been found to have been the candid, honest admission of the accused, defendant may be legally convicted upon it, provided the corpus delicti has been established. *People v Ramirez*, 101 Cal App 2d 50, 224 P2d 878.

Even two positive confessions of guilt would not be sufficient to authorize a conviction of a crime in the absence of independent proof of the corpus delicti. *Bines v State*, 118 Ga 320, 45 SE 376.

As to the weight and sufficiency of evidence to prove corpus delicti, see §§ 1476 et seq.

Footnote 71. *Solar v United States* (Mun Ct App Dist Col) 94 A2d 34, 35 ALR2d 1039; *Ridgell v United States* (Mun Ct App Dist Col) 54 A2d 679; *Robinson v State*, 71 Okla Crim 75, 108 P2d 196.

The proof to establish all the elements of the corpus delicti must be from a source or sources other than the confession; in the absence of extraneous evidence of all elements of the corpus delicti, the proof is insufficient to corroborate the confession. *Grimes v State*, 204 Ga 854, 51 SE2d 797.

Footnote 72. *State v Hale*, 45 Hawaii 269, 367 P2d 81; *State v Yoshida*, 44 Hawaii 352, 354 P2d 986; *Brower v State*, 217 Miss 425, 64 So 2d 576.

Footnote 73. *Smoot v United States*, 114 US App DC 154, 312 F2d 881.

Footnote 74. *Opper v United States*, 348 US 84, 99 L Ed 101, 75 S Ct 158, 45 ALR2d 1308; *Brown v State*, 239 Ind 184, 154 NE2d 720, cert den 361 US 936, 4 L Ed 2d 360, 80 S Ct 375; *Commonwealth v Harrison*, 241 Ky 88, 43 SW2d 354; *People v Mumford*, 171 Mich App 514, 430 NW2d 770; *State v Scarberry* (Scioto Co) 114 Ohio App 85, 18 Ohio Ops 2d 394, 180 NE2d 631.

An accused cannot be convicted on his confession alone; in addition, there must be independent, clear, and convincing evidence of the corpus delicti, although it is not required that it be convincing beyond a reasonable doubt. *State v Ferry*, 2 Utah 2d 371, 275 P2d 173.

◆ Comment: After *State v Ferry*, *State v Weldon* suggested, in dicta, a trustworthiness standard; *State v Johnson* discussed that proposition but ultimately agreed with *Ferry* that the clear and convincing standard was applicable.

As to the proof beyond a reasonable doubt standard, in general, see § 168.

Footnote 75. *United States v Calderon*, 348 US 160, 99 L Ed 202, 75 S Ct 186, 54-2 USTC ¶ 9712, 46 AFTR 962; *Woods v State*, 315 Md 591, 556 A2d 236; *State v Bushey*, 148 Vt 197, 531 A2d 902.

As to the proof by a preponderance of the evidence standard, see § 157.

Footnote 76. *Evans v United States* (CA10) 122 F2d 461, cert den 314 US 698, 86 L Ed 558, 62 S Ct 478; *People v Corrales*, 34 Cal 2d 426, 210 P2d 843; *Brower v State*, 217 Miss 425, 64 So 2d 576.

Supporting evidence, though small in amount, may be sufficient to establish the corpus delicti if, when considered in connection with the confession or admission, it satisfies the trier of fact beyond a reasonable doubt that the offense charged was committed and that the accused committed it. *Woods v State*, 315 Md 591, 556 A2d 236.

Footnote 77. *People v Cullen*, 37 Cal 2d 614, 234 P2d 1; *State v Webb*, 239 Iowa 693, 31 NW2d 337.

Footnote 78. *People v Jones*, 26 Ill 2d 381, 186 NE2d 246; *Pierce v State*, 227 Md 221, 175 A2d 743; *Davis v State*, 202 Md 463, 97 A2d 303; *People v Cuzzo*, 292 NY 85, 54 NE2d 20; *State v Goyet*, 120 Vt 12, 132 A2d 623.

Corroborative evidence is adequate if it is sufficient to warrant the reasonable inference that the crime charged was actually committed by some person. *State v Hernandez*, 83 Ariz 279, 320 P2d 467.

Footnote 79. *Bolland v United States* (CA4 SC) 238 F 529; *State v Hernandez*, 83 Ariz 279, 320 P2d 467; *State v Harris*, 215 Conn 189, 575 A2d 223; *State v Tillman*, 152 Conn 15, 202 A2d 494; *Solar v United States* (Mun Ct App Dist Col) 94 A2d 34, 35 ALR2d 1039; *Brown v State*, 239 Ind 184, 154 NE2d 720, cert den 361 US 936, 4 L Ed 2d 360, 80 S Ct 375; *Allen v State*, 230 Miss 740, 93 So 2d 844; *State v Frentzel* (Mo App) 730 SW2d 554; *People v Curro* (2d Dept) 161 App Div 2d 784, 556 NYS2d 364, app den 76 NY2d 855, 560 NYS2d 994, 561 NE2d 894; *State v Bates*, 76 SD 23, 71 NW2d 641; *Watkins v Commonwealth*, 238 Va 341, 385 SE2d 50, cert den 494 US 1074, 108 L Ed 2d 798, 110 S Ct 1797.

As to proof of the corpus delicti by circumstantial evidence, in general, see § 1477.

Footnote 80. *Commonwealth v Bishop*, 285 Pa 49, 131 A 657; *Commonwealth v Puglise*, 276 Pa 235, 120 A 401.

Footnote 81. *Fisher v United States* (CA8 Minn) 324 F2d 775, cert den 377 US 999, 12 L Ed 2d 1049, 84 S Ct 1935, reh den 379 US 873, 13 L Ed 2d 81, 85 S Ct 24; *Cutchlow v United States* (CA9 Or) 301 F2d 295; *State v Romo*, 66 Ariz 174, 185 P2d 757; *Paulino v People*, 113 Colo 180, 155 P2d 609; *State v Berkowitz*, 24 Conn Supp 112, 1 Conn Cir 439, 186 A2d 816, certif dismd 150 Conn 712, 204 A2d 933; *McVeigh v State*, 205 Ga 326, 53 SE2d 462; *People v Lueder*, 3 Ill 2d 487, 121 NE2d 743; *Williams v Commonwealth*, 306 Ky 225, 206 SW2d 922 (under statute); *State v Zaritz*, 235 Neb 599, 456 NW2d 479; *Wilshusen v State*, 149 Neb 594, 31 NW2d 544; *Sefton v State*, 72 Nev 106, 295 P2d 385, cert den 352 US 954, 1 L Ed 2d 244, 77 S Ct 329; *State v Ravenell*, 43 NJ 171, 203 A2d 13, cert den 379 US 982, 13 L Ed 2d 572, 85 S Ct 690; *People v Curro* (2d Dept) 161 App Div 2d 784, 556 NYS2d 364, app den 76 NY2d 855, 560 NYS2d 994, 561 NE2d 894; *Nixon v State*, 159 Tex Crim 548, 266 SW2d 150.

A statute providing that the confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that the offense was committed, requires other proof of the corpus delicti, rather than of defendant's connection with the commission of the alleged crime. *State v Webb*, 239 Iowa 693, 31 NW2d 337.

It is not necessary that a confession be corroborated by independent proof in all its details and particulars. *McVeigh v State*, 205 Ga 326, 53 SE2d 462.

Footnote 82. *Mouser v State*, 215 Ark 131, 219 SW2d 611; *Wahl v State*, 229 Ind 521, 98 NE2d 671; *State v Dupepe* (Mo) 241 SW2d 4; *State v James*, 96 NJL 132, 114 A 553, 16 ALR 1141; *People v Cuzzo*, 292 NY 85, 54 NE2d 20 (holding that there must be some

additional proof, of whatever weight, that the crime was in fact committed by someone); Riddle v State, 97 Okla Crim 206, 261 P2d 469; Yancy v State, 149 Tex Crim 566, 197 SW2d 361.

Where a crime involves physical damage to personal property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable, but where the crime involves no tangible corpus delicti, the corroborative evidence must implicate the accused in order to show that the crime has been committed. Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.

§ 1474 --Sexual offenses

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The rule that a mere or naked confession, uncorroborated by any circumstances inspiring belief in the truth of the confession, is not sufficient to warrant a conviction of the accused, 83 has been held or assumed to apply in prosecutions for sexual offenses. 84 In order to sustain a conviction for a sexual crime, there must be independent proof of the corpus delicti. 85 The independent proof may be either direct or circumstantial. 86

Footnotes

Footnote 83. § 1472.

Footnote 84. Matthews v State, 55 Ala 187; Skaggs v State, 88 Ark 62, 113 SW 346; Bergen v People, 17 Ill 426; State v Cardwell, 90 Kan 606, 135 P 597; State v Morgan, 157 La 962, 103 So 278, 40 ALR 458; Nolan v State, 60 Tex Crim 5, 129 SW 1108.

Footnote 85. State v Morgan, 157 La 962, 103 So 278, 40 ALR 458.

In a prosecution for sexual battery and lewd assault, proof of the corpus delicti was necessary as a prerequisite for admission of confession of defendant. State v Ochoa (Fla App D3) 576 So 2d 854, 16 FLW D 757.

Footnote 86. Harris v State, 72 Fla 128, 72 So 520.

As to direct and circumstantial evidence, in general, see § 1467.

§ 1475 --Judicial confessions

[View Entire Section](#)

The rule that a confession does not warrant a conviction unless corroborated is generally held applicable to extrajudicial confessions only, 87 and not, in the absence of statutes to the contrary, to judicial confessions. 88 Some jurisdictions have recognized this rule by legislative enactment. 89

Footnotes

Footnote 87. § 1472.

Footnote 88. *Skaggs v State*, 88 Ark 62, 113 SW 346; *People v Barker*, 60 Mich 277, 27 NW 539; *State v Dena*, 28 NM 479, 214 P 583.

As to judicial and extrajudicial confessions, see § 711.

As to admissibility, generally, of judicial confessions, see § 715.

Footnote 89. *Knowles v State*, 113 Ark 257, 168 SW 148; *Skaggs v State*, 88 Ark 62, 113 SW 346; *People v Lewis*, 260 NY 171, 183 NE 353, 86 ALR 1001, cert den and app dismd 289 US 709, 77 L Ed 1464, 53 S Ct 786; *People v Rogers*, 192 NY 331, 85 NE 135.

4. Evidence of Corpus Delicti [1476, 1477]

§ 1476 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The corpus delicti rule requires that the corpus delicti or the body or substance of the crime charged be proved independently from an accused's extrajudicial confession or admissions. 90 The corpus delicti of a crime consists of two elements: (1) the fact of the injury or loss or harm, and (2) the existence of a criminal agency as its cause. 91 When there is any evidence, direct or circumstantial, tending to establish the corpus delicti, the question of its sufficiency and weight is for the finder of fact, 92 and there must be sufficient proof of both elements of the corpus delicti 93 beyond a reasonable doubt. 94

Footnotes

Footnote 90. § 1472.

Footnote 91. *People v Jennings*, 53 Cal 3d 334, 279 Cal Rptr 780, 807 P2d 1009, 91

CDOS 2576, 91 Daily Journal DAR 4222, reh den, cert den (US) 116 L Ed 2d 462, 112 S Ct 443; *People v Jennings*, 53 Cal 3d 334, 279 Cal Rptr 780, 807 P2d 1009, 91 CDOS 2576, 91 Daily Journal DAR 4222, reh den, cert den (US) 116 L Ed 2d 462, 112 S Ct 443; *People v Pensinger*, 52 Cal 3d 1210, 278 Cal Rptr 640, 805 P2d 899, 91 CDOS 1514, 91 Daily Journal DAR 2504, mod 53 Cal 3d 729a, 91 Daily Journal DAR 4745 and stay gr (Cal) 1991 Cal LEXIS 3318 and reh den, cert den (US) 116 L Ed 2d 290, 112 S Ct 351, 91 Daily Journal DAR 12909, reh den (US) 116 L Ed 2d 821, 112 S Ct 923; *State v Pullos*, 76 Idaho 369, 283 P2d 590; *People v Friedland* (1st Dist) 202 Ill App 3d 1094, 148 Ill Dec 415, 560 NE2d 1012; *Brown v State*, 239 Ind 184, 154 NE2d 720, cert den 361 US 936, 4 L Ed 2d 360, 80 S Ct 375; *Joseph v State*, 236 Ind 529, 141 NE2d 109, 69 ALR2d 824, cert dismd 359 US 117, 3 L Ed 2d 673, 79 S Ct 720; *People v Aiken*, 66 Mich 460, 33 NW 821; *People v Gould*, 156 Mich App 413, 402 NW2d 27; *State v Simler*, 350 Mo 646, 167 SW2d 376; *State v Hill*, 47 NJ 490, 221 A2d 725; *State v Robinson* (App, Scioto Co) 83 Ohio L Abs 259, 168 NE2d 328; *State v Brown*, 103 SC 437, 88 SE 21.

Footnote 92. *Knight v State* (Ala App) 548 So 2d 647; *People v Jennings*, 53 Cal 3d 334, 279 Cal Rptr 780, 807 P2d 1009, 91 CDOS 2576, 91 Daily Journal DAR 4222, reh den, cert den (US) 116 L Ed 2d 462, 112 S Ct 443; *Ausmus v People*, 47 Colo 167, 107 P 204; *State v Hale*, 45 Hawaii 269, 367 P2d 81.

As to proof of the corpus delicti by circumstantial evidence, see § 1477.

Footnote 93. *Sanders v State*, 167 Ala 85, 52 So 417; *People v King*, 213 Cal 89, 1 P2d 15; *State v Sullivan*, 34 Idaho 68, 199 P 647, 17 ALR 902; *State v Hill*, 47 NJ 490, 221 A2d 725; *State v Brown*, 103 SC 437, 88 SE 21.

Footnote 94. § 174.

§ 1477 Proof by circumstantial evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The general rule is that direct and positive proof of the corpus delicti is not essential and that all the elements may be proved by presumptive or circumstantial evidence. 95

It would be unreasonable always to require direct and positive evidence, for crimes are naturally committed at chosen times, in darkness and secrecy. 96 But circumstantial proof of the corpus delicti must be acted on with caution. 97

Footnotes

Footnote 95. *Perovich v United States*, 205 US 86, 51 L Ed 722, 27 S Ct 456; *St. Clair v United States*, 154 US 134, 38 L Ed 936, 14 S Ct 1002; *Rifle v King* (ND W Va) 302 F Supp 992; *Evans v United States* (CA10) 122 F2d 461, cert den 314 US 698, 86 L Ed 558, 62 S Ct 478; *Knight v State* (Ala App) 548 So 2d 647; *People v Pensinger*, 52 Cal 3d 1210, 278 Cal Rptr 640, 805 P2d 899, 91 CDOS 1514, 91 Daily Journal DAR 2504,

mod 53 Cal 3d 729a, 91 Daily Journal DAR 4745 and stay gr (Cal) 1991 Cal LEXIS 3318 and reh den, cert den (US) 116 L Ed 2d 290, 112 S Ct 351, 91 Daily Journal DAR 12909, reh den (US) 116 L Ed 2d 821, 112 S Ct 923; People v Spencer, 60 Cal 2d 64, 31 Cal Rptr 782, 383 P2d 134, cert den 377 US 1007, 12 L Ed 2d 1055, 84 S Ct 1924; State v Kari, 26 Conn App 286, 600 A2d 1374, app gr, in part 221 Conn 910, 602 A2d 9, app dismd 222 Conn 539, 608 A2d 92; Sochor v State (Fla) 580 So 2d 595, 16 FLW S 297, motion gr, cert gr, in part (US) 116 L Ed 2d 455, 112 S Ct 436 and vacated, remanded (US) 119 L Ed 2d 326, 112 S Ct 2114, 92 CDOS 4787, 92 Daily Journal DAR 7598, 6 FLW Fed S 323, on remand (Fla) 619 So 2d 285, 18 FLW S 273, cert den (US) 126 L Ed 2d 596, 114 S Ct 638, reh den (US) 127 L Ed 2d 452, 114 S Ct 1142; Shuler v State (Fla) 132 So 2d 7; Rowe v State (Fla) 84 So 2d 709; People v Stell (3d Dist) 223 Ill App 3d 531, 165 Ill Dec 907, 585 NE2d 638; Brown v State, 239 Ind 184, 154 NE2d 720, cert den 361 US 936, 4 L Ed 2d 360, 80 S Ct 375; Harkrader v State (Ind App) 553 NE2d 1231; Bynum v State (Ind App) 498 NE2d 108; State v Saltzman, 241 Iowa 1373, 44 NW2d 24; People v Mumford, 171 Mich App 514, 430 NW2d 770; State v Simler, 350 Mo 646, 167 SW2d 376; State v German, 54 Mo 526; State v Stimmel (Mo App) 800 SW2d 156; State v Webber, 112 Mont 284, 116 P2d 679, 136 ALR 1077; State v Curtis (App, Franklin Co) 83 Ohio L Abs 25, 167 NE2d 359; Rawlings v State (Okla Crim) 740 P2d 153; Hilyard v State, 90 Okla Crim 435, 214 P2d 953, 28 ALR2d 961; Commonwealth v Boden, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US 846, 5 L Ed 2d 70, 81 S Ct 89; State v Owens, 293 SC 161, 359 SE2d 275, cert den 484 US 982, 98 L Ed 2d 495, 108 S Ct 496, later proceeding (SC) 424 SE2d 473, cert den (US) 123 L Ed 2d 482, 113 S Ct 1861; State v Ervin (Tenn Crim) 731 SW2d 70; McCallum v State, 160 Tex Crim 173, 267 SW2d 823; Williams v State, 156 Tex Crim 636, 245 SW2d 709; Wright v Commonwealth, 245 Va 177, 427 SE2d 379, petition for certiorari filed (May 27, 1993).

Corpus delicti of a killing may be proved by circumstantial evidence by proof of (1) means, (2) motive, (3) time and place, and (4) conduct of the defendant. Beasley v Holland (SD W Va) 649 F Supp 561, dismd without op (CA4 W Va) 841 F2d 1122, cert den 488 US 860, 102 L Ed 2d 127, 109 S Ct 156.

Footnote 96. Campbell v People, 159 Ill 9, 42 NE 123.

Footnote 97. State v Barnes, 47 Or 592, 85 P 998.

5. Identification [1478-1484]

a. In General [1478]

§ 1478 Generally; proof by circumstantial evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

It is not essential that an identifying witness make a positive identification or be free from doubt as to the correctness of the identification for the evidence of the identity of the accused as the person who committed the crime to be sufficient. Rather, uncertainty in identification is a matter of weight and witness credibility for the trier of fact to consider in reaching a determination. 98 The trier of fact may infer identification from all the facts and circumstances in evidence, 99 and the prosecution may establish the identity of the defendant entirely by circumstantial evidence. 1 The defendant may be identified, for example, by proof of any peculiarity of size, appearance, voice, features, or clothing. 2

Indefiniteness and uncertainty in testimony affect its weight, and testimony relative to identification of the accused will have greater or less weight according to the opportunity that the witness had for observation, 3 including the length of time which a victim had to observe an offender, lighting conditions, and other factors affecting visibility. 4 Further, when identification of the defendant depends solely on eyewitness testimony, any emotion, such as extreme fright, experienced by the witness during the criminal ordeal might lessen the value of the witness' later identification of the accused. 5

An extrajudicial identification of a defendant as a perpetrator of a crime, that cannot be confirmed by identification at the trial, is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime. Thus, a juvenile court erred in entering an order adjudging a minor to be a ward of the court upon a finding that he committed assault with a deadly weapon, where the only evidence connecting the minor with the charged assault was the victim's extrajudicial identification of the minor as the assailant, and where the victim could not identify the minor as the assailant at trial. 6

§ 1478 ----Generally; proof by circumstantial evidence [SUPPLEMENT]

Case authorities:

Evidence that defendant, charged with mailing threatening communication, had on another occasion called police chief's home and uttered threat and that police chief subsequently received in mail dead and badly mutilated pig, was admissible on issue of defendant's identity; defendant had identified himself in phone call, his fingerprints were on package, and he testified that he owned pig carcass. *United States v Pratt* (1996, CA1 NH) 73 F3d 450.

Evidence that defendant, charged with mailing threatening communication, had on another occasion called police chief's home and uttered threat and that police chief subsequently received in mail dead and badly mutilated pig, was admissible on issue of defendant's identity; defendant had identified himself in phone call, his fingerprints were on package, and he testified that he owned pig carcass. *United States v Pratt* (1996, CA1 NH) 73 F3d 450.

Procedure in which victim was first shown surveillance photograph of defendant and then shown photographic array including defendant's photograph, and from which victim selected defendant's photo, was not unduly suggestive. *People v Davis* (1993, Colo App) 851 P2d 239, cert den (Colo) 1993 Colo LEXIS 793.

Two robbery victims' identification testimony was admissible, although procedure

employed by police in showing victims photographs for possible identification was unduly suggestive, since identifications were reliable, in that victims had been inside car that defendant had entered in order to rob car's occupants, so that victims had opportunity to observe defendant during commission of crime. *State v Felder* (1995) 39 Conn App 840, 668 A2d 382, app den 236 Conn 906, 670 A2d 1306.

In capital murder prosecution, trial court did not err in admitting, during guilt-innocence phase, "Identikit" sketch of man wearing sunglasses who resembled defendant where, during trial, defendant's only objection to admission of this evidence was that detective who identified sketch was unauthorized to do so due to lack of knowledge of "Identikits," but detective identified sketch in question as one made at his request by another detective who was certified to do so. *Burgess v State* (1994) 264 Ga 777, 450 SE2d 680, 94 Fulton County D R 3985, reconsideration den (Dec 20, 1994) and petition for certiorari filed (Mar 17, 1995).

People proved defendant's identity as perpetrator based on victims' identifications, although victims testified that perpetrators wore masks which partially obscured their faces, where (1) victims observed several of defendant's facial features for 20 to 45 minutes from distance of 4 feet in well-lighted room, (2) mask worn by defendant had eyes cut out above brow and to cheekbones and full mouth from lips to chin, (3) defendant's eyes, bushy eyebrows, and full lips were visible, and (4) victims identified defendant in lineup in which participants were seated and covered with sheet that revealed only their faces. *People v Coico* (1989, 2d Dept) 156 AD2d 578, 549 NYS2d 86, app den 75 NY2d 867, 553 NYS2d 299, 552 NE2d 878.

Arresting officer did not impermissibly bolster identification testimony of undercover officer where arresting officer never testified that undercover officer made drive-by confirmation of defendant's identity, but instead related circumstances leading to defendant's arrest and informed jury that arrest was based solely on radio description transmitted, not on his personal observation of incident. *People v Acevedo* (1992, 1st Dept) 181 AD2d 596, 581 NYS2d 334, app den 79 NY2d 1045, 584 NYS2d 1013, 596 NE2d 411.

Court's charge regarding identification of defendant as person who committed charged offenses was proper where jury was instructed to consider all circumstances surrounding crime in determining whether witnesses' identification testimony was credible. *People v Hoytt* (1992, 2d Dept) 184 AD2d 659, 587 NYS2d 166, app den 80 NY2d 930, 589 NYS2d 858, 603 NE2d 963.

There is no "trained officer exception" to sanctions against potentially erroneous or tainted identifications of criminal defendants. *People v Munroe* (1992, 3d Dept) 185 AD2d 530, 586 NYS2d 420.

The victim's identification of defendant as the driver of the vehicle from which the codefendant shot at the victim was not inherently incredible so as to require the dismissal of charges against defendant for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property where the victim testified that she met defendant in the summer of 1992, she had seen him twenty to twenty-five times before the incident in May 1993, and when she pulled alongside the codefendant's vehicle, she noticed defendant looking at her from the driver's side. *State v Beasley* (1995) 118 NC App 508, 455 SE2d 880.

Defendant was entitled to new trial since conviction was based solely on victim's identification testimony and defendant was unfairly prejudiced by testimony which bolstered victim's identification where police officer testified that he arrested defendant after victim identified him and after ensuring that victim was certain of her identification. *People v Bell* (1989, 2d Dept) 155 AD2d 471, 547 NYS2d 567.

Footnotes

Footnote 98. *People v Jenkins* (Colo App) 768 P2d 727.

A witness need not describe the offender with complete accuracy; some inconsistencies between defendant's description of himself and complainant's description are minor and have no impact on the sufficiency of complainant's identification. *People v Kinzer* (1st Dist) 214 Ill App 3d 790, 158 Ill Dec 361, 574 NE2d 155 (criticized on other grounds by *People v Lopez* (1st Dist) 216 Ill App 3d 83, 159 Ill Dec 577, 576 NE2d 246) and (criticized on other grounds by *People v Chandler* (1st Dist) 218 Ill App 3d 97, 161 Ill Dec 28, 578 NE2d 155) and app den 146 Ill 2d 640, 176 Ill Dec 811, 602 NE2d 465.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Footnote 99. *Butler v United States* (CA8 ND) 317 F2d 249, 6 ALR3d 582, cert den 375 US 836, 11 L Ed 2d 65, 84 S Ct 67 and cert den 375 US 838, 11 L Ed 2d 65, 84 S Ct 77; *Womack v State*, 301 Ark 193, 783 SW2d 33; *People v Brengard*, 265 NY 100, 191 NE 850, 93 ALR 1465; *Commonwealth v Boden*, 399 Pa 298, 159 A2d 894, 88 ALR2d 223, cert den 364 US 846, 5 L Ed 2d 70, 81 S Ct 89.

Footnote 1. *Womack v State*, 301 Ark 193, 783 SW2d 33; *People v Barnum* (4th Dist) 147 Cal App 2d 803, 305 P2d 986; *State v Mecum*, 225 Neb 293, 404 NW2d 431.

Footnote 2. *People v Van De Wouwer*, 91 Cal App 2d 633, 205 P2d 693.

As to voice identification, see § 1481.

Annotation: Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair, 23 ALR4th 1199.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

Footnote 3. *Warren v State*, 103 Ark 165, 146 SW 477; *People v Kramer*, 103 Cal App 2d 35, 229 P2d 53; *Small v State*, 165 Neb 381, 85 NW2d 712, 70 ALR2d 984.

Identification by voice alone was insufficient evidence to convict for bank robbery. *Reamer v United States* (CA6 Mich) 229 F2d 884.

The weight of the testimony relative to identification is a question for the trier of fact. *People v Houser*, 85 Cal App 2d 686, 193 P2d 937.

The resolving of any discrepancies in the testimony as to the defendant's identity and his

presence at the time of the offense, in a narcotics case, is a factual question for the jury. *People v Ramirez* (4th Dist) 163 Cal App 2d 590, 329 P2d 499.

Footnote 4. *Battle v State* (Ala App) 574 So 2d 943, reh den, without op (Ala App) 1990 Ala Crim App LEXIS 2018, cert den (Ala) 1991 Ala LEXIS 153.

Annotation: Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases, 23 ALR4th 1089.

Footnote 5. *Harper v Kelly* (CA2 NY) 916 F2d 54, 31 Fed Rules Evid Serv 469, cert den 499 US 943, 113 L Ed 2d 459, 111 S Ct 1403, further stating that a jury's conclusions might be affected by whether an eyewitness remained calm during the robbery and had a good look at the perpetrator or was so frightened that he could not do so.

Footnote 6. *In re G.*, 25 Cal 3d 543, 159 Cal Rptr 180, 601 P2d 196.

b. Courtroom Identification [1479, 1480]

§ 1479 Generally; necessity

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In the absence of statute, one accused of a crime may be sufficiently identified by the uncorroborated testimony of the prosecuting witness, provided that the commission of the offense has first been established. 7 Courtroom identification is not necessary, however, when the evidence is sufficient to permit the inference that the defendant on trial is the person who committed the acts charged. 8

§ 1479 ----Generally; necessity [SUPPLEMENT]

Case authorities:

U.S. customs agent's in-court identification of defendant charged with possessing cocaine with intent to distribute and testimony that defendant's physical appearance was no longer same was highly probative since it corroborated other trial testimony that government witness had seen defendant and two others together at airport and it was defendant's atypical appearance which had attracted witness's attention to trio. *United States v Cotto-Aponte* (1994, CA1 Puerto Rico) 30 F3d 4.

Footnotes

Footnote 7. *La Vigne v Commonwealth* (Ky) 353 SW2d 376, 92 ALR2d 988; *Henderson*

v State, 85 Neb 444, 123 NW 459.

Annotation: Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases, 23 ALR4th 1089.

Footnote 8. United States v Morrow (CA4 NC) 925 F2d 779 (criticized on other grounds by United States v Naghdi (CA9) 1992 US App LEXIS 1401); United States v Capozzi (CA8 Mo) 883 F2d 608, 28 Fed Rules Evid Serv 898, reh den, en banc (CA8) 1989 US App LEXIS 15565 and cert den 495 US 918, 109 L Ed 2d 310, 110 S Ct 1947.

Defendant in a RICO case claimed that the evidence against him was insufficient because no one specifically identified him in court; that is, no one said that he, the man in the courtroom was the same man about whom the witnesses were talking. The defendant, however, had the same name, "Jake," as the person indicted and about whom the witnesses spoke; the defendant stipulated that he received salary payments as Revere Police Chief, as did the man discussed by the witnesses; and all the witnesses saw the defendant in court and heard him referred to by his name and no one denied the identity. United States v Doherty (CA1 Mass) 867 F2d 47, cert den 492 US 918, 106 L Ed 2d 590, 109 S Ct 3243, later proceeding (DC Mass) 729 F Supp 165.

Where appellant did not take the stand, and no witness physically indicated his presence in the courtroom, there was sufficient evidence to identify appellant as the accused because appellant was the sole defendant on trial, the jury could clearly infer that the Stanley Lingar referred to by the witnesses was the defendant present in the court, and a coparticipant in the crime and a man intimately acquainted with appellant referred to appellant by name throughout his testimony. State v Lingar (Mo) 726 SW2d 728, cert den 484 US 872, 98 L Ed 2d 157, 108 S Ct 206.

Annotation: Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

§ 1480 Identification by single eyewitness

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Absent physical impossibility or inherent improbability, the testimony of a single eyewitness, 9 if it is positive and credible 10 and believed by the jury beyond a reasonable doubt, is sufficient to establish identity 11 and support a criminal conviction 12 even if it is contradicted by the accused 13 or alibi testimony. 14 The victim's testimony alone is also sufficient to establish the defendant's presence at the crime scene. 15 The sufficiency of identification evidence is a question for the trier of fact, and discrepancies in identification simply present a question of the credibility of the witness and the weight to be given to the testimony. 16 In assessing the sufficiency of the evidence, the trier of fact should consider:

- (1) the opportunity of the witness to view the criminal at the time of the crime,
- (2) the witness's degree of attention,
- (3) the accuracy of the witness's prior description of the criminal,
- (4) the level of certainty demonstrated by the witness at the confrontation, and
- (5) the length of time between the crime and the confrontation. 17

§ 1480 ----Identification by single eyewitness [SUPPLEMENT]

Practice Aids: Effects of witnessing conditions and expert witness testimony on credibility of an eyewitness, 8 Am J Forens Psychol 4:11 (1990).

Deja vu all over again: Elliott's critique of eyewitness experts, 18 Law & Hum Beh 203 (1994).

Footnotes

Footnote 9. People v Allen (2nd Dist) 165 Cal App 3d 616, 211 Cal Rptr 837 (criticized on other grounds by People v Berry (2nd Dist) 17 Cal App 4th 332, 21 Cal Rptr 2d 299, 93 CDOS 5547, 93 Daily Journal DAR 9403); People v Slim, 127 Ill 2d 302, 130 Ill Dec 250, 537 NE2d 317; State v Myles (La App 1st Cir) 616 So 2d 754, cert den (La) 629 So 2d 369.

Footnote 10. People v Henne (4th Dist) 165 Ill App 3d 315, 116 Ill Dec 296, 518 NE2d 1276 (further stating that conviction cannot be based on a vague, doubtful or uncertain identification).

Footnote 11. State v Little (Mo App) 795 SW2d 95.

Footnote 12. People v Allen (2nd Dist) 165 Cal App 3d 616, 211 Cal Rptr 837 (criticized on other grounds by People v Berry (2nd Dist) 17 Cal App 4th 332, 21 Cal Rptr 2d 299, 93 CDOS 5547, 93 Daily Journal DAR 9403).

Footnote 13. People v Henne (4th Dist) 165 Ill App 3d 315, 116 Ill Dec 296, 518 NE2d 1276.

Law Reviews: Wilcox, Symposium on Eyewitness Identification Testimony. 8 U Brdgprt LR 1 (1987).

Footnote 14. People v Slim, 127 Ill 2d 302, 130 Ill Dec 250, 537 NE2d 317.

As to the alibi defense, see § 1496.

Footnote 15. State v Chism (Mo App) 799 SW2d 151.

As to presence at crime scene alone as insufficient to support conviction, see § 1465.

Footnote 16. *People v Slim*, 127 Ill 2d 302, 130 Ill Dec 250, 537 NE2d 317; *People v McKinley* (1st Dist) 242 Ill App 3d 124, 182 Ill Dec 186, 609 NE2d 720, app den 153 Ill 2d 566, 191 Ill Dec 625, 624 NE2d 813.

Uncertainty in identification is a matter of weight and witness credibility to be considered by the jury in reaching its determination. *People v Jenkins* (Colo App) 768 P2d 727.

Where witness initially described defendant as having dark or brown hair and brown eyes at the time of the offense, when he in fact had green eyes and gray or graying hair, these discrepancies go only to the weight of the witness's testimony and do not render the identification insufficient as a matter of law. *People v McCall* (2d Dist) 190 Ill App 3d 483, 137 Ill Dec 438, 546 NE2d 62, app den 129 Ill 2d 569, 140 Ill Dec 677, 550 NE2d 562.

Footnote 17. *State v Myers* (Minn App) 413 NW2d 122, mod, en banc (Minn) 416 NW2d 736.

c. Other Evidence of Identification [1481-1484]

§ 1481 Voice identification

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

In many cases, a victim of a crime is able to identify the defendant only by recognition of the defendant's voice. Voice identification is acceptable and sufficient to support a conviction where the victim has a prior familiarity with the defendant's voice or where the voice has clearly recognizable peculiarities. 18 For example, the voice identification of the defendant was not so inherently unreliable that it raised substantial doubts as to guilt, even though the victim never saw the face of the assailant at time of the attack and drank a considerable amount of alcohol on the night of the crime, where the defendant was the neighbor of the victim for over five years, they visited each others' homes on several occasions, spoke with each other, and had drinks together. 19

In the absence of the two requirements for identification based solely on voice identification, voice identification can support a conviction where additional circumstantial evidence corroborates the voice identification to provide a sufficient evidentiary basis to permit the matter to go to the jury on the question of whether the defendant was the person who committed the crime. 20 A rape and burglary victim's recognition and identification of defendant by his voice, for example, together with defendant's confession, and several articles seized from his residence and identified as connected with the crime, was sufficient to identify defendant as perpetrator of crime. 21

Some courts appear to apply a totality of the circumstances test in which voice identification of the defendant by the victim is weighed in conjunction with other

evidence of identification. 22 For example, a burglary victim's voice identification of the defendant was reliable under the totality of the circumstances where the defendant had talked incessantly during his confrontation with the victim and the victim further identified other physical characteristics of the defendant. 23

Telephone conversations with the defendant and sound recordings of defendant's voice may also be the basis of a voice identification. Communications by telephone are admissible in evidence where otherwise relevant to the facts in issue. The identity of the caller may be established by circumstantial evidence, such as if the party calling, in addition to a statement of his identity, relates facts and circumstances, which, taken with other established facts, tend to reveal his identity. 24 A witness may also identify a speaker on transcripts of tape-recorded telephone conversations as the defendant. 25

§ 1481 ----Voice identification [SUPPLEMENT]

Case authorities:

Two bank tellers' identification of defendant's voice as that of bank robber was properly admitted since robber had tellers' undivided attention during robbery with shouted commands and threats while armed, both had opportunity during defendant's first trial to hear him speak, both testified, based on his unusual voice and accent, that his was voice of robber, neither teller equivocated in identification of voice, and identifications occurred just three months after robbery., *United States v Duran* (1993, CA9 Wash) 4 F3d 800, 93 CDOS 6779, 93 Daily Journal DAR 11575, cert den (US) 1994 US LEXIS 1084.

In prosecution for sexual assault and criminal restraint, pretrial voice lineup at which victim identified defendant's voice was not impermissibly suggestive, where voice array included six voices, several of which sounded similar to defendant's voice, each reciting identical nursery rhymes; voice identification was otherwise reliable under totality of circumstances, where victim had ample opportunity to listen to her attacker's voice since she engaged him in conversation by asking him questions, she said she listened to his voice intently hoping that she could later identify him, she described attacker's voice to police, pretrial voice identification occurred only a few days after incident, and victim never equivocated in her identification of defendant's voice as voice of assailant. *State v Gallagher* (1995, App Div) 286 NJ Super 1, 668 A2d 55.

Footnotes

Footnote 18. *White v State*, 303 Ark 30, 792 SW2d 867; *Delatorre v State* (Ind) 544 NE2d 1379; *State v Worthen* (La App 3d Cir) 550 So 2d 399; *State v Booker* (Utah) 709 P2d 342 (ovrld on other grounds by *State v Long* (Utah) 721 P2d 483, 36 Utah Adv Rep 11) as stated in *State v Jonas* (Utah) 725 P2d 1378, 42 Utah Adv Rep 27.

Annotation: Admissibility and weight of voiceprint evidence, 97 ALR3d 294.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Identification of accused by his voice, 70 ALR2d 995.

Footnote 19. *People v Nunn* (1st Dist) 101 Ill App 3d 983, 57 Ill Dec 478, 428 NE2d 1158.

Victim's identification of defendant by his voice, which she recognized immediately due to her prior employment of him and his mother, together with other evidence, was sufficient to authorize a rational trier of fact to convict defendant of rape, aggravated sodomy, and burglary. *Clark v State*, 186 Ga App 882, 369 SE2d 282.

Footnote 20. *State v Booker* (Utah) 709 P2d 342 (ovrld on other grounds by *State v Long* (Utah) 721 P2d 483, 36 Utah Adv Rep 11) as stated in *State v Jonas* (Utah) 725 P2d 1378, 42 Utah Adv Rep 27.

Footnote 21. *State v Trent* (La App 3d Cir) 517 So 2d 1053.

Footnote 22. *State v Gilbert* (La App 5th Cir) 520 So 2d 1184, appeal after remand (La App 5th Cir) 535 So 2d 1313; *State v Seaton* (Mo App) 674 SW2d 214.

Footnote 23. *State v Hoffpauir*, 44 Wash App 195, 722 P2d 113, review den 107 Wash 2d 1003.

Testimony of 16-year-old rape victim and her 19-year-old sister who shared bed in bedroom of mobile home, that they identified defendant as their attacker by his voice, and that they had known defendant for years and recognized his voice because he had been married to their aunt, together with other evidence, was sufficient to support conviction of rape and burglary. *Seagraves v State*, 191 Ga App 207, 381 SE2d 523.

Voice identification of defendant by victim of rape, armed robbery, home invasion, and burglary, together with victim's son's identification of defendant from photograph, and defendant's identification by accomplice, was sufficient to support conviction. *People v Dunn* (1st Dist) 160 Ill App 3d 11, 111 Ill Dec 867, 513 NE2d 113, app den 117 Ill 2d 548, 115 Ill Dec 404, 517 NE2d 1090, habeas corpus proceeding (ND Ill) 1990 US Dist LEXIS 36.

Identity of defendant was proved beyond reasonable doubt where victim testified that, even though her attacker attempted to disguise his voice, she recognized it to be that of defendant with whom she had been speaking only hours earlier, and she was able to give general description which fit defendant. *People v Alston* (2d Dept) 134 App Div 2d 433, 521 NYS2d 56, app dismd without op 71 NY2d 966, 529 NYS2d 77, 524 NE2d 431 and cert den 488 US 832, 102 L Ed 2d 66, 109 S Ct 90.

Footnote 24. *State v Nickles* (Utah) 728 P2d 123, 43 Utah Adv Rep 20.

Footnote 25. *United States v Cooke* (CA6 Ohio) 795 F2d 527 (stating that the voice on wiretap recordings was properly identified as that of the defendant by the testimony of an FBI special agent that he had heard defendant speak in open court in Florida and Ohio and was satisfied that voice on tape was defendant's).

The jury could confirm the witness' identification where the witness testified that he was present when the voice exemplar of defendant was taken; that he had examined the voice exemplars of other key speakers; that he had heard the defendant and other key speakers

speak in person several times; that he was able to recognize the speakers' voices on tapes by relying on such factors as tone, diction, accent, and speed of delivery; and where the speakers often identified themselves in the course of call. *United States v Rengifo* (CA1 Mass) 789 F2d 975, 20 Fed Rules Evid Serv 1259.

Law Reviews: Carr, Voices, Tests, and Technology: Evidence Law Confronts Tapes and Their Transcriptions. 35 St. LU LJ 289 (Winter, 1991).

§ 1482 Fingerprints and palmprints

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Evidence of fingerprint or palmprint identification may be sufficient to support a conviction in a criminal prosecution. 26 Fingerprint evidence is circumstantial evidence which attempts to connect the defendant to the offense alleged. Fingerprint evidence alone is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could have only been made at the time of the commission of the crime. 27 Therefore, the unexplained presence of the defendant's fingerprint at or near the apparent point of entry in an apartment is proof of the commission of the offense by the defendant. But, the defendant will not be proved guilty beyond a reasonable doubt where—

—the fingerprint can reasonably be explained by the presence of the defendant in the apartment at some other time;

—the state fails to establish that the defendant had not been in the apartment at any other time than at the time of the crime's commission; or

—the state fails to demonstrate that the object upon which the fingerprint is found has never been removed from the apartment, so that the defendant could not have touched it even though he has never been authorized to enter the apartment. 28 Slight blurrings or imperfections in the fingerprints, preventing positive identification, will not affect the sufficiency of the proof to support a conviction where there is other evidence tending to connect the defendant with the crime. 29

It should be noted that while the a defendant's fingerprints at the scene of a crime is evidence that defendant was present at the scene, where defendant's prints are not found, the converse is not proved. That is, their absence does not conclusively show that defendant was not present at the scene, because there are many other explanations for their absence, such as the presence of other prints, or that the prints were smeared, or imperfect police lifting procedures. 30

The weight to be given evidence of the correspondence of fingerprints and palmprints, where offered to prove the identity of the accused as the person committing a crime, is for the determination of the jury in the light of all the surrounding facts and circumstances. 31 Thus, it is for the jury to determine the weight to be given testimony

of qualified experts, 32 and the inability of the prosecution to establish the twelve-point comparison used by the F.B.I. goes to the weight to be given fingerprint identification, not to its admissibility. 33

§ 1482 ----Fingerprints and palmprints [SUPPLEMENT]

Case authorities:

The State submitted substantial evidence of circumstances from which the jury could find in a prosecution for murder, burglary, robbery, and attempted rape that defendant's fingerprints could only have been impressed at the time the crimes charged were committed where the State's evidence showed that the victim was wearing her eyeglasses all day on the day the crimes were committed; the victim was studying or reading most of that day; she was reading when the group left at around 10:00 p.m. for a party, leaving her alone in the apartment; the furniture was in order and the victim was sitting on the sofa with her eyeglasses on, reading the newspaper when the group left the apartment; when the group returned approximately an hour later, the apartment was in disarray, the victim's lifeless body was lying on the floor away from the sofa, which had been moved, and her eyeglasses were on the coffee table; no one else was in the apartment; and defendant's fingerprint was found on the inside lens of the victim's eyeglasses. This evidence, disclosing the circumstances under which the eyeglasses were found, when combined with other testimony placing defendant in the vicinity of the victim's apartment, constitutes substantial evidence from which the jury could find that defendant's fingerprints could only have been impressed on the lens between the hours of 10:00 p.m. and 11:05 p.m. Since the evidence also showed that the crimes were committed during the same period, the fingerprint evidence logically tends to show that defendant was present and participated in the commission of the crimes. *State v Montgomery* (1995) 341 NC 553, 461 SE2d 732.

Footnotes

Footnote 26. *State v Carter*, 118 Ariz 562, 578 P2d 991; *People v Rodis* (3rd Dist) 145 Cal App 2d 44, 301 P2d 886; *Jamison v State*, 209 Tenn 426, 354 SW2d 252; *Briones v State* (Tex Crim) 363 SW2d 466.

Practice References Evidentiary value of prints, impressions, and other marks (fingerprints). 1 Am Jur Trials 555, Locating and Preserving Evidence §§ 101-120.

Footnote 27. *Pierce v State*, 145 Ga App 569, 244 SE2d 87; *People v White* (2d Dist) 241 Ill App 3d 291, 181 Ill Dec 746, 608 NE2d 1220; *People v King* (3d Dist) 135 Ill App 3d 152, 90 Ill Dec 274, 481 NE2d 1074; *People v King* (3d Dist) 88 Ill App 3d 548, 43 Ill Dec 937, 410 NE2d 1070; *State v White* (La App 2d Cir) 430 So 2d 171, cert den (La) 433 So 2d 1055 and cert den (La) 433 So 2d 1055; *Colvin v State*, 299 Md 88, 472 A2d 953, cert den 469 US 873, 83 L Ed 2d 155, 105 S Ct 226, post-conviction proceeding 314 Md 1, 548 A2d 506, later proceeding 332 Md 144, 630 A2d 725, petition for certiorari filed (Dec 10, 1993); *People v Himmelein*, 177 Mich App 365, 442 NW2d 667, app den 434 Mich 903, reconsideration den 435 Mich 879 and cert den 498 US 1096, 112 L Ed 2d 1070, 111 S Ct 985 and (criticized on other grounds by *People v Leary*, 198 Mich App 282, 497 NW2d 922); *State v Stewart* (Mo App) 615 SW2d 600, later

proceeding (Mo App) 679 SW2d 883 and habeas corpus proceeding (WD Mo) 1989 US Dist LEXIS 2610; *People v Pena* (2d Dept) 99 App Div 2d 846, 472 NYS2d 156; *Commonwealth v Price*, 278 Pa Super 255, 420 A2d 527; *State v Horton*, 170 W Va 395, 294 SE2d 248.

To sustain a conviction based solely on fingerprint evidence, the state must prove, to the exclusion of every other reasonable hypothesis, that the defendant's fingerprints found at the crime scene could only have been impressed there when the crime was committed.

Tyler v State, 198 Ga App 685, 402 SE2d 780, 102-49 Fulton County D R 19B.

In order to sustain a conviction solely on fingerprint evidence, the attendant circumstances must establish that the object upon which the prints were found was generally inaccessible to the defendant; thus, a jury could rationally find beyond a reasonable doubt the object had been touched during the commission of the crime. *State v Watson*, 224 NJ Super 354, 540 A2d 875, cert den 111 NJ 620, 546 A2d 537 and cert den 488 US 983, 102 L Ed 2d 566, 109 S Ct 535.

Fingerprint evidence, although circumstantial in nature, is sufficient proof if it leads to a conclusion of guilt beyond a reasonable doubt and excludes every hypothesis of innocence. *People v Murray* (2d Dept) 168 App Div 2d 572, 562 NYS2d 788.

In order for fingerprint evidence alone to sustain a conviction, the jury must determine that the fingerprints could only have been impressed during the commission of the crime. *State v Kyger* (Tenn Crim) 787 SW2d 13, reh den (Tenn Crim) 1989 Tenn Crim App LEXIS 757, post-conviction proceeding (Tenn Crim) 1993 Tenn Crim App LEXIS 224.

Footnote 28. *J.C. v State* (Fla App D3) 377 So 2d 731; *People v King* (3d Dist) 88 Ill App 3d 548, 43 Ill Dec 937, 410 NE2d 1070; *State v White*, 67 NC App 348, 312 SE2d 712.

Conviction of housebreaking was reversed where only evidence linking defendant to crime was his fingerprints on ordinary glass jar found at scene of crime, and the prosecution introduced no evidence indicating that jars were otherwise inaccessible to defendant. *Borum v United States*, 127 US App DC 48, 380 F2d 595.

Presence of defendant's fingerprint on steam iron whose cord was used to strangle murder victim was insufficient to support defendant's conviction for murder where there was evidence that defendant had been in victim's apartment some time prior to murder and state did not rule out possibility that print could have been impressed on iron at time other than when crime was committed. *People v Donahue* (1st Dist) 50 Ill App 3d 392, 8 Ill Dec 472, 365 NE2d 710.

Evidence was sufficient to justify inference by jury that palmprint found on telephone receiver ripped from wall during armed robbery of restaurant was left by defendant at time of crime where testimony by defendant that he used telephone while making job application one day prior to robbery was rebutted by testimony of restaurant personnel that no one applied for job during month robbery occurred, and that telephone had been cleaned minutes before robbery occurred. *State v Crawford* (Mo) 619 SW2d 735.

Footnote 29. *Moon v State*, 22 Ariz 418, 198 P 288, 16 ALR 362, upholding a conviction notwithstanding that the impressions of the index and little fingers were blurred beyond possibility of identification, and the print of the middle finger was blurred

at the center, where the print of the third finger was exceptionally perfect, and there was other evidence tending to prove that the defendant had committed the burglary in question.

Evidence that partial fingerprint had been lifted from hall in victim's apartment and that victim had never authorized defendant to enter her apartment, together with evidence of defendant's access to apartment through attic, presence of defendant's baseball cap in attic, and fact that victim's windows and doors were found to be locked shortly after burglary was sufficient to support conviction for attempted simple burglary of inhabited dwelling. *State v Scott* (La App 5th Cir) 461 So 2d 426.

Footnote 30. *United States v Dove* (CA2 Conn) 916 F2d 41.

Footnote 31. *Mason v Commonwealth* (Ky) 357 SW2d 667; *Breeding v State*, 220 Md 193, 151 A2d 743; *State v Tew*, 234 NC 612, 68 SE2d 291; *State v Helms*, 218 NC 592, 12 SE2d 243; *Rushing v State*, 88 Okla Crim 82, 199 P2d 614; *Jamison v State*, 209 Tenn 426, 354 SW2d 252.

The evidence of experts as to the identity of latent and actual fingerprints is a proper subject for the consideration of a jury, and the weight to be given such testimony is for the jury to determine. *People v Willis*, 60 Mich App 154, 230 NW2d 353.

Footnote 32. *People v Willis*, 60 Mich App 154, 230 NW2d 353, stating that five points of similarity between latent fingerprint and known fingerprint was not insufficient as matter of law where authorities differ on question of minimum standard and where defense failed to raise contention at trial and develop it through expert testimony.

Footnote 33. *People v Gomez*, 189 Colo 91, 537 P2d 297.

In prosecution for aggravated sexual assault, trial court did not err in admitting fingerprint evidence of 11 matching characteristics, where fingerprint expert testified that he found in excess of 20 matching points of identification but only marked 11, given that eight points of similarity were usually considered to be minimum requirement. *Vickers v State* (Tex App Beaumont) 801 SW2d 214.

§ 1483 Footprints

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The weight of evidence of the correspondence of footprints found in connection with a crime, with the track, foot, or shoe of one accused of the crime, where offered to identify the accused as the guilty person, 34 is dependent upon the circumstances of the particular case, and is a question for the trier of fact. 35 Such evidence may be very damaging to the accused when taken in connection with circumstances disclosed by following the track. 36 Similarity between footprints or tire tracks found at the scene of the crime, or leading from that place, and those of the defendant often constitutes one of a series of circumstances which is sufficient to prove that the defendant committed the

crime. 37 The absence at the scene of the crime of a defendant's bootprints does not, however, conclusively show that defendant was not present at the scene, because there are many other explanations, such as defendant's disposal of the incriminating boots. Because there are numerous possible explanations for the absence of his prints, it cannot be concluded that there is a probable inference that defendant was not at the scene. Nonetheless, their absence is circumstantial evidence in defendant's favor. 38

The lack of pictures or sketches of the prints goes to the weight, not the admissibility of the footprint comparison. 39

Footnotes

Footnote 34. For discussion of admissibility of footprints for such purpose, generally, see § 572.

Footnote 35. *Richardson v State*, 221 Ark 567, 254 SW2d 448; *People v O'Leary*, 22 Ill 2d 52, 174 NE2d 191, cert den 368 US 906, 7 L Ed 2d 100, 82 S Ct 187; *Ferrell v Commonwealth*, 177 Va 861, 14 SE2d 293; *State v Simons*, 172 Wash 438, 20 P2d 844.

Annotation: Admissibility of bare footprint evidence, 45 ALR4th 1178.

Footprints as evidence, 35 ALR2d 856.

Footnote 36. *Keller v People*, 153 Colo 590, 387 P2d 421, holding that an FBI agent's testimony that a heelprint in the burglarized premises was made by the heel of the accused's right shoe, and no other, was sufficient, when considered with other evidence, to support a burglary conviction.

Footnote 37. *People v Wynkoop* (2nd Dist) 165 Cal App 2d 540, 331 P2d 1040; *Hartlerode v State* (Ind) 470 NE2d 716; *Smith v Commonwealth* (Ky) 375 SW2d 819 (holding that an accused's footprints leading to and from the assault victim's house, together with other evidence, was sufficient to sustain a conviction); *State v Rhodes* (La App 2d Cir) 552 So 2d 585; *State v Jacques* (Me) 537 A2d 587; *State v Briner*, 173 Mont 185, 567 P2d 35; *State v Johnson*, 236 Neb 831, 464 NW2d 167; *State v Mihoy*, 98 NH 38, 93 A2d 661, 35 ALR2d 852; *State v Burclaff*, 137 Vt 354, 404 A2d 512.

Conviction of burglary of pawn shop was well supported by evidence that, in early morning hours, police officer found defendant's Volkswagen stranded in mud directly across street from pawn shop, that tire tracks identically matching those of defendant's car led directly from front of store across street to where defendant's car was stuck in ditch, and that footprints in mud led from defendant's car to spot where burglary tools were found and to spot where items identified as having come from pawn shop were found. *Elliott v State*, 193 Ga App 49, 387 SE2d 18.

There was ample evidence to support defendant's conviction where, among other evidence linking defendant to the crime, investigation revealed a set of footprints made by tennis shoes with the word TRAX on the sole leading from the edge of the burglarized building to a hole in the roof which led to the air shaft; at the time of defendant's arrest, defendant was wearing tennis shoes with the word TRAX on them and analysis found that his shoes matched the sole pattern, size, and wear pattern of the footprints found on

the roof of the building. *State v Rupprecht* (Minn App) 381 NW2d 25.

The evidence was sufficient to support a burglary conviction where officers found the shoe tracks of three persons behind the burglarized store, one set of tracks revealing three distinctive ridges on the heels which matched the accused's shoes. *Salas v State* (Tex Crim) 385 SW2d 859.

Footnote 38. *United States v Dove* (CA2 Conn) 916 F2d 41.

Footnote 39. *Burton v State* (Ind App) 564 NE2d 318, holding that the testimony of an investigating officer, that the prints in the snow leading to defendant's house from the scene of the crime matched the distinctive pattern on the bottom of tennis shoes found in defendant's room, was admissible despite the absence of photos or sketches of the print.

Practice References Evidentiary value of prints, impressions, and other marks (footprints and tire imprints). 1 Am Jur Trials 555, Locating and Preserving Evidence §§ 81-100.

Footprints. 3 Am Jur Trials 427, Preparing and Using Experimental Evidence § 53.

§ 1484 Dog tracking

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Courts adhering to the view that dog-tracking evidence is admissible concede that such evidence is to be accepted with caution and is not, under any circumstances, to be regarded as conclusive evidence of guilt. 40 Rather, it is cumulative or corroborative only, 41 and, at best, a circumstance for the trier of fact to consider in connection with all the other proof in the case, in determining the guilt or innocence of the accused. 42 The corroborating evidence necessary to support dog-tracking evidence need not, however, be evidence which independently links the defendant to the crime. It suffices if the evidence merely supports the accuracy of the dog-tracking evidence and the identification implied by it. 43

Tracking evidence is, therefore, not of itself, sufficient to support a conviction. A large majority of jurisdictions allowing introduction of dog-tracking evidence do so only after other evidence has been introduced clearly connecting the accused with commission of the crime, and courts which allow dog-tracking evidence regard its probative value with some suspicion. 44 Nor can a conviction resting in part upon bloodhound evidence be supported where the other evidence tending to show guilt is fragmentary and unsubstantial. 45

§ 1484 ----Dog tracking [SUPPLEMENT]

Case authorities:

Tracking-dog evidence was properly admitted, and sufficient in combination with other evidence to support defendant's armed robbery conviction, since after bank robbery police dogs tracked trail to ditch where defendant was found hiding in vicinity of gun used, and money stolen, in robbery. *People v Stone* (1992) 195 Mich App 600. 491 NW2d 628.

Footnotes

Footnote 40. *Brott v State*, 70 Neb 395, 97 NW 593; *State v Hunter*, 143 NC 607, 56 SE 547; *State v Dickerson*, 77 Ohio St 34, 82 NE 969.

Footnote 41. *Brott v State*, 70 Neb 395, 97 NW 593; *State v Hunter*, 143 NC 607, 56 SE 547; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *State v Loucks*, 98 Wash 2d 563, 656 P2d 480.

Due to varying skills of tracking dogs and their handlers, as well as the possibility that a jury may give more weight to dog-tracking evidence than it is entitled to, there must be other corroborating evidence presented before identification is sufficient to support a guilty verdict. *People v Laidlaw*, 169 Mich App 84, 425 NW2d 738.

The dangers inherent in the use of dog-tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime. *State v Loucks*, 98 Wash 2d 563, 656 P2d 480.

Footnote 42. *State v Adams*, 85 Kan 435, 116 P 608; *Pedigo v Commonwealth*, 103 Ky 41, 44 SW 143.

Annotation: Evidence of trailing by dogs in criminal cases, 18 ALR3d 1221.

Footnote 43. *People v Gonzales* (5th Dist) 218 Cal App 3d 403, 267 Cal Rptr 138.

Footnote 44. *Hodge v State*, 98 Ala 10, 13 So 385; *State v Adams*, 85 Kan 435, 116 P 608; *State v King*, 144 La 430, 80 So 615; *Carter v State*, 106 Miss 507, 64 So 215; *Brott v State*, 70 Neb 395, 97 NW 593; *State v Hunter*, 143 NC 607, 56 SE 547; *State v Dickerson*, 77 Ohio St 34, 82 NE 969; *Parker v State*, 46 Tex Crim 461, 80 SW 1008; *State v Loucks*, 98 Wash 2d 563, 656 P2d 480.

Footnote 45. *State v Freyer*, 330 Mo 62, 48 SW2d 894.

6. Testimony of Accomplices; Corroboration Thereof [1485-1492]

a. In General [1485, 1486]

§ 1485 Testimony, generally

The credibility of the testimony of accomplices suffers from the effect of fear, threats, hostility, motives, or hope of leniency. 46 Accomplice testimony is therefore not of the most satisfactory character 47 and the consideration of its infirmities goes to the credibility of the evidence. 48 The testimony must be closely scrutinized and accepted with caution. 49 However, although the trier of fact is to view the testimony of an accomplice with suspicion, it may nevertheless be enough to sustain a conviction, even in the absence of corroboration. 50

§ 1485 ----Testimony, generally [SUPPLEMENT]

Case authorities:

Evidence was sufficient to establish that defendants possessed cocaine Coast Guard recovered from ocean and government later submitted as evidence at trial, even without considering that defendants and their boat tested positive for cocaine after they were seized: bales observed being thrown overboard from defendants' boat were same bales later recovered by Coast Guard in vicinity where boat had been seen, crewman from navy surveillance aircraft testified that they saw people aboard defendants' boat throw bales from vessel overboard into water and that those in evidence were same ones, photographs from surveillance aircraft showed same bales in water that were present in courtroom, and crew testified that boat tried to evade it and even fired upon it, and that boat was type commonly used for drug smuggling, and cargo area of boat had been washed down with gasoline as is commonly done to eradicate traces of contraband. *United States v Romero* (1994, CA1) 32 F3d 641.

Admission of police officer's testimony that he had told defendant's 17-year-old girlfriend of defendant's affairs with other women in order to convince her to break up relationship and return home, which was offered to rebut girlfriend's trial testimony that she had lied in telling grand jury that she had seen guns and cocaine in defendant's apartment, was harmless since officer's testimony only corroborated what jury had already heard from girlfriend, though it should have been excluded as irrelevant. *United States v Thompson* (1996, CA9 Alaska) 82 F3d 849, 96 CDOS 2950, 96 Daily Journal DAR 4879.

Footnotes

Footnote 46. *People v Crump*, 5 Ill 2d 251, 125 NE2d 615, 52 ALR2d 834, appeal after remand 12 Ill 2d 402, 147 NE2d 76, cert den 357 US 906, 2 L Ed 2d 1155, 78 S Ct 1148, reh den 357 US 944, 2 L Ed 2d 1558, 78 S Ct 1382, habeas corpus proceeding (CA7 Ill) 807 F2d 1394.

As to who is an accomplice, see 21 Am Jur 2d, Criminal Law § 166.

Law Reviews: Note, Accomplice Testimony under Contingent Plea Agreements. 72 Cor LR 800 (May 1987).

Footnote 47. *People v Nitzberg*, 287 NY 183, 38 NE2d 490, 138 ALR 1253, reh den 287 NY 754, 40 NE2d 40, 138 ALR 1266.

Footnote 48. *Caminetti v United States*, 242 US 470, 61 L Ed 442, 37 S Ct 192; *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859; *State v Bailey*, 254 NC 380, 119 SE2d 165; *State v Hale*, 231 NC 412, 57 SE2d 322.

Footnote 49. *Phelps v United States* (CA5 Tex) 252 F2d 49; *United States v Lancaster* (CC Ga) 44 F 896; *Henderson v State*, 135 Fla 548, 185 So 625, 120 ALR 742; *Campbell v People*, 159 Ill 9, 42 NE 123; *State v Richardson*, 248 Mo 563, 154 SW 735; *State v Turnbow*, 67 NM 241, 354 P2d 533, 89 ALR2d 461; *State v Bailey*, 254 NC 380, 119 SE2d 165; *Whiting v State*, 48 Ohio St 220, 27 NE 96; *State v Riddell*, 38 RI 506, 96 A 531, reh den (RI) 97 A 15; *State v Gross*, 31 Wash 2d 202, 196 P2d 297.

Footnote 50. *People v Steidl*, 142 Ill 2d 204, 154 Ill Dec 616, 568 NE2d 837, cert den (US) 116 L Ed 2d 125, 112 S Ct 161.

Annotation: Propriety of specific jury instructions as to credibility of accomplices, 4 ALR3d 351.

§ 1486 Necessity of corroboration

[View Entire Section](#)
[Go to Parallel Reference Table](#)

At common law, it is well settled that the testimony of an accomplice, although entirely without corroboration, will support a verdict of conviction of one accused of crime, 51 unless the testimony of the accomplice appears on its face to be bald perjury, preposterous, or self-contradictory. 52 The common-law rule, although changed in many jurisdictions by statutes expressly declaring that the uncorroborated testimony of an accomplice cannot sustain a conviction, 53 is still applied in some jurisdictions. 54

Where the rule that an accused may not be convicted upon the uncorroborated testimony of an accomplice or accomplices in the crime prevails, the fact that the accused testifies in his own behalf does not render the rule inoperative. 55 Nor is the rule rendered inoperative where one jointly indicted with the defendant and testifying against him is acquitted by the jury, under the theory that the acquittal thereby exonerates such witness of all complicity in the crime. 56

Footnotes

Footnote 51. *Caminetti v United States*, 242 US 470, 61 L Ed 442, 37 S Ct 192; *United States v Moran* (CA2 NY) 151 F2d 661, 167 ALR 403; *United States v Fawcett* (CA3 NJ) 115 F2d 764, 132 ALR 404; *United States v Lancaster* (CC Ga) 44 F 896; *State v*

Heno, 119 Conn 29, 174 A 181, 94 ALR 696; *Jalbert v State* (Fla) 95 So 2d 589; *State v Carvelo*, 45 Hawaii 16, 361 P2d 45; *Boutwell v State*, 165 Miss 16, 143 So 479; *State v Routzahn*, 81 Neb 133, 115 NW 759; *State v Turnbow*, 67 NM 241, 354 P2d 533, 89 ALR2d 461; *State v Bailey*, 254 NC 380, 119 SE2d 165; *State v Brunette*, 28 ND 539, 150 NW 271; *State v Reichert*, 111 Ohio St 698, 2 Ohio L Abs 772, 146 NE 386; *State v Gross*, 31 Wash 2d 202, 196 P2d 297; *Sparkman v State*, 27 Wis 2d 92, 133 NW2d 776; *State v Alderilla*, 37 Wyo 478, 263 P 616.

Evidence was sufficient to sustain a conviction of conspiracy to violate the Federal Narcotic Act, based principally on the testimony of an informer who obtained the narcotics from the defendants through intermediaries. *United States v Pisano* (CA7 Ill) 193 F2d 355, 41 AFTR 476, 31 ALR2d 409.

Footnote 52. *Jahnke v State*, 68 Neb 181, 104 NW 154; *Hill v State*, 55 Tex Crim 407, 117 SW 134; *Sparkman v State*, 27 Wis 2d 92, 133 NW2d 776.

Footnote 53. *Tomlinson v United States*, 68 App DC 106, 93 F2d 652, 114 ALR 1315, cert den 303 US 642, 82 L Ed 1102, 58 S Ct 645 and cert den 303 US 646, 82 L Ed 1107, 58 S Ct 645; *McClure v State*, 214 Ark 159, 215 SW2d 524; *Perryman v State*, 63 Ga App 819, 12 SE2d 388; *People v Smith*, 55 NY2d 945, 449 NYS2d 177, 434 NE2d 246, on remand (2d Dept) 89 App Div 2d 929, 454 NYS2d 26; *Finley v State*, 84 Okla Crim 309, 181 P2d 849.

Footnote 54. *State v Hamm*, 299 NC 519, 263 SE2d 556, stating that the unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

Forms: Instruction—Jury's consideration of, and weight to be given to, testimony of accomplices. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 375.

Footnote 55. *Ripley v State*, 189 Tenn 681, 227 SW2d 26, 19 ALR2d 1347.

Footnote 56. *Ripley v State*, 189 Tenn 681, 227 SW2d 26, 19 ALR2d 1347.

b. Sufficiency of Corroboration [1487-1492]

§ 1487 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In the absence of statutory provisions on the subject, the extent and degree of corroboration of the testimony of an accomplice, where corroboration is required, rest in the discretion of the trial court and necessarily vary with the circumstances of the particular case. 57 The rule in some jurisdictions, by statute or otherwise, is that the required corroborative evidence must be evidence from an independent source of some material fact tending to show not only that the crime has been committed, but that the

defendant was implicated in its commission. 58 This rule generally prevails in jurisdictions in which corroboration of an accomplice is expressly required by statute. 59 Corroboration is not sufficient under this rule if it merely shows the commission of the offense or the circumstances of it, 60 and does not connect the defendant with the offense. 61 It is not sufficient that the accomplice be corroborated with respect to time, place and circumstances if there is nothing to connect the accused with the crime. 62 However, the rule is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime, so that the conviction does not rest entirely upon the evidence of the accomplice. 63

It is not necessary that every part of the testimony of the accomplice be corroborated, 64 so long as it is corroborated in some material fact legitimately tending to connect the defendant with the commission of the crime. 65 Nor is it necessary that the corroborating evidence be sufficient in itself to support a conviction. 66 Also, corroborating evidence need not be direct and positive; circumstantial evidence which tends to connect the defendant with the commission of the crime charged is sufficient. 67 Corroborative evidence is not sufficient if it merely raises a suspicion of the guilt of the accused. 68

According to a few decisions, the confirmation of a material part of the accomplice's testimony is a sufficient corroboration, and the corroborative evidence need not directly connect the accused with the commission of the crime. 69

Footnotes

Footnote 57. *Valdez v United States*, 244 US 432, 61 L Ed 1242, 37 S Ct 725; *People v Plath*, 100 NY 590, 3 NE 790.

Forms: Instruction—Jury's consideration of, and weight to be given to, testimony of accomplices. 8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 375.

Footnote 58. *Lindhorst v State* (Ala App) 346 So 2d 11, cert den (Ala) 346 So 2d 18; *McClure v State*, 214 Ark 159, 215 SW2d 524; *State v Fletcher*, 246 Iowa 452, 68 NW2d 99; *Powers v Commonwealth*, 110 Ky 386, 61 SW 735, supp op 110 Ky 462, 63 SW 976; *State v Ritz*, 65 Mont 180, 211 P 298; *People v Nitzberg*, 287 NY 183, 38 NE2d 490, 138 ALR 1253, reh den 287 NY 754, 40 NE2d 40, 138 ALR 1266; *State v Kent*, 4 ND 577, 62 NW 631; *Finley v State*, 84 Okla Crim 309, 181 P2d 849; *State v Reynolds*, 160 Or 445, 86 P2d 413.

Where there was no evidence other than accomplice testimony connecting the defendant with a robbery in which it was alleged that he discharged the firearm into an inhabited dwelling, the accomplice testimony was uncorroborated as a matter of law. *People v Falconer* (1st Dist) 201 Cal App 3d 1540, 248 Cal Rptr 60.

Sufficient evidence to support a jury's verdict of murder in the first degree existed where the testimony of an accomplice that defendant was one of the perpetrators was corroborated by the testimony of defendant's girlfriend as to defendant's activities and statements on the night of the murder. *Lewis v State* (Fla) 398 So 2d 432.

Footnote 59. *Green v State* (Ala App) 342 So 2d 419; *Knowles v State*, 113 Ark 257, 168

SW 148; *People v Moore* (1st Dist) 211 Cal App 2d 585, 27 Cal Rptr 526; *Powers v Commonwealth*, 110 Ky 386, 61 SW 735, supp op 110 Ky 462, 63 SW 976; *State v Yegen*, 86 Mont 251, 283 P 210; *People v Hudson*, 51 NY2d 233, 433 NYS2d 1004, 414 NE2d 385; *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086; *State v Kent*, 4 ND 577, 62 NW 631; *Cudjoe v State*, 12 Okla Crim 246, 154 P 500.

Footnote 60. *McClure v State*, 214 Ark 159, 215 SW2d 524; *Knowles v State*, 113 Ark 257, 168 SW 148; *People v O'Moore*, 83 Cal App 2d 586, 189 P2d 554; *Powers v Commonwealth*, 110 Ky 386, 61 SW 735, supp op 110 Ky 462, 63 SW 976; *State v Yegen*, 86 Mont 251, 283 P 210; *People v Bright*, 203 NY 73, 96 NE 362; *State v Kellar*, 8 ND 563, 80 NW 476; *State v Pancoast*, 5 ND 516, 67 NW 1052; *Finley v State*, 84 Okla Crim 309, 181 P2d 849; *State v Reynolds*, 160 Or 445, 86 P2d 413; *State v Phillips*, 18 SD 1, 98 NW 171; *Thorp v State*, 59 Tex Crim 517, 129 SW 607.

Footnote 61. *Nix v State*, 133 Ga App 417, 211 SE2d 26; *People v Nitzberg*, 287 NY 183, 38 NE2d 490, 138 ALR 1253, reh den 287 NY 754, 40 NE2d 40, 138 ALR 1266; *State v Reynolds*, 160 Or 445, 86 P2d 413.

Where a satchel and two hammers were found in defendant's automobile, and these were the only independent evidence linking defendant to a burglary, testimony of an alleged accomplice linking defendant to the crime was not sufficiently corroborated. *State v Fletcher*, 246 Iowa 452, 68 NW2d 99.

Footnote 62. *Nix v State*, 133 Ga App 417, 211 SE2d 26.

Footnote 63. *People v Ray* (2nd Dist) 210 Cal App 2d 697, 26 Cal Rptr 825; *State v Fletcher*, 246 Iowa 452, 68 NW2d 99; *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086; *State v Robinson*, 83 Ohio St 136, 93 NE 623; *Duff-Smith v State* (Tex Crim) 685 SW2d 26, reh den (Feb 27, 1985) and cert den 474 US 865, 88 L Ed 2d 154, 106 S Ct 186, habeas corpus den (CA5 Tex) 973 F2d 1175, reh den (CA5) 1992 US App LEXIS 30190 and cert den (US) 123 L Ed 2d 661, 113 S Ct 1958 and habeas corpus den, stay den, certif of prob cause den (CA5 Tex) 995 F2d 545, petition for certiorari filed (Jun 28, 1993) and companion case (Tex Crim) 739 SW2d 813, later proceeding (Tex Crim) 823 SW2d 232, reh gr (Apr 4, 1990) and reh overr (Tex Crim) 1992 Tex Crim App LEXIS 9, reh dismd (Feb 12, 1992); *State v Gross*, 31 Wash 2d 202, 196 P2d 297.

In determining whether the evidence is sufficient to corroborate the testimony of an accomplice witness, the proper test is whether there is evidence tending to connect the defendant with the offense committed. *Reed v State* (Tex Crim) 744 SW2d 112.

Footnote 64. *People v Moore* (1st Dist) 211 Cal App 2d 585, 27 Cal Rptr 526; *Miller v People*, 92 Colo 481, 22 P2d 626; *State v Yegen*, 86 Mont 251, 283 P 210; *State v Ritz*, 65 Mont 180, 211 P 298; *State v Gross*, 31 Wash 2d 202, 196 P2d 297.

Such evidence need not establish every element of the offense or corroborate all facts testified to by the accomplice. *People v Heishman*, 45 Cal 3d 147, 246 Cal Rptr 673, 753 P2d 629, cert den 488 US 948, 102 L Ed 2d 369, 109 S Ct 380, reh den 488 US 997, 102 L Ed 2d 593, 109 S Ct 569 and stay gr (Cal) 1989 Cal LEXIS 443.

Footnote 65. *State v Fletcher*, 246 Iowa 452, 68 NW2d 99.

Footnote 66. *Bennett v State*, 201 Ark 237, 144 SW2d 476, 131 ALR 908; *People v Melone*, 71 Cal App 2d 291, 162 P2d 505; *State v Ritz*, 65 Mont 180, 211 P 298; *People v Becker*, 215 NY 126, 109 NE 127, reh den 215 NY 721, 109 NE 1086; *State v Kent*, 4 ND 577, 62 NW 631; *State v Reynolds*, 160 Or 445, 86 P2d 413.

Evidence of footprints, testimony of persons who had seen the defendant or his vehicle in the area of the crime, and other similar testimony was sufficient corroboration to support conviction. *Currington v State* (Ala App) 342 So 2d 390, cert den (Ala) 342 So 2d 393.

Corroborative evidence may be slight and entitled to little consideration when standing alone. *People v Santo*, 43 Cal 2d 319, 273 P2d 249, cert den 348 US 959, 99 L Ed 749, 75 S Ct 451.

Footnote 67. *Leverton v State*, 23 Ariz 482, 205 P 321; *People v Moore* (1st Dist) 211 Cal App 2d 585, 27 Cal Rptr 526; *State v Fletcher*, 246 Iowa 452, 68 NW2d 99; *State v Ritz*, 65 Mont 180, 211 P 298; *State v Reynolds*, 160 Or 445, 86 P2d 413; *State v Brazell*, 126 Or 579, 269 P 884.

The evidence required to corroborate the testimony of an accomplice may be circumstantial and is sufficient, even though slight, if it tends to connect the defendant with commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth. *People v Walters* (1st Dist) 165 Cal App 2d 326, 331 P2d 1037.

Footnote 68. *People v Robinson*, 61 Cal 2d 373, 38 Cal Rptr 890, 392 P2d 970.

Footnote 69. *Hoback v United States* (CA4 Va) 296 F 5, cert den 265 US 594, 68 L Ed 1197, 44 S Ct 638; *United States v Lancaster* (CC Ga) 44 F 896; *State v Gallivan*, 75 Conn 326, 53 A 731.

§ 1488 Corroboration by objective evidence

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Objective evidence—that is, writings, tangible objects, and photographs, as distinguished from oral testimony, which tends to connect the defendant with the commission of the crime—may be sufficient corroboration of an accomplice witness under the rule 70 precluding a conviction on the uncorroborated testimony of an accomplice. 71 However, objective evidence which is dependent for its authenticity or relevancy upon the testimony of the accomplice who must be corroborated is not sufficient, for to hold otherwise would be to say that the accomplice may corroborate himself, 72 which is not permitted. 73 Thus, documents other than the purported writings of the defendant will not constitute corroborating evidence tending to connect the defendant with the commission of the crime where the only evidence of a relationship between the document and the defendant is the testimony of the accomplice who identifies or authenticates the document. 74 Likewise, while photographs and motion pictures may be admissible in

evidence when they are shown to have been accurately taken and to be a correct representation of the subject and when they tend to illustrate any material fact in the case or to shed light upon the transaction before the court, 75 where any or all of these factors are supplied solely through the testimony of an accomplice, the photographic evidence cannot serve as sufficient corroboration of the testimony of the accomplice to base a conviction on that testimony. 76 And while real evidence may be of value in connecting the defendant with the commission of the crime by proof that the object was owned by, or in the possession of, the defendant, and that it was used in connection with the offense, where either or both of these elements are supplied solely through accomplice testimony the object will not satisfy the requirement for corroboration. 77

Footnotes

Footnote 70. § 1486.

Footnote 71. *Braham v State* (Alaska) 376 P2d 714; *State v Kelliher*, 49 Or 77, 88 P 867; *Mitchell v State* (Tex Crim) 650 SW2d 801, reh den (Jun 15, 1983) and cert den 464 US 1073, 79 L Ed 2d 221, 104 S Ct 985, reh den 465 US 1074, 79 L Ed 2d 755, 104 S Ct 1431 and habeas corpus granted (Tex Crim) 853 SW2d 1, reh den (Apr 14, 1993) and cert den (US) 126 L Ed 2d 142, 114 S Ct 183.

In a prosecution for murder, robbery, and attempted robbery, sufficient independent evidence existed to corroborate the testimony of the accomplice, where it was independently established that the accomplice had participated in the criminal enterprise, that defendant was in the company of the accomplice prior to and after the crimes, that a portion of a distinctive handkerchief worn by one of the perpetrators was found near a dumpster by defendant's residence, and that defendant's departure for Detroit and his statement that there was "some trouble" could be interpreted as flight and an admission of guilt. *People v Glasper*, 52 NY2d 970, 438 NYS2d 282, 420 NE2d 80.

Footnote 72. *Rogers v State*, 101 Ark 45, 141 SW 491; *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859.

In a capital murder prosecution, evidence of the defendant's fingerprint on the accomplice witness' truck, which could have been there as long as two weeks before being lifted, and evidence which merely corroborated what the witness said he had done but which did not connect the defendant with the crime was insufficient to corroborate the accomplice witness' testimony as to the defendant's involvement in the crime. *Walker v State* (Tex Crim) 615 SW2d 728.

Footnote 73. § 1489.

Footnote 74. *Ing v United States* (CA9 Alaska) 278 F2d 362.

As to the admission of documents into evidence, in general, see § 1024.

Footnote 75. § 960.

Footnote 76. *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d

1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859.

In a prosecution for sex perversion, a motion-picture film depicting the acts charged was insufficient corroboration of the testimony of an accomplice who appeared in the film, where the only witness to testify as to the authenticity of the film was the accomplice herself. *People v Bowley*, 59 Cal 2d 855, 31 Cal Rptr 471, 382 P2d 591, 96 ALR2d 1178, appeal after remand (1st Dist) 230 Cal App 2d 269, 40 Cal Rptr 859.

As to photographs and motion pictures, in general, see §§ 960, 979.

Footnote 77. *State v Fletcher*, 246 Iowa 452, 68 NW2d 99.

§ 1489 Corroboration by words or deeds of accomplice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

An accomplice cannot corroborate himself by his own words or deeds. 78 Thus, an accomplice's out of court statements which tend to substantiate his testimony in court do not constitute sufficient corroboration of his testimony in court. 79 Nor can he be corroborated by evidence that he has previously pleaded guilty to the identical offense 80 or by objective evidence which is dependent for its authenticity upon the testimony of the accomplice. 81

Footnotes

Footnote 78. *State v Yegen*, 86 Mont 251, 283 P 210; *People v Cona* (2d Dept) 79 App Div 2d 1006, 435 NYS2d 30; *State v Pancoast*, 5 ND 516, 67 NW 1052; *Cudjoe v State*, 12 Okla Crim 246, 154 P 500; *State v Reynolds*, 160 Or 445, 86 P2d 413; *Clark v State*, 39 Tex Crim 179, 45 SW 576; *Blakeley v State*, 24 Tex App 616, 7 SW 233.

Footnote 79. *Clay v State*, 40 Tex Crim 556, 51 SW 212.

Footnote 80. *Branson v State*, 99 Ga 194, 24 SE 404.

Footnote 81. § 1488.

§ 1490 Corroboration by testimony of another accomplice

[View Entire Section](#)
[Go to Parallel Reference Table](#)

It is a general rule that the testimony of one accomplice cannot be corroborated by that of

another. 82 Corroboration from an independent source is not dispensed with by testimony from any number of accomplices. 83

Footnotes

Footnote 82. *People v Creegan*, 121 Cal 554, 53 P 1082; *State v Tennyson*, 212 Minn 158, 2 NW2d 833, 139 ALR 987; *Blakeley v State*, 24 Tex App 616, 7 SW 233.

Footnote 83. *People v O'Farrell*, 175 NY 323, 67 NE 588.

§ 1491 Corroboration by admissions or confession of defendant

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Admissions made by the defendant which tend to connect the defendant with the crime may constitute a sufficient corroboration of the testimony of an accomplice. 84 A confession of the defendant, whether made in open court or extrajudicially, may also be sufficient to corroborate the testimony of an accomplice. 85 However, a confession relating to an entirely separate and distinct transaction from the one for which the defendant is tried does not constitute sufficient corroboration of an accomplice's testimony. 86

Footnotes

Footnote 84. *People v Ruscoe* (2nd Dist) 54 Cal App 3d 1005, 127 Cal Rptr 6; *State v Chauvet*, 111 Iowa 687, 83 NW 717.

In a prosecution for the purchase and receipt of stolen property, the testimony of an accomplice was sufficiently corroborated where the defendant admitted buying personal property from the accomplice-witness, including items described in the indictment, the return of a search warrant showed that stolen property had been recovered in the search, and the victim of a burglary in the area of the alleged criminal activity testified that the items described in the indictment and shown to him after recovery had been stolen from him in the burglary. *Dudley v State* (Ala App) 342 So 2d 437.

As to admissions, in general, see §§ 754 et seq.

As to confessions, in general, see §§ 708 et seq.

Footnote 85. *United States v Lancaster* (CC Ga) 44 F 896; *Knowles v State*, 113 Ark 257, 168 SW 148; *People v Triplett*, 70 Cal App 2d 534, 161 P2d 397; *Tollifson v People*, 49 Colo 219, 112 P 794; *Anderson v State*, 34 Tex Crim 546, 31 SW 673.

Footnote 86. *State v Hansen*, 40 Utah 418, 122 P 375.

§ 1492 Corroboration by evidence of flight, concealment, or similar conduct

[View Entire Section](#)
[Go to Parallel Reference Table](#)

Evidence of flight, concealment, or analogous conduct of one charged with crime may, to the extent that it is evidence of guilt, be taken into account as corroborative of an alleged accomplice's incriminating testimony. 87 Such corroboration may 88 or may not 89 be sufficient to support a conviction, according to the other evidence and circumstances of the particular case.

Footnotes

Footnote 87. People v Spivak (2nd Dist) 166 Cal App 2d 796, 334 P2d 44, cert den and app dismd 361 US 13, 4 L Ed 2d 52, 80 S Ct 96; People v Reddy, 261 NY 479, 185 NE 705, 87 ALR 763; State v Pancoast, 5 ND 516, 67 NW 1052.

Footnote 88. Aulls v State (Ark) 195 SW 1066; People v Armstrong, 114 Cal 570, 46 P 611.

There was sufficient evidence corroborating an accomplice's incriminating testimony to sustain defendant's conviction for the robbery of a market and the murder of a clerk, where, among other factors, a witness observed a man resembling defendant run from the market at the time of the shooting, another witness living in the immediate vicinity of the market permitted defendant and the accomplice into his apartment around the time of the murder, and the police intercepted defendant on the evening of the crime in an apparent attempt to flee the jurisdiction by bus. People v Harpool (2nd Dist) 155 Cal App 3d 877, 202 Cal Rptr 467.

Footnote 89. People v Reddy, 261 NY 479, 185 NE 705, 87 ALR 763.

7. Defenses [1493-1499]

a. In General [1493-1496]

§ 1493 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

The burden which rests on the defendant in a criminal prosecution falls short of that imposed on the prosecution. The defendant has only to raise in the minds of the jury a reasonable doubt of guilt, based on all of the evidence in the case, and is entitled to an acquittal if any reasonable doubt exists on that point. 90 The defendant is entitled to acquittal where there is a reasonable doubt as to guilt, whether or not the defendant rebuts the case made by the prosecution, with all the legal inferences and presumptions deducible from it, or if the defendant adopts an affirmative defense, by undertaking to show exculpatory facts wholly disconnected from the proof made by the prosecution. 91

§ 1493 ----Generally [SUPPLEMENT]

Case authorities:

Although whether assault victim was violent and angry person was relevant to defendant's claim that he was acting in defense of his brother when he shot victim, it was not essential element of defendant's claim that shooting was justified because he was acting in defense of his brother; even had defendant proved that victim was violent person, jury would still have been free to decide that victim was not using or about to use unlawful force or that force he was using was not likely to cause death or great bodily harm, or that defendant did not reasonably believe force was necessary or used more than was necessary. *United States v Keiser* (1995, CA9 Mont) 57 F3d 847, 95 CDOS 4577, 95 Daily Journal DAR 7875, 42 Fed Rules Evid Serv 40.

Footnotes

Footnote 90. *Asher v State*, 201 Ind 353, 168 NE 456, 67 ALR 118.

Footnote 91. *Asher v State*, 201 Ind 353, 168 NE 456, 67 ALR 118; *State v Jackson*, 36 SC 487, 15 SE 559.

As to affirmative defenses, see §§ 1497 et seq.

§ 1494 Former jeopardy

[View Entire Section](#)
[Go to Parallel Reference Table](#)

To sustain a plea of former jeopardy, the defendant must introduce sufficient evidence to affirmatively show that: (1) there was a former prosecution in the same state for the same offense; (2) that some person was in jeopardy on the first prosecution; (3) that the persons are identical in the two prosecutions; (4) and that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar. 92 Where the record of the former prosecution exists, the production of it, either by the original or a certified copy, is proper and sufficient evidence to sustain the plea. 93 Where the record cannot be produced, the defendant may establish jeopardy by other evidence. 94 The defendant must sustain a plea of former jeopardy by a preponderance

of the evidence. 95

In the prosecution of offenses which from their nature are capable of repetition, however, the record of the former conviction is not sufficient to make out a prima facie case of identity of offenses. No presumption of identity arises from the fact that evidence sufficient to convict under one prosecution will warrant a conviction under the other; the defendant must show, affirmatively, by proof outside the record, that the offenses are one and the same. 96 Furthermore, the introduction of a portion of a record merely establishing the impaneling of a jury and the hearing of evidence, without anything to show the outcome of the proceedings, is not sufficient to establish former jeopardy. 97

Footnotes

Footnote 92. *Grayson v State*, 92 Ark 413, 123 SW 388; *State v Ellsworth*, 131 NC 773, 42 SE 699.

As to pleas of former jeopardy, in general, see 21 Am Jur 2d, Criminal Law §§ 458-468.

Footnote 93. *Jaquith v Commonwealth*, 331 Mass 439, 120 NE2d 189; *State v La Pean*, 247 Wis 302, 19 NW2d 289, cert den 326 US 801, 90 L Ed 488, 66 S Ct 486.

Footnote 94. See *Walter v State*, 105 Ind 589, 5 NE 735; *State v Neagle*, 65 Me 468; *State v Coolack*, 17 NJ Super 192, 85 A2d 353; *People v Afarian*, 196 Misc 63, 89 NYS2d 820.

Footnote 95. *Evans v State* (Ala App) 341 So 2d 749, cert den (Ala) 341 So 2d 750; *State v Downey* (Cuyahoga Co) 113 Ohio App 250, 17 Ohio Ops 2d 227, 85 Ohio L Abs 253, 170 NE2d 75, app dismd for want of debat q 171 Ohio St 565, 15 Ohio Ops 2d 42, 173 NE2d 106.

Footnote 96. *State v Pianfetti*, 79 Vt 236, 65 A 84.

Footnote 97. *People v Castree*, 311 Ill 392, 143 NE 112, 32 ALR 357.

§ 1495 Selective prosecution

<p>View Entire Section Go to Parallel Reference Table</p>

A violation of the principle that an individual's right to equal protection may be violated by discriminatory administration of a law that is impartial on its face may be established where the accused is able to show that other individuals similarly situated have not generally been prosecuted, that the alleged discrimination in the circumstances presented was intentional or purposeful, and that the selection of the accused for prosecution was based on an arbitrary or invidious classification. 98 Where the defendant fails to present evidence on all elements, the defendant fails to establish selective prosecution. 99 For example, although the defendant, appealing his conviction for possession of a firearm

after being previously convicted of a felony, pointed to two newspaper stories that indicated that his arrest was a part of a federal crackdown against motorcycle clubs as proof of his selective prosecution claim, this evidence was insufficient to establish selective prosecution. There was no proof that the defendant was singled out for prosecution while similarly situated persons (convicted felons) were not prosecuted for similar conduct, or that he was prosecuted because of his membership in the Hell's Angels. 1

Footnotes

Footnote 98. As to discriminatory enforcement of penal laws, see § 21A Am Jur 2d, Criminal Law § 833.

Footnote 99. United States v Hintzman (CA8 ND) 806 F2d 840 (criticized on other grounds by United States v Heidecke (CA7 Ill) 900 F2d 1155, 30 Fed Rules Evid Serv 185) and (criticized on other grounds by United States v Bourgeois (CA9 Cal) 964 F2d 935, 92 CDOS 4252, 92 Daily Journal DAR 6747, 92 Daily Journal DAR 6806).

Footnote 1. United States v Matter (CA8 Minn) 818 F2d 653.

Defendants' evidence allegedly indicating that the government initiated a criminal investigation of them almost immediately after defendants had written letters to Congressmen, and that at some juncture in the prosecution process the charges filed against them were raised from misdemeanors to felonies, was not sufficient to suggest that the decision to prosecute or to charge defendants with a felony was based on improper or vindictive grounds. United States v Reed (CA6 Ohio) 821 F2d 322, 87-1 USTC ¶ 9345, 23 Fed Rules Evid Serv 208, 60 AFTR 2d 87-5050.

Annotation: Malicious prosecution predicated upon prosecution, institution, or instigation of disciplinary proceeding against member of medical or allied profession, 39 ALR3d 473.

§ 1496 Alibi

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The defense of alibi is designed to show that the defendant, during the entire time that the crime was being committed, was so far from the place where the crime occurred that the defendant could not have participated in the crime. 2 It is enough if the proof adduced in support of the alibi, viewed in connection with all the testimony in the case, creates such a probability of its own truth as to engender a reasonable doubt of the truth of the charge upon which the defendant is arraigned, which might be effected even though the jury did not feel positively assured either of the veracity of the witnesses or of the correspondence of time. If, based on all the evidence, inculpatory and exculpatory, the jurors entertain a reasonable doubt of the prisoner's presence at, and participation in, the crime, they should acquit. 3 In other words, the defendant is entitled to an acquittal if

the evidence respecting the alibi, together with all the other evidence in the case, raises a reasonable doubt of guilt. It is not essential that the jury be absolutely convinced of the truth of the alibi, and a reasonable doubt of guilt may arise from lack of evidence of the defendant's presence at the time and place in question or from evidence offered by the defendant to prove that he was then at another place. 4

Distance from the place of a crime is not the controlling factor in determining a defense of alibi. The defendant may meet the prosecution's case by evidence merely controverting its evidence, and incidentally thereto, that evidence may tend to show that the defendant was not present at the time and place charged in the prosecution's evidence, but as explanatory and corroborative, that the defendant was elsewhere. 5 The defendant may go further and attempt to prove affirmatively, that by reason of extraneous facts, it was impossible that he could have been present. 6

Given the ease with which persons may be mistaken in dates long after the occurrence of a particular event, the ease with which an alibi may be made, and the difficulty of proving the contrary, courts have not generally considered evidence of an alibi conclusive; 7 such evidence is merely to be weighed by the jury. 8 An alibi which is corroborated and unimpeached and not inherently incredible is merely additional evidence which can be weighed and disregarded if not believed by the jury. 9

Although some courts, in sustaining cautionary jury instructions, have warned that it is a defense which should be carefully scrutinized, 10 others have fallen into error by speaking of the defense disparagingly. 11 If the defendant introduces sufficient evidence so that the jury entertains a reasonable doubt as to whether the defendant was present at the time and place alleged in the indictment and established by the prosecution's evidence, it is their duty to acquit. 12 The quality, and not the quantity, of the alibi testimony is controlling. The impartiality of the defendant's alibi witnesses, for example, may be suspect. 13 On the other hand, where the prosecution introduces sufficient evidence to rebut the defendant's claim of alibi and to prove that the defendant committed the crime charged, it is the duty of the jury to convict. 14 Although the defendant in the first instance must produce evidence in support of the alibi, 15 in most states it is the rule that the defendant does not have the burden of proving the alibi. The courts which take this position do so on the theory that an alibi is not an affirmative defense and that evidence to prove an alibi is not to be treated as proof offered to establish an independent affirmative matter set up by the defendant, but as mere evidence tending to disprove one of the essential factors in the prosecution—namely, the presence of the accused at the place and time of the alleged crime. 16

Footnotes

Footnote 2. As to the alibi defense, in general, see 21 Am Jur 2d, Criminal Law §§ 192 et seq.

Footnote 3. *Prince v State*, 100 Ala 144, 14 So 409; *People v Pearson*, 19 Ill 2d 609, 169 NE2d 252; *Asher v State*, 201 Ind 353, 168 NE 456, 67 ALR 118; *State v Ardoin*, 49 La Ann 1145, 22 So 620; *Johnson v State*, 88 Neb 565, 130 NW 282; *Turner v Commonwealth*, 86 Pa 54; *State v Bealin*, 201 SC 490, 23 SE2d 746; *State v Thornton*, 10 SD 349, 73 NW 196; *Draper v Commonwealth*, 132 Va 648, 111 SE 471.

To say that one who relies upon an alibi as a defense must prove beyond a reasonable doubt that it was impossible for him to be present at the scene of the crime at the time of its commission would take away from the jury their right of acquitting the defendant if the proof of alibi, although not perfect, is such as to raise a reasonable doubt as to whether he was present at the commission of the crime. *Evans v State*, 13 Ga App 700, 79 SE 916.

Practice References Proof of alibi. 27 Am Jur POF2d 431, Alibi defense §§ 11-23.

Footnote 4. *Falgout v United States* (CA5 La) 279 F 513, 29 ALR 1115; *Prince v State*, 100 Ala 144, 14 So 409; *Miles v State*, 93 Ga 117, 19 SE 805; *People v Gormach*, 302 Ill 332, 134 NE 756, 29 ALR 1120; *State v Ardoin*, 49 La Ann 1145, 22 So 620; *State v McClellan*, 23 Mont 532, 59 P 924; *Henry v State*, 51 Neb 149, 70 NW 924; *State v Steen*, 185 NC 768, 117 SE 793; *State v Jackson*, 36 SC 487, 15 SE 559; *Draper v Commonwealth*, 132 Va 648, 111 SE 471.

Footnote 5. *State v Wagner*, 207 Iowa 224, 222 NW 407, 61 ALR 882.

Footnote 6. *State v Wagner*, 207 Iowa 224, 222 NW 407, 61 ALR 882.

Footnote 7. *People v Connors*, 253 Ill 266, 97 NE 643; *Kelly v State*, 239 Miss 683, 124 So 2d 840, 85 ALR2d 1199.

The defense of alibi may be easily fabricated and is necessarily viewed with considerable suspicion. *Russell v State*, 115 Tex Crim 608, 28 SW2d 138.

Footnote 8. *People v Taylor*, 185 Mich App 1, 460 NW2d 582, app den 438 Mich 852, reconsideration den (Mich) 478 NW2d 103 and reconsideration den (Mich) 478 NW2d 103.

Because proof of an alibi depends entirely on the credibility of witnesses called to establish it, the matter is one for determination by the jury. *Haenel v State*, 134 Tex Crim 484, 116 SW2d 736.

Footnote 9. *State v Stark* (App) 162 Wis 2d 537, 470 NW2d 317.

Footnote 10. *United States v Fortes* (CA1 Mass) 619 F2d 108, 6 Fed Rules Evid Serv 174; *Surridge v State*, 239 Ark 581, 393 SW2d 246; *Threadgill v State*, 207 Ark 478, 181 SW2d 236; *State v Jonas*, 169 Conn 566, 363 A2d 1378, cert den 424 US 923, 47 L Ed 2d 331, 96 S Ct 1132; *State v Woolworth*, 148 Kan 180, 81 P2d 43; *People v Schaner*, 302 Mich 6, 4 NW2d 444.

But see *United States v Robinson* (CA6 Tenn) 602 F2d 760, cert den 444 US 878, 62 L Ed 2d 107, 100 S Ct 165 (jury instruction stating that defense of alibi should be received by jury discreetly and cautiously because it is defense that is easily manufactured or fabricated was improper where, in effect, judge was instructing jury that alibi witnesses, as matter of law, were to be viewed with suspicion; however, error was harmless); *People v Lucas* (2d Dept) 75 App Div 2d 827, 427 NYS2d 469 (trial court's instructions may have confused jury as to whether defendant was required to prove truth of alibi beyond reasonable doubt, and where trial court instructed jurors that alibi evidence had to be most carefully scrutinized and words of similar import were not used with respect to

other evidence, trial court's instructions were deficient).

Annotation: Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Footnote 11. *People v Costello*, 21 Cal 2d 760, 135 P2d 164; *Daniels v State*, 24 Md App 1, 329 A2d 712; *People v McCoy*, 392 Mich 231, 220 NW2d 456.

Footnote 12. *Falgout v United States* (CA5 La) 279 F 513, 29 ALR 1115; *Prince v State*, 100 Ala 144, 14 So 409; *State v Wagner*, 207 Iowa 224, 222 NW 407, 61 ALR 882; *State v Minton*, 234 NC 716, 68 SE2d 844, 31 ALR2d 682; *Turner v Commonwealth*, 86 Pa 54; *State v Jackson*, 36 SC 487, 15 SE 559.

Footnote 13. *State v Cari*, 163 Conn 174, 303 A2d 7, 72 ALR3d 608; *State v Grice*, 109 NJ 379, 537 A2d 683 (holding that even though the defendant's alibi testimony was quantitatively impressive, it was not intrinsically impregnable where several of the alibi witnesses testified that they were close friends of defendant, the alibi witnesses were all friends of each other, two of defendant's alibi witnesses were also friends of the codefendant, and the alibi witnesses did not agree on where they were when they were with defendant).

Footnote 14. *People v Connors*, 253 Ill 266, 97 NE 643.

An alibi sought to be established by one accused of crime on April 20, by showing that he had been taken ill about the middle of March and could not leave the house until after April 20, may be rejected where he is shown to have voted at elections on April 4 and 11, and subsequently, on cross-examination, the time of his illness was fixed as beginning in December. *People v Connors*, 253 Ill 266, 97 NE 643.

Footnote 15. *State v Vanek*, 59 Idaho 514, 84 P2d 567; *Witt v State*, 205 Ind 499, 185 NE 645; *State v Rosi*, 120 Wash 514, 208 P 15; *State v Withrow*, 142 W Va 522, 96 SE2d 913.

Footnote 16. § 179.

Annotation: Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

b. Affirmative Defenses [1497-1499]

§ 1497 Generally

[View Entire Section](#)
[Go to Parallel Reference Table](#)

In general, when a defendant raises and testifies in support of an affirmative defense, the state has the burden of disproving that defense beyond a reasonable doubt. 17 The

determination of whether the state has met its burden to disprove the affirmative defense is for the trier of fact. 18

Footnotes

Footnote 17. § 178.

Footnote 18. *Bentley v State*, 261 Ga 229, 404 SE2d 101, 102-100 Fulton County D R 11B.

As to affirmative defenses, in general, see 21 Am Jur 2d, Criminal Law § 183.

§ 1498 Entrapment

[View Entire Section](#)
[Go to Parallel Reference Table](#)
[Go to Supplement](#)

Entrapment is an affirmative defense which must be raised by the defendant. 19 In order for a defendant to establish entrapment as a matter of law, the evidence must clearly indicate that a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed a criminal act at the urging of the government agent. 20

The generally accepted test of entrapment is the subjective test, which allows the defense only if the criminal act was the product of the creative activity of law enforcement officials. The focus of the inquiry is on the defendant's predisposition to commit the offense charged. 21 A defendant who is predisposed to commit a crime is one who is of a frame of mind such that once the defendant's attention is called to the criminal opportunity, the decision to commit the crime is the product of the defendant's own preference and not the product of government persuasion. 22 In assessing whether a defendant was predisposed to commit a crime, the court examines a variety of factors, including:

- The defendant's ready response to the inducement offered 23
- The defendant's conduct before or after the commission of the offense 24
- The character and reputation of the defendant, including any previous criminal record 25
- Whether the suggestion of the criminal activity was originally made by the government 26
- Whether the defendant was engaged in criminal activity for profit 27
- Whether the defendant expressed reluctance, overcome only by repeated government

inducement or persuasion, to commit the offense 28

- The nature of the inducement or persuasion applied by the government 29

§ 1498 ----Entrapment [SUPPLEMENT]

Practice Aids: Entrapment as defense to federal criminal charge—Supreme Court cases 118 L Ed 2d 703.

Footnotes

Footnote 19. 21 Am Jur 2d, Criminal Law § 203.

Footnote 20. As to tests for determining entrapment, see 21 Am Jur 2d, Criminal Law §§ 202, 205, 206.

Footnote 21. 21 Am Jur 2d, Criminal Law § 205.

Footnote 22. As to the predisposition of the accused to commit a crime, see 21 Am Jur 2d, Criminal Law § 205.

Footnote 23. *United States v Osborne* (CA4 NC) 935 F2d 32; *United States v Akinseye* (CA4 Md) 802 F2d 740, cert den 482 US 916, 96 L Ed 2d 678, 107 S Ct 3190.

Predisposition may be shown by the defendant's ready compliance, acquiescence in, or willingness to cooperate in the proposed criminal plan. *State v Worthington*, 84 NC App 150, 352 SE2d 695, review den (NC) 356 SE2d 785 and review den 319 NC 677, 356 SE2d 785.

Law Reviews: Marcus, Proving Entrapment Under the Predisposition Test. 14 Am J Crim L 53 (Fall/Winter 1986-87).

Footnote 24. *United States v White* (ND Ind) 688 F Supp 1293.

Footnote 25. *United States v Fedroff* (CA3 NJ) 874 F2d 178; *United States v Beverly* (CA7 Ill) 913 F2d 337, cert den 498 US 1052, 112 L Ed 2d 786, 111 S Ct 766 and cert gr 498 US 1082, 112 L Ed 2d 1039, 111 S Ct 951; *United States v Skarie* (CA9 Cal) 971 F2d 317, 92 CDOS 6537, 92 Daily Journal DAR 10411.

Footnote 26. *United States v Beverly* (CA7 Ill) 913 F2d 337, cert den 498 US 1052, 112 L Ed 2d 786, 111 S Ct 766 and cert gr 498 US 1082, 112 L Ed 2d 1039, 111 S Ct 951; *United States v Skarie* (CA9 Cal) 971 F2d 317, 92 CDOS 6537, 92 Daily Journal DAR 10411.

Footnote 27. *United States v Beverly* (CA7 Ill) 913 F2d 337, cert den 498 US 1052, 112 L Ed 2d 786, 111 S Ct 766 and cert gr 498 US 1082, 112 L Ed 2d 1039, 111 S Ct 951; *United States v Skarie* (CA9 Cal) 971 F2d 317, 92 CDOS 6537, 92 Daily Journal DAR 10411.

Footnote 28. *United States v Beverly* (CA7 Ill) 913 F2d 337, cert den 498 US 1052, 112 L Ed 2d 786, 111 S Ct 766 and cert gr 498 US 1082, 112 L Ed 2d 1039, 111 S Ct 951; *United States v Skarie* (CA9 Cal) 971 F2d 317, 92 CDOS 6537, 92 Daily Journal DAR 10411.

Footnote 29. *United States v Kussmaul* (CA6 Ohio) 987 F2d 345; *United States v Beverly* (CA7 Ill) 913 F2d 337, cert den 498 US 1052, 112 L Ed 2d 786, 111 S Ct 766 and cert gr 498 US 1082, 112 L Ed 2d 1039, 111 S Ct 951; *United States v Skarie* (CA9 Cal) 971 F2d 317, 92 CDOS 6537, 92 Daily Journal DAR 10411.

The government established beyond a reasonable doubt that the defendant was predisposed to commit the offense charged where the defendant testified that he had twice before in recent months acquired drugs from another person and that before the defendant arranged a drug sale to the government agent, the defendant had called the co-defendant in this matter and asked her to acquire cocaine for him. *United States v White* (ND Ind) 688 F Supp 1293.

Factors which indicate a predisposition to sell drugs include knowledge of drug prices, knowledge of drug sources and suppliers, use and understanding of terminology of the drug market, solicitation of future drug sales, and multiple sales to undercover officers. *Martin v State* (Ind) 537 NE2d 491.

§ 1499 Insanity

[View Entire Section](#)
[Go to Parallel Reference Table](#)

The defense of insanity is available to all defendants in all criminal trials. 30 When insanity is raised as a defense, the focus of the inquiry is the defendant's capacity at the time the act was committed. If the defendant was insane, by the standard prevailing in the particular jurisdiction at the moment of the act, this will be a defense however sane the defendant may have been before or after that time. 31

The trier of fact may consider expert and lay testimony in determining the sanity or insanity of the accused. 32 In making its determination, it may accept or reject expert and lay testimony, and its determination will remain undisturbed if it is supported by substantial evidence. 33

The trier of fact may give one expert's opinion more weight than another's on the issue of mental illness. 34 Similarly, it may also reject one or more of the experts' opinions and give more credence to lay witness testimony and other evidence in determining whether or not a defendant comes within the purview of an insanity defense statute. 35 The fact that a witness is a lay witness goes not to the admissibility of the testimony but to its weight. If lay testimony is admitted, the jury is free to accept it as a basis for its verdict, even if there is conflicting medical testimony on the issue. 36 It is thus not always necessary for the state to present medical testimony that a defendant is sane in order to counter a defense of insanity. The circumstances of the offense and the life experiences of the defendant may also aid the jury in considering whether a defendant was insane at

the time of the offense. For example, attempts to conceal incriminating evidence and to elude officers can indicate knowledge of wrongful conduct. 37 The testimony of expert witnesses is not conclusive, and does not necessarily destroy the force or credibility of other testimony. 38 Some courts take the position that expert testimony is not entitled to greater weight than is nonexpert testimony. 39 And, there may be occasions where the psychiatric testimony offered by the defendant is so demolished by cross-examination that the state need not counter with its own expert. The kind and quantity of evidence of sanity which the prosecution must produce to meet its burden and take the issue to the jury will vary in different cases: the presumption of sanity will stand if no evidence of insanity is offered by the defense; some competent evidence of sanity may suffice when the defendant has introduced only token evidence of insanity; some evidence of sanity may be totally inadequate when the defendant's evidence of insanity is substantial. 40

Footnotes

Footnote 30. 21 Am Jur 2d, Criminal Law § 47.

Footnote 31. 21 Am Jur 2d, Criminal Law § 52.

Footnote 32. *State v Harkness*, 252 Kan 510, 847 P2d 1191; *State v Hollis*, 240 Kan 521, 731 P2d 260.

As to whether the defense of insanity is a question for the court or jury, see 21 Am Jur 2d, Criminal Law § 80.

Footnote 33. *Roundtree v State (Miss)* 568 So 2d 1173.

Footnote 34. *People v Wiley (1st Dist)* 185 Ill App 3d 1097, 133 Ill Dec 907, 541 NE2d 1345.

The fact that only one expert testified that the defendant was not insane at the time of the crime while three experts claimed that he was insane, was not dispositive of the issue. *State v Zmich*, 160 Ariz 108, 770 P2d 776, 27 Ariz Adv Rep 45.

Footnote 35. *State v Zmich*, 160 Ariz 108, 770 P2d 776, 27 Ariz Adv Rep 45.

Footnote 36. *State v Zmich*, 160 Ariz 108, 770 P2d 776, 27 Ariz Adv Rep 45.

In a prosecution for deviate sexual intercourse, indecent assault, and aggravated assault, Commonwealth established defendant's sanity beyond a reasonable doubt by testimony of victim and officers, who arrested defendant shortly after incident, that he seemed normal, even though psychiatrist testified that defendant was suffering from schizophrenia and that he had potential for impulsive behavior. *Commonwealth v Donofrio*, 247 Pa Super 345, 372 A2d 859.

Footnote 37. *Barnett v State (Tex App Corpus Christi)* 771 SW2d 654.

Even though prosecution did not offer additional or specific evidence to refute medical expert testimony to effect that defendant, charged with kidnaping and rape, was insane, the trial judge had the right to determine the weight and credibility to be given to expert

testimony. *People v Duffy*, 67 Mich App 266, 240 NW2d 771, habeas corpus proceeding (CA6 Mich) 772 F2d 1271, later proceeding (Mich) 384 NW2d 7, ctfd ques ans 425 Mich 457, 390 NW2d 620.

Footnote 38. *State v Parsons*, 181 W Va 131, 381 SE2d 246; *State v Rollins* (La) 351 So 2d 470.

Footnote 39. 31A Am Jur 2d, Expert and Opinion Evidence § 189.

Footnote 40. *State v Rollins* (La) 351 So 2d 470; *State v Parsons*, 181 W Va 131, 381 SE2d 246.

Expert medical testimony is not conclusive merely because it is not disputed by other medical testimony. *State v Hollis*, 240 Kan 521, 731 P2d 260.

Prosecution, by testimony of lay witnesses as to defendant's statements and acts before and after fatal shooting, sustained burden of showing defendant's sanity despite expert testimony presented by defense. *Edwards v State* (Tenn) 540 SW2d 641, cert den 429 US 1061, 50 L Ed 2d 777, 97 S Ct 784.

Where nonexpert witnesses established sufficient acquaintance with defendant and opportunity of observing him as to enable witnesses to form definite opinion, such opinion was sufficient to rebut expert testimony of defendant and establish his sanity, particularly where expert opinion tended to establish that defendant was voluntarily under influence of both alcohol and narcotics. *Pyburn v State* (Tenn Crim) 539 SW2d 835.